FREE SPEECH

RESPONSIBLE COMMUNICATION UNDER LAW

Robert M. O'Neil

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ROBERT M. O'NEIL

The Law School,
University of California, Berkeley

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Editor's foreword

The principal purpose of this volume of the Bobbs-Merrill Series in Speech Communication is to marshal those legal materials and principles that may be most useful to the public speaker. In part, discussion is focused on what the spokesman may not legally do, or when and to what extent he may be liable under the law for abuses of his constitutional rights of free speech, assembly, and petition. Considerable attention is given, however, to what the speaker may do and to what the law helps him to do in the realization of his goals of effective communication. From a consideration of this role of the law, as both deterrent and protector of the speaker's efforts, a better understanding of the pervasiveness of legal regulation of speech communication may emerge.

Two aspects or instances of interaction between speech communication and the law are selected for special treatment in this volume. They are freedom of speech on the college campus, which is treated in chapter one, dealing with problems of academic freedom, student rights of free expression, and the rights and responsibilities of the off-campus speaker who seeks a campus forum; and the legal regulation of communication by radio and television. Particular attention is given to the increasingly complex problems of political broadcasting, in terms of governmental regulation of political access to the radio-television channels, and of possible liabilities growing out of abusive political broadcasts.

The remainder of the book is of a more conventional, although

similarly important, nature, dealing with traditional "free speech" topics—legal restrictions of the content of speech communication, including such content-oriented headings as "clear and present danger," "fighting words," "obscenity," and "group libel." Attention is given also to the legal regulation of the time, place, and manner of speech communication, including the reasons why society demands some careful regulation of time, place, and manner, and the various methods and devices that have been employed to serve those interests.

The last two chapters concern matters of great importance to the communicator—legal liabilities he may incur through the law of defamation (herein the distinction between libel and slander), the law of invasion of privacy, and the developing remedy for infliction of mental distress. The final chapter then deals with the subject of legal protection of the speaker's work—chiefly through the important, but often neglected, law of copyright, but also through the recent, and still unsettled, law of protection of ideas beyond the copyright law. These two chapters round out a consideration of the speaker's rights and liabilities under law.

Russel R. Windes

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ONE

Free speech on the college campus

Most Americans in the middle of the twentieth century simply take freedom of speech for granted. They know that the federal Constitution forbids the passage of any law "abridging the freedom of speech or of the press." Most state constitutions contain similar guarantees of free expression. In recent years, too, the courts have been increasingly ready to protect individual rights under these constitutional guarantees. But it has not always been so; nor is it so in many other parts of the world even today. Suppression of the right to speak and to print is not something of which any nation should be particularly proud, but it is an inescapable part of our national history. One has only to recall the crisis over the Alien and Sedition Acts at the close of the eighteenth century, or the suppression of debate over the abolition controversy in the 1840's, or the prosecution of political "radicals" after World War I to realize that the First Amendment has had to weather rough storms to reach the calm of our own day. Even more recently, Congressional investigations have singled out for harsh treatment, if not persecution, those who held unorthodox or "un-American" political views. Yet the First Amendment has not only survived these crisis periods, but has consistently emerged a more effective and tougher guarantor of free expression than before each such crisis occurred.

The survival of free speech owes a heavy debt to the various civil-liberties groups that have fought the legal and political battles in

its behalf. Unfortunately, those who are singled out for persecution or harassment because of their opinions are often least able to protect themselves against a legal onslaught or even to rally political support. For this reason, their defense often must come from such groups as the American Civil Liberties Union, the American Association of University Professors, the American Library Association, local and state bar associations interested in civil liberties, and from other less formal, but equally committed groups.

