

YOU CAN'T ALWAYS SAY WHAT YOU WANT

The freedom to think what you want and to say what you think has always generated a pushback of regulation and censorship. This raises the thorny question: to what extent does free speech actually endanger speech protection? This book examines today's calls for speech legislation and places it into historical perspective, using fascinating examples from the past 200 years, to explain the historical context of laws regulating speech. Over time, the freedom to speak has grown, the ways in which we communicate have evolved due to technology, and our ideas about speech protection have been challenged as a result. Now more than ever, we are living in a free speech paradox: powerful speakers weaponize their rights in order to silence those less-powerful speakers who oppose them. By understanding how this situation has developed, we can stand up to these threats to the freedom of speech.

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The Paradox of Free Speech

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Foreword

Free speech is guaranteed by law in the United States, yet there are always exceptions. You may have “the freedom to think as you will and to speak as you think,” but there are always some things that you want to say but can’t.* We revel in our free speech. We taunt anyone who tries to shut us up with, “It’s a free country. I can say whatever I want.” Yet it’s never really “free speech,” it’s more like “free speech, but.”

This is a book about our freedom of speech and the legal “buts” that complicate it. Laws protect or limit the words we use, or at least they *try* to do so, because statutes that protect free speech often generate attempts to limit that freedom, and laws that limit what we say prompt us to get around those limits.

Whether it’s a broad law establishing an official language, a narrower one forbidding threats or obscene speech, or a statute that defines a single word, like *tomato* or *marriage*, breaking language laws has consequences. Penalties may range from a slap on the wrist to serious fines and long jail terms. The prominent American socialist and frequent presidential candidate Eugene Debs was sentenced to ten years in prison for protesting American participation in the First World War. Debs knew that the 1918 Sedition Act criminalized speaking against the war, yet he exercised his right to say what he thought and went to jail for his beliefs.

Attempts to regulate language in the United States go back to its founding. After the United States won its independence from England, Noah Webster proposed that the new nation drop English and adopt

* The elegant phrase in quotes is from Justice Louis Dembitz Brandeis’ concurrence in the Supreme Court case of *Whitney v. California* (1927), which we’ll look at in more detail in Chapter 3.

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what he called “Federal Language,” though he later changed the name to *American English*. Federal language yoked two common Enlightenment notions: that language was national and that it was perfectible. Webster set out to make American English not just independent, but also better than the original, an upgrade to English 2.0. But some of the “improvements” Webster championed in the schoolbooks and dictionaries that he published were quirky. He spelled words to better reflect their pronunciation or, rather, his pronunciation. Webster was from New England, and so in his dictionary *deaf* became *deef*, because that is how he and his neighbors said the word. Webster also rewrote *bridegroom* as *bridegoom*, to signal the word’s derivation from Old English *guma*, a word meaning variously “adult male, boy, or servant.” Webster’s speller was a hit, and some of his spellings became standard in the United States, like *ax*, *plow*, *honor*, *center*, and *gray*. But many of the “improvements” he put in his dictionary, like *deef* and *bridegoom*, proved too eccentric for most people. Although New York’s Philological Society promoted *federal language* in a procession celebrating the Constitution in Philadelphia in July 1788 – no doubt because Webster was a founder and mainstay of the group – Congress never adopted Webster’s Federal English or made his *American Spelling Book* the national textbook.¹ Nor has the United States ever designated English as its official language. Yet federal, state, and local governments repeatedly supported the idea of official English, and they frequently passed laws both defending and forbidding what Americans can say or write.

Manipulating language is a way of manipulating people, and it’s not just the law that shapes our words. Parents routinely correct children’s speech, pushing them toward preferred forms, even punishing them for swearing or saying “ain’t.” The concept of a *swear-box* or *swear jar*, a container into which one puts a coin to atone for each instance of swearing, originates in the late nineteenth century in England; it is not unknown in American families today, though given the amount of swearing both in private and in public, its effectiveness has always been limited. Friends police one another’s words to force consensus or affirm a group identity. And employers may compel workers to follow prepared scripts in order to protect the brand and increase profits. Or they may silence employees to protect trade secrets and discourage complaints on social media. Failing to follow the company’s language rules could lead to reprimands, fines, and even unemployment.

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Teachers may mold language as well, pressuring students to model standard grammar, accents, and vocabulary, and grading them down when they fail to do so. Webster, a failed lawyer, tried his hand at teaching, which led him to his career as a prescriber of correct English. Teachers in the mold of Webster argue that using Standard English will lead to social and economic success, though as linguists point out, there is no single agreed-upon language standard. Plus, the supposed standards are not innate features of language, not more logical, more effective, or more beautiful than any other variety of speech. Nor does mastering them guarantee success. The “standards” are merely the forms presumed to be in use by elite groups of speakers and writers, a presumption not always backed up by evidence.

