

Hard Cases:

Some Issues Concerning the First Amendment's Protection of Free Speech and Free Press

by Susan Steinfirt

Librarians, who provide access to the written word as well as access to spoken words, music of all varieties, and now information in myriad electronic formats, are guided by their interpretation of the First Amendment of the Bill of Rights.

The First Amendment in its entirety protects rights other than free speech and free press, saying: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." This article, however, focuses on the two most important aspects of the Amendment's protection for librarians, that of free speech and free press, the right to speak and write what one wishes in a free society.

Most American children, by the time they are in fourth grade, know that the First Amendment of the Constitution protects our freedom of speech and freedom of the press. As we grow older, we come to realize that the famous words, "Congress shall make no law abridging the freedom of speech, or of the press," are symbolic of our democracy, because they impose a legal barrier to official censorship, then and now considered one of the greatest dangers to a strong democracy.

Legal scholars today, as always, are debating the strengths and weaknesses

of the First Amendment in consideration of today's historical, social, political, economic, and technological changes; and indeed, some legal scholars and laypersons — liberal and conservative — are, in fact, debating whether the First Amendment serves all the people equally well. We are, as Cass Sunstein, a law professor at the University of Chicago, has said in his book, *Democracy and the Problem of Free Speech*, "in the midst of a dramatic period of new thought about the meaning of free speech in America."¹ Indeed, as Henry Lewis Gates, Jr., a black historian and scholar at Harvard, has written (even before our recent November election!), "These are challenging times for First Amendment sentimentalists."²

Several striking issues in the 1990s have risen to the surface again and again. Funding of the arts, including broadcasting, is one of them. Should "offensive" art be funded by the government, by all our tax dollars? If so, should it be restricted? What is the role of government in funding art? Should the NEA and public radio be eliminated?

Another topical issue is hate speech (and ensuing speech codes or bans), a problem particularly on college and university campuses, which arose out of the issues of political correctness, multiculturalism, and the needs and rights of marginalized people in our society to be protected by the institutions of which they are a part. Still another controversy is pornography, which will be discussed in greater detail

later. Free speech issues still mean protecting the rights of children, especially — but adults also — to read, hear, and see what they want. Some other general issues of free speech include restriction of song lyrics, new regulation of the press, denying reporters access to some governmental information, begging that can be defined as harassment, and the old stand-by, flag burning.

These are all, as Sunstein has called them, "hard cases," ones that even the most adamant of the First Amendment absolutists have to reckon with. Pornography, cross-burning, student newspapers that print harmful lies about minority students, and professors who teach that the Holocaust did not happen are just a few examples of painful issues to each of us and to the country, but these issues are ones that absolutists say have to be overcome in an open, democratic forum in order to preserve the sanctity of First Amendment rights. It is what we have to pay, they say, to ensure the protection of speech for all; if we give in on just one tough issue, we'll have to give in on others.

Critics of the First Amendment, on the other hand, say we are overprotected by it, and that the First Amendment has become both an "icon" and a means by which difficult moral decisions can be avoided. The First Amendment has produced a climate that fails to protect the unempowered in our society.

Our thinking about these tremendously important issues is aggravated by several factors. Gates has suggested,

for example, that there is a hierarchy of free speech. Political speech tends to be protected, while commercial speech does not; there are always political and historical ramifications to free speech. But even more important is the lack of a clear definition of free speech. Legal scholars, for example, argue and debate whether action (nonverbal expression) is free speech.