Not all of those who fight the battles of free expression, of course, are what we would call "liberals." Take, for example, the United States Supreme Court decision in 1931 that did more than any other to ensure respect by state as well as federal government for the freedom of the press.[1] The case arose in Minneapolis and involved a small newspaper, basically a "scandal sheet," whose editors bitterly attacked a number of state and local officials. Much of the attack involved off-color jokes and virulent anti-Semitism (for the paper charged among other things that the city had fallen under the evil spell of a clique of Jewish gangsters). Yet, despite the unattractive way in which the criticism was presented, it was apparently part of a sincere political crusade. Thus, when the local officials tried to put the paper out of business (by getting a court injunction against further publication), they stirred up a hornets' nest and raised an extremely serious issue of "freedom of the press." Of course, the publishers of the small weekly were not in a position to take their case all the way to the United States Supreme Court, where it would have to go before the injunction could be set aside on constitutional free-press grounds. At this point, however, Col. Robert R. McCormick, publisher of the **Chicago Tribune** and one of the country's most conservative Republican newspapermen, took an interest in the case. He and several other wealthy publishers financed the appeal, and

[1]**Near v. Minnesota,** 283 U.S. 697 (1931). (The first name that appears in the citation, "Near" in this instance, is that of the party appealing to the Supreme Court. The other name, here the state of Minnesota, is that of the party that prevailed in the lower court and is defending the judgment in the Supreme Court. Thus, while the case in the Minnesota courts was listed as **State v. Near,** the order of the parties is reversed when it gets to the United States Supreme Court. "U.S." denotes the United States Reports, the official reports containing all decisions of the United States Supreme Court from 1791 to the present. The first number, 283, is that of the volume in which the opinion appears. The second number, 697, is the page on which the opinion of the court begins. The United States Reports have now reached about volume 385, with approximately four new volumes added each term of the court.)

McCormick's highly professional Chicago lawyer argued and won the case in the Supreme Court. Thus a conservative—some would say even "reactionary"—publisher won what is probably the most important free-press case of the century by defending the right to print an anti-Semitic hate sheet.

So it has been with other aspects of the developing law of free speech and free press. The people whose rights are involved are sometimes not admirable—Communists, fascists, religious fanatics, hate-mongers, and panderers to atrocious taste. Yet these cases are the very ones in which the issues of free expression are most sharply etched and likely to be most bitterly fought. Two members of the United States Supreme Court have recently defended this principle. Justice Douglas points out that "we are not entitled to make exceptions merely because we do not like the particular person or the ideas he represents."[2] Justice Brennan adds: "If we are unwilling to recognize these rights in the hard case—we have no assurance whatever that they will still be available in the easy case."[3] In the course of our study of free expression, we will encounter a good many people—heroes of the fight, in fact—that few of us would like to have in our living rooms or perhaps even in our college classes. But we have to keep in mind that without their eccentricities and their perseverance, there would be far less latitude today for the expression of more conventional opinions.

Having said this much, we must then ask, "So what?" How, after all, does free speech matter to the study of speech communication? If there is freedom on the campus, as there is in most institutions, to say almost anything that students want to say and to hear, why worry about freedom of speech? The answers are in part historical, in part practical, in part philosophical. The college campus has always been looked upon—perhaps less in the United States than in other parts of the world—as the spawning ground of revolution and radical protest. Students have always been a good deal more active politically and are likely to be more liberal on most questions than the adult, nonstudent community. Students are anxious to learn,

[2]William O. Douglas, **A Living Bill of Rights** (New York: Anti-Defamation League of B'nai B'rith, 1961), p. 62. © 1961 by the Anti-Defamation League of B'nai B'rith. Reprinted with permission.

[3]William J. Brennan, Jr., **Teaching the Bill of Rights,** An Address to the National Council for the Social Studies, Philadelphia, Pennsylvania, November 24, 1962, p. 8.

and to experiment, with respect to unusual ideas and movements. Such experiences provide a vital part of the total educational process in the modern college or university. As Sidney Hook, the distinguished philosopher, has recently written:

> The genuine issue is the educational one. It is on educational, not political, grounds that a valid case can be made for permitting recognized student organizations to invite speakers of their choice to the campus to discuss any topic, no matter how controversial. The educational process cannot and should not be confined merely to the classroom. Students should be encouraged to pursue their educational interests on their own initiative, and contemporary issues which convulse society are legitimate subjects of inquiry.[4]

Perhaps most prominent among the "issues that convulse society" that have aroused controversy on the campus in the 1960's has been the civil-rights question. The introduction of this issue to the campus has made college administrators throughout the country increasingly aware of the breadth of the college's educational responsibilities.

