LAW WEEK 2019

FREEDOM OF THE PRESS

Sonoma County Bar Association

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1. Each of you have been assigned a classroom at a specific high school. The schedule you were provided has contact information for the teacher. Please make contact with your assigned teacher prior to the presentation (this is also a good time to find out about class size, and any other specifics of interest to you). Be creative and interactive with your presentations. The discussion questions and classroom demonstrations and exercises at the end of the materials are just suggestions. Once you are in contact with the teacher, feel free to create whatever format you think will be most engaging.

2. Most of you will present in pairs. Please coordinate with your co-presenter.

3. You will have approximately 1 hour to present and engage in discussions. Time available may change at each location. Please verify the time available to speak when you make contact with the teacher.

4. You should plan to spend a little time, at either the beginning or the end of the presentation, discussing the legal profession and your personal careers.

5. These materials are presented in an outlined format, but you need not follow that order. A lot of information is provided here; take what you wish, adapt it to fit your presentation, and supplement if you so desire.

On behalf of the Law Week Committee, including Eric G. Young, William L. Adams, Danielle Restieaux, Rebecca Gallagher, we would like to thank all of you for participating in Law Week 2019.

Carmen Sinigiani and Adam Eberts, SCBA Law Week Co-Chairs

A very special thanks to: Susan Demers at the Sonoma County Bar Association for her extraordinary and seamless work behind the scenes to make Law Week happen.

History of Freedom of the Press:

Why is it included in the US Constitution?

U.S. Constitution

The First Amendment permits information, ideas and opinions without interference, constraint or prosecution by the government. It was adopted on December 15, 1791, as one of the ten amendments that constitute the Bill of Rights.

The First Amendment to the U.S. Constitution is what guarantees the freedom of the press in the United States:

"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."

Historical Sources for US Freedom of the Press

The 1983 Maryland Law Review article, "The Origins of Freedom of Speech and Press" by David S. Bogen (42 Md. L. Rev. 429 (1983)) provides a comprehensive summary of several sources of the U.S. freedom of the press.

Parliamentary Privilege

Prior to the American Revolution, freedom of press and speech were only applied to members of Parliament as a part of their official duties. At this point, the two rights were distinct: members of Parliament established the freedom to openly debate matters of policy and criticize the crown (freedom of speech), as well as the freedom to publish and circulate their own documents (such as laws) without the crown's interference.

However, this only protected Parliament from the executive. It didn't protect citizens from any part of the government. In the colonies (as well as under the Articles of Confederation) American legislatures initially adopted this limited standard. Eventually, the Bill of Rights extended the concept of freedom of speech and press to all Americans.

Censorship & Libel

One of the historical concerns behind the freedom of the press is the threat of censorship and libel. Many of these concerns were directly related to printing technology. In English history, the government had established printing monopolies and strict licensure rules, as well as censorship, to control what could be printed. Freedom the press is intended to prevent the American government from doing this.

Additionally, Parliament had previously sued some printers for libel. Parliamentary privilege at one time prohibited anyone from publishing what was said in Parliament. When people started printing those records, Parliament responded with libel suits. Freedom of the press also addresses

this concern, by making it clear that the press can publish the affairs of government. Some of the founding fathers were printing professionals and were likely familiar with some of these issues.

Press and Speech

The authors of the Constitution and First Amendment considered "publishing" and "the press" to be different things. However, the two concepts are related. Madison wrote in an early draft of what became the First Amendment:

> "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolate."

In this sense, freedom of speech in its entirety must encompass both the right of citizens to speak, as well as to publish their views. Freedom of the press is specifically the protection of the printing industry from undue government influence. In an August 1789 letter responding to Madison's early draft, Jefferson recommended using even more condensed language, proposing: "The people shall not be deprived or abridged of their right to speak or to write or otherwise to publish anything but false facts . . . ." At this point, Jefferson had suggested deleting the specific recitation of freedom for the press.

Many Constitutional scholars argue that these are not redundant clauses. Remember, during this time the printing press was still a relatively new invention. Freedom of the press likely refers to protecting use of the press as a *technology*, as opposed to an *industry*.

Freedom of speech may well overlap with the duties of the press as an industry, but the Framers also wanted to ensure the right of every citizen to use the printing press itself, as well as any technological advances in printing technology thereafter.

The distinction between speech and press is the same as the distinction between slander and libel. The first is about saying words aloud. The second is about writing words down and disseminating them.

Cato's Letters

The application of American free press ideals can be traced back to Cato's Letters, a collection of essays criticizing the British political system that were published widely across pre-Revolutionary America. The essays were written by Brits John Trenchard and Thomas Gordon. They were published under the pseudonym of Cato between 1720 and 1723. (Cato was a statesman and outspoken critic of corruption in the late Roman Republic.) The essays called out corruption and tyranny in the British government.

A generation later, Cato's Letters frequently were quoted in newspapers in the American colonies as a source of revolutionary political ideas.

Evolution in the Thirteen Colonies

In the Thirteen Colonies before the signing of the Declaration of Independence, the media was subject to a series of colonial regulations imposed by the British monarchy and Parliament. British authorities attempted to censor American media by prohibiting the publication and circulation of unfavorable information and opinions of which they did not approve.

One of the earliest cases concerning freedom of the press occurred in 1734. In a libel case against *The New York Weekly Journal* publisher John Peter Zenger by British governor William Cosby, Zenger was acquitted and the publication continued until 1751. At that time, there were only two newspapers in New York City and the second was not critical of Cosby's government.

Virginia was the first state to formally protect the press. The 1776 Virginia Declaration of Rights, drafted by George Mason, stated, “The freedom of the Press is one of the greatest bulwarks of liberty, and can never be restrained but by despotic Governments.”

