

MASS MEDIA AND SOCIETY

Intro to the First Amendment

Introduction

The First Amendment to the Constitution says that:

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.

But there ARE laws that restrict or punish freedom in this country and they have been found by the Supreme Court to be legal. In this section of the class we'll take a look at the First Amendment and some of the restrictions and other ramifications of the First Amendment.

We'll also look at some of the threats to the First Amendment that exist today.

But before we do, let's take a look at that First Amendment. Those 45 words say enough that we COULD spend an entire semester just studying them. There are five areas, or clauses, built into that one sentence.

- **The establishment clause** -- The one that prevents the government from establishing an official religion and the one that is responsible for the concept of the separation of church and state.
- **The exercise clause**-- The one that allows you to practice any religion you want, within limits.
- **The free expression clause** -- This one protects free speech, free expression and free press. This is the one we'll focus on in this and coming lectures and in your First Amendment paper.
- **The assembly clause** -- The one that allows us to associate with anyone we want without punishment.
- **The petition clause** -- The one that allows us to question our government --or recall a governor-- and seek changes without punishment.

Restrictions to the 1st Amendment

There are several approaches to free speech, free expression and free press that come out of the expression clause. They include:



- **Prior restraints** -- It would seem that the First Amendment would discourage the government from setting up a system of prior review or prior restraint. You don't have to submit your planned utterances to a government authority any more than a journalist must submit her story to the government for approval before publishing it. This is not true in all countries.

Prior review/prior restraint does exist in this country, but it is the exception rather than the rule. In 1930 the Supreme Court gave its landmark ruling on prior restraint in *Near vs. Minnesota* when it ruled that the government bears a heavy burden in proving that prior restraint is needed . . . something that has been difficult to do since.

- **Copyright** -- In a sense, this is a type of prior restraint that is acceptable. Copyright is designed to protect people that create expression -- such as books, songs, works of art, etc. But the result is that it restrains you from legally using their creations without permission. We'll look at copyright in greater detail in the copyright lecture.
- **Punishment after the fact** -- There are some kinds of expression that have been deemed to be harmful and journalists --and others-- can be punished after the fact for expressing them. The two main areas of expression that fall under this category are libel/slander and invasion of privacy. We'll look at each of these areas in the libel lecture and the privacy lectures.
- **Access to information** -- To have a free press shouldn't information, especially government information, be available to the media? The media think so, and so do some legislators. Both the federal government and state governments have adopted freedom of information laws to make most government information available on request to not only the media, but to the general public.

Another access area is the openness of meetings of government groups. Most states adopt "sunshine" laws, meetings to require that elected officials hold their meetings and make their decisions in public. We'll discuss California's four open meeting laws in the open meetings lecture.

- **Confidentiality and Shield Laws** -- Most journalists would also argue that there need to be laws that protect them from revealing the names of secret sources or from revealing secret information gathered while researching stories. Without the privilege to promise sources anonymity, some sources would not be willing to come forward and talk to reporters. While the First Amendment does not specifically state that journalists should be protected or shielded from heavy handed governmental probes for the names of these sources many journalists would argue that it is implied in the right of a free press.

Where state "shield" laws come into play quite often, for example, is when a reporter talks to witnesses of crimes who are reluctant to or fearful of talking to police investigators. Sometimes these sources fear for their lives and do not want to get into a position of testifying, but are willing to tell what they saw as long as their names will be left out. Law enforcement agencies are interested in solving crimes and obtaining convictions and would require them to testify. Journalists feel strongly that they should not be put in positions of becoming agents for law enforcement.

An example of this is the Judith Miller case from late 2005. The New York Times reporter chose to go to jail rather than give up her source on who "outed" CIA operative Valerie Plame. She eventually capitulated.

As with the punish-after-the-fact areas we'll look at, there are also some areas of speech and expression that ARE NOT protected by the First Amendment. Commercial speech, for instance, is usually afforded less protection than noncommercial speech. Pornography is an unprotected area of speech. True pornography is illegal in this country. But what IS pornography? Smut is not pornography. Eroticism is not pornography. We'll look at legal definitions of pornography in one the pornography lecture.

Today's threats to 1st amendment

One of the major --and passionate-- themes of this course is that the First Amendment is in danger today. Its strengths and importance is being weakened, not necessarily by courts and legislators, but more by you and I because our complacency.

Some current examples of threats include:

- Speech codes/hate speech/political correctness
- Flag burning and art censorship
- Complacency
- Homogeneity of thought/press
- Internet restrictions
- Broadcast regulations
- Curbs on student press

Speech codes/hate speech/political correctness

For the last 10 years or so there have been moves to develop "politically correct" speech in sections of our society. It is no longer politically correct to call someone "fat" because we might offend that person. Instead, refer to the person as "gravitationally challenged." A person isn't "short" or "tall" but rather is "linearly challenged" or "linearly enhanced."

But it goes beyond these humorous examples. Racial epithets are considered hate speech today and there are attempts to curb such speech. Certain forms of sexual innuendo fall into the category of sexual harassment.

And the attempts to curb certain types of speech are being codified in speech codes at universities once known for their incubators of free speech.

Now, don't get me wrong. I am not defending offensive speech. My mother taught me better. The problem is in creating codes, even self-imposed organized codes, in the name of stamping out unpopular speech erodes the intent of the First Amendment. Those who wish to continue to offend have the Constitutional right to do so.

