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## The First Amendment in Cyberspace

*by Marjorie W. Hodges and Steven L. Worona*

In July 1996, a three-judge United States District Court panel in Pennsylvania unanimously declared the [**Communications Decency Act of 1996**](http://www.fenwick.com/pub/decency.html) unconstitutional. Specifically, the Court held that this act of the federal government abridged citizens' free-speech rights as protected by the First Amendment. In his written opinion, Judge Stewart Dalzell called the Internet "the most participatory form of mass speech yet developed." He also said the Internet is entitled to "the highest protection from government intrusion." Statements such as these contribute to the widespread belief that anyone can say anything in cyberspace. After all, "It's a free country. I have my First Amendment rights."

Is that true? Does the First Amendment really apply in cyberspace? And just how absolute are our free-speech rights, even in the real world? To answer these questions, we'll explore two key factors:

* The First Amendment directly specifies what the government may not do, not what individual citizens may do, and
* Even these limitations on government action aren't absolute.

#### "Congress shall make no law..."

The First Amendment to the United States Constitution stipulates that "Congress shall make no law ... abridging the freedom of speech." Of course, U. S. citizens aren't just subject to laws made by Congress. In our federal system, state laws are even more likely to affect our day-to-day lives, along with ordinances from cities, counties, townships, and a variety of other municipalities and government agencies. This potential loophole in the First Amendment was plugged in 1925, when the Supreme Court held, in Gitlow v. New York, that the Fourteenth Amendment (ratified in 1868 during the Civil War Reconstruction period) served to extend a variety of constitutional requirements -- including free speech -- to state and local governments.

This extension applies not just to governments, but to government-run institutions, such as public school systems and state colleges and universities. Public institutions of higher education are thus fully constrained by the federal Constitution, including the free-speech requirements of the First Amendment. Private schools, however -- including private colleges and universities -- are not. Even so, many private schools have voluntarily chosen to adopt policies ensuring freedom of speech, and several states have mandated free-speech provisions for private schools within those states.

**Application to cyberspace:** Institutions that are required to uphold First Amendment free-speech rights generally must uphold these rights in cyberspace as well. For higher education, this means, for example, that public colleges and universities have limited ability to filter incoming or outgoing Web pages or Usenet newsgroups based on content.

#### Public forums: time, place, and manner

So far we've noted that citizens' free-speech rights will be observed by a wide variety of public and private institutions. But even while observing these rights, most institutions cannot reasonably adopt an "anything goes" approach. The second part of the article addresses certain speech whose content -- for example, threats, libel, and shouting "fire" in a crowded theater -- may legitimately be constrained, but first we'll address another class of free-speech limitation, so-called "content -- neutral restrictions of time, place, and manner." For example, on what part of the city hall grounds may citizens set up their soap boxes? And at what hours of the day or night, and how loudly may they exercise their rights to free speech? Must a municipality permit soap boxes at city hall at all?

When called upon to answer such questions, courts typically ask whether the location is a "public forum," a public place that has public access, such as streets, sidewalks, and parks. As noted in Hague v. CIO (1939), public forums are places that have "immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions." Under common law tradition, the government could regulate speech in the public domain by time, place, and manner restrictions, but could not deny access. Current Supreme Court doctrine requires that content-neutral restrictions on speech in public forums be "narrowly tailored to a substantial government interest, and leave open ample alternative channels of communication."

**Application to cyberspace:** Is cyberspace a public forum? The United States District Court for the Western District of Oklahoma addressed this issue in Loving v. Boren (1997), ([**http://www.jmls.edu/cyber/cases/loving.html**](http://www.jmls.edu/cyber/cases/loving.html)). After an elected representative complained that material available in news groups stored on the public university's server violated state law, the university blocked access to some groups. A professor said this violated his free speech rights and filed suit. The court held that the computer systems of public institutions are not inherently public forums and that such institutions could limit servers to officially approved material. This decision would not prevent a public or a private institution from creating a public forum, either intentionally or unintentionally.

#### Free speech and the private sector

The cocktail party seems to be a success; you're enjoying yourself, and everyone else seems to be having a fine time as well. But then you hear a commotion, and notice the host angrily ushering one of the guests out the door. The guest's hat is flung out after him, unceremoniously. Mystified, you ask the host what happened. "Sorry for the disturbance, Mike, but I never realized Bill felt that way about abortion. I just won't tolerate such viewpoints in my house." You're outraged: What happened to Bill's free-speech rights?

Unless that cocktail party was part of a government function, or took place in a state building, or could somehow be considered a public forum, Bill's rights weren't violated. The host's rights to control his own property are not limited by the First Amendment. The First Amendment does not give individuals the right to say whatever they want whenever they want.

Now replace the cocktail party in the above example with a classroom at a private university. Could the university's code of conduct specify expulsion for expressing certain opinions or beliefs? Yes, indeed.

