

Freedom of expression: is it the primary right? The divide between Europe and United States.

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Course Description

Why protect freedom of expression? Should freedom of expression be protected over other constitutional values? Why is there a difference in the degree of protection between Europe and the United States? The course will start by exploring the philosophical justifications of the right to freedom of expression. It will study deontological and consequentialist defenses of freedom of expression and evaluate each one of these theories concerning their contribution to providing a foundation. The course will further examine the question of what are the legitimate limits of freedom of expression in cases where it conflicts with other rights. The study of recent controversies such as the occupy movement, wikileaks, and independent expenditures during political campaigns, will provide insights concerning the legitimate limits of freedom of expression. The course will further study cases where the divide between Europe and USA concerning the protection of freedom of expression is obvious. The course will discuss a number of controversies such as flag burning, hate speech, the Danish cartoons, lying and the law, pornography, artistic expression, offense to religion and academic freedom. The course will further assess the legitimacy of the headscarf ban by the French state. The divide in the case law of the United States Courts and the European Court of Human Rights on most of these issues will be instructive as to the different techniques of “balancing” between rights in conflict. It will analyze the case law of the Supreme Court of the USA and of the European Court of Human rights, as well as European Union regulations, which indicate a divergence in order to propose an interpretation of the socio-political context of the elaboration of the relevant legal rules, which can help understand the divergence. It will discuss philosophical and historical interpretations of the difference in the protection of freedom of expression in Europe and the US. How can the divergence between the European and the American perspective be instructive towards elaborating better solutions to concrete conflicts of rights?

Course Requirements:

A research paper on one of the topics covered by the course. Attendance and participation in class discussions is obligatory. Final grade distribution will be evaluated on the basis of class participation 40% and quality of research papers 60%.

Syllabus

Week 1

Why protect Freedom of Expression?

Consequentialist and Deontological defenses of free speech

John Stuart Mill, "Of the Liberty of Thought and Discussion", in *On Liberty*, (Cambridge, World's Classics, 1991), p. 20-61.

Immanuel Kant's *What is enlightenment*, in *Political Writings* (Cambridge, 1970, p. 54-60.

Ronald Dworkin, "Taking Rights Seriously" in *Taking Rights Seriously*, p. 184-205.

Thomas Scanlon "A Theory of freedom of expression", in *The difficulty of Tolerance, Essays in Political Philosophy*, Cambridge University Press, 2003, p. 6-25.

Ronald Dworkin, "Why must speech be free?" in *Freedom's Law*, p. 195-213.

Kent Greenawalt, "Free Speech Justifications", *Columbia Law Review*, vol. 89, 1989, p. 119-55.

Week 2

The Occupy Movement

Suppressing Protest: Human Rights Violations in the U.S. response to Occupy Wall Street, (on website)

Waller v. City of New York, 933 N.Y.S.2d 541 (on website)

Occupy Boston et al. v. City of Boston et al., 29 Mass. L. Rep. 337 (on website)

Week 3

Wikileaks, National Security and Flag Burning

The Pentagon Papers Case: U.S. Supreme Court, *New York Times Co. v. United States*, 403 U.S. 713 (on website).

Patricia L. Bellia, Wikileaks and the Institutional Framework for National Security Disclosures, 121 *Yale L. J.*, 1448 (2012) (on website)

Yochai Benkler, A Free Irresponsible Press, 46 *Harvard Civil Rights – Civil Liberties Law Review* (2012), 311-397

U.S. Supreme Court, *Texas v. Johnson*, 491 U.S. 397 (1989) (on website).

Kent Greenawalt, *Fighting Words, Individuals, Communities and Liberties of Speech*, p. 28-46

Week 4

Funding of political parties, Independent Expenditures

Buckley v. Valeo, 424 U.S. 1 (1976)

Citizens United v. FEC 130 S. Ct. 876 (2010)

Kathleen M. Sullivan, Two Concepts of Freedom of Speech, 124 *Harv. L. Rev.*, 143 (2010) (on website).

Samuel Issacharoff, What is Corruption?, 124 *Harv. L. Rev.*, 118 (2010) (on website).

Week 5

The divide Europe-US; defamation of public officials; lying and the law

Frederick Schauer, « The Exceptional First Amendment », in Michael Ignatieff ed., *American Exceptionalism and Human Rights*, Princeton and Oxford, Princeton University Press, 2005, p. 29-56.

U.S. Supreme Court, *New York Times v. Sullivan* 376 U.S. 254 (1964) (on website).

ECHR *Lindon v. France*, 2008, Application Nos. 21279/02, 36448/02 (on website).

U.S. Supreme Court, *United States v. Alvarez*, 132 S.Ct. 2537 (2012) (on website).

