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# Freedom of Speech



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## 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.”

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## A Core American Value

- Intuitive meaning: anyone can say anything
- Reality more complex and nuanced
- Restrictions exist

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## “Congress Shall Make No Law”

- The First Amendment applies to *Congress*
- Applies to government agencies — including schools — because they’re part of the government
- Due to the Fourteenth Amendment, the First Amendment protections have been *incorporated* and apply to state governments
- The First Amendment *does not* apply to the private sector

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# “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

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## The Traditional Press

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

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# 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
- Other regulation must be content-neutral

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# Speech

- Originally, just that: speech
- Were private pamphlets and leaflets “speech” or “press”?
- 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*

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# 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)

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## Some Speech is Never Protected

- Obscenity — but *very* hard to define
- 👉 “perhaps I could never succeed in intelligibly doing so. But I know it when I see it”. (Justice Potter Stewart, 378 U.S. 184 (1964))
- Speech inciting dangerous actions — as opposed to ideas — can be outlawed

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## Libel

- In the U.S., a statement must be *factual, false, and defamatory* to be libelous
- To libel a “public figure”, the statement must be not just false; rather 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))
- Statements of opinion, by definition, are never libelous

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## Enter the Net

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

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## 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

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## 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))

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## 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?

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## Internet Structure

- 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

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## Publishing: Individuals

- Consumer ISP — but some have restrictions on what you can do
- Example: Verizon FIOS Terms of Service do not let you “use the service in any fashion . . . which espouses, promotes or incites bigotry, hatred or racism”  
`(https://www.verizon.net/central/vzc.portal?\_nfpb=true&\_pageLabel=vzc\_help\_policies&id=AcceptableUse)`
- The government could not impose such restrictions; such speech, though extremely distasteful, is protected
- Employers generally have more stringent policies
- Schools? Sometimes available, but not to most people

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## Publishing: Small Group

- 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.”

`(http://www.pair.com/policies/adult.html)`

“Operating any service which enables or assists anonymous or abusive behavior by third parties is forbidden.”

`(http://www.pair.com/policies/misuse.html)`

- Other companies have their own restrictions

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## Publishing: Larger Organization

- Put a server in a “colo” — a co-location facility
- Requires system administration expertise
- Cost: about \$100/month for a small server
- May be bandwidth-limited; more bandwidth consumption increases costs

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## Your Own Location

- Expensive — must pay for “local loop” to provider, as well as the provider’s fee
- Typical total cost is several thousand dollars/month
- Need your own machines, staff, etc.
- Generally for larger companies only
- But — fewest restrictions

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## What's the Point?

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

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## Examples

- Diebold 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)
- A NJ court has ordered everyone, including the ISP, to disconnect a web site critical of a company’s H-1B visa practices (still pending)
- Google just incorrectly pulled the plug on some music bloggers

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## Big Brother versus Little Brother

- As noted, the First Amendment does not apply to 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

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## Who is Responsible for Content?

- If something is improper, the individual who posted it should be 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
- Exception: this applies only if they're more or less passive conduits, and do not exercise any editorial control

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## 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. . .

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## 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

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# Anonymity

- Anonymity is often a vital part of free speech
- Many lawsuits seek to discover the poster's identity
- More on this on Thursday

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## 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.”
- Can web sites, Facebook postings, etc., done from home be regulated by schools?
- Courts have disagreed; will likely end up in the Supreme Court soon

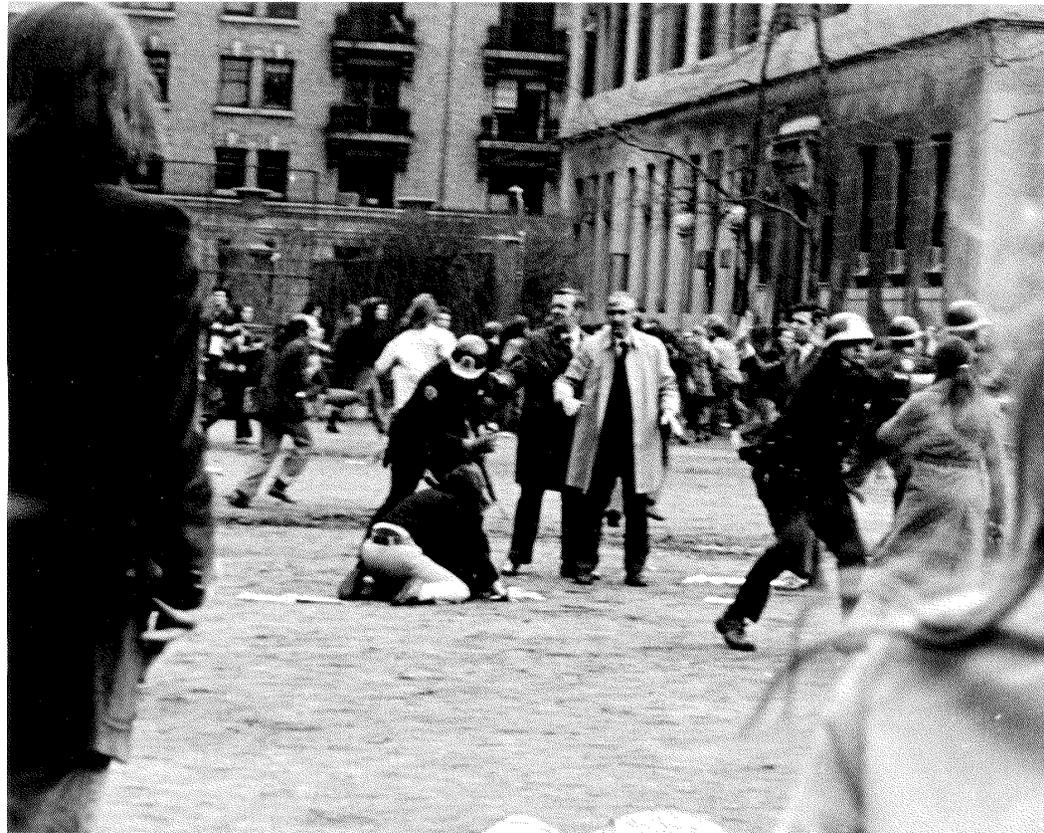
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## Blogger Rights

- 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

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# Was I a “Journalist” in the Eyes of the Law?



Outside Hamilton Hall, Spring '72