

## Freedom of Speech – Unlimited??

### Purpose:

This lesson is designed to help students identify for themselves when the freedom of speech should be limited. One of the most difficult but important questions the public faces is: If freedom is not absolute, then what circumstances justify a limitation? The lesson introduces standards that have been used in answering this question. Students then evaluate numerous instances and apply such standards, deciding specifically the beneficial or harmful consequences of the particular speech in question. Finally, students determine what values underlie the perceived need to limit speech, uncovering and discussion conflicts between freedom of speech and other values. After this lesson students will recognize that the freedom of speech is not absolute.

### Procedure:

1. Review the benefits of freedom of speech in a democracy. Point out that the First Amendment says, "Congress shall make no law...abridging the freedom of speech." That sounds very straightforward and simple. Ask students to imagine, however, this scene:

You are at a rival school across town for a game one evening. Suddenly you find yourself alone, surrounded by angry, taunting students from the other school. The crowd shouts, "You'll never get home tonight alive! You're gonna pay for being here!" Even though no one has touched you, you fear for your life. You haven't been hurt...yet. Does the crowd have the constitutional right to threaten you?

Use student discussion as a springboard for the idea that society and the courts have agreed upon limits to free speech. In the example, the hecklers are causing a dangerous situation that could easily get out of hand. At a minimum, they are causing great distress to the surrounded student.

2. Distribute the handout *Limits on Freedom of Speech*. Review the limits listed.

3. Divide students into six groups and give each group one of the case studies at the end of this lesson. Have students read the case study assigned to their group. Ask them to discuss the case and answer the questions using the *Limits...* handout. (You could use an alternate activity for this lesson. Distribute the handout *Free Speech?* Have students work in pairs to decide if the speech would be protected or not, and if not, what harm would occur and what would be the conflicting value. For answers to the handout, see step number 7.)

4. When students have finished, have a spokesperson from each group explain what the group decided and why. Ask the spokesperson if anyone in the group disagreed with the other group members. Have that person share why he/she disagreed.
5. The following notes are for your use to debrief the activity.
  - **Case 1** – This case, which involved the National Socialist Party of America and the Village of Skokie (a suburb of Chicago), generated rulings in both Illinois state and federal courts. The Illinois Supreme Court, by a 6 to 1 margin (1977), held that displaying swastikas was a form of symbolic speech protected by the First Amendment. The court further held that the “fighting words” doctrine developed by the Supreme Court did not permit “prior restraint” of the Nazis’ speech. Such prior restraint to prevent violence, which the court admitted was a possibility, amounted to a “heckler’s veto.” A month later, a federal district judge ruled that Skokie’s ordinances were unconstitutional, holding that not only did the ordinances censor certain kinds of speech, they provided censorship on the basis of what might be said, rather than what was actually said. The judge said, “The ability of American society to tolerate the advocacy even of the hateful doctrines espoused by the plaintiffs without abandoning its commitment to freedom of speech and assembly is perhaps the best protection we have against the establishment of any Nazi-type regime in this country.” This decision was upheld by the court of appeals. The Supreme Court refused to hear the case.
  - **Case 2** – In the case of the *United States v. O’Brien* (1968), The Supreme Court ruled 8 to 1 against the protesters. The court held that Congress had the authority to raise armies and could therefore require that draft cards be handled in particular ways. The military purposes of the draft law outweighed O’Brien’s right to expression through symbolic speech (i.e., burning his draft card).
  - **Case 3** – The case, *Rankin v. McPherson* (1987), arose after an attempt on President Reagan’s life in 1981. The Supreme Court ruled that the statement made by McPherson was not actually a threat on the president’s life. Further, simply making the remark did not show that McPherson was unfit for her job or interfering with the conduct of the sheriff’s office.
  - **Case 4** – In this case, *Pruneyard Shopping Center v. Robins* (1980), the Court ruled that Robins’ manner of speech was orderly and the activity was conducted in the common public area of the mall. Thus, the time, place and manner test was not violated and the speech was protected.
  - **Case 5** – In this case, *Sable Communications of California v. FCC and Thornburgh* (1989), the Supreme Court said that the government could ban “obscene” communications but not “indecent” communications. While the Supreme Court agreed that preventing children from hearing indecent messages was a valid goal, it did not think this goal justified making indecent communication illegal. The confusion arising from this (and other)

cases is that the Court did not define "indecent," making it difficult to differentiate between obscene and indecent messages.

