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The First Amendment (and the rest of the Bill of Rights) was ratified in 1791, but largely ignored by the U.S. Supreme Court for 128 years. In 1919, the Court finally gave content to the First Amendment by adopting the "clear and present" danger test, but then used that test to uphold a series of convictions for what we would now regard as peaceful dissent against U.S. involvement in World War I on the theory that speech criticizing the war created a "clear and present" danger of interfering with the war effort. It took another 50 years until the Supreme Court decided, in 1969, that speech can only be punished as incitement if it is intended and likely to produce imminent lawless action.

We are very fortunate in the U.S. to live in a society with a robust legal framework protecting free expression, and a cultural tradition that values free speech. Free speech is both part of our national character and a judicially enforceable right.

Most important first amendment cases

The most difficult free speech cases involve either national security or a conflict with other individual rights. The courts referee those disputes with more or less rigor depending on their perceived sense of institutional competence. Courts are most likely to be deferential to the government's asserted interests in the national security context, and especially so in the midst of a war.

Judges are put in a very difficult position when the government submits affidavits from senior military or intelligence officials asserting national security claims as a justification for restricting free speech (or other) rights. On the other hand, history has taught us that such claims are often overblown and that a degree of judicial scepticism is both healthy and warranted.

Conflicting rights can occur in different forms. One example is the conflict between a free press and the defendant's right to a fair trial. Can there be any limit on the right of the press to publish incriminating evidence prior to trial? Can the lawyers in a high profile case be limited in what they can say to the press? Another example is the tension between the rights of anti-choice protestors and the rights of those seeking an abortion? Is it appropriate to create a protest-free zone around abortion clinics to help preserve the emotional and physical well-being of women entering the clinic? If so, what kinds of restrictions are reasonable?

In 1997, in a case called **Reno v. ACLU**, the Supreme Court decided for the first time that speech on the Internet was entitled to the full protection of the First Amendment, like print media, and would not be subject to the greater regulatory controls that apply to broadcast television and radio.

The U.S. is an outlier in providing constitutional protection for hate speech. In **Snyder v. Phelps** (2010), for example, the Supreme Court reversed a jury verdict against a small Kansas church that protested outside military funerals claiming that soldiers were dying because the U.S. tolerated homosexuality. The explanation for that decision and others like it is not that we value hate speech

more than the rest of the world. It is that we are unwilling to entrust the government with the authority to determine what speech has value.

Holder v. Humanitarian Law Project (2010) was a terrible decision with potentially serious consequences for human rights groups and humanitarian organizations working around the world, as the ACLU pointed out in an amicus brief we filed on behalf of several such groups, including the Carter Center, the International Crisis Group, and Human Rights Watch. (A copy of the brief can be found at https://www.aclu.org/files/assets/08-1498_and_09-89_tsac_The_Carter_Center.pdf,) The decision in the Humanitarian Law Project case, however, is not the first time that the Court has balanced speech and security and come out in favour of security. The same thing happened during World War I in a series of cases that gave birth to modern First Amendment law. It happened in the Cold War with the conviction and imprisonment of Communist Party leaders in the U.S., and during the Vietnam War, when the Court upheld criminal convictions for burning draft cards as an act of symbolic speech.

Priorities for a first amendment "fit for purpose"

Freedom of information is not a constitutional right in the United States. The Constitution protects the right to publish information but not the right to access information in the government's control. However, we do have a well-developed body of freedom-of-information laws, both at the federal level and the state level. Those laws could, in theory, be repealed by the legislatures but that is not likely to happen as a practical matter.

The legal community in the U.S. is still largely uninformed (and too often uninterested) in legal developments abroad. We can and should learn from good jurisprudence elsewhere.

The U.S. still lags behind many other countries in developing standards for on-line privacy, both as applied to the government and to private industry. The recent revelations by Edward Snowden have helped bring this issue to the forefront. Privacy laws in the U.S. are old and outdated. The checks and balances designed to constrain government spying have not worked. And the Supreme Court has never definitively ruled on whether the U.S. Constitution provides a right to informational privacy. Domestically and internationally, this is one of the major human rights issues facing us today. The absence of adequate privacy protections poses a real threat to free expression, as well. A surveillance state both diminishes our privacy rights and chills our free speech rights. In April of this year, the Supreme Court will hear two cases, Riley v. California and United States v. Wurie, that raise the question of whether the government's power to conduct a search incident to arrest includes the power to search the contents of a cell phone carried by someone who is arrested.

As now written, U.S. law does not provide adequate protection for whistle blowers, especially those who reveal national security information. Among other things, a whistle blower who is prosecuted for revealing national security information has no right in the U.S. to argue that his revelations served the public interest. The government has also tried to blur the distinction between leaking to the enemy and leaking to the press.