**Application to cyberspace:** Many private institutions with religious affiliations prohibit blasphemy on campus. These institutions may apply the same restrictions in cyberspace, limiting expression in Web pages, e-mail, Usenet postings, chat rooms, and any other Internet communication.

### Shouting 'Fire' in a Crowded Theater

Even when applied to government action, the First Amendment protection of speech is not absolute. As noted above, the government and public institutions can create reasonable time, place, and manner restrictions. The courts also give some speech a lesser degree of protection -- commercial advertising, for example, and "indecent" speech -- and have excluded some speech altogether from First Amendment protection. "Fighting words," threats, harassment, obscenity, and child pornography are examples of speech that receive no First Amendment protections. Moreover, there is libel law, and prohibitions on perjury, blackmail, and solicitations of illegal conduct.

Even First Amendment absolutists recognize that the government has a legitimate interest in and ability to impose a variety of restraints on speech. As Justice Holmes said, in Schenck v. United States (1919), "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic." The First Amendment addresses "abridging the freedom of speech," but not every restriction of speech is considered an abridgment. The Supreme Court has held that content-based restrictions are constitutional when "they are narrowly tailored to a compelling government interest." This, however, is a very difficult test to pass.

#### Fighting words

In Chaplinsky v. New Hampshire (1942), the courts introduced the fighting-words doctrine. Fighting words are defined as having a "direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." One of the crucial aspects of this speech is that it occurs face to face. When the Supreme Court upheld the decision in Chaplinsky, it created a new category of unprotected speech, "[words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace." The rationale behind this ruling was that this particular kind of speech does not contribute to the exchange of ideas or the search for truth. Today, the courts rarely rely on this precedent. In fact, the courts have struck down most breach-of-peace and disorderly conduct statutes that relied on fighting words as overly broad.

**Application to cyberspace:** Perhaps because the parties have never met, e-mail and other Internet communications all too frequently break out into "flame wars," with insults, name-calling, and a leap-frog series of escalating invective. Inevitably, one of the combatants will demand that the other's fighting words be suppressed. As noted, however, a crucial aspect of the fighting-words doctrine is a face-to-face confrontation. It is thus highly unlikely that the courts will extend this doctrine to cyberspace, even when Internet videoconferencing is involved.

#### Threats

The courts have long upheld both state and federal statutes that prohibit threats. For example, there is federal legislation that reads: "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." While this statute is constitutional, the courts review its application carefully, as noted in The People v. B.F. Jones (1886): "It is not the policy of the law to punish those unsuccessful threats which it is not presumed would terrify ordinary persons excessively; and there is so much opportunity for magnifying or misunderstanding undefined menaces that probably as much mischief would be caused by letting them be prosecuted as by refraining from it."

**Application to cyberspace:** This is one of the very few instances where a relevant case has been tried and a judgment issued. Jake Baker was a student at the University of Michigan when he was charged under the federal statute quoted above with transmitting threats to injure or kidnap another ([**http://www.vcilp.org/chron/news/jakebake.htm**](http://www.vcilp.org/chron/news/jakebake.htm)). The transmissions occurred over the Internet. This case originated with a complaint about a story that Baker posted on the Usenet newsgroup alt.sex.stories describing the rape, mutilation, and murder of a female character to whom Baker had given the same name as one of his classmates. Ultimately, the prosecution relied on e-mail messages between Baker and an individual in Canada.

In granting Baker's motion to quash the indictment, the United States District Court for the Eastern District of Michigan held that in order to qualify as a threat, the statement charged must "contain some language construable as a serious expression of an intent imminently to carry out some injurious act." The judge in this case concluded that the language used by Jake Baker "was only a rather savage and tasteless piece of fiction," and admonished the United States Attorney's office for pursuing the charges.

#### Harassment and hate speech

Harassment generally applies to actions, not speech, but harassing actions do not require physical contact. Some legislation complicates the distinction between actions and speech, such as laws against creating a "hostile working environment." Still, even in cases where courts have upheld harassment charges against speech, it was the actions that were at issue: unwanted and repeated behavior targeted at one or more particular individuals.

In the late 1980s, in order to address the perceived increase in incivility on college campuses, many institutions of higher education developed "hate speech" regulations. Hate speech is a term used to describe speech which is uncivil, antagonistic, or derogatory, especially when applied to classes of people. Every such regulation tested by the courts has been found to be unconstitutional.

**Application to cyberspace:** Sending e-mail is an action, and an individual who knowingly persists in sending unwanted e-mail to another person may well be subject to charges of harassment. It is less clear that repeated unwanted postings to a Usenet newsgroup or to a mailing list can constitute harassment, since the action of sending these messages is not targeted at a specific individual (regardless of the content). Similarly, unwanted or unflattering references to an individual on a Web page are unlikely to constitute harassment, although they may be actionable as defamation.

