THE FOUR FREEDOMS OF THE FIRST AMENDMENT

A TEXTBOOK

CRAIG R. SMITH • DAVID M. HUNSAKER

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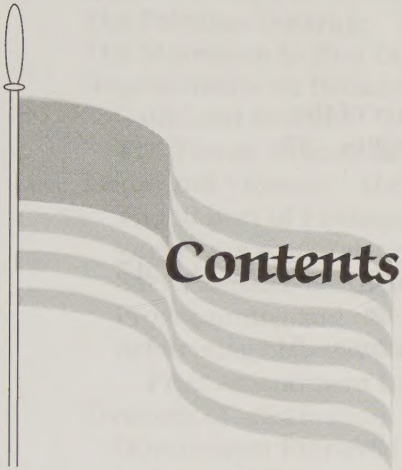

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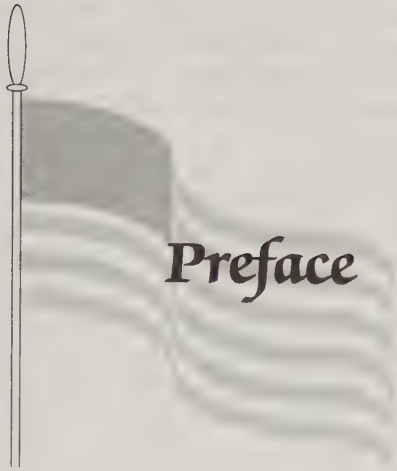


Preface

> Congress shall make no law respecting an establishment of religion, or prohibiting the full 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.

Does the First Amendment protection of free speech include such symbolic acts as burning your nation's flag? Does it protect an editorialist from a lawsuit if she refers to a reader as an "idiot?" Does the clause in the First Amendment referring to the free exercise of religion protect a person's right to sacrifice a cat on an altar of satanic worship? Does the clause referring to the right to assemble prohibit the police from investigating a suspect's membership in various associations? The First Amendment contains four core freedoms. The *first*—sometimes called freedom of conscience—prevents the government from imposing a religion upon its citizens and allows each citizen to believe in what they please; the *second* protects a citizen's right to speak out freely; the *third* protects the freedom of publication, particularly newspapers; and the fourth allows citizens to freely assemble and express their grievances. In each case we are granted a freedom to *do* something and protected by a freedom *from* government intrusion.

The Bill of Rights (the first ten Amendments to the Constitution) appropriately begins with guarantees that are the foundation for all of our other liberties. Without a free press, without citizens

being free to express their opinions, without the right to choose your faith, democracy would cease to exist. The people who founded the nation were children of the Enlightenment, an era and a school of thought that believed in individualism, freedom, and critical thinking. They realized that the synergy among freedoms of conscience, assembly, and expression had combined with an active press to produce the revolution that led to independence from Great Britain. Soon after the Constitution was ratified, amendments were proposed to safeguard the natural and inalienable rights that were the foundation of the Declaration of Independence. The debates over the Bill of Rights in 1790 and 1791 reinforced the necessity for a broad application of the First Amendment.

The subsequent protection of First Amendment values begins with understanding what they meant at the time they were adopted. Over time, the courts have generally accepted this interpretation. In *Garrison v. Louisiana*, for example, Justice William Brennan declared that "speech concerning public affairs is more than self-expression; it is the essence of self-government."[1] In *Cohen v. California* in 1971, Justice Harlan was more philosophical:

> The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[2]

In *Buckley v. Valeo* the Court asserted in 1976:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[3]

In 1985 the Court reaffirmed that "speech on matters of public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection."[4]

We begin this text by establishing the historic context of the First Amendment both in terms of its European heritage, the revolt against it, and the writing of the First Amendment into the Constitution. Once the history of the First Amendment is established, we move to the question of interpretation. We shall see that some jurists believe in a "living Constitution" that needs to be adapted to current times, technologies, and issues. Others call themselves "strict con-

structionists" and believe the Constitution should be interpreted on the basis of what it says and on the original intent of the people who wrote it. The founders of the nation instructed us to interpret the Constitution in the spirit in which it was written. In 1821, James Madison, the major author of the Bill of Rights, wrote that the Constitution must be interpreted according to "its true meaning as understood by the nation at the time of its ratification."[5] On June 12, 1823, fourteen years after his presidency, Thomas Jefferson wrote that we ought to return "to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed."[6] Madison and Jefferson had seen the dangers of misreading the Constitution to suit political whims when the Alien and Sedition Acts were passed in 1798. They believed that if the Constitution could not cope with a problem that the nation needed solved, then the Constitution should be amended, not reinterpreted willy-nilly.

To inform this debate, we rely on primary source material drawn from the archive on the Bill of Rights at the History Department of the University of Wisconsin. No study of this nature can proceed without some guidance from the past. Professor Zechariah Chafee, Jr. of Harvard University wrote *Free Speech in the United States* in 1941. Throughout the 1940s and 50s Chafee elaborated on his initial study. Leonard Levy wrote *The Emergence of a Free Press*, which follows the work of others who believe that the founders strengthened the First Amendment at almost every turn.[7] In 1988 Levy went a step further in *Original Intent and The Framers' Constitution*. While opposing those who use original intent to advance a conservative agenda, he admitted that the doctrine should be followed when it is "clearly discernable."[8]

The emergence of the Bill of Rights has been the subject of many fine studies. One of the best from the 1950s was by Robert Rutland and Edward Dumbauld; *The Birth of the Bill of Rights, 1776–1791* discussed how the Bill of Rights evolved from earlier documents. Prior to the formation of the archive at the University of Wisconsin under John Kaminski's direction, the most useful resource for documents was Bernard Schwartz's *The Bill of Rights: A Documentary History*, which was soon followed in 1977 by his *The Great Rights of Mankind: A History of the American Bill of Rights*. More recent in this line is James MacGregor Burns' *A People's Charter* co-authored with Stewart Burns. This 1991 volume argues that the Bill of Rights serves as a "parchment barrier" to those who would deprive us of our rights. Specific references appear in the chapters that follow and in the bibliography that is included in this volume. They too were instrumental in the interpretation of the data used in this text to tell the story of the ratification of the Constitution and the Bill of Rights.

The events depicted in this book were crucial to the establishment of a free press and other fundamental values: freedom of conscience, the right to a fair trial, protection from self incrimination, and reserving certain powers for the states. The Bill of Rights has guided the courts, the Congress, and the president in the task of nation building. In a republican democracy, that task is never ending. Thus it is important that we continually review what the First Amendment means. This textbook is dedicated to that project.

As mentioned earlier, the book begins with the historical context for First Amendment issues. It then explores the legal precedents surrounding those issues. Finally the book provides a series of simulated hypothetical cases that raise the issues in new ways. In teaching this course, the authors often divided their students into advocates on different sides of the various hypothetical cases and also assign them duties as Supreme Court justices who must decide these cases. We embrace John Dewey's belief that we learn by doing. Participation in the hypotheticals as judges and advocates sharpens understanding of the arguments and evidence needed to sustain a ruling before the Supreme Court. Such exercises, we hope, will make students aware of the shifting nature of First Amendment law and the importance of argumentation in advancing it.

These exercises also help students realize that the four core freedoms of the First Amendment—religion, speech, press, and assembly—have many sub-applications and competing claims that have generated a complex matrix of laws and court rulings.

Acknowledgement

Due to the untimely passing of my good friend and co-author, David Hunsaker, this book was very difficult to complete. However, with the help of Waveland Press in general, and Carol Rowe in particular, we got the job done. This is the second book I've done with Waveland Press, and again it has been a rewarding experience.

Endnotes

[1] *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

[2] *Cohen v. California*, 403 U.S. 15, 24 (1971).

[3] *Buckley v. Valea*, 424 U.S. 1, at 14 (1976), quoting *Roth v. U.S.*

[4] *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 53 U.S.L.W. 4866, 4869 (U.S. June 26, 1985), quoting *Connick v. Meyers*, 461 U.S. 138, 145 (1983).

[5] As quoted in *The Papers of Thomas Jefferson*, edited by Julian Boyd (Princeton: Princeton University Press, 1950–1982) and cited in Craig R. Smith, *To Form a More Perfect Union* (Lanham, MD: University Press of America, 1993), p. xi.

[6] Craig R. Smith, p. xi from letter to John G. Jackson in Robert A. Rutland et al., eds., *The Papers of James Madison* (Charlottesville: The University Press of Virginia, 1973–1988).

[7] Leonard W. Levy, *The Emergence of a Free Press* (New York: Oxford University Press, 1985); see also William T. Mayton's essay "Seditious Libel and the Lost Guarantee of Freedom of Expression," in the *Columbia Law Review* (84, 1984), William Van Alstyne's *Interpretations of the First Amendment*, and David Anderson's essay "Origins of the Press Clause" in the *UCLA Law Review* (30, 1983).

[8] For a balanced approach to this debate, one would be hard pressed to find a better collection than Eugene Hickock's recent anthology on *The Bill of Rights: Original Meaning and Current Understanding* or Thomas Emerson's 1970 volume on *The System of Freedom of Expression*.

Chapter 1

America Challenges the European Tradition

There are many models of governing freedom of expression and its manifestations in religion, speech, press, and assembly. One of the most prevalent throughout history has been censorship. The desire to control the press is easy to understand; what people read influences the way they think and form opinions. Prior to the American Revolution, the European tradition was to regulate new media as soon as they emerged for fear that unregulated media could provide an outlet for dissident thought. That tradition stands in marked contrast to the tradition established in the United States. When the nation ratified the Bill of Rights (the first ten Amendments) in late 1791, the First Amendment instructed Congress to make no law abridging freedom of speech or press.

Another part of the European tradition was to establish and support a state religion. When Charlemagne became Holy Roman Emperor in 800 AD, he was crowned by the pope, as was Napoleon when he became Emperor of France a thousand years later. The founders of the United States also challenged that tradition by inserting two very important clauses into the First Amendment forbidding the government from establishing a religion and protecting each citizen's right to exercise the religion of his or her choice. Because it helps establish the context for the American experience, the European tradition will be examined in this chapter, while chapter 2 will examine the founder's intentions at the time the First Amendment was ratified.

Before the United States became the first country to add freedom of expression to its Constitution, most governments did not consider freedom of speech, press, and religion to be natural rights. They viewed new technological developments in communication with suspicion. Sometimes this suspicion arose from a fear on the part of rulers that new communication technologies would allow those out of power to undermine current leaders by communicating criticisms to the population at large. Sometimes the suppression occurred for religious reasons: a church could fear losing its control if members of its congregation received information about religious matters from non-church sources. It is also true, however, that the restrictions placed on new communication media often resulted because the citizens of a country feared that new inventions might abolish older procedures and/or disseminate materials unsuitable for the public at large.

We begin with a discussion of the environment surrounding Johannes Gutenberg and his moveable type machine and conclude with the use of press and speech to foment revolution in the United States and to frame its Constitution. We will also discuss the European tradition regarding the press, speech, and religion, particularly the practices in England since the heritage of the United States is so closely related to the Enlightenment's reaction to controls over freedom of expression in England.

The Evolution of Printing

Scholars believe that around 3000 BCE the Sumerians were the first to develop writing based on symbols. A thousand years later, the Egyptians developed paper from papyrus and hieroglyphics, or picture writing. The papyrus scrolls allowed the Egyptians to store writings in the first libraries. At the same time, the nearby Semites developed the first alphabet, followed quickly by the Greeks. The Greeks then used signal torches set in different patterns to spell out messages, and they may have been the first to use carrier pigeons to convey messages. Both practices evolved around 500 BCE out of military needs among the warring Greek city-states.[1] Two and half centuries later, the Greeks developed parchment, which made writing easier, and its durability preserved Greek scholarship into the modern era.

The first newspapers may have been a Roman invention around 59 BCE when sheets of parchment containing news items were posted in marketplaces and forums. It was the Chinese, however, who invented ink and paper made from wood at the end of the First Century AD. They also invented moveable clay type in 1034, but it did not catch on and was not transmitted to the west. From about 400 to 1400, town criers were the main form of mass communication in an

illiterate and superstitious Medieval Europe. Monks in monasteries wrote or copied older manuscripts, a practice begun in Ireland at the beginning of the Dark Ages.

Richard Faques may have been the father of the modern newspaper when he published an account of the Battle of Flodden Field in 1513. His "news pamphlet" described how the English had routed the Scots. From that time on, "news pamphlets" devoted to single topics were quite common, running anywhere from 2,500 to 45,000 words.

The year 1456—the date when moveable type was introduced to Western civilization—is a landmark in the evolution of human consciousness. The invention made books much more accessible to the largely illiterate public. It allowed Martin Luther to succeed where so many earlier church reformers had failed because his words were printed and widely disseminated by the new presses. Luther posted his 95 theses on a church door in Wittenberg, Germany on Hallowe'en night in 1517. By the end of that year, the theses had been published throughout Europe, and Luther had begun a reformation that could not be stopped.

One of the most revolutionary aspects of Gutenberg's achievement was that it created a heightened desire to learn to read. Gutenberg, however, was no revolutionary and had little idea what consequences his invention would spark. Although he dutifully paid homage to the Catholic Church and was happy to be publishing only materials the church approved, those who followed him who were less obedient to the church might have failed in their reform efforts without the printing press.

In France, King Charles had heard that a new printing press with moveable type had been used to publish a Bible in Mainz. In 1458, the King sent an engraver named Nicholas Jenson to investigate the new technology. Charles was not interested in industrial espionage; he was worried that the new press might be used to foment unrest against him. Worse, it could fall into the hands of his heir, who was challenging Charles' right to rule and spreading malicious tales about him. What if those tales were printed and looked much more official? Charles feared the consequences. So clever was Jenson that he became an apprentice to Gutenberg. He soon relieved Charles' anxiety by writing that government and church officials in Mainz were keeping a careful watch over the printer and his machine. Charles' predisposition to control the new device would prevail. Edward IV is credited with allowing a printing press into Westminster in 1476, after William Caxton introduced it to England.

By 1485, Archbishop Berthold von Henneberg asked the town council of Frankfurt, which controlled Mainz, to censor all "dangerous publications." The next year both Mainz and Frankfurt established censorship panels. In 1579, the entire Frankfurt book market was put under the Imperial Censorship Commission, which complemented the Ecclesiastical Commission run by the Jesuits, a strict

order committed to defending the Catholic Church. This Commission had regularly contributed to the infamous Catholic Index set up by Cardinal Carafa[2] in 1559; its purpose was to warn Catholics not to read certain books. Even guild members got caught up in the censorship mania. They regularly reported secret and "inappropriate" instances of printing to secular and church commissions. The record of Protestant governments was not much better when it came to the new press. Monopoly licenses for printing were common even before moveable type. The City Council of Basel suppressed the Koran until Martin Luther wrote a preface for it in 1542 and begged the Council to allow its publication.

The English Connection

For the most part, citizens from England populated the American colonies. England was the cradle of Anglo-Saxon values; it led other European nations in establishing a set of natural rights. For example, by 1166 English "free men" enjoyed the right to trial by jury. More than two centuries before Gutenberg's famous invention, King John signed the Magna Charta in 1215, phrases of which were copied into many royal charters. Article 39 reads "No free man shall be seized or imprisoned or stripped of his rights or possessions or outlawed or exiled or deprived of his standing . . . except by the lawful judgment of his equals or by the law of the land." Article 40 reads, "To no one will . . . we deny or delay right or justice." That idea appears as Article VI in the Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." The liberties of British citizens were extended by subsequent documents such as the Petition of Right, the Habeas Corpus Act passed under King Charles II, the Bill of Rights enacted by Parliament near the end of the seventeenth century, and the Act of Settlement. Furthermore, English legal cases established the precedent that the law of England followed its flag. Thus, freeholders in America expected the same rights as citizens in England.

Since English laws served as the basis for the creation of a bill of rights in America, we need to take a closer look at England's record on civil liberties. Unfortunately, England's record on freedom of expression was little better than other nations of Europe. For example, in 1408 the Provincial Council of the Catholic Church in England banned any version of the Bible in the vernacular (native language) unless it had the imprimatur of the Church. In 1414, Parliament supported the Church's right to censor heretical publications. The government clearly favored one religion over all others.

Fearing "forged tydings" and other documents, Henry VII, who ruled from 1485 to 1509, instituted controls over the presses, which had proliferated quickly after being introduced by William Caxton.

The developing publishing industry was stopped in its tracks. By 1500, there were only five printers in London because Henry imposed sanctions on anyone who attempted to compete.[3] Because peace and security were highly valued by the end of the War of the Roses, the citizens of England were content to allow the ruler to make such decisions.[4]

Henry VIII, who reigned from 1509 to 1547, followed his father's example and retained strict control over what was printed in his realm. Cardinal Wolsey as Archbishop of Canterbury worked in concert with the Bishop of London as the sole arbiters of what could and could not be printed as religious doctrine. In 1521 in support of Pope Leo X, King Henry VIII condemned the writings of Luther and warned that his teachings were tantamount to treason. His suppression of Protestant tracts earned him the title of "Defender of the Faith" from the pope.

The system took an even more decided turn toward imperial rule in 1528. In search of support for his impending divorce from Catherine of Aragon, the King gave English printers preferential treatment and protection against encroachments into their budding businesses by foreigners. The next year the King issued an index of forbidden books for the first time, most of them by foreign authors such as Luther. He also instituted a licensing system to reward loyal printers. The forbidden list was drawn up by the clergy and supported by the licensed printers. In 1530, Thomas Hitton violated the new law by selling the books of Tyndall, a heretic who had published a new translation of the Bible a century earlier. Hitton was executed. Richard Bayfield in 1531 and James Bainham in 1532 were burned at the stake under the same law.

The King reinforced economic sanctions against outsiders in 1534; he refused to allow the importation of books that were bound in foreign countries. That same year Henry broke with Rome because the pope refused to sanction the King's divorce. When Henry broke with Rome, it was essential that he contain criticism from English Catholics. Thus, more suppression was necessary. By the end of 1535, he had strengthened his power and suppressed dissent by executing Sir Thomas More and Bishop Fisher. In 1538 Henry extended control over the press with a new proclamation: the Crown would grant copyrights. For printers, this meant enhanced protection for their works. At the same time, it meant that printing became a royal privilege, and the king had removed potential forums for airing grievances. Soon the privilege was granted or removed to keep printers in line. The Proclamation of 1538 strengthened licensing procedures and punished those who published "seditious opinions"—words critical of the king and his government.

When Henry died, his son, the boy-king Edward VI, converted the monopolies back to licenses and granted freedom to print tracts on the Reformation. However, the vitriolic and emotional nature of

the disseminated tracts led to chaos. His guardians forced Edward to issue proclamations re-establishing control by the Crown. Religious freedom was not tolerated and, therefore, freedom to print and to speak about religion was also restricted. For this reason, many of the people who immigrated to America viewed freedom of speech, press, and religion, and the right to a fair trial, as integral to their well-being.

With Edward's untimely death in July of 1553, his half-sister Mary assumed the throne and re-established Catholicism as the state religion. Even though Protestants were once again disenfranchised, Mary was initially popular. Thousands greeted her when she came to London for her coronation. For over a year, she ruled happily. However, when Protestants continued to plot to overthrow the new Queen, she quashed dissent by re-enforcing licensing procedures and targeting seditious and heretical speech. On June 6th, 1558, she made clear in a proclamation that verbal assaults on the Queen would be dealt with as harshly as treason. She had discovered that even a little freedom had resulted in disruptive pamphleteering. The Queen's license would be required for all printed material. Just as Mary was escalating the punishment of dissenters and the conducting of illegitimate trials, she died of a cancerous tumor.

Henry's second daughter, Elizabeth I, found the system she inherited from her half-sister extremely useful during her 45-year reign (1558–1603). In her second year on the throne, she revised the licensing system by "Injunction" to suit her purposes. All books were to be submitted to the Queen's Council for approval. For example, plays and ballads required licenses. So did "news pamphlets," the most prolific publisher of which was John Wolf. He was followed by Nathaniel Butter and Nicholas Bourne, both of whom were prolific "news pamphlet" publishers during and after Elizabeth's reign.

Even reprints required approval due to the changing religious affiliation of the throne over the preceding decade. Elizabeth granted licenses to her favorites; however, licenses were up for renewal regularly and revoked when the licensee offended the Crown. By the end of her first year on the throne, thirteen printers had been fined and one imprisoned.

Elizabeth faced opposition both from Catholics who sought re-unification with Rome and from Protestants who believed the Anglican Church had not gone far enough in removing "Popish ritual" from the church. Further, pretenders to the throne constantly threatened Elizabeth's rule, so she used the printing licensing system and her courts to control secular as well as religious dissent. Proclamations to reward those who would report sedition were common; enemies faced confiscation of books and pamphlets.

Still, Elizabeth remained unsatisfied with the results. In 1577 and again in 1580 she created a licensing board of twelve, who reported to her and relieved the Bishop of London of much of his

review authority. In 1586, Elizabeth issued the Star Chamber Decree, which remained in effect until 1637. This comprehensive decree limited printing, gave the Stationers Company search and seizure rights, further tightened the licensing process, and provided the Queen with more control over her courts. In 1599 yet another set of regulations was added to the tangle; it specified that drawings and epigraphs had to be approved by the Queen's Council, as did any new histories, plays, and political tracts. Doonesbury would not have survived long in the Queen's England. Religious freedom, freedom of expression, and the issue of a fair trial were bound together in the minds of dissenters, the same dissenters whose offspring would populate Massachusetts, Maryland, Virginia, Pennsylvania, and the other colonies.

The strife did not abate in seventeenth century England. While Catholics had no chance to gain control, they were at constant war with Protestants over civil liberties. And the Protestants were at war among themselves over how pure their religion should be. Charles I, the second son of King James I, took the throne in 1625 during a period of extreme religious and political turmoil. It was during his reign that graphics began to creep into the ever present "news pamphlets." When an attempt was made to kill Charles in 1627, the murder weapon (a knife) was depicted in most "news pamphlets." These same pamphlets depicted the drawing and quartering of the assassin of Henry IV of France, which resulted in a huge increase in circulation. Sensationalism became one of the hallmarks of the new journalism.

By 1630 when the Puritans set sail for America, only 23 master printers and 55 presses were certified in the kingdom—one at Oxford, one at Cambridge, and 53 in London under the ruler's nose. Respected for his degrees from Cambridge, John Milton (1608–74) supported the Presbyterian reform of what he believed to be the overly ritualistic Church of England. After Milton broke with Presbyterianism, he was given a post in Oliver Cromwell's Puritan government.

The oppression that followed under Oliver Cromwell was even worse than under the monarchy. In 1643, an "Act for preventing abuses in printing seditious, treasonable, and unlicensed pamphlets, and for regulating of printing and printing presses" prompted Milton to write *Areopagitica* in 1644. Milton's tract was a call for freedom of the press aimed at the repressive Parliament, which, ironically, he had earlier helped bring to power. A poet at heart, Milton brought his eloquence to the issue of suppression of freedom.

> Books are not absolutely dead things, but do contain a potency of life in them to be as active as that soul was who progeny they are; nay they do preserve as in a vial the purest efficacy and extraction of that living intellect that bred them.[5]

The give and take of argument was vital to reaching the truth. So even unpleasant debate must be tolerated because "Where there is much

desire to learn, there of necessity will be much arguing, much writing, [and] many opinions. . . . Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."[6] In fact, Milton's argument that if truth and falsehood were left to grapple freely, truth would win out, inspired Jefferson's statement in his first inaugural address that we are "not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left to combat it."[7] Cromwell's key to seizing power was the formation of the New Model Army in 1645; his military prowess led to the defeat of Catholic Ireland and Presbyterian Scotland by 1650. In 1653, Cromwell proclaimed himself Lord Protector of the realm, and immigration to the American colonies escalated. In the minds of those fleeing his rule, the goals of a free press, free speech, fair trial, and religious liberty were merged. In 1656 Cromwell refused the crown but continued to enact laws that crushed any dissent to his rule.

Religious toleration was at low ebb when Cromwell died in 1658; royalists immediately launched a movement to restore the crown. After the Restoration of the monarchy in 1660, Milton was forced into hiding and some of his books were banned. During Milton's absence, Enlightenment thinkers began to emerge; they argued for tolerance, liberty, and reasoned discourse. These early advocates of republican democracy embraced freedom of expression and influenced the American colonies. Algernon Sidney's *Discourses on Government* was standard reading for those who would found a nation. Even more popular was Burgh's *Political Disquisitions* on nonconformist thought and natural rights; his book could be found in almost every village in the colonies.

Read mostly by the intelligentsia, John Locke (1632–1704) had an influence beyond his readers since they took his ideas and tried to implement them in the United States. One of Locke's first works was *A Letter Concerning Toleration*.[8] Sprinkled through the letter one can find phrases that inspired Jefferson's draft of the Declaration of Independence. For example, Locke defined "civil interests" as "life, liberty, health" and happiness.[9] The letter begins with a discussion of religious tolerance that Locke links to the right to assemble peaceably. This was a critical point for the First Amendment: freedom of religion is nothing if one cannot associate with others who share one's beliefs. Writes Locke, "A church, then, I take to be a voluntary society of men, joining themselves together of their own accord in order to [accomplish] the public worshiping of God in such manner as they judge acceptable to Him. . . ."[10] It is often thought that freedom of assembly was meant only to protect the right to protest against government, but its roots also can be traced to the free exercise of religion. Locke catches the attention of the colonists in America when he writes, "Not even Americans, subjected unto a Christian prince, are to be punished either in body or goods for not embracing our faith and worship."[11] Anticipating the problems free-

dom of religion would bring to the law (see chapter 3), Locke writes that practices that are "not lawful in the ordinary course of life, or in any private house" are not lawful in the worship of God or "in any religious meeting."[12]

Locke's theory of the human soul also influenced his theory of government. Since every soul comes into the world "tabula rasa" (a blank slate), all persons are created equal. That would be the initial state of people if we lived in a natural state.[13] In the second of his *Two Treatises of Government*, he makes clear that the state is created out of a compact of consenting agents to provide the maximum amount of freedom and happiness consistent with order for the sake of security:

> [E]very man, by consenting with values to make one body politic under one government, puts himself under an obligation to everyone of that society to submit to the determination of the majority.[14]

Locke's writing influenced the English Bill of Rights of 1689, a product of the Glorious Revolution of the previous year. The Parliament replaced James II in a bloodless coup by putting his daughter Mary and her husband William of Orange on the throne.[15] They were willing to sign a new English Bill of Rights. Reflecting Locke's influence, religious freedom was extended to Protestant non-conformists in the Toleration Act of 1689. However, free speech, free press, and total religious tolerance (particularly for Catholics, Unitarians, and Jews) was not included in the laws following the Glorious Revolution. The Test Act and the Corporation of Act, which restricted the rights of dissenters, were left standing. Dissenters were still forced to swear loyalty to the king and to take communion in the Church of England if they wished to hold public office. These acts were not removed from the books until 1828.

The key premise that flowed from Locke through the English Bill of Rights and to America was that freedom of conscience, belief, and speech were inalienable rights. Self-determination in a person requires freedom to think and develop, just as responsible self-determination in a nation requires freedom of speech, press, and religion. A nation could not reach Locke's version of happiness without these rights.[16]

Liberal Thinkers

Some of the best thinking on freedom of expression did not appear in England until after the United States had a fairly well developed understanding of the issue. Nonetheless, we will summarize the writing of John Stuart Mill (1806–73) because his theory appealed to jurists in the United States. His father, James Mill, had been a proponent for Jeremy Bentham, the author of utilitarianism. Bentham had advanced theories of liberty and equality based on providing the greatest happiness to the greatest number. John Stuart

Mill wrote his most influential works from 1854 to 1861. *On Liberty* explored the balance between individual freedom and the government's need to protect its citizens from harm. This issue surfaces and resurfaces in cases involving discourse that might present a danger to the public: for example, advocating the violent overthrow of the government or inciting others to violence. In the first paragraph of *On Liberty*, Mill stated that his book was about "the nature and limits of the power which can be legitimately exercised by society over the individual."[17] Mill demonstrated that effective government should only deal with the individual's external actions, not internal thoughts. Liberty of conscience was as precious to Mill as it was to Locke, and he argued that self-development was a product of a free and educated mind. We have a right to think as we please and a right to receive information necessary for our growth into responsible citizens.[18] The search for the truth requires the freedom to express and the freedom to receive ideas and the evidence that supports them. Mills concluded *On Liberty* by arguing:

> A government cannot have too much of the kind of activity which does not impede, but aids and stimulates, individual exertion and development. The mischief begins when, instead of calling forth the activity and powers of individuals and bodies, it substitutes its own activity for theirs; when, instead of informing, advising, and upon occasion, denouncing, it makes them work in fetters, or bids them stand aside and does their work instead of them. The worth of a State, in the long run, is the worth of individuals composing it . . . a State which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes, will find that with small men no great thing can really be accomplished.[19]

The Emergence of First Amendment Freedoms in America

Long before Mill wrote those words, the relationship between preaching and civil rule in the often hostile environment in the colonies was a strong one. Many colonists were starving and under attack by "savages." They looked to God for help. Since preachers spoke out on public issues, they had a tremendous impact on political persuasion. Civic leaders like Jonathan Winthrop often quoted scripture to inspire unity and obedience. Aboard the ship *Arabella* just before landfall in the New World in 1630, he called for a New Zion in the wilderness with its "shining city upon a hill." That call created a civil government as well as a religious organization. Many of the crimes for which colonists would be tried were of a religious nature.

The unity Winthrop sought lasted for only a generation. As a whole, the second generation of settlers did not endure the hardships of their parents. The colonies had become more secure and somewhat prosperous. In their relatively secure world, they felt less need to rely on God, and a diversity of beliefs developed. The church fathers adapted to this situation by creating a "half-way covenant." It allowed members, especially children, to attend church but not to partake of communion. The hope was that these half-way members would eventually "see the light." The half-way covenant allowed them into the church in the hope that they would earn their way to the altar.

Propagating their faith was only one of the problems the Puritans faced in trying to sustain their ideology. A more devastating problem arose when "visible saints" (those recognized by the church as being saved) could not agree among themselves on who in the community had been saved. This fact led to confusion and disputes that compromised the legal status of the charter. In the end, civic leaders were forced to share legislative powers with "deputies" elected by freemen. This sharing was reinforced in 1641 when Charles I forced the colony of Massachusetts to accept religious tolerance in secular affairs. The new Royal Charter said:

> Every man whether inhabitant or foreigner, free or not free shall have libertie to come to any publique court, counsel, or Towne meeting, and wither by speech or writing to move any lawful, seasonable, and material question, or to present any necessary motion, complaint, petition, bill or information, where that meeting hath proper cognizance.[20]

While the rule did not endear Charles to the colonists of Massachusetts, they did debate local affairs in town meetings, a tradition that continues to this day in most of New England.

Three years later, Roger Williams lobbied for separation of church and state. The printed exchanges between Roger Williams and Puritan leaders reveal the flavor of early debate over theological issues. In his famous *Bloudy Tenent of Persecution for Cause of Conscience*, which refuted a tract prepared by the Massachusetts' ministers, Williams wrote: "Magistrates . . . have no power of setting up the Forme of Church Government . . . . And on the other side, the Churches as Churches, have no power . . . of erecting or altering formes of Civil Government." Williams opposed the laws requiring oaths of allegiance, tax payments to support the church, and church attendance. For his contrary religious beliefs, Williams had been brought before the General Court of Massachusetts in 1635, where he was found guilty of heresy, and banished to England. Williams escaped and joined other dissenters to form the colony of Rhode Island.

Freedom of expression flourished in Rhode Island under Williams' leadership. He made church and state separate institutions and prohibited religious tests for citizenship. The colony soon became a haven for persecuted minorities. In 1647, Rhode Island adopted a code of laws that began: "All men may walk as their consciences persuade them." The link between freedom of conscience and freedom of expression was never more clear. In 1663 Rhode Island obtained a royal charter from King Charles II, leader of the restored Stuarts, which provided:

> No person . . . shall be in any [way] molested, punished or disquieted or called in question, for any differences in opinion in matters of religion, [which] do not actually disturb the civil peace of our said colony.

Within this atmosphere of toleration, Quakers, Baptists, and Jews enjoyed the right to practice their religions. Newport, Rhode Island was soon the site of the first synagogue in America.

Through this period of turmoil, many colonies followed the example of Rhode Island. In 1669, the Carolina proprietors wrote a Constitution that ensured a prohibition against double jeopardy, a right to trial by a jury of twelve, and freedom of religion based on the writings of Locke. In 1676, West New Jersey passed "fundamental laws" that provided broad religious freedom and guaranteed trial by jury. In 1680, New Hampshire granted full rights to dissenters, as long as they were Protestant. In 1683, the Pennsylvania "Frame" outlined a charter of liberties that included trial by jury, and a reinforcement of the Quaker commitment to religious freedom.[21] In the same year, New York passed a Charter of Liberties that included trial by jury; in 1691 in the wake of the Glorious Revolution in England, the colony provided full religious freedom for all Protestants. Thus, by the early 1700s the Enlightenment dream of rule by law as determined by free men acting reasonably was becoming a reality throughout the colonies. As the American Revolution drew near, Samuel Adams would argue that colonists must fight for a bill of rights, a bill that contained the rights that had evolved over the previous century and a half. Following suit, Boston's James Otis quoted Locke, Rousseau, and the English Bill of Rights in his defense of revolution. Although incorporating many of the English ideas, the rights he asserted were first written and inserted into law in the colonies, not in Europe.[22]

The New Religion, Diversity, and Free Speech

A religious "awakening" preceded the American political revolution and opened the citizens of America to spiritual democracy.

George Whitefield, who visited from England, took his ministries to prisons and open fields. These tactics led to revivals that culminated in the Great Awakening of religious spirit in the first half of the 1700s.

The importance of the revivals that rocked America from 1690 to 1750 cannot be underestimated. For the most part, the revivalists abandoned notions of predestination and taught that every man or woman could find salvation in Jesus. This message heightened a sense of individualism among colonists since they were being told everyone was capable of salvation. Since the preachers crisscrossed the colonies, they also contributed a sense of nationhood among the less affluent Christian colonists. The mass outdoor meetings gave the colonists an expansive feeling of comradeship that crossed borders.

Thus, the tradition of clerical influence over community life was resuscitated. Even though the growth of colonial states meant the growth of separate civil governments, most voters still heeded the advice of their ministers. The effective politician identified himself with the local pulpit. The preacher inspired the politician, particularly after the Great Awakening.

A good example of this linkage occurs in the rhetoric of the Reverend Jonathan Mayhew of Boston. His most famous sermon, "Unlimited Submission and Non-Resistance to the Higher Powers," was delivered in 1750, twenty-six years before the Declaration of Independence. An examination of the sermon reveals why some historians have called it the morning gun of the revolution. It synthesized revivalist thinking and Protestant adaptation. Its avowal of independence and individualism reflects Enlightenment thinking and is, in turn, reflected in the writings of our nation's founders. Here is a passage about the duties of the ruler and the ruled:

> It follows, by a parity of reason, that when he turns tyrant, and makes his subjects prey to devour and to destroy . . . we are bound to throw off our allegiance to him . . . to resist their prince, even to the dethroning of him, is not criminal, but a reasonable way of vindicating their liberties and just rights.

Because he was something of a gadfly, Mayhew's argument may have been stronger than most of those issued from the reformed pulpits of the time and became the essence of the campaign for American revolution. His thoughts are incorporated into our most sacred civil documents: citizens have inalienable rights that deserve protection particularly from a misbehaving monarch.

If the pulpits began the drum beat for freedom, the press sustained it with a call for revolution. One of the landmark cases on free press occurred in 1734 when John Peter Zenger, the publisher of the *New York Weekly Journal*, was put on trial for sedition because his paper was critical of Governor William Cosby. Andrew Hamilton, Zenger's lawyer, pleaded with the jury to rise above the law and to allow truth as a defense for any comments made. Praising the judg-

ment of local juries, Hamilton, in effect, made a plea for jury nullification. They complied by finding Zenger not guilty in August of 1735. Suddenly, a jury had handed the press a license to print the truth, no matter how damaging it might be.

The press was a purveyor of knowledge, plans, and partisanship as the colonies moved toward revolution. It regularly printed the speeches of patriots (Patrick Henry, for example) and preachers (such as Jonathan Mayhew), calling for dissent from an immoral king and parliament. The press decried the new taxes imposed to pay for the debt England incurred in the French and Indian War (1757–63). The press spread news of atrocities such as the Boston massacre of civilians by British "lobster backs," and it regularly reprinted the propaganda of Thomas Paine and Samuel Adams. Samuel Adams, for example, editorialized in the Boston *Gazette* and used its offices to print many powerful pamphlets. He was the leading propagandist for American rights. When the First Continental Congress approved a "declaration of rights" in 1774, Adams used it as a tool to persuade New Englanders to break with England. In their famous letter to the inhabitants of Quebec, the Continental Congress delineated the rights they sought and invited their brothers to the north to join the fight. These rights included life, liberty, property, assembly, petition, trial by jury, and freedom of the press.

The Revolution

In 1776 as various states declared their independence from England, they listed the rights for which they were fighting. These too were carried in the press. George Mason's Virginia Declaration of Rights, for example, listed freedom of the press as one of the great bulwarks of liberty. The Declaration of Pennsylvania declared both freedom of speech and the press sacred rights, along with trial by jury, freedom of religion, freedom from unwarranted search and seizure, and the right to bear arms. North Carolina, Georgia, Maryland, and Delaware all followed suit. New York in 1777, South Carolina in 1778, and New Hampshire in 1783 endorsed bills of rights. In 1778, Massachusetts rejected a new constitution because it did not contain a bill of rights; a new one was finally approved in 1780. The abundance of new charters during the revolution set the precedent for colonists to demand a bill of rights when the federal constitution was written ten years later.

The growing diversity of people in the New World led to the development of new attitudes. The largest colonial cities, New York and Philadelphia, were prosperous and Enlightenment thinking flourished. Numerous religious sects coexisted in mutual toleration. As the frontier pushed westward, it became more difficult to control established religious institutions. An entirely new social order took root.

James Madison had joined the debate over religious freedom while studying at Princeton University (then known as the College of New Jersey) from which he received his bachelor's degree in 1771. He was steeped in Presbyterianism while witnessing the persecution of dissenters. Perhaps that is why Madison and his mentor, Thomas Jefferson, encouraged Virginia's endorsement of freedom of religion when the colony declared her independence from England. In Philadelphia, Jefferson first considered composing a constitution for his home state of Virginia when he was putting the finishing touches on the Declaration of Independence. He believed a state constitution should include the following article: "All persons shall have full and free liberty of religious opinion; nor shall any be compelled to frequent or maintain any religious institution."

In the same year, Madison represented Orange County as a delegate to the Revolutionary Convention in Virginia. He was appointed to the special committee drafting a declaration of rights. Madison advocated the strongest language possible for the separation of church and state. His amendment read in part:

> That Religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, that all men are equally entitled to enjoy the free exercise of religion, according to the dictates of conscience, unpunished and unrestrained. . .

Madison's substitute draft was very close to the final version adopted on June 12th, 1776.

In the spring of 1785, he penned one of the most influential documents on religious liberty, the *Memorial and Remonstrance Against Religious Assessments*.[23] It was written at the behest of his friends in the Virginia Assembly who were strongly opposed to the general tax proposed by Patrick Henry to support ministers of religion. Madison's *Memorial*, which was disseminated throughout Virginia and the other colonies, contended that religion was not the province of the state, that it "must be left to the conviction and conscience of every man," because religious freedom was an "unalienable right." He noted that the combination of church and state had left a legacy of "superstition, bigotry, and persecution." Furthermore, he argued that supporting religious institutions through public assessment would "destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects."

According to the *Memorial*, government's role in religious affairs was strictly limited to "protecting every citizen in the enjoyment of his religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any sect, nor suffering any sect to invade those of another." Madison drew a lesson from the history of religious persecution in the Old

World: "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?"

Henry's tax to support religious teachers was defeated. In its place, the General Assembly enacted "An Act for Establishing Religious Freedom," written by Thomas Jefferson in 1786. The statute began with the proposition that "our civil rights have no dependence on our religious opinions," and it went on to state:

> [N]o man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or bur[d]ened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no [ways] diminish, enlarge, or affect their civil capacities.[24]

After the passage of his Act, Jefferson wrote from Paris to his friend Madison:

> The Virginia Act for Religious Freedom has been received with infinite approbation in Europe and propagated with enthusiasm to most of the courts of Europe, and has been the best evidence of the falsehood of those reports which stated us to be in anarchy. It is inserted in the new Encyclopedie and is appearing in most of the publications respecting America. In fact it is comfortable to see the standard of reason at length erected, after so many ages during which the human mind has been held in vassalage by kings, priests and nobles: and it is honorable for us to have produced the first legislature who has had the courage to declare that the reason of man may be trusted with the formation of his own policies.[25]

This hallmark establishment of religious freedom laid the foundation for other freedoms.

Drafting the Constitution

The Constitutional Convention convened in Philadelphia on May 14th and adjourned on September 17th, 1787. The Framers deliberately left out any reference to God, Creator, or Divine Providence, all of which are reverently inscribed in the Declaration of Independence. Because most of the founders believed that individual liberties had been guaranteed by the states, only George Mason and Elbridge Gerry called for a national bill of rights. A compromise was crafted to deal with their complaint. Trial by jury was guaranteed in the new Constitution; bills of attainder were prohibited. But the only mention of religion appears in Article Six, paragraph 3: "No religious test shall

ever be required as a qualification to any office or public trust under the United States." Chapter 2 explores how the ratification conventions for the new Constitution created the push for a bill of rights.

Conclusion

The difference between the European and American models for dealing with freedom of expression is a product of history. The established monarchies of Europe were intolerant of dissidents and worried that arming them with a printing press and the right to speak out in mob meetings would increase their influence and weaken the governments in power. Until the invention of the printing press, Europe was composed mainly of Catholic countries. The majority of nations loyal to the pope could be counted on to bring those who wandered from Catholicism back into the fold. Heretics, doubters, and the like were treated harshly. All that changed when new technology combined with the rhetorical effectiveness of leaders like Martin Luther. As citizens read religious tracts in their native tongues, allegiance to Rome began to waiver At the same time, nationalism became more attractive than universalism in Europe. While nationalist leaders used the press and speech for their own purposes, they continued to oppress dissenters in their midst with the same force the Church had used earlier.

It took centuries for Europeans to win their natural rights. Watching in the colonies, "Americans" were inspired to seek more freedom, especially as they became more financially secure. Preachers of the new religion were on the cutting edge of the calls for freedom; they argued that all humans were savable in God's eyes, that each person as an individual could find God, and that emotionalism was a key to the conversion process. The revivalists were soon joined by the political speakers who wished to conserve American freedoms against a tide of taxes and restrictions being imposed by England in the wake of its war with France. The press carried these political speeches, letters, and editorials to a mass audience that was becoming more literate with each passing year. Clearly, the American Revolution was a product of religious freedom, free speech, free press, and the right to assemble. The First Amendment is often referred to as the amendment that contains our first freedoms; they are naturally bound together because they interacted effectively to produce our nation. Since speech and press were instrumental in fomenting revolution and protecting natural rights, the new nation did not quash dissent; it protected it. Because the colonies were of diverse origins and religions, they were forced to tolerate freedom of conscience in unparalleled ways. The American Revolution's chief contribution to the history of ideas is that it took the theories of the Enlightenment and converted them into pragmatic realities.

Chronology of Development of Press and Freedom of Expression

3000 BCE—Sumerians develop symbol-writing system.
2000 BCE—Egyptians begin writing on papyrus; Semites develop an alphabet.
59 BCE—Romans post the news on parchment in marketplaces and forums.
100 AD—Chinese invent ink and use it on paper made from wood.
1034—Chinese develop moveable clay type.
1215—King John signs the English Magna Charta.
1456—Johannes Gutenberg invents a machine that uses moveable type in the printing process.
1476—William Caxton establishes a print shop in Westminster, England.
1485—Archbishop Berthold von Henneberg of Frankfurt imposes censorship there and in Mainz.
1513—Richard Faques publishes newspaper account of Battle of Flodden Field.
1517—Martin Luther posts his 95 theses challenging church officials to a debate.
1521—King Henry VIII condemns the teaching of Luther.
1530—Thomas Hitton is executed for selling the works of the heretic Tyndall.
1534—King Henry VIII bans the importation of books published outside England.
1535—Thomas More is executed for refusing to leave the Catholic Church.
1538—King Henry VIII established royal copyrights, reinforced licensing powers of the crown, and held "seditious opinions" to be criminal.
1553—Mary Tudor becomes Queen and re-establishes Catholicism as official religion.
1558—Queen Mary issues proclamation condemning sedition and then dies.
1558—Elizabeth I begins her reign by re-establishing Protestantism as the state religion and strengthening licensing requirements for printers.
1559—Cardinal Carafa establishes the Catholic Index of forbidden books.
1579—The Frankfurt book market is placed under the Imperial Censorship Commission.
1586—Elizabeth I issues the "Star Chamber Decree."
1635—Roger Williams is condemned in Massachusetts as a heretic.
1641—Massachusetts adopts "Body of Liberties."
1642—"Act for preventing abuses in printing seditious, treasonable, and unlicensed pamphlets, and for regulating of printing and printing presses" is passed by the English parliament.
1644—John Milton publishes *Aeropagitica*. Roger Williams writes *Bloudy Tenent of Persecution for Cause of Conscience*.
1649—Maryland adopts "An Act Concerning Religion."
1688—William and Mary are put on the English throne by the Glorious Revolution.
1689—William and Mary issue the English Bill of Rights and the Toleration Act.
1750—Jonathan Mayhew delivers his sermon, "Unlimited Submission and Non-Resistance to the Higher Powers."
1774—The Continental Congress adopts a "declaration of rights."
1776—George Mason writes Virginia's Declaration of Rights; Pennsylvania approves a new "Frame" guaranteeing freedom of speech, press, and religion.

1785—James Madison publishes *Memorial and Remonstrance Against Religious Assessments*.
1786—Thomas Jefferson writes and Virginia adopts an "Act for Establishing Religious Freedom."
1787—United States new Constitution is written and approved in Philadelphia.
1788—The Constitution is ratified by the states.

Study Questions

1. Why was Charles VII of France worried when he heard that a printing press with moveable type had been invented in Mainz?
2. What position did the Catholic Church take on the issue of publications coming from Gutenberg's new press?
3. What kinds of restrictions did English kings and queens place on the press from 1476 to 1600?
4. Though John Milton considered himself a supporter of Oliver Cromwell's oppressive regime, Milton wrote a defense of free speech. Why? What was its major thesis?
5. What position did the new colony of Massachusetts take on freedom of speech and religion?
6. What role did the press play in fomenting revolution in America?
7. What role did the clergy play in fomenting revolution in America?
8. What does the drafting of the Constitution reveal about the founders' intent regarding freedom of speech, press, religion, and assembly?

Endnotes

[1]The Greeks most serious rivals, the Persians, reflected the sun off their shields to send messages.
[2]He eventually became Pope Paul IV, and supported the Inquisition.
[3]Frederick Seaton Siebert, *Freedom of the Press in England, 1476–1776* (Urbana: University of Illinois Press, 1952), pp. 24–25.
[4]W. S. Holdsworth, *A History of English Law* (Boston: Little, Brown, and Co., 1924), pp. 191–215.
[5]John Milton, *Areopagitica*, 1644. See *Bartlett's Familiar Quotations* (Boston: Little, Brown & Co., 1980), p. 281.
[6]*Areopagitica*, 1644. *Bartlett's Familiar Quotations*, pp. 281–282.
[7]March 4, 1801. See also "Letter for William Roscoe" in *The Papers of Thomas Jefferson*.
[8]In *John Locke on Politics and Education*, Howard R. Penniman, ed. (Roslyn, NY: Walter J. Black, Inc., 1947).
[9]Locke, p. 25.
[10]Locke, p. 27.
[11]Locke, p. 48. In fact, Locke contributed to the precept of religious freedom in the *Constitution of the Carolinas*.

[12]Locke, p. 48.

[13]The second treatise also appears in *John Locke on Politics and Education*, p. 77. Locke's thought on the natural state of persons was picked up by Jean-Jacques Rousseau (1712–78) in the next century. Rousseau, whose influence on the French speaking Thomas Jefferson should not be underestimated, believed that humans were innately good but often corrupted by civilization. This philosophical stance was partially responsible for Jefferson and Madison's desire to have a system of checks in place to restrain self-interest.

[14]Locke, p. 124.

[15]James II was allowed to flee to France. Two years later he came to Ireland hoping to foment a revolt in England. But his attempt to regain the crown failed.

[16]Locke's position was extended to include "the right to receive information and ideas" when the Supreme Court handed down its *Stanley v. Georgia* decision in 1969 (394 U.S. 557, 564).

[17]John Stuart Mill, "On Liberty" in *Essential Works of John Stuart Mill*, Max Lerner, ed. (New York: Bantam Books, 1961), p. 255.

[18]Justice Louis Brandeis, among others, included this belief in some of his decisions, most importantly in *Olmstead v. United States* (277 U.S. 438, 478) when he wrote:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations.

[19]Mill, p. 360.

[20]In the same year, Charles I fled to Scotland to form an army in an attempt to regain power from the Long Parliament.

[21]All of these charters preceded the English Bill of Rights of 1689.

[22]This is not to deny the influence of European philosophers such as Rousseau. Their writings certainly did persuade the founders and contributed to their eloquence. For example, the writings of Charles Louis Montesquieu (1689–1755), particularly his comparative study of government, were taken to heart by those who wrote the United States Constitution.

[23]For full text, see Craig Smith, *To Form a More Perfect Union* (Lanham, MD: University Press of America, 1993), pp. 192–197.

[24]For full text, see Smith, *To Form a More Perfect Union*, pp. 198–199.

[25]Letter of June 2, 1788 in Rutland, *The Papers of James Madison*, Vol. XI, p. 71.

Chapter 2

The Ratification of the First Amendment

In December of 1791, the First Amendment was added to the Constitution three years after its ratification. As they had over the ratification of the Constitution, the states argued about adding a Bill of Rights—for two years. Some like Virginia and Massachusetts wanted a very strong Bill; others like Connecticut thought such specifics were unnecessary. The debate over the Constitution had spawned new political parties—Federalists generally supporting the Constitution and a strong central government and Antifederalists generally objecting to the Constitution and seeking to retain states' rights. The debate over the Bill of Rights strengthened the differences between the new parties. The context of these debates often resurfaces before the contemporary Supreme Court and the Congress when the precept of "original intent" is invoked. Original intent relies on the thinking of the founders to interpret the language of the Constitution and its amendments. Since the various clauses of the First Amendment are open to interpretation, any guidance that can be provided is helpful in parsing its meaning. This chapter attempts to establish the context of ratification as a guide to the founders' intentions.

A chronology of the ratification of the Constitution and the Bill of Rights is provided at the end of this chapter. The chapter itself is organized around several themes. First, we examine the differences between the Federalists and the Antifederalists. Second, we return to the question of religious liberties and how they impinged on arguments for freedom of expression. Third, we examine the justifica-

tions for freedom of speech, petition, and peaceful assembly. By the end of the chapter, it should be clear that placing these clauses together in an amendment that began "Congress shall make no law abridging the freedom" of speech, press, assembly, and religion was no accident. At almost every turn, the founders strengthened crucial liberties inherited from Enlightenment philosophers and defended during the Revolutionary War.

Federalists vs. Antifederalists

The ink was hardly dry on the Constitution produced at the convention in Philadelphia in the hot summer of 1787 when objections were raised. Several founders sought to take the Constitution back to the drawing board even before it was put out to the states for ratification. Some of those who objected came from Pennsylvania whose famous new "Frame" (constitution) of 1776 was the first document in the newly independent colonies to guarantee free speech *and* free press along with freedom of assembly, the right of petition of grievances, and the right to a public trial.[1] It is important to remember that Pennsylvania's sense of religious tolerance stretched back to its founding under William Penn. Thus, when some members of the Pennsylvania Ratification Convention called for a second constitutional convention to secure religious freedom, their request had weight.