At issue, and very much at the center of the discussions about First Amendment rights today, is interpretation, which is necessary because those fourteen words framed by our Founding Fathers are not at all crystal clear and were never intended, most scholars and legal critics would agree, to be taken literally to ban all limits on free speech. What the writers of the First Amendment meant to protect in the eighteenth century might not be what they intended to protect in the future. Quoted often on this subject is the U.S. Supreme Court Justice Hugo Black, a First Amendment absolutist, who wrote that the writers of the Bill of Rights "neither said what they mean nor meant what they said when they composed the free speech clause in the First Amendment."³ Historically, federal appellate judges and the Supreme Court have heard, hear now, and will continue to hear cases which debated, debate, and will continue to debate First Amendment issues, and they will make decisions that will have repercussions for all further First Amendment issues. Only speech is protected by the First Amendment, and that which is declared to be an action, or a consequence of speech, is not. "Categorization" is the legal buzzword, says Gates, for deciding whether expression is protected at all and for then deciding what category it fits into. In this way, certain types of speech, namely libel, invasion of privacy, obscenity, commercial speech, and speech posing irreparable threat or "clear and present danger," have become exceptions to some degree to the First Amendment rule. Also, some forms of speech are not considered protected speech if their purpose is to incite violence; this concept of "fighting words" is based on the decision of *Chaplinsky v. New Hampshire* (1942), which said that words that were "likely to provoke the average person to retaliation," would cause a breach of speech.

There have been liberal interpretations of the free speech clause by those who believe there should be no limits on free speech and by those who agree with Justice William Douglas, who

said in 1952, "Restriction of free thought and free speech is the most dangerous of all subversions."⁴ And there are rising conservative interpretations of free speech, those who believe, as stated above, that expression has become over-protected to the exclusion of other (even constitutionally protected) rights.

As a means of explication of interpretation, this article will now summarize briefly the contents of three relatively new books that deal with interpretative issues: Stanley Fish's *There's No Such Thing as Free Speech, and It's a Good Thing Too* (1994), which attacks liberal ideas about interpretation and First Amendment rights; Nat Hentoff's *Free Speech for Me, But Not for Thee* (1992), which epitomizes the absolutist stance on the free speech clause; and Catherine MacKinnon's radically controversial discussion of pornography and its protection under the First Amendment, in her 1993 book, *Only Words*.

In a series of eighteen lectures (five of which are based on the "debates" he staged with Dinesh D'Souza, the author of *Illiberal Education*), Stanley Fish argues that expressions such as "free speech" are really just abstractions that have no meaning. Everyone, he says, would like to censor and suppress something. (A Milton scholar, Fish reminds us that even Milton, in his glorious paean to freedom of speech, *Areopagitica*, said essentially that freedom of speech is good for everyone but the Catholics.) Terms, such as "free speech" and "freedom of the press" are malleable and

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determined by what the "good guys" find correct right now.

Free speech, Fish says over and over again, is determined by political and historical considerations and nothing more: "We are all products of different histories; we are all committed to truths, but to truths perpetually in dispute."⁵ "The line between what is permitted and what is to be spurned is always being drawn and redrawn" depending on its historical context and "[s]tructures of constraint are simultaneously always in place and always subject to revision if the times call for it and resources are up to it."⁶ There is no such thing as fairness when it comes to the laws, because fairness is just another abstraction also based on different assumptions and background: "The truths any of us find compelling will be partial, which is to say they will be political."⁷ Free speech, Fish says, is therefore just the name we "give to verbal behavior that serves the substantive agendas we wish to advance — a political prize."⁸

Fish spends a lot of time debunking what he calls liberal views on censorship. He insists, for example, that all specific free speech issues should be seen within broad contextual limits because we are inescapably bound by our "interpretive communities" (e.g., in the case of hate speech, the interpretive community is the university and its students and faculty). There is nothing neutral about free speech, he says, and we would do well to realize this and say that some speech is better than others and that *de facto* censorship is a fact of life. (It is on this assumption, the lack of neutrality, that Fish defends speech bans on campus, saying that we have to protect those who have been dealt with unfairly because "talk of equality, standards, and level playing fields is nothing more than a smoke screen behind which there lies a familiar set of prejudices rooted in personal interest."⁹)