James Madison and the First Amendment

In 1789, Virginia Representative (and later President of the United States) James Madison — nicknamed "the father of the Constitution" — proposed 12 amendments that ultimately became the 10 amendments that make up the U.S. Bill of Rights. Madison was unquestionably the person who *wrote* the First Amendment by borrowing the first phrase from the Virginia Declaration of Rights. But this does not confirm that he was the only one who came up with the idea. Several factors complicate his status as an author:

- Madison initially stood by the unamended Constitution, viewing the Bill of Rights as unnecessary because he did not believe that the federal government would ever become powerful enough to need one.
- Madison's mentor Thomas Jefferson was ultimately the person who convinced him to change his mind and propose a Bill of Rights. The freedoms described in the First Amendment – separation of church and state, religious free exercise, and the freedoms of speech, press, assembly, and petition – were of particular concern to Jefferson.
- Jefferson himself was inspired by the work of European Enlightenment philosophers such as John Locke and Cesare Beccaria.
- The language of the First Amendment was inspired by similar free speech protections written into various state constitutions.

So while Madison drafted the First Amendment, it would be a bit of a stretch to suggest that it was solely his idea or to give him the entire credit for it. His model for a constitutional amendment protecting free expression and freedom of conscience wasn't particularly original and its purpose was merely to honor his mentor (and to humor opponents of the Constitution.) If there is anything outstanding about James Madison's role in the creation of the amendment it was that someone of his position (he was Jefferson's protegé) was able to stand up and call for these protections to be permanently written into the U.S. Constitution.

WHAT CONSTITUTES THE PRESS?

WHO IS PROTECTED BY THIS AMENDMENT?

Traditionally, the term, "the Press," has meant institutional print media, such as newspapers and periodical print media. However, as technology has changed, so has the notion of who is the Press.

Landmark Press Cases

There is no doubt that the First Amendment protects traditional publications.

The 1931 Supreme Court decision, *Near v. Minnesota*, rejected prior restraints on publication, ruling that a Minnesota law targeting publishers of malicious or scandalous newspapers violated the First Amendment.

In the 1938 Supreme Court, *Lovell v. City of Griffin*, Chief Justice Charles Evans Hughes defined the Press as "every sort of publication which affords a vehicle of information and opinion."

In the 1964 landmark decision, *New York Times Co. v. Sullivan*, the Supreme Court ruled that when a publication involves a public figure, to support a suit for libel the plaintiff bears the burden of proving that the publisher acted with actual malice, meaning that the publisher knew of the inaccuracy of the statement or acted with reckless disregard of its truth.

Dealing with Changing Technology

For the first 130 years of the Constitution, the only technology at issue was the printing press. What would happen when other technology came to prominence? The answer has changed as technology has changed. When radio and television were first introduced, there was no 4G LTE, no wi-fi, no satellites, and no cable. All that existed were select places on the electromagnetic spectrum that the then-available technology could use to transmit analogue signals and the right to use those places on the electromagnetic spectrum were doled out by the federal government. So, the federal government wanted control over how those electromagnetic waves could be used.

In the 1969 Supreme Court case, *Red Lion Broadcasting Co. v. FCC*, broadcasters challenged the Fairness Doctrine, which was a Federal Communications Commission rule that required them to give each side of an issue fair coverage. The Supreme Court upheld the rule, saying the government, because it was allocating a finite number of broadcast frequencies, could regulate the licensees of those frequencies. This "spectrum scarcity" rationale was used by the Supreme Court again the 1978 case, *FCC v. Pacifica Foundation*, in which the Supreme Court sided with the FCC against a New York radio station that had broadcast George Carlin's "Filthy Words" monologue in the middle of the afternoon.

Since *FCC v. Pacifica Foundation*, technology has exponentially expanded the ways in which the electromagnetic spectrum is used. Many of the FCC regulations have since been relaxed by politicians, without the need for judicial intervention. Even so, the FCC still restricts over-the-air broadcasts of indecent speech to between 10 p.m. and 6 a.m.

What about the Internet?

In 2014, blogger Crystal Cox accused Obsidian Finance Group of corrupt and fraudulent conduct, and Obsidian sued her for defamation. The trial court refused to give the blogger the protections afforded the Press because she failed to submit "evidence suggestive of her status as a journalist." The Court of Appeals for the Ninth Circuit reversed the judgment, finding that a blogger is entitled to the same free speech protection as a journalist because the "protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities….."

LIMITATIONS ON FREEDOM OF THE PRESS

What are some legal limitations on freedom of the press in the United States? Two legal limitations on freedom of the press are unique to newsgathering activities – protection of confidential sources and media search warrants. To understand the remaining the legal limitations, it is important to realize that freedom of the press is often thought of as coextensive with freedom of speech under the law (often, the two freedoms are referred to "freedom of expression"). Freedom of the press is, therefore, subject to similar legal limitations as is speech. And, yet, freedom of speech in the United States is considered quite broad, so the limitations on freedom of the press are extremely narrow and only apply in particular situations.

1. Limitations on Newsgathering Activities

a. Confidential Sources

News organizations have claimed the First Amendment compels a recognition by government of an exception to the long-standing rule that every citizen owes to his government a duty to provide testimony that he or she is capable of giving. These organizations have argued for a limited exemption to permit reporters to conceal the identity of their sources and to keep confidential certain information they obtain and choose not to publish. Reporters often rely on confidential sources for inside information that exposes government or corporate corruption. However, this argument was rejected in a closely divided Supreme Court case in 1972, *Branzburg v. Hayes.* [1] The Supreme Court concluded that if a confidential source violates a federal law in leaking information to the press, the reporter can be subpoenaed by a grand jury and required to name names.

