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Opening Plenary

Cancel Culture: Threat to Free Speech or Vital Accountability Measure

Moderator: *James E. Goldschmidt, Quarles, Milwaukee*

Panelists:

Hon. Janice Rogers Brown (Ret.), U.S. Court of Appeals – D.C. Circuit, Berkeley, CA

Prof. Franciska Coleman, Assistant Professor of Constitutional Law, UW Law School, Madison

Hon. William C. Griesbach, U.S. District Court, Eastern District of Wisconsin

About the Presenters...

James Goldschmidt helps clients litigate and win complex disputes by crafting clear, persuasive legal briefs and arguments. With a core focus on energy and utility law and environmental litigation, James also advises more generally on appellate matters and critical motions practice. James chairs Quarles' national Appellate Practice Group and is the immediate past chair of the State Bar of Wisconsin Appellate Practice Section. He also serves on the Board of Governors for the Seventh Circuit Bar Association. James has won numerous cases in the United States Court of Appeals for the Seventh Circuit, the Wisconsin Supreme Court, and the Wisconsin Court of Appeals, including several cases of statewide interest. He's also advised on complex civil, regulatory and tax appeals, with a focus on reducing difficult issues to understandable concepts for decision makers. In the past decade alone, James has fully briefed over 40 appeals in Wisconsin, Illinois, Florida and the Seventh, Ninth and Federal Circuits, briefed and argued cases before the Illinois Appellate Court and the Seventh Circuit Court of Appeals, and argued three times before the Wisconsin Supreme Court. In addition to his appellate practice, James advises public utility clients on a wide variety of matters, from cases before the Public Service Commission of Wisconsin (PSCW) to hydroelectric permit disputes before the Federal Energy Regulatory Commission (FERC) to utility disputes with the Wisconsin Department of Transportation (WisDOT). He also advises and defends potentially responsible parties in CERCLA Superfund litigation. James graduated from Harvard Law School and received his undergraduate degree from Harvard College.

Hon. Janice Rogers Brown (Ret.) was confirmed to the United States Court of Appeals for the District of Columbia Circuit on June 8, 2005. She retired from the court in 2017. From 1996 to 2005, she was Associate Justice of the California Supreme Court. Previously, she served as Associate Justice of the Third District Court of Appeals in Sacramento and as the Legal Affairs Secretary to Governor Pete Wilson. Prior to joining Governor Wilson's senior staff, Judge Brown was an associate at Nielsen, Merksamer, Parrinello, Mueller & Naylor. Earlier, served as Deputy Secretary and General Counsel for California's Business Transportation and Housing Agency (BT&H), working primarily with business regulatory departments. She came to BT&H after eight years in the State of California Attorney General's Office, where worked in both the criminal appellate and civil trial divisions. She also worked for two years for the Legislative Counsel and previously served as an adjunct professor at the University of the Pacific's McGeorge School of Law. Judge Brown currently serves on the Board of the Coolidge Foundation, and is Chair of The New Civil Liberties Alliance. She is the Darling Foundation Jurist-in-Residence and visiting professor of law at the University of California Boalt School of Law. Judge Brown is a graduate of the University of California, Los Angeles, School of Law and California State University, Sacramento. In 2004 Judge Brown received a Master of Laws degree in Judicial Process after completing the Graduate Program for Judges at the University of Virginia School of Law. She has been honored with the Jurisprudence Award of the Claremont Institute's Center for Constitutional Jurisprudence and The Lynde and Harry Bradley Foundation 2019 Bradley Award.

Prof. Franciska Coleman is an Assistant Professor of Constitutional Law at the University of Wisconsin Law School and the Associate Director of the East Asian Legal Studies Center. She is an interdisciplinary scholar, whose work draws upon political theory, critical discourse analysis, and constitutional law. Professor Coleman is deeply interested in the social justice implications of race and class hegemony in constitutional interpretation and in the effects of institutionalized oppression on the self-governing capability of vulnerable groups. Professor Coleman's current research projects focus on 1) understanding the anatomy of cancel culture and its effects on marginalized groups as speakers and 2) understanding the relationship between equal protection and political power. Prior to joining the faculty of UW Law School, Professor Coleman was a Visiting Assistant Professor at Washington University in St. Louis and also held a Visiting Scholar appointment at Harvard Law School. Professor Coleman previously taught American Constitutional Law I and II at Yonsei Law School in Seoul, South Korea. During that time, she worked closely with the Korean government on several initiatives, such as international roundtables on offensive speech held by the Korean Communication Standards Commission and efforts by the Korean Legislation Research Institute to make Korean statutes more accessible to foreign communities. Prior to her time in Korea, Professor Coleman worked as an associate in the litigation and appellate practice groups at Covington & Burling in Washington, DC. She received her JD from Harvard Law School and her PhD in Literacy, Culture and International Education from the University of Pennsylvania. While studying at these institutions, she was awarded the AAUW Selected Professions Fellowship and the Fontaine Fellowship.

