

Phil 116, March 17, 2010
Cohen, “Freedom of Expression”

Stringent protections of expressive liberties:

1. *Presumption against content regulation*: i.e., regulation of viewpoint (e.g., advocating adultery) or subject matter (e.g., debating adultery).
2. *Categorization*: some kinds of content regulation are less problematic: “truth in advertising, private libel, fighting words,... and nonobscene child pornography.”
3. *Costly protections*: the mere fact of costs—injures reputations, causes emotional distress, requires police protection from opponents, leads to litter, contributes “to an environment in which unacceptable forms of discrimination seem reasonable,” etc.—does not in general suffice to remove protection from expression.
4. *Fair access*: the value of expressive liberties must not be determined by a citizen’s economic or social position. Examples of measures to achieve fair access: “keeping traditional public forums (parks and streets) open and easily accessible; ... financing political campaigns through public resources; and regulating private political contributions and expenditures.”
 - Note that *even content-neutral* regulations can limit fair access, “when, as with regulations on the distribution of handbills, or on the use of parks and sidewalks, they work to disproportionately burden those who otherwise lack the resources to get their messages out.”

Minimalism: No appeal to the *value* of expression.

- *No-cost minimalism*: “expression—as distinct from action—is not *in itself* costly or harmful.” But feature 3 *assumes* that expression is costly.
- *Another version*: The government can’t appeal to *certain reasons* in order to support regulations. *Problem*: Restrictions (e.g.) to keep the streets clean don’t involve (e.g.) denials of autonomy. The objection is that they don’t attach enough *value* to expressive liberties.
- Minimalism does not explain feature 4 (fair access). Why care about access to means of expression, unless we think that expression is valuable?

Maximalism: The value of liberty always outweighs costs.

- Doesn’t explain the distinctions we draw between libel of private and public figures, between advertising and political argument, etc.
- Many people reasonably disagree that autonomy is a supreme value.

Interests protected by freedom of expression:

The interests are presented in general terms, so that they might be endorsed by a variety of moral and religious views.

1. *Expressive interest*: “a direct interest in articulating thoughts, attitudes, and feelings on matters of personal or broader human concern and perhaps through that articulation, influencing the thought and conduct of others.”
 - a. A perceived obligation (perhaps religious) to speak out. Like liberty of conscience.
 - b. Part of being a good citizen to address questions of political importance.

- c. Interest in expression about human life more broadly.
2. *Deliberative interest*:
 - a. Interest finding out *which* ways of life are supported by the strongest reasons.
 - b. Interest in understanding *what* the reasons are.
3. *Informational interest*: interest in reliable information about the means to one's aims

Costs:

1. *Direct costs*: "I shriek at a neurasthenic with a weak heart; disrupt the peace and quiet with loud shouting; falsely tell an elderly patient that her child has just died; spread defamatory falsehoods about a colleague; use offensive language in a public setting; offer a raise or higher grade in return for sex."
2. *Environmental*: Fosters a "degraded, sickening, embarrassing, humiliating, obtrusively moralistic, hypercommercialized, hostile, or demeaning environment."
3. *Indirect costs*: Expression causes (by persuading, suggesting, or providing information) someone to do something harmful.

Background facts:

Facts of Reasonableness (would favor the protection of speech even in an ideal world):

- (1) *The Fact of Reasonable Pluralism*: Freedom leads to reasonable disagreement.
- (2) *The Fact of Reasonable Persuasion*: People can change their minds by new reasons.
 - But for the Fact of Reasonable Persuasion, more speech would be a diversion rather than a remedy.

Bare Facts (favor protection and are unalterable):

- (1) *The Fact of Resource Dependence*: Expression depends on resources that are often unequally distributed.
- (2) *The Fact of Innocent Abuse*: Given liberty, people will sometimes (even if unintentionally) say things that are false, offensive, insulting, etc.
- (3) *The Cold (Chilling) Facts*: If sanctions are attached to expression for being false, offensive, insulting, etc., then people will be reticent to express themselves. Uncertain regulation—vague, or weighs costs and benefits in each case—may have the same effect.

Unhappy Facts (now favor protection but we might hope will change):

- (1) *The Fact of Power*: People—especially those in power—are tempted to use whatever means they have to avoid criticism or disagreement.
- (2) *The Fact of Bias*: People often confuse what they would *prefer* other people to do with what they *ought* to do.
- (3) *The Fact of Disadvantage*: People with less power are especially likely to suffer from uncertain regulation, whose implementation depends on the discretion of the powerful.
- (4) *The Fact of Easy Offense*: Everyone is offended by something.
- (5) *The Fact of Abuse*: Against a background of sharp disagreement, efforts at persuasion sometimes proceed through exaggeration, vilification, and distortion.

Against content regulation:

- *Expressive interest*: Content regulation is more likely to prevent people from expressing their views at all (not just in a given forum)

- *Deliberative interest*: Content regulation is more likely to exclude certain views from public deliberation entirely.
- *Fact of Power*: Content regulation an especially effective tool for suppressing dissent.
- *Fact of Reasonable Persuasion*: Apart from direct, unavoidable costs of expression, the remedy to such costs is more expression.

For categorization:

- *Political expression?* Clearly supported by the three interests and by the Fact of Power.
- *Group libel and libel of political figures?* Often political expression.
- *Commercial advertising?* Less closely connected to the three interests. Cold Facts and the Fact of Innocent Abuse have much less force in the case of commercial speech, which is fueled by economic interests and involves claims whose accuracy the speaker is in a very good position to judge.
- *Why not proceed case by case?* Cold Facts. Danger of the discretion this would give those responsible for making the judgments: Unhappy Facts of Power, Bias, and Disadvantage.

For costly protection:

The special case of offense:

- Given Fact of Easy Offense, avoiding offense would require substantial regulation. But the three interests in expression are more important than the interest in avoiding offense.

1. Expression important, vulnerable, and the costs are either environmental or indirect, and sometimes avoidable or remediable.

Pornography. (Contrast *obscenity*: prurient, offensive, minimal value.)

2. Expression important, vulnerable, but the costs are direct and unavoidable.

Libel of public figures.

3. Expression less important, less vulnerable, although the costs are direct and unavoidable.

Here, restriction easier to justify.

Libel of private figures.

For fair access:

1. Incoherent to justify expressive liberty (e.g., about a group) by appeal to the remedy of more speech, but not to provide means (e.g., to the group maligned) for more speech.
2. The interests that support *formal* equality of freedom of expression also support *substantive* equality of freedom of expression. What good are the formal liberties, if one never has the means to exercise them? The Fact of Resource Dependence.
3. A diversity of messages is necessary for deliberation. The Deliberative Interest.

Subcategorization:

Regulation of the subcategory, even though the defining feature of the *subcategory* would not justify regulation *outside* the *category*.

Regulation of *hateful* fighting words, even though regulation of *hate speech* generally is impermissible.

- *Fighting words* are provocations directed to individuals and comprise “no essential part of the exposition of ideas,” so deliberative interest less significant. There are other ways to express similar attitudes, and so to fulfill the expressive interest.
- *Hateful* fighting words have particularly significant costs, and these costs hard to remedy by further speech.

Regulation of pornographic *obscenity* (prurient, offensive, of minimal value, and involving the sexualization of violence) even though regulation of *pornography* generally is impermissible.

- Since *obscene*, expressive and deliberative interests less important.
- *Sexualizing violence* has particularly significant costs (indeed perhaps clearer and more significant costs than those of offensiveness associated with obscenity more generally). (But perhaps *these* indirect or environmental costs *can* be remedied by further speech?)