> *"Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. [The importance of investigating and exposing criminal misconduct] overrides the consequential, but uncertain, burden on news gathering which is said to result*

[1] 408 U.S. 665.

from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."[2]

The Court observed that Congress, as well as state legislatures and state courts, are free to adopt privileges for reporters.[3] Although efforts in Congress have failed, 48 states protect the confidentiality of reporters' confidential sources —32 (plus the District of Columbia) by statute and 16 by court decision. Wyoming has long been a holdout. Hawaii did enact groundbreaking legislation protection confidential sources, but the law was allowed to expire in 2013.[4]

Despite state law protections, the lack of a "reporter's privilege" at the federal level – that is, the right to refuse to disclose confidential sources – can still result in reporters facing jail time for noncompliance. In 2005, New York Times reporter Judith Miller served 85 days in jail for contempt of court when she refused to name the source who leaked the identity of an undercover CIA agent.[5] The following year, two reporters for the San Francisco Chronicle also served jail time for refusing to name the source who leaked closed grand jury testimonies from the Barry Bonds perjury case.[6]

b. Media Search Warrants

Similar to the limitations on press freedoms causes by the lack of a "reporter's privilege," the Supreme Court held in *Zurcher v. Stanford Daily* that the status of an entity as a newspaper (or any other form of news medium) does not protect it from issuance and execution of a search warrant for evidence or other material properly sought in a criminal investigation.[7] The press had argued that to permit searches of newsrooms would threaten the ability to gather, analyze, and disseminate news, because searches would be disruptive, confidential sources would be deterred from coming forward with information because of fear of exposure, reporters would decline to put in writing their information, and internal editorial deliberations would be exposed. The Court thought that First Amendment interests were involved, but doubted the consequences alleged would occur. It also observed that Constitutional limitations on the issuance of warrants would adequately protect press interests. In response, Congress enacted the Privacy Protection Act of 1980, which shields the press from federal and state searches, but only under specified circumstances.[8]

2. Limitations on Defamation

Defamation is also prohibited by law in specific cases. Defamation is the injury of an individual's reputation either by written or spoken word. Defamation by the press is called libel.

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[2] *Id.* at 690-691.
[3] *Id.* at 706.
[4] Reporters Committee for Freedom of the Press. *Reporter's Privilege Compendium*. (2019) https://www.rcfp.org/reporters-privilege/; Reporters Committee for Freedom of the Press. *Hawaii Shield Law Will Expire After Lawmakers Unable to Reconcile Competing Bills.* May 3, 2013. https://www.rcfp.org/hawaii-shield-law-will-expire-after-lawmakers-unable-reconcile-compe/.
[5] Judith Miller Homepage. http://www.judithmiller.com/about/.
[6] Alfano, Sean. *Reporters Get Jail in Bonds Leak Case.* CBS News. September 21, 2006. https://www.cbsnews.com/news/reporters-get-jail-in-bonds-leak-case/.
[7] *Zurcher v. Stanford Daily* (1978) 436 U.S. 547.
[8] Pub. L. 96–440, 94 Stat. 1879, 42 U.S.C. § 2000a.

In the landmark 1964 case *New York Times Co. v. Sullivan*,[9] the court ruled that the press is not guilty of libel against public figures unless the injured party can prove "actual malice" — knowingly and recklessly publishing false information — rather than merely negligent or reckless reporting. The ruling lifted restrictions on the press that had prevented it from reporting fully on the civil rights movement in the South.

The actual malice standard usually insulates the tabloid press, publications like the National Enquirer, the Globe, or the Star, from lawsuits by unfavorably treated celebrities and politicians. However, some celebrities, such as Carol Burnett and Jennifer Hudson, have still managed to prevail in libel lawsuits despite this difficult legal standard.[10] In 2016, Gawker Media, an online outlet, settled a lawsuit from Terry G. Bollea, better known as "Hulk Hogan," for $31 million, effectively bankrupting the media company.[11]

In decisions following *New York Times*, the Supreme Court has held that the press can be responsible for libel in defamation cases involving private citizens and private matters, sometimes without proof of actual malice. In *Gertz v. Robert Welch, Inc.* (1974),[12] the Court refused to extend the *New York Times* standard to actions for libel involving private individuals even where the matter is of public concern. In *Gertz*, the Court recognized a strong and legitimate state interest in compensating private individuals for injury to reputation, but also held that if the case regards a public concern, punitive damages are not recoverable. Punitive damages are a type of damages the law sometimes allows to punish someone who has acted with conscious disregard of another's rights, with fraud, or with oppression. The only exception to this is when the liability is based on a showing of knowledge of falsity or a reckless disregard for the truth.

In 1985, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[13] the Supreme Court held that in actions for libel involving private individuals and matters of purely private concern, punitive damages may be awarded without showing actual malice. The Court determined that the First Amendment was not violated by permitting recovery of punitive damages without a showing of malice, as long as the defamatory statements do not involve issues of public concern.

3. Limitations on Obscenity

Pornography is a type of published material that is generally protected by the First Amendment, but materials that are deemed "obscene" are not protected. While this issue has typically arisen in the context of the right of free speech, it also limits the right of individuals to publish obscene materials.

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[9] 376 U.S. 254.

[10] Associated Press. *Hudson Wins Libel Award Over Too-Thin Story.* July 20, 2006. http://www.today.com/id/13954188/ns/today-today_entertainment/t/hudson-wins-libel-award-over-too-thin-story/#.XH1AeohKjt8; Beam, Alex. *Tabloid Law.* The Atlantic. August 1999. https://www.theatlantic.com/magazine/archive/1999/08/tabloid-law/377722/.