- **Case 6** – The Court ruled in *McIntyre v. Ohio Elections Commission* (1995), that Ohio's ban on anonymous campaign literature was too broad to achieve the purpose that it was intended to achieve – protecting voters and candidates from false, misleading or libelous statements. While such a state interest might be compelling, the remedy used by the state was too broad. The Court stated, "Anonymous pamphleteering is... an honorable tradition of advocacy and of dissent" and held that McIntyre's speech was protected.

6. Conclude by pointing out how hard it sometimes is to decide on issues involving freedom of speech with such other values as national security.

7. If you use the handout, *Free Speech?*, here are the answers.

Yes, protected: 1, 2, 5, 6, 8, 10, 11, 15, 16, 17

No, not protected:

- 3 Defamation of neighbor's name (libel). Conflict: right to personal safety
- 4 Murder (a crime), death of the mayor. Conflict: right to personal safety
- 7 Construction and use of nuclear weapons. Conflict: national security
- 9 Panic might set in, leading to death, injury, rioting. Conflict: public safety, domestic tranquility
- 12 Denial of fair trial. Conflict: justice
- 13 Loss of store's ability to stay in business and customers to buy. Conflict: freedom of the marketplace
- 14 Murderer might go unpunished without truthful testimony. Conflict: justice
- 18 Rebellion against the government (sedition). Conflict: national security
- 19 Ill health, waste buyer's money. Conflict: health and safety of public
- 20 Offending viewers (by definition of obscenity). Conflict: public decency standards

### **Enrichment/Extension:**

1. To help students understand that freedom of speech is very much a contemporary issue, have them scan the newspaper for one week and see how many articles regarding freedom of speech issues they can find. Each article could be clipped and glued to a piece of paper. Beneath the article, students could indicate whether the speech issue would be protected in their opinion.

2. Students interested in creative writing might develop scenarios describing what life would be like without freedom of speech. What kind of government would be possible without freedom of speech?

3. Students could be assigned to search the Internet for current freedom of speech cases and then report on them. A good place to begin is <http://www.oyez.org>.

## Limits on Free Speech

*Does the First Amendment mean anybody can say anything at any time? The Supreme Court has rejected such a strict interpretation.*

*Because the amendment has such strong language, we do start with the presumption that any given speech is protected. The courts must decide whether another public interest – for example national security, justice, personal safety or freedom of religion – overrides freedom of speech. There are no simple rules for doing this, but there are some general tests that help.*

### **Clear and Present Danger**

Will this act of speech create a dangerous situation? The First Amendment does not protect statements that are uttered to provoke violence or cause panic.

### **Fighting Words**

Was something said to deliberately injure someone or incite a fight? Language that provokes a fight can be punished.

### **Libel and Slander**

Was the statement false, or put in a context that makes true statement misleading? You do not have a constitutional right to tell lies.

### **Obscenity**

This three-part test has three questions:

1. Would the average person in the local community viewing the work as a whole find it to be obscene?
2. Does the work depict or describe sexual conduct in an offensive way?
3. Does the work lack serious literary, artistic, political or scientific value?

The Supreme Court has also ruled that “higher standards” can be established to protect children from exposure to obscene material.

### **Conflict with Other Legitimate Social or Governmental Interests**

Does the speech conflict with other compelling interests? For example, in times of war, there may be reasons to restrict First Amendment rights because of conflicts with national security.

### **Time, Place and Manner**

Did the expression occur at a time or place that is inappropriate or illegal? Did the speaker use methods or communicating the idea that were inappropriate?