The social control of language is a vast topic best left for other volumes. *You Can't Always Say What You Want* focuses instead on the *legal* control of language. Webster was not alone in holding contradictory, even paradoxical, views of language: on the one hand, he argued that the words Americans use create a national identity. On the other, he insisted that American English must be perfected, modified, and policed in order to bring that much-desired national identity into existence. As we'll see in the pages that follow, the connection between language and nation is at best nebulous. Even before the United States gained independence, Americans knew that their English was diverging from the British variety, and it was clear to them that their own English varied from New England to the Southern states. The British generally frowned on words perceived to be American (many still do so today). So did some Americans, though others chose to celebrate the American language, even to enshrine it in the law. Controlling what we say and write often becomes a way to protect the national identity – the brand. At least that is what supporters of official language laws contend. And laws forbidding certain kinds of speech, like swearing, threatening, or lying, enforce ideas about class, race, gender, and appropriate behavior, even though the speakers of a language may ignore or actively rebel against these norms. Despite the laws and the cajoling of parents and teachers, of employers and friends, people continue to swear and threaten one another; they still say “ain't”; they violate language taboos; and in the words of the fictional Dr. Gregory House, “Everybody lies.”

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You Can't Always Say What You Want focuses on the history of several key free speech issues: political speech, obscenity, threats, official language, and compelled speech, in order to provide some background to the current threats to free speech in the United States, with references where applicable to freedom of expression in Britain and in the European Union (EU). Although liberal democracies like these have generally expanded speech rights over the years, that is no reason to be complacent. Some laws do broaden speech protections, but others continue to chip away at these hard-won freedoms.

As we look at the laws that protect or limit speech, we'll consider as well how courts interpret statutes, particularly those laws that deal with language use. Originalism, a method popular in American legal circles today, seeks to determine what reasonable people understood the Constitution and the early laws of the United States to mean at the time they were enacted. But as we'll see, that original meaning may be difficult or impossible to recover, and so other legal scholars prefer to read a law both practically and flexibly, understanding the meaning of older laws in light of present conditions in order to achieve an outcome that promotes the common good.

Although the scope of this book is broad, there are aspects of language law that I have not had room to address. These include defamation, a topic too varied and complex to be treated here, yet one with important connections to the freedom of speech and of the press. Case in point: former vice presidential candidate Sarah Palin sued the *New York Times* for defamation, claiming that the *Times* recklessly disregarded the truth when it printed a 2017 editorial mistakenly connecting her political rhetoric with a 2011 mass shooting in Arizona, even though the newspaper quickly corrected its error. But both the judge and the jury rejected her argument that the *Times* had acted with malice, finding instead that the newspaper had made an honest mistake, which it quickly corrected.² She failed to convince the courts to reverse the precedent set in the 1964 Supreme Court decision in *New York Times v. Sullivan*, that public figures must prove in a defamation suit that damaging misinformation about them wasn't simply an honest mistake, but was instead the result of "actual malice" on the part of the writer.

Other areas I do not address include blasphemy, not a current problem in the West but one which remains an issue – sometimes a life or

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death issue – in many parts of the world; and commercial speech, including the laws of intellectual property and of trademark and copyright. I do not cover the expanding field of forensic linguistics either, with topics as varied as the linguistic structure of police and courtroom interrogation; the impact of the common mis-translation and mis-transcription of witness testimony or patient interviews; document verification and author identification; and the identification or exoneration of suspects or defendants through linguistic analysis of their speech or writing. In the interests of brevity, I must leave a deeper exploration of these important aspects of language law to other books and other scholars.

Acknowledgments

First, a nod to truth in advertising: I am not a lawyer. I do not even play one on TV. But I have been writing about the history of language control and language law for over forty years, everything from spelling and grammar reforms to Constitutional interpretation; from gender pronouns to official English; from the ways that technologies of reading and writing channel the behavior of speakers and writers, to the ways that these technologies are shaped by what we say and write.

Many people and institutions provided invaluable help as I developed this book. The John Simon Guggenheim Memorial Foundation generously supported me as I drafted my manuscript, and the University of Illinois at Urbana-Champaign granted me valuable time for research and writing. Librarians and archivists at the University of Illinois, the Library of Congress, Yale University, Arizona State Library, the State Historical Society of Iowa, the Phoenix Police Museum, the Newberry Library, the Bodleian Library, the British Library, the University of Chicago Library, and the Chicago History Museum, all generously granted access to their collections, both in person and virtually, and helped me to locate important but elusive materials. Special thanks to my daughter and favorite librarian, Rachel Baron Singer, then at the University of Michigan Library, who found legal records for me that I could not locate on my own. And to my son, Jonathon Baron, who helped me access and photograph rare materials at Yale. A shout out, too, to the many students and colleagues over the last few years who have patiently listened to my musings (and a few rants) about language and law, and who have offered gentle but necessary corrections. Thanks, too, to Charles Dyke and Jeffrey Kaplan, my fellow co-conspirators writing the *Linguists' Brief*

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Finally, my thanks to Iryce, my wife, for decades of unflagging encouragement and support during the many setbacks and reboots that are endemic to life, to writing, and to writing this book in particular at a time when free speech has come under stress across the political spectrum.