

A Gift of Fire

Third edition

Sara Baase

Chapter 3: Freedom of Speech

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Slides prepared by Cyndi Chie and
Sarah Frye

Free Speech

I disapprove of what you say, but
I will defend to death your right
to say it.

Voltaire's view on freedom of speech

First Amendment

- Congress shall make no laws ...
abridging freedom of speech, or of the
press ...

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- It protects controversial speech

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- It protects controversial speech
but beware of speech that goes against
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Exposing children in schools on sexually-explicit materials was NOT the purpose of the Constitution

First Amendment

- but beware of speech that goes against the purpose of the Constitution

A quote from "The Merchant of Venice"
by William Shakespeare:

First Amendment

- but beware of speech that goes against the purpose of the Constitution

A quote from "The Merchant of Venice" by William Shakespeare:

"The devil can cite Scripture for his purpose."

First Amendment

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- It protects controversial speech
- Particularly, expression of opinion

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- Congress shall make no laws ...
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- It protects controversial speech
- Particularly, expression of opinion
or thought

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or thought – and unconditionally so

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First Amendment cont'd.

- Loopholes:

First Amendment cont'd.

- Loopholes:
 - State and local governments not covered

First Amendment cont'd.

- Loopholes:
 - State and local governments not covered (fixed by 14th Amendment)

First Amendment cont'd.

- Loopholes:
 - State and local governments not covered (fixed by 14th Amendment)
 - Judiciary branch makes laws, too

First Amendment cont'd.

- Loopholes:
 - State and local governments not covered (fixed by 14th Amendment)
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First Amendment cont'd.

- Loopholes:
 - State and local governments not covered (fixed by 14th Amendment)
 - Judiciary branch makes laws, too (unfortunately)
 - Electronic media and the Internet not covered

First Amendment cont'd.

- Loopholes:
 - State and local governments not covered (fixed by 14th Amendment)
 - Judiciary branch makes laws, too (unfortunately)
 - Electronic media and the Internet not covered (still not entirely settled)

First Amendment cont'd.

- Some restrictions in the US

First Amendment cont'd.

- Some restrictions in the US
 - false alarms

First Amendment cont'd.

- Some restrictions in the US
 - false alarms
 - obscenities

First Amendment cont'd.

- Some restrictions in the US
 - false alarms
 - obscenities

community standards are used to define what is obscene and what is not

First Amendment cont'd.

- Some restrictions in the US
 - false alarms
 - obscenities
 - fighting words

First Amendment cont'd.

- Some restrictions in the US
 - false alarms
 - obscenities
 - fighting words
 - incitement of violence

First Amendment cont'd.

- Some restrictions in the US
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thought

First Amendment cont'd.

- Some restrictions in the US
 - false alarms
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thought → speech

First Amendment cont'd.

- Some restrictions in the US
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thought → speech → action

First Amendment cont'd.

- Some restrictions in the US
 - false alarms
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 - classified information

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spies cannot use 1st Amendment defense

First Amendment cont'd.

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spies cannot use 1st Amendment defense

Why?

First Amendment cont'd.

- Some restrictions in the US
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 - classified information
 - self-censorship (a.k.a. “political correctness”)

First Amendment cont'd.

- Some restrictions in the US
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 - “chilling effect”

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- Some restrictions in the US
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Depriving someone of anonymity (an aspect of privacy) may have a chilling effect on the exercise of freedom of speech.

First Amendment cont'd.

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 - “chilling effect”

Depriving someone of anonymity (an aspect of privacy) may have a chilling effect on the exercise of freedom of speech. (According to the courts.)

First Amendment cont'd.

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 - “chilling effect”

Depriving someone of anonymity (an aspect of privacy) may have a chilling effect on the exercise of freedom of speech. (According to the courts – e.g., Supreme Court in *Talley v. California* (1960) and *McIntyre v. Ohio Elections Commission* (1995).)

First Amendment cont'd.

- Some restrictions in the US
 - “chilling effect”

Depriving someone of anonymity (an aspect of privacy) may have a chilling effect on the exercise of freedom of speech. (According to the courts.)

So, there is no truly free speech!

First Amendment cont'd.