[11] Bogomolova, Katherine. *Public Figure Versus Private Citizen: Does One Deserve More Privacy?* Columbia Undergraduate Law Review. November 19, 2017. http://blogs.cuit.columbia.edu/culr/2017/11/19/public-figure-vs-private-citizen-does-one-deserve-more-privacy/.

[12] 418 U.S. 323.

[13] 472 U.S. 749.

What makes something "obscene" is an issue the Supreme Court has grappled with for many years, as it faced many different factual scenarios in the cases brought before it. In fact, the Supreme Court has reviewed cases involving allegedly obscene speech or published materials more often than almost any other issue of comparable specificity, and its rulings have not always been so clear as to what the First Amendment protects and what it does not.

The Court's lack of clarity in its rulings on this issue is, perhaps, best captured in the words of Justice Potter Stewart, writing a concurring opinion in *Jacobellis v. Ohio*[14] in 1964. A concurring opinion is an opinion written by a justice who may agree with the outcome of a decision but for distinct reasons. In that case, Jacobellis was the owner of a neighborhood theater. He was criminally convicted of the crime of displaying obscenity and was fined after his theater featured a French art film called, *Les Amants* (The Lovers). His conviction was upheld by the lower courts, even though the film clearly was never intended to even be pornography much less obscenity.[15]

The Supreme Court overturned Jacobellis' conviction, but the justices could not agree as to why they were reaching this conclusion, illustrating the difficulty the Supreme Court has had with this topic. The case led to 4 separate, concurring opinions by the justices, none of which could garner the support of more than 2 justices. The most famous of these concurring opinions, however, is the one by Justice Stewart who famously muddied the water even further by writing:

> *"It is possible to read the Court's opinion in [past pornography cases] in a variety of ways…I have reached the conclusion, which I think is confirmed…that, under the First and Fourteenth Amendments, criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it…"*[16]

Such lack of clarity by the Supreme Court left lawyers and litigants without any clear idea of what obscenity is and what it is not. This remained the state of the law until 1973 when the Supreme Court put an end to Justice Stewart's vagueness when it eked out a 5-4 decision in *Miller v. California*.[17] Miller, after conducting a mass mailing campaign to advertise the sale of "adult" material, was convicted of violating a California statute prohibiting the distribution of obscene material. Some unwilling recipients of his mass mailed brochures complained to the local police, which led the initiation of criminal proceedings against Miller.[18]

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[14] 378 U.S. 184.
[15] Wikipedia contributors, "Jacobellis v. Ohio," *Wikipedia, The Free Encyclopedia*, https://en.wikipedia.org/w/index.php?title=Jacobellis_v._Ohio&oldid=862800577.
[16] 378 U.S. at 197.
[17] 413 U.S. 15.
[18] *Miller v. California.* Oyez. https://www.oyez.org/cases/1971/70-73.

The Court reaffirmed its long-standing rule that obscenity did not enjoy First Amendment protection. However, the Court modified the test for obscenity that had been established by earlier cases and created a new, three-part test for determining whether materials are obscene:

> *"The basic guidelines for the trier of fact must be (a) whether 'the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to a prurient*[19] *interest…(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."*[20]

In reaching this conclusion, the Court rejected earlier decisions to the effect that published material had to be "utterly without redeeming social value."[21] As a result, after *Miller*, there was a spike in convictions for obscenity, and for the first time in two decades, the Supreme Court stopped reviewing these cases, letting the convictions stand. Using restrictive zoning ordinances, communities also began to crack down on a wide variety of business establishments, including adult theaters, nude dancing halls, and even publishers of print materials.[22]

Critics of the *Miller* decision focused primarily on the "community standards" prong of the three-part test, charging that the decision was being used to prosecute national publishers for obscenity in locales with different, more restrictive views of what constitutes obscenity. In other words, what one considers obscene in Garden Grove, Iowa[23] might not be the same as in San Francisco, California.

In general, since *Miller*, the Court has granted more leeway to local communities to police obscenity themselves, but this has not necessarily resulted in greater clarity in the Court's rulings. In particular, the "community standards" portion of the *Miller* test has been difficult to apply with the rise of the Internet. Today, unlike when *Miller* was decided, materials that one might consider "obscene" can be accessed from anywhere in the nation with a few mouse clicks, so how does one apply a "community standards" test under those circumstances? For now the Court has not said. In fact, it has issued conflicting opinions in this area.

For example, in 1982, the Court clearly declared that child pornography violated the *Miller* test and was not protected under the First Amendment.[24] However, in 1997, after the Internet and World Wide Web were established, the Supreme Court ruled that the anti-obscenity

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[19] "Prurient" is defined as "marked by, arousing, or appealing to sexual desire." https://www.merriam-webster.com/dictionary/prurient.
[20] 413 U.S. 24-25.
[21] *Memoirs v. Massachusetts* (1966) 383 U.S. 413.
[22] Wikipedia contributors, "Miller v. California," *Wikipedia, The Free Encyclopedia*, https://en.wikipedia.org/w/index.php?title=Miller_v._California&oldid=871841881
[23] Garden Grove, Iowa is one the 10 tiniest towns in Iowa, with a population of only 211 people. https://khak.com/10-of-the-tiniest-towns-in-iowa/.
[24] *New York v. Ferber* (1982) 452 U.S. 787.

provisions of the Communications Decency Act passed by Congress was unconstitutional.[25] The Act had criminalized the sending of "obscene or indecent" material to minors over the Internet.

