

**Response of the
United States of America
to the Third Study Commission Questionnaire
By Judge Charles R. Simpson III**

- 1. Does your country protect freedom of speech and, if so, how? Please refer to legislation, including any applicable bill of rights or charter of rights or human rights code, as examples, and/or jurisprudence (court decisions) as an overall picture.**

The freedom of speech is expressly protected by the First Amendment to the United States Constitution, which states:

“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.”

The Supreme Court interprets the extent of the protection afforded by the First Amendment. The First Amendment has been interpreted by the Court as applying to the entire federal government even though it is only expressly applicable to Congress. Furthermore, the Court has found that the rights in the First Amendment are protected from interference by state governments.

- 2. Does your country criminalize hate speech and, if so, how? Please refer to legislation and/or jurisprudence as an overall picture.**

There are no U.S. laws that define or recognize “hate speech.” The Supreme Court has repeatedly ruled that most of what would qualify as “hate speech” in other western countries is legally protected free speech under the First Amendment.

Even “outrageous” and “hurtful speech” is considered public debate, particularly when conducted on public land, and must enjoy “special” First Amendment protection. *Snyder v. Phelps*, 562 U.S. 443 (2011).

In *Matal v. Tam*, 582 U.S. ___, 137 S. Ct. 1744 (2017), the justices unanimously reaffirmed that there is effectively no “hate speech” exception to the free speech rights protected by the First Amendment and that the U.S. government may not discriminate against speech on the basis of the speaker’s viewpoint.

- 3. Does your country have restrictions by the criminal law of the freedom of speech? And if yes, could you give an overall picture of what the legislation is like? Including:**

a. Are there groups of persons who enjoy special protection of their freedom of speech due to their gender, sexual preference, religion, race or other conditions

b. Are there topics that enjoy special protection in terms of freedom of speech – for example topics of religion and politics.

The U.S. Supreme Court has recognized that the government may prohibit some speech such as advocacy of illegal action, incitement of imminent lawless action, fighting words, specific threats of violence targeted against a person or group, obscenity, and some commercial speech.

Advocacy of Illegal Action

It is a felony under federal law to intentionally “solicit, command, induce, or otherwise endeavor to persuade” another person to engage in a crime of violence against a person or property. 18 U.S.C. § 373. Many states have similar laws.

Incitement of Imminent Lawless Action

In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Court found that the First Amendment did “not permit a State to forbid or proscribe advocacy ... except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” The speaker must have intended for incitement to result. Later, in *Hess v. Indiana* (1973), the Court applied *Brandenburg* and said that before an individual’s speech could fall under the unprotected category of incitement to imminent lawless action, the speech must lead to “imminent disorder.”

The Federal Anti-Riot Act makes it a five-year felony to travel between states or use a type of interstate commerce (such as mail, phone, wireless communications, or broadcast), intending to:

- incite a riot
- participate in or carry on a riot, or
- commit an act of violence in furtherance of a riot.

Under this law, “incitement” includes the encouragement of another person to commit a crime and a “riot” is defined as a public disturbance involving three or more persons whose actions or threats represent an immediate danger to persons or property. 18 U.S.C. §§ 2101, 2102 (2020).

Fighting Words

A small class of “fighting words” that are “likely to provoke the average person to retaliation, and thereby cause a breach of the peace” are not constitutionally protected. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Offensive and insulting language, even when directed at specific individuals, is not fighting words. *See, e.g., Gooding v. Wilson*, 405 U.S. 518 (1972); *Lewis v. New Orleans*, 415 U.S. 130 (1974). In *Texas v. Johnson*, 491 U.S. 397 (1989), the Court redefined the scope of fighting words to “a direct personal insult or an invitation to exchange fisticuffs.”

Specific Threats of Violence Targeted Against a Person or Group: “True Threats”

The First Amendment does not protect “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343 (2003).