At issue for Fish, as for most critics of the First Amendment, is the issue again of interpretation, which he says is the tool of whatever group of people is in power and has authority at any given time. "The courts," he says, "are never in the business of protecting free speech *per se* ...; rather, they are in the business of classifying speech (as protected or regulatable) in relation to a value — the health

of the republic, the vigor of the economy, the maintenance of the status quo, the undoing of the status quo — that is the true, if unacknowledged, object of this protection."¹⁰ The law is not formalistic — consistent, precise, or simplistic — and so it is always open to interpretation. All law is challengeable, although we must always remember, Fish insists over and over again, that "it is impossible not to interpret from an ideology or moral vision."¹¹ "Interpretation," he insists, "is the name for the activity by which a particular moral vision makes its hegemonic way into places from which it has been formally barred."¹²

Because of the dominance of interpretation, law has what Fish calls an "ad hoc quality," though he feels that this "doctrinal inconsistency," the "inability of doctrine to keep itself pure and precise"¹³ is a strength rather than a weakness because it produces rhetoric: "The law is a discourse continually telling two stories, one of which is denying that the other is being told at all."¹⁴

What is needed, Fish says, is an ad hoc, case-by-case balancing of interests. You have to balance whether harms caused by offending speech (as in the case of hate speech on campus or pornography) might materialize, and if so, they must be weighed against harms produced by regulation. Again, Fish says, this will depend on the social and institutional context in which the speech is occurring. (There would be a difference between the public school and the university.) Furthermore, Fish says the weak, who are basically unempowered, tend not to be protected by freedom of speech. In terms of "hard cases" — campus hate speech and pornography, especially — Fish comes down "reluctantly and cautiously" on the side of regulatory actions: "Some of the things that the First Amendment, as now interpreted, allows, and by allowing, encourages, are worse than the scenario set out in *Fahrenheit 451*."¹⁵ Furthermore, he argues, since nothing spoken is free from consequences, we have to "take responsibility for our verbal performances — all of them — and not assume they're taken care of by the Constitution."¹⁶ There are risks in permitting speech that is harmful, and risks that may deny us art; but Fish is "persuaded that at the present moment, right now, the risk of not attending to hate speech is greater than the risk that by regulating it we will deprive ourselves of valuable voices and insights or slide down the slippery slope toward tyranny."¹⁷

Stanley Fish is really not the enemy

of free speech. He says repeatedly that he would not regulate against it unless he felt that not to regulate it would cause more harm than to uphold the tenets of the First Amendment blindly. And, because speech is so tied to ideology and power, he believes that it is an impossibility: "The truth is not that freedom of speech should be abridged but that freedom of speech is a conceptual impossibility because the condition of speech's being free in the first place is unrealizable." Because all speech is informed by politics and ideology, he goes on, "there is no such thing as free (ideologically unconstrained) speech; no such thing as a public forum purged of ideological expressions or exclusions."¹⁸

Nat Hentoff, whom Fish calls (among others) a mouthpiece for a "very neo-conservative political agenda"¹⁹ would heartily disagree with Fish's wavering, issue by issue, on First Amendment matters. Hentoff's thesis is that the First Amendment is essential to democracy and that its protection must be given to all people, empowered or unempowered, liberal or conservative, man, woman and child, no matter how popular or unpopular any of their views may seem to someone else. "The First Amendment wasn't drafted to protect bland comments, inoffensive criticism or popular ideas. It was adopted specifically to ensure that controversial speech is not squelched and, in particular, to protect the free discussion of ideas."²⁰ He would agree with Fish that there is a tendency in all of us to censor: "Censorship — throughout the sweet land of liberty — remains the strongest drive in human nature, with sex a weak second. In that respect, men and women, white and of color, liberals and Jesse Helms are brothers and sisters under the same skin."²¹ But, and this is the gist of his book, though we believe in our own First Amendment rights, there is a tendency not to defend the rights of others whose views we oppose (e.g., anti-abortionists vs. free choicers) to speak openly and freely.

