Lecture Notes

# Chapter 8: The Boundaries of Free Expression: Libel, Obscenity, and Emerging Areas of Government Regulation

## Annotated Chapter Outline

1. Libel
   1. Public Officials and Libel
      1. *New York Times v. Sullivan (1964)*
         1. Brennan radically altered the standards that public officials acting in a public capacity had to meet before they could prove libel and receive damages.
         2. Brennan asserted that if plaintiffs were public officials, they had to demonstrate that the statement was false, damaging, and “made with ‘actual malice.’”
   2. Expanding the *Sullivan* Test
      1. ***Curtis Publishing Company v. Butts (1967)***
         1. At issue was a *Saturday Evening Post* article titled “The Story of a College Football Fix.”
         2. The writer asserted that Wally Butts, the athletic director at the University of Georgia, had given Paul Bryant, the football coach at the University of Alabama, “the plays, defensive patterns, and all the significant secrets Georgia’s football team possessed.”
         3. Butts initiated a libel suit against the publishing company, arguing that the article was false and damaging.
         4. Evidence introduced at the trial showed that the Saturday Evening Post had done little to verify the insurance salesman’s story.
         5. The magazine later asked for a new trial on Sullivan grounds—that Butts was a public figure and should have to prove actual malice.
         6. The judge refused, asserting that Butts was not a public official.
      2. ***Associated Press v. Walker (1967)***
         1. This case concerned a 1962 Associated Press story about riots at the University of Mississippi triggered by the government-ordered admission to the university of James Meredith, a Black student.
         2. According to the story, retired army general Edwin Walker “took command of the violent crowd and . . . led a charge against federal marshals. . . .”
         3. Walker sued the Associated Press for $2 million in compensatory and punitive damages, arguing that the article was false and damaging.
         4. The judge held that Walker, while not a public official, was a public figure; his views on integration were well known and, as such, he had to prove actual malice under the Sullivan standard.
   3. Pushing Back on the *Sullivan* Test
      1. ***Rosenbloom v. Metromedia (1971)***
         1. The Court held that the primary emphasis of the *Sullivan* test “derives not so much from whether the plaintiff is a ‘public official’ . . . as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest.”
      2. ***Gertz v. Welch (1974)***
         1. After a jury found a police officer guilty of murder, the victim’s family retained Elmer Gertz, a Chicago attorney, to bring a civil action against the officer.
         2. In a story written for *American Opinion*, an outlet for the views of the John Birch Society, a far-right, anticommunist organization, Robert Welch suggested that Gertz was a “Communist-fronter” engaged in a plot to disgrace and frame the police.
         3. Gertz sued Welch for libel, arguing that the story was false and damaging to his legal career.
            1. Welch argued that Gertz was covered by the Sullivan test, regardless of the standard adopted by the court.
            2. Gertz took the position that he was a private figure who had not voluntarily thrust himself into the public sphere.
         4. The Court sided with Gertz.
      3. ***Time, Inc. v. Firestone (1976)***
         1. In 1961, Mary Alice Sullivan married Russell Firestone, “the scion of one of America’s wealthier industrial families.”
         2. Three years later she filed for separation, and he countered with a plea for a divorce in Florida.
            1. The trial was a protracted, well-publicized affair, owing to the notoriety of the Firestones and the details of their relationship.
            2. The trial judge noted that each of the parties had accused the other of outrageous extramarital affairs but that he found the testimony to be unreliable.
         3. After the divorce was final, *Time* magazine ran a story, stating that the divorce proceedings “produced enough testimony of extramarital adventures on both sides, said the judge, ‘to make Dr. Freud’s hair curl.’”
            1. Because the magazine reported as true material the judge explicitly discounted as unreliable, Mary Alice Firestone requested a printed retraction.
         4. When *Time* refused, she sued on the ground that the story was “false, malicious, and defamatory.”
            1. *Time* argued that she was a public figure and, therefore, had to prove “actual malice.”
            2. Relying on its ruling in *Gertz*, the Supreme Court disagreed, concluding that Mrs. Firestone was not a public figure.
      4. ***Hutchinson v. Proxmire (1979)***
         1. Hutchinson, a behavioral scientist, sued for defamation after the research funding he received was criticized by a member of the U.S. Senate.
         2. The Court determined that the notoriety surrounding a libel case does not convert a private individual alleging defamation into a public figure.
