

John D. Stevens

**SHAPING THE
FIRST
AMENDMENT**

The Development
of
Free Expression

The SAGE COMMTEXT Series

SHAPING THE FIRST AMENDMENT

The SAGE COMMTEXT Series

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For Gwen

CONTENTS

<i>Acknowledgments</i>	9
<i>Introduction</i>	11
1 The Pragmatic Value of Free Expression	13
Libertarian Theory	14
Social Responsibility Theory	16
Pragmatism of Common Law	17
2 The Free Expression Guarantee	21
The Ancient World	22
The Middle Ages and Renaissance	22
Galileo and Free Inquiry	23
The Printing Press and Prior Restraints	25
English Antecedents	27
The Early American Experience	28
The Zenger Trial	30
The American Revolution	31
Ratifying the Constitution	34
The Sedition Act of 1798	37
3 Wars That Shaped the First Amendment	41
The Civil War	41
World War I and Its Aftermath	44
World War II and Its Aftermath	54
The War in Vietnam	56
4 Ideologues Who Shaped the First Amendment	63
Pacifists	63
The Jehovah's Witnesses	66
Ideologues of the Left	68
Ideologues of the Right	72

5	Editors Who Shaped the First Amendment	77
	Jay Near and His Scandal Sheet	78
	Mark Knops and His Underground Paper	83
	Erwin Knoll and His Magazine	87
6	“Protectors” Who Shaped the First Amendment	93
	Immigration Restrictions	93
	The Red Scare	95
	The Yellow Peril	97
	Special Protections Under Law	100
	Protecting Children from Obscenity	103
	Protecting Children from Violent Content	111
7	Print Technology and the First Amendment	115
	Prior Restraint	115
	Obscenity and Blasphemy	116
	Copyright	118
	Defamation	119
8	Newer Technologies That Shaped the First Amendment	127
	Cameras, Microphones, and Privacy	128
	Cameras in the Courtroom	132
	Regulation of Airwaves	135
	Newer Delivery Systems	141
9	How Do We Preserve Free Expression?	147
	<i>References</i>	151
	<i>Index</i>	155
	<i>About the Author</i>	157

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INTRODUCTION

This book is an impressionistic sketch of trends in the development of First Amendment law and theory. Like a painting by Renoir or Monet, it tries to suggest rather than define. It suggests what free expression has meant in the United States and seeks to provide the reader with a basis for evaluating the continuing controversies that touch on the First Amendment. Like the viewer of an impressionistic painting, each reader must think through the implications in his or her own terms.

Most books on free expression are in a different tradition, one similar to that of painters such as Rembrandt or Wyeth, who insert the most minute details to represent reality. One style is not necessarily better than the other, for each must be evaluated on its own terms.

It is well at the outset to state some of the things this book is not. It is not a comprehensive survey of communication law, nor is it a handbook on how to avoid or defend against libel and privacy suits. It is neither a "case book," with long citations from court decisions, nor is it a legal treatise, with citations to every seminal book or decision.

The book is organized unconventionally. Chapters are not based on traditional divisions, such as broadcast regulation or obscenity; instead, the chapters focus on shared interest or experiences of persons or groups, regardless of what kind of law they sought to enact or under which they were prosecuted. For examples, chapters 4, 5 and 6 are quite unorthodox, focusing on ideologues, editors, and "protectors." These juxtapositions throw some fresh light on important issues.

There is a good bit of history in this book, more than in most books dealing with the First Amendment. For this the author makes no apology, for he firmly believes that the past is prologue.

Ann Arbor, Michigan

John D. Stevens

THE PRAGMATIC VALUE OF FREE EXPRESSION

Free expression is only one among many fundamental values in a free society. When, then, does it deserve a special place in that hierarchy? The answer is found not in ideology but in pragmatism. Without free expression, the other values mean little.

Freedom to write, to speak out, to challenge—these are relatively recent concerns of mankind. For most of their existence on this planet, men and women have been too busy staying alive to worry about the need to express their innermost feelings. Even today, that freedom (even the concern about such freedom) is far from universal.

Since the time of primitive hunting packs, men have organized themselves into hierarchical structures, with all power gathered at the top. The principle has changed little through the centuries, although the societies became larger and more complex. Since in any authoritarian society all wisdom as well as power is at the top, it was logical for the communication systems to develop in one direction only, namely downward to carry decisions to those below who had no part in their formulation. Siebert et al. (1963) found this characteristic in all authoritarian societies, whether headed by monarchs, priests, or military dictators. For the ruler to permit dissent is an admission that he might not have a corner on all wisdom. Even when he asks for advice, he invites trouble.

The privilege of consultation can evolve into a genuine sharing of decision making, as it did in England, where beginning in the fourteenth century, a succession of monarchs conceded powers to Parliament in return for financial support for a long series of wars. When the Stuarts gained the throne, James I brought on a civil war when he tried to reassert the divine right of kings, as he did in this speech before Parliament in 1609:

Kings are justly called gods, for that they exercise a manner or resemblance of divine power upon earth; for if you consider the

attributes to God, you shall see how they agree in the person of a king. . . . They make and unmake their subjects, they have power of raising or casting down, of life and of death, judges over all their subjects and in all causes and yet accountable to none but God only.