Hon. William C. Griesbach graduated from Marquette University in 1976 and from Marquette University Law School in 1979. Following his graduation from law school, he was a law clerk to the Hon. Bruce F. Beilfuss, Chief Justice of the Wisconsin Supreme Court for the 1979-1980 term. He then served as a staff attorney to the United States Court of Appeals for the 7th Circuit in Chicago, IL from 1980-1982. In August of 1982, he joined the Green Bay law firm of Liebmann, Conway, Olejniczak and Jerry, S.C., and worked in private practice, primarily in the area of civil litigation, until 1987, at which time he took a position as an Assistant District Attorney for Brown County. He held that position from 1987 until 1995, at which time he was appointed to the bench by Governor Tommy Thompson. He was elected to his first full term in March of 1996 and re-elected to his second term in April of 2002. On May 1, 2002, Judge Griesbach was appointed by President George W. Bush to serve as the first United States District Court Judge for the Eastern District of Wisconsin assigned to sit in Green Bay. Judge Griesbach has served on the U.S. Judicial Conference Committee on the Administration of the Magistrate Judges System from 2010 through 2016, and was Chief Judge of the Eastern District of Wisconsin from November 1, 2012 through October 31, 2019. Judge Griesbach took Senior Status effective December 31, 2019, and currently maintains a full case load.

"Cancel Culture": Threat to Free Speech or Vital Accountability Measure?

Wisconsin State Bar Annual Meeting & Conference
Opening Plenary Panel—June 15, 2023

I. Working definition of "cancel culture"

a. "The practice or tendency of engaging in mass canceling as a way of expressing disapproval and exerting social pressure." *Cancel Culture*, MERRIAM-WEBSTER.COM

b. "Cancel culture is the phenomenon of aggressively targeting individuals or groups, whose views aggressors deem unacceptable, in an effort to destroy them personally and/or professionally." *Wisconsin Family Action v. Federal Election Commission*, No. 21-C-1373, 2022 WL 844436 (E.D. Wis. Mar. 22, 2022) (Griesbach, J.)

II. An alternative perspective: Consequence culture

a. "Like cancel-culture discourse, consequence-culture narratives entail assumptions about the type of speech being regulated, the nature of the harms and the persons or groups harmed. In terms of the type of speech being regulated, consequence culture assumes that injurious speech, rather than simply offensive speech, is being regulated. In this framing, individuals are not being fired for inartful phrasing or 'clumsy mistakes,' but for discursive violence that assaults listeners, denies them equal dignity and encourages third parties to inflict real-world harms on group members." Franciska Coleman, *The Anatomy of Cancel Culture* (March 3, 2023), University of Wisconsin Legal Studies Research Paper No. 1766, 2 JOURNAL OF FREE SPEECH LAW 205, 237–38 (2022) (internal citations omitted).

III. "Canceling" conduct and speech: A historical grounding

a. Public shaming (targeting action)

b. Newspaper subscription cancelations (shutting *out* opinion)

c. Civil rights movement (shutting *down* opinion)

IV. Legal principles

a. Constitutional protection of speech

i. U.S. Constitution – First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

ii. Wisconsin Constitution – Article I, § 3

"Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be

passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libel, the truth may be given in evidence, and if it shall appear to the jury that the matter charged as libelous be true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact." WIS. CONST. art. 1 § 3.

b. **Unprotected speech under the First Amendment**

i. Obscenity – *Miller v. California* (1973)

ii. Child pornography – *New York v. Ferber* (1982)

iii. Defamation – *New York Times v. Sullivan* (1964); *Gertz v. Robert Welch* (1974)

iv. Speech integral to criminal liability (blackmail, conspiracy, solicitation)

v. Fraud (usually) – *Illinois ex rel. Madigan v. Telemarketing Assocs.* (2003)