      5. ***Hustler Magazine v. Falwell (1988)***
         1. When the justices agreed to hear arguments in a libel case involving a national religious leader, some observers of the Court expected a decision that would overhaul—or perhaps even overrule—*New York Times v. Sullivan*.
         2. The Court further extended First Amendment protections to the press when it lampoons public officials and public figures.
            1. If they wish to sue a publication for causing emotional distress, such prominent persons must now demonstrate that a caricature also contains a false statement of fact, made with the same actual malice.
2. Obscenity
   1. Obscenity in Perspective: Origins
      1. *Regina v. Hicklin (1868)*
         1. This British case involved a pamphlet questioning the morals of Catholic priests.
         2. The court promulgated the following test: “Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall.”
      2. *Ex parte Jackson (1878)*
         1. Initially, the U.S. Supreme Court not only adopted the *Hicklin* standard but strengthened it, as well.
         2. The Court upheld the Comstock Act, which made it a crime to send obscene materials, including information on abortion and birth control, through the U.S. mail.
         3. The justices applied the *Hicklin* test and extended its coverage to include materials discussing reproduction.
      3. *United States v. One Book Entitled “Ulysses” by James Joyce (1934)*
         1. The judge argued that the proper standard should consider the work as a whole, not simply isolated and potentially offensive passages.
      4. ***Butler v. Michigan (1957)***
         1. The Court declared unconstitutional a state statute that defined obscenity along the same lines as the Hicklin test.
         2. The law made it a crime to distribute material “found to have a potentially deleterious influence on youth.”
         3. The justices struck down the statute, finding fault with the child-based standard.
      5. *Roth v. United States (1957)*
         1. The Court took its first stab at creating a contemporary American obscenity standard.
         2. Now known as the *Roth* test, Brennan’s obscenity standard posed the following: “Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”
      6. ***Jacobellis v. Ohio (1964)***
         1. The Court considered the appeal of Nico Jacobellis, the manager of a movie theater, who had been charged by Ohio authorities with showing an obscene film called *Les Amants (The Lovers)*.
         2. Brennan refined his *Roth* test by stating that contemporary community standards were those of the nation, not of a local community.
      7. ***Memoirs v. Massachusetts (1966)***
         1. This case reviewed the attempts of Massachusetts to declare obscene John Cleland’s *Memoirs of a Woman of Pleasure*.
         2. The Massachusetts Supreme Court held that just because *Memoirs* contained some nonerotic passages did not mean that it had redeeming value.
         3. The Court disagreed, with Brennan writing that if a work had a “modicum of social value[,]” it could not be adjudged obscene.
   2. The Political Environment and the “Nixon” Court
      1. *Miller v. California (1973)*
         1. During his campaign, Richard Nixon promised the voters that if he became president, he would appoint justices to the Court who were more conservative in their orientation.
         2. While in office, he had the opportunity to appoint four new justices to the Court.
         3. The anticipated change became when the justices announced their decision in this case.
      2. ***Paris Adult Theatre I v. Slaton (1970)***
         1. This case involved a 1970 complaint filed by Atlanta, Georgia, against the Paris Adult Theatre, asserting that the theater was showing obscene films.
         2. The offending films depicted simulated oral sex and group sexual intercourse.
         3. The judge ruled in favor of the theater, mainly because the owners did not admit to the theater anyone under the age of twenty-one.
         4. After the Georgia Supreme Court reversed, the owners appealed to the U.S. Supreme Court.
         5. The justices affirmed the ruling, refusing to extend to the theater First Amendment protection, even though only consenting adults could see the films.
         6. The majority reasoned that the state had a legitimate interest in protecting the corruption of public morality.
      3. *Miller* (and *Paris Adult Theatre I*) substantially changed the constitutional definition of obscenity.
         1. See Table 8.1.
   3. Child Pornography
      1. *New York v. Ferber (1982)*
         1. This case asked whether the government can restrict the production and distribution of materials that depict sexual activity by children, even if those materials do not meet the *Miller* test definition of obscenity.
         2. The decision was unanimous, indicating that liberals and conservatives alike recognize the state’s overriding interest in protecting child welfare.