Virginia had long been a leader in the establishment of legal guarantees of individual rights. As we saw in the last chapter, the Virginia Declaration of Rights of 1776 called for a free press, declaring it, in George Mason's words, the "bulwark of liberty."[2] Mason's Declaration inspired Jefferson's writing of the Declaration of Independence and was the first bill of rights in American history. Like Pennsylvania, Virginia broke new ground by guaranteeing free exercise of religion, free press, protection from searches, due process of law, and the right to a trial by a jury of one's peers. Thus, it came as no surprise that one of Virginia's Antifederalist representatives to the Constitutional Convention of 1787, Richard Henry Lee, moved that a bill of rights be sent to the states along with the Constitution.

Almost immediately after the Philadelphia Convention adjourned, George Mason held a meeting with Antifederalists in Philadelphia and complained that there was no declaration of rights. Mason's objections to the Constitution were quickly published in newspapers throughout the states. He was one of three delegates at the Constitutional Convention who did not sign the document; Edmund Randolph of Virginia and Elbridge Gerry of Massachusetts were the other two. In fact, Mason exclaimed he "would sooner chop off his right hand than put it to the Constitution as [it stood]." Randolph suggested a motion that the states should be "free to propose

amendments . . ." to the Constitution and "[t]hese amendments would then be submitted to another general convention that would be empowered either to 'reject or incorporate them as shall be judged proper.'"[3] These men, along with Governor Morris of New Jersey, believed that even if the document went to the states, a second convention was ultimately necessary to right the wrongs that had been written into, or omitted from, the Constitution. However, Randolph's motion did not carry, and no provision was made for a second general convention. The Constitution went to the states for ratification with Morris' reluctant signature.

With the question of a second convention put to rest, Federalists began to push for ratification of the Constitution in their strongholds. Delaware, Pennsylvania, and New Jersey had ratified the Constitution by the first day of January 1788. The Connecticut Ratification Convention met in Hartford from January 3 to 9. Connecticut was the first New England state to ratify.

The Role of the Press

The press was clearly the medium of choice in the debates over the Constitution. The newspaper dailies in Philadelphia alone included the *Independent Gazetteer* and the *Pennsylvania Packet and Daily Advertiser*. The *Packet* was a Federalist paper and the best source for formal pronouncements and "addresses." It was similar to a journal of record. The *Gazetteer* printed both Federalist and Antifederalist editorials and speeches until mid-November, 1787, when it became strongly Antifederalist. However, the *Gazetteer* printed more original writing on the Constitution than any other newspaper, and its columns were widely reprinted throughout the country.[4] The weekly *Gazette* was Philadelphia's leading Federalist paper; its stories were reprinted throughout the country. Of the two monthly magazines, the *American Museum* had a national subscription list and was strongly Federalist. Of the four weeklies and one biweekly published outside Philadelphia, the Carlisle *Gazette* was the most important. This Federalist paper was published in a Federalist town that was located in a hostile Antifederalist county.

The Constitution was reprinted at least once in each of these papers. It was also widely printed in handbills, broadsides, pamphlets, and almanacs. On September 24 and 25, 1787, the Pennsylvania assembly augmented this distribution by ordering the printing of English and German versions of the Constitution at state expense,[5] perhaps the first legislative order for a bi-lingual program of voter education.

Before, during, and after the Philadelphia Convention, the defects of the Articles of Confederation were endlessly attacked in the speeches and editorials. To find defects in the Articles was not

difficult, nor was it difficult to attack the proposed Constitution once its details were made public. Admirers of the state's "Frame" were aware that a new Federal Constitution was likely to alter the confederation considerably and would probably necessitate changes in the state's constitution. The *Independent Gazetteer* reported on August 8, 1787, more than six weeks before the Philadelphia Convention adjourned, that meetings were being held in the homes of George Bryan and Jonathan Bayard Smith to distribute publications "to excite prejudices against the new federal government, and thereby prevent its adoption by this state."[6] In mid-September public meetings were held in and about Philadelphia for the purpose of petitioning the assembly to call a convention. Between September 24 and 29, the assembly received petitions with over 4,000 signatures asking for a ratification convention.[7]

On September 26, 1787, three days before the assembly voted to call a ratifying convention, the first major attack on the Constitution was published in the *Freeman's Journal*. The same day Tench Coxe published "An American Citizen" Number 1, in the *Independent Gazetteer*, the first major defense of the Constitution to appear in the press in Pennsylvania. In the next few days, editorials flooded the press; "The Address of the Seceding Assemblymen," *Centinel I*, and James Wilson's speech of October 6, 1787 were the most influential. Samuel Bryan, a former clerk of the state assembly, authored the *Centinel* essay, which was published on October 5 in the *Independent Gazetteer* in both English and German. It was then excerpted in the Carlisle *Gazette* on October 24, and in the *Freeman's Journal* on December 12.[8] The Centinel essays, named for the *Massachusetts Centinel*, were the most outspoken attacks on the Constitution and on the motives of the delegates to the Philadelphia Convention. The first one argued that freedom of speech was unprotected by the new Constitution.

The day after the first *Centinel* essay appeared, James Wilson gave his speech in the State House yard, a speech that became an "official" Federalist interpretation of the Constitution in all the states.[9] It was delivered at a public meeting to nominate candidates for the assembly elections on October 9.[10] It was published as an extra edition of the *Pennsylvania Herald* that evening. Saying they were responding to "extensive demand," the *Herald* reprinted the speech over ten times within the following three weeks.[11] The far-reaching influence of this speech is documented by its publication on October 31 in the *Massachusetts Centinel*, which reported: "The *essence* and *quintessence* of all that can be objected to the American Constitution are comprised in the address of the Pennsylvania *seceders*, and a complete answer to them and the other Antifederalists, may be found in the address of Mr. Wilson."[12] The debate intensified when the Antifederalists responded to Wilson in "A Democratic Federalist" on October 17.[13]

The press played a major role in the ratification process in Pennsylvania. The arguments set a precedent that was followed in other states and enhanced the chances of the passage of an amendment to the Constitution that called for freedom of expression in the new nation.

The Federalists, who were concentrated in the cities and mainly from the merchant class, had won the initial struggle to strengthen the federal government with a Constitution. However, the Antifederalists, who were scattered on farms and mainly from the agricultural class, came up with a new strategy. They would seek *conditional* approval of the Constitution now that the focus for ratification had turned to Massachusetts, a state steeped in Revolutionary War honors with a strongly organized Antifederalist movement. Samuel Adams, who served as president of the state Senate, had many serious objections to the Constitution, including the prohibition of a religious test for office holding.[14] He criticized the Constitution because it formed a national government with the possibility of an "aristocratic" Senate such as England's House of Lords. He publicly announced his opposition to the Constitution at a party caucus dinner on January 3, 1788.

The Massachusetts Compromise

The Massachusetts convention got down to serious business on January 14. The new Constitution was read, after which Caleb Strong moved that all delegates have the opportunity for discussion paragraph by paragraph before any votes were taken. Strong's motion was approved, which explains why the debate in Massachusetts was so wide-ranging. The strategy was also a victory for the Federalists, who believed that discussing the Constitution section by section helped make it more palatable to the pragmatic delegates. The more ideological delegates, mainly Antifederalists, preferred an up or down vote based on philosophical premises because they did not have a workable alternative to the Constitution. When the Federalists realized that most of the delegates present opposed an unamended Constitution, they shifted their strategy. They would rely on George Washington's endorsement. On December 14, 1787, Washington had written Charles Carter of Ludlow, Virginia, closing with some comments on the Constitution:

> My *decided* Opinion of the Matter is, that there is *no Alternative* between the *Adoption* of it and *Anarchy*. . . . All the opposition to it that I have yet seen, is, I must confess, addressed more to the Passions than to the Reason; and *clear I am*, if another Federal Convention is attempted, that the Sentiments of the Members will be *more* discordant or *less* accommodating than the last. . . . I am not a blind Admirer (for I saw the Imperfections) of the Constitution I aided in the Birth of, before it was handed to the Pub-

> lic; but I am fully persuaded it is the *best that can be obtained at this Time* . . . a constitutional Door is opened for Amendments, and may be adopted in a peaceable Manner, without Tumult or Disorder.[15]

On December 27, 1787, Washington's letter was reprinted by the *Virginia Herald* and then reprinted in various versions and with differing emphasis throughout the states including Massachusetts.

On January 24, James Bowdoin, a Federalist supporter of Washington, claimed that the entire Constitution was a declaration of rights, which "primarily and principally" limited the government it created.[16] The rights of particular states or of private citizens were not subject to the Constitution, which was why they were only incidentally mentioned. The rights retained by the states could not be listed because they encompassed all rights not included in the specific powers delegated to Congress. All governments required a certain relinquishing of personal rights; it was, however, improper and foolish to attempt to itemize those rights.[17] By this circumstance and the other checks built into the system, he reasoned, both states and citizens would be secure against the abuse of the powers of the new system. He argued, "In considering the Constitution, we shall consider it, in all its parts, upon those general principles which operate through the whole of it, and are equivalent to the most extensive bill of rights that can be formed."[18] Bowdoin said that these considerations had greatly influenced him in favor of the new plan of government.

Amos Singletary, who was concerned about *too much* religious freedom in the new nation, linked religious freedom to the clause in the Constitution that said no office holder shall be tested on the issue of religion (see below). He reasoned that this clause would damage America's cultural heritage because there was no provision that those elected to federal office should be of the proper faith. Though he hoped to see "Christians" elected, a "Popist," "Infidel," or worse were equally eligible under the new document.[19] Luckily, he did not convince others to reject ratification because of that clause.

On January 31, the issue came up again when the delegates debated the sixth article and the clause that "no religious test shall ever be required as a qualification to any office, etc."[20] Several delegates had argued that the new Constitution departed from historic ideals; the Puritans and others had come to the new world to preserve their religion. The clause, it was argued, would admit "deists, atheists" and others into the general government, which they feared would lead to a corruption of morals.

However, supporters prevailed and applauded the liberality of the clause. It represented to them, "in striking colors, the impropriety, and almost impiety, of the requisition of a test."[21] The Reverend Shute claimed that the clause excluding a religious test was popular

because most men were tenacious in their religious beliefs "and disposed to impose them upon others as the *standard* of truth."[22] If his sentiments differed from those of the convention at large, he wished only that the delegates would exercise "that candor with which true religion is adapted to inspire the honest and well-disposed mind."[23] To require a test, he stated, would injure specific individuals while bringing no advantage to the whole. The question was, who should be excluded from the national trust? Whatever answer bigotry might suggest, he said, candor and freedom dictated the answer *none*.

Colonel Jones represented the Puritan view when he argued that the nation's rulers ought to believe in God or Christ. If "public men" were to be of good standing in the church, it would be to the advantage of the United States: "a person could not be a good man without being a good Christian."[24] Colonel Jones suggested that an amendment to fix this problem would buy his vote for ratification.

To his credit, Reverend Payson took offense:

> Mr. President, after what has been observed, relating to a religious test, by gentlemen of acknowledged abilities, I did not expect that it would again be mentioned, as an objection to the proposed Constitution, that such a test was not required as a qualification for office. Such were the abilities and integrity of the gentlemen who constructed the Constitution, as not to admit of the presumption, that they would have betrayed so much vanity as to attempt to erect bulwarks and barriers to the throne of God.[25]

Payson's side carried the day and religious liberty won an important endorsement in a state with a history of intolerance.

On January 31, the convention had finished going through the Constitution paragraph by paragraph, and a motion was made to ratify. Federalist William Heath, a moderate, then said "that many gentlemen appear opposed to the system," but stressed that ratification was necessary to preserve the Union. He suggested that the convention:

> . . . ratify the Constitution, and instruct our first Members to Congress, to exert their utmost endeavors to have such checks, and guards provided as appears to be necessary in some of the paragraphs of the Constitution, and communicate what we may judge proper, to our sister States, and request their concurrence.[26]

The popular Governor John Hancock spoke directly after Heath concluded. Acknowledging the impropriety of the president entering into the deliberations, he said that with the permission of the convention, he would "hazard a proposition" that would remove many of the delegates' objections.[27] At 3:00 P.M., Hancock submitted his amendments.

His first proposition read "that it be explicitly declared, that all powers not expressly delegated to Congress are reserved to the several states, to be by them exercised." The convention took up Han-

cock's proposals on February 1, 1788. John Adams said they amounted to a bill of rights. Caleb Strong expressed his belief that if recommended by the convention, the first Congress would make all efforts to insert the bill into the Constitution. A special committee reported on February 4 that some minor alterations in the proposed amendments had been made, and then fifteen of the twenty-four members approved the amendments.

Samuel Adams' opposition to the Constitution moderated considerably. He said that the proposed amendments would remove the doubts of the delegates. Since union was crucial, the only question left was whether to ratify on condition of the addition of amendments or to rely on amendments being added in the future. Adams preferred that Hancock's amendments be included because they would influence those states that had not yet ratified. That influence would insure that the necessary amendments were "introduced more early, and more safely."[28] John Hancock spoke a few final words on February 6 and then called for a vote because: "All the ideas appertaining to the system, as well those which are against as for it, have been debated upon with so much learning and ability, that the subject is quite exhausted."[29]

The final vote was fairly close at 187 to 168. The convention reconvened at the Boston State House on February 7 where the ratification was proclaimed by Joseph Henderson, high sheriff of Suffolk County. Massachusetts established a solid precedent for Antifederalists who sought amendments to the Constitution. Without this action, the rights embodied in the First Amendment might not have been as strongly stated as they were.

Ratification in Other States

The debate between Federalists and Antifederalists then continued in other states, but a precedent had been set: a state could ratify conditionally. Marylanders supported the new Constitution on April 28, 1788. In South Carolina, the vote to ratify the Constitution was taken on May 23, 1788. The result was 149 in favor, 73 against, with 15 members "absent." The instrument of ratification included some suggested amendments to the Constitution. The delegates wanted it known that South Carolina interpreted the Constitution to leave with the states every power not expressly granted to the Union. They also suggested the word "other" be inserted in "no [other] religious Test shall ever be required as a Qualification to any Office or Public Trust under the United States." The demand for an "oath" to support the Constitution was unacceptable to some fundamental Protestant religions, which considered it a religious test.

In the meantime, Mason, Lee, and Henry wrote various editorials and essays condemning the Constitution and warning the states of a severe loss of their power and rights. While the rhetoric of these

men was influential, they did not organize or distribute their writings as effectively as did Alexander Hamilton, James Madison, and John Jay, the authors of *The Federalist Papers*. When the Virginia ratification convention finally got under way in June of 1788, the Antifederalist situation was dire: eight states had ratified.

Undaunted, Patrick Henry made clear his grievances with the document, stressing that he could not support the new government or the Constitution unless a bill of rights was added. One of his speeches was seven hours long. In it, he proclaimed, "Perhaps in these refined, enlightened days an invincible attachment to the dearest rights of man . . . may be deemed old-fashioned, if so, I am content . . . to become an old-fashioned fellow."[30] He added that a bill of rights "securing to the states and the people every right which was not conceded to the general government is indispensably necessary."[31] Henry warned the convention delegates:

> . . . to be extremely cautious, watchful, jealous of your liberty; for instead of securing your rights, you may lose them for ever. If a wrong step be now made, the Republic may be lost for ever. If this new government will not come up to the expectation of the people, and they shall be disappointed, their liberty will be lost, and tyranny must and will arise.[32]

Although Henry reinforced Antifederalist sentiment against the Constitution, the Virginia convention, perhaps afraid of being left out of the Union, or perhaps comfortable with the idea of proposing amendments to Congress, narrowly ratified the Constitution.

A few days earlier New Hampshire had provided the necessary vote to put the Constitution into effect. After an extensive debate in July, New York narrowly ratified. The Federalists got their Constitution, but the Antifederalists extracted a pledge for a bill of rights.

Amending the New Constitution

Though several states, particularly Virginia and Massachusetts, ratified the Constitution with requests for a bill of rights, James Madison remained skeptical about the need for it. Antifederalists responded that if governments were moral, a bill of rights would not be necessary. Madison's skepticism was further eroded when he returned from the first meeting of the new Congress in the winter of 1789 to fight for his House seat. He faced a tough opponent in James Monroe, who favored a strong bill of rights. On February 2, 1789, Madison won that election by only 366 votes. During the election he was forced to rethink his position on amending the Constitution. In a letter dated January 2, 1789, he wrote:

> [I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it, ought to

> prepare and recommend to the states for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the Freedom of the press, trials by jury, security against general warrants, etc.[33]

Madison had changed his mind about amending the Constitution. A few days later he wrote to George Washington that he was at a disadvantage in the congressional campaign because it was unfairly assumed that he was opposed to amendments because his defense of the Constitution had been so strong.[34]

Jefferson had premised his support for the Constitution on a bill of rights. He wrote on March 18, 1789:

> I am one of those who think it a defect that the important rights, not placed in security by the frame of the constitution itself, were not explicitly secured by a supplementary declaration. There are rights which it is useless to surrender to the government, and which yet, governments have always been fond to invade. These are the rights of thinking, and publishing our thoughts by speaking or writing. . . .[35]

When Washington in his first inaugural address gave Congress the responsibility for designing amendments, Madison was persuaded that he ought to lead the battle. The task would not be easy because it meant he was leaving the Federalists and becoming an Antifederalist. By April, when Congress reconvened, it had received over 200 proposed amendments. After eliminating duplications, Madison's House Committee found that they still had about 100 amendments to ponder. The Constitution could not bear the plethora of changes; more consolidating and whittling would be required.

Madison noticed that all eight states submitting amendments sought one that specifically retained for the states any rights not specifically delegated to the Congress. These would be combined and eventually become the Tenth Amendment. Other consensus amendments concerned a fair and speedy trial, protection for religious freedom, the right to bear arms, prohibitions on quartering troops, the right of petition and assembly, and freedom from unreasonable searches and seizures. Five states asked for guarantees of a free press with three of them asking for the additional right of free speech. Making Madison's job easier was the fact that 22 amendments were supported by four or more states. Of these, he incorporated 14 into his list.

On June 8, 1789, Madison moved that the House dissolve into a committee of the whole for the purpose of considering the new amendments. He delivered a lengthy speech defending the proposed amendments.

Madison's reasoned approach to the debate and his deferential treatment of the issues were readily apparent:

> I shall proceed to bring the amendments before you as soon as possible, and advocate them until they shall be finally adopted or

> rejected by a constitutional majority of this house . . . . The applications for amendments come from a very respectable number of our constituents, and it is certainly proper for Congress to consider the subject, in order to quiet that anxiety which prevails in the public mind . . . . It will be a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled.[36]

Clearly, Madison tried to impress his colleagues with the gravity of the situation by revealing how many amendments had been proposed and what "anxiety" the issue was causing. He focused on the people themselves rather than the states; in fact, most of the amendments spoke in terms of the people, as does the Preamble of the Constitution. He continued by arguing that if no action were taken, citizens might take matters into their own hands:

> And if there are amendments desired of such a nature as will not injure the constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens, the friends of the Federal Government will evince that spirit of deference and concession for which they have hitherto been distinguished.

Madison also pressed for a stricter prohibition on the federal government from establishing and supporting religion:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

Eventually Madison listed the amendments he thought were most justified, that:

- all governmental powers were derived from the people
- changes in compensation for members of the Congress shall not be effected until after the next election
- religious freedom be protected
- freedom of speech and press be protected
- peaceable assembly be guaranteed
- citizens have the right to bear arms in order to form a militia
- quartering of soldiers shall not be mandatory
- double jeopardy be prohibited
- self-incrimination be disallowed
- due process of the law be guaranteed

- unwarranted searches and seizures be prevented
- the right to a speedy trial before one's peers, to confront witnesses, and to be informed of charges
- powers not delegated to the federal government are reserved to the states.

Of these proposals, Madison clearly endorsed what would become the First Amendment as "the choicest rights—freedom of speech, conscience, and press—as *natural* and *a priori*."[37] Madison's motion carried the day; the debating and redrafting process began.

Madison's drafts of the religious, speech, and press amendments were widely accepted. The select eleven-member committee added the right to assemble and to petition the government to redress grievances. It reported its changes to the House on July 28, which promptly tabled the report, much to Madison's frustration. When it reached the floor of the House on August 13, Madison's proposal to incorporate the amendments into the current draft of the Constitution at appropriate places was modified by Representative Roger Sherman, who succeeded in having the amendments added to the end of the Constitution as separate articles.

The debate in the House on religious freedom began on August 15, along with comments on freedom of expression in general. Madison said that Congress could not compel citizens to worship God in any manner contrary to their conscience. On August 20, on a motion from Fisher Ames of Massachusetts, the House accepted a substitute for the bill on freedom of religion: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." This change greatly strengthened the amendment and demonstrates that the founders supported separation of church and state and an individual's right to worship as he or she saw fit.

When the debate returned to the issue of freedom of expression, Madison added the provision that he believed to be the "most valuable amendment on the whole list." It indicates how dedicated Madison had become to freedom of expression. There is evidence that he won others to his point of view. In early September, a motion was made in the Senate to qualify freedom of the press by providing that it should be protected in as "ample a manner as had been secured by common law." This qualification was defeated, indicating that the framers of the First Amendment intended a broader interpretation of the Amendment than that which would protect the press from prior restraint (government censorship of the right of the press to publish information, see chapter 5) but not from prosecution for seditious libel.[38]

The remaining provisions were debated and approved on August 21 and 22, then sent to a special three-person committee for

final drafting. The House approved a draft of seventeen amendments on August 24 and sent them to the Senate, where they were read on August 25.

A new version of the proposed third amendment appeared in the Senate on September 4, 1789, limiting it for the first time to Congress: "That Congress shall make no law . . ." abridging the freedom of press or speech. The Senate sent the redrafted amendments to the House on September 10, having reduced the number to twelve. By September 19 it was clear that the House would not accept all of the Senate's changes, so representatives of the two bodies met in conference. Madison was made chairman of the meeting, which included Roger Sherman (Connecticut) and John Vining (Delaware) of the House and Oliver Ellsworth (Connecticut), Charles Carroll (Maryland), and William Paterson (New Jersey) of the Senate. The House acceded to many of the Senate's changes, but Madison insisted on the inclusion of language prohibiting the government from establishing a religion.

The final wording of the First Amendment was the result of considerable negotiation and political compromise. *However, the weaker Senate version was abandoned for Madison's stronger phrasing.* The opening clauses, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," were combined with the free speech. free press, and freedom of assembly clauses. We do not know who drafted the language of the final clauses; no notes of the conference committee exist. Given Madison's strong convictions on religious freedom, however, it is safe to assume that he played a key role in writing the final version.

The rewritten twelve amendments were approved in the House on September 24 and in the Senate on September 25, 1789. They were then sent to President Washington for transmittal to the states. On October 2, the President sent letters to the governors of the states with the amendments attached. Because North Carolina would enter the Union in November of 1789, Rhode Island in May of 1790, and Vermont in March of 1791, the number of states needed for ratification was eleven. The result was a prolonging of the debate and ratification period.

Legislative history indicates that the clauses of the First Amendment were strengthened throughout the negotiations between the House and the Senate. Clearly, the first clause mandates the separation of church and state. The second clause guarantees freedom of conscience—the government may not compel anyone to worship or even to believe. Moreover, the First Amendment ensures that no person will receive either special or detrimental treatment because of his or her religious beliefs. The right to free speech, assembly, and press reflects the fact that the colonial press had nurtured the debate that eventually erupted into a war of independence, that new state constitutions had consistently endorsed a broader interpretation of the

term "free press" than that which prevailed in England or the Colonies, and that such vigorous, partisan, and often vitriolic journalism was considered an essential check on the abuses of government.

The Public Debate

Once the amendments were sent to the public, the national debate between Federalists and Antifederalists was renewed, particularly in the press. Most commentators expected the amendments to pass. However, several difficulties arose. Some states did not like the first two amendments; others had objections to parts—or the wording—of other amendments. So once again the press found itself relaying information to the public and carrying on an editorial debate.

The dramatic news about popular revolt in France had a direct impact on the debate over a bill of rights. The Revolution, which began in July of 1789, and then deteriorated into a reign of terror, gave strength to those who argued that a bill of rights was essential and that America was a beacon of democracy for the world. The *New Hampshire Gazetteer* reported that the French had proposed a Declaration of Rights to precede their new constitution and claimed they borrowed the idea from America's call for a bill of rights. But things had gone awry. The *New York Packet* of October 29 read as follows:

> The dreadful butcheries at present carrying on in France, and from the danger even several of those characters who are styled patriots, are not exempt. It is a powerful lesson of suffering outrage in the lower orders of people to proceed to any considerable extent. A licentious mob levels all distinctions; and having no objects but devastation and plunder, devote to destruction the lives and property of all the wealthy citizens, whether friends or foes to the alleged causes of grievance.

The French Revolution became evidence for the arguments of proponents *and* opponents. Mob rule resulted from too much democracy; too little democracy led to revolution. The right to assembly stood on the razor's edge. Antifederalists, who generally were more sympathetic to the plight of France than Federalists, insisted on a right to petition the government and to assemble. Federalists were less sanguine about "mob gatherings." When the French sent "philosophes" and "Jacobins" seeking support a few years later, the Federalists claimed they had been vindicated and quickly passed laws limiting freedom of assembly and speech.

The Legislative Debate

Virginia took up the amendments almost immediately in October of 1789. However, the debate quickly bogged down because

Patrick Henry believed the amendments were too weak. Virginia's United States Senators Richard Henry Lee and William Grayson had sent a letter to Governor Beverly Randolph. The letter was dated September 28, 1789, and claimed "it is with grief that we now send forward propositions inadequate to the purpose of real and substantial Amendments, and so far short of the wishes of our Country."[39] Patrick Henry spoke against the amendments and cited the infamous letter from Virginia's Senators.[40] He then moved to postpone the debate, but the motion was handily defeated. Then, acting as a committee of the whole, the Virginia House approved the first ten amendments and rejected the last two on a vote of 64 to 58.[41]

The sledding in the Virginia Senate was much tougher. Because the Senate was elected from geographic districts rather than population centers, the Antifederalists had more power than they did in the assembly. In early December 1789, they rejected the third, eighth, eleventh and twelfth amendments, and accepted the others. This was an astonishing outcome. The state that had vehemently advocated a bill of rights not only split over the amendments but also rejected four that would eventually become part of the Constitution.[42]

If Virginia is the model of a state that ensnared the amendments in a legislative tangle, New Jersey is the model of one that moved in ways that pleased Madison and Jefferson. New Jersey, which had been quick to ratify the Constitution, lost no time in doing the same for the Bill of Rights once its legislature was in session. By November 20, 1789, the New Jersey *Journal* reported the ratification of all but the second of the proposed amendments by the legislature meeting in Amboy.[43]

After most states followed New Jersey's lead, attention returned to Virginia in late 1791. Virginia did not ratify what would become the First Amendment until November of 1791. On December 5, 1791, the rest of the amendments were approved by the House of Delegates and on December 15, the Virginia Senate concurred. At that point, the last ten of the twelve proposed amendments became the first ten amendments to the Constitution, the very first national constitution guaranteeing free speech, press, religion, and assembly in writing.

The Role of the Pulpit

It is important to note that when the amendments were submitted to the states, preachers played an important role in the debate over the amendments, especially with regard to the religious clause of the eventual First Amendment. In Virginia, the debate over the Bill of Rights intensified when the Committee of United Baptist Churches wrote an "address to the President," which was published in several papers. The group claimed that the Constitution would not protect religious freedom. Washington responded that he would never have signed the Constitution if he did not believe it protected religious freedom.

Along with political speeches and legislative debates in newspaper articles and editorials, sermons sparked the debate over the new amendments. One example is "The Rights of Conscience" delivered by Reverend John Leland in New London, Connecticut in 1791. It dealt strictly with religious freedom—particularly the lack of it in Federalist Connecticut. He argued that, "A man's mind should be always open to conviction, and an honest man will receive that doctrine which appears the best demonstrated." Establishing a state religion would corrupt the very nature of spiritual growth, according to Leland, because such an act would subvert the search for individual truth. Instead, Leland endorsed a free and equal marketplace of spiritual discourse:

> . . . if all stand upon one footing, being equally protected by law, as citizens, (not as saints,) and one prevails over another by cool investigation and fair argument, then truth gains honor; and men more firmly believe it, than if it was made an essential article of salvation by law. Truth disdains the aid of law for its defence—it will stand upon its own merit.

Israel Evans delivered another sermon with broader appeal and implications at the Annual Election in June 1791 in Concord, New Hampshire. The sermon was printed and widely distributed. During this period of time, the states' legislatures were well along in the debates over the ratification of the twelve amendments passed by Congress. Evans' address did not consider the arguments for or against the amendments, rather, he preached as though the existence of such rights was a given circumstance supported by the Gospel of Christ. Evans' sermon provides powerful proof of the influence of the pulpit in the ratification process. As one would expect, he paid particular homage to the issue of religious toleration. He used that liberty as a foundation for others in the Bill of Rights. The transformation from religious to secular advice was complete when he closed by condemning those who would betray their promises to the electorate.

The combination of Antifederalists and preachers of tolerance carried the day for the religious clauses of the First Amendment. Though they remain the center of controversy to this day, we can interpret them better understanding that those who supported the First Amendment at the time of ratification opposed religious qualifications for office holders and opposed governments attempting to establish religions. Freedom of conscience was as important as freedom of speech and press to the founders.

Conclusion

The state debates over ratification of the Bill of Rights lasted for over two years. Those debates reinforced several important themes that had emerged in the drafting of the Declaration of Independence

and the ratification of the Constitution. These themes bear heavily on the current arguments concerning the interpretation of the Constitution. The founders clearly believed that certain rights were inalienable; that they were natural and/or God given; that they were intended to protect the individual citizen against the *federal* government. The founders sought to preserve as many states' rights as they could while building a viable union. Only those items enumerated were to be the province of the Congress; it was not to assume any powers on its own. That predisposition would change with the Civil War and the passage of the Fourteenth Amendment, which enforced the first nine amendments against the states. However, at the time the Bill of Rights was being debated, Federalists were giving Antifederalists assurances that the federal government would not overstep the checks and balances established by the Constitution. The Ninth and Tenth Amendments sealed that bargain.

The Bill of Rights stretches back to the Magna Charta, winds through the works of Enlightenment thinkers and into America's colonial experience, revealing each colony to be a distinct innovator of human liberties.

The founders believed freedom of expression was essential to the success of democratic republicanism. They not only endorsed free speech and press, they participated in all of its various manifestations from pseudonymic editorials to legislative debates. The paper war between the Antifederalists and the Federalists was intense and produced a remarkable collection of essays that demonstrate the American penchant for converting political theory into governmental practice.

If the road to the Bill of Rights stretches into the past, it also wends its way into contemporary history and beyond. The Bill of Rights today is just as vital and vibrant as it was 200 years ago. We continue to debate its meaning, its application, its intent, and its history. That debate itself reinforces the importance of the first of all of our rights, freedom of expression. We have learned what our founders knew: where speech is not free, citizens are enslaved. Where speech is free, citizens are able to build other protections that guarantee life, liberty, and the pursuit of happiness.

The Chronology of Ratification of the Constitution and Bill of Rights

September 1787

17 Twelve state delegations to the Philadelphia Convention vote approval of the Constitution. Thirty-nine of the forty-two delegates present sign the engrossed copy, and a letter of transmittal to Congress is drafted. The Convention formally adjourns.

20 The Confederation Congress in New York receives the proposed Constitution.

28 Congress resolves to submit the Constitution to special state ratifying conventions.

October 1787

2 The proposed Constitution is unanimously approved by the Freeholders of Fairfax County, Virginia.

16 The Connecticut House adopts resolutions providing for the election of delegates to the state ratifying convention in Hartford.

18 The Massachusetts General Court issues the call for a state ratifying convention.

26 The New Jersey legislature resolves to conduct elections for delegates to the state ratifying convention.

27 The first Federalist paper appears in New York City in the *Independent Journal*.

November 1787

6 Pennsylvania elects delegates to its ratifying convention.

10 The Delaware legislature adopts resolutions calling its state ratifying convention for December 3.

12 Connecticut elects delegates to its state ratifying convention.

20 The Pennsylvania state ratifying convention opens in Philadelphia.

26 Delaware elects delegates to its state ratifying convention.

27 Maryland calls its state ratifying convention to convene on April 21, 1788.

December 1787

5 New Jersey elects delegates to the state ratifying convention.

7 *Delaware ratifies the Constitution by unanimous vote.*

12 *Pennsylvania ratifies the Constitution in the face of considerable opposition. The vote is 46 to 23.*

13 Benjamin Franklin presides over a large ceremony in Philadelphia where Pennsylvania ratification of the Constitution is announced.

18 *New Jersey ratifies the Constitution 38 to 0.*

25 Georgia's ratifying convention convenes.

January 1788

2 *The Georgia Convention adopts the Deed of Ratification, which is signed by all 26 delegates.*

9 *Connecticut ratifies the Constitution by a vote of 128 to 40.* The Massachusetts Ratifying Convention opens.

February 1788

1 The New York legislature votes to call a state ratifying convention.

6 *The Massachusetts Convention ratifies the Constitution by a close vote of 187 to 168 after vigorous debate.* Many Antifederalists, including Sam Adams, change sides after Federalists propose nine amendments, including one which would reserve to the states all powers not 'expressly delegated' to the national government by the Constitution.

13 The New Hampshire ratifying convention opens. Josiah Bartlett is chosen as chairman of the proceedings.

March 1788

1 The Rhode Island legislature calls for a statewide referendum on the Constitution to be conducted on March 24.

3 Virginia begins to hold elections to select delegates to the state ratifying convention.

24 Rhode Island, which had refused to send delegates to the Constitutional Convention, declines to call a state convention and holds a popular referendum instead. Federalists do not participate, and the voters reject the Constitution by more than ten to one: 2,708 to 237.

28 North Carolina elects delegates to its state ratifying convention.

April 1788

12 South Carolina concludes the election of delegates to its state ratifying convention.

21 The Maryland ratifying convention opens in the state House at Annapolis.

23 The Constitution is read to the delegates at the Maryland ratifying convention for the first time.

26 *The Maryland convention ratifies the Constitution by a vote of 63 to 11.*

29 New York begins the election of delegates to their state ratifying convention.

May 1788

12 The South Carolina ratifying convention opens in the Hall of the Exchange at Charleston.

23 *The South Carolina convention ratifies the Constitution, 149 to 73.*

June 1788

2 The Virginia Ratifying Convention opens in the temporary capitol building at Cary and Fourteenth Streets in Richmond.

17 The New York ratifying convention convenes in Poughkeepsie.

18 The New Hampshire ratifying convention reconvenes for a second session.

21 *The New Hampshire convention becomes the ninth state to ratify the Constitution, 57 to 47, making it the new law of the land.* The convention proposes twelve amendments.

25 Despite strong opposition led by Patrick Henry, *Virginia ratifies the Constitution, 89 to 79.* James Madison leads the fight in favor. The convention recommends a bill of rights, comprised of twenty articles, in addition to twenty further changes.

July 1788

2 The New Hampshire ratification is read in Congress. Cyrus Griffin, President of Congress, announces that ***the Constitution has been ratified by the requisite nine states***. A committee is appointed to prepare for the change in government.

21 The first North Carolina ratifying convention opens in a church at Hillsboro.

26 *The New York convention ratifies the Constitution, 30 to 27*, after Alexander Hamilton delays action, hoping that news of ratification from New Hampshire and Virginia will influence Antifederalist sentiment. The convention also urges the states to support a second convention for the consideration of necessary amendments.

August 1788

4 The North Carolina ratifying convention adjourns, having failed to ratify the Constitution.

6 Congress agrees that presidential electors should be chosen on the first Wednesday of January 1789; vote on the first

Wednesday of February; and Congress conduct business on the first Wednesday of March.

September 1788

3–6 Harrisburg (PA) convention meets to consider amending the Constitution and nominating members to the house.

13 Congress selects New York City as the site of the new government, and chooses dates for the appointment of and balloting by presidential electors, and for the meeting of the First Congress under the Constitution.

October 1788

1 The Philadelphia Federalists call a conference at Lancaster to nominate candidates for Congress.

10 The Congress of the Confederation transacts its last official business.

30 The Virginia House of Delegates approves resolutions calling for a second constitutional convention and sends them to committee for drafting into appropriate form.

31 The Virginia House of Delegates approves and sends to committee Francis Corbin's resolutions for the election of representatives and presidential electors.

November 1788

4 Another convention to consider a second convention takes place in Harrisburg but the movement fails.

8 The Virginia Assembly elects Richard Henry Lee and William Grayson, two outspoken opponents of the Constitution, to the first United States Senate.

20 Virginia, under the Constitution, requests that Congress call a second constitutional convention to consider amendments to the Constitution.

30 North Carolina calls for a second state ratifying convention.

December 1788

26 Virginia Governor Beverly Randolph certifies the credentials of William Grayson and Richard Henry Lee to the United States Senate.

January 1789

7 Presidential electors are chosen by ten of the states that have ratified the Constitution (all but New York).

February 1789

4 Presidential electors vote; George Washington is chosen as President; John Adams as Vice President. Elections of representatives take place in the states.

March 1789

4 The First Congress convenes in New York, with eight senators and thirteen representatives in attendance, and the remainder en route.

April 1789

1 The House of Representatives, with 30 of its 59 members present, elects Frederick A. Muhlenberg of Pennsylvania to be its first Speaker.

6 The Senate, with 9 of 22 senators in attendance, chooses John Langdon of New Hampshire as temporary presiding officer.

30 George Washington is inaugurated as the nation's first President under the Constitution. The oath of office is administered by Robert R. Livingston, chancellor of the State of New York, on the balcony of Federal Hall, specifically remodeled for the occasion by Pierre L'Enfant, at the corner of Wall and Broad Streets in New York City.

May 1789

5 Representative Theodorick Bland from Virginia submits his state's proposal for a second convention under Article V.

6 Representatives from New York submit their proposal for a second convention under Article V.

June 1789

8 Madison recommends amendments be drafted by Congress and opposes a second convention.

July 1789

21 The House again refuses to take up the proposed amendments, choosing instead to submit them to a committee for drafting.

28 Seventeen amendments are reported by the committee.

August 1789

3 Madison again urges the House to take up the amendments.

13–24 The House debates the proposed amendments, sending them to the Senate on the 24th.

September 1789

2 The Senate takes up the amendments.

9 The Senate adopts its version of the 17 proposed amendments, reducing the number to 12 and sending them back to the House for consideration.

21 A conference committee between the House and Senate is established to work out differences in the proposed amendments.

24 The House accepts the conference committee report.

25 The Senate concurs in the House action.

October 1789

2 President Washington transmits the proposed amendments to the states.

November 1789

21 *North Carolina ratifies the Constitution.*

20 New Jersey ratifies the amendments.

December 1789

19 Maryland ratifies the amendments.

22 North Carolina ratifies the amendments.

January 1790

19 South Carolina ratifies the amendments.

25 New Hampshire ratifies the amendments.

28 Delaware ratifies the amendments.

February 1790

27 New York ratifies the amendments.

March 1790

10 Pennsylvania ratifies the amendments.

May 1790

29 *Rhode Island ratifies the Constitution.*

June 1790

11 Rhode Island ratifies the amendments.

November 1791

3 Vermont ratifies the amendments.

December 1791

15 *Virginia's ratification provides the required number of states to make the Bill of Rights part of the Constitution.*

Study Questions

1. Divide the class into Federalists and Anti-Federalists and debate the merits of amending the Constitution of 1789 with a new First Amendment.
2. What colonial and state documents contained the roots of the First Amendment?
3. What does the debate over ratification of the Constitution reveal about the founders' intent with regard to the First Amendment?
4. Why were Massachusetts and Virginia important in the ratification process? Why did Patrick Henry oppose the new Constitution? Why did Alexander Hamilton support it?
5. Trace the ratification of the First Amendment from its first draft in the Congress to final ratification in 1791. How much credit does James Madison deserve for the ratification of the First Amendment?
6. What role did the press play in the ratification of the First Amendment?
7. What role did the clergy play in the ratification of the First Amendment?

Endnotes

[1] The original "Frame" of 1683 served as a foundation for the new one. See chapter 1.

[2] Mason was actually borrowing from Thomas Gordon, who wrote in 1720 that "Freedom of Speech is the great Bulwark of Liberty; they prosper and die together." See David L. Jacobson, ed., *The English Libertarian Heritage* (Indianapolis: Bobbs-Merrill, 1965), p. 40.

[3] Linda Grant De Pauw, "The Anticlimax of Antifederalism: The Abortive Second Convention Movement, 1788–89," *Prologue* (Fall, 1970), p. 99.

[4] Merrill Jensen et al., *The Documentary History of the Constitution*, Vol. 2 (Madison: State Historical Society of Wisconsin, 1974), p. 38. The tri-weeklies included the *Pennsylvania Mercury and Universal Advertiser*, the *Federal Gazette* and the *Philadelphia Herald*, (all Federalist) and the *Pennsylvania Herald and General Advertiser*. The semi-weeklies included the *Pennsylvania Journal and the Weekly Advertiser* and the *Evening Chronicle*. Both were Federalist papers; the last known issue of the *Chronicle* appeared on November 7, 1787. Weeklies included the *Pennsylvania Gazette*, the *Freeman's Journal, the North-American Intelligencer*, and in German, the *Gemeinnutzige Philadelphische Correspondez*.

[5] Jensen, vol. 2, p. 39.

[6] Jensen, vol. 2, p. 35. George Bryan (August 11, 1731–January 27, 1791) helped frame the 1776 Pennsylvania Constitution and was elected Vice President of the Supreme Executive Council from 1777 to 1779. He was elected to the state assembly in 1779, where he authored an act for the gradual abolition of slavery. He became a judge on the state Supreme Court in 1780. A strict constitutionalist, he fought against the Federal Constitution in the Pennsylvania Ratification Convention. He attended the "Harrisburg Convention" of September 3, 1788, which demanded a second Federal Convention. His contemporaries noted it was appropriate that he survived the fall of the state's 1776 Constitution by only five months. *Dictionary of American Biography*, vol. 2, pp. 189–90.
Jonathan Bayard Smith (February 21, 1742–June 16, 1812) violently opposed British economic measures. He was one of the first of his generation to call for American independence. Elected to Congress in 1777, he staunchly defended the Articles of Confederation. He served as judge in the Pennsylvania Court of Common pleas from 1771 to 1778. *Dictionary of American Biography*, vol. 9, pp. 308–09.

[7] Jensen, vol. 2, p. 130.

[8] See the *Pennsylvania Gazette*, October 31. And Jensen, vol. 2, p. 130. The 18 *Centinel* essays were published in Philadelphia between October 5, 1787, and April 9, 1788. The *Independent Gazetteer* printed all of them except *Centinel II*. *Centinel I* was the most widely circulated of the series, reprinted in 19 newspapers in 16 towns, most of them north of Philadelphia. It was also printed in Baltimore, Richmond, and Charleston.

[9] Jensen, vol. 2, p. 128.

[10] Jensen, vol. 2, p. 131.

[11] Jensen, vol. 2, p. 131. Wilson's speech circulated from Portland, Maine, to Augusta, Georgia. It was reprinted in thirty-four newspapers in twenty-seven cities. Although Federalists did not rush to Wilson's defense when the Anti-Federalists attacked, George Washington was pleased to see the speech published because he believed it answered George Mason's objections. See Kaminski, vol. XIII, p. 329.

[12] Jensen, vol. 2, p. 130.

[13] Jensen, vol. 2, p. 131.

[14] James Madison to Edmund Randolph, October 7, 1787. In *The Madison Papers* (Washington, D.C.: The Library of Congress), vol. X, pp. 185–86.

[15] The Maryland *Journal*, January 1, 1788. Washington wrote to Carter on January 12, 1788, "I find that an extract of my letter to you, is running through all the news papers; and published in that of Baltimore with the addition of my name," File Copy, *The Washington Papers* (The Library of Congress). Five days later Carter explained that he had given out copies of Washington's comments "under a prohibition . . . that they should not go to press." Washington accepted the reply and was apologetic that his concerns had given Carter "so much trouble." [Washington to Carter, January 20 and 22, 1788. John C. Fitzpatrick, *The Writings of George Washington* (Washington, D.C.: The Government Printing Office, 1931–1944), vol. XXIX, pp. 387–88, 390. Also, Washington to James Madison, February 5, 1788. Recipient's copy, Special Collections, "Signers of the Declaration of Independence," (Amherst College Library, Amherst, Massachusetts).

[16] Jonathan Elliott, *The Debates of the Several State Conventions on the Adoption of the Federal Constitution*, vol. II (Philadelphia: J. B. Lippincott Co., 1896), p. 87.

[17] Elliott, p. 88.
[18] Elliott, p. 88.
[19] Elliott, p. 44.
[20] Elliott, p. 118.
[21] Elliott, p. 118.
[22] Elliott, p. 118.
[23] Elliott, p. 118.
[24] Elliott, p. 119.
[25] Elliott, p. 120.
[26] John P. Kaminski and Gaspare Saladino, eds. *The Documentary History of the Ratification of the Constitution*, vol. XVI (Madison, Wisconsin: State Historical Society of Wisconsin, 1984), p. 63.
[27] *Massachusetts Centinel*, February 20, 1788.
[28] *Massachusetts Centinel*, February 20, 1788.
[29] Elliott, p. 175.
[30] Stephen F. Rhode, "The Other Founding Fathers," *California Lawyer*, vol. 7, no. 5; and reprinted in *The State Bar of California*, May 1985, p. 54.
[31] Rhode, p. 54.
[32] Rhode, p. 54.
[33] Letter to George Eve, *The Papers of James Madison*.
[34] January 14, 1789, *The Madison Papers*, vol. 5, p. 318.
[35] Letter to David Humphries, *The Papers of Thomas Jefferson*.
[36] For a full text of this speech, see Craig Smith, *To Form a More Perfect Union* (Lanham, Md: University Press of America, 1993), pp. 214–25.
[37] See *Madison Papers*, vol. 12, pp. 194, 203.
[38] In short, the Senate did not feel constrained by William Blackstone's version of common law. Blackstone was the expert on whom the courts of England and America relied for an interpretation of rights. Blackstone opposed government review of documents before they were published. He endorsed freedom of expression as long as it did not harm the state. Sir William Blackstone, *Commentaries on the Laws of England*, Warren C. Jones, ed., vol. IV (San Francisco: M.P., 1916), p. 151.
[39] Bernard Schwartz, *The Bill of Rights: A Documentary History* (New York, 1971), vol. 2, p. 1186.
[40] See Edward Carrington to Madison, December 20, 1789, in Schwartz, vol. 2, p. 1190.
[41] The two, which were eventually ratified as the Ninth and Tenth Amendments, concern what rights the people and the states retain.
[42] Perhaps the most amazing rejection was that of amendment number three, which would eventually become the first. Its "Congress shall make no law" language was stronger than the wording of any other amendment, and yet for some Antifederalists even that was not enough. One suspects, however, that these Antifederalists were joined by some in the Virginia Senate who opposed the separation of church and state and wanted to return to the Virginia tradition of establishmentarianism, the right of a government to endorse a state religion. They opposed the amendment's prohibition on Congress establishing a state religion.
[43] However, President Washington did not receive notification of this process until August of 1790. Thus, many states and some historians may differ with the assessment that New Jersey was the first to ratify what would become the first ten amendments to the Constitution.

Chapter 3

The Religious Clauses of the First Amendment

In the previous chapters, we learned that colonial preachers played an active role in the debate over the founding of the country, the Revolution, and the ratification of the Bill of Rights. The tradition of ministers and priests criticizing government policy can be traced to the beginning of time. In most ancient cultures, oracles were consulted before decisions were made. In the *Bible*, Moses and Jesus are portrayed as political as well as religious leaders; both bring "laws" to their followers, laws which not only govern religious conduct, but civic conduct as well. Confucius and Mencius in China as well as Buddha in India established religious tenets that had political impact.

Medieval popes acquired large land holdings and called for holy wars. Julius II even took part in battles to secure his beloved Papal States. Martin Luther led the Protestant reformation of the church but also wrote political tracks and condemned the revolt of the German peasants. Jesuit priests became close advisors to such political leaders as Queen Mary Tudor of England, Queen Isabella of Spain, and King Louis XIV of France. Henry VIII and Oliver Cromwell were both political leaders and heads of their respective religious sects.

Thus, the blending of religion and politics in the American colonies was not a novel situation. What was new to the mix was the issue of religious tolerance, which was hotly debated. Spanish colonies were Catholic and often intolerantly so; they had been established during the Spanish Inquisition by Queen Isabella and King Ferdinand in 1492. In the English colonies, the tradition was differ-

ent. Virginia was first settled by adventurers led by Captain John Smith. They were loyal to the English crown but witnessed changing commitments to various forms of Catholicism and Protestantism over the years. As we saw in chapter 1, Jonathan Winthrop, a minister, brought his weary band of Puritans to Massachusetts to escape persecution in England and to found a "shining city upon a hill." The Puritans, however, were an intolerant lot believing the sin of one to be the sin of all. Conformity was critical if their city was not to lose its luster. Soon Anne Hutchinson left Massachusetts to found Connecticut and Roger Williams left to found Rhode Island; both new colonies were strongly committed to religious freedom.

The diversity of beliefs in the colonies was astounding. Quakers founded Pennsylvania; Catholics founded Maryland; prisoners settled Georgia; adventurers and speculators settled Virginia; Pilgrims and then Puritans settled Massachusetts. The leadership in many communities centered on the church, and preachers and priests were not shy about making recommendations on political matters. Soon they realized that religious freedom also meant religious tolerance. If one religion was suppressed, then all were vulnerable to the will of the majority.

The First Amendment prohibited Congress from passing any law that established a religion; it also affirmed each citizen's right to the free exercise of religion. The First Amendment contains two kinds of prohibitions: one *exclusive*, the other *inclusive*. The latter forbids the making of laws that abridge free speech, press, petition, and assembly. The former—the exclusionary portion—bans the government from establishing a religion or interfering with the free exercise of it. These two clauses have created dilemma for the courts over time. Sometimes protecting the free exercise of religion is seen as supporting or promoting that religion. The courts have yet to work out a consistent position on this issue because in many cases there is a conflict between the Establishment and Free Exercise Clauses of the First Amendment. There is also a clash between a state's right to write regulations controlling individual activity and an individual's right to free exercise of religion. Finally, questions of religious freedom are inextricably linked to freedom of expression both historically and in case law. One of the most recent iterations of this tradition is the recognition by the Supreme Court that religion is rhetorical in nature.

In *Rosenberger v. University of Virginia*, for example, a religious magazine won publication funding from a state school because of its First Amendment right to free press, not its right to free exercise of religion. The Court in 1995 required the University of Virginia to pay printing charges for a student newspaper that "offer[ed] a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia."[1] The Court held that the neutrality required by the Establish-

ment Clause supported payment of the charges because the university paid printing charges for other groups. Furthermore, the Court found that the University violated the student's free speech rights when it singled out this paper, which discusses from a religious viewpoint topics otherwise worthy of printing cost payment. The justices seemed to assert that free speech was the paramount value in this case. Justice Kennedy wrote for the majority:

> [W]e have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.[2]

The Establishment Dilemma

Madison was adamant about preventing the state from establishing a religion. He was reacting in part to what he perceived to be church interference in government operations.[3] He compared those colonies that were established for religious reasons with those that were not and concluded that the latter were freer and more prosperous. Thus in his "Memorial and Remonstrance" he called for a strict separation of church and state. Five years later, President Washington addressed the Jews of Newport, Rhode Island, claiming that freedom to worship was a "natural right."

Shortly after being elected president, Thomas Jefferson expressed his views on the matter in a letter to the Danbury Baptist Association in 1802. He concluded that the First Amendment's religious clause builds "a wall of separation between church and State."[4] Jefferson's impact can be seen in *Everson v. Board of Education* (1947), which argued that the framers sought to establish a "high wall" of separation between church and state.[5] Incorporating Jefferson's understanding of Enlightenment thinking, the Supreme Court generally has ruled that individuals are free to believe what they want *but are not at liberty to practice that belief in ways that violate other, more privileged rights*.[6] That is to say, laws made by elected officials of the nation take precedent over religious practices when those practices are a matter of action rather than thought.

The difference was established in case law when the Supreme Court in *Reynolds v. United States* (1878) prohibited bigamy among Mormons despite their plea for free exercise of their religious rights. Chief Justice Waite wrote the majority opinion in which he condemned the odious nature of polygamy in the Western European, Enlightenment tradition. He made a distinction between performance and thought. Regulations, he claimed, could not interfere with religious beliefs and opinions, but they may prohibit uncivilized practices. He then posed this question: "Suppose one believed that

human sacrifices were a necessary part of a religious worship, would it be seriously contended that the civil government under which we lived could not interfere to prevent a sacrifice?"[7] Nearly a hundred years later, the Court made a similar claim in *Cantwell v. Connecticut* when it ruled that "The [First] Amendment embraces two concepts—freedom to believe and freedom to act."[8] The Court ruled that only the freedom to believe is absolute.