1. But "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation." *United States v. Alvarez*, 567 U.S. 709, 718-19 (2012).

vi. "Fighting words" – *Chaplinsky v. New Hampshire* (1942)

1. Words "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Id.*, 315 U.S. 568, 574.

2. *But* "speech cannot be restricted simply because it is upsetting or arouses contempt." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

vii. "True threats" – *Watts v. United States*, 394 U.S. 705, 708 (1969)

1. Words that "mean to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

2. Distinguished from "political hyperbole." *Id.*

viii. Incitement to imminent lawless action – *Brandenburg v. Ohio* (1969)

1. Must be "likely to incite or produce such action." *Id.*, 395 U.S. 444, 447-48.

2. Exception to protection for advocating the use of force or lawbreaking. *Id.*

ix. Hate speech?

1. Could fall into one or more categories above.

2. Could be basis for discriminatory harassment claim

c. **Intersection of First Amendment and attempts to 'cancel' viewpoints**

i. *New York Times v. Sullivan*, 376 U.S. 254 (1964)

The U.S. Supreme Court held that the *New York Times* had a right to publish a full-page advertisement seeking donations to defend Martin Luther King Jr., despite the presence of minor factual inaccuracies that did not rise to the level of defamation or libel.

ii. *Houston Cmty. Coll. Sys. v. Wilson*, 594 U.S. ___ (2022)

The U.S. Supreme Court unanimously rejected a board member's claims that Texas Community College violated the member's First Amendment right by censuring his speech. The dispute arose when members of the college's board censured Wilson after deeming his conduct inconsistent "with the best interests of the College" and "not only inappropriate, but reprehensible." Relying on established First Amendment principles, the Court highlighted that "longstanding practice suggests an understanding of the First Amendment that permits "[f]ree speech on both sides and for every faction on any side."

V. Principles in practice: Manifestations of 'cancel culture' in society

a. On campus: *Gibson Bros., Inc. v. Oberlin College,* 187 N.E.3d 629 (Ohio App. 2022)

i. Three African American students went to Gibson's Bakery & Market, near Oberlin's campus, to purchase wine. A store clerk confronted one of the students believing that the student was shoplifting wine and using a fake ID. The three students were arrested and later convicted for their roles.

ii. The arrest led to a series of protests among Oberlin students who believed the three students had been racially profiled. Because of the incident, Oberlin's Dean of Students requested that its food supplier cease suppling the campus dining halls with goods from Gibson's.

iii. Gibson's sued Oberlin College and its Dean of Students for libel and intentional interference with a business relationship, based on distributed flyers stating that the Bakery was a racist establishment and Oberlin's request that the College's food supplier cease ordering from Gibson's.

iv. The court held that the flyers were not constitutionally protected opinion and that the Bakery had a cognizable claim against the Dean of Students for tortious interference with its business relationship with the food company.

b. In the jury: Ensuring due process

    i. Where a defendant has been publicly "canceled" through social media or news reporting, is jury bias a necessary consideration?

c. In the legislature: Two bills from Florida

    i. Censoring education: HB 7 ("Individual Freedom") (Critical Race Theory ban)

        1. "A person should not be instructed that he or she must feel guilt, anguish, or other forms of psychological distress for actions, in which he or she played no part, committed in the past by other members of the same race or sex."

        2. "Instructional personnel may facilitate discussions and use curricula to address, in an age-appropriate manner, how the freedoms of persons have been infringed by sexism, slavery, racial oppression, racial segregation, and racial discrimination, including topics relating to the enactment and enforcement of laws resulting in sexism, racial oppression, racial segregation, and racial discrimination, including how recognition of these freedoms have overturned these unjust laws. However, classroom instruction and curriculum may not be used to indoctrinate or persuade students to a particular point of view inconsistent with the principles of this subsection or state academic standards."

    ii. Targeting private speech: HB 1557 (Parental Rights in Education Act), Disney's critique, and the ensuing ramifications

        1. HB 1557: Parental Rights in Education ("Don't Say Gay")

            a. Preamble states that an aim of the bill is to prohibit "classroom discussion about sexual orientation or gender identity in certain grade levels . . . ."

            b. Further, "[c]lassroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards."

        2. Critique by Disney:

            "Florida's HB 1557, also known as the 'Don't Say Gay' bill, should never have passed and should never have been signed into law . . . Our goal as a company is for this law to be repealed by the legislature or struck down in the courts, and we remain committed to supporting the national and state organizations working to achieve that."