The heavy recent emphasis upon freedom for student political activities may have overshadowed the traditional concern for academic freedom—the freedom of teachers to speak and write their views about controversial questions both within and outside their professional fields. Indeed, three kinds of problems raise serious questions of freedom of expression on the campus: first, there is the traditional academic freedom of the college professor; second, the freedom of students to engage in political activities of all sorts and to express their views in print, both on and off the campus; third, the problem of bringing unpopular or even "subversive" outside speakers onto the campus to address the students.

We shall begin by examining some case studies illustrating the hardest problems in each of these three areas. We shall then consider the range of issues—both of law and of policy—that confront students, faculty, and administration in balancing the desire of all groups for maximum effective expression against the equally important need to preserve and protect an atmosphere conducive to learning and scholarship. Freedom of speech on the college campus may

[4]Sidney Hook, "Academic Freedom and the Rights of Students." Published in the New York **Times** as "Freedom to Learn and Not to Riot," January 3, 1965, Sec. VI, p. 16. © 1965 by The New York Times Company. Reprinted with permission.

thus provide a microcosm of free speech in our democratic society, of which the campus is an increasingly important part. If we can understand the issues in this rather familiar environment, they may be less formidable when we analyze them in the larger community.

Free expression on the campus: some cases and controversies

Academic freedom for the teacher. The history of American higher education includes some shocking cases of infringement of academic freedom. During the nineteenth century and even early into the twentieth, professors were summarily discharged because they dared to teach about evolution. After the election of 1896, some faculty members were dismissed simply because they had voted for William Jennings Bryan, the Democratic candidate for President. Four years later, a Stanford professor was released because he had openly advocated free silver and thus roused the hostility of some university authorities. In 1948 one faculty member of a small college was fired for holding "ultraliberal" views; the sympathy of the rest of the faculty resulted in the eventual resignation of more than half their number. Even down to the present, there have been alarming cases in which college professors have been discharged for engaging in political activity, for writing controversial letters to local newspapers, for refusing to cooperate with legislative investigating committees, and so on.[5] But there are fewer and fewer outrageous cases of infringement of academic freedom. And even when extreme charges are made against faculty members, many more institutions today provide some form of hearing before the discharge can take effect. There may not be a full hearing, or even a fair hearing, but any hearing is at least better than summary discharge without notice or the giving of reasons.

For all the progress that has been made, however, serious threats to academic freedom undoubtedly remain, and we should examine some of them here. Recently, the University of Illinois witnessed two faculty freedom cases that provide an interesting contrast. The first involved an assistant professor of biology who had been appointed for three consecutive two-year contracts. During the last of these terms, in March 1960, the student newspaper printed a letter he had

[5]See Daniel H. Pollitt, "Statutory Comment: Campus Censorship," 42 **North Carolina Law Review,** 179–180 (1963).

written to the editor, in which he gave the impression that he was advocating or encouraging premarital intercourse among students. The letter brought strong protest from the community and from parents of students, who demanded the ouster of the professor. The president of the university thereupon suspended him for "conduct seriously prejudicial to the University." But the faculty committee on academic freedom recommended that he be reinstated and given only a reprimand for his letter. The case then went to the board of trustees, which held a full hearing at which the professor was represented by counsel. The trustees finally recommended that he be discharged as of August 1960, a year before the termination of his contract term.[6] The professor took the case to court, seeking either reinstatement or the rest of his salary, but the court denied him both.[7] It should be pointed out, as the court stressed, that this was a case of a **nontenure** faculty member, whose legal rights were obviously less secure than those of his tenured colleagues.

