H. FREEDOM OF THE PULPIT

Not least of the specific aspects of the autonomy of religious bodies is the question of freedom of the pulpit. Far from being low in importance, it is equal to any others, but there is virtually no case law under this heading. Members of Congress are protected against retribution for their official acts by the Speech and Debate Clause: "for any Speech or Debate in either House, they shall not be questioned in any other Place."[1] No such clause protects utterances in the pulpit of a church from (legal) repercussions elsewhere, but pulpits in America have been among the freest places in the world, at least from *legal* retribution. Some preachers have suffered obloquy, boycott or dismissal by members of their churches because of the content of their sermons, and a few have been assaulted and even driven out of town by mobs because of their views expressed from the pulpit (especially with respect to slavery in the mid-nineteenth century), but these were acts of private citizens, not state action.[2] The only recorded cases to come to this author's attention are *Delk v. Kentucky* (1915) and *Guinn v. Church of Christ of Collinsville* (1984),[3] which by their very paucity may be the exceptions that prove the rule.

1. *Delk v. Kentucky* (1915)

One James L. Delk, "a minister of the Nazarine [*sic*] Revival Mission, while preaching to a large audience at Science Hill, Pulaski County, in November, 1914, used the following language:"

> Some men will stand around the depot, stores, the post office and street corners, and watch the women pass, and size them up, the foot, ankle, and form, and they would be willing to give five dollars for the fork. [*sic*]

This idiom, as stated in the opinion of the Court of Appeals of the Commonwealth of Kentucky, is either unique to Kentucky, or is a bowdlerization of a common four-letter Anglo-Saxon term for fecundation, or they pronounce it oddly in Kentucky. At any rate, it excited quite a stir, clear up to the Court of Appeals.

> For using these words appellant was convicted and fined $67.50 for having committed a breach of the peace....
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1. Article I, Section 6, U.S. Constitution.
2. See story of Father John Bapst in *Donahoe v. Richards* (1854), discussed at IIIC2a(1).
3. Discussed at § C5c above and hereinafter.

> The... question before us is: What constitutes a breach of the peace; and did the use by the plaintiff of the words charged constitute a breach of the peace?... It will be observed that the warrant does not charge that any persons present were disturbed, but that the obscene language used by appellant was calculated to insult his hearers and to provoke an assault.... Is it necessary that violence should attend the act, and should it be calculated to provoke turbulence and open disorder; or was appellant's guilt established when the commonwealth proved the use of the obscene language?....

Following a learned canvass of cases and commentaries, the court concluded:

> The reason whereon most of the cases are said to rest, is a tendency to breach the peace, or, as otherwise expressed, the liability to stir up resentment and quarrels. The criminal law is as well preventive as vindictive, and a threatened danger demands correction the same as an actual one. Moreover, the community is disturbed when it is alarmed.... [T]he term "breach of the peace" is quite broad, and includes, not only all violations of the public peace or order, but acts tending to the disturbance thereof, including acts of public turbulence or indecorum, in violation of the common peace and quiet.
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> Applying this definition to the nasty and obscene words used by appellant, we are of opinion they come within the definition, and constituted a breach of the peace. There was no possible excuse for the use of such language in the pulpit or elsewhere; and that fact alone is sufficient to incite all right-thinking persons to indignation, if not violence.... The appellant's excuse that he was merely rebuking the sin of impurity, that he did not intend to disturb or embarrass any one, but made the statement as a warning and rebuke to sin, is wholly without justification. It does not avail appellant for him to say he has a right to propagate his religious views. That right is not denied; but no one will be permitted to commit a breach of the peace, under the guise of preaching the gospel. If one be licensed to use the pulpit for such disgraceful performances as the appellant admits he was guilty of in this case, then women and children are to be insulted with impunity by the use of the most obscene vulgarity in places where they go to worship.... If this be not an act of public indecorum, in violation of the common quiet, and consequently a breach of the peace, within the meaning of the definitions given above, it would be difficult to imagine such a breach, short of actual violence. That it tended to provoke violence at the hands of outraged parents and right-thinking men there can be little doubt....
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> ... In assessing against appellant the modest fine of $62.50, the jury acted with moderation. Judgment affirmed.[4]

4. *Delk v Kentucky*, 178 S.W. 1129 (1915). (The $67.50 fine mentioned at the beginning was reduced to $62.50 in the circuit court.)