It is a felony under federal law to communicate a threat to injure or kidnap another person online, by phone or mail, or using other interstate channels. 18 U.S.C. § 875(c).

It is a felony under federal law to engage in stalking, defined as a course of conduct conducted online, through the mail, or traveling across state lines, which would put a person in reasonable fear of death or serious bodily injury or cause substantial emotional distress, when done with the intent to kill, injure, harass, intimidate, or surveil that person. 18 U.S.C. § 2261A.

State criminal laws penalize threats to injure or kill another person as well as stalking, which generally refers to a course of conduct that involves repeated harassment or threats that would cause a reasonable person to feel terrorized, frightened, or intimidated. *See, e.g.*, Ariz. Rev. Stat. § 13-2923; Ga. Code § 16-5-90; Mich. Comp. Laws § 750.411i.; 18 Pa. C.S.A. § 2709.1; Wis. Stat. §§ 947.0125, 947.013.

Many states make it a felony to threaten to commit an act of terrorism, which generally is defined as a crime of violence with the intent to intimidate or coerce a civilian population or induce the policy of the government through intimidation or coercion. *See, e.g.*, Ariz. Rev. Stat. §§ 13-2301, 13-2308.01, 13-2308.02; Ga. Code § 16-11-221; Mich. Comp. Laws §§ 750.543b, 750.543f & 750.543m; 18 Pa. C.S.A. § 2717.

The true threats category does not encompass political hyperbole or statements uttered in jest. *Watts v. United States*, 394 U.S. 705 (1969).

Obscenity

The Court in *Miller v. California*, 413 U.S. 15 (1973) introduced a three-part test to determine whether the material is obscene:

1. Would the average person, using contemporary community standards, find that the work, taken as a whole, appeals to the prurient interest?
2. Would the average person, using contemporary community standards, find that the work depicts or describes hardcore sexual conduct in a patently offensive way?
3. Would a reasonable person find that the work, taken as a whole, lacks artistic, literary, political, or scientific value?

The Miller ruling allowed federal and state governments the right to regulate the following by making it criminal:

- Patently offensive descriptions or representations of ultimate sexual acts that are, normal or perverted, simulated, or actual
- Patently offensive descriptions or representations of excretory functions, masturbation, and lewd exhibition of the genitals

Federal law makes it illegal to distribute, transport, sell, ship, mail, produce with intent to distribute or sell, or engage in a business of selling or transferring obscene matter. Convicted offenders face fines and imprisonment. Although the law generally does not criminalize the private possession of obscene matter, the act of receiving such matter could violate federal laws prohibiting the use of the mails, common carriers, or interactive computer services for the purpose of transportation. 18 U.S.C. Chapter 71.

Pornography and obscenity charges related to children are always illegal by both federal and state laws.

The distribution of obscene material to minors is a federal crime. *Reno v. ACLU*, 521 U.S. 844 (1998).

Commercial Speech

Under *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557 (1980), there is a four-part test for whether governmental regulation of commercial speech is constitutional:

1. In order for the commercial speech to be considered as protected speech under the First Amendment, the speech must concern lawful activity, and the speech must not be misleading.

If this step is met and the commercial speech is considered speech, then the court will use steps 2-4 below to determine whether the government regulation is constitutional.

2. The alleged governmental interest in regulating the speech must be substantial.
3. The regulation must directly advance the governmental interest asserted.
4. The regulation must not be more extensive than is necessary to serve the interest expressed in step 3.

In certain circumstances, the government may lawfully compel certain commercial speech. In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Supreme Court held that a state may situationally compel commercial speech without violating the advertiser's First Amendment rights. Specifically, a state may require an advertiser to disclose certain information "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."

Defamation

There are no federal laws criminalizing defamation, but 23 U.S. states and 2 U.S. territories have criminal defamation/libel/slander laws on the books, along with 1 state (Iowa) establishing defamation/libel as a criminal offense through case law (without statutorily defined crime).