In 1961, however, the Supreme Court moved to a new paradigm, one that attempted to balance the interests of one side against another instead of establishing absolute rules. The most important case in this line of thinking was *Sherbert v. Verner*,[9] in which a Jehovah's Witness in South Carolina was denied benefits for refusing to work on Saturday, a Sabbath for that religion. Writing for the majority, Justice William Brennan argued that the state's interest was not compelling enough to justify denying benefits to the woman. It thereby infringed on her right to freely express her religion. Breaking with the *Reynolds-Cantwell* line of reasoning, Brennan established the "*Sherbert* Test" in which the courts must "consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right." Brennan went on to establish a three step "process for determining when the state could . . . impinge on religious activities, the most important step being a demonstration that . . . [it] had a compelling interest in controlling specific kinds of behavior." In other words, in order to restrict religious *activity*, the government must show that it is advancing some significant interest such as protecting the lives of children or preventing the use of illegal drugs. Forcing a woman to work on her Sabbath is not a compelling interest, so the requirement was struck down.

Another shift occurred in 1971 when the Supreme Court took up a case concerning the Establishment Clause. Perhaps the majority believed that previous rulings had led to a kind of paralysis of the religious clauses of the First Amendment. Brennan's contextual driven test was too relative for some judges. To resolve what some saw as a problem in the *Sherbert* test, the Supreme Court invented a new test in *Lemon v. Kurtzman* (1971). The ruling concerned laws in Pennsylvania and Rhode Island that provided funding for *secular* education to private schools, which were mainly Roman Catholic. Pennsylvania and Rhode Island argued that they were not supporting religion, only funding those segments of the curriculum that existed in all schools. The Supreme Court did not buy this rationale; they found the practice of these states to be unconstitutional. Chief Justice Warren Burger wrote that to withstand scrutiny any statute must pass this test:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances

> nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.[10] The language of [the religious clauses] is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state . . . religion. . . . Instead they commanded that there should be "no law respecting an establishment of religion."[11]

Burger's meticulous ruling warns states not to enter into arrangements that could pull them into the web of religious activity. Governments must walk a fine line between neither discouraging nor encouraging religion.[12] That fine line was clarified in *Bowen v. Kendrick* (1987) in which the Court upheld the Adolescent Family Life Act, which enabled governments to provide grants to public or nonprofit groups for services and research on teen sex and pregnancy. Those opposed to the Act argued that these funds could go to charitable organizations that were religious, such as Catholic Charities, Incorporated. Thus, the government would be supporting religions. The Court believed that funds would *not* be placed in "pervasively sectarian" institutions or that the funds would encourage religion. The goal of the act was secular in nature and there was no danger, according to the Supreme Court, of entanglement with religious goals.[13]

Prayers as Establishment Violations

More recently, Establishment Clause cases have developed coercion tests. The coercion test of *Lee v. Weisman* (1992) provided that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."[14] Under this principle a public school in Rhode Island was prohibited from inviting clergy to give invocations and benedictions at graduation ceremonies because the ceremonies carried the imprint of approval from the school. If clergy were allowed to speak, it would appear that the schools, and therefore the government through school districts, were endorsing the religions represented. Furthermore, the Court ruled that such religious activities at public school functions subjected unwilling audience members to religious activities.

That decision was reinforced in 1996 in *Moore v. Ingrebretsen*, which effectively struck down a Mississippi law allowing students to give prayers at assemblies and over the school intercom. Finally, in *Santa Fe Independent School District v. Doe*, the Court ruled that organized prayer at school events was a violation of the Constitution.[15] The school district had rewritten its policy several times to reduce its sectarian nature and to ensure that prayers were universal rather tied to a specific religion. Nonetheless, the Court struck the policy down on a 6–3 vote partially because the "majoritarian process implemented by the District guarantees, by definition, that

minority candidates [to deliver the invocations] will never prevail and that their views will be effectively silenced."[16] Thus, prayer in school is now restricted to private conduct and group associations, where purely voluntary, student-initiated prayer outside of instructional periods remains protected by the First Amendment. "[N]othing in the Constitution," ruled the Court, "prohibits any public school student from voluntarily praying at any time before, during or after the school day."[17] The Establishment Clause has allowed the Court to build a wall that separates church from state, including state supported schools.

The Free Exercise Clause

However, some holes have been punched in the wall between church and state using the Free Exercise Clause. The Court has provided protection for religious practices if they do not interfere with the operation of government. For example, in 1943 in *West Virginia State Board of Education v. Barnette*, Justice Robert Jackson wrote that student freedoms must be protected "if we are not to strangle the free mind at its source. . . ."[18] Just as important, he recognized the flag salute as a "form of utterance" which is a "primitive, but effective way of communicating ideas."[19] For that reason, the Court decided that schools could not require students to salute the flag if it violated their religious convictions, in this case against taking oaths. Said the Court, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[20]

Officials in private educational institutions are given wider latitude in regulating student activities and supporting religion since teachers and school administrators in such institutions are not considered representatives of the state, as are public school teachers and administrators. However, private action may be considered public action if the state or federal government is involved in some way, such as subsidizing the institution or providing grants to its professors and students.[21] Furthermore, almost 40 states have statutes protecting freedom of expression in all venues, private as well as public. California's provision is typical: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not abridge liberty of speech or press."

Even in the rather restrictive *Hazelwood School District v. Kuhlmeier* ruling, the Court said that "a student's personal expression that happens to occur on school premises" must be tolerated unless it contains "material that may be inappropriate for their level of maturity."[22] As we have seen, in *Rosenberger v. University of Virginia*, the Court ruled that the dispensing of funds to student publi-

cations was neutral; and therefore, funding a student religious magazine did not violate the Establishment Clause:

> The neutrality of the program distinguishes the student fees from a tax levied for the support of a church or a group of churches. A tax of that sort, of course, would run contrary to the Establishment Clause concerns dating from the earliest days of the Republic.[23]

The neutrality test was also used in the 1993 school case of *Zobrest v. Catalina Foothills School District.* State funds were used to provide a paid sign-language interpreter to a religion-based high school. The Court found that Arizona's Individuals with Disabilities Education Act, which provided the funding, "create[d] a neutral government program dispensing aid not to schools but to individual handicapped children. . . . [T]he Establishment Clause does not prevent [this service.]"[24] Under the ruling, the school district was required to provide this service for the Zobrest child, despite the fact that the child attended a parochial school. This line of thinking was strengthened in 1998 when the Supreme Court refused to take up a case in Wisconsin that allowed for state funding of school vouchers for private and parochial schools. The Wisconsin Supreme Court argued that the legislation was neutral with regard to religion.[25]

The intersection of education and religious freedom consistently provides examples of conflict between free exercise and other priorities. In *Wisconsin v. Yoder*,[26] the Supreme Court allowed the Amish to school their children at home despite Wisconsin's contention that it was in the interest of the state to see that all children received a certified education. In 1993, in *Alabama & Coushatta Tribes of Texas v. Trustees of Big Sandy Independent School District*, the Fifth Court of Appeals overturned a District Court ruling which had validated the right of a school district to regulate hair length even though "many southeastern tribes wore their hair long as a symbol of moral and spiritual strength."[27] The school district contended that the practice of young Native American boys wearing long hair was contrary to a dress code designed to "create . . . an atmosphere conducive to learning, [t]o foster . . . respect for authority," and "[t]o ensure that the conduct and grooming of students . . . creates a favorable impression for the District and the community."[28] The Appeals court tried to balance free exercise against the government's right to impose a regulation that "advances an unusually important . . . goal." The court struggled with the need to maintain a certain amount of discipline and safety for school children, against their desire to comport themselves in a manner befitting their culture.

These cases are significant to religious groups who wish to practice religion in their own way, who wish to send their children to private schools or educate at home, who wish to dress and groom their children in ways consistent with religious practices, and who wish to protect what they believe to be sacred sites. The Court seems

to have limited religious freedom based on a narrow reading of the First Amendment and a desire not to interfere in state regulation of various practices. For example, if students wish to meet somewhere to pray, it is permissible at a public school, but officials and teachers may neither discourage nor encourage such activity while acting in their official capacity.

Groups on Campus

Religious groups often assemble on campuses, therefore, the rules affecting assembly are examined here and in later chapters as they apply. Campuses need to be particularly careful about abridging the right of assembly as a means of suppressing religious speech. The Fourteenth Amendment guarantees due process and equal protection of the law. Since 1925 in *Gitlow v. New York*, the courts have ruled that the First Amendment is part of the due process, equal protection equation. To deny someone their First Amendment rights is to deny them due process and equal protection of the law. As the Court said in *De Jonge v. Oregon* (1937), "Peaceable assembly for lawful discussion cannot be made a crime," particularly where a national forum has been established by tradition.[29] Like *Gitlow*, *De Jonge* expanded the application of the First Amendment against the states by incorporating it through the Fourteenth Amendment.

However, suppose a religious group on a campus tried to prevent a student from attending its meetings. Recently, in the controversial decision regarding the *Boy Scouts of America v. Dale*[30], the Supreme Court ruled that the right of association protected by the First Amendment allows groups to exclude people from membership. In this case, that right even overrode the state's interest to insure freedom from discrimination. The Boy Scouts refused to allow one of its leaders to remain in the organization because that leader was homosexual. In short, freedom of association enables a group to choose its company. Some scholars feel that the *Dale* ruling may help universities enforce speech codes under the right to choose associates if they argue that they have the right to exclude people who engage in certain language patterns. Others argue that the inclusion of gays in the Boy Scouts does not undercut its message or its purpose; likewise, including those who engage in heretical speech might not undermine a religious group's purpose. On the contrary, it enhances the goals of a school to seek new ideas and test them. The *Dale* ruling is seen as an extension of rulings that permitted those holding religious parades to exclude those who would undercut the essential message of the parade participants. Thus, gays were excluded from the St. Patrick's Day parade in Boston.[31]

Other critics point out that before *Dale*, the Court had emphasized the more compelling interest of ending discrimination. In *Rob-*

erts v. United States Jaycees[32] and *Board of Directors of Rotary International v. Rotary Club of Duarte*,[33] the Supreme Court forced national organizations to accept the decision of local clubs to admit women despite the claim that the right to association allowed the national organization to exclude women. In these cases, the Court asserted that the inclusion of women did not undercut the message or goals of the clubs. Thus, the Courts have had to balance the desire to end discrimination against women, gays, and others with the desire to maintain the First Amendment right to association with those whom one chooses.

It should be clear by now that the conflict between the Establishment Clause and the Free Exercise clause bedevils school officials. Normally, the Supreme Court forbids aiding or encouraging a single religious view.[34] In *Edwards v. Aguillard* (1987), for example, the Supreme Court ruled 7–2 that giving equal time to "creationism" in public school's curriculum constituted establishing a religion and thereby violated the First Amendment.

Other decisions, however, prevent us from deducing a clear-cut rule on this issue. For example, in *Brandon v. Board of Education of the Guilderland Central School District* (1981), the Court examined a case where several students had organized a group called "Students for Voluntary Prayer," which sought permission to conduct communal prayer meetings in a classroom before the opening of school each day. These students sought no faculty involvement, but the principal, the superintendent, and the Board denied their request. The students brought suit under the First Amendment. The lower courts did not agree with the students on the grounds that schools could determine activities, that allowing the group to form its own forum constituted encouraging religion, and supervision would be required if the group met on school property. The Supreme Court let the ruling stand.

Only a week earlier, however, in *Widmar v. Vincent* (1981), the Court ruled that campuses could not deny campus facilities to a group of Christian students if other groups were allowed to use them; the Christian Group was given equal status with other political groups that met on the campus. Justice Powell wrote for the majority that the public forum in question was open to many groups, was already in existence, and would not "confer any imprimatur of state approval" on the Christian group. As in *Rosenberger*, the neutrality of the rule meant that it was not being applied prejudicially to establish religious activity.

In 1990, this privilege was extended to high school student groups in *Board of Education of Westside Community School v. Mergens* wherein the plurality on the Court argued "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[35]

This decision was a direct outcome of the Equal Access Act, which requires schools that receive federal funds to avoid discriminating against any student-initiated clubs on the basis of religious or political content of their messages. In a 1993 case, *Lamb's Chapel v. Center Moriches Union Free School District*,[36] the Court unanimously held that once the school district opened its facilities for after-hours use by local community groups, it could not exclude a religious group's request for space to show a six part film on child-rearing just because the group planned to teach it from a Christian perspective. The reasoning in this case also helped form the foundation of the *Rosenberger* decision previously discussed. Critics of these decisions argue that they open public high schools to all kinds of fringe groups, including student gangs and the Ku Klux Klan.

The Case of Native Americans

Prior to the First Amendment being extended to Native Americans in 1924, they had been treated with undue prejudice by the state and federal governments. The most famous example of suppressing Native American religion came with the outlawing of the Ghost Dance, a ceremony based on the message of Wovoka, a Paiute born in Nevada in 1858. His promise of "renewal, rebirth, and 'revitalization'" encouraged Indians to envision a brighter future. Demoralized by broken promises, military defeats, disease, loss of their homelands, and assaults on their way of life, Native Americans saw in Wovoka's teachings a promise of "deliverance from their depression and sorrow."[37] Word of the prophet's philosophy spread through the West. More than half of Native Americans west of the Missouri participated in a shared cultural and spiritual experience that constituted the largest Indian movement of the nineteenth century.

Wovoka claimed to have returned from heaven graced with God's directions for life and worship.[38] His vision promised Indians a new millennium, provided they performed his dance and adopted peaceful ways. The rite itself was an exhausting event producing a "delirium" that enabled "participants" to communicate with "the dead."[39] Because of differences among indigenous cultures, the Ghost Dance movement was pluralistic. Each Indian nation created its own mythology embracing the hope of a new millennium. Many traveled to hear Wovoka, returning to their homes with a Messiah Letter that counseled adherents to partake in the dance, live in peace, work with white people, and take heart that their ancestors would return.[40]

Anglo-Americans dubbed the movement a "Ghost Dance" because of the promise to awaken dead ancestors. Induced by lurid newspaper accounts, Anglo-Americans fixated on predictions that redemption would bring destruction of whites. They misperceived an

apocalyptic religion proclaiming fraternity and peace as a rebellious Sioux sect driven mad by a savage dance. The government banned the dance because, officials argued, the pseudo-sovereign status of native nations precluded their protection under the Bill of Rights. The banning led to the last tragedy of the Indian Wars, the massacre in South Dakota in which a "dream" based on a "religion of Hope died with the Sioux on the snow-swept plains . . . [of] Wounded Knee."[41]

The modern era for Native Americans began with the Indian Citizenship Act of 1924 and the Wheeler-Howard Act of 1934, which granted First Amendment rights to Native Americans, expanded reservations, encouraged self-government, and supported programs affirming of Indian culture. Since then, contemporary conflicts over free speech and religion have become exceedingly complex and Native Americans have turned to the courts to secure their rights. In a string of rulings starting in 1977 with *Rosebud Sioux Tribe v. Kneip*,[42] the Supreme Court has denied First Amendment protection to Native American religious practices established long before the colonization of the United States.[43] Similar rulings have allowed infringement on sacred sites. For example, in *Sequoyah v. Tennessee Valley Authority*[44] the Supreme Court refused to grant certiorari when a federal circuit court ruled the flooding of holy places, ancestral burial grounds, and gathering sites did not violate religious freedom of Cherokees because they had no property rights in the area. The Court thus ruled that property rights supercede ones associated with religion.

The most controversial decision related to the issue of sacred sites is *Lyng v. Northwest Indian Cemetery Assn.* (1988) in which the Supreme Court refused to extend sacred status to natural terrain.[45] In the early 1980s, Indian groups opposed road construction and timber harvesting in the Six Rivers National Forest, a site where various tribes exercised their right to freely exercise their religious beliefs by holding vision quests and gathering medicines.[46] The District Court of Northern California and the Ninth Circuit Court used the Free Exercise Clause to uphold an injunction against constructing a road through the area because it "would seriously damage the salient visual, aural, and environmental qualities of the high country,"[47] thereby impairing the ability of Native Americans in the area to practice their religion.

The Supreme Court, however, reversed on a five-three decision in which Justice O'Connor, writing for the majority, readily admitted that "[i]t is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion."[48] She also noted that even "indirect coercion or penalties of free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment."[49] Nonetheless, the majority held that the Constitution does not protect tribal religious sites used for worship on federal

lands unless "effects of government programs" actually "coerce individuals into acting contrary to their religious beliefs." Hence, the government need not offer a "compelling justification"[50] for use of "what is, after all, its land."[51] Consequently, O'Connor wrote, "However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[52]

In his dissent, Justice Brennan raised several questions about the majority's decision. Even though the Court admitted that the case involved use of "federal land in a manner that threatens the very existence of a Native American Religion," it chose to reverse the lower courts because such usage neither "coerce[s] conduct inconsistent with religious belief nor penalize[s] activity." However, free exercise addresses "any form of governmental action that frustrates or inhibits religious practice." The effect of the decision is to "refuse to acknowledge the constitutional injury the respondents will suffer," thereby leaving them with "absolutely no constitutional protection against perhaps the gravest threat to their religious practices."[53] The decision in *Lyng* effectively stripped Native Americans of legal safeguards protecting worship at sacred sites[54] because it prioritized federal property rights over the needs of a minority religion.

As we have seen, rulings related to sacramental use of peyote also illustrate how difficult it is to interpret the free exercise clause. In 1909 Native Americans founded what was to become the Native American Church of North America so that they could practice peyotism under the protection of the First Amendment. That move, however, did not go unchallenged. In 1914, for example, when a U.S. District Court failed to prohibit consumption of peyote under anti-alcohol statutes, the Office of Indian Affairs tried to circumvent the courts by defining peyote as a narcotic. Even when localities have recognized the drug as legal, "Indians have . . . [suffered] criminal justice harassments, arrests, prosecutions, convictions, and jail time."[55]

The most significant case addressing this issue is *Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990).[56] Alfred Smith and Galen Black, participants in an alcohol recovery program and members of the Native American Church lost their jobs and subsequently were denied unemployment benefits by the state of Oregon because they tested positive at drug screenings after using peyote in religious services. The Supreme Court refused them protection, allowing the state to prohibit sacramental use of peyote because it is a drug. Justice Scalia argued that the case presents "a free exercise claim unconnected with any communicative activity." He warranted the Court's endorsement of Oregon's right to deny employment benefits to persons fired for sacramental use of peyote by contending that "the only decisions in which . . . [the Court had] held that the First Amendment bars application of a . . . generally applicable law to religiously motivated action . . . involved not the Free Exercise Clause

alone, but . . . [it] in conjunction with other constitutional projections, such as freedom of speech and of the press."[57]

A state does need not to defend laws abridging religious freedom with a compelling state interest unless those policies somehow are coercive, for to limit the applicability of laws would amount to establishing a particular religion. Such action, they admitted, well might lead to the "unavoidable consequence" of placing "at a relative disadvantage those" faiths not widely practiced.[58] Justice Scalia's majority opinion argued that a person "first and foremost, has the right to believe and profess whatever religious doctrines he desires" and the government may not interfere with such belief. *But*, he continued, the peyote law does not impede the plaintiff's belief nor does it force one on anyone else.[59] Therefore, it does not violate the standard that blocks the government from either impeding or promoting a specific religion. With this decision, the majority effectively backed away from the *Sherbert* test (see above) and returned to the *Reynolds-Cantwell* distinction between action and belief.

However, the dissenters in this case, and even Justice O'Connor in her concurrence, defended the *Sherbert* standard. In support of the *Sherbet* test, Justice O'Connor dubbed Scalia's opinion "strained [and] narrow."[60] She claimed he disregarded the Court's "consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct."[61] In addition, she complained about majoritarian bias: "the Court today suggests that the disfavoring of minority religions is an 'unavoidable consequence' under our system of government and that accommodation of such religions must be left to the political process. In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."[62]

In his dissent, Justice Blackmun made a similar point contending that the *Smith* decision "effectuates a wholesale overturning of settled law concerning the Religious Clauses of our Constitution."[63] One consequence of the *Smith* decision was the passage of the Native American Free Exercise of Religion Act of 1993 by the Congress;[64] the act promised protection of "sacred sites, . . . use of peyote, . . . religious rights of North American prisoners, . . . use of eagle feathers and other surplus animal parts in ceremonies" and "extension of the compelling state interest test to religious practices."[65] The Supreme Court, however, re-entered the picture on June 25, 1997 and struck down the Religious Freedom Act. Using a new rationale, the Court ruled 6–3 in *City of Boerne v. Florida* that the act was an infringement on states' rights. Thus, if Native American religious practices are to be allowed, states must either exempt them from the laws they violate or repeal the laws altogether. These eventualities are unlikely where the majority rules, and the Supreme Court decides not to protect a minority.[66]

Conclusion

Despite the ambiguity of some of these rulings and the way they contradict one another, several concepts are now part of constitutional law. Even though a law may not intend to establish a religion, it may be struck down if that is one of its potential consequences. However, not every law that confers an indirect, remote, or incidental benefit upon all religious institutions is constitutionally invalid for that reason alone. In order to be unconstitutional, the law must specifically advance what the establishment clause intends to prevent. To be constitutional, a law must reflect a clearly secular legislative purpose, neither advance nor prohibit religion, and avoid entanglement between religion and government. Thus, a law that requires a healthy and safe environment for all school children whether in public or private schools, is advancing a secular goal, not a religious one, and is therefore permissible.

Less clear is the clash between government interests and the right of the individual to exercise religious beliefs freely. If it can be shown that religious *practice* violates the law and that the law advances a compelling government interest, then the courts have generally held that the religious practice can be outlawed. Furthermore, if there is no violation of an individual's due process or equal protection under the law, the state's right may prevail over the individual's religious practice.

Public schools may not establish religion by requiring or reciting prayers over the public address system or at school events, such as graduation ceremonies or football games. However, they may not discriminate against religious groups that seek the same privileges as other groups. If a school funds independent student news magazines, then student magazines with religious content are also entitled to funding.

It would appear that the Supreme Court has yet to reach a consensus on the question of religious freedom in America. New efforts to revive faith-based charities as arms of government policy may confuse the rules regarding the establishment of religion further.

Study Questions

1. What is religious speech? How does it differ from political speech?
2. What criteria do the Supreme Court use to determine which religious practices are protected by the First Amendment?
3. How did *Rosenberger v. University of Virginia* treat freedom of speech and free exercise of religion?
4. What is the link between Thomas Jefferson and *Everson v. Board of Education*?
5. What is the *Lemon* test?

6. What is the *Sherbet* test?
7. What is the case law surrounding prayer in schools?
8. What rights do religious groups have on school campuses?
9. How does freedom of assembly intersect with free exercise of religion?
10. Why have the courts forbidden the teaching of creationism as science in public schools?

Simulation Exercises

1. As a role-playing exercise, divide the class into Native Americans, atheists, Muslims, Jews, and Christians. Allow each group to meet privately to frame a statement regarding their position on religious freedom including what they are allowed to practice and what should be forbidden. Have each group present its position. Then have the class synthesize the statements into a single statement that two-thirds of the class endorses.
2. *Trial Case 3-1:* In March of 2003, Herman Bond was the head of the Gay and Lesbian Alliance in Lake Minnetonka, Minnesota. The Alliance had been in existence for three years. The Alliance announced that for the first time it planned to march in the annual St. Christopher day parade that has been operating for 50 years. The parade, which always starts on the steps of the Cathedral of St. Christopher, goes down the center of Main Street and ends up at City Hall. The parade is organized by the Cathedral's Knights of Columbus group. When they hear that the Alliance wants to march in the parade, they ask city officials to bar the group because it is not in the spirit of St. Christopher, nor the Catholic church. The head of the Knights told the city council, "Why don't they hold their own parade. This is our parade. Our kids will be on the sidewalks watching. We have established a tradition over 50 years that the Alliance will destroy." One city council member asked if the Knights have ever barred a group before. The head of the Knights answered that they have not. But what would happen if NAACP was to hold a march and members of the KKK asked to join. "Surely, you wouldn't allow that, would you? Furthermore, we can't guarantee the safety of these people if they choose to march." The city council agreed and banned the Alliance from marching in the St. Christopher parade. But the Alliance, citing the *Hurley* case in Boston, sought a court injunction to stop the parade or to allow the Alliance to march. They argue that the parade has never barred any group from marching and that since it is conducted on city streets and is a public tradition, they have a right to march. Furthermore, they add that precluding groups from participating in a religiously oriented

parade is yet another violation of the First Amendment because such a ban is tantamount to supporting one religion over another, which violates the establishment clause and the free exercise clause. The case goes to the Supreme Court. Side one = the Gay and Lesbian Alliance; side two = the City of Minnetonka. Supreme Court: Do you find for the Alliance or for the City of Minnetonka? (See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 94-749, 1995.)

Trial Case 3-2: Harriet Gangi, a junior, is elected student body president at California State University, Lodi, a state supported, public university that receives over a million dollars in federal grants. Upon election, as is the tradition at CSUL, Harriet is allowed to speak at the graduation ceremonies of the outgoing seniors. The provost of the University contracts Harriet and tells her that he will need to see her speech before she gives it so that he can make sure it is appropriate. Harriet gives the provost a copy of her speech and in it he finds these lines: "The Buddha is my God and will lead me to Nirvana. The Buddha is my enlightenment, and I hope he will be your enlightenment too." The day before the graduation ceremonies, the provost tells Harriet that she must either remove all references to the Buddha and Nirvana, or she will not be allowed to read the speech. When she asks why, the provost tells her that since the graduation ceremonies are a University activity and bear the imprimatur of the University, her speech would violate the Establishment Clause of the First Amendment if she were allowed to give it as written. Harriet's lawyer immediately files an injunction to force the University to let her speak. He argues that Harriet is not part of the administration and she has a right to express her own opinion under the First Amendment. If the University doesn't like what she has to say, it can precede her speech with a disclaimer that says her views are her own and not those of the University. The petition is denied. Harriet refuses to speak and sues the University for damages—specifically, damaging her reputation with the student body and depriving her of future success. The case goes to the Supreme Court. Side one = Harriet Gangi; side two = CSU, Lodi. Supreme Court: Whose First Amendment rights do you protect? Do you overturn any past rulings in the process?

Endnotes

[1] *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995).

[2] 515 U.S. 819, 821 (1995).

[3] See, for example, his letter to Jasper Adams (September, 1833), in *Religion and Politics in the Early Republic: Jasper Adams and the Church-State Debate*, Daniel Dreisback, ed. (Lexington: University of Kentucky Press, 1996), p. 117.

[4] Saul K. Padover, *The Complete Jefferson* (New York: Harcourt, Brace, 1943), p. 519.

[5] 330 U.S. 1, 16 (1947).

[6] See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Everson v. Board of Education*, 330 U.S. 1 (1947) Justice Rutledge persuaded his brethren that the establishment clause meant no government aid to any religions. In the majority opinion, Justice Black writes, "Neither [the Federal Government nor the states] can force nor influence a person to go to or to remain away from church against his will or for him to profess belief or disbelief in any religion. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U.S. 1, 15 (1947). See also *Engel v. Vitale*, 370 U.S. 421 (1962) which outlawed prayer in public schools. See Mark Fischer, "The Sacred and the Secular: An Examination of the 'Wall of Separation' and Its Implications on the Religious World View," *University of Pittsburgh Law Review*, 54 (1990) which concludes, "Underlying many of the theories used in Establishment Clause jurisprudence is an implicit disdain for the religious world view" (340). For further analysis, see Robert S. Alley, "Public Education and the Public Good," *William & Mary Bill of Rights Journal*, 4 (1995): 277–350.

[7] 98 U.S. 145, (1878).

[8] 310 U.S. 296, 303 (1940).

[9] 374 U.S. 398 (1963).

[10] 403 U.S. 612–613.

[11] 403 U.S. 612. Two years later in *Committee for Public Education v. Nyquist*, the Supreme Court reinforced the *Lemon* test. Justice Powell, writing for the majority, struck down a New York law that provided assistance to non-public schools on the grounds that such grants, tuition reimbursements, and tax relief provisions advance a religion. (413 U.S. 756, 1973.)

[12] This dilemma is most clearly apparent in *Zorach v. Clauson*, 343 U.S. 306. It also surfaces in the *Lemon* test, the second prong of which requires that the "principle or primary effect [of government action] must be one that neither advances nor inhibits religion" (403 U.S. 629).

[13] 483 U.S. 1304 (1987). In addition, the Supreme Court ruled in 2000 in *Mitchell v. Helms*, 530 U.S. 793 that under the Title VI program, the Establishment Clause does not prohibit certain types of educational equipment and materials such as library books and computers from being loaned to religious schools as long as the materials are distributed on a non-sectarian, equitable basis. The materials could not be put to religious use and had to supplement programs already in place.

[14] 120 L.Ed. 2d 480–481.

[15] 120 S. Ct. 2266 (2000).

[16] 120 S. Ct. 2266, 2269.

[17] 120 S. Ct. 2266, 2281.

[18] 319 U.S. 624, 637. This decision reversed *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) in which Justice Felix Frankfurter wrote a majority decision that claimed that national unity was a rationale for expelling a Jehovah's Witness for refusing to salute the flag. In 203, a parent of a student filed a case in California to end the requirement that pubic school students recite the Pledge of Allegiance because the words

"under God" in the pledge, which were inserted in 1954 based on a resolution of Congress approved by President Eisenhower. The Ninth Circuit Court of Appeals ruled in favor of the parent. The case has been appealed.

[19] 319 U.S. 624, 662 (1943).

[20] 319 U.S. 624, 642 (1943).

[21] See *Isaacs v. Board of Trustees of Temple University* 385 F. Supp. 473.

[22] 484 U.S. 260, 271 (1988).

[23] 515 U.S. 819, 826 (1995).

[24] 125 L.Ed. 2d 14.

[25] *Jackson v. Benson*, 98–376.

[26] 406 U.S. 205 (1972).

[27] 20 F. 3d 469. This ruling differs with *New Rider v. Board of Education of Independent School District No. 1, Oklahoma* (480 F. 2d 693, 10th Cir., cert. denied 414 U.S. 1097, 1973) involving a Pawnee youth who violated school restrictions by wearing his hair in long braids.

[28] 20 F. 3d 469.

[29] 299 U.S. 365.

[30] 530 U.S. 640 (2000).

[31] See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

[32] 468 U.S. 609 (1984).

[33] 481 U.S. 537 (1987).

[34] In May of 1995, the Supreme Court let stand a lower court decision requiring a Michigan high school to remove a portrait of Jesus that had hung in the hallway for 30 years (*Bloomingdale Public School v. Washesic*, 94-1383). This ruling was consistent with a 1980 ruling that required the removal of the Ten Commandments from a wall in a public school.

[35] 496 U.S. 250.

[36] 508 U.S. 384. The Court used the precedent set in *Cornelius v. NAACP Legal Defense and Ed. Fund*, 473 U.S. 788 (1985).

[37] L. G. Moses, "'The Father Tells Me So!' Wovoka: The Ghost Dance Prophet," *American Indian Quarterly* 9 (1985): 336, 335.

[38] Mooney describes the prophet's revelation: "God told him he must go back and tell his people they must . . . love one another . . . and live in peace with the whites; that they must work, and not lie or steal; that they must put away . . . [warlike] practices; that if they faithfully obeyed his instructions they would . . . be reunited . . . in this other world, where there would be no more death or sickness or old age. He was then given the dance . . . to bring back to his people." James Mooney, "The Ghost Dance Religion and the Sioux Outbreak of 1890," *Fourteenth Annual Report of the Bureau of Ethnology* (Washington, D.C.: Government Printing Office, 1896): 770–771.

[39] Moses 339.

[40] Mooney 23, 780–781.

[41] Moses 342.

[42] 430 U.S. 584 (1997).

[43] See also *Montana v. U.S.*, 450 U.S. 544 (1981); *Sioux Nation v. U.S.*, 448 U.S. 371 (1980); *Lyng v. Northwest Indian Cemetery Assn.*, 485 U.S. 439 (1988) and *Employment Div., Dept. of Human Resources v. Smith*, 108 L. Ed. 2d 876 (1990). In these cases, the Court draws a sharp line between religious *beliefs* and religious *conduct*. The Smith case is partic-

ularly disturbing because it overturned the three part test established in *Sherbert v. Verner*, 374 U.S. 398 (1963), which placed a heavy burden on states seeking to restrict religious practices. In *Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2233 (1993), a plaintiff won for the first time in twenty years when the Court ruled that "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny." The decision somewhat mitigates *Smith* but has created confusion. See Rod Fliegel, "Free Exercise and the Religious Freedom Restoration Act of 1993: Where We Are, Where We Have Been, and Where We Are Going," *Constitutional Law Journal* 5 (1994): 81, 83–88.

[44] 620 F. 2d 1159, 1164–65 [6th Cir.] *cert. denied*, 449 U.S. 953 (1980).

[45] 485 U.S. 439 (1988). *Bowen v. Roy*, 476 U.S. 633, is a related precedential case cited in the opinion.

[46] The Hoopa Valley Indian reservation adjoins the forest and Chimney Rock has historically been used for religious purposes by Yurok, Karok, and Tolowa tribes.

[47] *Northwest Indian Cemetery Protective Assn. v. Peterson*, 790 F. 2d (1986).

[48] 485 U.S. 439, 447 (1988). Justice O'Connor wrote the majority opinion in which Rehnquist, White, Stevens, and Scalia concurred. Justice Brennan wrote the dissent with Marshall and Blackmun concurring. Justice Kennedy did not participate in the case.

[49] 485 U.S. 439, 451 (1988).

[50] 485 U.S. 439, 490 (1988).

[51] 485 U.S. 439, 453 (1988).

[52] 485 U.S. 439, 451–453, and 490 (1988). See also Justice Scalia, writing for the majority in *Smith*, 494 U.S. 872, 888 (1990).

[53] 485 U.S. 439, 459 (1988).

[54] For a careful analysis of this issue, see Luralene D. Tapahe, "After the Religious Freedom Restoration Act: Still No Equal Protection for First Amendment Worshipers," *New Mexico Law Review*, 24 (1994): 331–363. Tapahe (332) contends that "native claims challenging the development of sacred land sites have not been given the same doctrinal treatment as those claims brought by mainstream Judeo-Christian plaintiffs."

[55] Paul E. Lawson and Jennifer Scholes, "Jurisprudence, Peyote and the Native American Church," *American Indian Culture and Research Journal* 10 (1986): 15, 16, 25.

[56] 494 U.S. 872 (1990).

[57] 494 U.S. 872, 881 (1990).

[58] 494 U.S. 890.

[59] That point had already been established two years earlier. The Court had argued in *Lyng v. Northwest Indian Cemetery Assn.* (1988) that "even assuming that the Government's actions [would] virtually destroy the Indians' ability to practice their religion," the First Amendment does not mandate redress in this case. 485 U.S. 439. The Supreme Court's consideration of issues related to free exercise relegates matters of cultural difference to the political realm, and thereby, argued Justice Brennan, engages in an "abdication" which "bestow[s] on one party . . . the unilateral authority to resolve all future disputes in its favor, subject only to the Court's toothless exhortation to be 'sensitive' to affected religions." 485 U.S. 439, 473 (1988).

[60] 494 U.S. 892, 895 (1990).
[61] 494 U.S. 892, 894.
[62] 494 U.S. 892, 902 (1990).
[63] 494 U.S. 892, 908 (1990).
[64] On November 19, 1990, the Native American Graves Protection and Repatriation Act became law in light of Scalia's ruling. But a year later the Supreme Court struck it down.
[65] Walter R. Echo-Hawk, "Native American Religious Liberty: Five Hundred Years After Columbus," *American Indian Culture and Research Journal*, 17 (1993): 49–50.
[66] 521 U.S. 507 (1997).

Chapter 4

Regulation of Political Speech

Of all the forms of speech that the founders sought to protect, most scholars believe that political communication received the highest priority. Through political communication, the founders translated the theories of Thomas Hobbes, John Locke, Jean Jacques Rousseau, John Milton, and Edmund Burke into a pragmatic plan for government. It was political communication that allowed the arguments of Thomas Paine to flow through the propaganda machine of Samuel Adams to help foment revolution. From the great speeches of Patrick Henry to the intense debates surrounding the ratification of the Constitution and the Bill of Rights, political communication played a major role in refining democratic republicanism.

Once the new nation was established, political communication continued to play a large role. Thomas Jefferson and James Madison defended individual rights against the Alien and Sedition Acts of 1798. Frederick Douglass and Angelina Grimke spoke out against slavery. Native American chiefs pled the case of their peoples before Congress. Abraham Lincoln and Stephen Douglas argued over the rights of states in their debates of 1858. Woodrow Wilson and Franklin Roosevelt justified entries into world wars on the grounds that U.S. values should be spread to the rest of the world.

However, not all political communication has been as high minded. During the Alien and Sedition crisis (1796–1801) Federalists accused Jefferson of harboring subversives in his State Department and their opponents of being traitors. Lincoln accused Douglas

of being part of a government conspiracy to spread slavery into the territories. Wilson justified a witch hunt to locate "reds" during and after World War I; Roosevelt justified the internment of Japanese-Americans during World War II. Senator Joseph McCarthy engaged in a campaign of exaggeration, guilt by association, and outright lies in the early 1950s. Currently, the United States faces a crisis of confidence in political communication that is often reduced to sound bites on the evening news and negative campaign commercials made on Madison Avenue.

All of this rhetoric is protected because our system of government is based on important Enlightenment principles. As Jefferson noted, we can tolerate error as long as truth and reason are free to combat it. Nonetheless, Congress regularly tries to level the playing field among politicians with attempts to control and reform political communication. These efforts sometimes cross constitutional lines. Our investigation of the restrictions imposed on political speech begins with a review of the rationale for restrictions on political speech.

Censorship of Political Speech

There are various rationales for curtailing freedom of expression: defamation, libel, slander, obscenity, and communication that present a clear and present danger to another or to the nation. We will discuss each of these issues later in this book. If political speech can be shown to fall into one of these categories, then regulators are free to curtail it. A political advertisement that uses false information to ruin the reputation of a politician is subject to legal action. A political speech that reveals national security secrets to an enemy of the state may be tantamount to treason. It is on the margins of these categories that political speech has sometimes been restricted in an unconstitutional manner.

For example, by 1798, the year the Alien and Sedition Laws were passed, over 300 U.S. ships had been sunk or commandeered by the French. After the storming of the Bastille in 1789, Louis XVI reluctantly endorsed the National Assembly and authorized the creation of a constitution. Radicals gained control of the National Assembly. In September 1792 the National Convention tried Louis XVI for treason and executed him in January 1793. The constitution passed in June 1793 was suspended almost as soon as it was ratified. The new government, known as the Directory, vowed to spread its ideology across the world by force.

Vice President Jefferson and members of his party debated Federalists about the extent to which that threat was real for the United States. Jefferson had been Minister to France during its revolution. He had also been Secretary of State of the United States. As Vice President, he tried to dampen fears of a foreign invasion and openly

opposed President Adam's call for a more stringent policy of immigration. The Federalists countered by arguing that the external threat of war with France was only one part of the story. The other was an internal threat from French "Philosophes" and "Jacobins" who had infiltrated the country and, according to Congressman James Otis of Boston, even served in Jefferson's State Department.

Federalists under the direction of Alexander Hamilton produced an ambitious legislative package that resulted in the passage of the following laws that President John Adams happily signed.

- The *Naturalization Act* forbade aliens from being admitted to citizenship unless they had resided in the United States for at least fourteen years. No native citizen, subject, or resident of a country with which the United States was at war could be admitted to citizenship.
- The *Alien Act* allowed the president to order all aliens that he judged to be dangerous to the peace and safety of the United States to depart.
- The *Alien Enemies Act* held that when war is declared or invasion threatened, all natives, citizens, denizens, or subjects of the hostile nation, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies.[1]
- The *Sedition Act* held that any persons combining or conspiring with intent to oppose any measure or measures of the government of the United States shall be liable to fines up to $5,000 and imprisonment up to five years. Any person writing, uttering, or publishing any false, scandalous, and malicious writing or writings against the government, the Congress, or the president shall be liable to fines up to $2,000 and imprisonment up to two years.

Under these laws, newspaper editors, politicians, and common citizens were jailed for criticizing the president or the Congress. It was one of the saddest moments in the early Republic's history. Eventually, war with France was avoided, and Jefferson was elected president. The laws had a sunset clause set for the day of Jefferson's inaugural; he allowed the laws to lapse. In his inaugural address, he called for tolerance and freedom of expression.

During the Civil War, President Lincoln suspended the writ of *habeas corpus* first in Maryland and then in southern Ohio because of the sympathy in those states for slavery and their strategic geographic locations. Lincoln reluctantly took the action against Maryland so that he could prevent its legislature from meeting and voting for secession. In September of 1861, nine members of the Maryland

legislature were arrested. It was the first time a president of the United States had prevented a state legislature from meeting and was a clear violation of constitutional rights. However, the threat of Civil War was so severe that Lincoln felt justified in his unprecedented action.

The same was true in Ohio. During his campaign for governor, Congressman Clement L. Vallandigham gave a fiery speech in southern Ohio in support of the rebel effort. When General Burnside read reports of the speech in the newspaper, he had Vallandigham arrested and sent to Boston for trial. Lincoln eventually exiled the congressman to the South because he had some doubts about incarcerating a congressman for delivering a political campaign speech. Vallandingham continued to support the Southern cause from abroad and eventually became the famous "man without a country."

Two other cases established contrary precedents during and after the Civil War. The *Merryman* case stemmed from the suspension of rights in Maryland; it centered on whether the president or the Congress had the power to suspend the writ of *habeas corpus*. John Merryman, a southern sympathizer and secessionist from Maryland, was taken into military custody on May 25, 1861. He immediately asked to be released under a writ of *habeas corpus*; that is, he claimed his rights had been unjustly suspended.

In one of the oddities of history, the Chief Justice of the Supreme Court Roger B. Taney, a Democrat appointed by President Jackson, sat in judgment on the case. Taney had penned the infamous Dred Scott decision of 1857, which returned a fugitive to his owner. Lincoln had consistently criticized Taney's ruling in his campaign for the presidency in 1860. Now Taney and Lincoln crossed swords again.

In arguing for the president's power to suspend the writ, Attorney General Bates contended that the three great branches of the Government are coordinated; the executive cannot rightly be subjected to the judiciary. The president, he maintained, is in a peculiar manner the preserver and protector of all the branches as the defender of the Constitution. Moreover, it is the president's duty to put down a rebellion because the courts are too weak to do so. Bates pointed out that the power of the Presidency does open the way for possible abuse; however, it is just as true that a legislature may be factious or a court corrupt. The president cannot be required to appear before a judge to answer for his official acts because the court would be usurping the authority of Executive Branch.[2] Bates contended that for any breach of trust, the president is answerable before the high court of impeachment and no other tribunal.

In filing his opinion, Taney ruled that the president had no lawful power to suspend individual rights and that a writ of *habeas corpus* should be issued for Merryman. In *Ex parte Merryman* Taney claimed that only Congress could suspend the privilege of the writ

and that the president, though sworn to "take care that the laws be faithfully executed," had broken the laws himself. He pointed out that the provision regarding *habeas corpus* appears in that portion of the Constitution that pertains to legislative powers; therefore, its suspension was a Congressional, not an executive, prerogative. Taney argued further that the military authorities should reveal the day and cause of the capture of Merryman and explain the reasons for his detention.[3] Such requirements were, of course, usual in civil affairs, but not in military ones.

Given the crisis in the United States surrounding presidential powers in times of crisis, it is enlightening to read Lincoln's response to Taney. Lincoln wrote it as a message to Congress on July 4, 1861. He began by pointing out that he was reluctant to suspend the writ, but that dire threats to the nation in general and the military in particular required such action:

> Soon after the first call for militia it was considered a duty to authorize the Commanding General in proper cases . . . to suspend the privilege of the writ of habeas corpus. . . . This authority has purposely been exercised but very sparingly. Nevertheless . . . the attention of the country has been called to the proposition that one who is sworn to "take care that the laws be faithfully executed" should not himself violate them. . . . The whole of the laws which were required to be faithfully executed were being resisted . . . in nearly one-third of the States. . . . To state the question directly, are all the laws *but one* to go unexecuted, and the Government itself go to pieces, lest that one be violated? . . . The provision of the Constitution . . . is equivalent to a provision—is a provision—that such privilege may be suspended when, in cases of rebellion or invasion, the public safety does require it.[4]

As with Dred Scott, Taney stuck to the letter of the law and read the Constitution strictly and in context. Lincoln sought refuge in a higher law: the law of survival. He gave his defenders grist for their propaganda mills by claiming that his suspension of the privilege of the writ of *habeas corpus* did not violate any law. According to Lincoln, the Constitution was "silent as to . . . who, is to exercise the power" of suspension.[5] He would not release Merryman, even in the face of Taney's writ. The full Supreme Court refused to meet on the matter. In 1863, the Congress passed the *Habeas Corpus Act*, giving Lincoln the power he had already exercised.

The *Milligan* Precedent

However, a second case settled after the war when cooler heads prevailed is seen by most scholars as the current prevailing precedent because the full court decided it. Lambdin P. Milligan was

arrested on October 5, 1864, by order of General Hovey, in command at Indianapolis; he brought Milligan before a military commission on charges of (1) conspiring against the government of the United States; (2) affording aid and comfort to the Rebellion against the authorities of the United States; (3) inciting an insurrection; (4) disloyal practices; and (5) violation of the laws of war.[6] Milligan, along with others, was a suspected member of Vallandigham's secret anti-war society. The military commission sentenced Milligan to be hanged on May 19, 1865. When Milligan petitioned the United States Circuit Court for a writ of *habeas corpus*, the controversy over Congressional versus presidential power was re-ignited.

Attorney General Stanbery and Benjamin F. Butler argued for the administration that:

> The Commander-in-Chief has full power to make an effectual use of his forces. He must . . . have the power to arrest and punish one who arms men to join the enemy in the field against him; one who holds correspondence with the enemy; one who is an officer in an armed force organized to oppose him; one who is preparing to seize arsenals and release prisoners of war taken in battle and confined within his military lines. . . . During the war his powers must be without limit, because if defending, the means of offense may be nearly illimitable.[7]

Milligan's lawyers insisted, however, that the Military Commission had no jurisdiction to try him on any charge whatever because he was a citizen of the United States and the state of Indiana and protected by the Constitution unless martial law had been declared in his area. Moreover, he contended that the right to a trial by a jury of peers was guaranteed to him by the Constitution of the United States.[8]

The *Milligan* case was decided in April 1866, a year after Lincoln's assassination and the end of the war. Justice Davis announced the court's opinion:

> During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgement. . . . [T]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances . . . [O]ne of the plainest constitutional provisions was infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges . . . [A]nother guarantee of freedom was broken

> when Milligan was denied a trial by jury . . . Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real . . . It is difficult to see how the safety of the country required martial law in Indiana . . . Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.

Chief Justice Chase concurred:

> The power to make the necessary laws is in Congress; the power to execute in the President . . . But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people . . . nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offenses, either of soldiers or civilians, unless in cases of controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature . . . What we do maintain is that when the nation is involved in war . . . it is within the power of Congress to determine to what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety.

Thus, the Court declared that the guarantees of such freedoms as safeguard against arbitrary arrest, fair trial, and Fifth Amendment privilege are not to be set aside during war unless the accused is in an actual war zone or area under martial law. Milligan's trial and conviction by a military commission were overturned.

Suppression of Political Speech in the Twentieth Century

The tendency of the Supreme Court to uphold convictions of persons criticizing war policy in wartime continued into the twentieth century. Three of the most important cases are, *Abrams v. United States* (1919), *Schenck v. United States* (1919), and *Gitlow v. New York* (1925).

The courts found Abrams guilty of violating the law because he distributed literature that called for a general strike and criticized President Wilson's policy of sending troops into Russia opposing the Bolsheviks during the Russian civil war at the end of World War I. In dissent Oliver Wendell Holmes coined his famous phrase about protecting speech in the "free marketplace of ideas." Claiming Abrams's leaflets were "silly," Holmes railed against the majority:

> . . . pronunciamentos by the Socialists in no way attack the form of government of the United States. . . . I do not see how anyone can find the intent required by the statute in any of the defendants' words. . . . In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution. . . . [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . [T]he United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed.

Holmes echoes Jefferson's challenge to a democratic republic to allow error as long as others are free to refute it.[9]

Schenck was the secretary of the Socialist Party of Philadelphia who circulated a paper that gave specific instructions on how to avoid and obstruct the draft. It also endorsed acts of insubordination by military personnel. The circular clearly violated the Espionage Act of 1917. The question was whether the act was constitutional. This time Holmes wrote the *majority* position, arguing that *Schenck* presented "a clear and present danger" to the nation; therefore, his speech was not protected. It was tantamount to "action." The most famous section of Holmes' decision reads:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight . . .[10]

For Holmes the question of harm is a matter of "proximity and degree,"[11] standards that return again and again in such cases.[12] That is, the courts must establish the context of the remarks to determine if they present a true threat. Someone might be joking or remarks may be so general that they cannot be taken as a true threat to any person or group.

We should also note that the *Schenck* decision flows from English philosopher John Stuart Mill's famous position that the primary function of government was protect its citizens from harm. In his book *On Liberty*, Mill attempted to differentiate between providing the greatest good for the greatest number and overriding individual liberties. Both Holmes and Mill argue that individual liberties are worth very little if personal security is not guaranteed; hence, speech that presents a clear and present danger must be curtailed. The trick is determining whether speech is a true threat.

Gitlow was also a Socialist agitator arrested in New York for his public advocacy. In this famous 1925 case, the Supreme Court incorporated the First Amendment through the Fourteenth and applied it against the states for the first time. That is, the Court viewed freedom of expression and the right to assemble as universal rights and an integral part of due process and equal protection. While the majority agreed with the incorporation, they *upheld* Gitlow's conviction on the grounds that the state knew best what constituted a real threat. Justice Holmes agreed with the incorporation of the First Amendment into the Fourteenth, but dissented when it came to taking Abrams seriously. He claimed that anyone could be locked up under the Court's decision because "Every idea is an incitement" of some sort; in fact, if something is worth saying, it is going to offend someone.[13] Thus, we need to be very careful about what we censure in the name of preventing violence.

The Supreme Court has examined the related issue of pamphleteering and demonstrating in some areas but not in others in several cases. The government usually claims that its prohibitions merely restrict time, place, and manner but do not affect content of expression. That is, as long as the government does not restrict speech based on its content, it can usually pass laws to keep speech orderly and out of improper venues. For example, demonstrators can be kept from disrupting college classes because they are not the proper place to voice mass dissent. However, restrictive measures cannot be so broad as to prevent all campus protest, especially when the campus has had a tradition of allowing dissent in designated areas.

In *Lovell v. Griffin* (1938), the Supreme Court unanimously struck down a Griffin, Georgia statute prohibiting any and all pamphleteering.[14] When Alma Lovell, a Jehovah's Witness, challenged the law, the Court found the blanket statute overly broad and a direct affront to the First Amendment. The unanimous decision overturned a law against door-to-door solicitation that had been upheld by the lower courts. As we saw in chapter 3, the same group challenged a similar law in 1940, which resulted in *Cantwell v. Connecticut*.[15] Connecticut had argued that the Cantwell's form of religious solicitation might incite people to violence. However, the Court held that reasoning to be tantamount to a heckler's veto over a group that did not present a clear and present danger. In other words, any time the government wants to suppress speech, it could do so by claiming that it could not protect the speaker from his or her audience. While the state could prohibit illegal or fraudulent solicitation, it could not prohibit legal solicitation.

In *Heffron v. International Society for Krishna* (1981), the Supreme Court ruled that agencies had the right to limit to stations the sale of materials and the solicitation of contributions.[16] However, the Court set out a four part test for such ordinances: (1) The restriction cannot be based on content. (2) It must advance a govern-

ment interest. (3) The agency must prove that there were no less restrictive means available to advance the government interest. (4) The regulation is valid only if alternate means of expression are available. Thus, the Courts have allowed laws that ban demonstrators and paparazzi who invade privacy and/or endanger clients,[17] but have protected harmless, yet often annoying solicitors.

