

The Gift

Freedom of Expression

by **Judy Kennedy**

If you were born in America – you were born with a priceless gift. But even today in the land of liberty, some folks would like to take it away from you. So watch out, lest we lose this precious gift that's called Freedom of Expression.

Though remarkable as it was as a blueprint for self-government, the Constitution in 1787 was deeply flawed because it had no bill of rights. Those early Americans wanted strong guarantees that their new government would not trample on their newly found freedoms. So the Constitution was not ratified until 1791 when the first ten amendments that we know as the Bill of Rights became the law of the land.

The First Amendment is first because it's the most important:

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 is the gift – the right that we call freedom of expression today. But our government's forefathers and representatives conveniently ignored the First Amendment for over a hundred years. Just seven years after adopting the Bill of Rights, Congress passed the Alien and Sedition Act that made it a crime for anyone to publish malicious writings against the government. In Virginia before the Civil War, anyone who spoke against slavery was imprisoned for one year. In 1912, Margaret Sanger was arrested for giving a lecture on birth control. During World War I, Eugene Debs was sentenced to ten years in prison just for telling a rally of peaceful workers that they were fit for something better than cannon fodder. And as late as 1923, the year my mother was born, author Upton Sinclair was arrested for trying to read the text of the First Amendment at a union rally!

This is why the American Civil Liberties Union was founded in 1920. Free speech rights still need constant, vigilant protection because new questions keep coming up, such as what are we going to do with the Internet, and old questions keep coming back such as what to do about flag desecration, if anything. It's the job of the United States Supreme Court to answer these questions using the First Amendment as its guide.

In 1919, the Supreme Court unanimously upheld the conviction of a Socialist Party member for distributing anti-war leaflets. But a few months later, two dissenting opinions would form the cornerstone of our modern First Amendment law. Justices Oliver Wendell Holmes and Louis D. Brandeis argued that speech could only be punished if it presented a "clear and present danger" of imminent harm. Mere political viewpoints, they said, were protected by the First

Amendment. Eventually, they convinced the other judges, and the right to free speech became a little more secure until the 1950s.

In the era of McCarthyism, many political activists were jailed for supporting communist views. It wasn't until 1969 that the Supreme Court established a new standard. In striking down the conviction of a Ku Klux Klan member, they said that speech could be suppressed only if it is intended and likely to produce imminent lawless action. All other speech, even speech that advocates violence, is protected. This is the standard that prevails today.

So what does protected speech include? Well, as we all know, it isn't limited to pure speech in the form of words. It also protects symbolic speech – nonverbal expression with the purpose to communicate ideas, like art. The flag in the toilet may be lousy art to some, but it is symbolic speech and therefore protected. This idea of symbolic speech came about in the 1969 Supreme Court decision, *Tinker v. Des Moines*. In this decision, the Court said that students had a right to wear black armbands in protest of the Viet Nam war.

The government can place limited restrictions on protected speech, such as requiring permits for demonstrations. But a permit cannot be denied on the basis of speech content because that would be viewpoint discrimination. The government can also intervene when certain protest goes too far such as in blocking building entrances or intimidating people. Hate speech is protected. If only popular ideas were protected, we wouldn't need a First Amendment. History teaches us that the first target of government repression is never the last. If we don't defend the free speech rights of the most unpopular and repugnant among us, even if their views are anti-First Amendment, then no one's liberty is secure. As one federal judge put it, tolerating hateful speech is really the best protection we have against fascism or totalitarianism.

So what speech is not protected? Yelling fire in a crowded theater, defamatory falsehoods that are expressed with malice, and material deemed legally obscene. However, the tests that the court uses to determine exactly what is obscene have not been very helpful. So this is an area of First Amendment law that is constantly challenged and subject to government abuse. It's clear that the battles will continue well into the 21st century. Therefore, according to the American Civil Liberties Union, protecting the gift of freedom of expression is essential to a free society for three reasons:

It's the foundation of self-fulfillment. The right to communicate freely with each other affirms the dignity and worth of every human being, allowing us to realize our full human potential. So as a means to an end, freedom of expression deserves society's greatest protection.

Freedom of expression is vital to the attainment of knowledge and the search for truth. As John Stuart Mill wrote, enlightened judgment is possible only when all facts and ideas are considered and tested against opposing views. Therefore all points of view, even those we consider bad or harmful, should be represented in society's "marketplace of ideas."

Freedom of expression is necessary in a democracy because it gives us important leverage against government excess and corruption. If the American people are to be the masters of their fate and an elected government, they must be well informed and have access to all information, ideas, and points of view. Mass ignorance is the breeding ground for all tyranny and oppression.^[i]

I urge you to enjoy, cherish and protect YOUR gift as well as that of your neighbors. Because the truth is, conspiracy or no, that in coming for one they come for all. We are so blessed with this gift. The best way to show our gratitude is to keep it sacred and secure for everyone.

^[i] American Civil Liberties Union, <http://www.aclu.org>.

ATTENTION:

To learn all about balancing First Amendment rights with intellectual property interests, go [HERE](#) and find out what REALLY HAPPENED in

Stan Tenen, Meru Foundation et al. v. Dan Winter.