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The Ongoing Challenge to Define Free Speech

Stephen Wermiel



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1050 Connecticut Ave., N.W., Suite 400

Washington, D.C. 20036

tel: 202-662-1030, fax: 202-662-1031

email: crsj@americanbar.org

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Introduction

The Ongoing Challenge to Define Free Speech

By Stephen J. Wermiel

Freedom of speech, Supreme Court Justice Benjamin Cardozo declared more than 80 years ago, “is the matrix, the indispensable condition of nearly every other form of freedom.” Countless other justices, commentators, philosophers, and more have waxed eloquent for decades over the critically important role that freedom of speech plays in promoting and maintaining democracy.

Yet 227 years after the first 10 amendments to the U.S. Constitution were ratified in 1791 as the Bill of Rights, debate continues about the meaning of freedom of speech and its First Amendment companion, freedom of the press.

This issue of *Human Rights* explores contemporary issues, controversies, and court rulings about freedom of speech and press. This is not meant to be a comprehensive survey of First Amendment developments, but rather a smorgasbord of interesting issues.

One point of regular debate is whether there is a free speech breaking point, a line at which the hateful or harmful or controversial nature of speech should cause it to lose constitutional protection under the First Amendment. As longtime law professor, free speech advocate, author, and former American Civil Liberties Union national president Nadine Strossen notes in her article, there has long been a dichotomy in public opinion about free speech. Surveys traditionally show that the American people have strong support for free speech in general, but that number decreases when the poll focuses on particular forms of controversial speech.

The controversy over what many call “hate speech” is not new, but it is renewed as our nation experiences the Black Lives Matter movement and the Me Too movement. These movements have raised consciousness and promoted national dialogue about racism, sexual harassment, and more. With the raised awareness come increased calls for laws punishing speech that is racially harmful or that is offensive based on gender or gender identity.

At present, contrary to widely held misimpressions, there is not a category of speech known as “hate speech” that may uniformly be prohibited or punished. Hateful speech that threatens or incites lawlessness or that contributes to motive for a criminal act may, in some instances, be punished as part of a hate crime, but not simply as offensive speech. Offensive speech that creates a hostile work environment or that disrupts school classrooms may be prohibited.

But apart from those exceptions, the Supreme Court has held strongly to the view that our nation believes in the public exchange of ideas and open debate, that the response to offensive speech is to speak in response. The dichotomy—society generally favoring free speech, but individuals objecting to the protection of particular messages—and the debate over it seem likely to continue unabated.

A related contemporary free speech issue is raised in debates on college campuses about whether schools should prohibit speeches by speakers whose messages are offensive to student groups on similar grounds of race and gender hostility. On balance, there is certainly vastly more free exchange of ideas

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