The issue of the right to demonstrate surfaces in many venues. As we have seen, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[18] the Supreme Court ruled in 1995 that the First Amendment's prohibition on compelling people to speak applied to privately organized parades. That is, you can't force someone to speak if they don't want to.[19] In this case, the gay and lesbian group sought to be included in the parade under the state public accommodations law and on the grounds that the streets were a public forum. The organizers protested that their license to march was a time, place, and manner restriction that was legally obtained and content neutral and that to include gays and lesbians would send a message contrary to what parade organizers believed. The gay and lesbian group countered that the license could not be content neutral if they were excluded based on the content of their message. In overruling the lower courts, the Supreme Court held for the parade organizers, the South Boston Allied War Veterans Council. The ruling tells us that you can't force the organizers of a St. Patrick's Day parade in Boston to include people carrying banners that are antithetical to the beliefs of the marchers. Writing for a unanimous Court, Justice David Souter acknowledged that parades are a collection of people trying to make a point; "parades are thus a form of expression. . . . But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." The Supreme Court protected group autonomy, essentially telling the gay and lesbian group to organize their own parade.

But the issue is not so simple when demonstrators want to take to the streets. The courts have consistently ruled that the streets are a public forum and orderly demonstrations must be allowed. The most recent affirmation of this principle occurred in Salt Lake City when the Mormon Church sought to prohibit demonstrators from the sidewalks of Mormon Square near Main Street. On October 9, 2002, the Tenth Circuit of the U.S. Court of Appeals ruled that restrictions on the public streets were First Amendment violations since the streets are open to pedestrians and the city holds the easement on them. The city had sided with the Mormon Church, and the ACLU brought suit. The city and the church won the first round but lost at the U.S. Court of Appeals. They are appealing to the Supreme Court.

Advocating the Violent Overthrow of the Government

The Declaration of the Causes and Necessity of Taking up Arms written by the Continental Congress of 1775 argued that "in defence (sic) of the freedom that is our birthright . . . we have taken up arms." The Declaration of Independence of 1776 begins by arguing that if "certain unalienable (sic) Rights" such as "Life, Liberty and the pursuit of Happiness" are violated by the government, then "it is the Right of the People to alter or abolish it." Nonetheless in 1951, the Supreme Court ruled that the Smith Act of 1940, which prohibited calling for the violent overthrow of the government, was constitutional. The case establishing this principle began in July 1948, when the Federal Bureau of Investigation arrested six members of the Communist Party in their New York City offices. Eventually eleven members of the leadership of the Party were brought to trial for teaching and advocating "the overthrow and destroying any government in the United States by force and violence," a violation of the Smith Act.[20]

The eleven, which included Eugene Dennis, Secretary of the Communist Party, were convicted despite protests from presidential candidate and former Vice President Henry Wallace and the American Civil Liberties Union. They were fined $10,000 each and sentenced to five years in jail. The Supreme Court upheld the *Dennis* decision, with Justices Hugo Black and William O. Douglas strongly dissenting.[21]

Chief Justice Vinson wrote the plurality decision in which he argued that the leader of a group who instructs about violent action is as guilty as the group who commits the action. Vinson relied on Judge Learned Hand's theory that speech is transformed into action at the moment of incitement or instigation.[22] Had we not been at war with Communist China in Korea at the time of this decision, it might have been different. Or had the country not been in the grip of a paralyzing fear of Communism because it had spread over half of Europe and a large portion of Asia, the Supreme Court might have returned to its previous position of protecting membership in the Communist Party in America saying it was a movement no different from many others.[23] In his dissent in *Dennis v. U.S.*, Justice Douglas said:

> Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state, which the Communists could carry. . . . The First Amendment . . . . does not mean that the Nation need hold its hand until it is in such weakened condition that there is no time to protect itself from incitement to revolution. Seditious *conduct* can always be punished. But the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech. . . . Unless and until

> extreme and necessitous circumstances are shown our aim should be to keep speech unfettered and to allow the processes of law to be evoked only when the provocateurs among us move from speech to action.[24]

Thus, Douglas and Black sought to draw a definitive line between speech and conduct—and to keep Congress from crossing it.

Four years after the "police action" ended in Korea, the Supreme Court ruled in *Yates v. United States* (1957) that fourteen members of the Communist Party who had been arrested in California for calling for the violent overthrow of the government were not guilty of advocating specific illegal activity; instead, they were engaged in the advocacy of an ideology. Justice John Harlan, who believed that there was a significant difference between speech (belief) and action, wrote the crucial opinion in *Yates*.[25] Note that this distinction mirrors one that we examined in chapter 3: religion as belief is fully protected, but religion as action is subject to restriction. The *Yates* ruling effectively gutted the Smith Act, though it remains on the books to this day. *Yates* was revised further in the *Brandenburg* case (see chapter 6), which allowed additional latitude to speakers advocating violent activity.

Symbolic Speech as Protest

The Vietnam War caused another set of important cases to come before the Supreme Court, the most important of which were *U.S. v. O'Brien* (1968), *Tinker v. Des Moines* (1969), and *Cohen v. California (*1971*).* Violating a federal law against destruction of draft cards, O'Brien burned his on the steps of a Boston courthouse to protest the war in Vietnam. He appealed his conviction on the grounds that his act was symbolic speech protected by the First Amendment. When the case reached the Supreme Court, it established a four-part test for determining whether expressive conduct could be punished. In the Supreme Court's words, the government could regulate speech "if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest."[26] Essentially, this ruling was a simpler standard than the ones developed later in the *Heffron* case of 1981 (see above). In *O'Brien* the Court found for the government by making a distinction between *conduct*, which could be regulated, and *expression of beliefs*, which could not. Chief Justice Warren, writing for the Court, concluded "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[27] The

conduct of burning the card violated a specific law that advanced a significant government interest: the Selective Service's ability to check the draft status of citizens.[28]

Paul Robert Cohen challenged the war in a different way. While walking in a corridor of the Los Angeles County Courthouse, Cohen was arrested for wearing a jacket with the words "Fuck the Draft" written on the back. He was arraigned under a law that prohibited "maliciously and willfully disturb[ing] the peace . . . by offensive conduct" and sentenced to 30 days in jail. Cohen claimed his First Amendment rights had been violated because he intended no act of violence and only meant to comment on the draft for what he believed was an immoral war. The Supreme Court ruled in favor of Cohen on the grounds that the law unduly punished his speech and not his conduct. Justice Harlan spoke for the majority when he wrote, "This case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon showing that such a form was employed. This is not, for example, an obscenity case."[29]

Tinker v. Des Moines Independent School District is a landmark decision on the First Amendment rights of students. *Tinker* involved three high school students who were suspended from school for wearing black armbands as a symbolic protest against the Vietnam War. The Supreme Court held that the suspension violated the students' rights of free expression.[30] The Court said students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court limited the scope of the decision, however, by stating that school officials could regulate student expression if it caused substantial disruption or material interference with school functions.

The Court revisited this issue in 1989 in *Texas v. Johnson*.[31] During the 1984 Republican Convention in Dallas, Gregory Johnson had burned a U.S. Flag to protest the policies of the Reagan administration. His act violated a Texas law against burning the U.S. flag. In a five to four decision, the majority of the Court overturned the Texas law, as it would later overturn a U.S. law on the same subject. Writing the majority, Justice Brennan claimed that Johnson's case differed from that of O'Brien because Johnson's action was expressive and suppressing it would advance no compelling government interest. "The state need not worry that our holding will disable it from preserving the peace." Furthermore, unlike the law under which O'Brien was prosecuted, the Texas law was not content neutral.[32] The U.S. Congress soon after passed a law forbidding "desecration" of the flag. But the Supreme Court struck the Flag Protection Act down in a 5–4 decision in 1990.[33]

Crises and Freedom of Expression: A Case Study

The history and cases reviewed above are important because they provide lessons for contemporary society. When the United States faces a crisis, such as a war or an internal threat of subversion, the president, the courts, and the Congress are more likely to restrict freedom of expression. On September 11, 2001, for example, terrorists attacked the World Trade Center in New York City and the Pentagon in Washington, D.C. In the wake of the tragedy, the Congress and the president assessed whether new laws should be written that might curtail civil liberties. By November 10, 2001, nearly 1,200 persons were arrested on suspicion of helping the conspirators, of committing related crimes, or of being material witnesses to terrorist activities.[34] Congress quickly passed the USA Patriot Act of 2001 to deal with the crisis. It allows a single federal district court to authorize the "trapping" of phone numbers anywhere in the United States. These "roving taps" allow interception of electronic evidence such as e-mail and a history of numbers called from or to tapped phones and e-mail. The legislation gives wider latitude to the special court that authorizes wiretaps on suspected agents of foreign powers.[35] The legislation allows information concerning foreign agents in the United States to be shared among government agencies.[36] The legislation allows the Immigration and Naturalization Service to detain aliens up to seven days.[37] It permits the Attorney General to detain "terrorist aliens" and expands the definition of terrorist activity. The district court of the District of Columbia has been given exclusive jurisdiction over such cases. The legislation ends the statute of limitation on the newly defined terrorist activities and increases the maximum sentence to life imprisonment.[38] Finally, the new law bans possession of biological agents that pose a threat to national security unless the possession would serve peaceful purposes.

After the president signed the legislation, Immigration and Naturalization Service Commissioner James Ziglar and Attorney General John Ashcroft outlined the new rules that had been put in place. The federal government's ability to deny visas to and deport immigrants who "endorse" terrorism was stressed. The attorney general designated 46 "terrorist organizations" around the world. Any linkage to any of this organizations can now be used as a justification to deny a visa or to deport an immigrant or visitor. The attorney general also established a task force to track foreign terrorists.

The new rules give the Federal Bureau of Investigation broad latitude to conduct surveillance and information gathering. While these methods are not prohibited by the Constitution, any evidence obtained in violation of the Constitution may not be used in court. For example, the Fifth Amendment provides a right to avoid self-

incrimination. However, there is no prohibition per se of the F.B.I. obtaining a confession to apprehend *other* terrorists; only the fruits of that confession would be unusable in court against the person who made the confession. The evidence could be used in a non-criminal case, such as a deportation hearing. In addition, it should be noted that if a witness were granted "use immunity," nothing confessed could be used against that witness; however, the witness could be compelled to answer questions pertaining to a crime and those linked to it. The due process clause of the Constitution only precludes coercion that shocks the conscience of the court. Thus, if the injection of truth serum could lead to the prevention of a terrorist act, it likely would be upheld, just as extracting blood from a drunk driver has been upheld. Torture, on the other hand, has tended to be of such a shocking nature that it is prohibited.

Perhaps the most controversial interpretation of the new legislation came on November 9, 2001, when Attorney General Ashcroft announced that federal prison officials would be allowed to eavesdrop on conversations between inmates and their lawyers. According to Ashcroft, as long as officials had a "reasonable suspicion" that useful information was being passed on to an attorney, they could listen in. Senator Patrick Leahy (D-Vermont) sent a letter to the attorney general demanding a rationale for the rule that appears to violate the Sixth Amendment right to "assistance of counsel" for one's defense.

The next reduction of civil liberties came on November 13, 2001, when President Bush agreed to allow military tribunals to try alleged terrorists. The order from the president said that those that he designates as terrorists will be "placed under the control of the secretary of defense," who shall have "exclusive jurisdiction" in these matters. These agents of terror may not appeal to "any court of the United States," nor "any court of any foreign nation or any international tribunal." The Bush Administration claimed it had a precedent for taking such action with the *Quirin* case, wherein Nazi saboteurs were apprehended in the Mayflower Hotel in Washington, D.C. in June of 1942 when two of their members defected. Ten prosecutors tried the saboteurs in the Justice Department building before a military tribunal. Six of the saboteurs were executed on August 8, 1942, and the defectors were sent to prison.[39] If and when terrorists are apprehended, it will be interesting to determine if their circumstances are analogous to those of the Nazi saboteurs, who had been delivered by a German U-Boat to U.S. shores during a declared war.

The *Milligan* case, examined above, would certainly protect American citizens from military tribunals, but foreign nationals might present a different set of circumstances. Under current law, the president must demonstrate that military tribunals are essential because the current system does not allow for the timely prosecution of terrorists. However, the Administration could claim that an open hearing might compromise national security. Secondly, the U.S. Constitution

applies to "persons" not just citizens who inhabit the country. Almost anyone in the country, as illegal aliens have learned, can file a writ of *habeas corpus* unless they inhabit an area that has been declared under martial law or unless they are "military combatants." Others, relying on Taney's ruling in the *Merryman* case, claim that Congress must legislate the procedure before the president can implement a suspension. In light of these and other arguments, President Bush eventually restricted his policy regarding tribunals to areas of actual conflict overseas. The courts have sometimes supported the administration and sometimes curtailed its actions. In the summer of 2002, the U.S. Court of Appeal for the Sixth District unanimously ruled that closed hearings violated the First Amendment rights of the press. A secret three-judge panel appointed by Chief Justice Rehnquist to oversee security operations upheld the administration's use of surveillance techniques.[40] With the passage of the Homeland Security Act, the government was empowered to collect any data about individuals that was available from any computer or electronic source. The debate over these measures continues at this writing.

Campaign Persuasion

To this point, we have seen that political speech is often threatened during times of crisis, particularly war. The Supreme Court is much more likely to uphold restrictions during times of crisis but often rescinds its decisions once peace resumes. However, this has not been the case when it comes to campaign reform legislation. In the name of preventing the appearance and opportunity for corruption, the Supreme Court has allowed the Congress to restrict campaign contributions, reveal political associations, and will soon have to rule on whether certain interest groups can be restricted from advertising a month before a primary and two months before a general election.

Discourse that attacks the policy of a government at war is a serious matter, as is specifically advocating ways to overthrow the government. Traditionally, however, Americans have not accorded the same importance to political campaign rhetoric. From colonial times to the present, campaign communication has been filled with innuendo, promises, half-truths, and the like. In the 1952 presidential campaign, the first political advertisements were televised; they were amateurish, cartoonlike, and short on specifics. In 1964, the first "negative" political advertisement was put on the air during a presidential campaign. It depicted a small girl picking petals from a daisy as the narrator called out a count down to nuclear war. Run only once because of protests, the advertisement was clearly an attack on the policies of Republican candidate Senator Barry Goldwater by President Lyndon Johnson. Negative or attack advertising has been with us ever since.

Attempts at Reform: *Buckley v. Valeo*

In the wake of Watergate, new requirements were added to the Federal Corrupt Practices Act of 1925 and the Federal Election Campaign Act of 1971. Along with requiring full disclosure of contributions to a federal campaign, the new rules limited individual contributions to $1,000 per election, prohibited corporate contributions,[41] and established that employees could contribute to a campaign only by forming political action committees (PACs), which could make maximum contributions of $5,000 per candidate per election. This restriction of corporate contributions can be traced back as far as 1907 when President Theodore Roosevelt asked Congress to ban all corporate contributions. When Congress passed the legislation, Roosevelt happily signed it. Now no individual is allowed to give more than $5,000 to a PAC or $25,000 overall to federal candidates during a single year. The new law also carefully monitored and limited what a political party could contribute to its candidates and what corporations or unions could "contribute in kind"—equipment, services, travel, and the like. Political parties were forced to allocate their contributions based on population formulas, but they could provide money to state parties and spend their own money in state elections for the purpose of "party-building activities." This provision opened the door to what is called "soft money": contributions given to the party for grassroots and party building activities were allowed under amendments to the FECA passed in 1979. These activities were not subject to the limitations of the Federal Election Campaign Act or the regulations of the FEC, nor are certain activities of corporations and unions, including corporate communications to stockholders, labor communications to its members or their families, non-partisan voter registration and get-out-the-vote activities, and creation of political action committees. Soft money also took the form of issue advocacy by for-profit, non-profit, and labor organizations as long as they are not coordinated with a candidate.

Further, the law provided for public financing of presidential nominating conventions and for matching funds to help pay for presidential primary and general election campaigns. In return for accepting matching funds, presidential candidates are limited in how much they may spend overall. If they refuse matching funds, they can spend their money in an unrestricted way.

Senator James L. Buckley (a conservative Republican Senator from New York) and Eugene J. McCarthy (a liberal Democrat and former Senator from Minnesota) brought suit to have the reforms stricken. They argued that the rules infringed on freedom of expression because the more money a campaign has at its disposal, the more media time it can buy to communicate its message. They also argued that campaign contributions were tantamount to symbolic speech, the contributed money being the same as an endorsement.

The Supreme Court, in a curious decision in 1976, ruled that the restrictions on contributions were constitutional but that the spending limitations were not. The former, said the Court, were appropriate ways of controlling undue influence in a campaign; the latter, however, restricted freedom of expression. Despite Chief Justice Warren Burger's argument that "Contributions and expenditures are two sides of the same First Amendment coin,"[42] the majority believed that contributors have alternative avenues of expression not available to candidates. Furthermore, despite an argument that the disclosure of contributions provision violated the rights of free association and privacy, the Court held that the government had a compelling interest in preventing a "corrupting" influence that overrode freedom of association. Finally, the Court held that the provisions regarding minor parties' matching funds and ballot access did not violate the Due Process Clause of the Fifth Amendment.

The decision is long and complex, with Justices joining and dissenting on various parts of various opinions. An analysis of the decision reveals that the shifting contexts created a barrier to consensus, though the majority was able to cobble together a compromise. They acknowledged that "The First Amendment protects political association as well as political expression" unless a compelling government interest can be advanced by a narrowly constructed regulation.[43] For some, Watergate verified the government's argument that it had a compelling interest. For others, the First Amendment context was more compelling.

The government had argued that illegal campaign expenditures were analogous to burning a draft card. These expenditures constituted conduct and therefore fell under the *O'Brien* rule that allowed for restrictions (see above).[44] The Court disagreed with the government's position on this issue in the *Buckley* case; it did not ". . . share the view that the present Act's contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien*. The expenditure of money simply cannot be equated with such conduct as destruction of a draft card."[45] Moreover, the Court ruled:

> Even if the categorization of the expenditure of money as conduct were accepted, the limitations challenged here would not meet the *O'Brien* test because the governmental interest advanced in support of the Act involve "suppressing communication." The interests served by the Act include restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns.[46]

Thus, the majority equated money and speech, accepting the argument that money is symbolic speech. With this move, the majority assured that the law would have to meet strict scrutiny if it were to be upheld since it sought to restrict expressive conduct.

When the Court examined the FECA's restrictions on *campaign spending* in light of strict scrutiny, it found the law wanting. The majority discounted "time, place and manner restrictions" as a rationale for the law. As we have seen, the Court established those criteria in a number of cases that had argued content-neutral restrictions on time, place, and manner of speech were permissible if the state had a compelling interest to advance.[47] In *Buckley*, the Court ruled:

> The critical difference between this case and [time, place and manner rulings] is that the present Act's contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner regulations otherwise imposed.[48]

The heart of the case for striking down the spending limitations came next:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. . . . The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.[49]

However, with regard to campaign *contributions*, the majority shifted contexts to find that "the governmental interest in preventing . . . the appearance of corruption is inadequate to justify [the] ceiling on independent expenditures."[50] They further ruled that contributions were not as analogous to speech as were campaign expenditures:

> [A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.[51]

Given that the government has a compelling interest in preventing corruption or its appearance, restricting large contributions goes to the heart of the problem, while restricting expenditures does not. The majority claimed that these restrictions would force campaigns to seek wider support, thereby involving more people in campaigns. Finally, contributors may engage in direct participation in the political process rather than contributing to candidates who speak for them. The law does not prevent, but in fact encourages, voters to organize with "like-minded" persons to support a candidate, which reinforces the important element of freedom of association. The Court concluded that "although the Act's contribution and expendi-

ture limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions."[52]

The final major issue addresses the right to associate with whom one pleases. The First Amendment guarantees "the right of the people peaceably to assemble" in order to "petition the government."[53] Like other First Amendment rights, it can be limited only if the law advances a compelling government interest.[54] It is difficult to see how the Court could rationalize curtailing a citizen's desire to support his or her association through a confidential contribution. The Court did so by accepting appellees' arguments that the government had a compelling interest to advance: "prevention of corruption and the appearance of corruption spawned by the real *or imagined* coercive influence of large financial contributions on candidates' positions and on their actions if elected to office" (italics added).[55] Restrictions and incentives are set in place to encourage broader participation (more candidates rather than one, the formation of political action committees, direct involvement rather than monetary support) and to reduce influence and associational strength (less money per candidate). Evidently, giving all of one's money to one candidate is not a specific enough symbolic message to warrant protection, and such a contribution gives an appearance of corruption which justifies restricting freedom of assembly.

Five justices dissented at various points but never coalesced into a majority on any one issue. Chief Justice Warren Burger's dissent is the most extensive. While he agreed that "the need for disclosure outweighs individual constitutional claims,"[56] he objected to the disclosure of small contributions, the limitation on contributions, and the public financing of presidential elections. Burger believed that small anonymous contributions could not corrupt the system; however, if the donor were revealed, he or she could be punished or harassed. He strongly opposed limits on contributions because they effectively limit expenditures, which the majority claimed was unconstitutional. Burger argued the majority simply could not have it both ways; all political campaign money translates into communication or none of it does.

Issue Advocacy

In decisions that followed *Buckley*, the Court said that federal regulations could limit donations for "communications that in express terms advocate the election or defeat of clearly identified candidate[s] for federal office" but could not limit donations for more general "issue advocacy."[57] In other words, independent advocates could certainly speak out on important issues and not face restric-

tion; but if these same advocates urged voters to support or defeat a particular candidate, they could be restricted. The Court affirmed that "individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction."[58] The FEC soon clarified its rules with regard to advertising covered by the Act: to be restricted, advertising had to be close to the election date, advocate voting for or against candidate, and suggest only one meaning.

These rules were tested in the courts and upheld when the Supreme Court denied *certiorari*[59] in 1987 in a Ninth Circuit case, *FEC v. Furgatch*.[60] In so doing, the Court endorsed a three-part test to determine whether a communication is issue advocacy:

> First, even if it is not presented in the clearest, most explicit language, speech is "express" for the present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of election or defeat of a candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.[61]

The aim of the FEC and the Court was to close a loophole that allowed special interest groups to come into an election campaign and run commercials against a specific candidate instead of sticking to their issues.

Partisan Political Activity

In 1996 the Supreme Court expanded freedom of expression for political parties with a seven to two vote when it rejected a move by the Federal Election Commission to fine the Colorado Republican party for having funded radio ads that criticized the record of the Democratic candidate for U.S. Senate. The Republican Party was free to advocate the defeat of the Democratic candidate as long as it did so independently of the Republican candidate's campaign. *If coordination between the party and its candidate's campaign could be proved, then the Republican Party would have violated the law.* The same rule applies to independent PACs. "The independent expression of a political party's view is 'core' First Amendment activity," wrote Justice Stephen G. Breyer, a Clinton appointee.[62] Thus, in *Colorado Republican Committee v. FEC*,[63] the Supreme Court ruled that the First Amendment prohibited the application of any provision of the FECA (1971) to political party expenditures made independently.[64] The ruling affirmed the standard practice of a major party

collecting soft-money from unions, corporations, and private individuals, passing that money to state parties, and then state parties using the funds to attack opponents of their candidates. The ruling allows for the conflation of expenditures and contributions given the possibility for earmarking contributions to the national party. While some justices sought to strike down the prohibition on coordination with the party's own candidate, enough justices disagreed to leave this restriction in place. When this case returned to the Supreme Court in June of 2001, the Republican Party argued that this restriction on coordination was a violation of the free speech rights of the parties, but the majority did not buy the argument. Justice Souter writing for a five to four majority in *FEC v. Colorado Republican Federal Campaign Committee*[65] re-affirmed the prohibition on coordination between the parties and their own candidates.

Spending Limits

In 1998, the Court refused to take up a case in which campaign-spending limits imposed by the city of Cincinnati had been struck down. Even though 26 states had joined the case as *amici* seeking to protect their spending limits, the Supreme Court upheld the U.S. Court of Appeals ruling striking down such limits because they were too severe. But this was not the end of the matter. In its most recent rulings, the Court has moved back to the corruption context reflecting the influence of the scandals of the 1996 campaign (see below).

By far the most significant ruling was *Nixon v. Shrink Missouri Government PAC* in January of 2000.[66] The PAC intentionally gave state auditor candidate Zev Fredman a contribution that was over the state-imposed limits. In the Eighth Circuit, the PAC and Fredman argued that the state law violated their First and Fourteenth Amendment rights. The Court of Appeals agreed, arguing that *Buckley* required courts to apply strict scrutiny to state laws. Therefore, Missouri was required to demonstrate that the law advanced a compelling interest and that the statutes were narrowly drawn.

The Supreme Court overruled, arguing that *Buckley* is the authority for comparable state limits on contributions, and those limits need not be pegged to the precise dollar amounts approved in *Buckley*. Justice Souter, again writing for the majority, claimed that the possibility of the appearance of corruption was enough of a compelling interest for the state to restrict contributions in this case.

Campaign Corruption

Buckley v. Valeo sent politicians scrambling for ways by which they could raise money in small amounts but gather enough contributions to meet their campaign needs. The contribution limits imposed

in 1975 were not indexed for inflation. Five thousand dollars is a lot less money today than it was in 1975 when the law was passed. The loopholes created by the Court had several consequences. First, those running for office could spend their own money in unlimited ways, a loophole through which presidential candidates John Connolly, Ross Perot, and Steve Forbes, among others, have driven.

Second, direct mail solicitation became a way to generate huge amounts of money from small donors. The Republican Party became the party of the small donor by using very sophisticated direct mail campaigns that amass huge numbers of supporters nationally but stay within the letter of the law. In the first 18 months of the 1986 election cycle, over a decade after the *Buckley* decision, the National Republican Senatorial Committee raised $59.6 million compared to $6.8 million raised by its Democratic counterpart.

Third, the "soft money" loophole meant that rich donors could give a great deal of money directly to political parties. Cynics noted that it would not be difficult to channel such money to the states where the donors' favorite candidates were running for office, thereby circumventing the intent of the law. This strategy was given some legitimacy by the decision in favor of the Colorado Republican Party (see above) spending "soft" money to advocate the defeat of Democrats as long as the Republican Party operated independently of its own candidates.

From 1996 to 2000, campaign contributions by the 544 largest public and private companies in America jumped 75% to $129 million.[67] Soft money became the fastest growing component of this sum, constituting over $50 million from corporations.[68] From January 1, 1995 to November 25, 1996, the Republican national committees reported raising $141 million in soft money, an increase of 183% over the previous cycle. The Democrat national committees raised $122 million, an increase of 237%. In the first fifteen months of the 1997–98 cycle, the national Democratic and Republican parties had raised a total of $90 million.[69]

Finally, with regard to soft money, the 1996 presidential campaign led to an influx of foreign money into campaign coffers. While foreigners are prohibited from contributing to federal campaigns, green card holders are not.[70] Furthermore, foreign groups, particularly Asian groups, attempted to circumvent the law by passing money through U.S. citizens or U.S. subsidiaries. Both tactics are illegal if the money is spent directly on candidates; however, if the money is given to parties as soft money, it may not be covered under the statutes.

Political Action Committees

Political action committees (PACs) have been criticized for a number of reasons. Because they represent business and labor inter-

ests, elected candidates may vote on issues that affect the contributors. PACs have been known to "bundle" their contributions with other PACs that have similar interests in order to increase the impact of the donation.

However, PACs do provide a voice for those who alone would have little influence. PACs are the vehicles through which employees can shift money to campaigns. They grew to over 4,000 in 1986 and have remained at about that level ever since. PAC contributors, including union and corporate members, number over 4 million, and total donations to House and Senate campaigns in 1996 reached over $200 million. The Congressional Research Service reports that "Twenty-nine percent of House and Senate general election candidates' funds came from PACs in 1996, up from less than 20% in 1976."[71] In 1996, the average contribution to a PAC was only $120 a year.[72] Millions of people contribute to PACs.

Campaign Costs

Campaigns have become so expensive that they exclude many candidates from running for election. The average cost of winning a House seat in 2000 was $847,000, up from $87,000 in 1976; the cost of winning a Senate seat was $7.2 million, up from $609,000 in 1976; House and Senate candidates spent over one billion dollars in 2000, up from $115 million in 1976.[73] In 1996 over $400 million was spent on broadcast advertising by federal, state, and local candidates in primary and general campaigns, up from $10 million in 1960 ($53 million in adjusted 1996 dollars).

Conclusion

Congress attempted to solve some of these problems with campaign reform legislation signed into law (P.L. 107-155, popularly known as McCain/Feingold) by the president on March 27, 2002. Provisions of the law that prohibit special interest groups from running advertisements against federal candidates 60 days before a general election and 30 days before a primary were immediately challenged in court, as were provisions ending soft money contributions to the national parties. The case went to the Supreme Court in September of 2003 providing yet another opportunity for the Court to modify and/or clarify its ruling in *Buckley*. However, in June of 2003, the Court upheld a ban on corporate contributions, and even refused to allow an exception for an incorporated, anti-abortion group.[74]

Buckley struck down the limits on campaign spending. That decision also allowed candidates to use their own fortunes to fund their campaigns at any level; it allowed corporate political action committees to bundle contributions for more impact; it allowed

issue advertising directed at opposition candidates as long as no coordination with the favored candidate could be proven; it spawned hugely successful direct mail campaigns that collected millions of dollars from small givers. And, of course, the law itself never addressed the issue of soft money from individuals, unions, and corporations going into the parties' war chests, which could then be redirected into federal campaigns in the name of "party building" and "issue advocacy."[75] Thus, in the name of equal treatment and by reworking congressional legislation, the Court has created a system that favors the independently wealthy, the major parties, and incumbents. If it wished to dispel the appearance of corruption, it certainly failed since large donors could simply redirect their giving directly to the national parties. In this way, *Buckley* has severely inhibited efforts at campaign reform; though if the *Nixon* ruling is any indication, the Court would again strike down attempts by Congress to limit expenditures by candidates. The McCain/Feingold legislation has given the Supreme Court another opportunity to visit this issue. The Supreme Court has made a distinction between campaign persuasion and political protest. Political protest, even when it is symbolic, has been given a great deal of protection, especially when the country is not facing a crisis. Campaign persuasion has been restricted because the majority on the Court believes campaign contributions may give the appearance of corruption and such an appearance could erode confidence in the electoral system.

Study Questions

1. In what ways has freedom of expression been curtailed during national emergencies?

2. Why did the Supreme Court rule differently in the *Milligan* and *Merryman* cases?

3. What do the rulings in *Schenck*, *Abrams*, and *Gitlow* have in common? How do they differ?

4. Compare and contrast the Supreme Court rulings in *Dennis* and *Yates*, *Tinker* and *Johnson*?

5. In the *Buckley* decision, how did the Supreme Court's majority rationalize restrictions on campaign contributions while striking down the restrictions on campaign spending?

6. What are the rules governing issues advocacy by independent groups in political campaigns?

7. What campaign practices remain in place that may give the "appearance of corruption" in the current environment?

Simulation Exercises

1. *Trial Case 4-1:* Congresswoman Ida Horowitz ran for re-election in the 38th Congressional District in California. After she won the election, the Federal Election Commission discovered that the wealthy land baron Randal Windsong had contributed $25,000 to Horowitz's campaign. The Federal Elections Commission fined Horowitz's campaign $50,000 and fined Windsong $25,000. He appealed the decision to the federal courts on several grounds: (1) it is his money, and he ought to be able to spend it as he sees fit, (2) limiting the amount he can give to a candidate limits his free speech and his ability to endorse a candidate. Windsong loses at the appeals level when the court cites the *Buckely v. Valeo* and *Nixon* cases, and argues that money is not speech, though it might be a symbol for it. Windsong, now joined by Horowitz, appeals to the Supreme Court arguing that the *Buckely* case and such subsequent rulings as *Nixon*, should be overturned because they are internally contradictory with regard to contributions versus spending standards. Both argue that money is equivalent to symbolic speech in a political campaign, and therefore, protected speech under *Johnson v. Texas*. The FEC replies that since *Buckley* the Supreme Court has upheld spending limits and the Federal Elections Campaign Act because eliminating the "appearance of corruption" is a compelling government interest that justifies restrictions. Do you find for Horowitz and Windsong or the FEC? Side one = Horowitz and Windsong; side two = FEC. Supreme Court: For whom do you find?

2. *Trial case 4-2:* During the War in Iraq in 2003, Harry Hopkins distributed leaflets that encouraged young men to "resign from the army" and to "sabotage machinery by putting sand in gas tanks" if they stayed in the army. The leaflets outline specific ways by which young men and women can leave the army or sabotage tanks, trucks, and guns. The leaflets call the war a "capitalist trick" and argue that the defeat of the U.S. in Iraq will mean the rise of a truly socialist government in this country, which he claims is what we need: "Your actions will be the first step in the war to overthrow the government of the United States as we know it." Hopkins is arrested when he distributes his leaflets just five feet in front of an army recruitment center in Los Angeles. The government claims that Hopkins presents a clear and present danger to the United States and that it is acting on a law passed by Congress in 1968 that prohibits demonstrations against the war from coming within 50 feet of a recruitment center. He is also charged with violation of the Smith Act, which prosecutors find is still on the books. The Smith Act makes it illegal to call for the overthrow of the government of the United States. The govern-

ment cites *Schenck*, *Abrams*, and *Dennis*, among other rulings to make its case under the Smith Act. It cites *Heffron* to defend the 1968 law prohibiting demonstrators near recruitment centers. Hopkins cites *Yates* and *Gitlow* to defend himself against the Smith Act and appellate rulings that have struck down laws prohibiting demonstrators near polling places and abortion clinics to defend himself against the 1968 law. When he loses, he appeals his conviction to the Supreme Court. Side one = Hopkins; side two = U.S. Government. Supreme Court: Do you find for Hopkins or the U.S. government?

Endnotes

[1] This act is in force (50 U.S.C. Sec. 21–24, 1982) with only one substantive change: states no longer have the jurisdiction to deal with enemy aliens.
[2] President Nixon used the same argument during the Watergate crisis.
[3] The military authorities, however, refused. See *Ex parte Merryman*, 17 Fed. Cas. 144.
[4] James D. Richardson, ed., *Messages and Papers of the President*, vol. VI, (Bureau of National Literature and Art, 1897) 24–25.
[5] This position was used by Democrats to justify the charge that Lincoln was a tyrant. This charge seems unjust given Lincoln's reluctance to suspend the writ.
[6] *Ex parte Milligan.*
[7] *Ex parte Milligan.*
[8] *Ex Parte Milligan.*
[9] One set of rulings relevant to the issue raised in *Schenck* and *Abrams* is the question of where and when one may demonstrate or distribute literature. The courts have ruled against restrictions on such speech near polling places (see *Daily Herald v. Munro*, 838 F. 2d 380 (9th Cir., 1988)) but have upheld them with regard to abortion clinics.
[10] 249 U.S. 47, 52 (1919).
[11] 249 U.S. 47, 52 (1919).
[12] See, for example, *Brandenburg v. Ohio* discussed below.
[13] *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes in dissent with Brandeis).
[14] 303 U.S. 444 (1938).
[15] 310 U.S. 296 (1940).
[16] 452 U.S. 640 (1981).
[17] In *Galella v. Onassis* (353 F. Supp. 196, 487 F. 2d 986 (2nd Cir., 1973), 533 F. Supp. 1076)), the courts upheld an injunction against photographer Galella for invading the privacy of Jackie Onassis and her family (see chapter 5). Other important cases on this issue include *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, *Boos v. Barry*, 485 U.S. 312, *Lee v. International Society for Krishna Consciousness, Inc.*, 505 U.S. 830. In the latter case, the Supreme Court ruled that distribution of material could not be prohibited, but solicitation of contributions could be prohibited.
[18] 115 S.C. 2338.
[19] See, for example, *Miami Herald Publishing Co. v. Tornello*, 418 U.S. 241 (1974) and *Wooley v. Maynard*, 430 U.S. 705 (1977).

[20] Quoting the Smith Act, ch. 439, tit. I, section 2(a), 54 Stat. 670, 671 (1940). The current version on the books is 18 U.S.C. section 2385 (2000).
[21] *Dennis v. United States*, 341 U.S. 494 (1951).
[22] Hand wrote the Second Court of Appeals decision in Dennis in 1950. See *United States v. Dennis*, 183 F. 2d 201 (2d Cir. 1950). See particularly, 208.
[23] See, *Schneiderman v. United States*, 1943.
[24] 341 U.S. 494, 588–590.
[25] See 354 U.S. 298 (1957).
[26] 391 U.S. 367, 376–77 (1968).
[27] 391 U.S. 367 (1968).
[28] The *O'Brien* opinion was reinforced in *Community for Creative Non-Violence v. Watt*, 468 U.S. 296 (1982), wherein the Supreme Court ruled 7 to 2 that sleeping in tents across from the White House was closer to conduct than to speech, even though it was intended as protest.
[29] 403 U.S. 15 (1971).
[30] Justice Black, an absolutist on First Amendment issues, was also a literalist. He voted against *Tinker* on the grounds that the First Amendment was not meant to cover symbolic speech.
[31] 491 U.S. 397 (1989).
[32] *Texas v. Johnson* clearly deals with individual rights. That is, individuals are free to burn the flag as means of expression and free to wear or post other symbols, such as the Confederate battle flag, which might be offensive to others. The government, on the other hand, has no such right since the First Amendment applies to individuals, not to the government.
[33] *U.S. v. Eichman* (1990).
[34] Reporters point out that "judges are denying bond, closing hearings, and sealing documents." See for example Richard A. Serrano, "A Swift, Secretive, Dragnet Attack," *Los Angeles Times* (September 10, 2002), A16.
[35] The former rules required the government to show that there was probable cause that the suspect was gathering foreign intelligence.
[36] The supposed firewall between the CIA and FBI is regularly breached de facto. The new acts authorized the practice *de jure*.
[37] The limit before the legislation was two days.
[38] The Internal Security Act of 1950 allowed the Attorney General to detain aliens who were members of the Communist Party. They were not allowed bail.
[39] Attorney General Francis Biddle claimed that the Nazis could not use the precedent set in the *Milligan* case (see above) since he was an American citizen.
[40] Even the Immigration and Naturalization Service reported that 26 jails across the country had misapplied INS procedures. See *Serrano*.
[41] These were first banned in 1907.
[42] *Buckley v. Valeo*, 424 U.S. 1, 241 (1976).
[43] 424 U.S. 1, 15 (1976).
[44] *United States v. O'Brien*, 391 U.S. 367 (1968).
[45] *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).
[46] 424 U.S. 1, 17 (1976).
[47] *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).
[48] *Buckley v. Valeo*, 424 U.S.1, 18 (1976).

[49] 424 U.S. 1, 19 (1976).
[50] 424 U.S. 1, 45 (1976).
[51] 424 U.S. 1, 20–21 (1976).
[52] 424 U.S. 1, 23 (1976).
[53] *United States v. Cruikshank*, 92 U.S. 542 (1876).
[54] *Cox v. Louisiana*, 379 U.S. 536 (1965).
[55] *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).
[56] 424 U.S. 1, 236 (1976).
[57] 424 U.S. 1 (1976). See also *Maine Right to Life*, 914 F. Supp. at 12.
[58] 479 U.S. 238, 261 (1986).
[59] 484 U.S. 850 (1987).
[60] 807 F. 2d 857 (1987).
[61] 484 U.S. 850, 864 (1987).
[62] *Colorado Republican Party v. Federal Election Commission*, 518 U.S. 604 (1996).
[63] 116 S. Ct. 2309 (1996).
[64] 2 U.S.C. Sec. 441 a(d)(3).
[65] 533 U.S. 431, 2001.
[66] *Nixon v. Shrink Missouri Government PAC*, Slip op. No. 98-963 (2000).
[67] "Donors: Survey Sheds Light on Firms that Play Politics," *Los Angeles Times* (September 21, 1997), A22.
[68] PAC contributions constitute about the same amount; but are slower in growth.
[69] This statistic is from Common Cause, which claimed that the Republicans had raised $55.7 million in soft money and the Democrats had raised $34.3 million. "Money: More than Ever," *Los Angeles Times* (May 16, 1998), A6.
[70] See Sec. 441e, FECA.
[71] Joseph E. Cantor, *Campaign Financing: Updated* (Washington, D.C.: Congressional Research Service: Library of Congress, December 17, 1997), p. 1.
[72] "Donors . . . ," A24.
[73] Joseph E. Cantor, *Campaign Financing*. Washington, D.C.: Congressional Research Service, 2002). p. 5.
[74] *F.E.C.v. N.C.R.L.*, 2003.
[75] 2 U.S.C. Sec. 441b(b)(2).

Chapter 5

Regulation of Broadcast Speech and Access to Information

Earlier in this book we traced the evolution of freedom of expression and particularly freedom of the press in Europe and America. The European tradition was marked by censorship and restriction, while the American one fostered liberty. These two attitudes toward the press were the result of historic circumstances. At the time the printing press was evolving, monarchs and church officials who feared the power of the press to stir dissent against them were in power in Europe.

The United States was founded in part because orators and newspapers disseminated arguments in favor of revolution. When the Constitution was amended in 1791, both speech and the press were protected. However, in the twentieth century, the regulation of new technologies in the United States more nearly resembled the European approach than the vision of the founders. This chapter begins with a history of how the federal government regulated broadcasting and then proceeds to examine the rationales used by the courts for such regulations in the contemporary era.

A Short History of Broadcast Regulation

When Congress debated the adoption of the First Amendment, it was against the background of a revolution produced by the press,

the pulpit, and the political soapbox. Where technology produces new freedoms, it is often perceived to be essential to proper governance. Ironically, the development of electronic media in the twentieth century in the United States led to restrictions that followed the European model where freedom of expression was perceived as a threatening new technology.

In 1901 Guglielmo Marconi attached an aerial to a kite in Newfoundland and received signals transmitted from Lands End, England. He had begun his work in 1895 drawing on research by Heinrich Hertz, a German physicist working on radio wave technology. Marconi established the Wireless Telegraph Company, which soon prospered. In 1906 the human voice was transmitted over the radio primarily due to the work of Lee DeForest, whose vacuum tube also contributed to the development of television. When the navy used radio transmissions, they became a matter of national security and needed to be protected from interference by competing transmissions. The result was the passage of the Wireless Telegraphy Act of 1910. Hard on its heels came the Radio Commission Act of 1912 that required the licensing of radio stations that broadcast across state lines. Any applicant could be granted a license, which could only be revoked for cause, such as interfering with a signal of another licensee or signals of the armed forces. Nonetheless, interference problems continued, and after four national radio conferences, the industry appealed to Secretary of Commerce Herbert Hoover in the 1920s to develop a solution that would equitably divide the frequency spectrum.

In 1927 based on Hoover's recommendations, the Congress passed the Dill-White Radio Act, which created the Federal Radio Commission (FRC), the forerunner to the Federal Communications Commission (FCC). In the process of passing this legislation, the Congress required that broadcasters must operate in the "public interest, convenience, and necessity" in order to retain their licenses—language borrowed from the law creating the Interstate Commerce Commission—and had to provide candidates for office with an equal opportunity for airtime. However, no speech could be censored unless it was proved "obscene, indecent, or profane." An important point during the debate over the bill was made in this exchange between Congressman LaGuardia, who would later become New York's mayor, and Congressman White, one of the bill's authors:

> *White:* The pending bill gives the Secretary [of Commerce] no power of interfering with freedom of speech in any degree.
>
> *LaGuardia:* Is it the belief of the gentleman and the intent of Congress in passing this bill not to give the Secretary any power whatever in respect of [program content] in considering a license or the revocation of a license?
>
> *White:* No power at all![1]

It would not take long for the newly created regulatory agency to contradict the legislative intent of the Congress.

The first test of the new law came in 1929 when a radio station owned by the Chicago Federation of Labor was not allowed to increase its airtime because its *programming* was deemed by the FRC *not* to be in the public interest.[2] The FRC claimed "all stations should cater to the general public and serve the public interest as against groups or class interest." In 1931 in the case of KFKB, the FRC *denied* a license based on a review of programming content;[3] it held that a Dr. Brinkley was not operating in the public interest because he was using his station to sell the "wonder" drugs he produced. In 1932 the FRC denied a license renewal to a Reverend Schuler of the Trinity Methodist Church, who frequently aired his public opinion and sometimes attacked Catholics and Jews.[4] Thus, the FRC established a tradition of re-defining the "public interest" standard to suit its own purposes, many of which violated the original intent and the legislative history of the Dill-White Radio Act.

In 1932 Congress tried to expand the equal opportunities rules of the act to include public referenda on issues but the effort fell victim to a pocket veto by then President Herbert Hoover. Later, with democrat Franklin Roosevelt as president, the Democratic-controlled Congress re-wrote the 1927 Act into the Communications Act of 1934. The Act created the Federal Communications Commission (FCC) to replace the FRC and gave it power over telephone, telegraph, and all broadcasting. (Eventually, the FCC was also given governance over cable and satellite television.) The legislation reformed the equal access rules to make them more "reasonable." If a legally qualified candidate for *federal* office requested advertising time for his or her campaign, stations were bound to provide it at their prime advertising rate. Second, if any legally qualified candidate for any office whether federal or not was given airtime, then the opponent was also entitled to equal and comparable time.[5] (This second rule was revised in 1959 to exclude bona fide newscasts, news interviews, news documentaries, and live debates.)[6]

The strongest use of new powers came in January of 1941 when the FCC handed down its *Mayflower* decision in which a licensee, the Yankee Network, was granted a renewal contingent upon its agreement *not* to editorialize. Overriding broadcasters' First Amendment rights, the FCC said "the broadcaster cannot be an advocate."[7]

The National Broadcasting Company took the FCC to the Supreme Court in 1943 to challenge these rules. However, in part because NBC programmed 86 percent of nighttime broadcasting, the Supreme Court ruled against the network and reinforced the initial rationale for the legislation: because a scarcity of outlets exists for broadcast programming, the government has a right to license the electromagnetic spectrum and assess its use in terms of programming in the public interest. The Court sought to promote a diversity

of voices by restricting what monopolies could say. Justice Felix Frankfurter said the FCC has the "burden of determining the composition of the traffic" that goes through the radio channels.[8]

The Fairness Doctrine

In 1949 the FCC overturned the *Mayflower* precedent by promulgating a rule called the "fairness doctrine." In the name of serving the public interest, it required coverage of local issues of importance and presentation of contrasting points of view on those issues. The FCC wrote:

> [T]he needs and interests of the general public with respect to programs devoted to news commentary and opinion can only be satisfied by making available to them for their consideration and acceptance or rejection . . . varying and conflicting views held by responsible elements in the community.[9]

According to the FCC, the Fairness Doctrine was meant to provide a way by which editorializing could take place without being unduly prejudicial. The objective was to increase the diversity of voices in the "marketplace of ideas" and thereby help broadcasters meet their public service obligations.

Almost immediately broadcasters began to comment on local issues of concern and to provide an opportunity for contrasting views from responsible representatives in the community. The apparent success of the doctrine led Senator William Proxmire (D-Wisconsin) to propose an amendment to the Communication Act in 1959 that he thought would codify the fairness doctrine into statutory law. Although the amendment was signed into law, its intent was unclear and its interpretation became a matter of some debate in the 1980s.

Over the years, the FCC developed several "corollaries" to the doctrine. The *Personal Attack Rule* (1962) required a broadcaster to provide response time when the honesty, integrity, or like characteristic of any identified group or individual was attacked during a discussion of a controversial issue of public importance. The individual or group was to be notified of the attack within seven days, provided with a script or tape of the attack, and given the opportunity to respond. The *Political Editorial Rule* had similar requirements: candidates who are not endorsed or opposed must be notified of the date and time of the broadcast, provided with a script or tape, and given a "reasonable" opportunity to respond. Both of these rules were repealed in 2000 when the FCC refused to provide the Court of Appeals for the District of Columbia with a rationale for their retention.

The *Zapple Rule* refers to announcements by political parties. If a party spokesperson is allowed on the air to endorse or oppose a candidate, the broadcaster must afford "equal" opportunities to a spokesperson for the opponent.

The *Cullman* decision (1963) provided that a licensee cannot refuse to air an unpaid presentation otherwise suitable for broadcast if: "(1) the licensee has broadcast a sponsored program which for the first time presents one side of a controversial issue; (2) the licensee has not presented contrasting viewpoints . . . and (3) the licensee has been unable to obtain paid sponsorship for the appropriate presentation of opposing viewpoints."[10] This ruling was particularly vexing to broadcasters since it opened the door to almost any interest group to seek free response time on a variety of issues. For example, in 1982 when Chrysler corporation sought to use its paid advertising time to push for mandatory seat-belt laws, the network refused the issue advertising on the grounds that those in favor of air bags and Libertarians opposed to any restrictions would have to be given free response time.

In *Red Lion Broadcasting v. FCC* (1969), the Supreme Court took up the constitutionality of the application of the personal attack rule. The precedent set in this unanimous ruling was then applied to the other corollaries and rules of the fairness doctrine mentioned above. Red Lion Broadcasting owned radio station WGCB in Red Lion, Pennsylvania, a town of less than 6,000 persons. Listeners in the small suburb had access to over 20 other radio stations in 1964, the time of the precipitating incident. They also had access to cable television, of which about half the households took advantage. During the election of 1964, WGCB aired a five-minute syndicated editorial by the Reverend Billy James Hargis of the "Christian Crusade." In the editorial, Hargis attacked Fred Cook, a liberal writer who consulted with the Democratic National Committee. Cook demanded time for a response under the "personal attack rule." WGCB said that Cook would have to pay five dollars for his response time. Cook refused and took the case to court. In 1969 the Supreme Court ruled unanimously in favor of Cook, arguing that the electromagnetic spectrum is scarce and that licensees are public fiduciaries and, therefore, subject to government control to insure "fairness."[11]

The Movement to End Content Restrictions

The Supreme Court had established a clear philosophical position with the *Red Lion* ruling. As long as broadcast outlets could be deemed scarce resources, and as long as licensees could be called into account in the name of serving the "public interest," their rights could be restricted in ways other media could not. The Court's position on the print media, for example, was quite different. In *Miami Herald v. Tornillo* of 1974, the Supreme Court struck down an "equal space" response law in Florida. A statute on the books in Florida since 1913 required that newspapers give response space to any candidate attacked in the paper. When the *Herald* urged voters

not to vote for Pat Tornillo for school board, he attempted to exercise his right of response under the 1913 law. The *Herald* refused his request based on its First Amendment right of freedom of press. Citing the *Red Lion* decision, the Florida Supreme Court unanimously ruled for Tornillo, and the *Herald* appealed to the Supreme Court. When the Court unanimously ruled for the *Herald*, it did not cite its *Red Lion* ruling, a clear signal that it did not view the electronic media through the same First Amendment lens that it viewed the printed press. It said that the First Amendment absolutely protected the press against compelled speech or equal space provisions. Thus, the Court established one standard for the electronic media and one for the print media.

Ironically, Senator Proxmire launched the first attempt to repeal the fairness doctrine. By 1974, he had changed his mind about the doctrine claiming that its effects were counter-productive to its goals. Rather than increasing diversity of opinion, the doctrine was *chilling* broadcast speech because people were using the doctrine to intimidate broadcasters by demanding response time on almost any issue the broadcaster discussed.[12] Proxmire introduced the "First Amendment Clarification Act" in 1974 and most every year following. Among Proxmire's supporters was Congressman Lionel Van Deerlin (D-California), who became the Chair of the Telecommunication Subcommittee of the House of Representatives. When Van Deerlin lost his seat in the Reagan landslide of 1980, Proxmire's campaign for repeal fell apart.[13]

In the summer of 1984, the movement for repeal was revived when the Supreme Court in two footnotes seemed to invite a review of the *Red Lion* decision. In *FCC v. League of Women Voters of California*, the Court said:

> We note that the FCC, observing that "if any substantial possibility exists that the [Fairness Doctrine] rules have impeded, rather than furthered, First Amendment objectives, repeal may be warranted on that ground alone," has tentatively concluded that the rules, by effectively chilling speech, do not serve the public interest, and has therefore proposed to repeal them. . . . As we recognized in *Red Lion* . . . were it to be shown by the Commission that the Fairness Doctrine "has the effect of reducing rather than enhancing" speech, we would then be forced to reconsider the constitutional basis of our decision in that case.[14]

The Court also questioned the legitimacy of the "scarcity rationale" given the proliferation of broadcast outlets.