While this viewpoint has seldom been stated so nakedly in the modern world, it is implicit in all authoritarian societies. Its direct opposite is libertarianism.

LIBERTARIAN THEORY

At its extreme, libertarianism means no controls on freedom. At its farthest extreme, it is anarchy. While no society has ever tried it to such extremes, it is useful as a theoretical construct. Defining rights as personal and absolute, libertarians recognize that there will be abuses but are willing to pay that price rather than have government set the boundaries. In the case of expression, they argue that to establish permissible limits would ultimately lead to a society unable to decide important questions for itself and thus easy prey for the demagogue.

The argument was given forceful form three centuries ago by John Milton in his *Areopagitica*. He wanted all ideas expressed because only in that way could true ideas win out over false ones. Although we are somewhat less sanguine about that in the light of twentieth-century history, all men want to believe it. It was the stuff of Aesop's fables five centuries before the Bible repeated the assurances about the meek inheriting the earth and about ultimate justice. The literature of all nations assumes some kind of just universe wherein the good are rewarded and the evil punished.

The writer most associated with the reasoning of a free marketplace of ideas is John Stuart Mill. This English philosopher set forth most of the arguments in his 1859 tract, *On Liberty*. The most often quoted sentences read:

If all mankind, minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted on a few persons or on many. But the peculiar evil of silencing the expression of an opinion

is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

Notice that Mill's arguments are rooted in the social value of free expression. He sees expression as one right among many, one that must be balanced against the others.

Few seriously argue that expression must always take precedence over other values. Justice Hugo Black of the Supreme Court of the United States was often called an absolutist, but while he believed the Constitution permitted no limitations on written or spoken materials, he had little sympathy for so-called "symbolic speech." For Black, pickets and demonstrators use mob tactics and do not come under his brand of expression absolutism. On the other hand, Lyle Denniston (1981), a veteran newspaper reporter covering the Supreme Court, has argued for *no* restrictions. He would sooner tolerate the disclosure of defense secrets or the plotting of a political murder rather than have the government decide who could and could not express themselves and in what ways. It is not that Denniston advocates treachery or murder, for certainly he does not. But he argues that a society pays an even higher price if it allows its officials to ban speech, at the same time conceding that his logic could lead to anarchy. By spelling out the extreme implications of this doctrine of absolutism, Denniston serves an important purpose.

Of course, this is not necessarily to agree with him. Political science professor Samuel Krislov (1968) insists that absolutism, like any orthodoxy, can have a "paralyzing effect on thought itself—not just judicial thought, but also that of the general public." Absolutism promises more than it or any other ideology can deliver, namely "untrammelled discussion unfettered by time and circumstance." In the real world, judges are called upon to interpret any doctrine, and judges, both by temperament and training, are pragmatists. They are interested in what works far more than they are in ideological consistency. In philosophy, the term "pragmatism" is applied to the formulations of William James and others at the turn of the century, but its spirit is much older. It measures the truth of a proposition by its practical outcome. Truth is therefore a relative matter, subject to constant redefinition.

This book is firmly rooted in free expression as a pragmatic concept, not a theoretical one, however appealing the latter may seem.

SOCIAL RESPONSIBILITY THEORY

The pragmatic view is inherent in the construct we call social responsibility. Unlike libertarian, absolutist, or authoritarian theory, this one sees free expression as a never-ending process, a search rather than a conclusion.

The theory emerged from deliberations of the Commission on Freedom of the Press in the years right after World War II. A panel of distinguished citizens spent many months evaluating the mass media of the United States. The final report of the nongovernmental body headed by Robert Maynard Hutchins, then chancellor of the University of Chicago, contains ideas that are as fresh today as they were in 1947. Their conclusions, although obviously reached within the American setting, are worth consideration by the citizens and governments of all free societies.

As one would expect, given the American situation, the commission favored private control of the media; however, it insisted that the managers either act responsibly or face the likelihood that they would be forced to do so through laws. Clean up your own acts, it said, or the government has not only a right but an obligation to do it for you. In its summary report (1947), the commission wrote:

Freedom of the press means freedom from and freedom for. The press must be free from the menace of external compulsions from whatever source. To demand that it be free from pressures which might warp its utterance would be to demand that society should be empty of contending forces and beliefs. But persisting and distorting pressures—financial, popular, clerical, institutional—must be known and counterbalanced. The press must, if it is to be wholly free, know and overcome any biases incident to its own economic position, its concentration, and its pyramidal organization. The press must be free for the development of its own conceptions of service and achievement. It must be free for making its contribution to the maintenance and development of a free society. This implies that the press must also be accountable. It must be accountable to society for meeting the public need and for maintaining the rights of citizens