The Philosophy of the Freedom of Expression:
Speech and Press Examined Philosophically and Implemented Legally

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Introduction:

The First Amendment to the Constitution explicitly protects the rights to five things: speech, press, religion, petition, and assembly. Of those five, two of these, the freedoms of speech and press, have been hotly contested and polemicized over the course of the last century. With the advent of wholly new forms of communication and the increased accessibility of information these two freedoms have become especially important. As such, a discussion of where these freedoms find their source and justification is very relevant and worthy of discussing. Furthermore, an examination of what these freedoms should be would be incomplete without an examination of case law to determine whether or not the ideals of the freedoms of speech and press are actually manifest in our society. This inquiry is the purpose of this two part paper.

Over the course of the first section I will be discussing the philosophical justifications for the freedoms of speech and press by examining the works of four famous philosophers and the arguments they made in relation to these freedoms. The paper itself will be divided into seven sections. In the first four sections following this one I will give summations of the arguments of each author in the chronological order of their writing. In these summations I shall briefly present the arguments and ideas in their writings that most clearly demonstrate their positions on the freedoms of speech and press. I will address them in this order: Thomas Hobbes, John Locke, David Hume, and then Immanuel Kant. Following explanation of these positions I will present a list of five derived principles from their writings with explanations from where the justifications for each principle come and their associated author. This will provide a basis for understanding some philosophical history of the freedoms of speech and press and how this philosophy may translate into application and practice by principle, as well as explain potential sources and justifications for these freedoms.

In the second section of this paper I will engage in a survey and analysis of both American and British jurisprudence. I shall do this by providing case briefs of landmark cases relating to the topic at hand, ordered country and then chronologically. This section will then close with a conclusory set of remarks summarizing and critically analyzing whether or not the examined jurisprudence is actually reflective of the principles presented at the end of Section I.

Section I: The Philosophy of the Freedoms of Speech and Press

I. Thomas Hobbes

Hobbes never wrote specifically on freedom of speech or press. As a result, it is necessary to extrapolate what his position on the freedoms of speech and press would be. Luckily, his works translate quite well into such an understanding. Through readings from *Leviathan* and *Of Liberty and Necessity*, Hobbes' position can be derived. This can be accomplished through examination of his conceptions of speech and liberty specifically, two things on which he wrote extensively.

In Chapter IV of *Leviathan* Hobbes contends that speech alone can provide a mechanism "whereby men register their thoughts… and… declare them one to another for mutual utility and conversation" (Leviathan IV). As such, Hobbes considers there to be three essential and proper uses of language. First, language is used to determine the causes of things, i.e., determining the order of events and communicating them (Leviathan IV). Second, speech is used to communicate knowledge between individuals for the purpose of obtaining "counsel and teach[ing]" (Leviathan IV). Third, speech is used to make assertions about one's "will and purposes", i.e., elucidating desires, needs, and goals (Leviathan IV). Because the written word is an extension of speech it is reasonable to apply these three principles of use to the written word as well.

Hobbes also considers there to be four abuses of one's speech. The first abuse of one's speech is when they speak or write such that they deceive themselves (Leviathan IV). The second is when they mince words to deceive others (Leviathan IV). The third abuse of speech is directly lying about their intentions (Leviathan IV). The fourth abuse of speech is its use "to grieve one another" (Leviathan IV). These principles of the use of language, in tandem with Hobbes' principles of liberty, provide a basis for understanding how speech and press may be used.

Hobbes' definition of liberty stems from his conception the State of Nature. When a person is in the "State of Nature", a society-less free-for-all, the only right they have is the defense of their person against death (Leviathan XIV). This right precludes any action against another person in the state of nature that does not constitute defense against the threat of harm (Leviathan XIV). Civil Society occurs as a result of the relinquishing of absolute liberty of action

by people in the State of Nature to a sovereign entity who provides protection of persons and property under their rule (Leviathan XIV). Civil societies are governed by the sovereign through the use of "Civil Laws" that determine in which actions the society and the individual agent may partake (Leviathan XXI). Within civil societies there are two types of liberty. First, there is the liberty of the civil society that allows the society to act as it pleases in a state of nature among other states (Leviathan XXI). The second form of liberty is "the absence of all the impediments to action" within the capabilities of the agent (Of Liberty and Necessity, §29). Further, the subject's liberties consist of those actions that the subject may refuse to do if ordered by the sovereign in addition to non-prohibited acts (Leviathan XXI).

Hobbes' conception of personal liberty culminates in a list of what actions the subject may undertake. The subject has two rights of free action. First, the subject is entitled to all actions not expressly prohibited by the sovereign (Leviathan XXI). Second, they have the right to sue the sovereign in a dispute if the dispute is based on precedent (Leviathan XXI). In contrast, there are two things the subject may refuse to do if ordered. First, the subject has the right to refuse to commit suicide or incur self-harm (Leviathan XXI). Second, the subject has the right against self-incrimination (Leviathan XXI).

II. John Locke

Locke never speaks directly about these freedoms either. His extrapolated position is one of non-interference/specific restriction. This is intimately tied to his conception of government and the powers and limitations of government. He believes such freedom can only exist within a commonwealth, and should only function in ways that will not harm the government. This position stems from his conception of liberty, and his argument for the existence extent of government. After establishing these theories, Locke's indirect principle of the freedom of speech can be derived.

Locke believes that, like Hobbes, the initial state of humankind is that of the state of nature. The Lockean state of nature is less bleak than the picture Hobbes paints, yet, he considers it a less free state. In the state of nature a person has the right to defend themselves from harm by other people and a right to the property they produce (II-6). Locke defines liberty as a state in

which one "is to be free from restraint and violence from others, which cannot be where there is no law" (VII-57). In the state of nature people have no institutions that protect them from incursion by other people, thus, although technically less restricted than a commonwealth, it is actually less free.

This desire for freedom from harm through laws that enable broad, protected actions, entails the creation of a commonwealth in which the rights to life, liberty, and property are protected (VIII-87). The commonwealth derives its power from the collective assent of the governed to be governed (VIII-112). The government comes with two essential institutions, a legislature that creates laws, and a "supreme executive" whose role is to enforce the laws and apply them situationally (XIII-151). The government itself has one end: the protection of the property of the citizens of the commonwealth (IX-124).

The government is bound and restricted in several ways under this system. Since law provides for the creation of greater freedom by the restriction of harmful actions, the government must also be restricted similarly (VI-57/XI-135). The government has a monopoly on force, but does not have the right to exercise it freely (XIII-155). It derives its power from the people, and thus can only act within the total amount of power acquiesced to it by the consent of the governed (XIII-155). Any excessive use of force would indicate tyranny as "tyranny is the exercise of power beyond right" (XVIII-199). For the above reason, the legislative cannot exercise arbitrary rule over the "lives and fortune of the people" (XI-135). The government's license to act is capped at the creation of laws that promote the common good (XIV-163). As such, any action undertaken by the government towards the common good that does not encroach on the rights of citizens or exceed its distributed power is authorized (XIV-163). Further, if the government fails, the right of governance falls back to the people to create another government because as long as society exists, so shall government (XIX-243).

The citizens of the commonwealth are also bound by similar rules to that of the government. In assenting to the authority of the government they agree solely to the rule of laws that bind all members of the society (XIII-151). Further, the government cannot force citizens to violate their fundamental rights to life, liberty, and property (VII-87/XI-138). Citizens that have

assented to be governed cannot act in favor of the dissolution of their government in favor of a new one (IX-124).

Citizens are permitted to act in any such way that is not against the law. But, they are also given license to act against the government and laws if they overstep their bounds, which is never justified: "the true remedy of force without authority is to oppose force to it" (XIII-155). This concept of resistance is furthered by Locke's statement that "force is to be opposed to nothing but to unjust and unlawful force" (XVIII-204). Such unlawful action "may be questioned, opposed, and resisted" (XVIII-206). Further, any actions of resistance towards government encroachments are non-harmful to the *stability* of the institution government, even if they may be temporarily harmful to the ways in which the government acts (XVIII-206/208).