At the same time, the Senate Committee on Commerce, Transportation, and Science held a series of hearings on the fairness doctrine in the wake of President Reagan's call for further government deregulation. The hearings laid the groundwork for an appeal to the FCC to suspend the Doctrine. The most effective testimony

came from Eugene Wilken, a former station manager from Spokane, Washington.[15] His story demonstrates how a well-meaning rule, such as the fairness doctrine, can be turned into an instrument of harassment.

Wilken had refused to allow a splinter group of eight neighbors to reply to a 60-second editorial that supported bringing an exposition to Spokane and had run only once. The neighborhood group, which had broken with an environmental group that supported the "Expo," filed a complaint with the FCC. Wilken was harassed for four years while files were seized and employees questioned by officers of the FCC. The station spent $40,000 in legal fees before the FCC exonerated it. Wilken's boss was less forgiving; Wilken was fired for getting the station into trouble in the first place.

Testimony also came from scientists, who said that spectrum scarcity was a myth, and from network anchormen, who claimed the Doctrine infringed on their rights. In response to the testimony of Wilken and others, the FCC issued its "final" report in the spring of 1985, concluding:

> In sum, we find that the evidence, derived from the record as a whole, leads us to conclude that the fairness doctrine chills speech. As a result of this finding alone we no longer believe that the fairness doctrine, as a matter of policy, furthers the public interest and we have substantial doubts that the fairness doctrine comports with the strictures of the First Amendment.[16]

A substantial part of the debate over the doctrine centered on the circumstances of its passage. Most advocates on both sides of this debate believed that Congress had codified the Doctrine into law in 1959.[17] These advocates were surprised when, in *Telecommunication and Research Action Center v. FCC* (1986), Judge Robert Bork of the U.S. Court of Appeals for the District of Columbia held that the doctrine had not been codified; the amendment that was passed simply gave the FCC primary responsibility for administrating the doctrine.[18] Thus, the FCC could repeal the doctrine if it saw fit.

His decision, which focused on the law itself rather than its legislative history, caught virtually all of the advocates off guard and allowed the FCC to suspend the doctrine. In the course of his decision, Bork leveled a broadside at the famed "scarcity rationale:"

> [I]t is unclear why [scarcity] justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another.[19]

Bork's decision strengthened the legal challenge to scarcity as a rationale for imposing content controls such as the fairness doctrine.

On August 4, 1987, using the authority given it by the Bork decision, the Federal Communications Commission unanimously "ceased enforcement of" the fairness doctrine. On February 10, 1989, the U.S. Court of Appeals for the District of Columbia unanimously upheld the FCC's decision.[20] The Supreme Court refused to review the decision—providing de-regulators with the victory they had long sought.

This historic step did not end the controversy over the doctrine; legislative, rhetorical, and legal maneuvering continued to the end of 1989.[21] As we have noted, the corollaries of the Fairness Doctrine, the Political Editorial and Personal Attack rules, were not abolished until 2000.

Requirements on Broadcasters for Political Speech

Many states now have campaign fair practices commissions which can fine and/or censor candidates for distorting the record or defaming their opponents, among other offenses. The Federal Communication Commission has also ruled that broadcast stations can refuse campaign advertisements that are obscene, indecent, or tasteless even though they are required to take commercials from candidates for federal office.

One of the major problems faced by contemporary campaigns is the difference accorded broadcasters and newspapers. Variations on this theme date back to the first rules imposed on broadcasters stemming from the vague requirement that they serve the public interest. The content rules born in 1934 require a broadcaster to provide "equal opportunities"[22] for appearances by all bona fide candidates for public office, including write-ins. That is, if a broadcaster made time available for one candidate running for sheriff, the broadcaster must make comparable time available to all candidates running for sheriff who request it within seven days of the "first prior use." However, candidates may speak in support of ballot propositions without triggering the equal opportunities provision. Thus, in California, many candidates link themselves to ballot measures in order to get more airtime than their opponents.

The 1934 law required that "reasonable access"[23] be provided for any federal candidates who sought to purchase it and that they be billed at the prime rate available for advertising at the station during the 45 days prior to a primary and 60 days prior to the general election. Since that time, the FCC has ruled that such access must be provided to presidential candidates eleven months prior to the election.

For a while this meant that if a station wished to sponsor a debate between the Democrat and Republican running for sheriff, it had to provide comparable time for others who had filed for the office, no matter what the size of their following or the legitimacy of their effort. In 1975 with the Aspen Rules and again in 1983, the FCC made it easier for major party candidates by allowing a station to cover a debate, no matter who participated, as long as the debate was put on the air live and in its entirety. In 1984, half the television stations in the country offered time for debates, a major increase over the number offering to cover debates in years when the FCC did not suspend the rules.

Cable and Satellite

Cable television evolved in the Rocky Mountains where reception of television signals was difficult. Cable pioneers like Community Antenna Television (CATV) ran a wire from a cable reception head situated to receive television signals through relay stations and into the homes of subscribers. Since cable companies operated as locally sanctioned monopolies, they were usually subject to more regulation than the broadcast media. They were categorized as "common carriers," similar to telephone companies and utilities.

The over-regulation muddied the waters. The Cable Communications Policy Act of 1984 settled the situation by reinforcing local governments' rights to license cable companies and to require that a certain number of channels be set aside for community access and educational programming. For example, in most localities, the meetings of the city council are carried live and the local state university has an "access channel."[24] The 1984 law reserved to the FCC the right to establish broadcast quality standards for the cable companies. The law also prohibited cable companies from owning television stations in their service area.

In 1985, a federal Court of Appeals for the District of Columbia issued a ruling that had important impact on the content of cable channels. In *Cruz v. Ferre*[25] the court held that the indecency requirements imposed on broadcasters (see chapter 9 on indecency) were not applicable to cable. Cable companies were free to carry the Playboy Channel and such contemporary programs as the racy *Queer as Folk* on Showtime. Since consumers paid for most of these channels, the programs were "invited" into their homes and were therefore not intrusive.

Over time consolidation of cable companies took place, with many being gobbled up by larger conglomerates. AT&T, Disney, and Viacom, for example, bought up many cable companies. The rapid consolidation led to another round of congressional regulation in 1992 and 1996. When the dust settled, cable owners were free to screen out indecent moments on cable access channels, thereby rein-

forcing their roles as editors. Some producers, notably the Playboy Channel, have challenged this provision to no avail. Cable owners were also allowed to set their own cable rates but soon faced stiff competition from satellite or dish systems. Telephone companies, which had been prohibited from using their phone lines to carry cable, were suddenly encouraged to do so with advent of fiber optic technology. Today, most Americans have access to a cable system that can provide hundreds of channels. Cable companies are rapidly converting to high quality digital signals to compete with dish satellite makers.

The *Turner Broadcasting* Case

The most important case in terms of defining cable's First Amendment rights was *Turner Broadcasting v. FCC*[26] in 1994. The Supreme Court ruled that while cable owners deserved a good deal of First Amendment protection because of the diversity of voices they were bringing to subscribers, they still could be required to carry local stations since they operated much like a local monopoly. On rehearing in 1997, the Supreme Court again upheld the "must carry" provision despite cable owners' arguments that they were tantamount to newspaper publishers and editors and should have the right to decide what channels to carry. On a five to four vote, the Court sided with localities and broadcasters, retaining the "must carry" rule in part because cable operators are licensed by localities and bear some resemblance to local utilities (indeed often using utility poles to string their cables).

Media and Violence

Since at least the time when Socrates was condemned for "corrupting" the youth of Athens, societies have been concerned about how to protect themselves from bad influences. While most of the classic cases of alleged corruption have dealt with indecency and obscenity (see chapters 8 and 9), in the United States in recent years, there has also been an outcry against violence in the media—whether a violent film about mass murder or a computer game whose scores are computed by body counts. The purveyors of violent programming tend to be media giants who may own motion picture studios, cable channels, and computer companies. Their adversaries tend to be members of Congress responding to pleas from constituents to end violence in the media. The arbiters in these cases are members of various judicial panels, including the Supreme Court.

The cases that emerge raise several important philosophical and psychological questions. How much influence does a given medium or program have on an individual? How much responsibility does a programmer have for the influence of the program on the

average viewer or player? What is the value of social scientific evidence in a court of law?

Perhaps the most direct challenge that has come to program producers has been the charge that they are responsible for imitative actions on the part of viewers. Suppose a sixteen-year-old boy watches a wrestling match on a cable channel and then while trying to imitate the feigned violence breaks his buddy's neck. Can the parents' of the victim sue the cable channel and the wrestling producer for inducing the damage? To date, the courts have ruled against such torts.

In fact, no court has granted monetary compensation for harm allegedly caused by a television program or music recording because the courts doubt the existence of a *provable link* between television and violence. In *Zamora v. Columbia Broadcasting System*,[27] *Olivia N. v. NBC*,[28] *Walt Disney Prod. v. Shannon*,[29] *DeFilippo v. NBC*,[30] and *Waller v. Osbourne*,[31] the plaintiffs were denied damages when they alleged that they were victims of violence incited by television programming or in the last case, an Ozzy Osbourne recording. Instead, the courts sided with the defendants' claim to a First Amendment right to freedom of expression. Based on *Brandenburg v. Ohio* (1969), which concerned inducement to violent activity, one must prove that the lawless action that is advocated is directed at an individual likely to happen, and is imminent, that is, that it is being called for very soon. The Supreme Court has specifically ruled that televised violence does not fall into that category, especially if it is entertainment. The same is true of the "clear and present danger" standard articulated in *Schenck v. United States* (1919, see chapter 4). Television programs are generally fictional and, therefore, cannot present a real threat. That test was strengthened in *Whitney v. California* (1927), where Justice Louis Brandeis in a concurring opinion joined by Justice Oliver Wendell Holmes wrote:

> Fear of serious injury cannot alone justify suppression of free speech. . . . Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.[32]

The First Amendment was adopted to protect the creative, the free thinkers, and those that question. Only in this way can the cauldron of thought be allowed to bubble freely to produce the new, the innovative, and the corrective. The price is that the cauldron will also produce some things that are rank. That is the price of freedom and often the price of truth. Viewing Shakespeare's *Hamlet* shocks the system while providing a catharsis. Hamlet's father is poisoned; Ophelia commits suicide; Polonius is stabbed to death; Queen Gertrude and King Claudius are poisoned; Hamlet is stabbed with a poisoned rapier and kills Laertes. However, Shakespeare finds these

murders necessary to advance several important themes concerning existential existence. If violent entertainment is the cause of our ills, and if that cause is to be exterminated, then a great many works of art would have to be destroyed in the name of protecting society.

In the United States, the First Amendment was established in part to protect minority views that contributed to the public understanding, the search for knowledge, and political reform. However, new media have often aroused legislators' and judges' suspicions. In some cases, they have argued that a compelling government interest trumps the First Amendment. For example, during World War I, President Woodrow Wilson established a review board for the newly emerging motion picture industry to make sure its films did not undermine the war effort. Censorship of motion pictures lasted until 1952, though it tended to focus on sexual content as opposed to violence.[33]

The Impact of Fictional Violence on Society

Many a politician has argued that violence in the media contributes to violence in society as a whole; thus, the government has a compelling interest to reduce and/or censor violence in programming. A host of national policy makers has brought pressure on producers and broadcasters of violent programming to curtail "gratuitous violence." Given its popularity, politicians have been unable to resist the urge to blame television for the ills of society. In 1954, for example, Senator Estes Kefauver (D-Tenn.) investigated the relationship between juvenile delinquency and television programs. Senator Thomas Dodd (D-Conn.) revived this issue in the early 1960s; he eventually persuaded President Lyndon Johnson to establish the Eisenhower Commission on the Causes and Prevention of Violence in 1968. Since its conclusions were not in accord with his impressions, Senator John Pastore (D-R.I.) requested that the Surgeon General issue another report on the problem. Three years later under the watchful eye of the Congress, a report was published that hinted at a weak correlation between the viewing of violence and violent activity: "The effect is small compared with many other possible causes, such as parental attitudes or knowledge of and experience with the real violence in society. [The evidence does not] warrant the conclusion that televised violence has a uniformly adverse effect . . . [or] an adverse effect on the majority of children."[34] Nonetheless, the Surgeon General appeared before Senator Pastore's committee and claimed a causal link had been documented though "carefully phrased and qualified in language acceptable to social scientists."[35]

By the fall of 1974, the Chairman of the Federal Communications Commission, Richard Wiley, was urging the three networks to curtail "sex and violence" on television; his call intertwined indecency with violence. In reaction, the networks and the National Association

of Broadcasters Television Review Board adopted the "family viewing" policy, which shoved violent and sexual programming into the 9 to 11 P.M. time slot. Nonetheless, the Commission made clear that "industry self-regulation" was preferable to governmental regulation, that such standards were highly subjective and raised "serious constitutional questions."[36] In November of 1976, the courts found the "family viewing" hour unenforceable and unconstitutional in *Writers Guild of America W., Inc. v. FCC*.[37] More recently, the courts have ruled that the FCC can put in place a restriction on "indecent" material limiting it to broadcast in the 10 P.M. to 6 A.M. time period (see chapter 9), but they have not included "violent" material in their rulings.

Vagueness and Violence

In *Winters v. New York* (1948), Justice Stanley Reed, writing for the majority, protected the entertainment industry from regulation by ruling that "[t]he line between . . . informing and . . . entertaining is too elusive . . . . Everyone is familiar with instances of propaganda as fiction. What is one man's amusement, teaches another's doctrine."[38] That was an important ruling because *Winters* is one of the few Supreme Court cases that deals with the question of the effect of violence in the media. The state of New York had arrested Winters under a statute that prohibited the sale of stories of bloodshed. After three arguments before the Supreme Court, the law was deemed unconstitutional on the ground that it was too vague.

The vagueness of the term "violence" is one of the most persistent problems for those who seek to regulate it because it encourages arbitrary regulation that violates free, creative speech. The Supreme Court has consistently ruled that inhibiting speech is unconstitutional, especially when the inhibition is caused by the application of an "arbitrary and capricious" standard. Television programs from reruns of *The Three Stooges* to *Will & Grace* achieve comic effects using what some have called violent activity. Because conflict makes drama, it is hard to find serious fiction, whether it is *Macbeth* or *The West Wing*, that is not violent in some way.

Furthermore, philosophically, it is not difficult to demonstrate that violence can be used to reinforce in the mind of audience members what is moral and what is immoral. In *The Case for Television Violence* (2000), Jib Fowles demonstrates that violence in programming is cathartic and might actually prevent further violence on the part of viewers.

Social Science Studies

The use of social scientific studies in the courts is troubling because the studies rely on probability and correlation unlike the more precise scientific studies of physics, biology, and chemistry. When the Clinton administration issued a report linking violence

with the media, it came under immediate attack by numerous scholars. For example, Karen Sternheimer, a sociologist at the University of Southern California and a researcher at the Center for Media Literacy, wrote: "One of the studies the [administration] cites equates programs as diverse as cartoon and police dramas with video games and action movies."[39] This procedure, claims Sternheimer, negates "the importance of context and meaning." The study's comparisons are misleading and dangerous because they ignore the more likely causes of violence such as "alcohol abuse, the deterioration of public education and the lack of economic opportunity in impoverished areas." The issue of causation is a problem for social scientists because they can never eliminate all possible causes and must rely instead on a substantial "correlation" of activities to make their case.

A further problem for social scientists is the definition of violence. Aside from reality and news programming, most violence on television is acted; it is not real. When viewers see a motion picture, they know that it is not real. So how does one measure the impact of violence that is not real, but imagined.

Other problems exist with the definition. Sometimes violence is described as aggressive behavior; sometimes it is described as verbal abuse and teasing. Constitutional scholars Thomas Krattenmaker and Scott Powe put the problem this way in their landmark two-hundred-page review of social scientific research:

> Finally, and most damaging to proponents of the violence hypothesis, no one yet has been able to suggest an acceptable operational definition of the very kind of behavior sought to be measured: "violence." To be useful as a basis for policy making, studies of the causes of violence must rest upon a definition incorporating normative, social connotations. To illustrate, if violence is defined simply as a willingness to stand one's ground when physically attacked, it is extremely unlikely that violence caused by television would produce an outcry for increased regulation. What then can the researcher take as an objective observable conception of violence capable of measuring behavior that produces social concern?[40]

One case in this regard concerns an ordinance written by the city of Indianapolis attempting to limit access to violent video games by minors in arcades. The ordinance defined "graphic violence" in two ways. First, it compared "graphic violence" with obscenity arguing that it caters to a "morbid interest" and is "patently offensive to prevailing standards in the adult community as a whole . . . lacks serious literary, artistic, political or scientific value." Secondly, the ordinance defines "graphic violence" as "amputation, decapitation, dismemberment, bloodshed, mutilation, maiming, or disfigurement." The local judge approved implementation of the ordinance on the grounds that psychological studies of other games provided

enough data to convince him that such games induced minors to aggressive acts of violence. He also ruled that because the ordinance defined violence in a very specific way it was not open to arbitrary and capricious interpretations.

The case was appealed to the Seventh Circuit Court before the ordinance could be put in place. In 2001 Judge Posner issued a ruling in *American Amusement Machine Association v. Kendrick*. Citing *Winters* (see above), which makes clear that "depiction of torture and deformation are not inherently sexual," he rejected grouping violence with obscenity; court sanctioned obscenity prohibitions do not apply to violence. Furthermore, Posner argued that "no showing has been made that games of the sort found in the record of this case" induce violence. "The grounds" for such an ordinance "must be compelling" not merely plausible because "[c]hildren have First Amendment rights."[41] Posner compared the video games to literature containing graphic violence and concluded that video games, despite their interactive nature, were still stories that taught a lesson.

As in the case of video games above, there has been much research on the effect of broadcast violence on its audience. However, much of it is subject to criticism because of methodological flaws.[42] The laboratory tests are not scientific, not representative of the population, and do not use an operational definition of violence. In fact, the Department of Education concluded that "a disturbing amount of scholarship has been slipshod."[43] For these reasons, it is very difficult to get such evidence admitted in courts of law.

Edward Donnerstein is one of the leading experts on violence in the media. He recently gave a lecture in which he argued that "viewing violence per se does not cause people to become violent."[44] Donnerstein points out that countries with much more violence on broadcast media than the United States do not have high levels of violence in society. He cites Japan and Canada as examples. What the United States does have that Japan and Canada lack is a high level of poverty, excessive gun ownership, drug abuse, broken homes, illegitimacy, and gangs. Donnerstein demonstrates that violence in America has declined for every age group except teenagers, where the increase skews the results for the rest of the population. James Q. Wilson, the Collins Professor of Management and Public Policy at UCLA, reaches a similar conclusion in his book *The Moral Sense* (1995). Wilson points out that in Japan incredible violence pervades the media. And yet Japan has remarkably low rates of crime, especially violent crime.

Programming and the Future

Unable to demonstrate a causal link between violence on screen and in society, those calling for censorship of violence worked to attach labels to media programs. In 1997, Congress put in place a system whereby producers of television programming had to rate

their shows and new televisions had to be equipped with computer chips that could be programmed to block them. Ostensibly, parents could then program a V-chip to block programs rated at a level of violence the parents do not want their children to watch. However, critics found the ratings wanting because they did not contain enough information to be useful or accurate. Five months after the ratings were in place, a survey taken by the Annenberg School East revealed that 70 percent of parents were familiar with it; however, only 35 percent used it to advise children's viewing. Only 6 percent could correctly identify what "TV-14" means and this was on a multiple-choice answer with the correct choice staring them in the face.[45] Thus, the networks, with the exception of NBC, and producers reluctantly agreed to supplement their age-based ratings with V for violence, S for sexual conduct, D for dialogue not suited for children, and FV for fantasy violence. TV-Y means this program is designed to be appropriate for all children; TV-Y7 means the program is directed to children age seven or older; a TV-Y7-FV rating means the same thing except that the program contains fantasy violence. TV-14 means this program contains some material that many parents would find unsuitable for children less than 14 years of age. TV-MA means this program is specifically designed to be viewed by adults and therefore may be unsuitable for children under 17.

The networks and cable companies have cooperated with the government in other ways. For example, in 1994, the broadcast networks chose the UCLA Center for Communication Policy to monitor programming; cable networks selected MediaScope to conduct a parallel study coordinated through four different campuses. The UCLA study quickly narrowed its purview to the hours that children were most likely to watch (Saturday morning and prime time programming) and argued that context was the most important factor in deciding whether or not violence was appropriate. The 1994–95 report stated that television series raised relatively few concerns. Movies for television were more violent, but not as violent as versions shown in motion picture theaters. The report recommended that violent programming be moved later in the prime-time viewing hours but not eliminated. It also recommended that the major networks re-examine their policy of importing films made for theaters to television screens.

The Center for Communication Policy at the University of California, Santa Barbara took over the cable project. Its first-year report was based on an examination of 2,500 hours derived from 2,693 programs. It warned that the consequences of bad behavior needed to be emphasized and that the use of handguns in violent acts should be reduced. However, the study concluded that television violence is usually not explicit or graphic. Most violent acts portray a minimum of blood and gore; camera angles often protect the viewer from more graphic portrayals with the exception of *news and real-*

ity-based programming. The Center's report also concluded that most violence was concentrated on premium cable channels that required extra payment for viewing. The report made very clear that it was merely describing the gathered data and not recommending government censorship of any kind.

Much more to the point were studies and statements released in 2000 that analyzed these and other violence studies. Jonathan Freedman, a professor at the University of Toronto who has studied violence and the media for many years, concluded that none of the 200 or so recent violence studies support a causal relationship between violence in programming and violence in society. Richard Rhodes, a Pulitzer Prize winning scientist, told ABC News: "There is no good evidence that watching mock violence in the media either causes or even influences people to become violent."[46]

Arbitrating between Social Scientific Claims and First Amendment Rights

With regard to violence and the media, there are several conclusions we can reach given the current status of research and court rulings. First, given the controversy over social scientific data, the courts have usually found that violence in programming cannot be regulated without creating a chilling effect on its content. Such an effect could only be justified if convincing data existed to establish a causal link between violence on the media and violence in society. As we have seen, studies to date have yet to establish such a link.

Second, since violence is very difficult to define, regulators have no reliable measure and their decisions risk violating the arbitrary and capricious standard, which results in an unconstitutional prohibition. Thus, until a viable, legally tenable definition of violence can be found, regulation may prove impossible. The movement to conflate violence with indecency or obscenity has also not found solid legal grounds.

Third, other remedies, such as the V-Chip, have been imposed only because the media involved have cooperated with regulators. The constitutionality of such government-mandated labels has not been tested. Thus although members of Congress and others would like to curtail violence in the media, it is likely to remain a staple of the entertainment industry.

Freedom of Information, National Security, and Privacy

Ever since the Vietnam War, reporters have sought information that the government claims it cannot release because of national security considerations. In 1966, President Johnson signed the Free-

dom of Information Act making it easier for reporters to get access to information they believed was important to their jobs. Daniel Ellsburg, who had served in Johnson's administration, sought release of the infamous "Pentagon Papers," which revealed a great deal about decision making in the military during the war. The Nixon administration attempted to prohibit the release of the papers on national security grounds. However, the case became moot when the *Village Voice* newspaper published the papers. Most readers of the papers concluded that their release posed no threat to the United States and revealed that Johnson's war policy was tragically flawed. Preventing the release of the papers was a classic case of "prior restraint" which is prohibited under the First Amendment unless some overwhelming government interest in suppressing the information can be shown. Recall our discussion in chapter 1 about the English licensing system. Nothing could be published without a license, meaning the state or church had authority over what could be published. Freedom of the press established the right to publish without a license—no prior restraint, therefore no censorship.

The Freedom of Information Act, FOIA (5 U.S.C.A. Sec. 552) makes the records of all federal agencies available to the public unless the records fall under any of the nine categories that allow the agencies to withhold the information: national security, internal agency rules, information specifically exempted by other federal laws on the books, trade secrets, internal agency memoranda, personal privacy, law enforcement records, bank reports, and oil and gas well data. In the case of law enforcement records, they can only be withheld if their release would adversely affect on-going investigation or trial. The FOIA does not apply to Congress; it exempted itself and federal courts, private corporations, and federally funded state agencies.

To get information under the Act, a requester is required to make a request, usually in writing, that "reasonably describes" the information sought. A requester may be asked to pay for the cost of duplication of the material. If denied the information sought, a person may appeal the decision to higher authorities and eventually to the courts.

The FOIA has been supplemented by the Federal Government in the Sunshine Act (5 U.S.C.A. sec. 552b), which requires a variety of government meetings to be held in public. The law requires that public notice be given of federal commission and agency meetings. The meetings can go into closed session only if the item being covered falls under one of the nine exemptions listed in the FOIA. Most states have also adopted "sunshine" laws for their commissions and agency board meetings.

The FOIA's spirit is often violated because of the broad nature of the exemptions it lists. In 1982 President Reagan issued an Executive Order (No. 12356) that effectively closed access to government records by telling bureaucrats to use the highest possible security assignments for government documents. The Bush administration

continued the Reagan policies regarding the restriction of reporting from the battlefield. The invasions of Grenada under Reagan, Panama under Bush,[47] and the Gulf War imposed restrictions on reporters that did not exist during the Vietnam War. Pete Williams, now the legal correspondent for NBC News, was the spokesperson for the Pentagon during the Gulf War. On January 7, 1991, he set out the ground rules for what was NOT to be reported: "numerical information on troop strength, aircraft, weapons systems, on-hand equipment, or supplies." Reporters were allowed to describe numbers of troops in such general terms as "company-size" or "multi-division." Reporters were not allowed to divulge future plans, specific locations of troops, intelligence information about the enemy obtained by U.S. military forces, bases for air sorties, or any support weaknesses discovered. Of the 200 stories the Pentagon felt obligated to review during the Gulf War, only 5 were submitted to "high level" review for possible breach of the rules. Competition between news organizations was reduced by the requirement that all reporters be escorted into battle areas and that all news would be the product of pool reporting of the two news briefings conducted each day. When CBS News reporter Bob Simon and his crew broke away from their escort, they were captured by the enemy, beaten, and eventually released. During the War in Iraq in 2003, the news media and the Pentagon reached a compromise. Reporters would be "embedded" among the troops. Once again Americans saw live action from the battlefield with little damage done to national security.

In 1995 President Clinton issued an Executive Order (12958) that declassified most government files that were more than 20 years old. The battle over information is reflected in the fact that the FOIA has been amended several times (1974, 1986, 1996) in an attempt to balance an open, informative government against the needs of national security. The 1974 revision gave the Justice Department more discretion in keeping its files secret. The 1986 revision gave the FBI the power to protect undercover agents and gave judges the right to review documents before their release.

One of the most interesting cases to arise under these laws was *Wiener v. FBI*, a Ninth Circuit ruling in 1991. Professor Wiener sought FBI records on John Lennon (one of the Beatles) for his scholarly research. The FBI refused to surrender the information claiming it was exempted under the FOIA rules. The court ruled that Wiener deserved a fair hearing and that the FBI had to provide a better rationale for withholding its information.

Government Retrieved Information

The Land Remote-Sensing Commercialization Act of 1984 provides the guidelines for the use of satellite information. It authorizes the Department of Commerce to license any private party, including a

news organization, to construct, launch, and operate a remote sensing system. However, LANDSAT also put barriers in front of news organizations in the form of national security regulations. The National Oceanic and Atmospheric Administration (NOAA) was given the authority to define what constituted national security and international treaty concerns. As with other new technologies, this one raised the question, what First Amendment standards apply to remote sensing and how would NOAA incorporate them to serve the national interest?

One could easily argue that since the law allows private parties to build and launch satellites, and since the U.S. does not own outer space, it would have no jurisdiction over satellites. Remember also that the United States has adhered to an "open skies" policy since the Eisenhower administration, a position that was reinforced with the Treaty on Outer Space in 1967. After Congress endorsed this approach, the Defense Department intervened to propose certain limitations on access to government property and documents. Any information obtained would be subject to prior restraint before publication; that is, the Defense Department would review the information and approve its publication. The news media claimed that such rules violated the First Amendment. Furthermore, since the standards seemed vague to the news media, they argued that they could be applied in an arbitrary and capricious way, also violating basic rights.

The Defense and State Departments responded that the national security required certain latitude in the language of the rules. For example, the State Department argued that even weather information has national security implications. However, legal precedents required the government to articulate a specific procedure concerning clearly defined content in order to exercise prior restraint. The news media quickly pointed to that requirement and to the fact that much of the information the government sought to restrict was readily available in the Soviet Union. Like the citizens of Frankfurt who were denied certain books in the eighteenth century, U.S. citizens would be denied information that citizens of other countries could readily access. With the advent of advanced computer systems, the government's argument melted under the heat of Internet access.

To this point we have seen that laws on the books make access to information possible, though the person seeking the information must take the initiative and, in some cases, must enlist the courts. We also have seen that in general the government has a tendency to want to protect the information it has and to classify it as crucial to national security when in many cases the information should not be classified that way. Access and privacy are often at loggerheads.

Access and Privacy

Freedom of information is about access to information. For example, broadcasters have for years sought to televise the proceed-

ings of the Supreme Court and the Federal District Courts, but federal justices have refused to allow such an intrusion on the grounds that it would demean the Court. Current Chief Justice Rehnquist did permit radio broadcasts of the oral arguments in the *Bush v. Gore* case because the case would decide the outcome of the presidential election in 2000.

All states have adopted rules governing the admission of television cameras, radio equipment, and the like into their courts. Most states require written application before the trial begins. In almost every case, the presiding judge must grant the request. Most states prohibit cameras and other means of identifying juvenile offenders, even when they are tried as adults, although they are more liberal on this policy during the penalty stage. Coverage of the examination of jurors is usually prohibited, as are their deliberations.

Access to prison inmates has also been a bone of contention between the press and the government. There are over 1 million adults incarcerated in fourteen hundred state prisons across the country. Wardens often argue allowing reporters access takes up time, compromises security, and is a nuisance. The Supreme Court issued important rulings on this issue in at least two cases: *Pell v. Procunier* (1974) and *Turner v. Safley* (1987). The *Pell* ruling held that reporters have no more right than the general public to have access to prisoners. In the *Turner* ruling, the Court refined its position by requiring that prison officials provide a rationale for their policy of access (such as security concerns) and that it be regulated fairly and equitably (one reporter may not be preferred over another).

Protecting Sources

The flip side of this problem occurs when the government or its courts want information that the media refuse to turn over on the grounds that freedom of the press requires that reporters be allowed to protect their sources. The courts respond that the Sixth Amendment's guarantees to a fair trial require them to demand that reporters reveal sources of information. The result is that reporters can be held in contempt and incarcerated.

The news media have sought rulings to protect them from intrusions into newsgathering by the courts. Such intrusions have a chilling effect on news operations, which are essential for the education of the citizens in a democracy. In 1972, the Supreme Court took this issue up in *Branzburg v. Hayes*[48] and ruled that basic materials of news reporting are protected from confiscation but reporters are required to testify when called. Justice Byron White wrote the 5-4 majority opinion that argued even the president of the U.S. must testify when called. The case at bar involved a reporter who had written a story about the transformation of marijuana into hashish. He got the story by promising those involved that their identities would

be protected. Branzburg refused to testify when the Kentucky court ruled that what he witnessed personally was not protected by his First Amendment rights. Justice White wrote:

> The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources. . . . The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. . . . [T]he great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. . . . Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.[49]

In writing for the minority, Justice Potter Stewart tried to establish a special status for reporters under the First Amendment. Despite the fact that this decision was narrowly decided by the Supreme Court, it has not been re-visited and remains the ruling precedent to this day, though the lower courts have made some modifications to protect notes, photographs, tapes, and the like collected by reporters, somewhat vindicating Stewart. However, reporters with specific knowledge or information about cases who refuse to testify have regularly been held in contempt.

Personal Privacy

Other clashes occur between reporters and citizens who desire to protect their privacy. It is one thing for reporters to demand information from government files and quite another for them to seek information from private citizens. For example, reporters often see information about voting patterns, driver's licenses, and medical records. You may ask why should reporters have access to such information at all. Those coming down on the side of privacy argue that access to credit card, medical, and driving information makes people vulnerable to telemarketers or even stalkers. Some with a memory of past history recall that the Nazi regime used public records to locate Jews, who were then sent to concentration camps. In California abortion foes recorded license plate numbers of people going into abortion clinics. They then used the motor vehicle registration information to locate their homes and to harass them.

In some cases, the federal government agrees with privacy advocates. In 1994 it passed the Driver's Privacy Protection Act, which allows anyone to have their records closed to the media and the pub-

lic. But there is a flip side to such laws. Consider the case of Providence, Rhode Island, where a reporter got a list of the drivers' licenses of school bus drivers and ran it against a list of state criminal records. He found that not only did several of the school bus drivers have bad driving records but also criminal records. This was information the school board should have had during their interviewing process.

There are limits, however, to what the media may seek. As we have seen, under FOIA, millions of requests are filed annually for information the government possesses. But sometimes the government holds information that was originally generated by other entities, such as the court system. When CBS tried to obtain information about the criminal indictments of a mob family, the government refused to supply them under one of the exemptions to the FOIA. CBS then sued. When the case reached the Supreme Court, Justice Stevens wrote the majority opinion in *Justice Department v. Reporters Committee*:[50]

> We hold as a categorical matter that a third party's request for law-enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted."

The Court denied CBS' request because information the government stores is not necessarily information the government has generated.

Shield Laws

On the other hand, to protect reporters, many states have passed so-called "shield laws" which generally read like this composite version:

> A person engaged in the gathering and dissemination of news for the public through a newspaper has a *qualified* privilege against disclosure of any information obtained in the gathering or dissemination of news in any judicial proceeding in which compelled disclosure is sought and where the one asserting the privilege is not a party in interest to the proceeding. The person may not be compelled to disclose any information obtained in the gathering or dissemination of news unless the party seeking to compel establishes by clear and convincing evidence that the material sought is relevant to the controversy, cannot be obtained by other reasonable means, and is necessary to the proper preparation of the case of a party seeking the information.

The citizen rights versus the news media was most clearly addressed in the *per curiam* ruling in *CBS v. Jackson*.[51] In this case, a CBS news team piggybacked onto a cocaine raid on Jackson's home. Jackson claimed that his rights were violated during the raid and asked the court to subpoena the outtakes of the CBS broadcast of the

event. CBS claimed that its work product was protected under the First Amendment and therefore compelled disclosure of the material was unconstitutional. Since the outtakes were not from a confidential source, the trial court ruled against CBS and demanded a look at the outtakes. The appellate court refused to overturn the lower courts and ruled against CBS. It held that the tapes of Jackson's arrest might contain evidence that was useful to Jackson's defense.

In a related case, courts have ruled that if reporters act as agents of the law, they can be prosecuted if they have intruded without a warrant. Probably the most important case in this regard is *Dietman v. Time, Inc.*,[52] which held that undercover reporting can be intrusive and therefore subject to damage claims.[53] The most famous follow-up case came in *Food Lion, Inc. v. Capital Cities/ABC* when *Prime Time Live* reporters pretended to be job seekers, then surreptitiously reported on unhealthy practices in the Food Lion stores. Food Lion sued and won a $5.5 million judgment from the jury against ABC. The jury apparently felt that the lies the reporters told on the job applications constituted a breach of journalistic ethics and violated the store's right to privacy. In these cases, the court refused to give preference to the First Amendment over the Fourth Amendment's guarantee of privacy. The intrusive act was seen as more offensive than the story obtained was newsworthy. Such judgment calls by the courts are not uncommon in this area of the law.

Invasion of Privacy

Private citizens also have the Fourth Amendment right to protect their privacy against intrusions that are highly offensive to a reasonable person. This right has been used to keep intrusive photographers, such as paparazzi, from interfering with normal family functions and outings. It keeps reporters from entering a house without permission and prohibits them from harassment during travel. In 1972, for example, Jackie Kennedy Onassis, the former first lady, sought an injunction to prevent paparazzi photographer Ron Galella from harassing her and her children. The U.S. Secret Service that guarded her and her family supported Onassis in her claims. Galella stalked the family and would then yell at them to get them to look at his camera. In *Galella v. Onassis*, the district judge wrote:

> The essence of the privacy interest includes a general 'right to be left alone,' and to define one's circle of intimacy; to shield intimate and personal characteristics and activities from public gaze; to have moments of freedom from the unremitted assault of the world and unfettered will of others in order to achieve some measure of tranquility for contemplation of other purposes, without which life loses its sweetness. The rationale extends to protect against unreasonably intrusive behavior which attempts or succeeds in gathering information.[54]

Galella was not banished completely, however. The carefully written injunction kept him 150 feet from Mrs. Onassis and 225 feet from her children. The ruling was upheld in the Court of Appeals from the Second Circuit, but it reduced the distances, almost completely eviscerating the injunction. Galella could come within 25 feet of Mrs. Onassis and 30 feet of the children.[55] Nonetheless, Galella violated even these standards and was eventually convicted of contempt of court in 1982.

Justice Louis Brandeis claimed that each citizen has the "right to be left alone."[56] And recently the Supreme Court returned to the issue in *Hill v. Colorado*, when the Court ruled that we cannot be compelled to listen to speech if we do not want to hear it. In *Hill*, the Court upheld a statute that prevented protesters from coming within eight feet of a person seeking entrance or leaving an abortion clinic.[57] The decision flows naturally from the captive audience cases in which those who have no choice but to be somewhere, such as a work place or a classroom, may not be taken advantage of in terms of propaganda, harassment, or other forms of indoctrination.

In other cases, these intrusions may be prosecuted under the tort of "trespass." An owner has the right to exclusive possession of his or her property unless they give permission for someone to enter. Party crashers are trespassers and can be prosecuted, so can reporters, who again in this instance are treated the same as private citizens. In the age of long-range surveillance, preventing such intrusions has become more difficult.

Conclusion

It is odd that in a country that was founded on political rhetoric and a free press that restrictions should be placed on political speech broadcast over the electronic media. We have seen that even burning an American flag is protected "expression" (chapter 4). The fact is that many people believe that restrictions on broadcasters could promote political speech rather than hinder it. The rationales begin with the argument that since broadcasters have government-granted licenses, unlike the print media, they can be required to provide free and equal time and access to federal candidates, guaranteeing them a right to reply to broadcast editorials and commercials. Variations on this theme date back to the first rules imposed on broadcasters stemming from the vague requirement that they serve the public interest. No such requirement is imposed on newspapers since the Supreme Court ruled in *Miami Herald v. Tornillo* (1974) that equal space and reply requirements could not be imposed on newspapers.

What seems clear is that media are accorded different degrees of First Amendment protection based on their history and their

form. Newspapers receive the highest degree of protection since they existed at the time of the ratification of the First Amendment and were instrumental in securing independence from Great Britain. Television and radio receive the least protection since they are "new technologies" that are pervasive and intrusive, and because broadcasters receive their licenses from the federal government. Cable lies somewhere in between because it often has monopoly status but provides a multiplicity of channels. The difficulty the courts and the Congress face is that the technology is developing so rapidly that the law cannot keep up.

The reporters who work for these newspapers and broadcast outlets also face many regulations. They can attempt to secure information from the government using various access laws, but the government tends to err on the side of caution when dealing with reporters. Reporters' notes and sources are not secure since a judge may ask to see them in order to provide a fair trial. And if reporters' film or videotape an incident that is relevant to a trial, that material also may be confiscated. Finally, with regard to personal privacy, reporters have been given a good deal of leeway in terms of pursuing information. They are subject to the laws of trespass, but on the streets, most people are fair game for the photographer's camera.

As in other areas of the First Amendment law, we see that broadcast speech has multiple tensions: the tensions between a defendants' rights and the rights of reporters to have secret sources; the tensions between a public's right to know important information and the government's need to keep certain information secret in the name of national security; the tensions between a reporter's ability to get a story and a private citizen's right to a private life. When you add to the mix the evolving nature of the technology involved, you begin to understand why the law can be challenged with regard to broadcasters' First Amendment rights.

Study Questions

1. What is the "public interest" standard under which broadcast licensees are required to operate? Is it "content neutral" as required by Supreme Court precedent in such cases as *O'Brien* and *Texas v. Johnson*?

2. How did the so-called fairness doctrine and its corollaries evolve? How and why was the fairness doctrine suspended?

3. What are the differences and similarities in the *Miami Herald* and *Red Lion* cases?

4. To what government information does the Freedom of Information Act grant access? Why is it important that reporters obtain this information?

5. How have the courts balanced Fourth, Fifth, and Sixth Amendment rights of citizens against First Amendment rights of reporters when they have come into conflict? All things being equal, which right is more important, privacy or free press?

Simulation Exercises

1. *Trial Case 5-1:* Michael Buck, a local anchorman who often gives his opinion on the news, says, just after a series of riots in Beverly Hills, that Mayor Minny Bradley "incited the riots with her statement following the verdict in the case of a beating of an aged man at a bus stop." The man had been pulled off his walker by police who had been in hot pursuit of him suspecting that he was the aged man school children reported as a lewd flasher. When the man refused to fall to the ground to be cuffed, the police pulled him from his walker, shot him with a taser gun, and beat him severely. Despite a videotape of the incident provided by an unemployed Hollywood director who lived on the street, the police were found not guilty of the use of excessive force. Mayor Minny Bradley, then said, "If ever there was a justification for the people of Beverly Hills to riot, this is it. I hope a few cars get torched. This decision is outrageous and a clear case of prejudice against the aged of our community." Immediately following her press conference, thousands of senior citizens in Beverly Hills stormed out of their rest homes and condos and began setting cars on fire and looting stores. Buck, giving his opinion over the air at the end of his "action news" segment, said that the Mayor's remarks were inflammatory and "caused people to burn and loot. The Mayor ought to be put in jail for her criminal inducement to riot." Mayor Bradley demanded response time from Buck and his station, invoking the "Personal Attack Rule" of the fairness doctrine and relying on the *Red Lion Broadcasting* case. Buck's station told the Mayor to take a hike. It claimed their First Amendment rights would be violated if they were forced to grant the Mayor's wish and that the courts had suspended the "Personal Attack Rule" in 2000. They argue that the appellate court of the District of Columbia ruled in *TRAC v. FCC* that the fairness doctrine had not been codified in 1959, and the FCC had subsequently (Aug. 1987) repealed the fairness doctrine. Then in 2000 the FCC did not respond to the same court's request for a justification of the "Personal Attack Rule" and also suspended it. Mayor Bradley went to the FCC asking it to force Buck's station to put her on the air by ending the suspension of the fairness doctrine and its corollaries (which the FCC was empowered to do according to *TRAC* and other court rulings). The FCC, populated with appointees who favored re-establishing the fairness doctrine, agreed and ordered the station to put Bradley on to

respond to Buck. The local station and Buck appealed the FCC's ruling to the Supreme Court asking that it declare the fairness doctrine and its corollaries null and void once and for all. Side one = Buck and Local Station; side two = FCC and Bradley. Supreme Court: Do you find for Buck and his station or for the FCC and Mayor Bradley?

2. *Trial Case 5-2:* District Attorney Bobby Copps believes that the owner of a local video store, Buster Luster, is secretly selling videos of sixteen year olds having sex. Copps hears that local television reporter Jason Roberts has been put on probation by his boss because Roberts has not been getting the kinds of stories that increase ratings of the station. Copps calls in Roberts and offers him the chance to investigate the probability that Luster is selling illegal materials. Roberts disguises himself with a beard and cap, and enters Luster's store wired for sound. Video cameras operating in the store show that Roberts slipped through a side door after looking over the standard shelves in the store. It turns out that the door Roberts walked through led to Luster's living room; he lived on the premises of his store. While in the living room, Roberts grabs some videos from a shelf and tries to exit. But Luster confronts him and tries to take back the videotapes. There is much yelling between the two, but Roberts makes off with some of the tapes. It turns out that one of the tapes shows two sixteen year olds having sex. Roberts reports the story on the news, and Copps arrests Luster. Luster sues Roberts for invasion of privacy; he further asks that the audiotape of the confrontation between himself and Roberts be made available to the court. Roberts refuses to make the tape available on the grounds that it is irrelevant to the crime at hand. The first court to consider the case finds Luster guilty of selling illegal material when witnesses come forward claiming they had purchased copies of Luster's obscene videotape from him. A second court rules that Roberts must make the audiotape available. After hearing the tape, a jury finds for Luster and awards damages of $2 million against Roberts and his television station. Roberts and his station appeal the ruling to the Supreme Court. Side one = Roberts and his station; side two = Luster. Supreme Court: Do you find for Roberts and the television station reversing the damage award on the grounds that Roberts was simply doing his job as an investigative reporter? Or do you find for Luster and sustain the damage award on the grounds that his privacy was invaded?

Endnotes

[1] 67 *Congressional Record* 5, 480 (1926).

[2] *Chicago Federation of Labor v. FRC*, 1929; cf. *Great Lakes Broadcasting et al. v. FRC*, 1929.

[3] *KFKB Broadcasting Ass'n v. FCC*, 47 f.2d 670 (D.C. Cir. 1931).

[4] *KFKB Broadcasting, v. FRC*, 47 F. 2d 670 (1931).

[5] This rule is contained in section 315 of the Act and remains in effect to this day as does "reasonable access" rule.

[6] The crisis necessitating the revision was caused by a presidential candidate in 1956 named Lar Daily who dressed up in an Uncle Sam costume. He demanded "equal access and equal time" to that given by the news networks to Republican presidential candidate Dwight Eisenhower and Democratic presidential candidate Adlai Stevenson.

[7] *Mayflower Broadcasting Corp.*, 8 FCC, 1941, at 333.

[8] 319 U.S. 190, 216 (1943).

[9] *Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949).

[10] Cullman Broadcasting, Co., 40 FCC 576 (1963).

[11] Later Fred Friendly, Edward R. Murrow's producer, discovered that while on the payroll of the Democratic National Committee, Cook had written a book called *Barry Goldwater: Extremist on the Right*, an article in *Nation* magazine attacking the right, and was coordinating an effort to suppress right-wing attacks on the Johnson administration (1976, pp. 32–42). The overall strategy of the DNC under the direction of Martin Firestone, a former FCC Commissioner, was to intimidate stations into dropping rightist editorials. L. Powe in *American Broadcasting and the First Amendment* (Berkeley: U. of California Press, 1987) has chronicled a long list of cases dating back to Franklin Roosevelt's press secretary in which the public interest standard in general and the Fairness Doctrine in particular were used to threaten broadcasters. See also, L. M. Benjamin, "Herbert Hoover, Issues of Free Speech, and Radio Regulation in the 1920s," and R. W. McChesney, "Constant Retreat: The American Civil Liberties Union and the Debate Over the Meaning of Free Speech for Radio Broadcasting in the 30s," *Free Speech Yearbook*, ed. Stephen Smith, (Carbondale: Southern Illinois U. Press, 1988).

[12] In a dissent, in 1973 in *CBS v. Democratic National Committee* (412 U.S. 94, 161), William J. Brennan had reached a similar conclusion: "The Fairness Doctrine tends to perpetuate coverage to those 'views and voices' that are already established, while failing to provide exposure to . . . those . . . that are novel, unorthodox, or unrepresentative of prevailing opinion." In a majority concurring opinion, Justice William O. Douglas said: "Television and radio . . . are . . . included in the concept of press as used in the First Amendment and therefore are entitled to live under the laissez-faire regime which the First Amendment sanctions." Proxmire also discovered that Presidents Johnson and Nixon had used the doctrine to intimidate their enemies in the media.

[13] Ironically, as Proxmire was launching his attempt to get the rule repealed, the FCC, then composed mainly of Nixon appointees, reaffirmed its faith in the Doctrine while limiting its application to commercial programming (FCC, *The 1974 Fairness Report*, 48 FCC 2d.). As we shall see, there have been times in Congress when this issue has become partisan. However, on the whole, prominent leaders of both parties can be found on each side of this issue. Governor Mario Cuomo (D-New York) and President Ronald Reagan supported repeal of the Doctrine. Senators Jesse Helms (R-North Carolina) and Edward Kennedy (D-Massachusetts) opposed repeal.

[14] 468 U.S. 364, 379, nn. 11–12 (1984).
[15] United States Senate, *Hearings on the Freedom of Expression Act before the Committee on Commerce, Science, and Transportation*, 98th Congress, 2d. Session (January 30, February 1 and 8, 1984), p. 227.
[16] Federal Communications Commission, *Fairness Report*, 102 FCC 2d (1985), pp. 225–26; see also pp. 156–57.
[17] See, for example, Freedom of Expression Foundation, *Comments before the FCC on the Inquiry into Section 73.1910*, 102 FCC 2d (Washington, DC, 1985).
[18] No. 85-1160, slip op.
[19] *TRAC*, 1986, no. 85-1160, slip op.
[20] Judge Williams wrote, "Although the Commission somewhat entangled its public interest and constitutional findings, we find that the Commission's public interest determination was an independent basis for its decision and was supported by the record. We uphold that determination without reaching the constitutional issue" (*Syracuse Peace Council v. FCC*, No. 87-1544, slip op. (D.C. Cir., 1989) p. 1). Judge Kenneth Starr disagreed in his concurring opinion. He believed that evidence of a chilling effect and lack of scarcity rationale called for a ruling on the constitutionality of the Doctrine. (*Syracuse Peace Council v. FCC*, concurring op., pp. 1–2).
[21] For example, S. 577, a bill to codify the Doctrine, was introduced in the Senate and a companion bill was introduced in the House in January of 1989. In anticipation of Senate hearings scheduled for March 15, *USA Today*, a supporter of repealing the doctrine, devoted its March 6 editorial page to the controversy. The *Washington Post* followed suit on April 4 and again on September 27, 1989. The March 1989 issue of *Quill*, the magazine of the Society of Professional Journalists/Sigma Delta Chi, carried a speech by the president of the American Society of Newspaper Editors, urging editors to fight attempts to codify the doctrine. In October of 1989, the House voted 261 to 162 to keep the codification of the doctrine in the budget reconciliation bill, but that was the smallest majority such a measure had in the previous three years. As at the end of 1988, the threat of a presidential veto prevented the legislation from being enacted by the time Congress adjourned in November of 1989.
[22] Section 315 of the Communications Act. There are four exemptions to the rule: when a candidate appears on a newscast, a news interview program, a documentary, or on the spot news coverage.
[23] Section 312 (a) (7) of Communications Act.
[24] In fact, the courts have ruled that once a community access channel is established, it becomes a public forum that cannot be closed simply because locals find some of the things said on the channel to be offensive. Even the right of the Ku Klux Klan to have access to these channels has been upheld.
[25] 755 F. 2d 1415 (11th Cir., 1985).
[26] 129 L. Ed. 2d 497 (1994).
[27] 480 F. Supp. 199 (S.D. Fla 1979).
[28] 74 Cal. App. 3d 383 (1977).
[29] 247 Ga. 402 (1981).
[30] 446 A. 2d 1036 (R.I. 1982).
[31] 763 F. Supp. 1144 (MD Ga. 1991).
[32] 274 U.S. 357, 376 (1927).