Week 6

Understanding the divide between Europe-US : The understanding of liberty

Bernard Bailyn's *The ideological Origins of the American Revolution*, Chapter III, "Power and Liberty: A Theory of Politics", p. 55-93.

Philippe Raynaud "American Revolution" in François Furet's and Mona Ozouf's ed., *A Critical Dictionary of the French Revolution*, p. 593-603,

Marcel Gauchet, "Rights of Man", in François Furet's and Mona Ozouf's ed., *A Critical Dictionary of the French Revolution*, p. 818-828.

Maurice Cranston, "The Sovereignty of the Nation" in Keith Baker ed., *The French Revolution and the formation of modern political culture*, vol. 2, p. 97-104.

Week 7

Hate speech

U.S. Supreme Court: *Snyder v. Phelps*, 000 U.S., 09-751 (2011)

European Court of Human Rights: *Vejdeland and Others v. Sweden*, Feb. 9th 2012

European Union: Council Framework Decision 2008/913/JHA of 28 November 2008, « On Combating Certain forms and Expressions of Racism and Xenophobia by means of criminal law », *Official Journal*, L328/55

US Supreme Court: *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Kent Greenawalt, *Fighting Words, Individuals, Communities and Liberties of Speech*, p. 47-98.

Jeremy Waldron, "Dignity and Defamation: The Visibility of Hate", 123 *Harvard Law Review*, 1597-1657 (2010) (on website)

Benoît Frydman and Isabelle Rorive, "Regulating Internet Content through Intermediaries in Europe and the USA", 23 *Zeitschrift für Rechtssociologie*, 41 (2002).

Week 8

Free Speech versus Privacy and Dignity

European Court of Human Rights: *Von Hannover v. Germany*, June 24, 2004, application n°59320/00

American Perspective: *Jackson v. Playboy Enterprises*, 574 F. Supp. 10 (1983)

James Q. Whitman, « Enforcing Civility and Respect: Three Societies », 109, *Yale Law Journal*, 2000, p. 1279-1398.

James Q. Whitman, « The two Western Cultures of Privacy: Liberty versus Dignity », 113, *Yale Law Journal*, 2004, p. 1151-1221.

Frederick Schauer, « Can Public Figures Have Private Lives? », in Ellen Frankel Paul et alii ed., *The Right to Privacy*, New York, Cambridge University Press 2000, p.293-309.

Week 9

Freedom of Expression and Pornography

Roth v. United States and Alberts v. California, 354 U.S. 476 (1957)

Miller v. California, 413 U.S. 15 (1974)

Kent Greenawalt, *Fighting Words, Individuals, Communities and Liberties of Speech*, p. 47-98. 99-123

Ronald Dworkin, "Do we have a right to Pornography?", in *A Matter of Principle*, Harvard, 1985, p. 335-372.

Ronald Dworkin, "Pornography and Hate", in *Freedom's Law*, p. 214-226.

Ronald Dworkin, "McKinnon's words", in *Freedom's Law*, p. 227-243.

Rae Langton, « Speech acts and Unspeakable acts », *Philosophy & Public Affairs*, vol. 22, n° 4, 1993, p. 293-330.

Week 10

The islamic Headscarf

John Stuart Mill, *On liberty*, p. 62-128.

Bowen, *Why the French don't like headscarves: Islam the state and Public Space*, (Princeton) 2007, p. 9-43, 155-242.

Jonathan Laurence, Justin Vaisse, *Integrating Islam, Political and Religious Challenges in Contemporary France*, Washington D.C. Brookings Institution Press, 2006, p. 15-74, 135-191.

Ioanna Tourkochoriti, "The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the U.S.A.", 20 *William & Mary Bill of Rights Journal* (2012) (on website)

Week 11

Artistic expression

European Court of Human Rights: Otto Preminger Institut v. Austria, September 20 1994, Application no. 13470/87 (on website)

U.S. Supreme Court: Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (on website)

Alexander Meiklejohn, "The First Amendment is an Absolute", 1961 Sup. Ct. Rev., 245 (on website)

Mark Tushnet, "Art and the First Amendment", 35 *Columbia Journal of Law and the Arts* 169 (2012) (on website)

Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998)

Week 12

The Danish Cartoons case

Jytte Klausen, *The Cartoons that Shook the World*, Yale University Press, 2009.

Robert Post, "Religion and Freedom of Speech: Portraits of Muhammad", 14 *Constellations*, 72, (2007) (on website).

Peter Danchin, "Defaming Muhammad: Dignity, Harm and Incitement to Religious Hatred", 6 *Duke Forum for Law and Social Change*, 5 (2010) (on website).

Week 13

Academic Freedom

Scholars at Risk Presentation

Robert Post, *Democracy, Expertise, Academic Freedom, A First Amendment Jurisprudence for the Modern State*, Yale University Press, 2012.