## Case 1

A group of Nazis decided to hold a demonstration in a city with a large number of Jewish residents, many who were Holocaust survivors. The Nazis wanted to display the swastika, a symbol of Nazi beliefs and the Holocaust itself. The citizens of the city were not only deeply offended by the Nazis' beliefs but also feared that violence would result if the Nazis were allowed to parade through their streets with the swastika.

The city government passed several ordinances regulating public demonstrations. These ordinances required the organizers of any parade or assembly that involves more than 50 persons to obtain insurance coverage. The ordinances also gave the city council the authority to deny a permit for a demonstration if that demonstration might result in disorder. The council also banned demonstrations by members of groups wearing military-style uniforms, as well as all demonstrations that "incite violence, hatred, abuse or hostility toward a person or group of persons by reasons or reference to religious, racial, ethnic, nation or religious affiliation."

The Nazis then sued, declaring the ordinances unconstitutionally interfered with their rights to free speech.

- Is this speech protected?
- If not, what harm would occur as a result of the speech?
- What value or right is conflicting with free speech in this case?

## Case 2

In 1966 four friends burned their draft cards on the steps of the South Boston Courthouse to protest the Vietnam War. After the cards were burned, a crowd that had been watching attacked the four young men. An FBI agent in the crowd took the men into the courthouse, where they were arrested and charged with violating a law that made it illegal to destroy or mutilate a draft card. The protestors said that this law unconstitutionally denied them freedom of speech.

- Is this speech protected?
- If not, what harm would occur as a result of the speech?
- What value or right is conflicting with free speech in this case?

### **Case 3**

After a gunman wounded a public official, a woman remarked to a friend "If they try again, I hope they get him." She was fired from her job as a computer operator in the sheriff's department because someone overheard the comment. The woman sued, saying that her dismissal violated her right to free speech. Her employer argued that the woman's comment was disruptive of the work environment in a law enforcement office, as well as being a threat to a public official.

- Is this speech protected?
- If not, what harm would occur as a result of the speech?
- What value or right is conflicting with free speech in this case?

### **Case 4**

Mike Robins and a group of his classmates went to their local shopping mall to peaceably protest a United Nations resolution they believed to be anti-Semitic (against Jews). They passed out pamphlets and asked shoppers to sign a petition. Security guards at the mall asked them to leave and they did.

Robins and his friends then sued the shopping mall, claiming that their First Amendment rights had been violated. The shopping mall responded that free expression could be restricted at the mall because it was private property and the actions of the protesters interfered with people shopping and therefore with the merchants' ability to make a living.

- Is this speech protected?
- If not, what harm would occur as a result of the speech?
- What value or right is conflicting with free speech in this case?

## Case 5

The federal government passed a law making it illegal to offer commercial, interstate services that involved "obscene" or "indecent" telephone communications. The law was aimed at "dial-a-porn" services. These services provide a taped, sexually explicit message that is activated when customers dial a phone number. Customers are charged for the call. One company sued, claiming that the law was unconstitutional under the First Amendment.

- Is this speech protected?
- If not, what harm would occur as a result of the speech?
- What value or right is conflicting with free speech in this case?

## Case 6

On April 27, 1988, Margaret McIntyre passed out flyers outside a school where a public meeting was being held to discuss an increase in school taxes. McIntyre's flyers urged people not to vote on the tax increase. The flyer was signed "Concerned Parents and Taxpayers" but did not give a person's name or address.

A school official complained, and McIntyre was charged with violating an Ohio state law against distributing anonymous literature about election issues. The law required that the name and address of a person or organization be printed on all campaigning pamphlets, flyers, brochures, etc. The law was to protect candidates and voters from anonymous libelous or false information that might unfairly influence the results of an election. However, it applied to all anonymous literature, even if it was not libelous or obviously false.

- Is this speech protected?
- If not, what harm would occur as a result of the speech?
- What value or right is conflicting with free speech in this case?