[33] See *Joseph Burstyn, Inc. v. Wilson*.
[34] *Television and Growing Up: The Impact of Televised Violence* (U.S. Government Printing Office, 1972), pp. 4, 7.
[35] *Surgeon General's Report by the Scientific Advisory Committee on Television and Social Behavior: Hearings Before the Subcommittee on Communications of the Senate Comm. on Commerce*, 92d Cong., 2d Sess. 25, 26 (1972).
[36] *Broadcast of Violent, Indecent, and Obscene Material*, 51 FCC 2d 418, 419 (1975).
[37] 423 F. Supp. 1064, 1161 (C.D. Cal. 1976).
[38] See also *Cohen v. California* (1971) discussed in chapter 4.
[39] "Blaming Television and Movies Is Easy and Wrong," *Los Angeles Times* (February 4, 2001), p. M5.
[40] "Televised Violence: First Amendment Principles and Social Science Theory," *64 Virginia L. Rev.* 1155 (1978).
[41] *Erznoznick v. City of Jacksonville*, 1975; *Tinker v. Des Moines*, 1969.
[42] See, for example, Jonathan Freedman, "Television Violence and Aggression: A Rejoinder," *Psychological Bulletin*, 100 (1986): 372–78; Victor Strassburger, "Television and Adolescents: Sex, Drugs, Rock 'n' Roll," *Adolescent Medicine*, 1 (1990): 161–94.
[43] *Sex and Sensibility* (NY: Perseus Publishing 1994), p. 93.
[44] Marcia Meier, "Violence in Our Society: Who's to Blame and What's to be Done?" *Santa Barbara News-Press*, March 5, 1995, G5.
[45] "Parents Don't Understand, Study Concludes," *Broadcasting & Cable*, June 9, 1997, p. 7.
[46] *Broadcasting and Cable*, October 30, 2000, p. 82.
[47] Congressman Charles Rangle was forced to file a FOIA claim to obtain footage of the Panama invasion.
[48] 48 U.S. 665 (1972).
[49] For the remainder of their careers on the Court, Stewart defended the press as a special class and White continued to carry a majority with him treating the press as part of the general public.
[50] 498 U.S. 749 (1989).
[51] 578 So. 2d 698 (Fla. 1991).
[52] 449 F. 2d 245 (9th Cir., 1971).
[53] For a different kind of ruling see *Desnick v. Capital Cities/ABC, Inc.* 851 F. Supp. 303 (N.D. Illinois, 1994) in which the court ruled that *Prime Time* reporters had not been overly intrusive in videotaping activities in an eye doctor's office since the public was regularly invited on to the property. Of course, the court was influenced by the fact that the eye doctor was guilty of immoral practices.
[54] 353 F. Supp. 196 (S.D. N. Y., 1972).
[55] 487 F.2d 986 (2d Cir. 1973).
[56] *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928). Brandeis dissenting.
[57] 530 U.S. 703 (2000).

Chapter 6

Libel, Slander, and Freedom of Speech

Good name in man and woman, dear my lord.
Is the immediate jewel of their souls.
Who steals my purse steals trash;
'Tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.

Shakespeare, *Othello*, Act III, scene 3.

From earliest times, the concept of defamation, and its punishment, has been used to serve several distinct purposes. Societies have considered slander to be a "wrong" at least as far back as the Old Testament, and it constitutes the Ninth Commandment against bearing false witness against one's neighbor. To originate or disseminate lies told about one's neighbor is fundamentally an *antisocial* act, since it strikes at the heart of the *social compact* by undermining trust and cooperation. Because of John Locke's theory of the social compact, England developed one the earliest legal theories on defamation.

In England, defamation consisted first of slander and then later, included libel. The early Anglo-Saxon kings punished slander—speaking falsely against one's neighbor—in local secular courts, not only to remedy the dishonor and personal insult it

caused, but also to preserve the peace by eliminating personal vendettas. Initially, slander was charged only for wrongs committed against the king or the nobles and was linked to sedition. Persons who spread rumors or malicious gossip about the king or nobles were prosecuted in order that the originator of the falsehood might be found and punished even more severely. Out of this tradition grew the crime of "seditious libel."

As the influence and power of the Church *vis-à-vis* the king and feudal lords grew, the courts were separated into "ecclesiastical" (courts established by the church to try and punish *moral* offenses) and *secular* (courts under the control of the king and Parliament established to try civil crimes and offenses against the king). After the Norman invasion of 1066 and until the late sixteenth century, slander became the province of the ecclesiastical courts. Since the church courts relied on public knowledge of crimes and public accusations to maintain order, the perjurer and false accuser posed a threat to the fair and effective administration of ecclesiastical justice. Thus, slander was readily punished and the defamation suit soon became a popular vehicle for vindication and self-defense following most of the secular trials that ended in acquittal for the accused.

During the reign of Elizabeth I, the common law lawyers, aware of the popularity of the slander action in the ecclesiastical courts, began to pursue defamation actions in civil courts. By 1650, the popularity of the slander suit in civil (common law) courts was so great that judges imposed rules on interpretation and limitations, often quite arbitrarily, in an attempt to reduce the caseload and to lighten the dockets.

The law of libel arose within a different institutional framework. As we have seen in previous chapters, the eruption of religious and constitutional controversy in the sixteenth and seventeenth centuries increased official concern over sedition, political dissent, and particularly the influential role of the press in promoting these ideas. After the printing press enabled literacy in the general population governments soon realized that the damage caused by a malicious rumor in print was even more severe than that created by word of mouth. The damaging falsehood remained in a much more permanent form, allowing the harm to reoccur every time someone else read the passage. The civil wrong of *libel* thus became associated with more permanent forms of speech—a handwritten letter, a book, or pamphlet—whereas slander became limited to the spoken word. The distinction takes on additional importance when determining *damages*, the monetary compensation to be awarded to the plaintiff.

To suppress the flow of harmful information, the charge of libel was more easily proven and covered a broader range of falsehoods than common law slander. Words never considered to be defamatory when spoken were libelous and criminal when published in the press. A libel defendant even lacked the safeguard against an unjust

verdict assured by common law slander: truth, an absolute defense in slander, initially was not even admissible in an action for libel. Further, malicious intent was assumed in libel rather than an issue to be proved as in slander. Until 1800, the only issue for the jury in libel was the *fact* of publication.

The Nature of Defamation

We briefly mentioned "seditious libel" and other forms of verbal attack on the government and/or its leaders in chapter 2. Here we will focus on the civil injury known as *defamation*—whether spoken, written, broadcast, or otherwise disseminated—and the natural tension between the right to speak and the responsibility for speaking truthfully about other people.

The essence of a defamatory statement is that it is understood, or capable of being understood, as damaging the *reputation* of the person about whom the statement is made. Reputation, as it is used in this area of the law, means the estimation of a person's character or worth in the eyes of the community. If third persons tend to dissociate themselves from the person about whom the statement is made, then that person has been defamed. We find here a tension between freedom of association, or assembly, and freedom of speech: one can actually impinge negatively on the other. For example, if neighbors refuse to associate or come into contact with Mr. Jones because it has been rumored that he was HIV positive, Mr. Jones' freedom of association has been infringed upon unless he can find a forum in which to vindicate himself. The law court, as the social institution designed to test and find the truth, is the standard vehicle for vindication.[1] The law examines the civil action of defamation to determine its effect on the freedom to speak and the freedom to associate.

In addition to personal reputations, a trade or business can also be defamed. If someone says that Dr. Punjab is a "quack," the natural meaning drawn from the statement would cause others not to consult with that physician.

If no additional information is needed in order to understand that a statement impugns the character of the injured party, it is *slander per se*. If we assert that Jones has committed murder, no additional information is necessary to understand the effect of the statement on Jones's reputation in the community.

However, sometimes innocent-sounding statements may, because of other known facts, cause the meaning to be defamatory. This is known as *defamation per quod*. The example often used is the newspaper story announcing (incorrectly) that Mrs. Jones just gave birth to twins. On its face, there is nothing defamatory. However, when coupled with other facts generally known in the community (for

example that Mr. and Mrs. Jones have only been married for one month) the statement can imply a defamatory meaning.[2] Of course, having a child out of wedlock is not automatically and universally regarded as undesirable; one must always look to the *community* and context in question to see if a statement has a defamatory meaning.

Who Can Be Defamed?

Not all defamatory statements are actionable. Only living *persons* can be defamed, since death removes the possibility of association with others in the community. Thus, you can say just about anything about a dead person, so long as the statement does not also defame a person who is still living. For example, if Mrs. Busybody says that Mrs. Crocker, a deceased woman, had an illegitimate child, the child has been defamed and could bring charges of defamation. As mentioned earlier, the law recognizes entities other than natural human beings as "persons," and any corporation, partnership, limited liability company, unincorporated association, or other *legally recognized entity* may be defamed and may sue for defamation. Accordingly, Burger Queen, Inc. may lawfully sue for defamation if one falsely states that it uses dog meat in its hamburgers. However, in more recent litigation, a Texas court upheld Oprah Winfrey's First Amendment right to tell her studio and television audience that she was no longer going to eat beef in light of the alleged danger of "mad cow" disease being passed on to humans.

Although groups can be defamed, the group must be small enough so that the statement can reasonably be inferred as applying to each and every member of the group. Thus, the statement, "All politicians are on the take" is too broad; but an allegation that, "The Election Board is criminal," may be specific enough to lead to the conclusion that every member of the board is implicated.

Publication

Another essential element of the tort of defamation is proof that the defendant intentionally (or negligently) *published* the defamatory statement to at least one other person. By "published," we mean "communicated." The utterance need not be printed and circulated in mass media form. There are some exceptions: If the defendant sends a note to the plaintiff that includes defamatory statements about the plaintiff, the matter has not been published unless it could be reasonably foreseen that the plaintiff would show it to a third person (for example, was blind, illiterate, or a young child and needed someone else to read the note). In some states, courts have ruled that where a defendant is notified that someone has written a defamation on her premises, but the defendant refuses to remove it or fails to do so within a reasonable period of time, she is held to be a publisher of the defamation. The classic example is the tavern

keeper who, after being notified that there is a scandalous and defamatory statement about the plaintiff in the restroom, refuses to remove the graffiti.

Anyone who has any part in the publication of a defamatory statement can be liable for charges. For example, where the defamation appears in a newspaper, the reporter who writes the story, the editor who reviews it and decides to include it, the printer, and the owner of the newspaper all could be liable. The plaintiff needs only to establish that the statement was published within the authorized scope of the newspaper's activities.

Republication and Dissemination

Every repetition of a defamatory statement is a "republication" and constitutes a separate *publication* under the law, even though the secondary source quotes the original source—or makes it clear that he or she (the secondary source) does not believe the truth of the matter stated. The rumor monger may cause far more damage to the plaintiff than the original utterer of the defamation, and society has a clear interest in curtailing the spread of rumor and untruths that could lead to violent or other antisocial behavior. Moreover, if the original defamer intended or reasonably could have foreseen that his or her statement would be repeated, his or her liability is increased to the extent that greater harm was caused by such republication.

A *disseminator* is a type of republisher who circulates, sells, rents, or otherwise deals in the *physical embodiment* of defamatory matter contained in the material. For example, the distributor of books or newspapers, the newsstand vendor or book dealer, even the newspaper delivery boy can be a disseminator and, in certain cases, liable for the injury along with other republishers and the publishers. The same is true for e-mail forwarded to others. However, disseminators are held only to a standard of due care in their activities, and if they have no knowledge of the defamation contained in the material and are not chargeable with knowledge concerning it (*that is*, they *should have known*, even though they did not, in fact know), then there is no liability. For example, if the bookseller and the newspaper boy had no reason to be aware of the contents of a particular book or article, they cannot be liable as disseminators. Similarly, the law would not deem couriers (for example, UPS or FedEx delivery persons) as disseminators, since the packages they deliver are sealed and usually considered confidential.

Electronic media pose different problems. Different jurisdictions hold differently on the question of whether they are publishers or disseminators. If a station's employees *originate* the programming, most courts agree that the station, like the newspaper, is a *publisher*. However, where the programming containing the defama-

tory matter originates elsewhere, either as a network feed or from a local source who purchased time on the station to broadcast the program, many courts treat the station in the same manner as the newspaper vendor and limit the station's liability to that of a disseminator.

Causation and Harm

The phrase "no harm, no foul" applies, to a certain degree, to the civil action of defamation. It is not enough, usually, for the plaintiff to seek a monetary award from the defendant on the basis that he or she has been defamed without some showing, however minimal, that the defamatory statement was the *cause*, directly or "proximately,"[3] of some measurable form of injury to reputation. Thus, if none of the individuals hearing the defamation interpret it as defamatory, the courts have held that the plaintiff has not proved his case. An admitted thief could hardly claim that the statement that he is a thief damages his reputation. However, if he were to be accused falsely of being a sex pervert, he may have a claim for damages. The adage, "there is honor among thieves" implies that a thief has a reputation the law will protect—even if it is limited to his reputation among other thieves.

It is in the area of damages that the distinction between libel and slander makes a difference. When the defamation is a more permanent form of statement than the spoken word, the majority of courts *presume* nominal damages, and the plaintiff is relieved of the necessity of showing actual monetary harm for libel. Where the defamation is an oral utterance only, most courts hold that the plaintiff must prove "special damages"—injuries actually suffered by the plaintiff, such as loss of employment or business, failure of any firm expectancy including gifts, bequests, or the bestowing of favors—for slander.

The only exception to the rule that the plaintiff must prove actual damages caused by a slander, is where the slander is deemed by the law to be so egregious as to amount to a presumption that the plaintiff has been injured by it. This is known as *slander per se* and is limited to the following types of utterances: (1) where the defendant has charged that the plaintiff committed a serious, morally reprehensible crime or has been incarcerated in a prison for such a crime; (2) where the defendant imputes a presently existing loathsome, communicable disease to the plaintiff (historically limited to venereal disease and leprosy, although it would include AIDS today); (3) where the defendant has attributed to the plaintiff conduct, characteristics, or associations incompatible with the plaintiff's business, trade, office or profession—such that the natural and expected consequence of anyone who hears it and believes it true, would be to refuse to do business, or cease doing business with, the plaintiff;[4] and (4) where the defendant imputes unchastity to a woman.[5]

Defenses to the Defamation Action

If the plaintiff has, by word or deed, consented to the publication of the defamatory statement, he or she may not later seek to recover damages for its publication. *Consent* is seldom an issue in the legal context because few people ever voluntarily expose themselves to statements designed to injure their reputations.

Equally logical is the defense of *truth*. That is, if the statements made about the plaintiff are true, the fact that they were injurious will not matter, since society has an interest in protecting and encouraging truthful speech. The majority of courts hold that if the defendant proves that his or her statements were true, it does not matter if the purpose was to hurt the plaintiff, or even that he or she did not personally believe the statements to be true at the time they were made.[6] In such a case, however, there may be liability for other personal injury, such as *intentional infliction of emotional distress*, or wrongful invasion of privacy.

The question, "what is the truth?" is pertinent here. Is it necessary that the defendant prove that every single aspect of the statement is absolutely true in every detail? Most courts have held that the defendant must present and prove facts having the basic "sting" of the original charge, but not necessarily the literal truth of every phrase of the original charge. Thus, if the original charge stated that the plaintiff bilked "hundreds of people out of their life's savings through a fraudulent investment scheme," most courts would hold that proof of the existence of eighty-five such individuals, would be sufficient to sustain the defense of truth. At the same time, proof of the commission of a completely different, though morally reprehensible act (for example, that the plaintiff robbed a liquor store and shot the owner) will not excuse the defamation if it is untrue. As we noted above, even thieves have some reputation that the law will protect.

Privileges to Defame

The law recognizes that there can sometimes be a tradeoff between the interest the state has in protecting a person's reputation in the community and other social objectives, such as ensuring that the processes of government and the courts work effectively and preserve domestic tranquility. Accordingly, there are certain privileges, both absolute and conditional, that protect defamatory speech. Much of the litigation over defamation revolves around whether the defendant had a privilege to utter the defamatory words in question, or if he or she had a privilege, whether it was lost by previous or subsequent actions. We will deal first with those privileges recognized at common law.

Privileges at common law were divided into two sorts: absolute and conditional. An *absolute* privilege is one that cannot be lost due

to the improper motives of the speaker. The usual reason cited for an absolute privilege is that some greater public policy is being served that outweighed the relative merits of such a defense in any particular case. For example, almost all courts recognize an absolute privilege to defame by any participant in a judicial proceeding, so long as there is some reasonable relationship between the statement and the subject matter of the legal proceeding. This privilege covers utterances not only by the litigants, but also by their counsel, witnesses giving testimony, the judge, and the jury. The statement, of course, must be made inside the courtroom during a judicial proceeding. Statements made "on the courthouse steps" are *not* privileged and may be actionable.

The courts have not always been in agreement as to what constitutes an "improper motive." Clearly, however, where the party knows the factual statement to be false, or does not care whether it is true or false, one would conclude that the motive in making such a statement is improper. We shall reexamine this element in the section on Constitutional defenses.

The rationale for the absolute privilege is the belief that justice may not be served if parties or witnesses are afraid to come forward to testify or file claims if they think they could be immediately sued and be required to defend against a claim of defamation for having done so. Since the statements that are privileged are subject to judicial scrutiny and review, as well as testing by the opposition through cross-examination, it is believed that adequate protections against fraud are available.

Absolute privileges also exist in other branches of government. The courts have recognized an absolute privilege exists for statements made by federal and state legislators *while on the floor* of their legislatures or in committee sessions of that legislature. The most notorious example of the abuse of this privilege was the Army-McCarthy Hearings in 1954 when Senator Joseph McCarthy used his power as a United States Senator to damage the reputation of many people in the State Department and the Army by labeling them communists or communist sympathizers. The "naming of names" always took place in a committee meeting or on the floor of the Senate, where the absolute privilege against defamation was available. Unlike the judicial privilege, however, the legislative privilege does not require the statements uttered to be germane or relevant to any other matter.

The legislative privilege is limited to statements made on the floor of the legislative body. When Senator William Proxmire announced his "Golden Fleece" Award[7] at a press conference off the Senate floor, his defamation of a federal grant recipient was not protected speech, and Senator Proxmire had to defend against the suit, which he eventually lost.

There is also an absolute privilege afforded to cabinet, department head, or other top-level policy-making officials in the executive

branches of government, both federal and state. The privilege can be lost, however, if, as in the courts, the statements have no reasonable relevancy to the public official's duties or the scope of his or her office.

A related absolute privilege, created by the U.S. Supreme Court, protects radio and television stations and other electronic mass media subject to Section 315 of the Communications Act.[8] Because broadcasters and cablecasters were compelled by law to provide equal opportunities to all opposing candidates for the same public office as was initially provided to the first candidate, the Supreme Court held that the stations could not be held liable for defamatory utterances made by such opposing candidates, even if made with absolute malice.

Spousal Privilege

In common law, a spouse had an absolute privilege to utter a defamation of a third person to the other spouse. The reason for the privilege is the same as one under common law where one spouse cannot be compelled to testify against the other spouse: the state has an interest in preserving the marital relationship, and the compulsion to disclose statements made in confidence by one spouse to the other could disrupt that relationship. As a practical matter, the spousal testimony immunity effectively precludes proving a case of defamation of a third party made by one spouse to the other.

Conditional Privileges

Conditional privileges are those that, while serving some important governmental interest, can be asserted only when uttered or published for *proper motives*, and where such publication was not *excessive*. Either an improper motive or unnecessarily wide dissemination of the defamatory statement can defeat the privilege. Wide dissemination or excessive publication can defeat a conditional privilege where the defendant does not exercise care to publish the defamatory statement only to those who are privileged to hear it. For example, addressing a letter to the editor of a newspaper concerning a person who is not a public figure when the issue should have been addressed to a much smaller audience could defeat the conditional privilege. While statements made by managers to their secretaries in dictation of a letter to a third party are privileged by necessity, speaking in a loud voice so that others can overhear the defamation results in a loss of the privilege.

At common law, the courts recognized a number of conditional privileges. Among these was the fair reporting of proceedings, statements made by local governmental officials, statements made for the purpose of protecting either the public or a private interest, and fair comment and criticism. The courts recognize a conditional privilege to report what takes place in proceedings of governmental bodies

and other meetings or conventions in which there is sufficient public interest (such as political conventions or large gatherings of other organized groups such as trade associations, medical societies, national religious organizations).[9] Typically, the mass media reports on such proceedings and quotes statements made there. If the reports are fair and substantially accurate, the media are privileged to report them. Thus, Senator McCarthy's statements made on the Senate floor, which were absolutely privileged, were also conditionally privileged when *republished* the next day in the *New York Times*.[10] Unlike their counterparts in state and federal legislatures and cabinet level departments, public officials in local legislative and administrative bodies have only a conditional privilege to utter defamations in the course of their functions and with proper motives.

The law recognizes that citizens may mean well but sometimes be mistaken in their belief of certain facts that form the basis of a defamation. Accordingly, where the defendant has acted to protect the public interest by stating facts about a third person that turn out to be false, he or she is nevertheless privileged to utter the defamation if he or she *honestly* believes the truth of the matter stated. For example, if Mr. Adams saw a person whom he honestly believed to be Mr. Baker, commit a crime, his reporting of that crime to the police and naming the perpetrator as Mr. Baker are privileged if it later turns out that the guilty party was not Mr. Baker, but rather Mr. Carlson.

There is a conditional privilege to defame where the defendant has a reasonable belief that some important interest in person or property is threatened (it need not be his or her own) *and* if the statement is reasonably related to this interest and the defendant reasonably believed that the person to whom the defamation was published was in a position to protect or assist in the lawful protection of that interest.

Generally, the courts require that there be some sort of *relationship* between the defendant and the person to whom the defamation is published. This can be a family relationship, a business, or employment relationship. The existence of such a relationship tends to demonstrate the *bona fides* (authenticity) of the defendant's beliefs.[11] A statement made by a mother to her daughter, "Don't get involved with John Doe; I've heard that he was jailed for beating his ex-wife" would be conditionally privileged (assuming no improper motive by the mother) because of the family relationship between them and the likely concern the mother has to protect her daughter's interests. Similarly, if an employee tells his employer that the plaintiff is stealing from the employer, the relationship has been established and the person to whom the defamation is published is in a position to protect the interest.

The courts have held that, where there is no such relationship, there may still exist a conditional privilege to defame, if the defamation is made in response to a request for information made by the

person to whom the defamation is published. Thus, when a prospective employer contacts a former employer, asking for information about a job applicant, statements made by that former employer about the job applicant are privileged if related to the information requested and not made with malice (in this case, knowingly false and from a desire solely to injure the plaintiff). In some jurisdictions, a former employer may *volunteer* such information, rather than responding to a request, and still not lose the privilege.

Fair Comment and Criticism

Perhaps one of the most significant privileges, usually available only to the media is the privilege of "fair comment and criticism." The privilege generally extends only to opinions expressed about matters of public interest. What is a matter of public interest has been held to be fairly broad: public officials and candidates for public office, public institutions, public or private schools and their faculties, objects of art and science, and persons espousing theories about art and science, entertainers and other "public figures."[12] So long as the matter discussed is of legitimate public interest, and the comment expressed by the defendant is his or her *honest opinion*, the defendant is privileged, even though the opinion expressed is cruel or disparaging. Thus, a movie critic's scathing review of the motion picture, *Titanic*, is normally protected even if it includes harsh opinions of the acting ability of Leonardo DiCaprio or the directing ability of James Cameron.

Opinions expressed about the personal characteristics, affairs, or motives of a public figure may cause the "fair comment" privilege to be lost unless the opinion or observation expressed is a *reasonable* one. In addition, the courts have held that the morals and motives of *public officials* and high profile *public figures* are matters of public interest. Clearly, the much-published affair of President Clinton and Monica Lewinsky was a matter of public interest and formed the basis for an investigation by special prosecutor Kenneth Starr into whether the president abused his office in attempting to suppress the facts surrounding his affair from being known. Practically *any* opinion about the president's moral character would have been held to be conditionally, if not absolutely, privileged given the unceasing public interest in the matter.

In other situations not involving public officials or public figures, an opinion based on false facts might not be privileged unless the opinion expressed is a *reasonable* one, and the defendant *honestly* believes the facts on which the opinion is based to be true.

Fact vs. Opinion: The *Milkovich* Case

Reasonableness is also a factor when it must be determined whether a statement is one of fact or one of opinion. Milkovich was a

wrestling coach who had appealed his team's probation after a brawl with another team. The coach won his appeal with the state athletic commission, but a reporter who witnessed the brawl claimed that Milkovich had "lied" at the hearing. Milkovich sued the reporter and lost in the Ohio appellate court. That court held that the reporter's remarks were protected.

In *Milkovich v. Lorain Journal Co.*,[13] the Supreme Court overturned the Ohio court and held that while statements that cannot reasonably be interpreted as stating or implying actual facts about an individual are protected,[14] those statements that imply facts that are susceptible of being proved true or false do not enjoy either Constitutional or common law protection merely because they are couched in the *language* of opinion. For example, the Court reasoned,

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."[15]

Accordingly, statements of opinion reasonably based on true facts or which are incapable of being proven true or false are normally protected under the "fair comment" privilege. As the *Milkovich* case demonstrates, however, there are situations where someone is *not* entitled to his or her own opinion—at least not free to express it without heeding the consequences that may result if they harm a person's reputation.

Defamation Law and the First Amendment

Despite the unequivocal language of the First Amendment, "Congress shall make *no* law . . . ," certain restrictions are placed on freedom of expression where such expression is likely to cause significant *harm* to *society* in general, to a specific *group* in society who require greater protection (such as minors) or, in the case of defamation, to *individuals* and their relationships with others. The ultimate interpreter of what the Constitution protects and what it does not protect is the United States Supreme Court.

The Supreme Court has carved out certain *exceptions* to the freedoms guaranteed by the First Amendment where the needs of society outweigh the restrictions on individual liberty. While various

theories have been advanced concerning the "preferred position" of the First Amendment, the rationale for giving greater protection to *political speech* is clear. In a society based on the principle of self-governance, an informed populace is much more important than in autocratic or totalitarian societies; without information, the members of the society cannot make informed choices, which is the hallmark of democracy. Any law, rule, or mechanism that stifles the free flow of information inevitably stifles self-rule and helps those in power stay in power.

Such was the rationale of the U.S. Supreme Court in its 1964 landmark decision in *New York Times v. Sullivan*.[16] In that case, the *New York Times* was sued by L. B. Sullivan, a Montgomery County, Alabama Commissioner in charge of the police department for the publication of a full page advertisement detailing abuses by the police in Montgomery against nonviolent protestors, claiming that unnamed officials had violated federal law in denying Blacks their civil rights. The ad contained minor factual errors. The Alabama jury awarded Sullivan $500,000 in damages, and the Alabama Supreme Court affirmed, holding that the ad was libelous *per se*, thus excusing Sullivan from having to prove specific monetary damages. Despite the fact that no official was named in the ad, the Alabama Court held that the statements could be understood as being about the plaintiff. Since Alabama law did not recognize any applicable common law privilege, truth was the only defense. But it was unavailable to the *New York Times* because of the minor factual inaccuracies contained in the ad.[17]

Under traditional common law, the verdict was, on its face, a perfectly reasonable one and totally consistent with common law principles. However, the U.S. Supreme Court overturned the verdict and announced that the First Amendment demanded that the common law of defamation be modified in a number of ways. First, the common law *presumption* that a defamatory statement was *false* and that the burden of proof was on the *defendant* to prove its truth was held to be unconstitutional, at least with respect to statements made about *government officials*. In such cases, the Constitution requires that truth be a complete defense and that a public official plaintiff must persuade the trier of fact[18] that the statement was false.

Second, the Court held that the First Amendment will protect false statements made about public officials unless the plaintiff can show that the statement was made with "actual malice" (as opposed to the presumption of malice under common law). But *actual malice* did not necessarily mean an ill motive, said the Court; rather, the term meant that the plaintiff either *knew* the statement was false or, lacking direct knowledge, made the statement in *reckless disregard* of its truth or falsity.

The imposition of this constitutional standard, said the Court, was necessary to give adequate "breathing space" to the political pro-

cess.[19] The Court observed that the founders lived in an era where political debate and criticism of public officials in the newspapers of the day were often vitriolic in the extreme. In order to ensure that debate is "uninhibited, robust, and wide open," said the Court, a little falsehood must be tolerated so that citizens will not engage in self-censorship[20] for fear of criminal prosecution or a ruinous civil suit.[21]

As noted above, the development of constitutional limitations on common law defamation arose over the concern for protecting the political process. If those in power can silence any public criticism by means of a defamation suit, they could perpetuate and increase their power. One could easily imagine a situation where the misconduct of President Nixon, with respect to the 1972 Watergate break-in and subsequent cover-up, or the morally questionable conduct of President Clinton and Monica Lewinsky would never have come to the public's attention, if the media engaged in self-censorship for fear of huge damage awards in a defamation suit. Documented facts in both cases of attempts to suppress evidence of wrongdoing or in blaming such stories on a "vast, right-wing conspiracy" demonstrate that if those officials had greater power to suppress speech, they would use it to stay in power.

Public or Private Persons?

The *New York Times* case limited its holding to defamatory statements made about *public officials*. While the term clearly covered the acts of a county commissioner who had significant control over the mechanics of voting in his jurisdiction, the Court did not attempt to say how far down the chain of responsibility one could go before the *Times* case did not apply. Certainly, not every public employee could be considered a "public official."[22] Subsequent decisions have held that a determination of who is and who is not a public official does not turn on either their title or whether or not they were elected or appointed. Rather, as the Court stated in a subsequent case, public officials are those persons engaged in government service "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[23]

The "actual or apparent" test has sometimes been criticized because of its subjective nature: if the public perceives you to have such influence, you are a "public official" for purposes of Constitutional protection. However, Justice William Brennan, who wrote for the Court in *Rosenblatt*, cautioned that mere general public interest in the qualifications and performance of all government employees would not be sufficient to confer "public official" status to an individual under *New York Times*. His or her job must be one of "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it."[24] But the *Rosenblatt* case makes it clear that a government employee

need not have a high ranking job in order to be considered a "public official" under the ruling in *New York Times*[25] and that government employee plaintiffs face a high hurdle in arguing that they are not subject to the rule.

Public Figures

It soon became evident that, at least in the United States, not all persons who are in a position to wield power affecting the lives of ordinary citizens hold public office. Rather, there are individuals in the private sector who, either because of their backgrounds or activities, become involved in public controversies. Two cases, following three years after *New York Times*, extended the *Times* rule to what became known as "public figures."

In *Curtis Publishing Co. v. Butts*[26] former University of Georgia athletic director Wally Butts, who at the time was employed by the Georgia Athletic Association, brought suit against Curtis for publishing a story in the *Saturday Evening Post* that accused Butts of conspiring with University of Alabama Coach "Bear" Bryant to fix the 1962 Georgia-Alabama game. While a majority of the Justices agreed on the result—that Butts as a public figure could not avail himself of the traditional "strict liability" nature of defamation law but must prove some measure of "fault" on the part of the defendant—they did not all agree on what the standard should be.

Two theories were advanced. Chief Justice Earl Warren argued that many governmental functions, particularly the resolution of public questions affecting large segments of the public, are performed by private entities. Increasingly, he contended, the distinctions between governmental and private sectors are blurred; as a result, many "private" individuals are intimately involved in the resolution of important public questions. Others, by reason of their fame, shape events in areas of concern to society at large. Moreover, public figures, like public officials, have considerable access to the mass media, both to influence policy and to counter criticism. Thus, he reasoned, public figures have less need than purely private individuals to avail themselves of the defamation suit to correct the record. Accordingly, the Chief Justice concluded that *New York Times* applied equally to public figures and that such plaintiffs must prove "actual malice"—knowledge of falsity or reckless disregard thereof.

A second rationale, advanced by Justice John Harlan, focused more on the activities of the plaintiff to determine whether he or she had a legitimate call on the court for protection in light of his or her prior activities and means of self-defense. In light of the values inherent in the First Amendment, it is always preferable to meet erroneous speech with "more speech," countering the first. In examining Butts's background and continuing involvement in college athletics,

Justice Harlan concluded that Butts "commanded sufficient continuing public interest and had sufficient access to the means of counter argument to be able to 'expose through discussion the falsehood and fallacies' of the defamatory statements."[27]

In a companion case decided concurrently with *Butts*, Edwin Walker, a retired army general, sued the Associated Press.[28] He claimed that the AP had defamed him in a news dispatch stating that he encouraged students to protest against federal marshals when James Meredith became the first African American to enroll at the University of Mississippi.

Unlike Butts, Walker held no *position*, public or private, that gave him public figure status. Rather, according to Justice Harlan, he became a public figure "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy."[29] A majority of the Court agreed with this assessment. However, Justice Harlan believed that public figure plaintiffs should not be required to prove "actual malice" as part of their case. He would, instead, use a standard of fault most closely resembling "gross negligence," that the defendant engaged in "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[30]

While a majority of the Supreme Court had agreed that the *New York Times* case extended to public figures, the individual Justices could not agree on a rationale. It was not until 1974, in *Gertz v. Robert Welch, Inc.*[31] that a majority opinion could be obtained on the definition of public figures and the rationale for lessening their rights under the common law of defamation.

The definitions and justifications offered up in the *Butts-Walker* opinions were blended in Justice Lewis Powell's majority opinion in *Gertz*. Public figures, said the majority opinion, are those who are especially prominent in society and thereby "invite attention and comment."[32] Public figure status may be accorded to:

1. Those persons who by
   a. occupying positions of "persuasive power and influence;"[33] or
   b. "pervasive involvement in the affairs of society;"[34] or
   c. the "notoriety of their achievements" have acquired such fame or notoriety in the community that they are deemed public figures for all purposes and in all contexts;[35] ***or***
2. More commonly, public figure status may be accorded to those persons who "have thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved."[36] Such individuals thereby become public figures "for a limited range of issues."[37]

The Powell majority also clarified the First Amendment values supporting the extension of the *Times* standard to public figures.[38] The *voluntary nature* of the individual's activities was stressed, implying that public figures, for the most part, *assume the risk* of adverse publicity by "thrusting" themselves into the vortex. Access to the media, while recognized as usually more available to public officials and public figures, was downplayed in *Gertz* as a constitutional justification for the application of the *Times* rule.[39]

The dichotomy established in *Gertz* between public figures and private individuals was reinforced two years later in a 1976 decision, *Time, Inc. v. Firestone*.[40] There, a majority of the Court ruled that Mary Alice Firestone, former wife of the scion of one of America's wealthier industrial families, was not a public figure under the *Gertz* formulation because she (1) did not voluntarily become involved in a public controversy, (2) did not choose to publicize questions concerning the propriety of her marriage, (3) was not prominent in the resolution of public questions, and (4) did not use her access to the media to influence the outcome of the divorce proceedings, nor "as a vehicle by which to thrust herself to the forefront of some unrelated controversy in order to influence its resolution."[41]

Media vs. Non-Media Speakers

A third area of traditional defamation law which the Supreme Court has modified, is the notion that the "press," *that is*, the mass media, is entitled to greater First Amendment protection than private speakers who become defendants in defamation actions.

Apart from reaffirming the plurality decisions of *Butts* and *Walker* (that public figures come under the *New York Times* standard and must prove "actual malice"), *Gertz v. Robert Welch, Inc.* is significant because it completely restructured the standard of proof in common law defamation suits by private individuals against media defendants. A majority of the Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or a broadcaster of defamatory falsehoods injurious to a private individual" as opposed to a public official or public figure.[42]

No attempt was made by the Court to define what level of fault should apply in private individual suits against media defendants. Anglo-American law recognizes several degrees to fault, ranging from strict liability (*that is*, no proof of fault is required), to intentional misconduct (*that is*, "knowing and willful," almost always applicable in misdemeanor and felony criminal cases). Between these two extremes are several shades of "fault."

Negligence is the standard of fault most often applied in civil cases. The plaintiff in a personal injury case, for example, has the burden of persuading the jury that the defendant acted *negligently*,

that is, breached his or her duty, as a reasonable citizen, to exercise due care with regard to other members of society. Usually, the question of negligence centers on whether or not the defendant should have foreseen that his or her actions would likely cause injury to another. Foreseeability and probability are used to assess negligence. A plaintiff would be required to prove that the publisher or broadcaster acted reasonably in gathering the information for the news story, reviewing and checking its accuracy, and in reporting it. If, for example, a newspaper defendant neglected to check the accuracy of a reported story that had defamatory overtones, when its standard policy was to seek further verification or collaboration, it could be concluded that the newspaper was negligent, and thus at fault.

Finally, the law recognizes *intentionality* as the highest level of fault. Analyzed within the context of a defamation action, "intentional fault" means that the defendant *knows* the facts uttered to be untrue, yet disseminates them anyway. The motive for doing so (what courts have referred to as "malice"), is not actually an element of proof but may be used to prove intent to injure: If the defendant had something to gain by spreading falsehoods about the plaintiff, proof of that motive could help establish that the defendant knowingly defamed the plaintiff. As noted above, proof of intent to injure can justify an award of *punitive* damages.

The *Gertz* case distinguished between public and private persons in 1974 and ruled that plaintiffs could not recover punitive damages unless they proved actual malice, but it was not until 1986 that the Court specifically held that, with respect to alleged defamations of private individuals by media defendants, the burden was on the *plaintiff*, (the private individual and not the media defendant) to prove the *falsity* of the facts on which the defamatory statement was based.

In *Philadelphia Newspapers, Inc. v. Hepps*,[43] a majority of the Supreme Court held that a private individual was required to prove that statements published in the *Philadelphia Inquirer* linking the plaintiff with organized crime were false. In that case, the trial court ruled that *Gertz* required that the plaintiff prove malice or negligence, but reserved ruling on the issue of whether *Gertz* also required the plaintiff to prove the statements false. At the end of the trial the court ruled that the *Inquirer* was not required to prove the truth of the stories.[44] The Pennsylvania Supreme Court reversed, holding that the trial judged erred in shifting the common law burden of proof of truth/falsity, from the defendant to the plaintiff. The U.S. Supreme Court reversed again, stating,

> [T]he need to encourage debate on public issues that concerned the Court in the governmental-restriction cases is of concern in a similar manner in this case involving a private suit for damages: placement by state law of the burden of proving truth upon

> media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result. . . . Because such a "chilling" effect would be antithetical to the First Amendment's protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could "only result in a deterrence of speech which the Constitution makes free."[45]

Non-Media Liability for Defamation of Public Officials

Whether the *Gertz* Court intended the Media/Non-Media distinction to apply in public official cases, is not so clear. While the *New York Times* case obviously involved a media defendant, the rationale offered by the Court would seem to provide protection to non-media speakers who defame public officials but who do not do so knowingly or with reckless disregard of truth or falsity. Uninhibited, wide-open, and robust political debate often occurs outside of the mass media. Un-televised debates between candidates for public office (none of whom are presently public officials), statements made by members of the audience at such debates, mass mailings of political literature that contains defamatory statements about public officials, and even the lone speaker passing out leaflets to pedestrians on a busy street are a few examples of situations where the potential defendant is not a member of the organized mass media.[46] Few would argue, however, that the thrust of *New York Times* would extend to them as well as newspaper publishers and broadcasters.

Proof of Fault

In the *Hepps* case referred to above,[47] the lower court permitted the defendant newspaper to refuse to disclose its sources, pursuant to a state *shield law* (see chapter 5). This raises the question of whether it is fair to impose the burden of proving both falsity and fault in a defamation case, and yet be denied access to information that might tend to show that the defendant media was negligent or reckless in relying on such undisclosed "sources." The issue was not addressed in *Hepps*. However, in an earlier case, *Herbert v. Lando*,[48] a majority of the Supreme Court had ruled that a media defendant's news-gathering methods, thought processes, and editorial judgments, including copies of prior drafts of a news story, the reporter's notes, and comments from an editor, all were subject to "discovery" in terms of proving malice.[49]

Justice Brennan dissented in part, saying that the actual *editorial process* should be exempt from discovery unless the plaintiff first established, to the judge's satisfaction, a *prima facie* case of the falsity of the statements published by the media defendant.[50] This

"editorial privilege," he argued, would be treated similarly to the concept of "Executive Privilege."

The majority of the Justices, however, believed that the creation of an "editorial privilege" that would shield the newsroom from all inquiry would shift the balance between freedom of expression and the social values served by the defamation action too much in favor of freedom without accountability:

> But if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and other cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First Amendment credentials. "[T]here is no constitutional value in false statements of fact."[51]

Conclusion

Absolute freedom to do and say as one pleases cannot exist in a society that seeks domestic tranquility or the truth. Sooner or later, society exerts pressure on individuals to curtail their freedoms for the good of all. Indeed, one can say that civilization, particularly Western civilization, by holding the individual in high value is a study in how individual freedoms are balanced against the needs of the group. The tradeoffs—protecting the individual as much as possible from harm by others either intentionally or unintentionally, but negligently committed, obviously requires the individual to refrain from engaging in behavior that causes harm to others.

Words, in addition to sticks and stones, *can* hurt you, particularly where you are dependent on others for so much in society. Unless one elects to become a hermit and reject all of the benefits of society, one must necessarily surrender some freedom and assume *responsibility* for one's actions. The common law of defamation, tempered by the First Amendment, is an on-going process of balancing the rights of the individual with the needs of society. As with other areas of the law, the law of defamation will continue to evolve and adjust to changing social and technological realities.

Study Questions

1. This chapter has focused on *defamatory falsehoods* as a wrong that society has an interest in preventing. What other kinds of falsehoods are punished by society, either as criminal or civil wrongs? Should the First Amendment protect such falsehoods?

   a. President Clinton stated at his deposition in the Paula Jones case that he did not have sexual relations with "that woman . . . Miss Lewinsky"—which was later revealed to be false. Should the President have been impeached for lying

under oath? Was his later defense that oral sex was not sex a convincing explanation?

b. Mr. Brown buys a used car from Joe's Used Cars, relying on the representation by the salesman that the vehicle had been completely overhauled and had four new tires. These representations turn out to be mostly untrue: the engine had only been given a partial tune up and four retreads had been put on the car. Are the representations the kind of falsehoods for which Mr. Brown should be able to recover some sort of damages from Joe? What about criminal prosecution? Does the First Amendment have any role to play in a criminal prosecution for fraud?

c. The Federal Trade Commission has frequently required manufacturers of consumer products to print or broadcast "corrective ads" where it was found that the claims made in the ad were false or misleading. Should the Supreme Court strike down such regulations as violating the First Amendment?

2. Suppose a right-wing speaker on campus accuses a professor of being a spy for the People's Republic of China.

a. Has the professor been defamed? Why or why not?

b. What if the same speaker claims that the Physics Department is full of left wing terrorists. Can Professor Green, a Physics professor, sue for defamation?

c. At what point does the group defamed become too big to be defamed?

3. DEA and local narcotics officers break down the front door of a residence suspected of being a "crack house." A news team from a local TV station follows them inside and films the ensuing action. A man and woman are handcuffed and taken away by the police. The footage is broadcast on the 6:00 o'clock evening news. Later, it is learned that the tip about the crack house was wrong and the man and woman are totally innocent of any wrongdoing.

a. Do Mr. and Mrs. White, the innocent couple, have a right to sue the TV station for defamation?

b. Do you think the First Amendment should protect the station from such a suit?

c. Should the motives of the station management have any bearing on the issue? (What if the station manager was fired from his previous job by Mr. White?)

d. Are Mr. and Mrs. White *public figures?* What facts would be necessary before you could make that determination?

e. Suppose there had been no news team, but Smith, a busybody neighbor down the street, witnesses the bust and arrest of Mr. and Mrs. White and tells all of the neighbors in the neighborhood that the Whites were arrested for drugs. May the Whites successfully sue Smith for defamation?

4. In *Herbert v. Lando* discussed in this chapter, the majority of the Supreme Court Justices refused to create an "editorial privilege" that would shield the news media from inquiry into their news gathering functions. Should the news media have such a privilege? Why or why not?

Simulation Exercises

1. *Trial Case 6-1:* An anonymous prankster used the name of "Alex Xtapa" to create several accounts with ActionNet, Inc., an Internet Service Provider ("ISP"). After setting up the accounts, the prankster logged onto the ISP and posted offensive material on an electronic bulletin board. One posting read, "The Nazi Party will rise again and destroy Zionism." He also sent an offensive e-mail to a third party. It read, "If you are a friend of Israel, you should leave the United States." The real Alex Xtapa, a Jew, discovered the offensive postings and notified ActionNet that the accounts were not established or authorized by him. ActionNet subsequently closed the fraudulent accounts and deleted the offensive postings.

   Xtapa files an action against ActionNet, alleging that the messages sent by the prankster defamed him. He also alleges that a stigma is now attached to him because his name was associated with the offensive messages. Xtapa contends that ActionNet should be liable as the publisher of the messages. Furthermore, Xtapa argues that ActionNet was negligent in allowing the prankster to create accounts using Xtapa's name. The case is appealed to the Supreme Court which must rule on whether or not ActionNet has any liability for the actions of the anonymous prankster. Side one = the real Alex Xtapa; side two = ActionNet. Supreme Court: Do you find for Xtapa or ActionNet? (See *Alexander G. Lunney v. Prodigy Services Co.*, 1999 N.Y. Int. 0165 [Dec. 2, 1999].)

2. *Trial Case 6-2:* Frances Poulanc, the Vice Principal at Oxford High School, comes before a board of supervisors meeting to request an increase in the budget of the athletic program for the women's sports team. Her speech is interrupted by a Harold Bizet, who yells out, "You are a lesbian. And you are trying to advance the lesbian agenda." Though Mr. Bizet's child claims it is common knowledge the V.P. is a lesbian, Ms. Poulanc is happily married to William Poulanc; they have three children and attend a fundamentalist Christian Church. Poulanc sues Bizet for damages and

wins at the local court. However, Bizet appeals the ruling because the judge improperly instructed the jury. Bizet believes that the judge needed to tell the jury that Poulanc was a "public person" and therefore had to qualify for actual malice. The case reaches the Supreme Court. Side one = Poulanc; side two = Bizet. Supreme Court: How do you find?

Endnotes

[1] Even if Mr. Jones had his blood tested and went around telling people he was not HIV positive, he would likely continue to be disbelieved, since he might be regarded as having a motive to lie.

[2] The plaintiff has the burden of proving the additional facts which would give the statement a defamatory meaning.

[3] "Proximate Cause" is a judicial doctrine invented by the courts to limit responsibility for injuries to those actions which foreseeably could have led to the actual result in question. Thus, a person struck by an automobile that had defective brakes might recover damages not only from the driver but also from the manufacturer who designed and installed the brakes, since it is foreseeable that an automobile with defective brakes will more likely cause an accident resulting in injury than an automobile with good brakes.

[4] A statement that falsely suggests that a restaurant uses dog meat in its stew or that it has been cited repeatedly by the Health Department for violations so clearly damages the reputation of the establishment that no proof of nominal damages is necessary. It is *slander per se*. However, monetary recovery may still be limited unless the plaintiff can show that the defendant made the statement knowing it was false (thus justifying an award of *punitive damages)* or that the plaintiff's business dropped off to a substantial degree (*actual damages*).

[5] A few states hold that imputation of unchastity to either sex is actionable. This is clearly the minority view. Historically, a woman's virginity was considered a far more precious commodity than a man's. In modern U.S. society, one could argue that the ideal of feminine chastity has lost much of its significance or value, perhaps even signifying something negative, and that this last exception should be eliminated.

[6] A minority of courts requires a justifiable motive. However, in cases involving public officials, public figures and media defendants, the Constitution requires that truth be an absolute defense.

[7] The Award was an attempt, by Proxmire, to focus public attention on the waste and mismanagement of government funds by federal contract and grant recipients.

[8] 47 U.S.C. §315. The so-called "equal time" legislation requires broadcasters and cablecasters who afford one candidate for public office time on their facilities, to give *equal opportunities* to any opposing candidate for the same office. See chapter 5.

[9] This privilege has also been called the privilege of "record libel."

[10] In 1987, Senator Edward Kennedy, from the floor of the U.S. Senate, accused the Freedom of Expression Foundation of being a "front" for media mogul Rupert Murdoch. The Foundation's president was incensed when the *New York Times* and other national newspapers printed Kennedy's remarks. Knowing that Kennedy's remarks on the floor and

that the *Times* repeating of them were both privileged, the Foundation president challenged the Senator to repeat the accusations off the Senate Floor. Senator Kennedy declined, apparently realizing that he would lose the protection afforded by the privilege.

[11] That is, the degree that the defendant holds the beliefs *in good faith.*

[12] The U.S. Supreme Court has created a legal definition of "public figure" that is discussed below.

[13] 497 U.S. 1 (1990).

[14] *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); see also, *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6 (1970) in which an accurately reported statement that a real estate developer was "using blackmail" to get the city council to give him zoning variances was held to be not actionable because it could not reasonably be interpreted to mean that the plaintiff was actually being accused of the crime of blackmail.

[15] 497 U.S. 1, 19–20 (1990).

[16] 376 U.S. 254 (1964).

[17] For the same reason, the privilege of *fair comment* was not available, since fair comment must be based on true facts to be privileged.

[18] The "trier of fact" is usually the jury. However, in civil trials where there is no jury, the judge is the trier of fact as well as of the law.

[19] 376 U.S., 254 271–72 (1964).

[20] The Court has utilized the concept of "chilling effect," *that is*, the tendency of a law to discourage not only unlawful behavior but lawful behavior as well, due to the fear of being wrong in interpreting where the line has been drawn. See chapters 3 and 8.

[21] In *Garrison v. Louisiana*, 379 U.S. 64 (1965) decided the following year, the Court revisited this principle, noting that the common law of libel had a tendency to discourage the dissemination of truth, which in the realm of public affairs was a fatal defect barred by the First Amendment.

[22] *Hutchinson v. Proxmire*, 443 U.S. 111, 119, n.8 (1979).

[23] *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

[24] 383 U.S. 75, 86 (1966).

[25] Frank P. Baer, the plaintiff in the *Rosenblatt* case, was a supervisor of a county recreational skiing center. The Supreme Court considered his status to be questionable enough to remand the case back to the lower court for an initial determination of that point.

[26] 388 U.S. 130 (1967).

[27] 388 U.S. 130, 155 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (dissenting opinion of Brandeis, J.).

[28] 388 U.S. 130 (1967).

[29] 388 U.S. 130, 155 (1967).

[30] 388 U.S. 130, 155 1967).

[31] 418 U.S. 323 (1974).

[32] 418 U.S. 323, 345 (1974).

[33] 418 U.S. 323, 345 (1974).

[34] 418 U.S. 323, 352 (1974).

[35] 418 U.S. 323, 351–52 (1974).

[36] 418 U.S. 323, 345 (1974).

[37] 418 U.S. 323, 351 (1974). The Court ruled that Gertz, a Chicago attorney, was *not* a public figure, since he played a minimal role in the public controversy surrounding the prosecution of a police officer for man-

slaughter, had never discussed this issue in any context with the press, and was never quoted as having done so, and while operating as a civil advocate, did not engage the public's attention in an attempt to influence the resolution of the "police brutality" issue surrounding the prosecution. 418 U.S. 323, 352 (1974).

[38] 418 U.S. 323, 345, 352 (1974).

[39] This was probably due, in part, to the fact that the Court had decided the same day *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In that case, the Court struck down Florida's *right of access* statute, which gave political candidates the right to respond to newspaper editorials attacking their candidacy or endorsing their opponents as a constitutionally impermissible infringement on the freedom of the press. It could easily be argued that the *Miami Herald* decision prohibiting government-enforced access, and a constitutional theory underlying the extension of the *Times* case to public figures because they have greater access to the press, are contradictory.

[40] 424 U.S. 448 (1976).

[41] 424 U.S. 448, 453–55 (1976).

[42] 418 U.S. 323, 347 (1974).

[43] 475 U.S. 767 (1986).

[44] During the trial, the *Inquirer* took advantage of Pennsylvania's "shield law" on a number of occasions, and refused to disclose the *sources* of some of the facts included in the stories. The trial judge refused to give the jury instructions that they could draw a negative inference as to the truth of the stories by the defendant's resort to shield law protection, but also refused to instruct the jury that they could not do so.

[45] 475 U.S. 767, 779 (1986). Justice Sandra Day O'Connor, writing for the majority, observed that, "As a practical matter . . . , evidence offered by plaintiffs on the publisher's fault in adequately investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted."

[46] A more modern example is the individual publisher of a Web site on the Internet that contains matter defamatory of one or more public officials. Although it could be argued that the Internet, itself, is a form of mass media, it is unlike *The New York Times* or NBC in that there is no single owner, editor, or publisher who has control over the content of what appears on the Internet. Indeed, as the "www" of the Internet aptly reminds us, the sources of content on the Internet are world wide and under the jurisdiction of no single nation or state.

[47] *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)

[48] 441 U.S. 153 (1979).

[49] "Discovery" refers to the pre-trial process whereby the litigants may ascertain the basis for their opponent's case. U.S. courts, both federal and state, generally afford parties wide latitude in the discovery process and will usually grant motions to compel, if production of documents or answers by party/witnesses are not readily forthcoming. The rationale usually given for permitting broad pre-trial discovery is to eliminate unfair surprise—and thus unnecessary and costly delay—at trial. Discovery can also lead to a sharpening of the issues, or an out-of-court settlement—again leading to the saving of valuable judicial time.

[50] *Herbert v. Lando*, 441 U.S. 153, 197–98 (1979).

[51] *Gertz v. Robert Welch, Inc.*, *supra*, at 340.