Two years later the University of Illinois faced another controversial faculty case. This one involved Classics Professor Revilo P. Oliver, an extreme conservative, who had suggested in an article in a John Birch Society publication that President Kennedy might have been assassinated by Communists in or around the government because he was about to "turn American." This time, before taking any action, the president of the university sought the advice of the faculty academic-freedom committee. The board of trustees, in turn, accepted the committee's recommendation that the professor not be discharged. The trustees issued a statement strongly deploring Oli-

[6]See M. M. Chambers, **The Colleges and the Courts Since 1950** (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1964), pp. 80–81.

[7]**Koch v. Board of Trustees of University of Illinois,** 39 Ill. App. 2d 51, 187 N.E. 2d 340 (1962). (The decision of a state appellate or supreme court is usually cited to two sets of reports. The Koch case, for example, will be found in the official state reports, on page 51 of volume 39 of the second series of Illinois Appellate Reports; this series contains only decisions of the Illinois intermediate appellate courts. Decisions of the Illinois Supreme Court are found in the Illinois Reports, second series, which are abbreviated "Ill. 2d." A report of the Koch Case will also be found in an unofficial volume, part of the West Publishing Company's regional-reporter series, which covers the entire country. Specifically, one would look on page 34 of volume 187 of the Northeastern Reports, second series. The Northeastern Reports also contain decisions of the appellate courts of Massachusetts, Indiana, New York, and Ohio. The rest of the country is covered in six other series of unofficial regional reports—Atlantic, Southeastern, Southwestern, Southern, Northwestern, and Pacific. Thus the decisions of most state supreme courts can be found in two places, and for that reason two parallel citations are usually given.)

ver's views but defending his right to express them in public. Thus, in light of the two cases, academic freedom at this state university may be said to have made notable progress. Perhaps this progress resulted largely from the severe criticism of educators and professional groups and from some segments of the press concerning the first case.[8]

A similar issue troubled the University of Minnesota campus in 1963. Political Science Professor Mulford Q. Sibley wrote a letter to the student newspaper, suggesting that the campus ought to have "one or two Communist professors, a student Communist Club, a chapter of the American Association for the Advancement of Atheism, a Society for the Promotion of Free Love, a League for the Overthrow of Government by Jeffersonian Violence, an anti-automation league, and perhaps a nudist club. No university should be without individuals and groups like these." Whether Sibley meant the suggestion seriously, much of the campus and community took it that way. The letter aroused the ire of various citizens' groups such as the American Legion, which demanded Sibley's ouster. Although the university's board of regents, with the concurrence of the governor and lieutenant governor, issued an unequivocal statement in defense of academic freedom, the Minnesota legislature voted to undertake an investigation of the university in response to the Sibley episode.[9]

Quite conventional political activities by faculty members have sometimes gotten them into trouble with the university. For example, a ten-month interim associate professor of law at the University of Florida in 1959–1960 announced his intention to campaign for an elective judgeship. The Florida Board of Control, which governs the university, had adopted a rule prohibiting any employees of the university from seeking any political office. In February 1960, shortly after the professor's announcement of his political plans, he received an official warning that his candidacy would terminate his contract. He nonetheless went ahead with his plans, and the president of the university dismissed him immediately after the filing of his election papers. A faculty committee voted to uphold the president's action, on the ground that the rule was a reasonable one and

[8]See "Academic Freedom and Tenure: The University of Illinois," **Bulletin of the American Association of University Professors,** March 1963, pp. 25–43.
[9]See Speech Association of America Committee on Freedom of Speech, **Freedom of Speech Newsletter,** No. 5 (April 1964), p. 4.

had clearly been violated. The board of control gave the professor a hearing, in accordance with its rules, but refused to disturb the president's order.[10] The professor then brought suit against the board of control, seeking reinstatement on the ground that the rule was an unconstitutional invasion of his rights of expression if not an abridgment of academic freedom. But the court had little difficulty in sustaining the university's action.[11]