In 2002, after the the Internet and the World Wide Web had become fixtures in our daily lives, the Court declared that material that only *appeared* to depict minors in sexual situations was protected by the First Amendment.[26] Since then, both the Child Pornography Prevention Act (CPPA)[27] and the Child Online Protection Act (COPA)[28] have had sections struck down by the Supreme Court as unconstitutionally infringing on the right of free speech.

4. Limitation on Broadcasting "Indecent" or "Profane" Material

Despite the protections the Supreme Court has granted in recent years to Internet distribution of pornographic material, the Court has not demonstrated a willingness to protect mass media from broadcasting material that might be considered "indecent" or "profane." In 1973, the same year the Court decided *Miller*, a New York FM radio station aired comedian George Carlin's "Filthy Words" routine, which included the "7 dirty words" you can say on the radio or television. As part of the routine, the comedian then went on to say the 7 prohibited words. The airing was allegedly heard by, John Douglas, a member of a group called Morality in Media who complained to the Federal Communications Commission (FCC) that his 15-year-old son also heard the broadcast, which Douglas alleged was aired at approximately 2 p.m. Douglas complained that the broadcast was inappropriate for that time of day. In response, the radio station received a letter of reprimand from the FCC censuring them for allegedly violating broadcast regulations prohibiting airing indecent material.

The case made its way to the U.S. Supreme Court, which upheld the FCC's action against the radio station, holding that because of the "pervasive nature" of broadcasting, it has less First Amendment protection than other forms of communication. The FCC was justified in concluding that Carlin's "Filthy Words" broadcast, though not obscene, was indecent, and subject to restriction. [29] This result seems almost ironic considering how pervasive the Internet is in our daily lives, and yet, it has received protection from the Supreme Court

Current FCC rules reflect the state of the law in this area as it limits freedom of the press, at least broadcast media. These rules prohibit radio stations as well as cable and television outlets like CNN from airing material that is "obscene, indecent, or profane." Material that is "obscene" may not be aired at any time. "Indecent" or "profane" material may not be aired between the hours of 6 a.m. and 10 p.m. Each of these categories is given a distinct definition under FCC rules:

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[25] *Reno v. American Civil Liberties Union* (1997) 521 U.S. 844.
[26] *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234.
[27] *Ibid.*
[28] *Ashcroft v. American Civil Liberties Union,* Oyez, https://www.oyez.org/cases/2003/03-218.
[29] *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978)

Obscenity: For content to be ruled obscene, it must meet a three-pronged test established by the Supreme Court. It must appeal to an average person's prurient interest; depict or describe sexual conduct in a "patently offensive" way; and, taken as a whole, lack serious literary, artistic, political or scientific value.

Indecent content: Content that portrays sexual or excretory organs or activities in a way that does not meet the three-prong test for obscenity.

Profane content: Content that includes "grossly offensive" language that is considered a public nuisance.[30]

5. "Fighting Words": Making Threats or Inciting Violence

The First Amendment also does not protect what the U.S. Supreme Court has characterized as "fighting words." But what exactly are "fighting words?"

Fighting words were first defined by the U.S. Supreme Court in 1942 in *Chaplinsky v New Hampshire*[31] as words which:

> "…[B]y their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value…that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[32]

Because fighting words lie outside First Amendment protection, *Chaplinsky* suggests that freedom of the press might also be curtailed if the media uttered or published material that tends to inflict injury or incite a breach of the peace. However, we know the media publishes such material all the time, so how is this possible?

Chaplinsky must be understood as symptomatic of the times when it was decided. The year was 1942. The United States was waging war against both Nazi Germany and Imperial Japan, and in 1942, it remained unclear who would emerge victorious. Significant fears existed among many Americans, including government officials, about issues like sedition and civil unrest. Sedition occurs when one incites others to rebel against the government. Because our nation was embroiled in World War II, the need to maintain social order, mentioned in *Chaplinsky*, took on even greater importance.

Almost immediately after Word War II was over, the U.S. Supreme Court pulled back from the law and order reasoning of *Chaplinsky*. In *Terminiello v. Chicago*,[33] the Supreme Court narrowed the scope of what constitutes fighting words. The Court found that words which produce a clear and present danger are unprotected (and are considering fighting words), but

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[30] Federal Communications Commission. "Obscene, Indecent, and Profane Broadcasts." https://www.fcc.gov/consumers/guides/obscene-indecent-and-profane-broadcasts.
[31] 315 U.S. 568 (1942)
[32] Legal Information Institute. *Fighting Words.* Cornell Law School. https://www.law.cornell.edu/wex/fighting_words.
[33] 337 U.S. 1 (1949).

words which invite dispute and causes unrest are protected (and are not considered fighting words).[34] This general trend of the Court pulling away from the original, expansive view of what constitutes "fighting words" has continued throughout the years, such that it is unlikely that most media outlets could actually find themselves punished for using "fighting words" unless they openly advocated for the immediate and violent overthrow of the U.S. government. The following non-exhaustive list of "fighting words" cases illustrates this point:

> *Feiner v. New York* (1951) – The Supreme Court held that inciting people to riot which creates a "clear and present danger" is not protected by the First Amendment.
>
> *Texas v. Johnson* (1989) – The Supreme Court redefined the scope of the "fighting words" doctrine to mean words that are "a direct personal insult or an invitation to exchange fisticuffs." In that case, the Court rejected the argument that burning a U.S. flag constituted "fighting words."
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> *R.A.V. v. St. Paul* (1992) – The Supreme Court found that the First Amendment prevents government from punishing speech or expressive conduct because it disapproves of the ideas expressed. Even if the words are considered "fighting words," the First Amendment will still protect the speech if the restriction imposed by the government is based on its discrimination against the viewpoint expressed.[35]

B. Moral Limitations on Freedom of the Press

As the previous section demonstrates, broad freedom of the press is considered a pillar of a democratic society, and the legal restrictions placed on press freedoms are few, and they are narrowly drawn to fit only particular circumstances. If legal restrictions on freedom of the press are scant, are there any moral restrictions that we, as a society, should place on the press? Are moral restrictions on freedom of the press even appropriate in a truly democratic society that holds itself up as valuing all ideas equally? These questions take us away from the realm of the law and into the world of philosophy.