Chapter 7

Hate Speech

> By words one person can make another person blissfully happy or drive them to despair, by words the teacher conveys his knowledge to his pupils, by words the orator carries his audience with him and determines their judgments and decisions. Words provoke affects and are in general the means of mutual influence among men.[1]

Hate speech is a pervasive problem, particularly for racial, religious, and sexual minorities. It can undermine self-esteem, cause isolation, and result in violence. As we saw in the last chapter, words can injure reputations. In this chapter, we examine the law concerning the damage that is done by hateful language that is heightened by emotion and other contextual factors. Words can reinforce and/or maintain social inequality in the home, in the classroom, in the workplace, and in the nation. Yet the First Amendment protects freedom of expression, thereby guaranteeing protection of hate speech unless it presents a clear and present danger, is obscene, libelous, slanderous, or an imminent true threat. The First Amendment does not impose a "good taste" standard on the nation.

Because offensive speech is protected under the First Amendment, those who would restrict hate speech face a serious dilemma. They must protect all speech unless it can be shown to present a "true threat,"[2] which places a heavy burden of proof on the person attacked. Or they can write speech codes, as have many campuses, none of which have passed constitutional muster.

This chapter examines the legal bases of the two prongs of the hate speech dilemma including a description of sexual harassment

law that legally proscribes hate speech without violating the First Amendment or placing an imposing burden of proof on the offended. The chapter pays special attention to hate speech on campuses and in work places.

Fighting Words

To understand the current status of hate speech, we need to trace a line of cases extending back to 1942. The *fighting words* doctrine, as articulated in *Chaplinsky v. New Hampshire*,[3] made it unlawful to "address any offensive, derisive or annoying word to any person who is lawfully in any street or public place." While the nation was at war with Hitler, Mr. Chaplinsky had referred to a local marshall as a "God damned racketeer" and a "damned fascist." The Court ruled that fighting words are "those by which their very utterance inflict injury or tend to incite an immediate breach of peace."[4] In other words, in context, the words Chaplinsky spoke were analogous to throwing the first punch.

Terminiello v. The City of Chicago in 1948 was the first ruling to modify the *Chaplinsky* precedent. This oft-cited decision overturned a conviction because the sitting judge had instructed the jury that all the prosecution needed to prove was that the speech in question "stirs the public to anger, invites disputes, brings about a condition of unrest, or creates a disturbance."[5] Writing for the majority, William O. Douglas argued that free speech often invites dispute:

> It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.[6]

During the war in Vietnam, when protest was rampant, the Supreme Court further limited what states and the federal government could regulate. In 1969 in *Brandenburg v. Ohio*,[7] the Supreme Court unanimously overturned Klan leader Brandenburg's conviction for having advocated anti-Black and anti-Semitic violence at a gathering of the Ku Klux Klan. Brandenburg's most inflammatory language included these passages:

> [I]f our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revenge taken. . . . Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.[8]

The Court ruled that "a State [may not] forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless

action, and is likely to produce such action. . . ."[9] That burden of proof is huge. It includes immediacy, specificity, and the likelihood that the action called for would take place and is directed at a specific individual. This standard opens the door to a good deal of reasonable doubt.

In a series of subsequent decisions, the Court has tried to clarify this decision by arguing that the First Amendment protects speech if it is not obscene, not libelous, or falls short of illegal action. The most important of these decisions was the 1971 ruling *Cohen v. California*, which we introduced in chapter 4.[10] Recall that Cohen was arrested for wearing a jacket that had the words "Fuck the Draft" written on the back. When the case reached the Supreme Court, Justice John Harlan wrote the majority opinion. He argued that the only conduct that California sought to punish was communication; therefore, the law had to meet a very high standard in order to be constitutional. Harlan then claimed that the speech in question did not fall into any of the other categories of speech that the government could restrict. Harlan turned to *Chaplinsky v. New Hampshire* (1942) to determine if the use of the word "fuck" could be considered a "fighting word." Harlan found that the word was not directed at a person, but was designed as a form of protest, more akin to the wearing of armbands, which the Court had protected in its 1969 ruling in *Tinker v. Des Moines Independent Community School District*. Harlan reasoned that the average person would not assume that the words on Cohen's jacket would apply to them and while they were tasteless, they could not be considered a breach of the peace.

Speech Codes

Hate speech laws and campus codes are designed to punish hate speech or to teach people that racism is unacceptable and harmful.[11] Writing codes that do not violate constitutional rights is almost impossible. For example, in *Hess v. Indiana* (1973), Gregory Hess was brought to trial for encouraging anti-war demonstrators to escalate their activities. At one point, he yelled, "We'll take the fucking street later."[12] The Supreme Court overturned Hess's conviction on the grounds that his speech was protected because it was not "obscene," did not constitute "fighting words," and was unlikely to produce imminent lawless action (see *Brandenburg* above).

The limitation on speech codes has continued into more recent decisions. Those seeking to restrict speech that contributes to sexual and/or racial harassment might do well to examine the case of *Doe v. University of Michigan*.[13] In 1989, a federal district court held that the University's "Policy on Discrimination and Discriminatory Harassment of Students in the University Environment" was unconstitutional because it was vague and overly broad. The policy prohib-

ited any behavior, verbal or physical, that stigmatized or victimized an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or veteran status, and proscribed verbal or physical conduct that stigmatized or victimized an individual on the basis of sex or sexual orientation. The policy was brought down by a biology graduate student who insisted on his right to discuss certain controversial theories positing biologically based differences between sexes and races. The court ruled that the "University could not . . . establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages . . . to be conveyed."[14] The court did this while recognizing that "fighting words" and "[c]ertain kinds of libel and slander are not protected" under the First Amendment.[15] However, it should be clear from this example and the ones that follow that the Court has severely narrowed what qualifies as fighting words.

The Supreme Court has also ruled that verbal attacks on groups are not actionable because that would "render meaningless the right guaranteed by the First Amendment to explore issues of public import."[16] Kent Greenawalt writes, "When a law is directed at group epithets and slurs, words are made illegal because they place people in certain categories and are critical of members of those categories. This is clearly content discrimination."[17] An incident in 1988 at the University of Connecticut at Storrs clearly demonstrates the meaning of content discrimination. The university expelled a junior named Nin Wu from the dormitories for taping a poster to her door listing types of persons who should be "shot on sight." The list included "bimbos," "preppies," "racists," and "homos." The federal district court in Hartford reinstated Wu arguing her First Amendment rights had been violated.

In 1991 another federal district court stopped George Mason University in Virginia from imposing any discipline on a fraternity for engaging in expressive conduct that perpetuated racial and sexual stereotypes.[18] In this instance fraternity members dressed up as "ugly women" using blackface and articles of apparel that suggested racial stereotypes. The court said, "The First Amendment does not recognize exceptions or ideas or matters some may deem trivial, vulgar or profane . . . . [A] state university may not hinder the exercise of First Amendment rights simply because it feels that exposure to a given group's ideas may be somehow harmful to certain students."[19] In February of 1995, the California Supreme Court found the Stanford code to be "overbroad." Similar rulings occurred in the cases of Zeta Beta Tau fraternity at California State University at Northridge and Phi Kappa Sigma at the University of California at Riverside.[20]

These cases present a daunting challenge to speech code advocates in that speech codes are subjected to exacting scrutiny. In addition, the university must prove *that the codes will result in a*

change of atmosphere and belief. That is, they must advance the cause the university believes is in the government's interest.[21] This position was reinforced by *R.A.V. v. City of St. Paul* (1992), which struck down a city ordinance that made it a misdemeanor to place "on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know, arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender. . . ."[22] Justice Scalia in the majority decision wrote that the ordinance was unconstitutional because:

> . . . displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. . . . Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.[23]

While this decision was somewhat modified in 1993 and again in 2000 and 2003 (see discussion below), it still makes it almost impossible for a campus to write speech codes.

Penalty Enhancements

In *Wisconsin v. Mitchell*, the Court upheld a Wisconsin statute that allowed for the enhancement of a penalty for aggravated battery on the grounds that Todd Mitchell's selection of a victim was based on race.[24] A black male, Mitchell had been arrested for beating a white youth; upon conviction, Mitchell was sentenced to an additional two years because the crime was racially motivated and therefore fell under the Wisconsin law that allowed for extended sentencing if the victim had been targeted on the basis of "race, religion, color, disability, sexual orientation, national origin, [and/or] ancestry." The Wisconsin Supreme Court reversed the sentencing believing that Mitchell's First Amendment rights had been violated. However, a unanimous U.S. Supreme Court re-instated the sentence and argued that judges have latitude in sentencing including taking into account racial bias.[25] Furthermore, in writing the decision, Chief Justice Rehnquist argued that the statute had no "chilling effect" on free speech and was therefore not overly broad: pure expression may not be prohibited even if racially offensive, but if a crime is committed and it can be shown that the perpetrator was racially motivated, the penalty for the crime can be increased. Relying on precedents that establish judicial flexibility in sentencing,[26] Rehnquist wrote:

> Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant. The defendant's motive for committing the offense is one important factor. . . . [I]t is equally true that a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge. . . . [However] Title VII, for example, makes it unlawful for an employer to discriminate against an employee "because of such individual's race, color, religion, sex, or national origin." In Hishon, we rejected the argument that Title VII infringed employers' First Amendment rights.[27]

Mitchell was refined in a 5–4 ruling in June of 2000 when the Supreme Court stated that juries, not judges, must decide whether defendants deserve more prison time because their offense was a hate crime. Writing for the narrow majority, Justice John Paul Stevens argued that the Constitution gives all defendants facing substantially more prison time the right to have the hate crime charge "submitted to a jury and proved beyond a reasonable doubt."[28] The case at bar involved a thirty-seven year old pharmacist from New Jersey who, while intoxicated, fired gun shots into homes owned by Blacks. While no one was hurt, the judge ruled that the crime was hate motivated and therefore imposed a longer sentence. The Supreme Court ruled that the judge should have submitted the issue to the jury.

St. Paul tried to prevent symbols of hatred from being displayed. Since its ordinance was considered too broad, some states tried to narrow new ordinances. One result was a plethora of laws outlawing burning crosses. Cross burning originated as a Scottish tribal signal from one clan to another. The first reported cross burning in the U.S. occurred on Stone Mountain, Georgia in 1915. It was part of a Ku Klux Klan ceremony and soon associated with attempts to intimidate Blacks and Jews. In 2003 in *Virginia v. Black*, a 6–3 ruling struck down a Virginia law against flag burning but upheld state laws that prohibit place of symbols that might "terrorize" residents. In writing for the majority, Justice O'Connor noted that threats of violence are not protected by the First Amendment especially if, as in the case of cross burning, the threat carries a message of intimidation that strikes fear of physical harm in others. She recommended that Virginia amend its law to include regulation of only those instances where there is an "intent to intimidate." It is one thing for the Ku Klux Klan to meet by itself in a field and burn a cross; it is quite another for members of the Klan to burn such a cross on or near the property of a Black family.

Thus, while the Supreme Court has opened the door to penalizing hate speech when it occurs in the context of another crime, it has generally restricted speech codes per se. In other words, states, localities, and campuses are free to enhance penalties for non-speech

crimes such as assault, if they can prove that assault was motivated by racial, religious, or gender bias.[29] They are restricted when it comes to hate speech that is not in the context of a criminal action.

On top of these restrictions, we need to be aware of a string of decisions over the years in which the Court has decided that the following words are opinions, not fighting words nor slanderous, nor libelous: bigot, horse's ass, jerk, idiot, con artist, charlatan, Marxist, liar, Fascist, racist.[30]

Hate Speech on the Internet

While private online systems have the right to censor and ban a user's speech,[31] the case is murkier for universities that are publicly funded. Their rules must be content neutral under First Amendment precedents, particularly those set in "hate speech" cases where judges found codes to be overly broad and vague and thus open to arbitrary and capricious application. Furthermore, we should not be surprised if the courts add the Fourth Amendment right of privacy to the First Amendment right of freedom of expression when questioning campus policies with regard to e-mail.[32]

As we have seen, the right to publish privately and anonymously was born during the revolution and sustained during the debate over the Constitution and the Bill of Rights. Along with the Fourth Amendment's guarantee of the right of privacy, officials face the freedom of assembly clause in the First Amendment that is regularly read by the courts to grant freedom of association and the need for anonymity that goes with it. There can be little doubt about the original intent of the founders on this issue. That is why the so-called "acceptable use" policies now in place are unlikely to survive constitutional scrutiny. Government—or by extension, university—use of filters and censorship standards invades privacy, violates the right of association, and chills free speech.

Government control over Internet communications has been justified on many grounds including prevention of terrorism, stopping the distribution of obscene or indecent material to children, detection of computer hackers, and the traditional position that all new media should be regulated until their impact is known. Thus, some legislators believe that a new regulatory model should be developed for electronic communications providers. Their call for reform raises several questions: What level of responsibility will universities bear for communications initiated by their students? Should communications retain traditional academic freedom once they leave the campus?

Two cases in this area deserve mention. The first involves a two million dollar lawsuit for damages to his career by a graduate student at the University of Texas, Dallas. The student, Gregory Steshko, was kicked off e-mail by the university because he was using his account

to broadcast political messages critical of Boris Yeltsin's sexual predilections and his policy toward the Ukraine. Since the University of Texas is government supported, it must answer to the charge that its restrictions on e-mail violate the First Amendment protection of content. Is an e-mail account an automatic right for graduate students? Or is it a privilege that can be revoked at any time?[33]

The second case involves a University of Michigan student who exchanged e-mail with a man in Canada describing their mutual sexual interest in violence against women and girls.[34] Additionally, the student posted a story to an Internet newsgroup describing violent sexual acts. The female character in the story bore the name of one of his classmates. The district judge dismissed all charges against the student because the communications failed to create a "true threat" as required by First Amendment jurisprudence. The district judge noted that the First Amendment requirements must be met regardless of the mode of communication.

The Haiman Solution

The rationale behind restricting the use of the "fighting words" standard was outlined by Franklyn Haiman in *Speech Acts and the First Amendment* (1993) in his response to Catharine MacKinnon's call for considering speech a performative utterance.[35] Her standard was born from a school of thought that asserts that certain phrases are in fact "performative utterances." Philosophers such as Ludwig Wittgenstein, J. L. Austin, and John Searle argue that words are often deeds. For example, when the president of a university confers degrees, he/she not only speaks words, he/she makes graduation official. So why isn't it equally clear that when one person insults another, that person is also performing an act that can be punished in the way assault is? The answer lies in the analysis of the original example. Imagine if the president of the university had a snit and decided not to confer degrees. Those present would certainly not be deprived of their degrees. If one tells a colleague to go to hell, it is very unlikely that will happen. Thus, the Courts have continually restricted the fighting words standard as formerly unacceptable terms creep into common usage. As Haiman points out, in 1972 the Supreme Court narrowed fighting words to be only those that "tend to incite an immediate breach of the peace."[36] Even in the case of malicious language, one must show that the "stimulus had been followed by palpable injury, such as a heart attack or a physiological nervous breakdown" to collect damages.[37]

Haiman has consistently recommended that the answer to "hate speech" is more speech. That is, if you don't like what someone says, tell him or her why. Those who utter hate speech might simply be ignorant of its content or its consequences. Furthermore, the more

purveyors of hate speech speak, the more we know where and who they are. If hate speech is prohibited, hate speakers may go underground. There they can be more dangerous.

Using Haiman as a guide, Ann Gill has proposed a "more speech is better than less speech" doctrine. Responding to *Connick v. Myers* (1983), which prohibits universities from limiting the expression of its employees on "political, social or other concerns to the community,"[38] Gill would encourage campuses to provide for contrasting views to those who utter hate speech.[39] She builds her case by arguing that "In the absence of coercion, the Constitution does not prohibit the university from expressing its own opinion or sponsoring particular points of view."[40]

The first problem lies in the prepositional phrase "in the absence of coercion." Where does coercion start or end for a university stating its position on an issue? How much would the untenured professor risk in opposing the university stance? Gill is proposing a "Campus Fairness Doctrine."[41] As we saw in chapter 4 until the fairness doctrine was rescinded in August 1987, broadcasters were required to air contrasting views on broadcast issues. On the surface, that seems mild enough, but in practice it had a chilling effect on the discussion of issues in news programs, advertisements, and other broadcast forums for fear of investigation by the Federal Communications Commission and possible litigation. The over-broad and content-oriented fairness doctrine raised such questions as: Who decides what an important issue is? (A small group in the community? A representative minority? A majority of citizens? A single concerned citizen?) How do important issues get prioritized? (Do we take up traffic signals before school funding?) Who decides who is afforded the right to present contrasting views? How many potential contrasting views are there? Given the academy's penchant for splitting hairs, one could imagine a proliferation of views that could well take several days of programming on the minutest of issues. It is not difficult to see how arduous the administration of such a program would be.

Hate Speech as Harassment

In *Meritor Savings Bank v. Vinson*[42] the Supreme Court unanimously ruled that sex discrimination is "not limited to economic or tangible discrimination"; it also covers sexual harassment that creates a "hostile environment."[43] To put it another way, the *Meritor Savings* case translated Title VII of the Civil Rights Act of 1964 to mean that employers are liable for actions *or words* that interfere with an employee's ability to perform work or that create an intimidating or *hostile work environment*.

Mechelle Vinson claimed that she submitted to sexual intercourse for fear of losing her job. She also claimed to have been fon-

dled in front of other employees and followed into the women's restroom. In a more subtle case, *Broderick v. Ruder* (1988), the Court ruled that an employer creates a hostile work environment by affording preferential treatment to female employees who submit to sexual advances.[44] *Meritor* was extended to campuses in *Franklin v. Gwinnett County Public Schools* (see below) wherein the Court ruled that school districts are liable under Title IX for damages for teacher harassment of pupils if the pupil has notified the administration or the administration is in any way aware of such harassment.[45]

These decisions resolved a tension that exists between protection of freedom of expression and protection from sexual, ethnic, or racial harassment. Perhaps that is why when a federal appeals judge in Cincinnati ruled that women who work in male-dominated environments have to tolerate "rough-hewn and vulgar language," the Supreme Court granted *certiorari* in that case.

Teresa Harris v. Forklift Systems allowed the Supreme Court to clarify lower court rulings. The history of the case is instructive. Both sides stipulated that Harris's employer, Charles Hardy, made many statements to her that had sexual overtones; they included, "Let's go to the Holiday Inn to negotiate your raise. . . . You're a dumb ass woman. . . . We need a man [in your job]."[46] Hardy thought it humorous to ask women to fetch coins from his pants pockets. When Harris complained and threatened to resign, Hardy promised to reform what he called his joking ways. He also noted that on occasion Harris had stayed after work to have beers with other employees in a setting where sexual references were frequent. A few weeks later when Harris brought in a new contract, Hardy said to her, "What did you do, promise him [sex] on Saturday night?"[47] Harris quit and filed a sexual harassment suit.

In the first trial, the judge was critical of Hardy but dismissed Harris' claim because Hardy's harassment was not "so severe as to . . . seriously affect [Harris'] psychological well being."[48] A panel of three judges for the Cincinnati appeals court upheld that decision without comment. Harris appealed to the Supreme Court. Justices Ruth Bader Ginzburg and Antonin Scalia clashed over who had what burden of proof during their questioning of the attorneys. Ginzburg implied that those seeking redress for sexual harassment should have no greater burden of proof than those bringing suit under the Civil Rights Act of 1991, which increased damages for job discrimination. Scalia's questioning indicated that making someone uncomfortable on the job was not enough to warrant restricting someone else's First Amendment rights.

In November of 1993, the Court ruled *unanimously* that Harris did not need to prove that she suffered psychological harm; her burden was to prove that the harassment was frequent, severe, humiliating, and an unreasonable interference with her work performance. In other words, she had to prove that she worked in a hostile work

environment. The decision written by Justice Sandra Day O'Connor was meant to clarify a 1991 amendment to job bias laws that allowed employees to sue for up to $300,000 in damages for job discrimination including sexual harassment. O'Connor asked whether a "reasonable person" would have viewed Harris' workplace as a "hostile or abusive work environment."[49] O'Connor ruled out off-hand remarks and "mere offensive utterances . . . or jokes" as grounds for damages.[50] Nonetheless, the unanimous Court found that Harris' workplace was hostile, and she was awarded damages.

Title VII has also recently been extended to harassment by someone of the victim's own sex in *Oncale v. Sundowner Offshore Services, Inc.*[51] This ruling held that an employer is liable for sexual harassment even though no job action took place.[52] Joseph Oncale was sexually assaulted and threatened while working on an offshore oil rig. His complaints to supervisors fell on deaf ears. The *Oncale* ruling is important because Justice Scalia writing for a unanimous Court emphasizes that sexual harassment is discriminatory; racial harassment parallels sexual harassment in most workplace cases. Using Title VII, section 703(a)(1), the same section used in the *Meritor* decision, Scalia argued that the plaintiff has the burden of showing that discrimination was based on sex and had an effect on compensation, terms, conditions, *or* privileges of employment.

Another important case focusing on racial harassment is *Aguilar v. Avis Rent-A-Car Systems*[53] from the California Court of Appeals. Seventeen Hispanic workers for Avis Rent-A-Car at San Francisco Airport claimed to have been severely ridiculed, insulted, and intimidated. The jury agreed and the judge ordered Avis to "cease and desist from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees . . . [and to] further refrain from any uninvited intentional touching of" those employees.[54] The appeals court upheld the ruling but narrowed the judge's injunction to the workplace.

Sexual Harassment as an Analogue for Hate Speech

In reaction to the *Harris* case, the Department of Education of the U. S. Government issued guidelines for determining if harassment has taken place in an educational environment. One must prove that the harassment was so severe and persistent that it had an adverse affect on a student's performance. However, the EEOC guidelines do not identify which behaviors constitute sexual harassment. The guidelines are based on *consequences* of behavior that interfere with work performance or create an intimidating, hostile, or offensive working place. *Any* behavior that *causes* those effects can be claimed to be sexual harassment. The result has been a case-

by-case determination of sexual harassment. The courts have consistently placed the burden of proof on the alleged victim. In the meantime, the Court refined its position in two cases that demonstrate how the standards of sexual harassment could be used to establish a similar test for hate speech on campuses. The Court ruled that students who are victims of sexual discrimination or harassment may be entitled to damage awards. In *Christine Franklin v. Gwinnett County Schools* (1992), the Court handed down a unanimous decision that allowed an Atlanta woman to seek damages beyond back pay and prospective relief from her high school under Title IX of the 1980 Education Act. Until this decision, schools or colleges found to have violated Title IX were threatened only with a loss of federal funds. This decision was clarified in *Gebser v. Lago Vista Independent School District* in 1998. The Court ruled that Title IX "was modeled after Title VI" and that the two statutes are "parallel," with Title IX covering gender discrimination and Title VI covering racial discrimination in federally funded education programs. The Court limited employer liability to employer fault after notification:

> It would be unsound, we think, for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice. (Emphasis theirs).[55]

This decision was followed with another clarification in a five-to-four ruling in 1999 in *Davis v. Monroe County Board of Education*.[56] Justice O'Connor wrote the majority decision in *Davis* which once again held that if a school official is notified of one student harassing another and chose to do nothing about it, then the school is liable for damages. Under this ruling, however, schools can be held liable only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive victims of access to educational opportunities. Again the courts have imposed a large burden of proof on the plaintiff.

Thus, despite slits of opportunity for regulation of hate speech on campuses,[57] the burden of proof on the person offended remains prohibitively heavy. Worse yet, victims who are of lower status than perpetrators (for example, a student versus a teacher, an untenured versus a tenured professor) may be deterred from reporting hate or harassing speech because they fear their anonymity will be compromised, that the perpetrator might not be disciplined, or that even if disciplined the perpetrator will continue to harass or take revenge. As Fisk and Chemerinsky have written, "The Court's holding in *Gebser* . . . says that schools usually are not responsible for the harms students suffer at school. This holding is astounding given

that the victims of harm are children and that the law requires them to spend most their waking hours in the school's care."[58]

Solutions

Based on this analysis of case law, campuses may be able to proscribe repeated hate speech by using the workplace model with some modification. For example, if one considers students in the classroom to be a captive audience because of graduation, and attendance requirements and the like, then in-class or class-related hate speech becomes easier to regulate because the courts have been very clear that when an audience is captive, the speaker enjoys less protection under the First Amendment. In *Resident Advisory Board v. Rizzo*[59] the court ruled that employees were a captive audience because they could not avoid being inflicted with unseemly language without walking off the job. The courts may soon put students into this same category.[60] Even if a professor does not take attendance, the students are captive in the sense that absence would affect their ability to score well on class assignments. *R.A.V. v. City of St. Paul* made clear that officials may restrict speech to protect members of a captive audience.[61]

Furthermore, *Meritor Savings* opened the way to protect employees in the workplace from "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . [that] has the purpose or effect of unreasonably interfering with an individual work performance. . . ."[62] It is not a large step to translate that into regulation that prohibits interfering with students' educational performances in their places of learning, that is, on the campus including cafeterias, libraries, and other places of study.

The *Harris* ruling reinforces the framework for such regulations by pointing out that behavior that is "sufficiently severe or pervasive" to create a hostile work (read "learning") environment is in violation of Title VII.[63] If one were to apply the *Harris/Meritor* formulation to the academic environment, one would have to prove that the words or behavior detracted from the student's performance, encouraged the student to leave the classroom or other academic venue, or kept them from completing the class or the degree. To meet this burden of proof, students could supply evidence of how they were hampered in their studies, how their grades had dropped, how their self-esteem had suffered, how they felt intimidated, and so forth, all of which were accepted as evidence in the *Harris* case. To run the analogy back to the work environment guidelines discussed above, if hate speech happened in a class where attendance was mandatory *and* a student claimed to be offended to the extent that it affected his or her grade, then a hate speech charge could be filed by that person. Hearing offensive remarks in public forum would not be the same.

Recently, the United States Court of Appeals for the Sixth Circuit handed down *Bonnell v. Lorenzo*, which held faculty to a standard of germaneness in the classroom; that is, discourse not relevant to the course would be afforded less protection than discourse related to the course materials. John Bonnell, an instructor of English literature at Macomb Community College in Michigan, used words such as "fuck," "pussy," and "cunt" in his classroom when those words were not "germane" to the subject matter. After several student complaints and a warning from the administration, Bonnell continued this practice and was suspended. He sued claiming his First Amendment rights had been violated and was upheld by the district court. However, the Court of Appeals reversed the lower court on the following grounds:

> As a public employee, in order to establish a likelihood of success on his section 1983 claim that Defendants denied Plaintiff his First Amendment right to free speech, Plaintiff has to demonstrate that 1) he was disciplined for speech that was directed toward an issue of public concern, and 2) that his interest in speaking as he did outweighed the College's interest in regulating his speech. . . . Plaintiff may have a constitutional right to use words such as "pussy," "cunt," and "fuck," but he does not have a constitutional right to use them in a classroom setting where they are not germane to the subject matter, in contravention of the College's sexual harassment policy. . . . Although we do not wish to chill speech in the classroom setting, especially in the unique milieu of a college or university where debate and the class of viewpoint are encouraged—if not necessary—to spur intellectual growth, it has long been held that despite the sanctity of the First Amendment, speech that is vulgar or profane is not entitled to absolute constitutional protection.[64]

The decision concludes by citing the need to maintain "a hostile-free learning environment" on campus. Using the balancing test established in Supreme Court precedent, the Appeals Court defends a "student's right to learn in a hostile-free environment." The First Amendment is not to be used to shield harassers.

Based on this analysis, the following options may be constitutionally permissible on a campus if the courts accept the workplace-campus analogy.

1. Create a campus area for freedom of expression and warn that what is said may be offensive and that those saying it may be recorded. Providing an outlet for hate speech in a designated area strengthens the case one can make that hate speech in another part of the workplace is part of a pattern that is aimed at creating a hostile environment. It exposes the intolerant, the bigoted, and the problematic to further scrutiny, an obligation of campuses under the *Davis v. Monroe County Board of Education* ruling of 1999.

2. Condemn hate speech with moral force rather than with physical restrictions or penalties. While some hate speech will always be protected, there is no question that a campus can build a climate in which it is condemned.

3. Establish records of sustained patterns of hate speech that create a hostile learning environment and charge those guilty of creating such environment similar to the process used in sexual harassment cases. In other words, if one could argue that a record of hate speech interferes with a student's ability to gain an education, do his or her homework, attend class, etc., it would no longer be protected speech. Establishing a record of sustained patterns that create a hostile environment might allow the university to create a points system, not unlike that used by some states for recording traffic violations, which can lead to a suspended driver's license. Should the offender take a workshop on tolerance, he or she could have their record cleared. Such a system would have the advantage of encouraging offenders to participate in educational programs that might help them overcome their biases while avoiding other legal sanctions. Should no offense occur over a period of time, points could be removed from the record.

4. Provide educational programs for repeat offenders. Such programs should indicate which labels and phrases are appropriate and which are inappropriate for minorities, and why. These labels should be clearly listed so that any regulations regarding them cannot fall into the abyss of "over-broad regulations." They should be narrowly drawn and specific in the same way obscenity regulations are.

5. Using *Wisconsin v. Mitchell* allows for the imposition of stiffer penalties when a campus offense is committed in the context of hate speech.

Conclusion

Because freedom of expression has rightly been given priority over many other rights and is constitutionally protected, it is difficult to restrict. The Supreme Court, backing away from its *Chaplinsky* decision of 1942, seems to say, "Sticks and stones may break your bones, but words will not hurt you." In other words, the states and localities cannot regulate *content.* When it comes to hate speech, words can only be regulated if they are tied to hate crimes or perhaps are part of a pervasive pattern of harassment that creates a hostile work environment. Even the most vitriolic attack on a racial group is protected unless it can be shown that imminent action

could have taken place against that group. The worst kinds of campus fraternity and sorority pantomimes are allowed unless they can somehow be linked to a "true threat" or to intimidation.

The one softening of this barrier has occurred where the courts have hinted that an analogue can be built between sexual harassment law and the creation of a hostile environment in a work or learning place. A careful review of court decisions, particularly those regarding sexual harassment, provide a narrow avenue for action on campuses. The solutions outlined here are the least restrictive and most open means to achieve civility, vent frustrations, educate the ignorant, and diminish hate speech. If a university embarked on such a path, the university would not only show good faith, it would protect itself from charges that it allowed a hostile environment to exist and hate speech to fester.

Study Questions

1. What context justifies conceptualizing spoken words as physical assaults?
2. What would constitute an actionable case under the *Brandenburg* standard?
3. Devise a speech code for your campus that would pass constitutional muster before the Supreme Court.
4. Under the *Mitchell* standard, what speech would allow for penalty enhancement of a crime?
5. Write a policy to regulate hate speech transmitted by e-mail on the campus server.
6. How would you implement the Haiman model on your campus?
7. Based on *Meritor* and *Harris*, create an anti-harassment code for your campus.
8. Are the *Davis* and *Gebser* rulings helpful or a deterrent to those who support hate speech codes for campuses?

Simulation Exercises

1. *Trial Case 7-1:* In 1996 Riverside, California passes a "Bias-Motivated Crime Ordinance" aimed at preventing "hate crimes" and "hate speech." The law imposes a $5,000 fine and up to one year in jail. Specifically, the ordinance forbids "placing on public or private property" a symbol such as a Nazi swastika that will "arouse anger, alarm or resentment in others on the basis of race, color, religion, creed, or gender." In July of 2003, Junior Lapinski, a 14-year old living in Riverside, paints an upside down Buddha on the wall of his neighbor's house, Mr. Ishtar Punjawahara,

who is a Buddhist. Mr. Punjawahara takes the symbol to be a threat. He calls the police and demands protection. Instead of arresting Junior for "defacing private property," Junior is arrested under the 1996 law against hate speech. Lapinski's lawyer argues that the arrest is a violation of Lapinski's rights under *R.A.V. v. St. Paul*. "Junior mean no harm," he claims, "Junior merely meant to make a statement about the world being upside down." The California Supreme Court upholds the Riverside law under the "fighting words" doctrine of *Chaplinski v. New Hampshire* and the enhanced penalty ruling in *Mitchell v. Wisconsin*. The case goes to the U.S. Supreme Court. Side one = Junior Lapinski; side two = City of Riverside. Supreme Court: Do you hold for Riverside or for Junior Lapinski?

2. *Trial Case 7-2:* Carol Muhumed is a student at Palos Verdes High School. She is of Iraqi descent. During the War in Iraq, she lets her fellow students know that she opposes the war by wearing an Iraqi flag around her shoulders. During her lunch break, she is yelled at by a group of fellow students, who defame Iraqis and call for their deaths. Carol appeals to the administration for protection and is told that if she wants to wear the Iraqi flag, she cannot be protected. The vice principal tells her: "If you come to school wearing that thing, I will see that you are sent home." The next day at school, Carol arrives wearing the flag. She is pelted with an egg in the morning on her way to her locker. She places the Iraqi flag in her locker and goes to class. At lunch, she returns to her locker and puts on the flag. A student rips off her flag and tramples it into the mud, reducing Carol to tears. She leaves the campus.

   The next day during an outdoor school-wide assembly, Carol jumps out of the stands and pulls a kerosene-drenched U.S. flag from a small bag. Before she can be stopped she burns the flag in the middle of the football field. The classes are meeting in the stands around the field as they always do during assemblies. Several students run onto the field chasing Carol; she flees back to where she was sitting and several students of Iraqi descent try to protect her. Fights break out and several students are injured. Carol is expelled for disruptive behavior, particularly for burning the U.S. flag, which the school argues was the cause of the disruption. "Her action constituted fighting words," claims the vice principal. She is expelled.

   After losing in the lower courts, she appeals to the Supreme Court arguing her First Amendment rights have been violated. Side one = Carol Muhumed; side two = Palos Verdes High School District. Supreme Court: Do you hold for Carol Muhumed or for the school district?

Endnotes

[1] Sigmund Freud, *Introductory Lectures on Psycho-Analysis* (1916) reprinted in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, 15, James Strachey, ed. (1963), p. 15.

[2] A number of scholars support this position. See for example, Kingsley E. Browne, "Title VII as Censorship: Hostile-Environment Harassment and the First Amendment," *Ohio State Law Journal*, 52 (1991): 481–99; Jules B. Gerard, "The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment," *Notre Dame Law Review*, 68 (1993): 1003–1021; Larry Alexander, "Banning Hate Speech and the Sticks and Stones Defense," *Constitutional Commentary*, 13 (1996): 71–92.

[3] 315 U.S. 568 (1942).

[4] 315 U.S. 568, 572 (1942). See also, *Beauharnais v. Illinois* 343 U.S. 250 (1952) which convicted a man of group libel. Though thought to be a dying opinion of the Court, it was recently revived in a Wisconsin case.

[5] 337 U.S. 3.

[6] 337 U.S. 3, 4.

[7] 395 U.S. 444.

[8] 395 U.S. 446–47 (1969).

[9] 395 U.S. 444, 447 (1969).

[10] 403 U.S. 15.

[11] See, for example, Richard Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," *Harvard Civil Rights-Civil Liberties Law Review*, 17 (1982): 133–181.

[12] See also *Hernandez v. Loury*, 1937.

[13] See John Hulshizer, "Securing Freedom from Harassment without Reducing Freedom of Speech: *Doe v. University of Michigan*," *Iowa Law Review* (January, 1991), pp. 392–98. See also Richard Delgado, "Campus Anti-Racism Rules: Constitutional Narratives in Collusion," *Northwestern University Law Review* (Winter, 1991), pp. 375–378; J. Peter Byrne, "Racial Insults and Free Speech Within the University," *Georgetown Law Journal* (February, 1991), pp. 425–30; Rodney A. Smolla, "Academic Freedom, Hate Speech, and the Idea of a University," *Law and Contemporary Problems* (Summer, 1990), pp. 211–16.

[14] 721 F.Supp. 863 (E.D. Mich. 1989).

[15] The federal court cited *Chaplinsky v. New Hampshire* (1942) and *Beauharnais v. Illinois* (1952). In Chaplinsky, the Supreme Court said:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. (315 U.S. 571, 572 (1942).)

More recent cases can be read to have narrowed the application of Chaplinsky. Summarizing the results of *Gooding v. Wilson* (1972), *Brown v. Oklahoma* (1972), and *Eaton v. City of Tulsa* (1974), Archibald Cox wrote:

> Later cases place more reliance upon the doctrine of overbreadth or the duty of a policeman to suffer verbal abuse, but upon one ground or another they reverse convictions for such utterances as 'white son

of a bitch, I'll kill you' and 'm----r f----r fascist pig cops' or calling a prosecution witness 'chickenshit'. . . .

See *Freedom of Expression* (1981), p. 51. In 1994 the Supreme Court of California recently struck down Stanford University's speech code on similar grounds to the Michigan case.

[16] See *Khalid Absullan Tario Al Monsour Faissal Fahd Al Talal v. Fanin*, 506 F. Supp. 187 (1980).

[17] In "Insults and Epithets: Are They Protected Speech?" *Rutgers Law Review*, 42 (1990), 304.

[18] *Iota XI Chapter of Sigma Chi Fraternity v. George Mason University* 733 F.Supp. 792 (E.D. Va. 1991).

[19] 733 F.Supp. 792, 793 (E.D. Va. 1991). See also *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*.

[20] Members of the administration at U.C. Riverside were forced to take First Amendment sensitivity classes because they banned "offensive" fraternity T-shirts.

[21] See *Boos v. Barry; Police Department of Chicago v. Mosley; Linmark Associates v. Township of Willingboro; First National Bank of Boston v. Bellotti; Central Hudson Gas Company v. Public Utility Commission*.

[22] See Justice Scalia's opinion, pp. 1–2 of slip opinion no. 90-7675. I should note that the majority in this case was supported by two very different rationales. The moderates supported overturning the law on the grounds that it reached beyond "fighting words." The conservatives, led by Scalia, objected to the law because it banned only particular categories of fighting words to the exclusion of others.

[23] Many legal scholars believe that *R.A.V.*, named for Robert Allen Viktora, was a clarification of a well-known ruling by the Court of Appeals for the Seventh Circuit which held that the First Amendment protected a neo-Nazi group from prior-restraint, and hence allowed them to march through a Skokie neighborhood populated by Jews, many of whom had been prisoners in German concentration camps. That decision *Collin v. Smith* (578 F. 2d 1197, 7th Cir. 1978, *cert. denied*, 439 U.S. 916 (1978)) invalidated Skokie's anti-defamation law. See, for example, Sionaidh Douglas-Scott, "The Hatefulness of Protected Speech: A Comparison of the American and European Approaches," *William and Mary Bill of Rights Journal*, 7 (1999): 305–346.

[24] *Wisconsin v. Mitchell* (92-515), 508 U.S. 47 (1993). The statute provided: "(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sbu (2): (a) Commits a crime under chas. 939 to 948. (b) Intentionally selects the person against whom the crime under par. (a) is committed or selected the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property. (2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000, and the revised maximum period of imprisonment is one year in the county jail. (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years. (c) If the crime committed under

sub. (1) is a felony, the maximum fine prescribed by law for the crime my be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years."

[25] See *Dawson v. Delaware* (1992) and *Barclay v. Florida* (1983).

[26] *U.S. v. Tucker*, 404 U.S. 443, 446 (1972); *Williams v. New York*, 337 U.S. 241, 246 (1949).

[27] 506 U.S. 476, 489 (1993)

[28] *Apprendi v. New Jersey* Slip op. 99–478.

[29] Franklyn Haiman reluctantly agreed that the *Mitchell* ruling was constitutional: "I, like a majority of my colleagues on the national ACLU Board, after much intense and enlightening debate, became persuaded that laws which enhanced penalties for hate crimes, if carefully drafted to avoid guilt by association or because of generally held ideologies, and if they punished only those whose criminal acts were directly, immediately, and demonstrably attributable to group hatred, were constitutional." In "Hate Crimes," a book review in *The Free Speech Yearbook* (Anandale, VA: NCA, 1998), p. 161. But Haiman said he had changed his mind after reading James B. Jacobs and Kimberly Potter, *Hate Crimes* (New York: Oxford U. Press, 1998). Jacobs and Potter argue against decisions such as *Mitchell* on the grounds that hate speech is poorly defined and highly ambiguous, that hate speech is exaggerated by the media and identity politics, and that *Mitchell* will lead to eratic enforcement.

[30] See *Sall v. Barber*, 782 F. 2d 1216 (1989); *Buckley v. Littell*, 539 F. 2d 882 (1976), cert. denied, 429 U.S. 1062 (1977); *Blouin v. Anton*, 431 A. 2d 439 (1981); *Ferguson v. Dayton Newspapers*, 7 Med. L. Rptr. 2502 (1981); *Stevens v. Tillman*, 855 F. 2d 394 (1988); *Kirk v. CBS*, 14 Med. L. Rptr. 1263 (1987); *Ollman v. Evans*, 750 F. 2d 970 (1984). It is possible that the decision regarding "racist" may be overturned on appeal, but the cost of legal action for the offended party will still be enormous.

[31] The issue of privacy on these systems is addressed in the Electronic Communication Privacy Act of 1986.

[32] See, for example, *NAACP v. Alabama*, 1958, on the privacy issue. See also *McIntyre v. Ohio Elections Commission*, 1995.

[33] See also D. L. Wilson, "Suit Over Network Access," *Chronicle of Higher Education* (November 24, 1993), pp. A16–17.

[34] *U.S. v. Baker*, No. 95-80106 (E.D. Mich June 21, 1995).

[35] Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Press, 1979).

[36] Franklyn Haiman, *Speech Acts and the First Amendment* (Carbondale: Southern Illinois University Press, 1993), p. 22.

[37] Haiman, *Speech Acts*, p. 30.

[38] 461 U.S. 146.

[39] See Ann Gill, "Revising Campus Speech Codes," *Free Speech Yearbook*, 31 (1993), pp. 124–137.

[40] Gill, p. 128.

[41] Gill, p. 130.

[42] See particularly 477 U.S. 57, 60 (1986).

[43] 477 U.S. 57, 64 (1986).

[44] Previous cases include *Katz v. Dole* (1983), and *Henson v. City of Dundee* (1982)

[45] 503 U.S. 60, 75 (1992).
[46] 510 U.S. 17, (1993).
[47] 510 U.S. 17, (1993).
[48] 510 U.S. 17, (1993).
[49] 510 U.S. 17, 21 (1993).
[50] In other cases based on Title VII courts have ordered certain conduct curtailed. See for example *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991).
[51] *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. at 1001–02. The full implications of this decision are discussed by Steven L. Willborn, "Taking Discrimination Seriously: Oncale and the Fate of Exceptionalism in Sexual Harassment Law," *William and Mary Bill of Rights Journal*, 7 (1999): 677–721. Willborn believes the decision reduces sexual harassment to a subset of other forms of discrimination.
[52] *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998); *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998). For a closer analysis of these rulings, see Rebecca Hanner White, "There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment," *William and Mary Bill of Rights Journal*, 7 (1999): 725–54.
[53] 53 Ca. Rptr. 2d, 606–608.
[54] 53 Ca. Rptr. 2d, 603.
[55] *Gebser*, 118 S. Ct. 1999 (1998).
[56] 97–843. See also *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998). The Court ruled that employers are liable under Title IX only if they have knowledge of sexual harassment by employees and are deliberately indifferent to such harassment.
[57] For example, the Supreme Court rejected the "view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968).
[58] Catherine Fisk and Erwin Chemerinsky, "Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX," *William and Mary Bill of Rights Journal*, 7 (1999): 793.
[59] 503 F. Supp. 383 (E.D. Pa. 1976), modified, 564 F. 2d 126 (3d Cir. 1977), and cet. denied, 435 U.S. 908 (1978).
[60] While the courts have yet to accept this application fully, they took a major step in that direction in *Bonnell v. Lorenzo* discussed below.
[61] at 414 n. 13 (White, J., concurring). See also Fisk and Chemerinsky, pp. 755–800, who argue that employers should be strictly liable under Title VII for supervisors' harassment and schools should be liable under Title IX for teacher's harassment of students.
[62] at 65.
[63] at 21–22.
[64] Electronic Citation: 2001 FED App. 0057p (6th Cir.).

Chapter 8

Obscenity and the First Amendment

Evolution of the Law of Obscenity

As with defamation, the law dealing with obscenity had its origins in England. Similarly, spoken and written material considered obscene was dealt with differently. Obscene speech tended to be prosecuted as a disturbance of the peace or "public lewdness." Written and pictorial materials thought to be obscene were prosecuted because of the belief, by legislatures and judges, that exposure to such materials tended to corrupt and debase the reader.[1] Accompanying that view was the recognition that some sort of standard or test must be developed for evaluating material that could be easily applied in a number of different situations.

The *Hicklin* Rule

One of the earliest tests was the *Hicklin* rule, derived from an English case *Regina v. Hicklin* (1868). This rule stated: "Whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." The Courts interpreted the *Hicklin* rule to mean that a work could be obscene if an "isolated passage" could tend to corrupt the "most susceptible person." Thus, a single passage taken out of context could condemn a work if it could be shown that a person particularly susceptible to

"immoral influences" would *tend to be* corrupted by that passage. Such a test, while clearly in line with Victorian prudery, was selectively enforced, allowing the authorities to prosecute those persons whose economic or political positions were different from their own.

Although obscenity convictions had been appealed to the U.S. Supreme Court in the first half of the twentieth century, they were either routinely affirmed, or, if reversed, the reversal was based on a Constitutional principle broader than the question of obscenity itself.[2] While the Court had made numerous announcements that *presumed* the validity of properly drafted laws against obscenity,[3] the direct question of whether obscenity was protected speech under the First Amendment did not reach the Supreme Court until 1957.

The *Roth* Test

In *Roth v. United States* (1957),[4] Justice William Brennan, writing for a majority of the Court, specifically held that obscenity is not within the area of constitutionally protected freedom of speech or press—either under the First Amendment regarding the federal government or under the due process clause of the Fourteenth Amendment, as applied to the States.[5]

Because obscenity was considered to be outside the area of "constitutionally protected speech," the Court ruled that the usual constitutional requirement that the prosecution present evidence that the particular utterance presented a "clear and present danger"[6] of antisocial conduct is not required.[7] Such a conclusion, stated the Court, was compelled by the overwhelming historical evidence that "obscenity" had always been regarded as speech undeserving of protection.

For example, the Court noted that all of the states ratifying the Constitution had, by 1792, made either blasphemy or profanity or both statutory crimes, and as early as 1712 the Massachusetts Bay Colony had made it criminal to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon" in imitation or mimicking of religious services. These examples indicated, however, that obscenity historically had been associated with "profanity," that is, actions or words indicating an irreverence toward God or sacred or holy things, or blasphemy, and less to do with sex or sexual acts. It was only later that these same laws were used to prosecute materials of a purely sexual nature having nothing to do with religion or religious services other than the fact that most religions held that sexual activity outside of the sacrament of lawful marriage was immoral. The Court, nevertheless, found that there was sufficient historical evidence that neither the framers nor the states ratifying the Constitution and Bill of Rights considered that the right of freedom of speech and press would prevent the prosecution of obscenity as well as profanity.

The Social Value of Ideas

Apart from the historical basis for concluding that obscenity was not protected speech under the First Amendment, the Court then focused on the *purpose* of the rights of free speech and press, and what has come to be termed, "the central meaning" of the First Amendment:

> The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.
>
> * * *
>
> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.[8]

In emphasizing obscenity's lack of social importance, the Court was addressing the nature of ideas themselves, not the form or manner in which they were expressed. Thus, an idea may be expressed in a work of fiction or a play or even nonverbally in a painting or sculpture, rather than in a political tract, and still receive the protection afforded by the First Amendment. The question is whether the idea being expressed concerns an issue or subject of public or social importance rather than solely a matter of personal gratification.

Appeals to Prurient Interest

Having ruled that obscenity was not protected speech under the First Amendment, the Court was still faced with proving a definition or standard for judging whether a work was or was not obscene. First, the Court made clear that, despite the historical relationship between obscenity and profanity, a work could be found to be obscene without being blasphemous. The focus of obscenity was upon a specific form of immorality dealing with depictions of sexual conduct that had, as their effect, the excitation of impure or lustful thoughts.[9]

However, the Court acknowledged that not all material dealing with sex should be considered "obscene." Obscene material, ruled the Court, is material that deals with sex in a manner appealing to *prurient* interest, that is, "material having a tendency to excite lustful thoughts."[10] In attempting to provide a more amplified definition, the Court stated that it perceived no significant difference between the use of the term, "prurient" in prior state and federal case law dealing with obscenity, and the more formal definition offered by the American Law Institute ("ALI") in the latest draft of the Model Penal Code:

> . . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . .[11]

Rejection of *Hicklin* as a Standard

The adoption of the ALI standard signaled a departure from the stricter *Hicklin* rule, which permitted a conviction if even a single passage met the prurient interest test. The Court rejected the *Hicklin* test of judging obscenity by the effect of isolated passages upon the most susceptible person, as an overbroad restriction on the freedoms of speech and press. The Court therefore adopted a standard (reflected in many recent state and federal court decisions) that required consideration of the work as a whole, and its effect upon the *average*, not the most susceptible person in the community:

> Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.[12]

The Court then concluded that the trial judges in both the *Roth* and accompanying *Alberts* cases had given adequate instructions to the jury on the standard to be applied in judging whether the works were obscene under the pertinent statute and that such instructions adequately paraphrased the essential test articulated above.

Justice John Harlan, who also dissented in *Roth*, stated that making the question of whether or not a work was obscene a factual issue for the jury to decide was an avoidance of the responsibility of judges to make individual constitutional judgments. Harlan believed the ruling transformed jurors into constitutional scholars. What if the jury did not like James Joyce's *Ulysses* or Bocaccio's *Decameron*? Couldn't they send the seller of such books to jail? How would a jury decide the question redeeming social value?

Justice William O. Douglas, with whom Justice Hugo Black joined, dissented from the holding on more general grounds that the decision upholding both obscenity convictions was inconsistent with the unambiguous language of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech or of the press." Moreover, the use of a standard that directs the jury to apply "the common conscience of the community" or "contemporary community standards," opens the door to the silencing of legitimate expression:

> Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, juries can censor, suppress, and punish what they don't like, provided the matter relates to "sexual impurity" or has a tendency

"to excite lustful thoughts." This is community censorship in one of its worst forms. It creates a regime where in the battle between the literati and the Philistines, the Philistines are certain to win.[13]

Refinements of the *Roth* Test

The Court's decision in *Roth* ended up raising more questions than it answered. The lack of a clear standard as to prurient appeal opened the door for the danger discussed by Justice Harlan—that no one could know in advance what might and might not be considered by a jury to be obscene. Even the *Roth* Court admitted that not all depictions of sex or sexual organs were obscene. A work of classical art might deal directly with a sexual act, such as *The Rape of the Sabine Women*, yet clearly not be regarded as something that should be suppressed or the exhibitor punished.

Justice Harlan's examples raised the issue of *degree*: should the prurient appeal test be applied as "either/or," that is, a work either has it or it doesn't, or are there degrees of prurient appeal, so as to distinguish erotica in general from "hard core pornography"?

A related issue concerned the nature of the *audience* at which the work is directed. Although *Roth* eliminated the old *Hicklin* rule that the work be judged by its impact on the most susceptible members of society, did that mean that the states and federal government could take no steps to protect *children* from being exposed to pornographic, albeit non-obscene material?

Moreover, while a work may have no prurient appeal to the average person in the heterosexual community, it could have strong appeal, for example, to the homosexual community. Did this mean that the state could not prosecute purveyors of pornography that had the requisite prurient appeal for the gay community? Did the *intent* of the creator, exhibitor, publisher, or distributor of such works have any bearing on how they were treated? These and other issues were presented to the Supreme Court over the next fifteen years; and the Court struggled with them but with little success.

The Element of "Offensiveness"

In *MANual Enterprises, Inc. v. Day*,[14] the Court reversed an administrative ruling by the Postmaster General that the petitioners' magazines violated the federal obscenity statute and should be seized.[15] The magazines consisted largely of photographs of nude male models and gave the name of each model, each photographer, and the latter's address.

