

Court invalidated a Texas law that prohibited burning the American flag, arguing that the law's sole purpose was to suppress speech.<sup>56</sup> The decision motivated Congress to pass the Flag Protection Act of 1989, which penalizes anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States." Applying the same reasoning as the Texas case, the Court found that the federal law violated the guarantee of free speech.<sup>57</sup>

## Boundaries of Free Speech

The Supreme Court traditionally has given less consideration to speech that is not necessary to stimulate the marketplace of ideas and to preserve the workings of a democratic political system. For example, the Court has declined to grant First Amendment protection to utterances and writings that are obscene or defamatory. More recently, the Court has added hate speech to the category of unprotected expression.

## Obscenity

The Supreme Court has consistently held that obscenity falls outside the boundaries of free speech, but it has struggled to define the meaning of *obscene*. Justice Potter Stewart expressed the difficulty in his famous utterance: "I shall not today attempt to further define [obscenity]. . . . But I know it when I see it."<sup>58</sup> If Justice Stewart were alive today, would he view nudity on the Internet as obscene? The answer depends on the judicial test he used to determine obscenity. Today, the Supreme Court uses the *Miller test*, which asks three questions:

1. Does the average person, applying contemporary community standards, believe that the dominant theme of the material, taken as a whole, appeals to a prurient interest?
2. Is the material patently offensive?
3. Does the work, taken as a whole, lack serious literary, artistic, political, or scientific value?<sup>59</sup>

If the answer to any of the three questions is no, the Court considers the work not to be obscene.

Trying to regulate obscenity on the Internet has been difficult for Congress. In 1996 it passed the Communications Decency Act (CDA) that prohibited transmission of any obscene or indecent material over the Internet to anyone under the age of 18. In *Reno v. American Civil Liberties Union* (1997), the Supreme Court ruled the term *indecent* was too vague to prohibit speech.

In 1998 Congress tried again to limit the transmission of obscene materials in cyberspace with the Child Online Protection Act (COPA). Rather than prohibiting "obscene and indecent" materials, the statute banned any material "harmful to minors." The Supreme Court rejected this law as well with its argument that the "community standards" principle has no application to the Internet because of the unlimited geographic scope of online communications (*Ashcroft v. American Civil Liberties Union*, 2004). In 2011, the Court refused to create a new category of speech beyond the protection of the First Amendment. In *Brown v. Entertainment Merchants Association*, it struck down a California law that barred the sale of violent games to children. Thus, the issue of obscenity obviously involves questions of identification and definition that may change over time but what is clear legally is that once material is labeled as obscene, it is not protected by the free speech guarantee of the First Amendment.

## Defamation

Free speech allows a vigorous exchange of ideas and criticisms that are sometimes hurtful and even mean-spirited. Legislative bodies have placed limits on such comments by allowing a person to sue anyone who makes false statements that injure his or her reputation. Slander is a false oral statement that causes injury, whereas libel is a written statement that

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**libel** Written statements that are false and injure another's reputation.

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