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Depriving someone of anonymity (an aspect of privacy) may have a chilling effect on the exercise of freedom of speech. (According to the courts.) Thus anonymity is protected.

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NYT and Facebook disagree.

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NYT and Facebook disagree.

So, they are against free speech

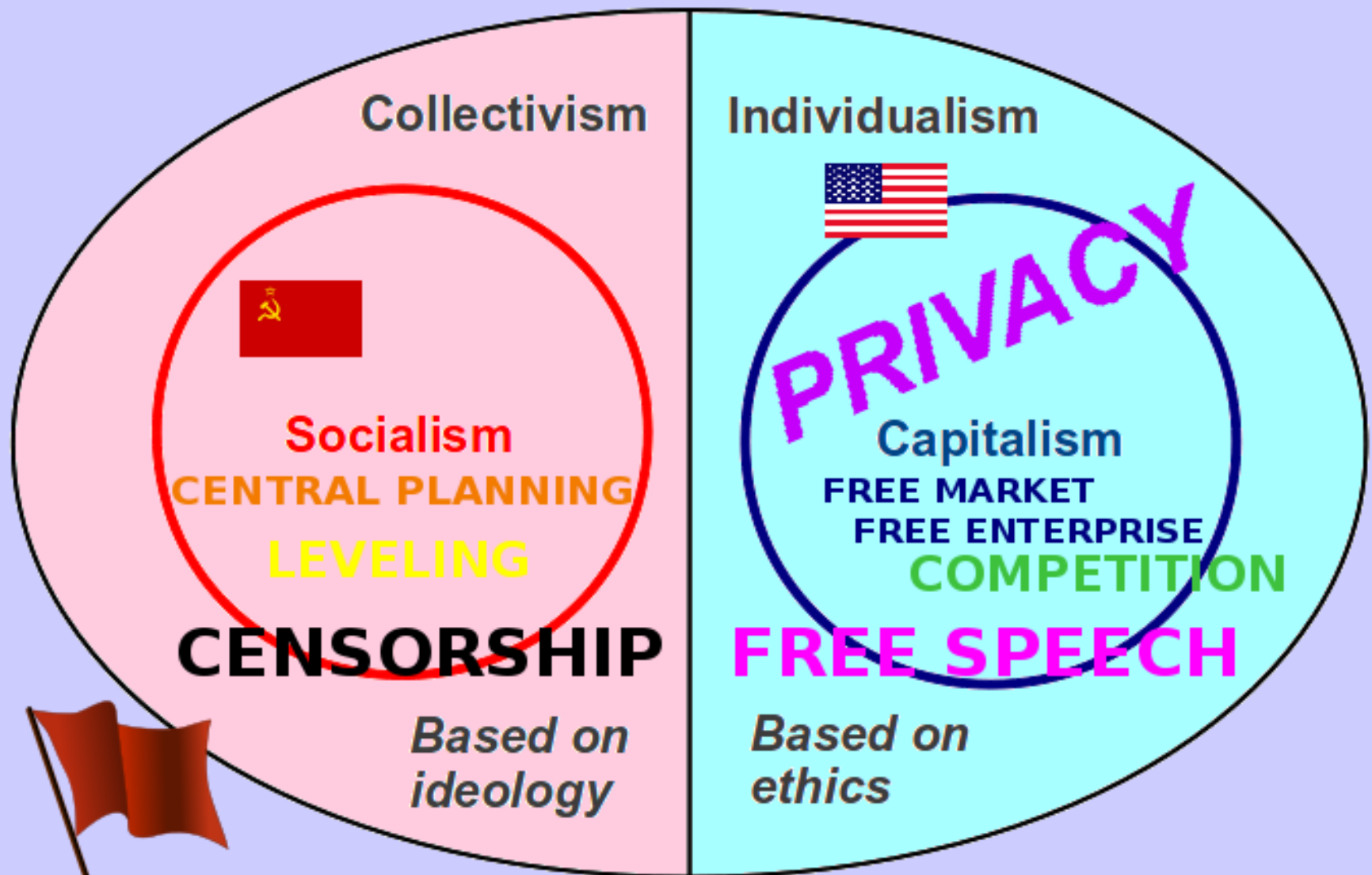
First Amendment cont'd.