III. David Hume

Hume's essay, *Of the Liberty of the Press*, is centered around two questions: why is it the case that Great Britain has such lax regulation around the freedom of press, and is this liberty is beneficial (P1)? In this work Hume provides a justification for the existence of the freedom of press (P7). But, before examining his justification, it is important to understand where this comes from.

Hume's argument begins with a clarification of the status quo. In 1742, Great Britain has an "extreme" degree of liberty with its press (P1). This is something not found in within the borders of any other European power. In Great Britain it was incredibly common for the government to be openly criticized and mocked for its varying positions. If the government seeks war, for example, it would be attacked for misunderstanding "the interests of the nation," or, in contrast, should they seek peace, they would be accused of being cowardly (P1).

This level of freedom and latitude for thought in the press is a result of Great Britain finding a balance of government that deeply intermingles a monarchy and republic, with republican superiority (P2). He feels that if you "mix a little of monarchy with liberty" you'll come away with a freer society (P2). This intermingling results in a high degree of jealousy between the powers of government and demands the republican portion keep a close eye on the activities of the crown and enforcers of law (P3). This jealousy leads the government to strip

down responsibilities and restrict such bodies as much as possible (P3). In this way government may be safe from itself. As a result, it creates incredibly strong and sweeping laws against itself (P3). Such laws only determine crimes, and do not prescribe allowed actions (P3). Thus, the public is kept as free from government interference as possible.

Hume considers this liberty to also be beneficial to the country as a whole. The freedom of press serves as a warning system to the country if the monarchal government seeks to overstretch its bounds (P5). It therefore serves as the ultimate check of the power of the government because it serves to quickly mobilize a nation's defense of freedom (P5). Further, it is in the best interest of the republican government to keep such freedoms for its own preservation against the monarchy (P5). Thus, the freedom of press serves to maintain the freedom of the nation. He furthers this by claiming that the freedom of press is itself all but completely free of negative effects, justifying universal support of the freedom of press (P5).

The freedom of press lacks detractors, first, for above mentioned purposes of retaining republican control. And second because it serves to distribute information to the public via the written word (P5). The written word, in his eyes, is less likely to invoke strong and immediately actionable passions in the people (P5). The act of reading the press is a "cool" activity that isn't conducive to immediate non-lawful action (P5). As such, it serves as a better way to address societal ills because it provides greater potential to resolve disputes lawfully (P5).

IV. Immanuel Kant

Kant produces two major works in political philosophy that relate to the freedom of speech and press: "The Idea for a Universal History with Cosmopolitan Intent" (1784) and the "Answer to the Question: What is Enlightenment?" (1784). In these two essays he provides a justification for the existence of the freedom of speech through his argument for the free use of reason.

Kant begins his argumentation in Proposition Three of the "Universal History" essay. Importantly, in Proposition Two, Kant reiterates his constant claim that humans are endowed with reason, and are obliged to use reason (pursuant to his moral philosophy) (8:18, p121). The Third Proposition argues nature has endowed humanity with everything they will ever need to

"transcend the mechanical ordering of his animal existence" (8:19, p121). In this, Kant means humans have reason, and reason will allow us to create and achieve anything necessary for our ends. Because humans were not given other animalistic qualities, claws, teeth, etc, we are obliged to use our endowment of reason (8:20, 121-122).

Proposition Five further argues that "the solution which nature forces [humankind] to see, is the achievement of a civil society" (8:22, p123). Kant feels that the achievement of a civil society through that of a "just civil constitution" is the ultimate goal of society. This is because, he thinks the full development of human faculties, and a society of the greatest freedom and enlightenment, is only possible through a civil society (8:22, p124). Freedom in this society will be determined and proscribed under "external laws" originating from such a civil constitution (8:22, p124).

Kant feels that this constitution is a telos of human nature (8:27, p128). In Proposition Eight that Kant begins to describe the current state of affairs to demonstrate that the world is moving towards the creation of the civil constitution. Kant feels that freedom is "gradually being extended" to the common man (8:28, p129). This expansion of freedom is causing the enlightening of his era (8:28, p130). Kant closes his argumentation in Proposition Nine by arguing that a focus on the legal side of the civil constitution will allow for greater understanding of "human affairs" and expansion of arts and sciences, supporting a freer society (8:30, p131).

Therefore, a civil society should exist because it is a natural teleological end of humanity's reason. Further, its component pieces will bring about greater freedom, enlightenment, social understanding, and advances in art and science. From this justification, he begins to describe the content of the civil constitution in his essay "Answer to the Question: What is Enlightenment?".

Kant begins by saying the key to enlightenment is the usage of one's intelligence (8:35, p135). If enlightenment is a byproduct of a just civil constitution, then it logically follows that actions that promote the rise of enlightenment should be included as part of the civil constitution.

Kant states that the freedom to publicly use one's "reason in all matters" is the only thing required for enlightenment (8:37, p137). In order for a society to make progress in any direction, it is necessary that members of that society be able to state their discontent with the society.

Learned members of society have a duty to present their thoughts on the state of affairs (8:38, p137). Without allowing free expression of discontent, the society only hurts itself through deprivation of necessary dialogue (8:38, p137). This sharing of thoughts and opinions openly only serves to promote the usage of one's reason and intelligence and the subsequent spread of enlightenment.

For Kant, this expression is divided between the public and private use of reason. He claims that it is the public use of reason that promotes the spread of enlightenment, not necessarily the free use of private reason (8:37, p137). By private he means the private position one holds in society, e.g., a priest is privately the member of a church, and thus, while serving church functions they are obliged to present church doctrine because it is a private space (8:37-8, p137). Were they not to do so, they present a risk to the overall functioning of society (8:37, p137). It is necessary to preserve the effective functioning of societal institutions such as that the "public good be maintained", and this stability can be harmed by improper use of reason in private (8:37, p137). It does follow, however, that these institutions can be changed through the public use of reason. Thus, the restriction of private use of reason does not actually harm the general functioning of society, nor does it prevent the spread of enlightenment (8:37, p137).

V. Derived Principles

With these summaries in mind, it is now appropriate to derive a set of principles around the freedoms of speech and press. There are five fundamental principles I have derived from these writings that I will address below. They relate to the source of the freedom of speech and press, restrictions of these freedoms towards others, restrictions of these freedoms towards governments, the extent of the license of these freedoms, and the extent of the benefits of the freedom of speech with a prescription its use.

The first principle is this: the basis freedom of speech is naturally found in all possible political states of human existence. If, like in the case of Hobbes, people are in the State of Nature, then the basis for these freedoms comes from the absolute license of the state of nature. Further, these freedoms of speech and press are based in the proper use of language. With the creation of the civil society, they become codified in law and find further justification with the

will of the sovereign. In the case of Locke, such freedoms arise from the consent of the governed acting through the legislature to create laws protecting free expression. To that end, such freedoms can only arise as a result of society because they are predicated on the existence of mechanisms of enforcement and protection. In reference to Hume, these freedoms arise from a desire of self-preservation on behalf of the government. In order to maintain its position and peace in society the freedom of speech and press must come about. Finally, in terms of the ideas of Immanuel Kant, the freedom of speech arises as a necessary faculty by which the ideal civil society may come about. Thus, the principle can arise from any political state, be it in nature, via law, for preservation, or as an ideal.

