

Institute for Constitutional History Seminar: Free Press

Fall 2017

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As of 2016, the American media remain the freest in the world. “The freedom of the press,” as explained by Sir William Blackstone in the 1760s, has not only become a central feature of the American system of politics and government—it has also been the source from which the larger concept of “freedom of speech” has evolved in the past century.

But “the freedom of the press” is not, and has never been, a stable and clear system of ideas and practices. Each generation finds itself repeating historical free-press debates, usually centering around the same flashpoints: protection of reputation and privacy vs. the needs of the public to know about prominent people and institutions, the need for and danger of government secrecy, the status of journalists in society when balanced against the needs or demands of law enforcement and national-security bureaucracies, the role of courts as enforcers of their own independence of public scrutiny and criticism.

In 2017, with a President who pledged during his campaign to “open up” the libel laws and thus curb the ability of the press to report on powerful people, “the freedom of the press” is likely to be once again in the midst of crisis.

This reading group will offer a grounding in the classical ideas and law of press freedom, with an eye toward applying these ideas to the challenges of 21st Century media technology and political change. Beginning with John Milton’s *Areopagitica* (and its famous rhetorical question, “who ever knew Truth put to the worse, in a free and open encounter?”) we will try to grapple with a new situation in which deliberate falsehood and propaganda threaten to swamp Milton’s all-conquering Truth, and (in the words of Supreme Court Justice Stephen Breyer), “the crowded theater is the Internet.”

Readings in the classic texts will be juxtaposed with contemporary news accounts and case studies in six areas:

- The origin of the notion of “free press” and the question of “special status” for the press;
- Government censorship, prior restraint, and military security, including the “Pentagon Papers” case, *New York Times v. United States*;
- Individual reputation and sensibility, from “seditious libel” to individual defamation to “group libel” and “hate speech”;
- Sex and censorship: obscenity, pornography, and child pornography.
- Privacy, parody, and leaks—Jerry Falwell meets Hulk Hogan.
- The core notion of “the freedom of the press” in a post-press age.

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Students will write two reaction papers based on the reading in preparation for class discussion.

The text for this group is THE FIRST AMENDMENT FREEDOM OF THE PRESS: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE (Garrett Epps, ed. Prometheus, 2008) and selected readings assigned by the instructor.

Sessions

1. From Areopagus to Breitbart: Can Truth Prevail in the Age of “Fake News”?
Sept 12
 - a. Freedom of the Press, pp. 17-39; 87-95; 233-42;256-79; 286-299
 - b. Jim Rutenberg, “Sean Hannity, a Murder and Why Fake News Endures, *New York Times*, May 24, 2017.
<https://www.nytimes.com/2017/05/24/business/media/seth-rich-fox-news-sean-hannity.html>
 - c. Jacob Nelson, “Is Fake News a Fake Problem?” *Columbia Journalism Review*, January 21, 2017, <https://www.cjr.org/analysis/fake-news-facebook-audience-drudge-breitbart-study.php>
2. Bull Connor and the “libel bully”; the history of American libel laws. Sept 19
 - a. 52-67;76-85; 121-132;170-75;300-06.
 - b. Susan Steager, “Donald J. Trump Is A Libel Bully But Also A Libel Loser” (Report prepared for the American Bar Association Forum on Communications Law and then suppressed by the ABA for fear of libel suit),
http://www.medialaw.org/index.php?option=com_k2&view=item&id=3470
 - c. Adam Liptak, “Fearing Trump, Bar Association Stifles Report Calling Him a Libel Bully,” *New York Times*, October 24, 2016.
<https://www.nytimes.com/2016/10/25/us/politics/donald-trump-lawsuits-american-bar-association.html>
 - d. W. Coleman Allen & Rodney Smolla, “Statement From Iseman’s Lawyers,” *New York Times*, February 19, 2009.
<http://www.nytimes.com/2009/02/20/business/media/20lawyers.html?ref=media>
3. Jerry Falwell and Hulk Hogan: Privacy as Limit on Media October 17
 - a. 210-215.
 - b. Nausicaa Renner, “How Hulk Hogan v. Gawker May Change the Face of Journalism,” *JSTOR Daily*, April 27, 2016
<https://daily.jstor.org/journalism-in-age-of-hulkmania/>
 - c. Peter Thiel, “The Online Privacy Debate Won’t End With Gawker,” *New York Times*, August 15, 2016.
https://mobile.nytimes.com/2016/08/16/opinion/peter-thiel-the-online-privacy-debate-wont-end-with-gawker.html?_r=0&referrer=

4. The Business of the Censor is to Censor: The Doctrine of Prior Restraint October 24²
 - a. 107-114;141-50;196-202;307-22
 - b. *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196 - Fla: Dist. Court of Appeals, 2nd Dist. 2014,
https://scholar.google.com/scholar_case?case=7561323597631905396&hl=en&as_sdt=6&as_vis=1&oi=scholar
 - c. U.S. District Court for the Central District of California, “In the Matter of Search Warrant for [redacted].com,” March 31, 2017.
<https://www.cacd.uscourts.gov/sites/default/files/documents/16mj2316-1.pdf>

5. Sex Sells: Obscenity, Pornography, and Child Pornography November 14
 - a. 164-179;203-211;
 - b. *Ashcroft v. Free Speech Coalition* (2002)
<https://www.law.cornell.edu/supct/html/00-795.ZO.html>
 - c. “Age of First Exposure to Pornography Shapes Men's Attitudes Toward Women,” American Psychological Association, August 3, 2017, <http://www.apa.org/news/press/releases/2017/08/pornography-exposure.aspx>
 - d. Nick Bilton, “Parenting in the Age of Online Pornography,” *The New York Times*, January 7, 2015,
<https://www.nytimes.com/2015/01/08/style/parenting-in-the-age-of-online-porn.html>

6. Reporters, Sources, and Espionage. November 21³
 - a. 151-163; 272-80
 - b. “Attorney General Jeff Sessions Delivers Remarks at Briefing on Leaks of Classified Materials Threatening National Security,” Office of Public Affairs, United States Department of Justice, August 4,
<https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-delivers-remarks-briefing-leaks-classified-materials>
 - c. Margaret Sullivan, “Of Course Washington is Plagued by Leaks: That’s a Good Thing.” *Washington Post*, June 4, 2017
https://www.washingtonpost.com/lifestyle/style/of-course-washington-is-plagued-by-leaks-thats-a-good-thing/2017/06/02/f6a8245c-46e7-11e7-98cd-af64b4fe2dfc_story.html?tid=ss_mail&utm_term=.1bb6b7790652
 - d. “Director Pompeo Delivers Remarks at CSIS,” Central Intelligence Agency News and Information, April 13, 2017
<https://www.cia.gov/news-information/speeches-testimony/2017-speeches-testimony/pompeo-delivers-remarks-at-csis.html>

² First reaction paper due.

³ Second reaction paper due.