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 - “chilling effect”

Depriving someone of anonymity (an aspect of privacy) may have a chilling effect on the exercise of freedom of speech. (According to the courts.)

NYT and Facebook disagree.

So, they are against free speech,
at least, partially so.



United Left



Divided Right

First Amendment cont'd.

- Freedom of thought is the necessary precondition of freedom of speech.

First Amendment cont'd.

-
- Freedom of thought is the necessary precondition of freedom of speech.

First Amendment cont'd.

- Freedom of thought is the necessary precondition of freedom of speech.
- No such thing as “crime of thought”

First Amendment cont'd.

- Freedom of thought is the necessary precondition of freedom of speech.
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- No such thing as “crime of thought”
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First Amendment cont'd.

- Freedom of thought is the necessary precondition of freedom of speech.

No such thing as “crime of thought” (however, remember “**crimethink**” in “1984”)

First Amendment cont'd.

- Freedom of thought is the necessary precondition of freedom of speech.
- No such thing as “crime of thought” (however, remember “1984”; how about *hate crime*?)

"The further a society drifts from the truth, the more it will hate those that speak it."



Free speech on campus

A decorative graphic consisting of a large, light blue arc that starts from the top left and curves towards the bottom right. A smaller, light blue triangle is positioned at the end of this arc, pointing towards the bottom right corner of the slide.

Free speech on campus

Freedom of thought and expression is essential to any institution of higher learning.

Free speech on campus

Freedom of thought and expression is **essential** to any institution of higher learning.

Free speech on campus

On a campus that is free and open, no idea can be banned or forbidden.

Free speech on campus

On a campus that is free and open, no idea can be banned or forbidden.

Free speech on campus

No viewpoint or message may be deemed so hateful or disturbing that it may not be expressed.

Free speech on campus

In response to verbal assaults
and use of hateful language,
some campuses have felt it
necessary ...

Free speech on campus

... to forbid the expression of racist, sexist, homophobic, or ethnically demeaning speech, along with conduct or behavior that harasses.

Free speech on campus

But [...] rules that ban or punish speech based upon its content cannot be justified.

Free speech on campus

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Free speech on campus

An institution of higher learning fails to fulfill its mission if it asserts the power to proscribe ideas—

Free speech on campus

- . An institution of higher learning fails to fulfill its mission if it asserts the power to proscribe ideas—

Free speech on campus

—and racial or ethnic slurs, sexist epithets, or homophobic insults almost always express ideas, however repugnant.

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Indeed, by proscribing any ideas, a university sets an example that profoundly disserves its academic mission.

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Free speech on campus

The above are excerpts from the statement adopted by the

American Association of University Professors (AAUP) – the most influential and respected organization of university faculty in November 1994.

Free speech on campus

Some 2,400 years ago:

[Despite] Athens's allegiance to the ideal of freedom of speech, [...] Socrates [...] was legally prosecuted not for an overt act that directly harmed the public or some individual—such as treason, corruption, or slander—but for **alleged harm indirectly caused by the expression and teaching of ideas.**

[Encyclopedia Britannica]

Free speech on campus

Some 400 years ago:

Giordano Bruno, a harmless scholar, was burned on stake for expression and teaching of his ideas.

Free speech on campus

Some 80 years ago:

University students in Nazi Germany publicly burned books that expressed “politically incorrect” (at that time) ideas.



Free speech on campus

In 2017:

Students at UC Santa Cruz (CA) demanded:

“No freedom for hate speech”.

NO
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Can “hate speech” restrictions be used to silence
“heretics” and political adversaries? **They** sometimes are.

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Can “hate speech” restrictions be used to silence “heretics” and political adversaries? They sometimes are.

Is criticism of disrespecting the Constitution and the Bill of Rights (the so-called “conservative” speech) a case of “hate speech”?

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Many universities, under pressure to respond to the concerns of those who are the objects of hate, have adopted codes or policies prohibiting speech that offends any group based on race, gender, ethnicity, religion or sexual orientation.