The second principle is this: use of speech to cause harm is abusive and unprotected. In the view of Hobbes, language can be abused if it used to cause harm to another member of society. This can be by means of deceit, or intent to "grieve" the other person. In terms of both Locke and Hobbes, speech can be used to cause harm to another person if it attempts to violate their right to self-preservation. This can come in the form of forcing someone to say things injurious to themselves, or in attempts to mislead them. In terms of Hume, actions that result in violence are unjustified because violence is to be avoided, and violence prevents the progression of society. All uses of speech intended to harm for the purpose of causing harm are unjustified as they do not serve the common good in addition to their violating all person's rights to self-preservation.

The third principle is this: speech cannot be used to cause harm to the government or societal institutions. According to Hobbes, the consent of the people to the will of the sovereign in return for protection of self and property strips the rights of the people to speak against the government. This is not to say criticism is prohibited, but that speech explicitly against government is unwarranted and expressly contrary to the purpose of the initial assent of the governed. In respect to Locke, and similarly to Hobbes, seditious speech is not to be tolerated. Action against the government in any other manner than critique and participation is unwarranted unless such actions are in response to tyrannical action by the government. Seditious speech is expressly against the purpose of having a government in the first place. In the creation of a government by assent the people have obliged themselves to act to improve this

government rather than act against, or attempt to eliminate, it. In terms of Hume, once again actions that result in violence, be it violence against citizens or government, does not serve the interests of society, and should be avoided. In terms of Kant, speech cannot be used to cause harm to societal institutions because such institutions are necessary for the proper and effective functioning of society. If the ideal, and best functioning, society is to be reached, then institutions must be protected from types of speech (specifically, inappropriate private speech) that could harm them.

The fourth principle is this: all speech not explicitly prohibited in the above principles is justified. Speech can only be used wrongly and can only be restricted if it is the case such speech will cause malicious and unjustified harm to persons or government. It is irrational to arbitrarily restrict the freedoms of speech and press. Such restriction, to use Lockean terminology, is tyrannical, and should be opposed. Unnecessary restriction falls outside the purview of government, and is directly contrary to the promotion of societal advancement.

The fifth, and final, principle I will be discussing is this: speech is, and should be used for, the benefit of society. Justification for this principle is found mainly in the writings of Hume and Kant. Hume argues that press is incredibly beneficial to the overall functioning of government specifically because it acts such to promote the safety and continued existence of a free government. Further, it serves as a warning signal of freedom should liberties begin to be encroached. Additionally, critiques of government serve to keep the government itself in check and accountable. Kant feels similarly that speech is beneficial to the functioning of a society. The use of reason, as our most important natural faculty, promotes the advancement of society. Such progression can only be achieved if the use of reason is protected and encouraged.

Section II: A Survey and Analysis of American and British Jurisprudence

I. The United States

Relevant Constitutional Text:

The First Amendment to the Constitution:

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. *(emphasis added)*

The Fourteenth Amendment to the Constitution (Section 1):

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of** life, **liberty**, or property, **without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws. *(emphasis added)*

Case Briefs:

Schenck v. United States (1919)

Citation: *Schenck* v. *United States,* 249 U. S. 47 (1919)

Parties to the Case:

Defendant: Charles Schenck

Prosecution: The United States

Facts:

1. Charles Schenck was the secretary general of the Socialist Party in Philadelphia.
2. During the first world war the United States implemented a policy of conscripted service, something to which the socialist party of Philadelphia objected. They felt that it violated the thirteenth amendment to the Constitution.

3. a result, they directed Mr. Schenck to produce on the order of 15,000 leaflets in response to this — the contents of which was in decided contrast to the tenets of conscription, arguing that it was unconstitutional, and recommending that people who are conscripted should not comply with said conscription. The leaflets were specifically targeting people who had already been approved for conscription.
4. The documents were printed and received from the printer on August 20th, and were then addressed and disseminated accordingly.
5. This was opposes the Espionage Act of 1917, and Schenck was indicted by the authority of that act for actions against the United States during a time of war. The act states that no party may "obstruct the recurring of enlisting service". The court found that these actions constituted such obstruction.
6. Schenck appealed to the Supreme Court, arguing that his actions were protected under the auspices of the first amendment as free speech.

Main Issue:

- Does the freedom of speech extend to things that encourage sedition against the government, particularly in a time of war?

Rules Applied:

1. Espionage Act of 1917 states that no party may "obstruct the recruiting of enlisting service".
2. The first amendment states that the government shall make no law abridging the freedom of speech, i.e. protected speech.

Holding:

Chief Justice Holmes, in an unanimous opinion of the court, held that there is such speech that does cause a clear and present danger or has a high risk to cause a clear and present danger. Such speech is unprotected by the constitution because it has the potential to cause a crime and/or encourages criminal activity.

Debs v. United States (1919)

Citation: *Debs* v. *United States,* 249 U. S. 211 (1919)

Parties to the Case:

Defendant: Eugene V. Debs

Prosecution: The United States

Facts:

1. Eugene Debs was a socialist who opposed the United States' activity in the first world war.
2. On June 16, 1918, he gave a speech to an audience in which he praised the actions of individuals who acted in resistance to the United States selective service laws. In this speech he went over several case examples of people who directly defied the instructions of the government and/or actively worked against the government and extolled their actions as heroic. He continued into a discussion of the inevitability of socialism.
3. Within this speech he encouraged listeners to actively defy the government in regard to selective service.
4. Following his speech he was prosecuted for violating the 1917 Espionage Act which protects against actions harmful to the country within the country. His actions are recorded to have incited action against the government and to encourage further unlawful action in other similar instances.
5. Debs was indicted on the grounds that his actions did incite/encourage unlawful action. He appealed to the Supreme Court on first amendment grounds, claiming that his speech was protected under its auspices.

Main Issue:

- Does speech encouraging resistance to the government in a time of war constitute a clear and present danger to the public and its continuance? Is such speech protected?

Rules Applied:

1. Espionage Act of 1917, no party may "obstruct the recruitment of enlisting services"
2. The First Amendment

Holding:

The court held, in an unanimous decision, that speech that presents a clear and present danger is unprotected speech. Debs' speech was held to present a clear and present danger because it

directly encouraged unlawful action and may have led to unlawful action. Thus, his appeal was rejected, and the initial indictment upheld.

Gitlow v. New York (1925)

Citation: *Gitlow* v. *New York,* 268 U. S. 652 (1925)

Parties to the Case:

Defendant: Benjamin Gitlow

Prosecution: The United States

Facts:

1. Benjamin Gitlow was a journalist in New York.
2. He wrote an article in the newspaper he works for called "The Revolutionary Front". In this paper he wrote an article in which he discusses the status quo of the United States and advocates for its overthrow, a piece titled, "The Left-Wing Manifesto".
3. He was arrested for this action per the strictures of the New York "Criminal Anarchy Act", which defined any action, including speech, that advocated for the violent overthrow of the government to be illegal.
4. He was indicted on criminal anarchy charges and appealed them to the Appellate Court after serving two years of his ten year sentence. He further appealed to the Supreme Court, arguing that his piece was merely a discussion of the status quo and not a call to action, in other words: a political statement.
5. Gitlow appealed the judgement of the New York appellate court to the Supreme Court on the basis that it violated his freedom of speech as secured by the first amendment.

Main Issue:

- Does the freedom of speech protections in the Constitution extend to state legal doctrine? More specifically, does the "clear and present danger" test extend to the states in addition to the federal government (given that the bill of rights is meant to limit the federal government).

Rules Applied:

1. The New York Criminal Anarchy Law (1901)

2. First Amendment

Holding:

The state of New York is bound by the bill of rights, and is bound to not act in interference with the first amendment via the prescriptions of the fourteenth amendment. Thus, they are also bound to act according to the clear and present danger test. They also have the license to act in their own self-preservation. The court further upholds the ruling of the lower courts in their determination that "The Left Wing Manifesto" does contain a call to action.