One school of philosophical thought believes that, because we are a Constitutional democracy, only political expression, speech or press, is within the core area protected by the First Amendment,[36] although some tend to define more broadly the concept of "political" than one might suppose from the word alone.

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[34] Legal Information Institute. *Fighting Words.* Cornell Law School https://www.law.cornell.edu/wex/fighting_words.

[35] Legal Information Institute. Cornell Law School. https://www.law.cornell.edu/wex/fighting_words.

[36] *E.g.*, A. MEIKLEJOHN, POLITICAL FREEDOM (1960); Bork, Neutral Principles and *Some First Amendment Problems*, 47 IND. L.J. 1 (1971); BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978). This contention does not reflect the Supreme Court's view. "It is no doubt true that a central purpose of the First Amendment 'was to protect the free discussion of governmental affairs.' . . . But our cases have never suggested that expression about philosophical, social, artistic,

Other scholars recur to the writings of the philosophers Milton and Mill and argue that protecting free expression, even when it is in error, is necessary for the eventual ascertainment of the truth. This view subscribes to the "marketplace of ideas" concept – that only through conflict of ideas will we ever know what the truth really is.[37]

A broader view is expounded by scholars who argue that freedom of expression is necessary to promote individual self-fulfillment. In other words, when speech is freely chosen by the speaker to persuade others, it defines and expresses the who the speaker is and promotes his or her liberty[38] and "self-realization" by enabling him or her to develop his or her powers and abilities and to make and influence decisions regarding his or her destiny.[39]

Still others take a different view, arguing that it is a conceptual mistake to conflate free speech with free press. This school of thought leads to excessive deference to media corporations. Properly understood, the freedom of the press requires that mass-media corporations be free from government control, but not that they be free from regulation in the public interest. Whether or not the press supports rather than impedes individuals' freedom of expression, public reasoning, and the accountability of politicians depends on how the media market is set up and policed.[40]

The body of philosophical literature is enormous and no doubt the Justices on the Supreme Court as well as our larger society are influenced to some degree by it. However, as shown in the previous section, the Court's decisions, particularly in thorny areas of law like obscenity, seldom clearly reflect a principled and consistent application of any philosophy. Is it unreasonable to expect 9, isolated, black-robed individuals, who are not elected by the people, to establish a philosophy or morality for the rest of society? What morality can, or should, the people insist on when it comes to freedom of the press? Does it depend upon the method of communication being used? Does it depend on whether it is an individual reporter or a mass media conglomerate?

The following non-binding list of ethical rules in journalism has been suggested by the Society of Professional Journalists:

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economic, literary, or ethical matters—to take a nonexclusive list of labels—is not entitled to full First Amendment protection." *Abood v. Detroit Bd. of Educ.* (1977) 431 U.S. 209, 231.

[37] The "marketplace of ideas" metaphor is attributable to Justice Holmes' opinion in *Abrams v. United States* (1919) 250 U.S. 616, 630. *See* Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979). The theory has been the dominant one in scholarly and judicial writings. Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 967–74 (1978).

[38] *E.g.*, C. Edwin Baker, The Process of Change and the Liberty Theory of the *First Amendment*, 55 S. CAL. L. REV. 293 (1982); C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646 (1982).

[39] Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

[40] Wells, Thomas R. "Freedom of the Press is not the Same Thing as Freedom of Speech." The Philosopher's Beard. January 3, 2013. http://www.philosophersbeard.org/2013/01/freedom-of-press-is-not-same-as-freedom.html.

1. Seek Truth and Report It - Ethical journalism should be accurate and fair. Journalists should be honest and courageous in gathering, reporting and interpreting information.
2. Minimize Harm - Ethical journalism treats sources, subjects, colleagues and members of the public as human beings deserving of respect.
3. Act Independently - The highest and primary obligation of ethical journalism is to serve the public. Journalists should not act out of self-interest, disclose conflicts of interest, not favor certain individuals or companies such as advertisers.
4. Be Accountable and Transparent – Ethical journalism means taking responsibility for one's work and explaining one's decisions to the public. Journalists should explain ethical choices and processes to audiences and encourage a civil dialogue with the public about journalistic practices, coverage, and news content.[41]

As the Society's website states:

> *"[This] is not a set of rules, rather a guide that encourages all who engage in journalism to take responsibility for the information they provide, regardless of medium. The code should be read as a whole; individual principles should not be taken out of context. It is not, nor can it be under the First Amendment, legally enforceable."*[42]

Guidelines such as these are simply that – guidelines. Often, they raise as many questions as they answer. What do you think about these guidelines? Consider the following questions for further discussion:

1. Does the media follow these guidelines?
2. Is it even possible to fully adhere to them? For example, is it possible to be both "accurate" and "fair" when reporting on a person or group that espouses hatred or racism for others? Should the media "call out" such individuals or groups? Would that not benefit a democratic society?
3. Can the media call someone out without violating the second guideline which requires treating "members of the public as human beings deserving of respect?" How is a reporter supposed to treat a racist as "deserving of respect" when that individual does not respect others?
4. Can we legitimately expect journalists to be "accountable and transparent" when most media outlets in the U.S. are owned by giant corporations who, to one degree or another, may be motivated by profits rather than the truth?
5. How do journalistic standards of truth-telling and newsgathering sit with the constant press of opinion, trolling and vigilantism that thrives online?
6. What kinds of gatekeeping behavior should we expect of journalists? What roles have they abandoned?