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Free speech on campus

That's the wrong response, well-meaning or not.

Free speech on campus

▪ That's the wrong response, well-meaning or not. ▪

Free speech on campus

The First Amendment to the United States Constitution protects speech no matter how offensive its content.

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This is particularly true at universities, whose mission is to facilitate learning through open debate and study, and to enlighten.

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Speech codes are not the way to go on campuses, where all views are entitled to be heard, explored, supported or refuted.

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Free speech on campus

The above are excerpts from **ACLU**
article “Hate Speech on Campus”,
December 31, 1994

Free speech on campus

"There is no clash between the constitutional right of free speech and equality. Both are crucial to society. Universities ought to stop restricting speech and start teaching."

[ACLU Executive Director Ira Glasser]

Free speech on campus

▪ "There is no clash between the constitutional right of free speech and equality. Both are crucial to society. Universities ought to stop restricting speech and start teaching."

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Changing Communication Paradigms

Regulating Communications Media:

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- First Amendment protection and government regulation

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Changing Communication Paradigms (cont.)

Telecommunication Act of 1996:

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- Changed regulatory structure and removed legal divisions of service areas and restrictions on services that telephone companies can provide

Changing Communication Paradigms (cont.)

Telecommunication Act of 1996:

- Changed regulatory structure and removed legal divisions of service areas and restrictions on services that telephone companies can provide
- No provider or user of interactive computer service shall be treated as a publisher of any information provided by another information-content provider (**Section 230**)

Changing Communication Paradigms (cont.)

Telecommunication Act of 1996:

- No provider or user of interactive computer service shall be treated as a publisher of any information provided by another information-content provider (Section 230)

The above provision was granted under assumption that ICS providers would not edit or censor the content provided by another information-content provider

Changing Communication Paradigms (cont.)

Telecommunication Act of 1996:

The above provision was granted under assumption that ICS providers **would not edit or censor** the content provided by another information-content provider

As of today, several ICS providers (e.g., Facebook, Twitter) **do edit and censor** the said content

Changing Communication Paradigms (cont.)

Telecommunication Act of 1996:

As of today, several ICS providers (e.g., Facebook, Twitter) **do edit and censor** the said content

Thus part of the Telecommunication Act (Title V, Communication Decency Act, **Section 230**) *de facto* delegated a mandate to **censor free speech** to ICS providers

Changing Communication Paradigms (cont.)

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Changing Communication Paradigms (cont.)

Telecommunication Act of 1996:

Thus part of the Telecommunication Act (Title V, Communication Decency Act, **Section 230**) *de facto* delegated a mandate to censor free speech to ICS providers

The above fact **invalidates the argument** that censorship by private ICS providers is not violating 1st Amendment and is Constitutional

Changing Communication Paradigms (cont.)

The above fact invalidates the argument that censorship by private ICS providers is not violating 1st Amendment and is Constitutional, because:

- Provisions of Section 230 gave ICS providers (a.k.a. “social media platforms”) a privileged position by immunizing them from lawsuits
- This allowed them to become *de facto* utility companies and to lure tens of millions of unsuspecting users and then to censor them
- The above goes against the purpose of the Constitution
- Due to *de facto* “delegation” to censor from the Federal Legislature, restrictions of 1st Amendment should apply to ICS providers

Principles

Free-speech Principles:

Principles (cont.)

Free-speech Principles:

- **Subject of protection:** offensive and/or controversial speech and ideas

Principles (cont.)

Free-speech Principles:

- **Subject of protection:** offensive and/or controversial speech and ideas
- **Form less protected than the contents**

Principles (cont.)

- The U.S. Supreme Court has consistently held that governments may impose “reasonable time, place, and manner” restrictions to regulate nuisances attendant upon expression. A court will uphold such a regulation if it is tailored to meet a significant governmental interest, such as noise abatement, and if it does not discriminate based on the content of expression. The rule that applies for a rock concert, for example, must also apply to an equally loud opera performed at the same time of day.

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- **However, the purpose of the Constitution was not to facilitate censorship by consortia of private businesses**

Principles (cont.)

