

# Freedom of Expression - ACLU Position Paper

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**Freedom** of speech, of the press, of association, of assembly and petition -- this set of guarantees, protected by the First Amendment, comprises what we refer to as freedom of expression. The Supreme Court has written that this freedom is "the matrix, the indispensable condition of nearly every other form of freedom." Without it, other fundamental rights, like the right to vote, would wither and die.

But in spite of its "preferred position" in our constitutional hierarchy, the nation's commitment to freedom of expression has been tested over and over again. Especially during times of national stress, like war abroad or social upheaval at home, people exercising their First Amendment rights have been censored, fined, even jailed. Those with unpopular political ideas have always borne the brunt of government repression. It was during WWI -- hardly ancient history -- that a person could be jailed just for giving out anti-war leaflets. Out of those early cases, modern First Amendment law evolved. Many struggles and many cases later, ours is the most speech-protective country in the world.

The path to freedom was long and arduous. It took nearly 200 years to establish firm constitutional limits on the government's power to punish "seditious" and "subversive" speech. Many people suffered along the way, such as labor leader Eugene V. Debs, who was sentenced to 10 years in prison under the Espionage Act just for telling a rally of peaceful workers to realize they were "fit for something better than slavery and cannon fodder." Or Sidney Street, jailed in 1969 for burning an American flag on a Harlem street corner to protest the shooting of civil rights figure James Meredith. (See box)

## THE FIRST AMENDMENT IGNORED

Early Americans enjoyed great freedom compared to citizens of other nations. Nevertheless, once in power, even the Constitution's framers were guilty of overstepping the First Amendment they had so recently adopted. In 1798, during the French-Indian War, Congress passed the Alien and Sedition Act, which made it a crime for anyone to publish "any false, scandalous and malicious writing" against the government. It was used by the then-dominant Federalist Party to prosecute prominent Republican newspaper editors during the late 18th century.

Throughout the 19th century, sedition, criminal anarchy and criminal conspiracy laws were used to suppress the speech of abolitionists, religious minorities, suffragists, labor organizers, and pacifists. In Virginia prior to the Civil War, for example, anyone who "by speaking or writing maintains that owners have no right of property in slaves" was subject to a one-year prison sentence.

The early 20th century was not much better. In 1912, feminist Margaret Sanger was arrested for giving a lecture on birth control. Trade union meetings were banned and courts routinely granted injunctions prohibiting strikes and other labor protests. Violators were sentenced to prison. Peaceful protesters opposing U. S. entry into World War I were jailed for expressing their opinions. In the early 1920s, many states outlawed the display of red or black flags, symbols of communism and anarchism. In 1923, author Upton Sinclair was arrested for trying to read the text of the First Amendment at a union rally. Many people were arrested merely for membership in groups regarded as "radical" by the government. It was in response to the excesses of this period that the ACLU was founded in 1920.

Free speech rights still need constant, vigilant protection. New questions arise and old ones return. Should flag burning be a crime? What about government or private censorship of works of art those touch on sensitive issues like religion or sexuality? Should the Internet be subject to any form of government control? What about punishing college students who espouse racist or sexist opinions? In answering these questions, the history and the core values of the First Amendment should be our guide.

## THE SUPREME COURT AND THE FIRST AMENDMENT

During our nation's early era, the courts were almost universally hostile to political minorities' First Amendment rights; free speech issues did not even reach the Supreme Court until 1919 when, in *Schenck v. U.S.*, the Court unanimously upheld the conviction of a Socialist Party member for mailing anti-war leaflets to draft-age men. A turning point occurred a few months later in *Abrams v. U.S.* Although the defendant's conviction under the Espionage Act for distributing anti-war leaflets was upheld, two dissenting opinions formed the cornerstone of our modern First Amendment law. Justices Oliver Wendell Holmes and Louis D. Brandeis argued speech could *only* be punished *if* it presented "a clear and present danger" of imminent harm. Mere political advocacy, they said, was protected by the First Amendment. Eventually, these justices were able to convince a majority of the Court to adopt the "clear and present danger test."

From then on, the right to freedom of expression grew more secure -- until the 1950s and McCarthyism. The Supreme Court fell prey to the witch-hunt mentality of that period, seriously weakening the "clear and present danger" test by holding that speakers could be punished if they advocated overthrowing the government -- even if the danger of such an occurrence were both slight and remote. As a result, many political activists were prosecuted and jailed simply for advocating communist revolution. Loyalty oath requirements for government employees were upheld; thousands of Americans lost their jobs on the basis of flimsy evidence supplied by secret witnesses.

Finally, in 1969, in *Brandenburg v. Ohio*, the Supreme Court struck down the conviction of a Ku Klux Klan member, and established a new standard: Speech can be suppressed only if it is intended, *and likely to produce*, "imminent lawless action." Otherwise, even speech that advocates violence is protected. The Brandenburg standard prevails today.

### WHAT DOES "PROTECTED SPEECH" INCLUDE?

First Amendment protection is not limited to "pure speech" -- books, newspapers, leaflets, and rallies. It also protects "symbolic speech" -- nonverbal expression whose purpose is to communicate ideas. In its 1969 decision in *Tinker v. Des Moines*, the Court recognized the right of public school students to wear black armbands in protest of the Vietnam War. In 1989 (*Texas v. Johnson*) and again in 1990 (*U.S. v. Eichman*), the Court struck down government bans on "flag desecration." Other examples of protected symbolic speech include works of art, T-shirt slogans, political buttons, music lyrics and theatrical performances.