#### Pornography, obscenity, and indecency

Pornography -- humorously summarized as "naked people doing nasty things" -- is, in general, constitutionally protected speech. When pornography reaches an extreme of offensiveness, however, it becomes obscenity, and loses its First Amendment privileges. By today's laws, the most restricted form of pornography is child pornography, characterized by its depiction of actual children engaged in sexual conduct. Restrictions against distributing adult material to minors have also passed constitutional scrutiny. Further, material considered "indecent" may legitimately be restricted on certain "pervasive" and limited distribution channels -- for example, broadcast radio -- to times when children are not likely to be in the audience. For a more complete description of the various categories of adult material and the laws regulating this material, see the authors' previous CAUSE/EFFECT article. **[1](http://net.educause.edu/ir/library/html/cem/cem97/cem9732.html%22%20%5Cl%20%221)**

**Application to cyberspace:** The recent Supreme Court decision in ACLU v. Reno (1996) established that cyberspace content cannot be limited to only that which would be acceptable to minors. In general, First Amendment protections for adult material have followed that material into cyberspace.

#### Defamation: libel and slander

Defamation entails making a false statement to a third party that harms the reputation of someone else. Libel is defamatory writing; slander is defamation by word of mouth. Neither is constitutionally protected. In New York Times v. Sullivan (1964), however, the Supreme Court found that libel "must be measured by standards that satisfy the First Amendment," in order not to unduly restrict political discourse. This led to the "actual malice" rule in cases involving public figures, whereby such individuals can win a defamation claim only by showing that the statement was made "with knowledge that it was false or with reckless regard of whether it was false." One of the justifications for this standard is the presumption that public figures have the ability to publicly challenge allegedly defamatory information.

**Application to cyberspace:** "Slander!" "Libel!" "Defamation!" These cries are sure to be heard in any Internet flame war. The handful of Internet-related cases dealing with complaints of defamation indicate that the law of defamation applies online. An interesting nuance in this area is the claim, made by some, that any individual with a visible presence in cyberspace is a "public figure," with the ability to publicly challenge allegedly defamatory information. As of this date, the courts have refused to accept this argument.

#### Calls to violence

Imagine the firebrand Socialist explaining to his audience that the capitalist system can only be brought down by force of arms. Can the government stop this speech? At what point? Or must government action be directed against the crowd instead? If the speaker is engaged in otherwise lawful expression and not intentionally inciting the crowd, but the crowd is acting in a threatening manner, then the police have to go after the crowd, not the speaker. Justice Holmes, in Schenck v. United States (1919), introduced the famous "clear and present danger" test, which defined when speech can be the basis for criminal penalties. This test was later narrowed in Abrams v. United States (1919), when the court determined that we must tolerate opinions "unless they so imminently threaten immediate interference with the lawful and pressing purposes of law that an immediate check is required to save the country." Most legal scholars agree that the clear and present danger test is merely a more ambiguous version of the content-based restriction test, requiring that the regulation be narrowly tailored to a compelling government interest.

**Application to cyberspace:** While no Internet-related case law exists in this area, it seems unlikely that communications taking place solely in cyberspace can lead to the "clear and present danger" envisioned by Holmes, let alone meet the narrower standard set forth in Abrams.

### Conclusion

As the Internet becomes ever more pervasive, it takes on more and more of the character of society as a whole. The First Amendment is one of the fundamental principles of our society. It is therefore perfectly natural to find the First Amendment operating in cyberspace. It will, of course, take some time for the legal system to work out the details, metaphors, and nuances. For now, it's important to understand how the First Amendment operates in the real world and how the courts have applied it to cyberspace so far, and to track future developments in case law and legislation.

Beyond this, it's also important to keep in mind that cyberspace cuts across national borders, and that not all governments care about citizens' free-speech rights. In recent cases, Germany, France, and Canada have attempted to apply speech restrictions on U. S. corporations and citizens. As Tim May has said, "The First Amendment is only a local ordinance in cyberspace."

## Sidebar:Acceptable Use/Access Policies Online

Creating or updating policies related to technology can be a formidable task. A useful approach would be to look at the policies developed by other institutions. While many institutions have published their policies on the Web, searching from site to site, or even within the Web site of a single institution takes time, and often results in little useful information.

CAUSE can help. One of the functions of our Web site is to serve as a clearinghouse of valuable information. We've collected the data so that you spend less time searching for it and more time evaluating it and putting it to use.

For example, there are currently more than 60 references to policies related to acceptable/ethical use and two dozen more on access. All you have to do is follow the link below to our online information resources library. You can search the library by keyword or browse through it in a variety of ways.

Take a look. We think you'll be pleased with what you find.

**Link to the CAUSE Information Resources Library:**
[**http://www.cause.orgasp/doclib/**](http://net.educause.edu/ir/library/html/cem/cem97/asp/doclib/)

## Endnotes:

**1** Marjorie W. Hodges and Steven L. Worona, "[**Legal Underpinnings for Creating Campus Computer Policy**](http://net.educause.edu/ir/library/html/cem/cem96/cem9642.html)," CAUSE/EFFECT, Winter 1996, pp. 5-9.

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