The essays in Hentoff's books deliberately work at dispelling the need to censor the hard cases—hate speech on campus, issues of political correctness, pornography, offensive literature for

young people, offensive works of art—all the while championing the absolutist notion that "the Bill of Rights is for *everyone*, even the politically incorrect."²²

He speaks of the tendency of campus administrations to protect the civility of the community over the right to free expression by installing speech bans barring certain people from speaking on campus as well as the desire on the part of many minority students, and women of all colors, who believe that the First Amendment must give way when hate speech is at issue, by saying simply and plainly that everyone, no matter how despicable his or her point of view, is entitled to free expression, however obnoxious and hurtful it may be.²³ Hentoff, who feels that speech bans don't work and serve mainly to make the university administration and minorities feel good "by creating and sustaining true equality on campus by eradication of speech that makes minorities, women and gays feel unwanted,"²⁴ thinks that political correctness — the politically correct intolerance of issues such as racism and sexism — is at the root of this evil.

He argues against Catherine MacKinnon's theory that hate speech and pornography are really Fourteenth Amendment (civil rights) issues rather than First Amendment (civil liberties) issues. The Fourteenth Amendment guarantees everyone equal protection under the law, and most Fourteenth Amendment cases are usually litigated as group rights rather than individual rights that the government must implement. But Hentoff argues that the First Amendment supersedes the Fourteenth. He also argues against the position, held by Fish and MacKinnon, that the unempowered are weaker and deserve more free speech than others and that members of these groups should get a little extra free speech. Hentoff says that in those communities that impose bans so as not to hurt the community, students are really being instructed to see themselves as "fragile victims," and that is not the way they will learn empowerment. It is wrong, he says, to think you can suppress certain kinds of unpopular speech because it does so much harm. The inviolability of the First Amend-

... freedom of speech is itself empowering because it opens young people to all points of view, the open marketplace of ideas.

ment is not to be tried because of it. The First Amendment does not say that freedom of speech is "limited only to ideas and symbols that further freedom, dignity, and nonviolence."²⁵ "If speech is to be free," he says, "there is always a risk that those who would destroy free speech may be sufficiently eloquent to use that constitutional freedom to end it."²⁶ That is a chance we have to take.

Hentoff's book is the only one of the three that discusses issues of censorship and free speech related to children. In his discussion of Mark Twain's *Huckleberry Finn*, a book he has championed for many years, Hentoff uses the argument that freedom of speech is itself empowering because it opens young people to all points of view, the open marketplace of ideas. Hentoff cites very specifically many of the problems caused by the book's 160 instances of the word "nigger," and notes that indeed he understands that blacks believe that the book makes them feel unworthy and that some black children have been taunted by their white classmates because of it. He says that banning the book makes school systems feel that they have done the respectful thing to these kids and their parents. And he says that any and every child should have the right to say he or she is not willing to read the book, telling us that we (as adult teachers and librarians) have to be, above all, sensitive to other people's feelings.

Hentoff says that we need to help children understand the book historically, to help them understand the context in which it was written and what Twain, whom he calls a humanitarian, was trying to say. The meaning of the book, Hentoff says, quoting an article by Russell Baker in the *New York Times*, is that the white adults in the book Huck encounters are all white and disrepu-

table; ironically, the only character of honor is the black man, Jim. We underestimate the capacity of young people to think for themselves and to understand the satire and meaning of the book, he says, and we do not respect young people enough to allow them to talk and think for themselves. If we ban the book, if we restrict the flow of ideas through language, we show we do not trust readers to make up their own minds. We silence debate, the marketplace of ideas, which to Hentoff is the horror of regulating free speech — anyone's free speech. Learning new ideas empowers people.

Hentoff also discusses the inroads that have been made against children's free speech. *Tinker v. Des Moines* (1969) gave young people the right to protest the war in Vietnam by wearing black armbands to school, with the implication that the rights of everyone — even