Government can limit some protected speech by imposing "time, place and manner" restrictions. This is most commonly done by requiring permits for meetings, rallies and demonstrations. But a permit cannot be unreasonably withheld, nor can it be denied based on content of the speech. That would be what is called viewpoint discrimination -- and *that* is unconstitutional.

When a protest crosses the line from speech to action, the government can intervene more aggressively. Political protesters have the right to picket, to distribute literature, to chant and to engage passersby in debate. But they do not have the right to block building entrances or to physically harass people.

### FREE SPEECH FOR HATEMONGERS?

The ACLU has often been at the center of controversy for defending the free speech rights of groups that spew hate, such as the Ku Klux Klan and the Nazis. But if only popular ideas were protected, we wouldn't need a First Amendment. History teaches that the first target of government repression is never the last. If we do not come to the defense of the free speech rights of the most unpopular among us, even if their views are antithetical to the very freedom the First Amendment stands for, then no one's liberty will be secure. In that sense, all First Amendment rights are "indivisible."

Censoring so-called hate speech also runs counter to the long-term interests of the most frequent victims of hate: racial, ethnic, religious and sexual minorities. We should not give the government the power to decide which opinions are hateful, for history has taught us that government is more apt to use this power to prosecute minorities than to protect them. As one federal judge has put it, tolerating hateful speech is "the best protection we have against any Nazi-type regime in this country."

At the same time, freedom of speech does not prevent punishing conduct that intimidates, harasses, or threatens another person, even if words are used. Threatening phone calls, for example, are not constitutionally protected.

## **SPEECH & NATIONAL SECURITY**

The Supreme Court has recognized the government's interest in keeping some information secret, such as wartime troop deployments. But the Court has never actually upheld an injunction against speech on national security grounds. Two lessons can be learned from this historical fact. First, the amount of speech that can be curtailed in the interest of national security is very limited. And second, the government has historically overused the concept of "national security" to shield itself from criticism, and to discourage public discussion of controversial policies or decisions.

In 1971, the publication of the "Pentagon Papers" by the *New York Times* brought the conflicting claims of free speech and national security to a head. The Pentagon Papers, a voluminous secret history and analysis of the country's involvement in Vietnam, was leaked to the press. When the *Times* ignored the government's demand that it cease publication, the stage was set for a Supreme Court decision. In the landmark *U.S. v. New York Times* case, the Court ruled that the government could not, through "prior restraint," block publication of any material unless it could prove that it would "surely" result in "direct, immediate, and irreparable" harm to the nation. This the government failed to prove, and the public was given access to vital information about an issue of enormous importance.

The public's First Amendment "right to know" is essential to its ability to fully participate in democratic decision-making. As the Pentagon Papers case demonstrates, the government's claims of "national security" must always be closely scrutinized to make sure they are valid.

## **UNPROTECTED EXPRESSION**

The Supreme Court has recognized several limited exceptions to First Amendment protection.

- In *Chaplinsky v. New Hampshire* (1942), the Court held that so-called "fighting words ... which by their very utterance inflict injury or tend to incite an immediate breach of the peace," are not protected. This decision was based on the fact that fighting words are of "slight social value as a step to truth."
- In *New York Times Co. v. Sullivan* (1964), the Court held that defamatory falsehoods about public officials can be punished -- *only* if the offended official can prove the falsehoods were published with "actual malice," i.e.: "knowledge that the statement was false or with reckless disregard of whether it was false or not." Other kinds of "libelous statements" are also punishable.
- Legally "obscene" material has historically been excluded from First Amendment protection. Unfortunately, the relatively narrow obscenity exception, described below, has been abused by government authorities and private pressure groups. Sexual expression in art and entertainment is, and has historically been, the most frequent target of censorship crusades, from James Joyce's classic *Ulysses* to the photographs of Robert Mapplethorpe.

In the 1973 *Miller v. California* decision, the Court established three conditions that must be present if a work is to be deemed "legally obscene." It must 1) appeal to the average person's prurient (shameful, morbid) interest in sex; 2) depict sexual conduct in a "patently offensive way" as defined by community standards; and 3) taken as a whole, lack serious literary, artistic, political or scientific value. Attempts to apply the "Miller test" have demonstrated the impossibility of formulating a precise definition of obscenity. Justice Potter Stewart once delivered a famous one-liner on the subject: "I know it when I see it." But the fact is, the obscenity exception to the First Amendment is highly subjective and practically invites government abuse.

## **THREE REASONS WHY FREEDOM OF EXPRESSION IS ESSENTIAL TO A FREE SOCIETY**

1. It's the foundation of self-fulfillment. The right to express one's thoughts and to communicate freely with others affirms the dignity and worth of each and every member of society, and allows each individual to realize his or her full human potential. Thus, freedom of expression is an end in itself -- and as such, deserves society's greatest protection.
2. It's vital to the attainment and advancement of knowledge, and the search for the truth. The eminent 19th-century writer and civil libertarian, John Stuart Mill, contended that enlightened judgment is possible only if one considers all facts and ideas, from whatever source, and tests one's own conclusions against opposing views. Therefore, all points of view -- even those that are "bad" or socially harmful -- should be represented in society's "marketplace of ideas."
3. It's necessary to our system of self-government and gives the American people a "checking function" against government excess and corruption. If the American people are to be the masters of their fate and of their elected government, they must be well-informed and have access to all information, ideas and points of view. Mass ignorance is a breeding ground for oppression and tyranny.