Not all the hard cases result, of course, in decisions adverse to academic freedom. We have already considered the Oliver case at the University of Illinois, which marked an important victory for faculty free expression. Other recent cases have had equally liberal results. For example, the future contract of a man just hired by a Nebraska state teachers college was canceled in 1962, because, while still teaching in Ohio, he had provided a back-yard forum for a speaker attacking the House un-American Activities Committee who had been denied a chance to speak on the Ohio State University campus. The American Civil Liberties Union and the American Association of University Professors vigorously protested the Nebraska State Board of Education's action. That action was not reversed; but Ohio State University, meanwhile, determined to invite the professor to stay on for another year, despite the incident.[12]

Perhaps the most prominent academic freedom issue of recent years involved a visiting lecturer at the University of New Hampshire, one Paul Sweezy. Sweezy styled himself a "classical Marxist" and "socialist." In March 1954 he had delivered a lecture to about one hundred University of New Hampshire students at the invitation of a regular member of the faculty. When summoned to testify before New Hampshire's attorney general, Sweezy refused to answer any questions (e.g., "Did you express the opinion, or did you make the statement at that time, that Socialism was inevitable in America?") about what he had told the class in that lecture. On the basis of these refusals, a state court found Sweezy to be in contempt and committed him to jail.[13] But the United States Supreme Court re-

[10]See Chambers, pp. 83–84.
[11]**Jones v. Board of Control,** 131 So. 2d 713 (Fla. 1961).
[12]See American Civil Liberties Union, 42d Annual Report, **Freedom Through Dissent** (New York: Oceana Publications, Inc., 1962), pp. 16–17.
[13]**Wyman v. Sweezy,** 100 N.H. 103, 121 A. 2d 783 (1956).

versed the conviction by a 7–2 decision. Chief Justice Earl Warren, who wrote the opinion for the court, gave bold and valuable recognition to the constitutional status of academic freedom:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[14]

One other rocky battleground of academic freedom that should be mentioned involves the attempts to guarantee the loyalty of faculty members. In the early 1950's the University of California and several other major institutions were severely shaken by loyalty oath controversies. A number of faculty members refused to sign such oaths—requiring them to swear, for example, that they had not belonged to, and did not then belong to, any organizations that advocated the forcible or unlawful overthrow of the government—not because they were in fact disloyal, but simply because of conscience and principle. A number of these cases came to the courts, and the results were divided. The Supreme Court of California sustained a form of oath that required affirmation not only of past and present loyalty, but also exacted a pledge that:

> . . . during such time as I am a member or employee of the [University] . . . I will not advocate nor become a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means.[15]

On the other hand, at about the same time, the United States Supreme Court struck down a rather similar form of oath in a case

[14] **Sweezy v. New Hampshire,** 354 U.S. 234, 250 (1957).
[15] **Pockman v. Leonard,** 39 Cal. 2d 676, 249 P. 2d 267 (1952).

coming from Oklahoma. The court reasoned that this oath could be used to punish innocent or unknowing membership in a subversive organization. The court concluded:

> [U]nder the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether the association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. . . . Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power.[16]

Since the Wieman decision, the Supreme Court has sustained some types of loyalty oaths and struck down others. A recent case of this kind involved a loyalty oath required of faculty members at the University of Washington. The oath required a faculty member to swear, among other things, that he was not "a subversive person" as defined in the state laws, and that he was not a member of the Communist party or "knowingly of any other subversive organization." Despite the presence of the requirement of knowledge in the clause last quoted—the ingredient fatally lacking in the Oklahoma oath—the Supreme Court in 1964 held this oath form unconstitutional because it was so vague that no one taking it could be expected to know what risks he might incur by swearing that he was not a "subversive person." "Is it subversive activity," asked the court, "to attend and participate in international conventions of mathematicians and exchange views with scholars from Communist countries?" The court concluded, after weighing the uncertainties of the oath:

> Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.[17]

Another approach to the loyalty problem has been to summon faculty members before investigating bodies and to ask questions bearing upon their political associations or advocacy. Occasionally, teachers who have refused to respond to such questions, either on

[16] **Wieman v. Updegraff,** 344 U.S. 183, 191 (1952).
[17] **Baggett v. Bullitt,** 377 U.S. 360, 372 (1964).