Chaplinsky v. New Hampshire (1942)

Citation: *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942)

Parties to the Case

Defendant: Walter Chaplinsky

Prosecution: State of New Hampshire

Facts:

1. Walter Chaplinsky is a Jehovah's Witness.
2. Mr. Chaplinsky was standing on a street corner disseminating information about his faith via pamphlet and street preaching. He was lawfully engaged in this behavior.
3. During the course of his street preaching, the crowd surrounding him became restless at some of his comments. Specifically, Mr. Chaplinsky denounced all other religions as "rackets".
4. City Marshal Bowering, to whom Chaplinsky's most egregious statements were directed, requested Mr. Chaplinsky stop agitating the crowd. To this, Mr. Chaplinsky informed Mr. Bowering that, "you are a god-damned racketeer" and "a damned fascist, and the government of Rochester are fascists or agents of fascists".
5. Upon hearing this, Mr. Bowering placed Mr. Chaplinsky under arrest for violating New Hampshire's Public Laws directing citizen behavior in public.
6. Mr. Chaplinsky was convicted under the aforementioned laws for speaking offensive words to another person in public. Mr. Chaplinsky appealed this conviction to the Supreme Court

on grounds of violation of the first amendment by the state. He argued the stipulations within the fourteenth amendment prevent state interference with the first amendment and that the laws surrounding restriction on what could and could not be said in public were "too vague".

Main Issue:

- Are offensive words, "fighting words" in the legal parlance, protected by the first amendment?

Rules Applied:

1. New Hampshire Public Law c. 378 § 2
2. First Amendment
3. Fourteenth Amendment

Holding:

In an unanimous decision by the court, the indictment of New Hampshire law was upheld. It was decided that there are words that people can say that would lead a reasonable person to a violent response, or "fighting words". These include certain obscenities, slanders, slurs, and other such statements that would lead a person to unlawful actions. Such speech is unprotected by the first amendment because it is intended to cause harm and/or incite unlawful behavior, constituting a breach of the peace.

United States v. O'Brien (1968)

Citation: *United States* v. *O'Brien,* 391 U. S. 367 (1968)

Parties to the Case:

Defendant: David Paul O'Brien

Prosecution: The United States

Facts:

1. David Paul O'Brien was a male of drafting age.
2. Mr. O'Brien was a registered member of the selective service, as proscribed by law under Congress' ability to raise armies if necessary.
3. Mr. O'Brien, in objection to this policy, publicly burned his draft card along with three other men. This was a commonplace action of protest during the time.

4. Mr. O'Brien was arrested and convicted under the United States' Universal Military Training and Service Act for destroying his draft card. It is illegal, under this law, to "forge, alter, knowingly destroy, knowingly mutilate, or in any manner change any such certificate".
5. Mr. O'Brien appealed his conviction to the United States District Court on the grounds that this law constituted an unnecessary abridgment of the freedom of speech. In this context the speech in consideration is considered to be "symbolic" speech.
6. The District Court upheld the ruling of the lower court. Mr. O'Brien further appealed the ruling to the US Appeals Court, which overturned the ruling in favor of Mr. O'Brien, agreeing that the law constituted an unnecessary abridgment of the first amendment. The Supreme Court then examined the case to render further judgement.

Main Issue:

- Is the law in question actually an abridgment of the freedom of speech, prima facie? In what circumstances is the government justified in restricting symbolic freedom of speech?

Rules Applied:

1. 50 U.S.C.App. § 462(b), a part of the Universal Military Training and Service Act
2. First Amendment

Holding:

The law in question does not constitute a prima facie abridgment of the freedom of speech. It is not taken that alterations to such documents (draft cards) is necessarily a case of symbolic expression. Further, Mr. O'Brien was held to have been convicted for unlawful destruction of government assets and non-possession of a draft card, not for the symbolic expression itself. It is held that the government has the jurisdiction to restrict non-verbal symbolic speech incidentally (particularly) if such restriction is in the substantial interest of the government. It is further justified in incidental restriction if non-restriction results in unnecessary frustration of the government's legally proscribed duties, i.e., in raising armies for the common defense.

Tinker v. Des Moines (1969)

Citation: *Tinker v. Des Moines Independent Community School Dist.,* 393 U. S. 503 (1969)

Parties to the Case:

Petitioners: John and Mary Beth Tinker, and Christopher Eckhardt, petitioners through their parents (as they were underage at the time of the incident).

Respondents: Des Moines Independent Community School District

Facts:

1. The petitioners, in conjunction with two younger Tinker children, Hope and Paul, are students within the Des Moines Independent Community School District.
2. These five children wore black armbands, with an approximate width of two inches, to school one day in protest of the government's actions in Vietnam.
3. The School Board had prior knowledge of this protest, and implemented school policy to punish any student wearing an armband should they not remove it upon request.
4. The five children wore armbands. Three of them, John, Mary Beth, and Christopher, were punished and suspended from school for refusing to remove the armbands when requested. Upon the end of the suspension period from school, they did not return to school.
5. The parents of the Tinker children and Christopher Eckhardt filed suit against the school board for damages and an injunction against the school policy, arguing that it violated first amendment rights to the freedom of speech.
6. The initial court hearing the case rejected it, holding that the school board was within its rights to implement such policies so long as such speech, "'"materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school". The Tinkers further appealed the case through the fifth and eighth district courts until it reached the Supreme Court for a final decision.

Main Issue:

- To what extent does the school, as a special arm of the state, have the right to abridge the freedom of speech within its confines?

Rules Applied:

1. First Amendment
2. Fourteenth Amendment

Holding:

The Supreme Court held that it is within the rights of a school board to implement policies that prevent action that inhibits the effective functioning of the school. However, the policies of the school board in question are unconstitutional. First, the freedom of speech applies universally to minors and adults, and as such, it is necessary for the school to demonstrate that policies restricting the freedom of speech are absolutely necessary for the effective functioning of the school. Second, it is not the case that the students were behaving in any disruptive way — they were simply wearing armbands. Thus the ruling of the lower courts was reversed.

Brandenburg v. Ohio (1969)

Citation: *Brandenburg* v. *Ohio,* 395 U. S. 444 (1969) *(per curiam)*

Parties to the Case:

Defendant: Clarence Brandenburg

Prosecution: The State of Ohio

Facts:

1. Clarence Brandenburg was a leader of a local sect of the Ku Klux Klan in Hamilton County, Ohio.
2. Mr. Brandenburg requested a journalist record a local KKK rally for broadcast at a later point.
3. The nature of the rally included suggestions taking violent action against racial and ethnic minority groups, as well as suggestions of demonstrations in the future. The speeches also included critiques of the government at the time.
4. Once the recordings were made public, Mr. Brandenburg was arrested and indicted on counts of criminal syndicalism. Specifically, he was held to have been "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform". He was sentenced to serve between one and ten years in prison.
5. Mr. Brandenburg appealed the decision of the lower court up to the Appellate Court, which upheld the ruling, and the State Supreme Court, which dismissed the case. His appeal, made

on the grounds that his speech was protected under the first amendment, made its way to the Supreme Court for further deliberation.

Main Issue:

- How extensive is the "clear and present danger" test (in terms of what constitutes a "clear and present danger", and to what degree does it apply in terms of its ability to restrict speech?

Rules Applied:

1. First Amendment
2. Fourteenth Amendment

Holding:

The Supreme Court held, in a seven-justice majority decision with two concurring justices, that Mr. Brandenburg's conviction was unconstitutional, and that his speech was protected. The "clear and present danger" test is held to refer to any such speech that is intended to *immediately* incite unlawful action. Speech that advocates unlawful action is protected unless it directly encourages immediate unlawful action. The ruling of the lower courts was overruled.