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[41] Society of Professional Journalists. "SPJ Code of Ethics." Revised September 6, 2014. https://www.spj.org/ethicscode.asp.
[42] *Ibid.*

7. Do you think journalists, especially those who broadcast on television or the radio, feel pressured to develop a certain degree of "celebrity" in themselves, to cultivate a following? How might that pressure influence their decisions about accuracy or impartiality?

When it comes to questions like these, there really are no "right" or "wrong" answers. One of the greatest benefits of living in America is that we each have the right to our opinion, we have the right to peacefully express it, and we have the right to disagree with one another without fear of reprisal. Questions like these are subjects for debate, and you should exercise your right to debate them intensely and often. Freedom of the press is important to the continued well-being of all Americans – it is like an insurance policy on our right to be free from government overreach and corruption. All of us should have a care for it.

CASE STUDIES FOR FURTHER DISCUSSION

Case Study 1

Rob is a reporter working for the Sonoma Star Newspaper. Stacy works as treasurer for Sonoma County.

Stacy calls Rob at his office and tells him that, while reviewing plans for a new proposed round-about in Healdsburg, she realized that the state government was secretly sponsoring the project and that it was meant to hide an underground bunker housing a ground-to-air missile launcher as part of a secret government defense system. Stacy is able to show Rob documents to back up all of this information.

Rob writes an explosive article revealing this conspiracy, listing his source as "anonymous." Rob's editor, Eric, reads the story and is so disturbed that he talks to his wife about it when he gets home. The next day, his wife tells her friend about the article that's about to be published, forgetting that her friend is married to a county official.

The County of Sonoma files with the court to enjoin the Sonoma Star Newspaper from publishing Rob's article as a matter of "public security."

a. What arguments can the County of Sonoma make to convince the Court to stop Rob's publication?
b. What arguments can the Newspaper make to convince the Court to allow this article to be published?
c. Do you think the Court will stop the publication of the article? Why or why not?

Near v. Minnesota, 1931

The Court established as a constitutional principle the doctrine that, with some narrow exceptions, the government could not censor or otherwise prohibit a publication in advance, even though the communication might be punishable after publication in a criminal or other proceeding.

New York Times Co. v. United States, 1971

The Court held that the government did not overcome the "heavy presumption against" prior restraint of the press in this case. The word "security" should not be used "to abrogate the fundamental law embodied in the First Amendment." Since publication would not cause an inevitable, direct, and immediate event imperiling the safety of American forces, prior restraint was unjustified.

Case Study 2

Reporter Rob infiltrates a local gang called the Radicals. They are infamous for dealing large amounts of heroin in Sonoma County. Rob's source, Sal, is a member of the gang, but recently his little brother overdosed and died, inspiring Sal to regret being part of the drug cartel. With Rob's promise of anonymity, Sal gives Rob detailed information about how the gang smuggles the drugs over the Oregon border and into Sonoma County.

Rob writes an article based on Sal's information, listing his source as "anonymous." The article is published in the Sonoma Star Newspaper.

Abe is the District Attorney. Abe has been building a criminal drug dealing case against key members of the Radicals. Upon reading Rob's article, Abe subpoenas Rob to the criminal court and demands that he testify before a grand jury as to the identity of his source. Rob refuses to identify Sal, claiming that the First Amendment protects him from being compelled to reveal a source he has promised anonymity to.

a. Is Rob protected by the First Amendment from being forced to reveal his confidential source? Why or why not?
b. What arguments can the District Attorney make to convince the Court to compel Rob to reveal his Source?
c. If the Court determines that Rob must reveal his source, what are Rob's options? If Rob still refuses to reveal his source, what are the Court's options?

Branzburg v. Hayes, 1972

The Court found that requiring reporters to disclose confidential information to a grand jury serves a "compelling " and "paramount" state interest and does not violate the 1st Amendment. The fact that reporters receive information from sources in confidence does not create a privilege

for them to withhold that information during a government investigation. The Court points out that this is not a case of the reporter being forced to publish or disclose his sources indiscriminately, which he may have been a covered 1st Amendment protection.

Case Study 3

Nancy is a junior at Sonoma High school. Nancy writes for and edits the school's newspaper, the Sonoma High Tribune. Nancy writes an editorial calling out the Healdsburg City Council for a recent scandal regarding a proposed roundabout. Nancy is proud of her well-researched article and decides to publish it in the next edition of the Sonoma High Tribune.

Before the paper is printed, school principal, Pat looks over the articles. When he reads Nancy's piece, he removes it from the newspaper, deciding that it is too controversial to print.

Nancy is infuriated to find her article missing from the school paper. Nancy sues the school district for violating her First Amendment right of free press.

a. What arguments should Nancy make to win her case?
b. What arguments should the school district make?
c. How do you think the Court will rule and why?

Hazelwood School District v. Kuhlmeier, 1988

The Court held that schools do not violate the 1st Amendment rights of its students by exercising editorial control over student speech as long as the censorship is "reasonably related to legitimate pedagogical concerns." Schools must be able to set their own high standards for student speech published in its name and may refuse to publish speech that is "inconsistent with 'the shared values of a civilized social order.'"

Case Study 4

Reporter, Rob, publishes an article in the Sonoma Star Newspaper about a recent City Council meeting he attended at which he witnessed City Council Person, Carl, tell one of his constituents that she has "a sexy booty." In his article, Rob excoriates Carl for his unprofessional and sexist behavior.