Political speech is the most highly guarded form of speech in the U.S. because of its purely expressive nature and importance to a functional republic. Restrictions placed upon core political speech must weather strict scrutiny analysis or they will be struck down.

The constitutional protection of **religious speech** can overlap with the protection offered by the Free Exercise and Establishment Clauses of the First Amendment.

4. If there are restrictions in the criminal law of the freedom of speech, are the restrictions then absolute or must they be weighed against the consideration of free speech?

a. Does this apply to all groups and if not, are the restrictions either absolute or not? Please mention which persons and groups belong to which category.

b. In cases where the freedom of speech and the restrictions are to be weighed against each other –

i. Are there then guidelines on how balancing should be done?

ii. If yes, which of the two parameters weighs heaviest, a) the protection of free speech or b) the category that is protected by the legislation? And does this differ from category to category?

iii. And how much discretion is there such that the outcome of the balancing exercise may differ from judge to judge?

Content-based and viewpoint-based restrictions on speech are presumptively unconstitutional. When the government engages in content-based discrimination, it is restricting speech on a given subject matter; when it engages in viewpoint discrimination, it is singling out a particular opinion or perspective on that subject matter for treatment unlike that given to other viewpoints. Because the government is essentially taking sides in a debate when it engages in viewpoint discrimination, the Supreme Court has held viewpoint-based restrictions to be especially offensive to the First Amendment.

Any content- or viewpoint-based restrictions on speech are subject to strict scrutiny: the government must show that it has a compelling interest and has narrowly drawn regulations designed to serve that interest without unnecessarily interfering with First Amendment freedoms. *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989). This means that to be constitutional, a law restricting speech because of its content or viewpoint must, in addition to serving a compelling government interest, either be very narrowly tailored or the least speech-restrictive means available to the government.

Time, place, and manner restrictions on speech must withstand intermediate scrutiny. This means that any such restrictions must:

- Be content neutral
- Be narrowly tailored
- Serve a significant governmental interest

- Leave open ample alternative channels for communication. Note: any regulations that would force speakers to change how or what they say do not fall into this category (so the government cannot restrict one medium even if it leaves open another).

Ward v. Rock Against Racism, 491 U.S. 781 (1989).

The level of protection speech receives also depends on the **forum** in which it takes place. The Supreme Court has established three types of forums: traditional public forums, designated forums, and nonpublic forums. *Perry Educ. Ass'n v. Perry Educators' Ass'n*, 460 U.S. 37 (1983).

- **Traditional public forums** include public areas, such as parks and sidewalks. These areas have the strongest protections under the First Amendment.
- A **designated forum** is usually public property the government opens for public expression, such as theatres and state schools. The difference between traditional public forums and designated public forums is in a designated public forum the government may limit access to the area to only certain groups, speakers, or subjects, so long as their rules are consistent.
- **Nonpublic forums** include airport terminals and internal mail systems. In these areas the government has significant control over the speech they allow in these forums because the government acts like a private owner here. This means the government may restrict any speech, as long as the restrictions are reasonable, and do not come in to play because a public official wants the speech restricted.

5. Do you find that the legislation is clear and comprehensible to the citizen or does it give cause for doubts?

a. If it gives cause for doubt, how is it expressed? Does it deter the citizen from making statements? Or does it deter citizens from suing?

See below.

6. Do you find in your work as a judge that the relevant legislation in your country, as it pertains to the freedom of speech and its protection and the criminalization of hate speech, is clear and comprehensible, or do you find that it gives too much room for different outcomes in the same type of cases?

While freedom of speech is clearly protected by the U.S. Constitution, legislation and court legal decisions can involve complicated analysis, balancing of interests, and complex judicial scrutiny. So, there is not always clarity. Judges can arrive at differing conclusions, even if the underlying facts are the same. Most citizens and judges have a general idea of what is protected speech, but the particular details of each case are very important to the degree of protection that our Constitution provides.