Cohen v. California (1971)

Citation: *Cohen v. California*, 403 U.S. 15 (1971)

Parties to the Case:

Defendant: Paul Robert Cohen

Prosecution: The State of California

Facts:

1. Paul Robert Cohen was a resident of California.
2. On April 26, 1968 Mr. Cohen was observed in the Los Angeles County Courthouse wearing a jacket that read, "Fuck the Draft".
3. He was arrested under California Penal Code for "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person… by… offensive conduct" and was sentenced to 30 days in jail. Prior to the arrest, and during the time in which he was present at the court,

he made no statements or incitements to the people around him, and was recorded as being quiet during the process.

4. Cohen appealed his conviction to Appellate Court, and they upheld the original ruling of the lower court, arguing that his behavior did constitute offensive conduct because it had the "tendency to provoke others to acts of violence".
5. Mr. Cohen then appealed to the supreme Court on the grounds that his first amendment rights were being infringed.

Main Issue:

- Are potentially offensive statements protected speech? Is a general disturbance of the peace a sufficient reason for restriction of speech?

Rules Applied:

1. First Amendment
2. Fourteenth Amendment
3. California Penal Code § 415

Holding:

The Supreme Court, in a 5-4 decision, held that Cohen's actions were protected under the First Amendment. The court held that Cohen cannot be tried based on the message his jacket conveyed, for its opinions are entirely legal. Nor could it be because it presented a "clear and present danger" because it contains no messages of incitement whatsoever, nor did Mr. Cohen act to incite anyone present. Nor can the indictment rest on the manner of conveyance of this message, which was itself non-provocative. Thus, his indictment was predicated on the usage of crass language, something which cannot be reasonably outlawed. The logic of the state in protection of their citizens from potentially offensive speech was untenable, and the decision was overturned.

II: The United Kingdom

Relevant Constitutive Text:

Article 8 of the European Convention on Human Rights:

1. **Everyone has the right to respect for his private and family life, his home and his correspondence.**
2. There **shall be no interference by a public authority** with the exercise of this right **except** such as is **in accordance with the law and is necessary in a democratic society** in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10 of the European Convention on Human Rights:[1]

1. **Everyone has the right to freedom of expression**. This right shall include **freedom to hold opinions** and to receive **and impart information and ideas without interference by public authority** and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. *(emphasis added)*
2. The **exercise of these freedoms**, since it **carries** with it **duties and responsibilities**, **may be subject to** such **formalities**, **conditions, restrictions or penalties** as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. *(emphasis added)*

Case Briefs:

Wingrove v. The United Kingdom (1996)[2]

Citation: *Wingrove v. The United Kingdom - 17419/90 - Chamber Judgment [1996] ECHR 60 (25 November 1996)*

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[1] adopted by the United Kingdom in 1950, incorporated into statute through the Human Rights Act (1998)

[2] This case was submitted to the European Court of Human Rights for adjudication, not a High Court in the United Kingdom.

Parties to the Case:

Applicant to the Court: Nigel Wingrove

Respondent: The United Kingdom

Facts:

1. Nigel Wingrove is a resident of the UK, and is a filmmaker.
2. Mr. Wingrove wrote, produced, and directed a film entitled *Visions of Ecstasy*, which depicts an interpretation of the ecstasy that St. Teresa of Avila felt through her visions of Jesus Christ. The film contains no dialogue nor text, only music and moving images, and runs for 18 minutes. It is erotic in nature, depicting scenes of erotic/sexual interaction between two women, one of whom represents St. Teresa, the other St. Teresa's psyche, and Jesus Christ. It is not evident purely from observing the film that the subject matter of the film is the ecstasy of St. Teresa (it is not made clear that the nun depicted in the film is meant to be St. Teresa).
3. Upon completing his film, Mr. Wingrove submitted the film to the British Board of Film Classification for a rating so he could release the film to the public. The Board refused to provide a classification for the film based on the justification that they felt the film violated laws against blasphemy in the UK (blasphemy is held to be anything "which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England" — this does not extend to temperate commentary in opposition to the faith).
4. Mr. Wingrove then made several appeals of the decision of the Board to the Video Appeal Committee (VAC) in order to bring a classification onto his video. The Committee maintained the decision of the Board and refused to give the film a classification. The Committee further stipulated that if Mr. Wingrove elected to disseminate the film without classification he would be held as having violated blasphemy laws.
5. Mr. Wingrove then appealed his case to the European Court of Human Rights for further adjudication on the grounds that his Article 10 rights to free expression were being violated.

Rules Applied:

1. Article 10 of the European Convention on Human Rights
2. The Law of Blasphemy

Main Issue:

- Is blasphemy a sufficient justification for prior restraint or does it violate the applicant's right to free expression?

Holding:

The European Court of Human Rights upheld the decision of the VAC in a 7-2 vote. Blasphemy, it held, is a viable and commonly held law across the world. The freedom of expression can, according to Article 10, only be abridged in the case that such abridgment is necessary for the functioning of the democracy in question. The court held that laws of blasphemy in the UK are intended to prevent believing members of the Christian Faith (alone) from being offended in their religious convictions. The court further held that such laws are appropriate and necessary for the proper functioning of a democratic society given that they protect citizens from having deep and intimately held convictions egregiously offended. In this line of argumentation, the court upheld the VAC's ruling that the film did, in fact, contain imagery that was deeply offensive in nature, especially given the context that the film in no way attempted to explore the meaning of its contents.

Shayler v. Regina (2002)

Citation: *Shayler, R v. [2002] UKHL 11 (21st March, 2002)*

Parties to the Case:

Appellant: David Shayler

Respondent: Regina

Facts:

1. From November 1991 to October 1996 David Shayler was a member of MI5, the UK's intelligence agency.
2. In 1991, upon being accepted to work for the agency, he signed an Official Secrets Act document, signifying he understood that there is clandestine information, he further signed a document signifying that he was not allowed to divulge, without expressly given authority, any information he came across as a result of his employment.
3. Before August 1997 Mr. Shayler gave out 29 documents to The Mail newspaper. The intelligence classification of these documents ranged from "classified" to "top secret".

4. On August 24, 1997, Mr. Shayler and a number of journalists published a series of articles based on the documents he disclosed to the newspaper. Before the articles were published, however, Mr. Shayler left the country.
5. Following Shayler's return to the UK of his own free will (the UK failed to successfully extradite him from France) he was arrested for violating the Official Secrets Act of 1989 by divulging classified information without the authority to do so.
6. Shayler then appealed this conviction twice, both times on the grounds that this dissemination of information was protected by his right to free expression, as secured by Article 10 of the European Convention on Human Rights, and that dissemination of the information was in the national and public interest.

Main Issue:

- Does the freedom of expression extend to official state secrets, and does the "national/public interest" mitigate the legality of dissemination of otherwise secret information?

Rules Applied:

1. The Official Secrets Act of 1989
2. The Interception of Communications Act of 1985
3. Article 10 of the European Convention on Human Rights

Holding:

The court held that Mr. Shayler's actions were unprotected under the ECHR. Although it is the case that the freedom of expression is a vitally important facet of democratic government, it is made explicit clear in the text of the Convention that the freedom of expression does not absolve the agent of culpability for their actions. Further, it is made clear that the freedom of expression is not an absolute freedom. From this, the High Court held that the divulging of classified information on account of one's freedom of expression is unprotected. Restrictions on the freedom of expression are allowable insofar as they maintain conditions necessary for the proper functioning of a democratic society (e.g. national security, public safety, etc.). Further, as is made evident by the previous argument, and by Section 1 of the OSA (1989), information divulged for the public interest is unjustified given that, in this context, it could harm the security of the nation. The appeal was dismissed.