We accept these codes because we do not want offensiveness in our society. In fact, we are so tired of it, that we're willing to see an erosion in our rights to curb it.

Flag burning and art censorship

Two controversial areas in free expression these days are the right to express your anger by burning the American flag and the disgust with what is being purported as art in some public galleries.

While you don't see a lot of examples of flags being burned in protest there are a lot of emotions attached when it does happen. On one side of the argument are those who feel that the flag is a symbol of the freedoms in our country and should be treated with respect. Many who fought in the military look at the flag as a motivating symbol that drove them in combat. To see it desecrated is equivalent to sacrilege. They are vehemently to allowing to take place without punishment.

Those on the other side see burning of the flag as a protected form of expression and the courts agree. The irony is that those opposed to flag burning as protected expression argue that they fought for free expression in this country and not for flag burning. In other words, they fought for freedoms they would gladly curb because they find the expression offensive. This is another example of people not understanding that popular speech needs no protection . . . unpopular speech DOES.

According a the Freedom Forum survey of public attitudes about the First Amendment 74 percent think flag burning as a political expression is wrong.

More in the news these days, though, is outrage with publicly funded art. Many are in favor of encouraging young artists to develop their expression, only to find out later that they are offended by that expression. Controversial examples have included art pieces that featured:

- A crucifix sitting in a jar of urine.
- Nude photos of families, including children
- A cut up photo of the Virgin Mary splattered with elephant dung.

Again, clearly offensive to many, but examples of unpopular speech/expression protected by the First Amendment. If we start stamping out offensive speech/expression, it is a short step to canceling your favorite television show because it contains too much sexual innuendo or banning your favorite music group because the lyrics to its newest song contains racist lyrics.

Complacency

Another major threat to our freedoms is the complacency of the general public to free speech. When we see excessive exercise of free expression, or we see things like the press overkill a story it is easy to say, "There ought to be a law that prevents the press from covering that story," "There ought to be a law against that kind of art," "There ought to be a law that prevents that kind of content on the Internet," etc.

When we offhandedly make these kinds of statements, we are indicating that we are willing to give up some rights. The Freedom Forum annually does a major survey about public attitudes concerning the First Amendment. The findings are discouraging. Among them are:

- Sixty-seven percent feel public remarks offensive to racial groups should not be allowed.
- Fifty-one percent said art offensive to some in a community should not be placed in a public place.
- Forty percent said musicians shouldn't sing offensive songs in public.

- Fifty-one percent think the press have too much freedom.
- Fifty-five percent think high school students get school authorities' approval for controversial stories.
- Twenty percent think government should be allowed to approve what newspapers publish.

Homogeneity of thought/press

The media are responsible for some of the threat to the First Amendment and public attitudes about the First Amendment. Aside from some excesses, the problem is the homogeneity, or sameness of media the country. It is more cost effective to look like everyone else, to sound like everyone else, etc. Pick up a newspaper in Los Angeles, for instance, and except for local stories, you'll find that the front page stories are pretty much the same as the papers you might pick up in Chicago, New York and St. Louis, minus their local stories. Furthermore, the papers look pretty much the same.

Now turn to television newscasts. Except for local stories the news programs will cover the same stories. (And the local stations will all be covering the same local stories!)

If media all look and sound the same then you don't end up with the diversity of expression that is the goal of the First Amendment.

Internet Restrictions

The rapid rise of the Internet has given legislators new bandwagons to jump on in regard to limiting freedoms. The 1996 Telecommunications Act, for instance, included a section that made it unlawful to post anything on the Internet, including the World Wide Web, that was "indecent." The American Civil Liberties Union quickly challenged that new law as being too vague and violating First Amendment rights. The law was intended to curb smut on the Internet. But smut is protected speech, whether you like that or not.

The Communications Decency Act portion of the 1996 Telecommunications Act was found unconstitutional. Since then there have been attempts by Congress to pass other laws that abridge freedom of speech on the Internet. The most recent has been a successful attempt by the government to force public and school libraries to place Internet filters on their computers to prevent children from logging onto questionable sites.

Broadcast Regulations

Part of the reason Congress is willing to attempt to control freedom of speech on the Internet is that it has effectively done so in broadcast media for years. In this country we limit who can become a broadcaster and regulate, indirectly, some of the types of content that a broadcast on radio or television. We've done this since the infancy of radio.

We'll look at some of these regulations and the rationale behind them in the next section in the rationales for regulation lecture.

Congress determined that since we interact with the Internet on a computer screen that looks like a television that the Internet was more like our broadcast media than like our print media. The content of the Internet and the way we actually interact with it, though, is more related to our print media, as you will see in the

Curbs on student press

A disturbing cutback in freedoms has taken place in the student media. We'll discuss what has been happening there in the student media lecture. The impact of cutbacks in student expression freedoms is disturbing as high school and college students are learning to be our leading citizens of the future. How do we train students on the rights and responsibilities of free expression if we deny them the right to practice it?

Reading Assignment

You should be reading the chapter on media law in your textbook to get more information about media law and the First Amendment.

Exercise

Which of the threats to the First Amendment listed above do you feel is the most significant? Explain why.

Note that when submitting the answer start the subject line with:

J100x - YourLastName - First

Send to rcameron@cerritos.edu