# Free Speech?

For each of the situations, decide if the speech is protected. If not, explain and give the conflicting value.

*Values: justice, domestic tranquility, national security, health and public safety, public decency standards, right to personal safety, freedom of the marketplace*

Examples:

	Yes	No
A. Shouting "Fire" in a crowded concert when there is no fire. If not, explain harm: <u>Concert goers could be injured or killed trying to escape.</u> If not, name conflicting value: <u>public safety</u>	___	<u>X</u>
B. Yelling at another driver who smashed your car. If not, explain harm: _____  If not, name conflicting value: _____	<u>X</u>	___
1. Campaigning for anti-democratic candidates. If not, explain harm: _____  If not, name conflicting value: _____	___	___
2. Preaching hellfire and damnation sermons on a street corner. If not, explain harm: _____  If not, name conflicting value: _____	___	___
3. Passing out letters falsely calling your neighbor a thieving, lying, tax cheater. If not, explain harm: _____  If not, name conflicting value: _____	___	___
4. Asking a friend to kill the mayor, a corrupt politician. If not, explain harm: _____  If not, name conflicting value: _____	___	___
5. Publicly denouncing the photographs in an art show and sharply criticizing the artist as talentless. If not, explain harm: _____  If not, name conflicting value: _____	___	___
6. Advertising cigarettes and alcohol, known to be harmful to public health. If not, explain harm: _____  If not, name conflicting value: _____	___	___

- |  | Yes | No  |
|--|-----|-----|
| 7. Describing in detail how to make an atomic bomb.<br>If not, explain harm: _____<br><br>If not, name conflicting value: _____  | ___ | ___ |
| 8. Telling a crowd to burn copies of the Bill of Rights.<br>If not, explain harm: _____<br><br>If not, name conflicting value: _____   | ___ | ___ |
| 9. Broadcasting on TV an untrue news story that Iran just attacked Israel with nuclear weapons.<br>If not, explain harm: _____<br><br>If not, name conflicting value: _____      | ___ | ___ |
| 10. Calling a candidate a "stupid, worthless wimp."<br>If not, explain harm: _____<br><br>If not, name conflicting value: _____  | ___ | ___ |
| 11. Revealing that a Senator is in treatment for drug addiction.<br>If not, explain harm: _____<br><br>If not, name conflicting value: _____                                     | ___ | ___ |
| 12. Interrupting a trial by demonstrating loudly in the courtroom.<br>If not, explain harm: _____<br><br>If not, name conflicting value: _____                                   | ___ | ___ |
| 13. Picketing at a fur store by shouting, passing out leaflets and blocking customers from entering.<br>If not, explain harm: _____<br><br>If not, name conflicting value: _____ | ___ | ___ |
| 14. Lying under oath as a witness in a murder trial because you fear for your life.<br>If not, explain harm: _____<br><br>If not, name conflicting value: _____                  | ___ | ___ |
| 15. Trying to sell your car that is worth \$500 for \$1,500.<br>If not, explain harm: _____<br><br>If not, name conflicting value: _____   | ___ | ___ |

- |   | Yes | No  |
|---|-----|-----|
| 16. Organizing a demonstration at the State Capitol in support of legalizing marijuana.<br>If not, explain harm: _____<br><br>If not, name conflicting value: _____ | ___ | ___ |
| 17. Advocating the creation of a separate nation for African-Americans.<br>If not, explain harm: _____<br><br>If not, name conflicting value: _____                 | ___ | ___ |
| 18. Calling for revolution by the violent overthrow of the government.<br>If not, explain harm: _____<br><br>If not, name conflicting value: _____                  | ___ | ___ |
| 19. Advertising a "miracle cure" for AIDS, known to not really work.<br>If not, explain harm: _____<br><br>If not, name conflicting value: _____                    | ___ | ___ |
| 20. Showing a movie with obscene sex and violence.<br>If not, explain harm: _____<br><br>If not, name conflicting value: _____                                      | ___ | ___ |