Justice Harlan, in an opinion joined by Justice Potter Stewart, announced the judgment of the Court.[16] He pointed out that there is a difference between "simple nudity" and "hard core pornography," and that the statute, in order to be upheld under the First Amend-

ment, must be construed to apply only to the latter. Since this was a plurality opinion (less than five justices), Justice Harlan announced that *Roth* must be deemed to include the element of "offensiveness" in addition to prurient appeal:

> These magazines cannot be deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as "patent offensiveness" or "indecency." Lacking that quality, the magazines cannot be deemed legally "obscene" . . . .
>
> * * *
>
> Obscenity under the federal statute thus requires proof of two distinct elements: (1) patent offensiveness; and (2) "prurient interest" appeal. Both must conjoin before challenged material can be found "obscene" under 1461. In most obscenity cases, to be sure, the two elements tend to coalesce, for that which is patently offensive will also usually carry the requisite "prurient interest" appeal. It is only in the unusual instance where, as here, the "prurient interest" appeal of the material is found limited to a particular class of persons that occasion arises for a truly independent inquiry into the question whether or not the material is patently offensive.[17]

Other members of the Court who agreed that the Post Office determination should be reversed, argued that it was not necessary for the Court to address the substance of the determination at all, since they believed that Congress, in enacting Section 1461; had not authorized the Postmaster General to hold his own administrative proceeding.[18]

Community Standards and "Social Value"

In *Jacobellis v. Ohio*,[19] the Court addressed an appeal by the manager of a motion picture theater who had been convicted under an Ohio statute making it a crime to possess and exhibit an obscene film. While the Ohio State Supreme Court had affirmed the conviction, the U.S. Supreme Court reversed, holding that the statute violated the First Amendment.

Joined by Justice Goldberg, Justice Brennan announced the judgment of the Court.[20] Justice Brennan addressed two important issues: the question of "community standards" and the meaning of "social value." The meaning of these two terms in the overall definition of obscenity continued to plague the Court.

First, citing *Burstyn v. Wilson*,[21] Justice Brennan reiterated that motion pictures are entitled to First Amendment protection, although obscenity is not. As to whether the determination of obscenity was one of *fact* (to be decided by the jury) or *law* (to be decided by a judge) he reluctantly concluded that the issue necessarily includes questions of constitutional law, ultimately requiring a

decision by the U.S. Supreme Court. Accordingly, the Court has the power and the right to make an independent review of the facts—and to reach a conclusion contrary to what a jury or other fact-finder in the courts below had found.

Second, Justice Brennan rejected the idea that the term "community standards" in the *Roth* test meant that trial courts and juries had to apply a *local* community standard. The phrase, originally mentioned by Judge Learned Hand in a 1913 Federal District Court case, referred to "community" in the sense of "society at large," "the public," or "people in general."[22] Thus, while "community standards" of what appealed to the prurient interest might change over time in a society, they did not vary from state to state or town to town.

The other issue concerned the meaning of "social value" or "social importance" of a work. After citing the *Roth* "prurient interest" test as a starting point, Brennan alluded to the language contained in *Roth* that suggested that a work may not be proscribed unless it is *utterly without redeeming social value.*

Justice Stewart concurred, and wrote a famous one-paragraph opinion stating that he believed that the only kind of "obscene speech" not protected by the First Amendment was "hard core pornography." As to the meaning of that term, Justice Stewart claimed that, while he could not define categories of obscene material with precision, he *knew* obscenity when he saw it!

Chief Justice Warren and Justice Clark dissented, saying that Justice Brennan's attempts to extend and expand the *Roth* test were unwise. The Chief Justice criticized Justice Brennan's "national community" standard, and Justice Stewart's "hard core pornography" limitation as essentially undefinable. If the Supreme Court cannot define these terms, they could hardly expect the state courts to do so. To avoid having the Supreme Court becoming the ultimate censor, being required to review the entire record of every case appealed to it, the Chief Justice argued that the standard for review should be limited to cases where the evidence supporting the conviction was not "sufficient"—"requiring something more than merely any evidence but something less than 'substantial evidence on the record . . . as a whole.'"[23]

Defining the "Average Person"

Throughout the 1960s the Court continued to struggle with the *Roth* definition of obscenity. Three cases, all decided in 1966, illustrate the recurring issues in obscenity law. In *Mishkin v. State of New York*,[24] the Court upheld a conviction against a book publisher and seller of books depicting "deviant" sexual acts under a New York obscenity statute. The statute made it a misdemeanor for persons to have in their possession with the intent to sell, lend, or distribute, "any

obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book . . . or who . . . prints, utters, publishes, or in any manner manufactures, or prepares any such book . . . or who . . . in any manner, hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them."[25]

At issue was the question of whether the material that depicted various deviant sexual practices such as flagellation, fetishism, and lesbianism satisfied the "prurient appeal" test contained in *Roth*. That is, instead of appealing to the prurient interest of the *average person*, ". . . they disgust and sicken." The Court, in a majority opinion delivered by Justice Brennan, rejected this argument as being derived from an incorrect interpretation of *Roth*.

> Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.[26]

Justice Brennan, the author of *Roth*, explained that the use of the term, "average person" in the *Roth* definition was intended to distinguish the holding from the rule in *Regina v. Hicklin*, which judged the work by its impact on the *most susceptible person*.

> We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the *Hicklin* test.[27]

Thus, this case addressed the issue first presented, but not decided, in *MANual Enterprises*: whether the "average person" aspect of *Roth* precluded a finding that a work appealed to the prurient interest of an average member of a deviant group. The majority of the Court concluded that *Roth* permitted a variable notion of prurience, which depended upon the intended audience.[28]

The Concept of "Pandering"

In a companion case decided the same day as *Mishkin*, the Court upheld a conviction for sending obscene materials through the mails, a violation of the federal obscenity statute.[29] In *Ginzburg v. United States*,[30] Ralph Ginzburg and three corporations under his control were denied their appeal. Evidence introduced at trial included the advertising brochures and the actions of the defendants in promoting the material. For example, the magazine *EROS* sought mailing privileges from postmasters of Intercourse and Blue Ball,

Pennsylvania and Middlesex, New Jersey. The trial court found that these communities were selected solely because their names on the postmark would help promote the salacious nature of the magazine. Other promotional literature hyped the sexual nature of the materials and included graphic sexual imagery.

In rejecting the petitioner's claim that the lower court erred in finding the works obscene despite evidence proffered of the social importance of the works, the Court held that:

> Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the *Roth* test.[31]

The notion of "pandering" derives from Homer's *The Iliad*, where one of the characters, with voyeuristic pleasure, urged the lovers Helen and Paris to engage in sexual activity. Shakespeare's tragedy, *Troilus and Cressida*, immortalized Pandar's role as a man who took his pleasure mostly from urging others to engage in various acts of depravity. Where the bookseller or distributor engages in acts of pandering (advertises the work in salacious terms, promising, in effect, that the purchaser's "prurient interest" will be aroused by the work), the Court felt justified in concluding that a work was not subject to constitutional protection. This kind of reasoning works only in one direction. For example, if the purveyors advertised the work as artistic and edifying, the Court would not be bound by the content of the advertising alone to rule that the work was not obscene.

The *Ginzburg* pandering rationale was criticized by Justice Douglas in a concurring opinion he wrote in another case—*Memoirs v. Massachusetts*—also decided the same day as *Mishkin* and *Ginzburg*. The Attorney General of the Commonwealth of Massachusetts brought an action against the book, *Memoirs of a Woman of Pleasure*, written by John Cleland in 1750.[32] Lacking jurisdiction over the publisher and concerned that it could not prove that the distributor could be charged with knowledge that the work was obscene, the Attorney General attempted to obtain a court ruling against the work itself, thereby permitting its seizure and destruction. The publisher intervened, offering expert testimony on the political and artistic value of the historical work.

The Massachusetts trial court decreed the book obscene and not entitled to the protection of the First and Fourteenth Amendments. The Massachusetts Supreme Judicial Court affirmed, holding that a patently offensive book that appeals to prurient interest need not be unqualifiedly worthless before it can be deemed obscene. On appeal the U.S. Supreme Court reversed, but without a majority opinion. Justice Brennan, in an opinion in which the Chief

Justice, and Justice Abe Fortas concurred, stated that even if a work is found to appeal to prurient interest and is patently offensive, it is nevertheless protected speech under the First Amendment if it had but a modicum of redeeming social value. Loss of constitutional protection in such a situation could only occur if it were also found that the publisher and/or distributor had touted only the prurient aspects of the work in promoting its sale—that is, if they were pandering.[33]

Varying Meanings of Obscenity: Protecting Minors

In 1968 the Court revisited the issue of whether the State may define obscenity differently for different classes of persons (see discussion of *Mishkin v. New York*). In *Ginsberg v. New York*,[34] Sam Ginsberg, who operated a stationery store and luncheonette, was convicted of selling "girlie" magazines to a 16-year-old boy in violation of 484-h of the New York Penal Law. The statute made it unlawful "knowingly to sell . . . to a minor" under 17 "(a) any picture . . . which depicts nudity . . . and which is harmful to minors," and "(b) any . . . magazine . . . which contains [such pictures] and which, taken as a whole, is harmful to minors." The State appellate court affirmed his conviction, and he appealed to the U.S. Supreme Court.

It was stipulated at the trial that the magazines in question were not obscene for adults under the *Roth* test, and the issue was whether or not the State of New York should accord to minors under 17 years of age a more restricted right than that assured to adults to judge and determine for themselves what sexually-oriented material they may read and see. A six-justice majority of the Supreme Court concluded that, given the special sensibilities of minors and the valid interest of the State in protecting minors, the New York statute was constitutional.

Justice Brennan, again writing for the majority, held that the State has power to adjust the definition of obscenity as applied to minors, for even where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."[35]

Justice Douglas, predictably, dissented, pointing out that the issue is not whether or not the nation's youth should be protected, in some way, from immoral influences, but whether or not the State may constitutionally do so.

> It is one thing for parents and the religious organizations to be active and involved. It is quite a different matter for the state to become implicated as a censor. . . .[36]

Justice Fortas dissented on different grounds, criticizing the majority for failing to define what is obscenity for minors under 17 years of

age and what makes it different from obscenity for adults: "We must know the extent to which literature or pictures may be less offensive than *Roth* requires in order to be "obscene" for purposes of a statute confined to youth."[37]

Obscenity and Privacy

In 1969, the Supreme Court ruled that the mere *possession* of admittedly obscene materials in the privacy of one's own home may not be punished by the state. In *Stanley v. Georgia*,[38] police officers, conducting a search of Stanley's home for evidence of alleged bookmaking activities pursuant to a valid warrant, found some films in his bedroom that were deemed to be obscene. He was indicted, tried, and convicted under a Georgia statute that made it a crime to knowingly possess obscene matter. The Georgia Supreme Court upheld the conviction saying that evidence of intent to sell or distribute such materials was not an element of the crime. The mere possession of the material was sufficient.

The Supreme Court voted 9–0 to reverse. Justice Thurgood Marshall wrote a brief opinion that stated that regardless of the legality or illegality of the search that uncovered the obscene films, the Constitution prohibited making the mere possession of obscene materials in one's own home, without evidence of an intent to sell or distribute, a crime. The Court rejected the notion that the materials were harmful in and of themselves and could lead to anti-social behavior:

> Given the present state of knowledge [as to the causes of antisocial behavior], the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.[39]

Justice Stewart, joined by Justices Brennan and White, concurred in the reversal of the conviction but on Fourth Amendment grounds, that is, that the screening and subsequent seizure of the films were not authorized by the warrant and thus constituted an illegal search.[40] The justices contended that the cases could be disposed of on these grounds, rather than embarking on a much more novel theory of a First Amendment "right to receive" information or a fundamental *right of privacy.*

The *Miller* Reformulation

On June 21, 1973, the Supreme Court announced a series of new decisions on the law of obscenity that are collectively referred to under the lead case of *Miller v. California*.[41] It was the first time,

since 1957, where a majority of the Court could agree on a reformulation of *Roth*. Chief Justice Warren Burger, building on *Roth*, and some, not all, of the Supreme Court decisions that followed, stated the revised test for the prosecution of obscenity:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[42]

The Court took the occasion also to reaffirm that the state (be it the federal or state government) has a legitimate and constitutionally valid interest in controlling obscenity. In *Paris Adult Theatre I v. Slaton*,[43] one of the *Miller* companion cases, the Court concluded that the state has a right to make a "morally neutral judgment" that the public exhibition of obscene material or the commercial distribution of such material has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize the states' right to maintain a "decent society."[44] In so holding, the Court made reference to the Hill-Link Minority Report of the Commission on Obscenity and Pornography,[45] which contended (in opposition to the Majority Report) that there is at least an arguable correlation between obscene material and crime.[46] In short, the Court selected the evidence that best supported its findings.

The "Serious Value" Test

Instead of proof of "utterly without" social value, the Court adopted a "serious [public] value" test. Specifically, a work meeting the "prurient interest" and "patently offensive" tests might still be redeemed if it nevertheless has *serious* literary, artistic, political, or scientific value (L.A.P.S.). The substitution of "serious" for "utterly without" trades a quantitative standard for a qualitative one. Thus, under the new test, a work may have a modicum of value, but is nevertheless lacking any *serious* value—a judgment as to quality of the work, or perhaps the *motive* or *intent* of the author.

The limitation of what can redeem an otherwise obscene work to only four categories of expression also raised concern among critics of the *Miller* formulation. For example, it was asked, "how is the element of serious value to be determined?" In *Kaplan v. California*,[47] one of the companion cases to *Miller*, the Court ruled that the State need not introduce expert testimony to prove obscenity; moreover, the "contemporary community standards" was not included as a qualifier to the L.A.P.S. test, indicating that varying standards of value from community to community was not what was contemplated. Could jurors, who might be trusted to decide for themselves

whether (applying contemporary community standards) the work appeals to the prurient interest also be expected to have the requisite academic knowledge to make value judgments as to literary or artistic quality, or the scientific background to evaluate the work as a contribution to scientific knowledge? The *Miller* cases did not answer these questions.

The "Patently Offensive" Test

Another change in the wording of the *Roth/Memoirs* formulation was the "patently offensive" test. The new formulation added both the elements of *required specificity* and a limitation on the type of material that the State may punish as patently offensive, that is, *sexual conduct*. In discussing this element the Court ruled that the applicable state law must specifically define the depictions or descriptions of sexual conduct. Once again, the Court grappled with the concept of "hard core pornography" without using the phrase. In an attempt to provide some guidance, the Court listed two examples of what a State could define for regulation under the patently offensive test:

(a) *Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.*

(b) *Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.*[48]

These examples, however, seemed only to point to the specific subject matter, and not to any specific manner of presentation—particularly since the same terminology "patently offensive" is repeated in the example. The Court did not devote any space to distinguishing between a constitutionally protected and an unprotected "lewd" exhibition of the genitals. The Court did, however, make reference to the statutes of Oregon and Hawaii as examples of statutes that in its opinion would meet the required degree of specificity.[49]

The Application of "Contemporary Community Standards"

Perhaps the most troublesome aspect of the *Miller* reformulation of earlier definitions of obscenity was the emphasis on the application of "contemporary community standards." The concept is traced to an early federal district court opinion by Judge Learned Hand,[50] who argued for a standard unrelated to the "most susceptible person" test that had been used in *Regina v. Hicklin*: "To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by necessities of the lowest and least capable

seems a fatal policy."[51] Picking up on that decision as well as *Roth*, which rejected the *Hicklin* test, the American Law Institute had defined obscenity in its *Model Penal Code* as material going "substantially beyond customary limits of candor in description or representation of such matters as nudity, sex, or excretion."[52]

The *Miller* Court, however, opted for a *local*, not national, community standard for judging prurience and offensiveness in the context of obscenity. While admitting that fundamental First Amendment limitations on the powers of the states do *not* vary from community to community, the majority opinion argued that this meant that there are no fixed, uniform standards of what appeals to the prurient interest or is patently offensive. Rather, said the Court, these are questions of fact to be determined by the local jury applying the standards of their own communities. The Court claimed that it was relieving the jury of "abstract" applications of such terms as "prurient," and allowing the adversarial process to be grounded in contemporary and local standards of what was offensive. The local prosecutor should not have to construct his or her case around a vague, national standard. The announcement of a variable standard for prurience and offensiveness brought immediate criticism from constitutional scholars and libertarians alike, who warned that such use could have a depressing effect on interstate commerce. If the states were free to determine for themselves what could be considered obscene, national publishers and distributors of films, books, and magazines could face a multitude of prosecutions, all with differing sets of standards.

Moreover, the local standards doctrine created a potential dilemma for federal judges attempting to apply *federal* obscenity statutes. In a companion case to *Miller*, *United States v. 12 200-Ft. Reels of Film*, the Supreme Court stated that the three-part test announced in *Miller* applied to federal legislation.[53] However, that case did not address the specific question of multiple community standards in applying federal law. In a federal circuit court case, decided after the issuance of *Miller*, the concept of multiple community standards was rejected as unworkable.[54] The case involved the seizure of a film by U.S. customs officials at Logan Airport in Boston, and the commencement of an action in federal district court to adjudge it obscene. The circuit court upheld the federal district court's determination that local community standards did not apply to proceedings brought under the statute permitting seizure by customs officials of suspected obscene materials.[55]

Justice Brennan, the author of the majority opinion in *Roth v. United States* and many of its progeny, dissented from the *Miller* formulation and announced that he believed it was time to abandon the whole concept underlying the exemption of obscenity and pornography from First Amendment protection.

> I am convinced that the approach initiated 16 years ago in Roth v. United States, . . . and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach.[56]

The problem, said Justice Brennan, was that any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although the Court has assumed that obscenity does exist and that they "know it when [they] see it," the Justices are "manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech."[57] Justice Brennan concluded,

> The problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so. The number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court.[58]

After reviewing the efforts of the Court to define obscenity with greater degrees of precision after *Roth*, Justice Brennan concluded that no formulation could draw the requisite "bright line" between material that was protected and material that was not. As a result, Justice Brennan argued that, except for laws advancing the state's legitimate interest in protecting juveniles and unconsenting adults, neither the states nor the federal government had an interest in prosecuting obscenity that was strong enough to outweigh the constitutional protection of freedom of expression.[59]

Prosecution of Allegedly Obscene Materials

In the immediate wake of *Miller* came a bevy of prosecutions brought by state and local prosecutors against producers and publishers of movies, books, and magazines. Armed with community backing, and what appeared to be almost *carte blanche* authority to suppress materials dealing with explicit sexual activity, local prosecutors began seizing books, closing down movie houses, and adult bookstores and bringing criminal proceedings against their owners. Among the motion pictures alleged to be obscene under state prosecutions were *Last Tango in Paris*,[60] *Deep Throat*,[61] *Vixen*,[62] *Behind the Green Door*,[63] and *Carnal Knowledge*.[64] Prosecutions of books included *The Illustrated Presidential Report of the Commission on Obscenity and Pornography*[65] and *A Clockwork Orange*.[66] It soon

became clear to the members of the Supreme Court who had sided with the majority in *Miller* that, rather than resolving the vagueness and ambiguity that surrounded obscenity prosecutions, the *Miller* decision had exacerbated the problem.

In *Hamling v. United States*,[67] Hamling and others were convicted under the federal statute prohibiting the mailing or conspiring to use the mails to distribute obscene matter.[68] The principal issue before the Supreme Court was whether or not the federal statute imposed a *national* community standard, and if so, whether the federal district court's instructions to the jury to apply the community standard prevalent in California (where the prosecution took place) was in error.

A majority headed by Justice Rehnquist held that neither a "national" nor a statewide community standard was required in federal cases:

> The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion "the average person, applying contemporary community standards" would reach in a given case. Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that "community" upon which the jurors would draw. But this is not to say that a district court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide.[69]

A second issue addressed in the *Hamling* case concerned the breadth of the instructions given to the jury by the trial court concerning prurient appeal. The jury was instructed that it could find prurient appeal based upon the sensibilities of deviant groups as well as those of the "average person," citing *Mishkin v. New York*. The *Mishkin* case, however, ruled that "where the material is *designed for and primarily disseminated to* a clearly defined deviant sexual group rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied" if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that deviant group.[70] The government offered no evidence in *Hamling* that the material in question was designed and intended to appeal to such groups. In spite of that lack of foundation, the trial judge allowed the government to offer evidence that such material would appeal to deviant groups and gave instructions to the jury that allowed them to make different findings as to the type of intended recipients of the brochure. The Court's affirmation of

that ruling raised questions about whether the "most susceptible person" test of *Regina vs. Hicklin*,[71] rejected in *Roth*, had been resurrected by the Court in *Hamling*.

In *Jenkins v. Georgia*, a theater owner was convicted under a Georgia statute[72] (similar in substance to the Massachusetts statute in the *Memoirs* case) of exhibiting the film, *Carnal Knowledge*. A divided Georgia State Supreme Court upheld the conviction. The U.S. Supreme Court reversed the conviction. In doing so, it nevertheless held that there is no constitutional requirement that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community (the *Miller* case approving, but not mandating, such an instruction), and jurors may properly be instructed to apply "community standards," without a specification of which "community" by the trial court.

At the same time, ruled the Court, juries do not have unbridled discretion in determining what is "patently offensive" since, under *Miller*, the material in question must depict or describe patently offensive "hard core" sexual conduct. In making an independent review of the film, the Court concluded that its depiction of sexual conduct was not patently offensive.

> While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards.[73]

With *Jenkins*, the Court sent a message to state and local prosecutors that the *Miller* decision decided the previous term had not given *carte blanche* authority to prosecute the purveyors of any book or film that depicts nudity or even sexual acts, even if members of a particular community found such depictions offensive.[74]

Justices Brennan, Stewart, and Marshall pointed out a problem with the new obscenity test: no standard had yet been enunciated that would give jurors and judges a clear basis for determining the alleged obscenity of a work. Thus, it is clear that as long as the *Miller* test remains in effect "one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so."[75]

Post-*Miller* Litigation

Despite Justice Brennan's dire prediction that the Court would continuously be besieged by appeals on the question of whether or not various materials were obscene, the development of the law took

a different turn. After the decision in *Jenkins v. Georgia* state and local legislative bodies, recognizing that portrayals of nudity could not be banned outright as constituting obscenity, shifted to the theory that adult bookstores and movie houses could be controlled under *zoning* ordinances and *public nuisance* statutes.

The Supreme Court had previously ruled, for example, that the First Amendment did not prevent the government from protecting its citizens from unwanted *intrusions* into their privacy by materials they found offensive. In *Rowan v. Post Office Department*,[76] the Court upheld a federal statute that gave the right to citizens to ask that the post office not deliver additional letters or other materials from a particular sender on the ground that the addressee finds the material offensive. The citizen's right to privacy outweighed the sender's right to free speech, according to the Court, because the mail intruded into one's private home, rather than in public. Similarly, in *Lehman v. City of Shaker Heights*,[77] the Court upheld a municipal policy that refused to make advertising space on buses available to political advertisers. The plurality concluded that the city transit system was not a traditional public forum such as were streets and parks, and members of the public who used the city bus system were a "captive audience" who should not have to forego public transportation to avoid being bombarded with political messages.[78]

Beginning in 1975, the Court's emphasis shifted from reviewing the *content* of allegedly obscene works to the statutory framework created by states and localities to restrict, or *channel*, rather than prohibit, the purveying and distribution of materials dealing with sexual conduct. In *Erznoznik v. City of Jacksonville*,[79] the appellant, a manager of a drive-in theatre in Jacksonville, Florida, was convicted of exhibiting a motion picture, visible from public streets, in which "female buttocks and bare breasts were shown."[80] The city readily admitted that the ordinance swept far beyond the permissible restraints on obscenity under the *Miller* test, but argued that any movie containing nudity that is visible in a public place may be suppressed as a *nuisance*. The city argued that the government has a right to protect children and non-consenting adults, who would be injured or offended by such material.[81]

A majority of the Court, this time composed of many of the dissenters in *Miller* and *Hamling*, held that, while the government has the right to place reasonable time, place, and manner restrictions of the expression of all ideas in public places, when it acts as a censor and undertakes *selectively* to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. Here, the majority argued, the ordinance discriminated among movies solely on the basis of *content*.[82] The majority also held that if the main purpose of the ordinance was to protect minors, it was still too broad, since not all nudity can be deemed obscene, even for minors. The Court was

equally nonplused by the city's argument that such displays could be distracting to motorists and lead to traffic congestion or accidents.[83] Other scenes, ranging from soap opera to violence could be equally distracting, said the Court, and the city offered no justification for the *under inclusiveness* of the ordinance with regard to subject matter.[84]

Chief Justice Burger wrote a dissent, in which Justice Rehnquist joined, arguing that the majority applied absolutes to a situation that required specific factual analysis. If it is true, said the Chief Justice, that the government has the right to prohibit nudity in public places (despite any communicative nature of that nudity), the Court needs to explain why, under a public nuisance theory, it cannot equally prohibit displays of nudity on film visible to the public. The fact that the film in question was not obscene was thus not an issue, and the majority's attempts to apply elements of the *Miller* test to the situation were misguided.[85]

The Court next took up the question of zoning and whether municipal ordinances restricting the location of "adult" theatres and bookstores infringed on First Amendment rights.

In *Young v. American Mini Theatres*,[86] decided the year after *Erznoznik*, a majority ruled that Detroit's "Anti-Skid Row" ordinances did not violate the First Amendment. The ordinances provided that an adult theater may not, without a special waiver, be located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area.[87] If the theater was used to present "material distinguished or characterized by an emphasis on matter depicting 'specified sexual activities' or 'specified anatomical areas'" it was an "adult" establishment. The proprietor of an adult theatre, while not claiming that the "specified" activities or anatomical areas were not specific enough, challenged the ordinances as unconstitutionally vague because there was no guidance as to how much of such activity would be necessary before an enterprise could be characterized as an adult establishment.

The Court rejected the vagueness arguments,[88] saying that the ordinance was written with a good deal of precision and contained valid "time, place and manner" restrictions on commercial enterprises that would have no demonstrably significant effect on the exhibition of films protected by the First Amendment. Justice Powell wrote a concurring opinion, saying that the Detroit ordinances were valid examples of land-use regulation designed to preserve the quality of life which the Court had previously sustained in a 1926 case,[89] and there was no evidence whatsoever that the exhibition of adult films, and a citizen's right to view them, had been infringed.

The dissenters, led by Justice Stewart, argued that the ordinances were a system of prior restraints enforcing content-based restrictions on the geographic location of motion picture theaters that exhibit non-obscene but sexually explicit films. They contended that this case was indistinguishable from *Erznoznik* and like cases

upholding the speaker's rights over the government's attempt to protect the sensibilities of non-consenting persons in public places. Unlike truly content-neutral time, place, and manner restrictions, these ordinances, said Justice Stewart, made categorical distinctions based solely on the *content* of the films or books. Justice Blackmun wrote a separate dissent, pointing out that the vagueness challenge to the ordinances was compounded by the fact that not only must a theater owner determine whether his business must be deemed "adult" but also whether his theater was in an area where there were two other such regulated uses—which in turn required him to evaluate for himself whether any such other uses could be characterized as primarily "adult."

Ten years later, similar zoning regulations adopted by the city of Renton, Washington, came before the Court. Unlike Detroit's Anti-Skid Row ordinances (designed to prevent clustering of adult theaters and bookstores in a small area) Renton had adopted an ordinance simply prohibiting any adult motion picture theater from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park, or school. While the federal district court upheld the ordinance as a valid content-neutral time, place, and manner restriction, the Ninth Circuit U.S. Court of Appeals reversed saying that the ordinance constituted an impermissible intrusion into First Amendment rights.

A seven-justice majority[90] of the Supreme Court reversed the Ninth Circuit, however, and upheld the validity of the regulations citing the *Young* case as authority.[91] Both the *Young* case and the *Renton* case, said the Court, were attempts by the affected municipalities to address the deleterious effects such businesses had on neighborhoods, rather than intended to suppress expression:

> The District Court's finding as to "predominate" intent, left undisturbed by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression. The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views. . . . As Justice Powell observed in *[Young v.] American Mini Theatres*, "[i]f [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location."[92]

A more recent case took the concept of zoning or channeling constitutional but undesirable speech one step further. In *City of Los Angeles v. Alameda Books, Inc.*,[93] the Supreme Court reversed a Ninth Circuit ruling that struck down a Los Angeles zoning ordi-

nance that banned not only the location of adult bookstores and theatres near schools, parks, and churches but also the *concentration* of such establishments within a single area.[94] The city had relied on a 1977 study that concluded that a concentration of such businesses resulted in an increased incidence of crimes in the surrounding area.

Two adult establishments that operated combined bookstores/video arcades in violation of the ordinance sued for declaratory and injunctive relief, alleging that the ordinance, on its face, violated the First Amendment. Finding that the ordinance was not a content-neutral regulation of speech, the U.S. District Court granted summary judgment on the grounds that the city had not offered sufficient evidence demonstrating that its prohibition was necessary to serve a compelling government interest.

The U.S. Court of Appeals for the Ninth Circuit affirmed on the different grounds that even if the ordinance were content neutral the city failed to present evidence upon which it could reasonably rely to demonstrate that its regulation of multiple-use establishments was designed to serve its substantial interest in reducing crime. The court therefore held the ordinance invalid under *Renton*.

The U.S. Supreme Court, in a plurality opinion written by Justice O'Connor and joined in by Chief Justice Rehnquist and Justices Scalia and Thomas,[95] reversed. The 1977 study, said Justice O'Connor, provided more than adequate support for the city's belief that high concentrations of adult entertainment establishments were linked with significantly higher crime rates and that a reduction of one could lead to a reduction of the other. That the reduction of crime rates in the city was a compelling governmental interest was not really in dispute. So long as a municipality had a reasonable basis to regulate—but not altogether ban—the commercial activity, under *Renton*, the ordinance would pass muster as a reasonable restriction on the time, place, and/or manner of expression. At the same time, Justice O'Connor noted, if the challengers could demonstrate with their own evidence that the link between the governmental interest and the specific regulation was not reasonable, the burden would be shifted back to the government to provide additional evidence that the regulation would pass the strict scrutiny test.[96]

Conduct vs. Speech

An issue related to zoning and channeling cases concerns public nudity. We saw in chapter 4 that the Supreme Court adopted special procedures to deal with speech as conduct, such as flag burning, draft-card burning, street theater, and the like. Since 1968 the Court has followed a "balancing test" for determining whether or not the legitimate interests of the state in regulating objectionable conduct outweigh the rights of the speaker in using such conduct as a means of communicating ideas:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[97]

One year before the *Miller* decision, the Court had dealt with the question of whether or not nude dancing was entitled to any First Amendment protection. In *California v. LaRue*,[98] the Court by a six-justice majority upheld California liquor licensing regulations that prohibited nude dancing and certain kinds of sexual acts (real or depicted) at bars and other establishments licensed to serve alcoholic beverages. While the U.S. District Court struck down the regulations as failing the *O'Brien* Test, the U.S. Supreme Court reversed, holding that, given the evils the legislature had found associated with such acts and the imbibing of alcohol, this was a valid statutory scheme under the Twenty-First Amendment.[99] The decision was reaffirmed eleven years later in *New York State Liquor Authority v. Bellanca*,[100] where the Court upheld the validity of a New York law prohibiting nude dancing in establishments licensed to serve alcoholic beverages, again on the theory that the power granted to the States under the Twenty-first Amendment outweighed whatever First Amendment protection to which nude dancing would otherwise be entitled.[101]

In *Barnes v. Glen Theatre, Inc.*,[102] the Court addressed the separate issue of whether or not a state could ban totally nude dancing. Chief Justice Rehnquist wrote an opinion in which Justices O'Connor and Kennedy joined, upholding the constitutional validity of an Indiana "public indecency" statute that barred totally nude dancing, requiring dancers to wear pasties and a G-string.[103]

While a majority of the members of the Court regarded nude dancing as having a modicum of First Amendment protection, they viewed the state's interest in regulating public nudity as outweighing whatever First Amendment protection that nude dancing may have as a means of expression. Four of the Court's members believed that the appropriate test to apply was the *O'Brien* balancing test referred to in chapter 4. The Court upheld the regulation of public nudity as the valid exercise of a state's police power,[104] and that the legislative history of the statute in question clearly established that the governmental purpose was to protect the public morals and prevent public disorder—important governmental interests.

Moreover, the Chief Justice reasoned, the purpose of the statute was not intended to suppress speech:

> [W]e do not think that, when Indiana applies its statute to the nude dancing in these nightclubs it is proscribing nudity because of the erotic message conveyed by the dancers. Presumably numerous

> other erotic performances are presented at these establishments and similar clubs without any interference from the state, so long as the performers wear a scant amount of clothing.[105]

The last prong of the *O'Brien* test was also met, according to the Chief Justice, because the public indecency statute was narrowly tailored: "Indiana's requirement that the dancers wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve the state's purpose."[106]

The dissenters, led by Justice White found troubling the fact that Indiana had selectively applied the statute to ban topless and nude dancing in bars and nightclubs, while making no attempt to prosecute nudity when part of a theatrical production, such as *Hair* or *Salome*. "The perceived damage to the public interest caused by appearing nude on the streets or in the parks," said Justice White, "is not what the State seeks to avoid in preventing nude dancing in theatres and taverns. There the perceived harm is the *communicative* aspect of the erotic dance."[107] Thus, he argued, the governmental interest is, in fact, related to the suppression of free expression, and the level of constitutional scrutiny to be applied to such a statute is much more significant than the majority justices imply.

The Regulation of Child Pornography

We learned in *Ginsberg v. New York*[108] that the Constitution allows the states to exercise more restrictive measures against non-obscene materials dealing with sexual conduct where the purpose is to protect minors. Cases decided subsequent to *Miller* continued to make this distinction, particularly in the area of *child pornography*.

In *New York v. Ferber*,[109] for example, the Court upheld a New York statute prohibiting persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material that depicts such a performance.[110] Ferber, a bookstore proprietor, was convicted under the statute and challenged it as violating the First Amendment by being overly board, that is, prohibiting non-obscene as well as obscene material. The New York Court of Appeals agreed and struck down the statute.

Justice White, writing the majority opinion for the Supreme Court,[111] reversed the State appellate court concluding that the statute as applied to the defendant in this case was constitutional. The states are entitled to greater leeway in the regulation of pornographic depictions of children, Justice White argued, for the following reasons: (1) the legislative judgment that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child easily passes muster under the First Amendment; (2) the standard of *Miller v. California* for determining what is legally obscene is not a satisfactory solution to the child por-

nography problem: (3) the advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the nation; (4) the value of permitting live performances and photographic reproductions of children engaged in lewd exhibitions is exceedingly modest; and (5) recognizing and classifying child pornography as a category of material outside the First Amendment's protection is not incompatible with the Court's previous decisions dealing with what speech is unprotected. When a definable class of material, such as that covered by the New York statute, he stated, bears so heavily and pervasively on the welfare of children engaged in its production, the balance of competing interests is clearly struck, and it is permissible to consider these materials as without the First Amendment's protection.

In upholding the statute, the Court took upon itself to explain how this separate category of unprotected speech was to be distinguished from *Miller*:

> The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for the purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection. As with obscenity laws, criminal responsibility may not be imposed without some element of *scienter*[112] on the part of the defendant.[113]

In *Osborne v. Ohio*,[114] the Court revisited the question of whether mere *possession* of child pornography could be prosecuted. Recall that in *Stanley v. Georgia*,[115] the Court had reversed the conviction of a man who had a library of obscene materials in his house, with no evidence to support a conclusion that the materials were intended to be sold or otherwise distributed to others. The rationale developed by the Court was that the state's interest in prohibiting the mere possession of such materials was inadequate to void a person's right to privacy in his own home.

The *Osborne* case involved a state statute[116] making it unlawful for any person to possess or view any material or performance showing a minor[117] who is not his child or ward in a state of nudity or undress.[118] Osborne appealed his conviction, citing *Stanley*, on the basis that the materials were found in his home, and there was no evidence that he was distributing or had any intent to distribute the materials. Additionally, he attacked the statute as overbroad and that

he had been denied due process by the trial court's failure to give adequate instructions to the jury on the state's burden of proof.

The Court upheld the validity of the statute saying that *Stanley* was not applicable, as it did not involve child pornography. The interest of the state in protecting minors was a more compelling governmental interest than in controlling a consenting adult's private thoughts. The Court noted that other governmental interests also supported the statute. As noted in *Ferber*, the materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. The State's ban on possession and viewing encourages the possessors of these materials to destroy them. Second, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

Having rejected Osborne's objections on facial validity and overbreadth, the Court nevertheless reversed the conviction and remanded to the Ohio courts because the record was inadequate to support a conclusion that the state had proved each of the elements of the offense, specifically, (1) *scienter*, (knowingly violating the law) and (2) the saving construction of the statute that the depictions were limited to those that were *lewd*. Since the trial judge did not instruct the jury that the state had to prove these elements in order to return a guilty verdict, Osborne was denied procedural due process.[119]

In 1996, Congress passed the Child Pornography Prevention Act (CPPA),[120] which expanded the federal prohibition on child pornography to include not only pornographic images made using actual children but also "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct," and any sexually explicit image that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct."[121] Subparagraph (B) thus banned a range of sexually explicit images, sometimes called "virtual child pornography," that appear to depict minors but were produced by means other than using real children, such as through the use of youthful-looking adults or computer-imaging technology. Subsection (D) was aimed at preventing the production or distribution of pornographic material pandered as child pornography.

An adult-entertainment trade association and others filed suit alleging that the "appears to be" and "conveys the impression" provisions were overbroad and vague, chilling production of works protected by the First Amendment. The U.S. District Court disagreed and granted summary judgment in favor of the federal government.

On appeal, the Ninth Circuit reversed, holding that the CPPA was invalid on its face, because it was substantially overbroad by

banning materials that are neither obscene under *Miller v. California* nor produced by the exploitation of real children as upheld by the Supreme Court in *New York v. Ferber*. The government asked the Supreme Court to overturn the Ninth Circuit's holding.

In *Ashcroft v. Free Speech Coalition*,[122] a five-justice majority agreed with the Ninth Circuit and held the language of the statute constitutionally overbroad. The language of the statute, Justice Kennedy argued for the majority, could be found to prohibit such meritorious films as *Lolita*, *American Beauty*, or *Traffic*, because the actresses in each of those films appeared to be and were intended to be regarded as minors. Because the statute prohibited any depiction of sexually explicit activity, regardless of whether or not it had prurient appeal or taken as a whole possessed serious literary, artistic, political, or scientific value as required by *Miller*. Moreover, since the ban extended to "virtual" child pornography and was not limited to cases where minors were used and exploited in the visual works, the statute was not saved by the *Ferber* rationale, which was intended to halt the exploitation of minors in the pornography industry.

For similar reasons the Court found the "pandering" provision of CPPA overbroad. The Act does more than prohibit pandering, said the Court. It bans possession of material pandered as child pornography by someone earlier in the distribution chain, as well as a sexually explicit film that contains no youthful actors but has been packaged to suggest such a prohibited movie. Possession was made a crime even when the possessor knew the movie was mislabeled (and thus neither obscene nor child pornography). Thus, the statute reached well beyond what *Ginzburg* and subsequent cases stood for.

Conclusion

More than seventy years ago, Sigmund Freud wrote:

> The liberty of the individual is no gift of civilization. It was greatest before there was any civilization, though then, it is true, it had for the most part no value, since the individual was scarcely in a position to defend it. The development of civilization imposes restrictions on it, and justice demands that no one shall escape those restrictions. What makes itself felt in a human community as a desire for freedom may be their revolt against some existing injustice and so may prove favorable to a further development of civilization; it may remain compatible with civilization. But it may also spring from the remains of the original personality, which is still untamed by civilization and may thus become the basis in them of hostility to civilization. The urge for freedom, therefore, is directed against particular forms and demands of civilization or against civilization altogether.[123]

The Supreme Court, as a final arbiter of the rules of U.S. civilization, has been perplexed by the problem of obscenity. On the one hand is a belief (approaching certitude) that if left unchecked, obscenity could grow into a monster that would devour our children and enslave and debase adult minds. The lack of empirical evidence to support such a belief has not caused the justices to waver in their conviction that obscenity is an evil.

The problem is reaching a consensus about where to draw the line. While some, like Justice Stewart, "know it when they see it," *intuitive* line drawing is the very antithesis of the concept of law in Western civilization. Moreover, each person's intuition about what is and what is not obscene can vary significantly, as we saw in the immediate wake of *Miller*. Rather than providing a solution, the *Miller* test seemed only to stir things up, leaving the tension between freedom of expression and the law as taut as ever.

Although the legal system may never be able to arrive at a concise definition of what is and what is not obscene, there is less disagreement about the need to protect children not only from becoming victims of the child pornographer but also from being exposed to overly graphic depictions of sexual and excretory conduct. Court decisions in this area tend to be unanimous, at least on the point that the State has the right to protect minors from pornography, even if the material is not legally "obscene" under the *Miller* formulation. Nearly every state has laws against child pornography, and one never hears impassioned defenses of the First Amendment rights of child pornographers.

Similarly, there exists a point where all would agree that even an adult has the "right not to listen"—to be protected from offensive messages, be they unwanted material of a graphically sexual nature or the hard sell messages of an aggressive telemarketer.

However, even in these areas, protection of minors and the privacy of non-consenting adults, the law cannot be absolute. The *Erznoznik*, *American Mini-Theatres*, and later cases illustrate the difficulties encountered when the government attempts to erect "pornography-free zones" within a community. Moreover, twentieth century technologies that now bring art, entertainment, and other expression directly into the home may require different kinds of regulation than what the Supreme Court has found acceptable for theatres, streets, and parks.

Study Questions

1. Do you agree with former Chief Justice Burger (who authored *Miller v. California*) that the reformulation of *Roth* as articulated in the majority decision would limit the definition of obscenity only to what traditionally has been regarded as "hard core pornography"? Do you agree with Justice Potter Stewart that al-

though "hard core pornography" may be hard to define, one "knows it when he sees it"?

2. Do you agree with the Court that states have greater power to infringe on freedom of expression to protect children? Are children, in fact, "more susceptible" to the evils of obscenity and pornography? If so, what is it about children or about pornography that makes them more susceptible and what is it that they are more susceptible *to*? Does the *Ginsberg* decision and its progeny resurrect the *Hicklin* test, allowing the state to prohibit that which would have an adverse impact on the "most susceptible person"?

3. It cannot be disputed that during the last fifty years of motion pictures as well as television programming we have seen a steady expansion of the kind of material dealing with sexual conduct that could be shown without fear of prosecution. Network censors in the 1950s, for example, required bedroom scenes to have twin beds and that a husband and wife could not be in the same bed in such scenes. The only nudity allowed was the posteriors of infants. Standards of what is offensive, if not obscene, have obviously changed. Does this mean that what constitutes "hard core pornography" has also changed over those fifty years, or does that "core" remain the same?

Simulation Exercise

1. *Trial Case 8-1:* An employee in a photo lab in Omaha, Nebraska, discovers photographs of nude children, estimated to be ages 3 through 5. The backdrops for these photos appear to be a bathroom as well as a bedroom. The children are not consciously posing for the camera but appear to be engrossed in playing with toys or reading books, etc. Nebraska has a "child pornography" law that prohibits the taking, sale, or distribution or possession of photographs or other graphic depictions of minors that portrays or exposes the genitalia. Some of the nude pictures show the children's genitals. Employees in the photo lab have been instructed to advise their superiors if they develop any film that contains pictures of children in the nude. The employee does so, and his superior calls the police, who come and confiscate the photos. Based on the information supplied on the envelope by the party who left the film, the police are led to the home of Mrs. Dubfire, an elderly woman who baby-sits for a number of families in the neighborhood. She is arrested and charged with violation of the child pornography statute.

   At trial, Mrs. Dubfire explains that she thought the children were very cute playing together and she wanted to take the pictures

and give them to the parents of the children. The prosecution offers no other evidence on Mrs. Dubfire's culpability. Several witnesses for the defense testify as to the good character of Mrs. Dubfire. At the end of the case, a motion is made by the defense for a "directed verdict" in favor of the defendant (that is, asking that the judge direct the jury to return a verdict of not guilty because the prosecution has failed to prove its case). However, the judge allows the case to go forward. The state argues that the restrictions pertaining to the pictures might well result at times in the arrest of a well-meaning person. However, it is the price we must pay to eliminate child pornography altogether. Where well-meaning people are convicted a judge can reduce the sentence. The jury convicts Mrs. Dubfire; the judge offers a reduced sentence. But Mrs. Dubfire appeals the case to the Supreme Court. Side one = Mrs. Dubfire; side two = the prosecution. Supreme Court: How do you find?

Endnotes

[1] Once again, the distrust and fear of the newer communication technology print despite widespread illiteracy in England at the time caused lawmakers to treat the potential harm that the print media could cause as far more serious and extensive than it really was.

[2] For example, in 1948, the Supreme Court reversed the misdemeanor conviction of a bookseller under a New York statute that permitted prosecution of any person who:

> Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime . . .

The Court held that the statute, even as construed by the New York courts to apply to obscenity and indecency, was unconstitutionally vague. *Winters v. New York*, 333 U.S. 507, 510 (1948).

[3] See, for example, *Ex parte Jackson*, 96 U.S. 727, 736–737; *United States v. Chase*, 135 U.S. 255, 261; *Robertson v. Baldwin*, 165 U.S. 275, 281; *Public Clearing House v. Coyne*, 194 U.S. 497, 508; *Hoke v. United States*, 227 U.S. 308, 322; *Near v. Minnesota*, 283 U.S. 697, 716; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572; *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158; Winters v. New York, *supra*, 333 U.S. at 510; *Beauharnais v. Illinois*, 343 U.S. 250, 266.

[4] 354 U.S. 476 (1957). *Roth* dealt with a conviction under a federal statute, 18 U.S.C. §1461, that made it a crime to mail any material that is "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character. A companion case decided with *Roth*, *Alberts v. California*, dealt with a state statute which made it a misdemeanor to keep for

sale, or to advertise, material that is "obscene or indecent." (West's California Penal Code, 1955, §311).

[5] 354 U.S. 476, 482–485 (1957).

[6] The "clear and present danger" test was established in chapter 4.

[7] The Court cited to an earlier decision, *Beauharnais v. Illinois*, 343 U.S. 250 (1952), where the Court had rejected the need to prove clear and present danger under a criminal libel statute:

> "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' *Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances.* Libel, as we have seen, is in the same class." 343 U.S. 250, 256 [emphasis supplied].

[8] 354 U.S. 476, 485 (1957).

[9] The fact that such lustful thoughts did not result, or did not have any tendency to incite others to commit any antisocial acts was irrelevant, said the Court, because obscene speech had no social importance or value and was not protected. This circular nature of this argument apparently went unacknowledged by the Court.

[10] 354 U.S. 476, 487 (Note 20).

[11] 354 U.S. 476, citing A. L. I., Model Penal Code, §207.10 (2) (Tent. Draft No. 6, 1957).

[12] 354 U.S. 476, 489. The Court referred to a number of federal and state cases where a similar formulation had been used in instructions to the jury. (Note 26). Thus, the *Roth* case did not originate the "prurient interest" test for obscenity, but simply adopted the viewpoint expressed in most of the more recently decided state and federal cases to date.

[13] 354 U.S. 476, 512 (Opinion of Douglas, J.)

[14] 370 U.S. 478 (1962).

[15] The publishers sought an injunction against the Postmaster General in federal District Court, which denied the injunction. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the District Court's denial. The Supreme Court granted *certiorari* to the petitioners in order to rule on this application of the federal statute (18 U.S.C. §1461).

[16] Since fewer than five justices joined in the opinion, the holding of the case was limited to only the judgment.

[17] The issue of whether or not the photos in the magazines had prurient appeal to the homosexual community and if so, whether or not that was sufficient to meet the *Roth* requirement was not addressed, Justice Harland finding it unnecessary to do so. The issue of variable obscenity was revisited by the Court four years later in *Mishkin v. New York*. See below.

[18] Justice Brennan made this point in a concurring opinion in which the Chief Justice and Justice Douglas concurred. Justice Black concurred in the result, but offered no opinion. Justices Frankfurter and White did not participate at all in the decision. Justice Clark was the lone dissenter, who argued that the determination could be upheld on the grounds that the magazines contained advertisements as to where obscene material could be found and that the statute *required* that the Postmaster General make the kind of determination involved here.

[19] 378 U.S. 184 (1964).

[20] Once again, the six Justices who voted for reversal could not agree on a uniform rationale. Justice Harlan, who authored the *Roth* opinion, used the occasion to advance his own constitutional theory, but succeeded only in convincing Justice Goldberg, who was soon to leave the Court to become the U.S. ambassador to the United Nations, to go along. As in *MANual Enterprises*, Harlan could not assemble a five-justice majority, only a plurality on this point.

[21] 343 U.S. 495 (1943).

[22] 378 U.S. 184, 193 (citing Webster's New International Dictionary, 2nd ed. 1949, p. 542).

[23] 378 U.S. 184, 203.

[24] 383 U.S. 502 (1966).

[25] The Court noted that the New York courts had interpreted obscenity in the statute to cover only "hard-core pornography"—a definition more stringent than the definition contained in the *Roth* test. Thus, the appellant's attack on the facial validity of the statute as being too vague was rejected.

[26] 383 U.S. 502, 508.

[27] 383 U.S. 502, 509.

[28] Although the Court upheld the conviction on the basis that the material would satisfy the "prurient interest" test of *Roth* by referring to the effect on the *intended audience*, there was no evidence offered in the lower court that the material had such an appeal. See, Dissenting Opinion of Justice Stewart (383 U.S. 502, 518-519).

[29] 18 U.S.C. §1461.

[30] 383 U.S. 463 (1966).

[31] 383 U.S. 463, 470–471.

[32] The work is better known by its heroine's name, "Fanny Hill."

[33] Justices Black and Stewart concurred in the reversal but not in the basis for Justice Brennan's opinion. Justice Douglas dissented, referring, as he often did, to the "Congress shall make no law" phrase in the First Amendment, but took the occasion to amplify the record by referencing the expert opinions offered at trial and attaching a copy of an address by a Unitarian Minister supporting the moral teachings of *Memoirs*. Justices White, Harlan, and Clark dissented, each writing separately.

[34] 390 U.S. 629 (1968).

[35] 390 U.S. 629, 638–639.

[36] 390 U.S. 629, 655–56.

[37] 390 U.S. 629, 673.

[38] 394 U.S. 557 (1969).

[39] 394 U.S. 557, 567.

[40] Justice Stewart distinguished *Stanley* from the Fourth Amendment cases that permitted the seizure of illegal contraband or other criminal evidence where discovered in plain sight. In *Stanley*, the officers had to find a movie projector and screen the films before any determination could be made that they constituted "illegal" material.

[41] *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Kaplan v. California*, 413 U.S. 115 (1973); *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123 (1973); *United States v. Orito*, 413 U.S. 139 (1973).

[42] *Miller v. California*, 413 U.S. 15, 24 (1973).
[43] 413 U.S. 15, 49 (1973).
[44] 413 U.S. 15, 69.
[45] *The Report of the Commission on Obscenity and Pornography*, pp. 456–505 (*New York Times* Edition, 1970) ("Obscenity Commission"). The Commission, appointed by President Richard Nixon, was charged with studying the effect of obscenity and pornography on society. The Majority Report concluded that there was no empirical evidence supporting a conclusion that exposure to explicit sexual materials play a significant role in the causation of delinquent or criminal behavior among youth or adults. *Id.*, at p. 32.
[46] *Paris Adult Theatre I, supra*, 413 U.S. 49, 58, (citing the *Obscenity Commission Report* at pp. 390–412). While the Court denied that it was overruling its 1969 decision in *Stanley v. Georgia*, 394 U.S. 557, its holding in *Paris Adult Theatre I* that the State may reasonably conclude a correlation between exposure to obscene materials and anti-social behavior would apply equally to possession of such materials in public or in the privacy of one's home.
[47] 413 U.S. 115 (1973).
[48] *Miller v. California*, 413 U.S. 15, 25.
[49] Oregon's statute, while specific in describing the conduct to be prohibited, was limited in its application only to minors.
[50] *United States v. Kennerley*, 209 F. 119 (S.D.N.Y. 1913).
[51] *Ibid.*, 209 F. 119, 121. Justice Brennan had previously argued that Judge Hand was clearly referring to the community at large, the public, or people in general and not to some specific local community. *Jacobellis v. Ohio*, 378 U.S. 184, 193 (1964).
[52] *Model Penal Code*, §207.10 (2) (Tentative Draft No. 6, 1957).
[53] 413 U.S. 123, 130 (1973).
[54] *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 37 L.Ed2d 500, 93S.Ct. 2665 (1973).
[55] The film was *Deep Throat*, starring Linda Lovelace. The district court found it obscene and subject to forfeit under the federal statute, Title 19 U.S.C. §1305(a).
[56] *Paris Adult Theatres, II v. