

Freedom of Speech



What is “Freedom of Speech”?

- You can say anything?
- You can say most things, subject to some restrictions?
- What might those restrictions be?
- Does the Internet change anything?

The 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.”

A Core American Value

- Restrictions exist
- What these are has varied over time
- Not protected: obscenity, “fighting words”, “clear and present danger”, etc.
- Some justices think that that’s wrong:

It should be noted at the outset that the First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” That leaves, in my view, no room for governmental restraint on the press.

New York Times Co. v. United States, 403 U.S. 713 (1971), Justice Douglas, concurring

“Abridging the Freedom of Speech, or of the Press”

- Note the distinction between “speech” and “the press”
- Many things qualify as “speech”
- The “press” has a long-standing traditional role as a public critic

The Traditional Press

- Traditional newspapers and other publishers
- Radio and television
- Cable TV

Characteristics

- Corporate structures
- High financial barrier to entry
- Some content-based regulation of radio and TV: limited spectrum forces the government to make allocation decisions
- 👉 Note that cable TV and Internet “channels” do not have spectrum limitations
- Generally, other regulation must be content-neutral

- Originally, just that: speech
- Were private pamphlets and leaflets “speech” or “press”?
- (Such pamphlets and leaflets were an important dissident activity in colonial times; the concept was of course known to the authors of the Bill of Rights.)
- Since then, many other activities, including things like dancing, art, flag-burning, and more have been held to be speech within the meaning of the First Amendment
- It is now held to protect *expression*

Protected Speech

To block some speech, a “compelling government interest” must be shown. The restraint must be narrowly tailored, and its beneficial effects are measured against the harm it causes.

Political speech Very heavily protected; “compelling interests” are rare or non-existent

Ordinary speech Still well-protected, but there may be context issues, i.e., graphic nudity in a scientific or legitimate artistic context, as opposed to the same images designed to titillate

Commercial speech Can be restricted (e.g., tobacco ads)

Some Speech is Never Protected

- Obscenity—but *very* hard to define
- 👉 ● “[P]erhaps I could never succeed in intelligibly doing so. But I know it when I see it”. (*Jacobellis v. Ohio*, 378 U.S. 184 (1964), Justice Potter Stewart, concurring)
- Speech inciting dangerous actions—as opposed to ideas—can be outlawed. Note: there must be a direct, immediate relationship relationship, not a general statement like “I think that all X should be killed.”
- (“The first thing we do, let’s kill all the lawyers”: Dick the Butcher, *Henry VI, Part II*, act IV, Scene II, Line 73, William Shakespeare)

- In the U.S., a statement must be *factual*, *false*, and *defamatory* to be libelous
- A true statement can never be libelous
- Statements of opinion, by definition, are never libelous
- To libel a “public figure”, the statement must be not just false; rather that the “statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” (*New York Times v. Sullivan*, 376 U.S. 254 (1964))
- But: “prior restraint” is almost always prohibited

Enter the Net

- The net changed everything
- There was no longer a high barrier to entry
- Or was there?

The Net is Decentralized

- The Internet was designed to be decentralized
- Slightly older technologies—Usenet, FIDO, dial-up “bulletin boards”—required only a PC and a modem to participate

A Court's View

“It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen. The plaintiffs in these actions correctly describe the ‘democratizing’ effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche.” (*ACLU v. Reno*, 929 F. Supp. 824 (1996))

But...

- You don't connect to the "Internet", you connect to an ISP
- Anyone can create an ISP—but anyone can create a newspaper
- More and more of the net is controlled by large ISPs
- Is there a problem?

- Big ISPs—the so-called “Tier 1”s—*peer* with each other at multiple points, and generally share the cost of the physical interconnection
- Small ISPs purchase *transit* from big ISPs. They may or may not peer with each other; they also may peer at *exchange points*
- 👉 Many (but not all) consumer ISPs are in this category
- End-sites, including colos (colocation facilities), buy connectivity from one or more ISPs

Publishing: Individuals

- Consumer ISP—but some have restrictions on what you can do
- From Verizon Online Terms of Service: “[I]t is a violation of the Agreement and this AUP . . . (k) use the service in any fashion . . . in a manner that is obscene, sexually explicit, **cruel or racist in nature or which espouses, promotes or incites bigotry, hatred or racism**; (<https://www.verizon.com/about/terms-conditions/acceptable-use-policy>)
- The government could not impose such restrictions; such speech, though distasteful, is protected
- Employers generally have very stringent policies

Some ISPs Didn't Like Free Speech

- “You may NOT use the Service. . . to damage the name or reputation of Verizon, its parent, affiliates and subsidiaries” (Verizon, in 2007)
- (AT&T had a similar clause in its terms of service)
- “Saying it had the right to block ‘controversial or unsavory’ text messages, Verizon Wireless has rejected a request from Nara Pro-Choice America, the abortion rights group, to make Verizon’s mobile network available for a text-message program.”
(<https://www.nytimes.com/2007/09/27/us/27verizon.html>)
- All of those policies were changed after the press noticed them. . .
- (But: the terms of service of Trump’s new social network say that you can’t “disparage, tarnish, or otherwise harm, in our opinion, us and/or the Site.”)

- Often use a hosting service
- Example: Pair Networks says “Adult-oriented sites, designed for entertainment or commercial purposes, are not allowed on Pair Networks servers.” (<https://www.pair.com/why-pair/hosting-policies/adult-content/>)
- But—fewest restrictions

What's the Point?

- Publishing cheaply often comes with content restrictions
- Usually, the restrictions aren't onerous
- At times, especially in copyright cases, web sites do pull the plug

Examples

- Diebold (which made widely-criticized electronic voting machines) demanded that ISPs pull down allegedly-copyrighted content (Diebold found liable; the judge said “no reasonable copyright holder could have believed that the portions of the email archive discussing possible technical problems with Diebold’s voting machines were protected by copyright”)
- Uri Geller, the alleged psychic, got YouTube to yank a video critical of him (Geller backed down in an out-of-court settlement)
- YouTube’s Content-ID system flagged a video of a cat purring as infringing copyright (<https://torrentfreak.com/youtube-flags-cat-purring-as-copyright-infringing-music-150211/>)

Big Brother versus Little Brother

- As noted, the First Amendment does not apply to restrictions imposed by private parties
- More and more, online access is controlled by a few large companies.
- Is this a problem?
- So far, it hasn't been too serious—but for some content, overseas servers have been safer

Who is Responsible for Content?

- A lot of content is user-created
- Should the ISP be responsible for policing it? The Web site operator?
- Last year, Youtube [said](#) that “500 hours of video are uploaded to YouTube every minute.”
- A story on www.nytimes.com about the Parkland shootings has more than 1,200 comments
- And how should ISPs police encrypted traffic?

(The Communications Decency Act)

- A 1996 law that criminalized using “any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication” that is (in effect) obscene
- In other words, it would criminalize adult web sites that didn't do age verification
- It was struck down by the Supreme Court, but §230 survived.
- Obviously, no such ban exists today. . .
- But some companies are doing it on their own

- US law: if something is improper, the individual who posted it is the liable party
- ISPs are protected from liability for user-created content
- However, they may have to take down offending content if properly notified of the problem
- They are liable only for their own speech
- Libel? Copyright infringement? The site operator isn't at risk.

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

- (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

Why §230?

- Generally, a neutral content distributor, e.g., a bookstore, is not liable for the content of the books sold *unless* it knew or had reason to know that the contents were, e.g., obscene or defamatory
- Prodigy—an early online service—used automated and manual filtering to eliminate undesirable content
- Someone posted that Stratton Oakmont, a brokerage, engaged in fraudulent behavior
- A court held (*Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995)) held that the filtering made Prodigy a publisher, not a distributor
- In other words, imperfect moderation increased risk, which Congress didn't like
- P.S. The next year, Stratton Oakmont was shut down for fraudulent business practices; a few years later, its founders pleaded guilty to stock fraud...

FOSTA: “Allow States and Victims to Fight Online Sex Trafficking Act of 2017”

- Some websites allegedly encourage classified ads for prostitution
- It is “the sense of Congress that section 230 . . . was not intended to provide legal protection to websites that unlawfully promote and facilitate prostitution”
- Criminalizes sites “with the intent to promote or facilitate the prostitution of another person”
- Retroactive criminal liability (which is unconstitutional)
- Craig’s List has taken down its Personal’s section; Reddit has deleted some content

Content-Blocking in the UK

- Access to IP addresses deemed to contain child pornography must be blocked by ISPs
- They tried to mandate age verification, but backed off
- A draft law would fine companies for carrying content that is “legal but harmful.” What does that mean?

Is Computer Code “Speech”?

- If source code is speech, it is protected by the First Amendment.
- Is code purely functional? If so, it is not protected
- Is code expressive as well as functional? A few appellate courts have opined on this, and they generally have concluded that code *can* be speech.
- However—in all of these cases, part of the point of the code was to make an expressive point.

- 6th Circuit, *Junger v. Daley*, 209 F.3d 481 (2000): “Likewise, computer source code, though unintelligible to many, is the preferred method of communication among computer programmers.
“Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment.”
- 2nd Circuit, *Universal Studios v. Corley* 273 F.3d 429 (2001): “But the fact that a program has the capacity to direct the functioning of a computer does not mean that it lacks the additional capacity to convey information, and it is the conveying of information that renders instructions “speech” for purposes of the First Amendment.”
- Similar analysis by the 9th Circuit, in an opinion withdrawn for procedural reasons.

Apple versus the FBI

- If code is speech, can a court compel Apple to write code to unlock seized iPhones?
- Note that Apple has stated that they find such code offensive
- But if it's purely functional, perhaps they can be compelled to cooperate

Apple versus the FBI: Signatures

- All boot images for iOS must be digitally signed by Apple
- Is the signature speech, saying, “We, Apple, attest to the quality of this software”?
- Or is it a mere functional access control mechanism?

Speech on the Web: Good News

- Generally, very cheap and easy to post things—the court was right; very low barrier to entry
- Without too much effort, it's possible to find ISPs and hosting companies that have many fewer restrictions
- Controversial content is easily mirrored outside the US (i.e., Wikileaks)—and can sometimes be found in Google's cache...

Speech on the Web: Bad News

- Increasing concentration of power
- Increasing use of lawsuits to force takedown of material
- Increasing push for regulation and censorship by many governments

Student Speech Online

- What can (pre-college) students say online?
- On-campus, students have free speech rights unless they “materially and substantially disrupt the work and discipline of the school.” (*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969))
- Can web sites, Facebook postings, etc., done from home be regulated by schools?
- But: “The school’s regulatory interests remain significant in some off-campus circumstances. . . These include. . . the use of computers, or participation in other online school activities” (*Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038 (2021))
- (It’s a complex, nuanced area; there is no definitive answer from the Supreme Court)

Blogger Rights

- Bloggers, of course, have full First Amendment protections
- But—are they “journalists”?
- In some states, journalists have special privileges, such as protecting sources
- Not yet clearly settled

Was I a "Journalist" in the Eyes of the Law?



Across the street from SIPA, Spring '72

Look Who's There...



Outside Hamilton Hall, Spring '72

Anonymity versus Accountability

- Anonymity is often a vital part of free speech
- Many lawsuits seek to discover the poster's identity
- Does anonymity lead to online misbehavior?
- What is the right balance between anonymity and accountability?
- More on this next class

Why Anonymity?

- Free speech can be unpopular
- Threats of physical harm
- Threats of job loss or other forms of financial coercion
- Social shame—unpopular lifestyles, embarrassment, etc,
- *Often, anonymity is necessary for truly free speech*

Long History of Anonymous Political Speech

- The *Federalist Papers* were nominally written by “Publius”
- There were many examples in British history of reprisals against authors—and of others writing anonymously to avoid such fates (i.e., the “Letters of Junius”)
- “There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.” *Talley v. California*, 362 U.S. 60 (1960).

But—What About Accountability?

- Sometimes, we want to hold people accountable for what they say
- We vote by secret ballot, but the legislators we elect (usually) vote publicly
- The Supreme Court has closed deliberations, but its votes and the rationale for them are very public
- “during election campaigns . . . false statements, if credited, may have serious adverse consequences for the public at large.” *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).
- More on accountability next class

It's Not Just Political Speech

- The Court has held that all speech can benefit from anonymity: “The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment. ” (McIntyre)
- The Court also noted that law school exams are graded without knowing the students’ names

Social Networks: True Names

- Some social networks require use of real-world names
- “Facebook is a community where people use their authentic identities. We require people to provide the name they use in real life”
(<https://www.facebook.com/help/112146705538576>)
- Google+: “we recommend using your first and last name on your profile”
(<https://support.google.com/plus/answer/1228271?hl=en>)
- But: “there are no more restrictions on what name you can use”
(<https://plus.google.com/+googleplus/posts/V5XkYQYYJqy>)
- Twitter does not have a real names policy

Why the Issue?

- Some people *need* anonymity, to avoid harrassment
- LGBTQ individuals
- Sometimes people (especially women) who speak out on certain topics
- All of the reasons discussed at the beginning of the class

The Social Graph

- Whom you talk to leaks information
- Your set of Facebook friends, or who follows whom on Twitter leaks information
- Whom you call leaks information—no one else calls the same people as you do
- “If you had enough metadata—the pattern of how a communications device was used (whom did it call, who called it, when, for how long)—you could pretty much determine what the owner of a device was up to.”
(Michael Hayden)

- Many—but not all—LGBTQ individuals self-identify that way on Facebook
- Hypothesis: LGBTQ individuals have many more friends who are also LGBTQ than do heterosexuals
- Question: is it possible to identify other LGBTQ individuals on Facebook, simply according to their “friend” patterns?
- According to an MIT study, yes
- What else leaks that way?

Questions?



(Catbird, Central Park, June 5, 2019)