Norwood v. Director of Public Prosecutions (2003)

Citation: *Norwood v Director of Public Prosecutions [2003] EWHC 1564*

Parties to the Case:

Appellant: Mark Anthony Norwood

Respondent: Director of Public Prosecutions

Facts:

1. Mark Anthony Norwood is a resident of Gobowen, Shropshire, and regional organizing member for the British National Party (BNP).
2. Mr. Norwood displayed a poster, distributed by the BNP, in the window of his first story apartment. The poster contained the phrases "Islam Out of Britain" and "Protect the British People" overlaid on a picture of the World Trade Center in flames, with a crescent moon showing with a prohibition symbol over it. The poster was displayed from November, 2001, until January 9th, 2002.
3. On January 9th, 2002, a member of the public saw the poster and reported it to the police, stating that the content of the poster had offended him. Police subsequently went to Mr. Norwood's residence and removed the poster. An investigation was then launched into the matter.
4. Mr. Norwood was later tried and convicted on the grounds of Britain's Public Order Act of 1986, under Section 5, for presenting "any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby."
5. Norwood appealed this conviction and £300 fine on the grounds of Article 10 of the European Convention on Human Rights, arguing that his poster was not intended to offend anyone, that no one had actually been offended by the poster, and that his actions were reasonable.

Main Issue:

- Is it necessary for an offensive statement to actually cause distress and alarm for it to be unprotected?

Rules Applied:

1. Article 10 of the European Convention on Human Rights
2. The Public Order Act of 1986 (Sec. 5).

Holding:

The High Court held that Mr. Norwood did indeed present a message to the public that was offensive and abusive, and was meant to insult Islam and followers of Islam. It was held that the appellant had displayed the poster full-well under the knowledge that it could be insulting to onlookers, and/or intended it to be so. It was further held that it is unnecessary to prove that anyone *was* offended by the contents of the poster, merely that it is offensive and constitutes a breach of the peace. It was held by the lower court, and upheld by the High Court, that the appellants conduct was wholly unreasonable and was undertaken with motivation stemming from religious and racial intolerance and hostility.

Associated Newspapers v. HRH Prince of Wales (2006)

Citation: *Associated Newspapers Ltd v HRH Prince of Wales [2006] EWCA Civ 1776 (21 December 2006)*

Parties to the Case:

Appellant: Associated Newspapers Limited

Respondent: His Royal Highness the Prince of Wales

Facts:

1. Prince Charles keeps private handwritten journals of his trips abroad, and records his experiences and opinions in detail.
2. The journals, upon receipt from Prince Charles, are photocopied by staff and circulated to a small number of select people with a letter from Prince Charles, are labeled “private and confidential”, and remaining copies are kept under lock and key.
3. At the time of the dispute the photocopying of these journals was the responsibility of Ms. Sarah Goodall, a member of Prince Charles’ staff who, like all members of his staff, had signed an agreement not to disclose information about her work unless given express authority to do so.

4. In one of the journals, following a trip to Hong Kong before the former British Colony was given to the Chinese government, Prince Charles wrote several disparaging remarks about his hosts.
5. Ms. Goodall was dismissed from her employment in December of 2000. In May of 2005 she provided typed copies of 8 of Prince Charles' journals to the Mail newspaper in hopes they would purchase them. Shortly following this, she disclosed her actions to Prince Charles' staff.
6. Both the staff and Ms. Goodall were unsuccessful in recovering the journals from the newspaper, and subsequently requested the newspaper not print any material found within the journals. They further advised the newspaper that if material were printed a lawsuit would be filed against them, stating that the information contained within the journals was private, was removed from the office of Prince Charles without consent, and was copyrighted.
7. The newspaper proceeded with the publishing of several excerpts from the journals. Prince Charles sued the newspaper for this publication, and the court ruled in his favor.
8. The newspaper then appealed this judgement on the grounds that its Article 8(2) right to disclose information in the public interest and its Article 10 right to free expression was being interfered with. Prince Charles argued in the contrary that his Article 8(1) rights were being infringed.

Main Issue:

- Was the content of the journals private and/or confidential (as per Article 8 of the ECHR)? Does the manner of receipt of the information, i.e. information received via a breach in a contractual obligation of confidence, affect the legality of publishing that information? Further, does privacy affect free expression?

Rules Applied:

1. Article 8 of the European Convention on Human Rights
2. Article 10 of the European Convention on Human Rights

Holding:

The court held that Prince Charles was wronged in the publication of these materials, and that the newspaper was in the wrong for printing the information. Firstly, it was held that the information contained within the journals was, at the very least, private information. Thus, it is protected by

Article 8(1). Secondly, it was held that such a breach that occurred under a contractual obligation of confidence only furthers the claim that the information was inappropriately removed from the private sphere and published. The court further held that, even with the important public position that Prince Charles holds and given that his opinions are relevant to the public interest, he is, like everyone else, entitled to have his own private thoughts and opinions, and to not have them broadcast without his consent. Thus the court rejected the claim of the newspaper's right to publish in the public interest. Finally, the court held that given the imbalance of the wrong on Prince Charles as a result of his infringed Article 8 rights, interference with the Article 10 rights of the newspaper held less significance, and thus would have been justified. Thus, the appeal was dismissed.

Abdul & Ors v. Director of Public Prosecutions (2011)

Citation: *Abdul & Ors v Director of Public Prosecutions [2011] EWHC 247*

Parties to the Case:

Appellants: Munim Abdul *et al*.

Respondent: Director of Public Prosecutions

Facts:

1. On March 10th, 2009, there was a parade welcoming home British Soldiers. There was a group of people who wanted to protest this parade.
2. The protestors informed the police that they wanted to protest, and they were given a time and location at which they may do so. The group that wanted to protest was anticipated to number around 50 persons.
3. On the day of the parade a group of 13 persons arrived and went a non-designated location and began to protest separately from the larger group of protestors.
4. The 13 involved were quoted and recorded as shouting things like, "British Soldiers Go to Hell", "Baby Killers", and "British Soldiers Murderers".
5. An angry crowd immediately formed around the protestors in response, and the police formed a line between the two groups, and successfully moved the protestors into the agreed upon protest location. Upon connecting with the larger group of protestors, the 13 continued

to protest in the same manner as before, and later disbanded. Throughout the entire protest the protestors were compliant with the police and no effort was made by the police to confiscate materials used by the protestors.

6. Several months later, 7 of the original 13 were charged with violating Section 5 of Britain's 1986 Public Order Act for acting in a disorderly way. A person has committed disorderly conduct "if his words or behaviour, or the writing, sign or other visible representation, to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting or (as the case may be) he intends his behaviour to be or is aware that it may be disorderly."
7. 5 of the 7 were convicted on charges of being disorderly, specifically for the words they were using. The defendants appealed the case on the grounds that they felt their words were protected by Article 10.2 of the ECHR.

Main Issue:

- What constitutes unprotected offensive statements? What role does context play in the protection of speech?

Rules Applied:

1. Article 10.2 of the European Convention on Human Rights
2. The Public Order Act of 1986 (Sec. 5)

Holding:

The lower court held that of the 7 defendants, 5 were guilty of going beyond the scope of reasonable protest, and were found to have acted in such a way that, given the context of their protest, their language was offensive, and that they should have had the foresight to recognize this. It was found by the lower court that although the political beliefs expressed are wholly legal, and venue and method by which they chose to express those opinions were not protected by Article 10.2 of the ECHR. The High Court found these charges to be true, and the appeal was dismissed. The method of protest (via placards and PA systems), and the location of the protest was found to be inappropriate. It also held that the message of the protestors, given the context, could clearly lead to public outcry and disrupt the public order, which it did. The courts cite that Article 10 protects the rights of people to hold political views, even in the case that the views could be offensive to some. It does not, however, protect people from the consequences of holding those views, nor protect them in all contexts.