This opinion was rendered before a series of decisions by the Supreme Court made the free-speech guarantees of the federal First Amendment applicable to the states[5] and rejected the contention that speech could be silenced because it *might* incite disorder.[6] There came a day (1970) when the U.S. Supreme Court even upheld the right—under the protections of free speech—of a person (not claiming any religious mandate) to enter a county courthouse wearing a jacket inscribed with the curious legend, "Fuck the Draft."[7] The Victorian innocence and judicial outrage of pre-World War I Kentucky seem like souvenirs of a bygone place and time, with the intervening changes not all necessarily for the better.

The singularity of *Delk* makes it a cautionary beacon to ward off any infringement by government on the preaching and teaching responsibilities of churches, where the First Amendment freedoms of religion and speech intersect. That state interference in that area is not totally implausible is shown by a 1972 case from Wisconsin in which a district attorney threatened to prosecute a church if it did not submit a proposed sex education course for "voluntary" precensorship.[8] Though not involving the pulpit, it did implicate the teaching authority of the church, of which the pulpit is a salient part. It would be good if this section could conclude with the probably obsolete instance of *Delk*, but a later case suggests that freedom of the pulpit may have its limitations—like other exercises of freedom of speech—under the law of defamation.

2. *Guinn v. Church of Christ* (1984)

An earlier section traced the disciplinary action of the elders of the Church of Christ of Collinsville, Oklahoma, in officially declaring from the pulpit the sin(s) attributed to a member of the church, despite the fact that she had formally withdrawn from membership in the church prior to that announcement.[9] When the elders insisted that she was not allowed unilaterally to withdraw and that they still had responsibility for the salvation of her soul, which they exercised by castigating her from the pulpit, she sued the church and won a substantial judgment for defamation.

The teaching of that case would seem to be that freedom of the pulpit can be curtailed at law if strictures are addressed from that platform by name against a person or persons known to the congregation (but who are not public figures) and putatively harmed by loss of reputation in their eyes. From this, prudent pastors may conclude that the pulpit is not a good place to denounce by name the sins of individuals known to the congregations, but who are not—or no longer—members of

5. *Fiske v. Kansas*, 274 U.S. 380 (1927).
6. *Cantwell v. Connecticut*, 310 U.S. 296 (1940), discussed at IIA2c.
7. *Cohen v. California*, 403 U.S. 15 (1970).
8. *Unitarian Church West v. McConnell*, 337 F. Supp. 1251 (1972), discussed at IIIB5.
9. See § C5c *supra*.

it. Admonishing from the pulpit identifiable sinful members of the congregation by name may be privileged at law, though it may be an expensive risk to find out.

But, irrespective of the law, it is probably not good pastoral practice—at least in the first instance. The Gospel of Matthew suggests dealing with wayward sheep privily at first before chiding them in the congregation. (The elders of the Collinsville Church of Christ had sought to follow those steps.) Moral instruction can be offered from the pulpit without an identifiable target as an object-lesson. If a "backslider" has failed to respond favorably to private remonstrance and is to be cut off, that could be done without publicly listing a catalog of moral failures; it should suffice to warn off the faithful simply to inform them that a specified person has been disfellowshipped for cause.

These counsels of prudence are not legal curtailments of freedom of the pulpit, nor is it suggested here that preachers are immune from non-legal reprisals for statements from the pulpit that are offensive to some of their hearers, who have their own freedom of religion not to listen to doctrines or particulars that are repugnant to their consciences, and they can "vote with their feet" or—in exacerbated cases—find a more acceptable occupant of the pulpit. The author, as preacher and more recently occupant of the pew, respects the free will of hearers as well as speakers. The former are not a "captive audience," and they are not obliged to listen to objectionable matter, at least not if repeated. They are obliged to honor the terms of their contract with the preacher in terms of tenure and payment, but the contract does not require them to occupy their pews, and they are not required to renew the contract if it is no longer acceptable.

It is a poor preacher who is unable to realize that there are ways to convey the message that he or she feels called to utter without breaking the bond of communication entirely. Most congregations are remarkably long-suffering in the belief that the preacher is delivering the Word with commitment and integrity. But there will come times when the preacher feels the duty to impart messages that will be hard for some to hear, and even the most diplomatic formulations may entail some risk. But the vocation of the pulpit is not immune to risk, though it should be to violence, duress or action at law.