3. Senate Bill 4-C: "An act relating to independent special districts…"

   Provides that "any independent special district established by a special act prior to the date of ratification of the Florida Constitution on November 5, 1968, and which was not reestablished, re-ratified, or otherwise reconstituted by a special act or general law after November 5, 1968, is dissolved."

4. The Magic Kingdom strikes back:

   On April 25, 2023, Disney files suit against Florida Governor Ronald D. DeSantis, Central Florida Tourism Oversight District board members, and others, seeking declaratory and injunctive relief. Case is framed around alleged violation of Disney's First Amendment rights.

VI. Audience questions and wrap-up

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Panel Questions

I. Introductions

II. Working definition of "cancel culture"

a. What does 'cancel culture' mean to you? Can it be succinctly defined?

b. Can 'cancel culture' serve as a healthy accountability tool or does it only function as an impermissible sanctioning mechanism?

III. An alternative perspective: Consequence culture

a. How can the perspective of 'consequence culture' contribute to this discussion?

b. What types of speech already receive little or no First Amendment protection, and how might those categories inform our view of consequences for speech?

IV. "Canceling" conduct and speech: A historical grounding

a. Which aspects of the current phenomenon have we seen before? (see examples in outline: public shaming, newspaper subscriptions, civil rights movement)

b. Is 'cancel culture', as we understand it today, is a distinct phenomenon? If so, what makes it distinct?

V. Intersection of First Amendment and attempts to 'cancel' viewpoints

a. What First Amendment lessons can we draw from *New York Times v. Sullivan*, where the Court upheld the newspaper's right to publish controversial speech?

b. What First Amendment lessons can we draw from *Houston Community College System v. Wilson*, where the Court held that a college board member did *not* have a right not to be censured for speech the rest of the board found "reprehensible"?

c. Is there still a First Amendment obligation to ensure opposing viewpoints get equal airtime on government-licensed platforms? What can we gather from the failed experiment with the fairness doctrine?

d. Does the First Amendment have any role in restraining private efforts to shame or cancel unpopular speech?

VI. Manifestations of 'cancel culture' in society

a. On campus: *Gibson Bros., Inc. v. Oberlin College*

i. What First Amendment lessons can we draw from the lawsuit at Oberlin College, where an incident at a bakery led to the college calling the bakery a racist establishment? How is this different from *Houston Community College*?

ii. Is there a legitimate concern that 'cancel culture' infringes on the free speech rights of university speakers? Are other important legal principles in play?

iii. Do you believe that students exercising their First Amendment right to protest speech deemed offensive encourages more speech (i.e., discussions between groups with varying viewpoints), or that these forms of protest are more likely to chill speech by silencing those who are the subject of widespread critique?

iv. How can universities balance free speech and controversial speakers where a potential threat to safety is a concern? Does potential discomfort on the speaker's party amount to a safety concern?

b. In the jury: ensuring due process

i. In the age of social media and widespread, immediate access to news, 'cancel culture' can villainize individuals very quickly and well beyond the borders of their community. Where 'canceled' individuals are charged (or sued) and juries are empaneled, is the current judicial system equipped to address the potential for jury bias, particularly for higher-profile cases that garner significant media attention?

c. In the legislature: Two bills from Florida

i. HB 7 attempts to eliminate certain instruction from the classroom based on the current legislature's disagreement with what it understands to be Critical Race Theory. Is that prohibited viewpoint discrimination or legitimate cancellation? How is this like or unlike laws prohibiting "hate speech"?

ii. HB 1557 similarly attempts to prohibit classroom instruction on sexual orientation and gender identity. How is this like or unlike a state department of education prescribing certain content to be taught at each grade level? To the extent this form of 'cancellation' makes us uncomfortable, is it because of how we feel about the particular subject matter, or simply because the government is doing it?

iii. SB 4-C followed Disney's outspoken criticism of HB 1557 and essentially stripped Disney of its ability to self-govern its theme park. Is this a law abridging Disney's freedom of speech? Are all of these bills precisely the form of 'cancelling' that conservatives often criticize? If not, why not?

iv. Now Disney has sued Governor DeSantis and others, and its complaint is framed around alleged violation of Disney's First Amendment rights. If Disney had no independent right to perpetual self-governance or favored tax status, then can the government's motive alone give rise to a cause of action?

VII. Audience questions and wrap-up