Mosley v. The United Kingdom (2011)

Citation: *Mosley v. The United Kingdom - 48009/08 [2011] ECHR 774 (10 May 2011)*

Parties to the Case:

Applicant: Max Mosley

Respondent: The United Kingdom

Facts:

1. Max Mosley is a British National living in Monaco, and, at the time of the case, was the President of the Fédération Internationale de l'Automobile (FIA — the chief executive for the Formula 1 racing organization).
2. Mr. Mosley was a participant in what he referred to as a "party" during which various sadomasochistic activities took place. Another participant in these events secretly filmed the "party" after being paid in advance to record such footage.
3. Mr. Mosley was, following this event, the subject of a series of articles by the *News of the World* Sunday tabloid which alleged that Mr. Mosley was a participant in what they described as a "Nazi orgy".
4. Mr. Mosley, upon the publishing of these articles, filed a suit against the newspaper alleging his Article 8 rights to privacy as secured by the ECHR had been violated by the newspaper. He did not file any defamation and/or libel claims against the newspaper.
5. The newspaper responded with the argument that printing such information constituted a "public interest" and was thus protected under Article 10 of the ECHR.
6. UK courts ruled in favor of Mr. Mosley, arguing that his Article 8 rights were infringed by the newspaper.
7. Mr. Mosley then applied to the European Court of Human Rights arguing that the domestic laws of the United Kingdom were insufficient in regard to their ability to protect the privacy of the citizens. He further requested the court impose a rule that newspapers inform the subjects of their reports that articles are going to be published about them before said articles are published — a pre-notification.

Main Issue:

- Is there a requirement on the behalf of newspapers to inform the subject of their articles of an impending article about them? Are articles printed about the lives of citizens protected by the strictures of Article 10, and what is their relation to the strictures of Article 8? Does the lack of a "pre-notification" requirement constitute a violation of a person's Article 8 rights?

Rules Applied:

1. Article 8 of the European Convention on Human Rights
2. Article 10 of the European Convention on Human Rights

Holding:

The court upheld the ruling of the lower courts in reference to the fact that Mr. Mosley's Article 8 rights to privacy were breached. It is the case that the private life of a person, especially that of their sex lives, is not a matter of public interest. In this regard, even though the lives of citizens can be written about by the press, the Article 10 "public interest" justification falls short when concerned with intimately private matters of people's personal lives. The court further agreed with the lower court that the illicit filming of private interactions is open to "severe criticism" (although the legality of such actions was not considered in this matter). The court made note of the notion of a "pre-notification" requirement, and did not disagree that it may be something newspapers should consider doing. However, the court held that a "pre-notification" requirement would have "chilling" risks associated with it for the continued autonomy of the press and dissemination of information, and would violate Article 10 of the ECHR. The level of risk associated with such a requirement, and the impracticality of implementing such a requirement, eliminates it from consideration. Thus, the court held that while his Article 8 rights to privacy were most certainly violated, it was not a result of the UK's lack of a pre-notification requirement, and that the domestic laws of the UK were acceptable. Thus, the court ruled against Mr. Mosley.

Regina v. Peacock (2012)

Citation: *R v Peacock, unreported January 6, 2012 (Crown Ct, Southwark).*

Parties to the Case:

Defendant: Michael Peacock

Prosecution: Regina

Facts:

1. Michael Peacock is a producer and distributor of hardcore homosexual pornography.
2. Mr. Peacock sold his products via Craigslist. The contents of such films included hardcore BDSM and the sexual usage of various bodily fluids — acts which, in themselves, are not illegal.
3. In 2009 the Metropolitan Police in London came across Mr. Peacock's website, and launched an investigation into his business. This culminated in his arrest under the text of the Obscene Publications Act of 1959.
4. The DVDs procured by the police were held to be obscene in that they had the tendency to "deprave and corrupt" the viewer who is exposed to such material.
5. Mr. Peacock plead not guilty to the charges of obscenity. The case was then delivered to the court for prosecution and ruling by a jury.

Main Issue:

- Is obscenity still a viable justification for the restriction of speech? Is the tendency of published material to "deprave and corrupt" something that can be decided by a court?

Rules Applied:

- The Obscene Publications Act of 1959

Holding:

The jury held that Mr. Peacock was not guilty of violating obscenity law. The nature of the material is such that people would not stumble across it blindly, they would have to go looking for it. It was then up to the jury to determine whether or not the material was likely to "deprave and corrupt" the minds of those individuals who specifically set out to absorb such material. The jury held that, given the esoteric nature of the material, it lacked the ability to "deprave and corrupt" the minds of those who watched it. In their commentary, the defense held that because the actions within the material are not themselves illegal, it was arbitrary and anachronistic for a court to determine that publication of such material constituted a criminal offense.

Chambers v. Director of Public Prosecutions (2012)

Citation: *Chambers v Director of Public Prosecutions [2012] EWHC 2157*

Parties to the Case:

Appellant: Paul Chambers

Respondent: Division of Public Prosecutions

Facts:

1. Paul Chambers is a resident of the United Kingdom, and, at the time of this case, was 26 years old, was of good character (no prior convictions), and was employed.
2. Mr. Chambers is a Twitter user. Through Twitter, he developed a romantic relationship with another user, and made plans to fly to see her.
3. Shortly before he was scheduled to leave, the Doncaster Robin Hood Airport was shut down. This prompted Mr. Chambers to post a tweet on January 6, which contained the message: "Crap! Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high!!"
4. Five days after this tweet was posted, the security manager at the airport noticed the tweet and sent it to the airport police, both of whom regarded it as a "non-credible" threat. But, the airport police passed the investigation along to the South Yorkshire police.
5. Now seven days after the tweet was sent, Mr. Chambers was arrested and later charged with making a statement that was "menacing per se", constituting a violation of the Communications Act of 2003, and was convicted thereof.
6. He then appealed this conviction on the grounds that his Article 10 rights had been infringed, and that the contents of the tweet was not menacing.

Main Issue:

- Is posting on Twitter (or through other electronic mediums) a protected mode of speech? Were the messages posted of a "menacing character"? Are messages *not* of a menacing character that still suggest unlawful activity protected by Article 10 of the ECHR?

Rules Applied:

1. Communications Act of 2003

2. Article 10 of the European Convention on Human Rights

Holding:

The court allowed the appeal of Mr. Chambers. It held that the tweet was not initially, nor later should have been, considered to be an actual threat against the airport. It was held to be, albeit in poor taste, a joke. The court further held that the tweet was not of menacing character, defined as "which seeks to create a fear in or through the recipient that something unpleasant is going to happen". This was evidenced by the lack of an immediate reaction by any concerned authorities which would lend it credit of actually being a threat. The court also held that the possibility of "some" people considering the tweet to be of a menacing character does not actually constitute an indictment or definite characterization of the tweet as such. It was also held that the intent of the tweet was clearly not that of a menacing threat, not to mention that it is highly unlikely a terrorist would post a threat of violence using their actual name.

The Principles Reexamined

Jurisprudence presents an encouraging picture of the freedom of speech when examined in relation to the five principles previously discussed. Over the course of this final section I shall reexamine each principle and associated cases to demonstrate how the principles find their instantiation in existent jurisprudence: a clear indicator that these principles serve not only as philosophical justifications for the freedoms of speech and press, but as legally existent descriptions of jurisprudence.

The first principle argues that the basis of the freedom of speech is naturally found in all possible political states of human existence. This principle does not lend itself to any particular case law, but it does find its realization in the First Amendment to the Constitution, the Fourteenth Amendment to the Constitution (which demands, via Gitlow v. New York (1925), that states abide by the bill of rights), and in Article 10 of the European Convention on Human Rights. Given that it is difficult to empirically examine whether or not such freedoms exist in the state of nature, this portion of the question of which political states this freedom is demonstrable in cannot be answered in this paper. That said, it is clearly evident that this principle exists in the other political states humans exist in: as citizenry, as governors, and as theorists. The text of these binding pieces of legislation clearly indicates that people, in at least the United States and on the European continent, do believe in, and do inscribe in law, a principle of the freedom of speech.