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- **However, the purpose of the Constitution was not to facilitate censorship by consortia of private businesses**
- **Therefore, First Amendment may restrict private businesses in actions that go against the purpose of the Constitution**

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- Restriction on the power of government, not individuals or private businesses
- However, the purpose of the Constitution was not to facilitate censorship by consortia of private businesses
- Therefore, First Amendment may restrict private businesses in actions that go against the purpose of the Constitution, particularly if said businesses implement mandates and directives from governmental agencies.

Principles (cont.)

Free-speech Principles (cont.):

- Supreme Court principles and guidelines

Principles (cont.)

Free-speech Principles (cont.):

- Supreme Court principles and guidelines
 - Advocating illegal acts is illegal

Principles (cont.)

Free-speech Principles (cont.):

- Supreme Court principles and guidelines
 - Advocating illegal acts is illegal
 - but only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" [Brandenburg v. Ohio (395 U.S. 444, 1969)]

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 - Why?

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 - Inciting violence is illegal
 - Allows some restrictions on advertising

Principles (cont.)

Free-speech Principles (cont.):

- Supreme Court principles and guidelines
 - Advocating illegal acts may be illegal
 - Does not protect libel and direct, specific threats
 - Inciting violence is illegal
 - Allows some restrictions on advertising
 - Protects anonymous speech

Controlling Offensive Speech

A large, light blue curved shape that starts from the top left and sweeps across the top and right side of the slide, ending in a vertical bar on the right edge.

Controlling Offensive Speech

What constitutes offensive speech?

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Who decides if any particular expression is offensive?

Controlling Offensive Speech

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Who decides if any particular expression is offensive?

Can telling the truth be considered offensive?

Controlling Offensive Speech

What constitutes offensive speech?

Who decides if any particular expression is offensive?

Can telling the truth be considered offensive?

Can expression of opinion or belief be considered offensive?

Controlling Offensive Speech

Those questions cannot be dismissed easily.

Controlling Offensive Speech

What is it? What is illegal?

Controlling Offensive Speech

What is it? What is illegal?

- Answer depends on who you are

Controlling Offensive Speech

What is it? What is illegal?

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- Many efforts to censor the Internet with a focus on child pornography or sexually explicit material

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Controlling Offensive Speech

What is it? What is illegal?

- Answer depends on who you are
- Many efforts to censor the Internet with a focus on child pornography or sexually explicit material
 - However, no restrictions on using children for political propaganda.

Controlling Offensive Speech

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Controlling Offensive Speech

What is it? What is illegal?

- Answer depends on who you are
- Many efforts to censor the Internet with a focus on child pornography or sexually explicit material
 - Recently, exposing children on **sexually explicit material in school libraries** has been improperly characterized as “freedom of speech”.

Controlling Offensive Speech

What is it? What is illegal?

- Recently, exposing children on **sexually explicit material in school libraries** has been improperly characterized as “freedom of speech”.
- Just like in "The devil can cite Scripture for his purpose."

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Controlling Offensive Speech (cont.)

What was already illegal?

- Obscenity
 - Depicts a sexual act against state law
 - Depicts these acts in a patently offensive manner that appeals to prurient interest as judged by a reasonable person using community standards
 - Lacks literary, artistic, social, political or scientific value

Controlling Offensive Speech (cont.)

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Controlling Offensive Speech (cont.)

Internet Censorship Laws & Alternatives:

- Communication Decency Act 1996 (CDA)
 - Federal judge stated that the Internet is the most participatory form of mass communication
 - Attempted to avoid conflict with first amendment by focusing on children
 - The Internet deserves the highest protection from government intrusion

Controlling Offensive Speech (cont.)

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 - Federal judge stated that the Internet is the most participatory form of mass communication
 - Attempted to avoid conflict with first amendment by focusing on children
 - The Internet deserves the highest protection from government intrusion

Controlling Offensive Speech (cont.)

Internet Censorship Laws & Alternatives (cont.):

- Communication Decency Act 1996 (CDA) (cont.)
 - Found to be unconstitutional (in part protecting children from indecent speech) in 1997:
 - The worst material threatening children was already illegal
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Controlling Offensive Speech (cont.)