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the young — were not to be abridged. It also protected their right to free expression in student newspapers with some limitations (e.g., the writing was not to cause substantial disorder in school and there was not to be obscenity). In 1988, however, school authorities were given the right to censor school-sponsored papers. Hentoff also notes the tendency on the part of some librarians to think that a little censorship is okay if some material is offensive or dangerous for children and young people. But, he says,

attempts to control what anybody reads, and therefore thinks, though increasing across the country, is itself dangerous and should be stopped. The right to free speech as outlined in the First Amendment is a given for all citizens no matter what their beliefs, no matter what possible harm their beliefs, as expressed in language, might cause. For free speech to flourish, the good must be allowed with the bad. As Henry Louis Gates, Jr., so concisely put it, "When pluralism decided to let a thousand flowers bloom, we always knew that some of them would be weeds."²⁷

Catherine MacKinnon's thinking on issues of the First Amendment is diametrically opposed to Hentoff's and Gates's. MacKinnon, a law professor at the University of Michigan, argues in her book, *Only Words* that pornography, which she defines as "the graphic, sexually explicit subordination of women through pictures or words,"²⁸ does not fall under the rubric of free speech. Because it is action rather than speech, and therefore a civil rights issue, pornography should be treated and litigated as such.

Her argument is: pornography is not just speech ("only words") that serves as an outlet for male sexual fantasies that should rightly be protected by the First Amendment free speech clause. Rather, it serves as a manual for men who use it to shatter women's civil rights by humiliating and subordinating them. The Fourteenth Amendment, rather than the First Amendment, should be invoked because women's equal rights have been abridged. Pornography should be treated as defamation rather than as an issue of discrimination. It is the ideas in pornography, not the words, that hurt: "Pornography (especially films) is not con-

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stitutionally free speech,"²⁹ she says. Indeed, it is not speech at all. The First Amendment protects pornographers because it says the experience is one of thought. But, she says, the consumers of pornography do not want to think when confronted by pornography. They want to "live it out"; they want to be violent and act violently.

The issue of equality, or lack of it, is at the core of MacKinnon's argument. She says: "What is wrong with pornography is that it hurts women and their equality."³⁰ "The Constitutional doctrine was developed without taking seriously either the problem of social equality or the mandate of substantive legal equality."³¹ Those who lack equality, she says, lack power and need more protection. Some people — the powerful, she argues, as do many others, including Stanley Fish — get more free speech than others and are more legally protected.

As might be expected, MacKinnon detests the reflexive appeal to free speech, saying that when that occurs the government can make no judgment as to content. There are no "false ideas," just "offensive ones" that we cannot silence. The notion that in order to protect free speech we have to take the bad with the good is equally odious and wrong to her. "This approach is adhered to with a fundamentalist zeal even when it serves to protect lies, silence dissent, destroy careers, intrude on associations, and retard change."³²

MacKinnon and Andrea Dworkin have proposed that there be city and state laws that would allow women to sue pornographers, writers, artists, and film makers of pornography, publishers of pornography, and sellers of pornography if they find a piece of literature, a film, magazine, etc., to be offensive and can make the Office of Equal Opportunity believe that they have been maligned. Fines can be levied, material can be removed, and an injunction ("a prior restraint") can be issued forbidding further dissemination of the book, magazine, record, media, etc. Though such a law passed in Indianapolis, it was overturned as a restriction of free speech, although, as MacKinnon argues, it is similar to a law endorsed lately by the Canadians in their newly formulated Charter of Rights and Freedom.

MacKinnon's theories are hotly discussed even among feminists who are unsure about the evidence linking pornography to systematic violence, citing that the data are more anecdotal than proven. The ACLU has opposed the bill

when it has been discussed in various cities and states again on the inadequacy of the data linking pornography with crime and on the grounds that pornography as speech is protected by the First Amendment.

MacKinnon, however, remains adamant that what is needed now is a change in our thinking about First Amendment protection:

We need a new model for freedom of expression in which the free speech position no longer supports social dominance, as it does now; in which free speech does not readily protect the activities of Nazis, Klansmen, and pornographers, while doing nothing for its victims, as it does now; in which defending free speech is not speaking on behalf of a large pile of money in the hands of a small group of people, as it does now. In this new model, principles will be defined in terms of specific experiences, the particularity of history, substantively rather than abstractly. It will notice who is being hurt and never forget who they are. The state will have as great a role in providing relief from injury to equality through speech and in giving access to speech as it now has in disciplining its power to intervene in that speech that manages to get expressed.³³

MacKinnon's argument is compelling because most thinking people find pornography abhorrent. Indeed, pornography, as well as hate speech on college and university campuses, freedom of written and artistic expression that is offensive to both individuals and groups of people, cross burning, and Nazi and Ku Klux Klan marches, are "hard cases," not easily defended.