The second principle contends that the use of speech to cause harm is abusive and unprotected. This is clearly manifest in jurisprudence from both the United States and the United Kingdom. This is first evident in US cases concerning the idea of the "clear and present danger" test. The test, notably found in *Schenck v. United States* (1919) and *Debs v. United States* (1919), indicates that any speech which can cause a "clear and present danger" is unprotected speech — lining up comfortably with the idea that harmful speech should not be protected. This idea of harmful speech as unprotected is best explored in its various applications to different kinds of speech. *Schenck* and *Debs* both demonstrate that speech that is used to incite unlawful behavior is harmful unprotected speech. This discussion of incitement to unlawful behavior was further expanded upon in *Brandenburg v. Ohio* (1969) when the "clear and present danger" guideline for

determination of protection was restricted to apply only to such speech that encouraged *immediate* unlawful action. *Chaplinsky v. New Hampshire* (1942) codifies a more robust determination of what constitutes unprotected speech with its inclusion of "fighting words" into the class of unprotected forms of speech (e.g. slurs, slanders, egregious swears, etc).

Similar examples of unprotected speech can be found in the jurisprudence of the United Kingdom, albeit in different forms. *Abdul & Ors v. Director of Public Prosecutions* (2011) argued that some speech can be contextually illegal if presented in a manner that would otherwise be injurious to the public (e.g. protesting in such a way that a riot may start). This idea of opinions being voiced in an illegal fashion is continued in *Norwood v. Director of Public Prosecutions* (2003), contending that unprotected speech can take the form of offensive printed opinions on display for public consumption. Speech as harm is further manifest in *Wingrove v. The United Kingdom* (1996), albeit in a more polemical fashion. This case is of particular interest given that its application of the principle arises from blasphemy law, something that does not exist in many parts of the world, including the United States. Although it is worth noting that such laws are difficult to enforce, it represents a deviation between the two common law states on what kind of speech can constitute harm (this position specifically will be expanded on in relation to principle three).

Principle three argues that speech should not be used to harm the government nor societal institutions. Although broad, this principle has narrow practical applications. In jurisprudence, this principle normally finds its instantiations in instances of speech acting in such a way that it would seriously damage the ability of the government to perform its duties. In American case law, this principle is most evident in *Schenck v. United States* (1919) and in *United States v. O'Brien* (1968). Government has a vested interest in preserving itself, especially in a time of war (which is the context of both of these cases), and has thus acts to preserve itself. In both cases, the actions of the parties did constitute a direct harm against the interests of the government in relation to, and in defiance of, the draft, which may be necessary for the continuance of the state. Whether or not the draft was a necessity in these particular cases is beyond the scope of this paper.

Jurisprudence in the Untied Kingdom as it relates to principle three is also very evident in the cases examined. United Kingdom implementation of principle three is most similar to US applications in its application through the maintenance of official secrets in *Shayler v. Regina* (2002). The leaking of official secrets of the state would constitute a harm against he state, and is thus justifiably restricted. More polemically, the application of principle three finds itself in *Wingrove v. The United Kingdom* (1996). *Wingrove v. The United Kingdom* (1996) argues in favor of a state religion, and the maintenance of a certain degree of respect towards it that begins and ends at the restriction of malicious and egregiously offensive statements. This, in particular, falls in line with the Kantian reasoning of institutions of society (e.g. religions, arts, etc.) as necessary components to a society. In this regard, and with respect to the Anglican Church as a literal institution of the state, the decision of the court is supported by principle three. In the United Kingdom principle three has also found its instantiation in Article 8 of the European Convention on Human Rights, which considers privacy to be an essential human right. Harms against privacy, a necessarily societal institution, have also been strongly restricted, as seen in *Associated Newspapers v. HRH the Prince of Wales* (2006), and in *Mosley v. United Kingdom* (2011), both of which strongly held that the freedoms of speech and press do not extend into harming the private lives of individuals, and cannot be used to justify intrusion into such matters (especially in the case of unlawful dissemination of documents and unauthorized recording).

Principle four contends that all actions not restricted by the former principles are justified and cannot be justifiably legislated against. The instantiations of this principle are inspiringly evident. This is evident, first, in *Tinker v. Des Moines* (1969) when the Supreme Court held that although schools have a vested interest in maintaining an environment conducive to education, that does not allow infringement upon the rights of students to peacefully protect — all restrictions of such a manner must be *definitively* proven necessary to be enforceable. This is also evident in *Brandenburg v. Ohio* (1969), where the Supreme Court held that speech encouraging and/or discussing crime is only an offense if and only if it intends to encourage *immediate* unlawful action. Finally, in the United States (for the purposes of this examination), this is evident in *Cohen v. California* (1971), in which the Supreme Court held that speech which may be construed as offensive cannot be banned merely because of its capacity to offend, and that the

manner of conveyance of said speech must be, itself, inciting, in order for such restrictions to begin to be discussed. This ruling can be further extended to codify that offensive language, in and of itself, is protected speech.

In the United Kingdom there is similar jurisprudence for the fourth principle. Of the cases examined, this is first evident in *Chambers v. Director of Public Prosecutions* (2012) when it was held that foolishness and errant jokes in poor taste are not violations of law, and thus cannot be restricted. Further, it can be inferred that such a ruling could be used as precedent for other cases when jokes may cross a line. Principle four next comes into play in *Mosley v. United Kingdom* (2011), particularly in the European Court of Human Rights. Here, it was held that while Mosley was wronged, in what was a violation of principle three, a pre-notification requirement would be incredibly harmful to the freedoms of speech and press and would constitute an egregious violation of principle four. Principle four also finds itself positively applied within *Regina v. Peacock* (2012). In this instance, it was very clearly held that people have the agency to make their own determinations about what kind of media they can consume, and that restrictions on media through the lens of what could easily be construed as a moralizing arbitrator are archaic and anachronistic.

The fifth principle serves as a call to action and prescription of how the freedom of speech and the freedom of press should be used. Principle five does not find specific instantiations of itself within the examined jurisprudence, but it does exist as an undercurrent within all the cases examined. In each examined case that provides examples of the other principles within them, principle five underlies. All of these cases represent movements towards the better use of the freedoms of speech and press, and help inform the public as to how we might best utilize such freedoms for our own benefit.

Conclusion

Throughout the course of this paper I have attempted to give an outline of both the principles and justifications we use for our closely held freedoms of speech and press, as well as provide an account of jurisprudence that informs whether or not these principles and justifications for said freedoms are actually existent in the enforcement mechanisms of our ideals; i.e., our laws.

In the first section of this paper, with Hobbes, Locke, Hume, and Kant, we saw pragmatic ideals arise that support our commonly held intuitions as to why these freedoms are important to our society. They are necessary for our continued existence as a free society, and, if we take the accounts leading to principle one to be true, then it will not be the case that these freedoms can ever be permanently taken away from us, even if they may occasionally falter in practice. It was further demonstrated how the writings of these philosophers might be translated into actionable principles by which we may critically examine these freedoms as they exist in our society, and as benchmarks of how we might continue to progress our society.

In the second section of this paper the law itself was examined through the lens of its practical jurisprudential application. In this section it became clear that the jurisprudence of the era reflects, to an extent, these five principles. It will never be the case that these principles, nor the freedoms of speech and press writ large, are perfectly represented within jurisprudence. But, given the arc towards greater application of these principles is evident, the future of the freedom of speech, specifically in reference to jurisprudence, remains optimistic.

This, however, does not mean that all that is necessary for the continued existence and flourishing of these principles is to maintain the status quo. As society continues to change, and jurisprudence along with it, we are obligated, as agents in society, to continually maintain a vigilant watch over our freedoms, as the examined philosophers would have us do. The maintenance of the freedoms of speech and press, as indicated especially by Kant, must be the work of the entire society, especially those well equipped to critically examine the nature of contemporary society.

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