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Section 8 of the U.S. Constitution

[1] "The Congress shall have Power [...]
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Controlling Offensive Speech (cont.)

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Controlling Offensive Speech (cont.)

Internet Censorship Laws & Alternatives (cont.):

- Children's Internet Protection Act of 2000 (CIPA):
 - Requires schools and libraries that participate in certain federal programs to install filtering software
 - Upheld in court:
 - Does not violate First Amendment since it does not require the use of filters, impose jail or fines
 - It sets a condition for receipt of certain federal funds

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 - It sets a condition for receipt of certain federal funds
 - Recall the Power of Purse

Controlling Offensive Speech (cont.)

Internet Censorship Laws & Alternatives (cont.):

- Filters
 - Blocks sites with specific words, phrases or images
 - Parental control for sex and violence
 - Updated frequently but may still screen out too much or too little
 - Not possible to eliminate all errors
 - What should be blocked?

Controlling Offensive Speech (cont.)

Spam:

- What's the problem?
 - Loosely described as unsolicited bulk email
 - Mostly commercial advertisement
 - Angers people because content and the way it's sent
- Free speech issues
 - Spam imposes a cost on others not protected by free speech
 - Spam filters do not violate free speech (free speech does not require anyone to listen)

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Controlling Offensive Speech (cont.)

Spam (cont.):

- Anti-spam Laws
 - Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act)
 - Targets commercial spam
 - Criticized for not banning all spam, legitimized commercial spam

Censorship on the Global Net

Censorship in Other Nations

“Today, censorship in the West comes primarily from the left.”

[A quote from:

<https://humanevents.com/2020/10/22/pressing-mute-the-threat-of-censorship-in-america/>

]

Censorship on the Global Net (cont.)

Censorship in Other Nations:

- Attempts to limit the flow of information on the Internet similar to earlier attempts to place limits on other communications media
- Some countries own the Internet backbone within their countries, block at the border specific sites and content
- Some countries ban all or certain types of access to the Internet

Censorship on the Global Net (cont.)

Foreign Censors:

- North Korean worker executed for passing on news
- <http://www.guardian.co.uk/world/2010/mar/04/north-korea-human-rights-execution>

Censorship on the Global Net (cont.)

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Remember the 4th Branch of the US Gov't?

Political Campaign Regulations in Cyberspace

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 - Ruled (partially) unconstitutional in 2010

Political Campaign Regulations in Cyberspace

McCain-Feingold act gave the power to elect to mass media (mostly, TV networks).

- Then McCain run for Republican nomination and won it as a result of strong support from mass media (quite a kick-back).

Political Campaign Regulations . . . (cont.)

Campaign Laws and the Internet (cont.):

- Federal Election Commission (FEC) administers election laws
 - Covers content placed on the Internet for a fee
 - Unpaid individuals may put political content on their Web site, send emails, blog, create or host a campaign-related Web site and provide links to campaign sites

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Media are exempt from restrictions on political speech before and during elections.

Any doubts why those favored by the majority of media supported BCRA?

Political Campaign Regulations . . . (cont.)

"The press's job is to stand in the
ramparts and protect the liberty and
freedom of all of us from a government
and from organized governmental
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"When they desert those ramparts and [...] decide that their job is not simply to tell you who you may vote for, and who you may not, but, worse [...] what truth [...] you may know [...] and what truth you are not allowed to know,

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Political Campaign Regulations . . . (cont.)

"they have, then, made themselves a fundamental threat to the democracy, and, in my opinion, made themselves the enemy of the American people."

Pat Caddell

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Anonymity

Common Sense and the Internet:

- Anonymity protected by the First Amendment
- Services available to send anonymous email (Anonymizer.com)
- Anonymizing services used by individuals, businesses, law enforcement agencies, and government intelligence services

Anonymity (cont.)

Is Anonymity Protected?

- FEC exempted individuals and organizations that are not compensated from election laws that restrict anonymity
- Supreme Court has overturned state laws that restrict anonymity
- SLAPP, a Strategic Lawsuit Against Public Participation - lawsuits filed (generally libel) used to obtain the identities (via subpoena) of those expressing critical or dissenting opinions

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To be continued ...

See the Lecture Notes