      2. *Osborne v. Ohio (1990)*
         1. The justices allowed states to criminalize the mere private possession of child pornography.
      3. ***Ashcroft v. Free Speech Coalition (2002)***
         1. The justices considered a challenge to the constitutionality of the Child Pornography Prevention Act of 1996 (CPPA).
         2. The federal law not only prohibited using minors to create such materials but also barred the use of adult actors who looked like children as well as computer-generated images of youngsters.
         3. These provisions, according to the Court, went too far.
      4. *United States v. Williams (2008)*
         1. The PROTECT Act was an attempt to remedy the defects in the 1996 law.
         2. It was limited to anyone who knowingly “advertises, promotes, presents, distributes, or solicits . . . any material or purported material that reflects the belief, or that is intended to cause another to believe, that the material or purported material” contains illegal child pornography.
         3. The Court upheld that law, noting that, rather than attempt to regulate the material itself, the new law targeted the speech of those who engaging in criminalized behavior.
   4. Regulating Access to Internet Sites
      1. *Ginsberg v. New York (1968)*
         1. The Court heard a challenge to a New York law that made it illegal to sell depictions of nudity to minors, even though the material would not have been classified as obscene for adults.
         2. The Court upheld the law, reasoning that the “well-being of its children is of course a subject within the State’s constitutional power to regulate . . . .”
      2. *Reno v. American Civil Liberties Union (1997)*
         1. This case presented the justices’ first opportunity to consider the legal status of the Internet.
         2. For at least two reasons, Reno is an interesting decision.
            1. First, it seems to provide an early indication of the Court’s thinking about the Internet: that it is closer in kind to the printed press than it is to broadcast media.
            2. Second, the Court’s ruling itself, which struck down the CDA’s prohibition against sending “indecent” or “patently offensive” communications to minors.
      3. ***Ashcroft v. American Civil Liberties Union [I] (2002)***
         1. A group of organizations that maintained websites containing sexually explicit materials challenged the Child Online Protection Act.
         2. Their concern was that COPA defined “harm to minors” in the context of “contemporary community standards,” a feature of the Court’s obscenity definition in *Miller*.
         3. Because the *Miller* ruling stipulated that “community standards” were determined by individual communities, they feared that “any material that might be deemed harmful by the most puritan of communities in any state” might expose them to prosecution.
         4. The Court declared that the use of COPA’s “community standards” to identify material harmful to children did not render the statute facially invalid.
         5. The Court did not express an opinion on other questions and sent the case back to the court of appeals, instructing it to evaluate the law more extensively.
      4. ***Ashcroft v. American Civil Liberties Union [II] (2004)***
         1. The court of appeals held that COPA violated the First Amendment, ruling that it was not the “least restrictive” alternative available to accomplish Congress’s goal of shielding children from harmful materials.
         2. The Court agreed, pointing to the availability of blocking and filtering software that parents could use to limit minors’ access to sexual material.
      5. *United States v. American Library Association (2003)*
         1. At issue in this case was the constitutionality of the Children’s Internet Protection Act of 2000, which withholds federal financial aid from libraries that do not use “filtering” software to block “visual depictions” that are harmful to minors.
         2. Six of the justices voted to uphold the law, but Chief Justice Rehnquist failed to obtain a majority for his view.
         3. Rehnquist thought that restricting the ability of adult library users to access certain Internet sites was no more in violation of the First Amendment than placing limits on their ability to borrow books that librarians did not use their discretion to purchase.
   5. Cruelty and Violence
      1. ***United States v. Stevens (2010)***
         1. This case involved a 1999 federal law that criminalized the commercial creation, sale, or possession of certain depictions of animal cruelty.
         2. The statute addressed only portrayals of harmful acts, not the underlying conduct.
         3. There were prosecutions, mostly against those compiling or selling videos depicting dogfights.
         4. Robert Stevens was among those indicted, and upon conviction he was sentenced to thirty-seven months in prison.
         5. Stevens argued that the law violated his rights under the First Amendment.
         6. The government responded by arguing that, since they “lack expressive value,” depictions of animal cruelty should be categorized as unprotected press.
         7. The Court rejected the government’s claims, ruling that the law unconstitutionally singled out a particular subject matter for regulation.
      2. *Brown v. Entertainment Merchants Association (2011)*
         1. The Court rejected the State of California’s request to remove the sale of violent video games to minors from First Amendment protection.
         2. The majority informed the state that all laws prohibiting the sale of such games would be subject to strict scrutiny.