Carl reads the article and demands a retraction, which the Sonoma Star refuses to give. Carl sues the Sonoma Star and Rob for libel.

At the trial, Rob testifies that he witnessed Carl's unprofessional behavior personally. Carl testifies that he actually said to his constituent that she "has a civil duty," and Carl explains that he was referring to her obtaining a license from the city for her new puppy. As a witness for Carl, the constituent testifies that Carl is correct in his testimony.

Rob, feeling a bit foolish, tells the Court that he believed he was correct when he published the article, so he is protected under the First Amendment. Carl argues that it does not matter if Rob thought he was telling the truth because his statement was false and he (Carl) is not a public figure.

a. Should the Court find that Carl is not a public figure? Why or why not?
b. What difference does it make whether Carl is a public figure or not?
c. Should the Court find for Rob or Carl? Why?
d. Do you think it is fair to hold public figures to a higher standard of proof than private individuals are held, in order to prove libel? Why or why not?

New York Times v. Sullivan, 1964

The Court found that, in order for a public figure to prove libel, the 1st Amendment requires that public officials show the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." This is the "actual malice" standard.

Gertz v. Robert Welch Inc., 1974

The Court held that the First Amendment does not allow a newspaper or broadcaster to assert defamatory falsehoods about an individual who is neither a public official nor a public figure. The Court found that private individuals need only prove the falsity of the statement to prove libel and do not need to prove knowledge of or reckless disregard for the falsity on part of the Defendant.

Kathrine Mae McKee v. William H. Cosby, Jr., 2019

In his concurring opinion, Justice Thomas states his belief that the Court should reconsider *New York Times v. Sullivan* and other cases that require courts to hold private and public individuals to a different standard in proving libel. Justice Thomas refers to these cases as, "policy-driven decisions masquerading as constitutional law." Justice Thomas went on to state that, "Instead of simply applying the First Amendment as it was understood by the people who ratified it, the Court fashioned its own "'federal rule[s]'" by balancing the "competing values at stake in defamation suits." *Gertz, supra, at 334, 348 (quoting New York Times, supra, at 279).* Justice Thomas asks the Court to, in light of an appropriate case in the future, "carefully examine the original meaning of the First and Fourteenth Amendments" to determine whether they "require public figures to satisfy the actual-malice standard in state law defamation suits." Justice Thomas asserts that the Court should return to its pre-New York Times stance that the First Amendment "did not replace the common law of libel," and that, "The States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm."

Case Study 5

Michael is a controversial radio personality who is extreme in his views about keeping dogs as pets. Michael organizes a rally to take place on Healdsburg Plaza. He gets a permit from the city to hold the rally, he arranges to broadcast his speech at the rally live on a local radio station, and he uses social media to invite the public to attend.

The rally is heavily attended and many of the attendees are wearing tee shirts in support of and against pet ownership. There are several children in attendance as well as adults of all ages.

Before Michael makes his speech, the radio station warns its listeners that it might include "sensitive language which might be regarded as offensive to some." During his speech, Michael drops the F-bomb more than 26 times. Michael screams into the microphone, "My supporters should beat the heck out of anyone here who owns pets!" A fight immediately breaks out among a few of the attendees and the Healdsburg Police Department rush the stage, pull the microphone away from Michael and arrest him. Before he is carried away, Michael manages to throw hundreds of leaflets out to the audience depicting a do laying on its back with its genitalia exposed.

Michael is charged with and convicted of inciting a riot and disseminating obscene material in the form of the leaflets he threw out to the audience.

After the radio broadcast is over, a listener calls the Federal Communications Commission (FCC) to complain about what he and his 8-year-old son just heard. The FCC fines the radio station that broadcast Michael's speech $10,000 for broadcasting profanity.

Michael appeals his prosecution, claiming it is a violation of his First Amendment rights. The radio station appeals the FCC's fine on the same grounds.

a. Michael's Case:
    1. Did the police violate Michael's First Amendment right to free expression when they terminated his speech? Why or why not?
    2. Is Michael's conviction for disseminating obscene material a violation of his First Amendment rights? Why or why not?
    3. Is Michael's statement to the crowd, "My supporters should beat the heck out of anyone here who owns pets!" constitutionally protected by the First Amendment? Why or why not?

b. Radio Station's Case:
    1. Did the FCC violate the First Amendment right of free press by fining the radio station for its broadcast of Michael's speech? Why or why not?
    2. Did Michael's speech meet the legal standards of "profanity?" Why or why not? If they did, does the government have the right to restrict the broadcast of his speech? Why or why not? If so, in what ways?

FCC v. Pacifica Foundation, 1973

The government may restrict the public broadcast of patently offensive words that deal with sex and execration, even if they are not obscene, without violating the First Amendment.

Miller v. California, 1971

The Court held that obscene materials are not protected under the First Amendment. The test for obscenity is (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes sexual conduct in a patently offensive way, specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Chaplinksy v. New Hampshire, 1942

The Court held obscenity, certain profane and slanderous speech, and “fighting words” are categorical exceptions to First Amendment protections. The Court found that “fighting words” are insults that cause a direct harm to their target and could be construed to advocate an immediate breach of the peace. “Fighting Words” lack the social value of disseminating information or ideas to the public and a state can use it police power to curb their expression in the interests of maintaining order.

Terminiello v. Chicago, 1949

The Court held speech can only be restricted in the event that it is “likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." Justice Douglas wrote, "A function of free speech under our system is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."

Feigner v. New York, 1951

The Court held that the police may arrest a speaker when they believe that a riot may occur if the speaker continues his speech, so long as the suppression of the speech is motivated only by the crowd’s reaction and not based on the content of the speech.