A glance at some recently collected articles from the *News and Observer* and the *New York Times* does, indeed, give credence to the issue of the use of the First Amendment to say what we please. Some examples

include: a University of Michigan student, jailed on charges of transporting threatening material across state lines because he published a sexually violent piece of fiction about a classmate on the Internet, who invoked the First Amendment, saying "I haven't harmed anyone. I think it is a violation of my First Amendment rights and probably several other rights;"³⁴ the state of Vermont, which voted down a resolution that would ban flag burning because it would "diminish the very freedoms and liberties for which the flag has stood for over 200 years"³⁵ (however, 45 states have urged Congress to pass an amendment on flag desecration); a local artist, who said her First Amendment rights had been abridged when a Raleigh art gallery asked her to remove a piece of art which is said to be "sexually offensive"; a letter to the editor of the *New York Times*, which complained that, in the case of the president of Rutgers University, who had made a careless remark about the ability of black students to do well on college entrance exams because of their genetic hereditary backgrounds, what is at stake is free speech: "The potential link between genetics and intelligence continues to be of public and academic interest, and it ought to be possible for reasonable people to talk about the subject freely, especially in a university setting, without rousing anybody's thought police";³⁶ and a radio station in San Francisco, which invoked its right to broadcast under the First Amendment after changing its format to conservative from liberal (declaring itself "the new voice of the city"), appalling politicians and gay-rights leaders who have been opposing the new

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station, insisting that it goes beyond poor taste and has crossed the line into inciting violence.³⁷

While Nat Hentoff and Henry Louis Gates, Jr. would argue that it is a difficult time for First Amendment purists, and Catherine MacKinnon and probably Stanley Fish would argue that the current First Amendment thinking tends to be absolutist (with exceptions mentioned earlier in this paper), I think Cass Sunstein's statement that "[w]e are in the midst of a dramatic period of new thought about the meaning of free speech in America"³⁸ is most to the point. Critics of our current legal status are persuasive in their notions of group-based harms, such as those described by Catherine MacKinnon in terms of pornography and Stanley Fish in terms of hate speech on campuses. There is a perceived move to get the federal courts and the Supreme Court to take account of group particularity and of the inequality of certain groups. Furthermore, current social theory emphasizes that "expression which distorts or undermines self conception can be a serious social problem."³⁹

Kathryn Abrams, in an article, "Creeping Absolutism and Moral Impoverishment: The Case for Limits on Free Expression," discusses some of the problems of the absolutist tendencies of the First Amendment, noting that this has "contributed to a climate where expression is overprotected, and members of the intellectual community are deterred from thinking systematically about how to reconcile expression with other norms—for example, respect for and recognition of politically marginalized groups."⁴⁰ New thinking about the First Amendment clause indicates a move toward looking at the environmental context in which the speech takes place (e.g., the university or the public schools), focusing on who is the target audience for certain forms of speech, and always looking out for "fighting words." What this does is focus more on the victim and the nature of the harm, which absolutist First Amendment readings disallow. "Such criteria pave the way to a system where a speech interest will be neither an icon nor a ground for moral judgment, but one factor to be placed in the balance with other, socially valued goals."⁴¹ Hard cases, indeed, for librarians, who protect their readers', listeners' and viewers' rights to read, listen and view, to ponder with great care.

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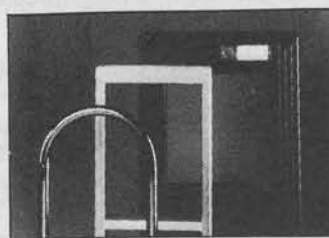
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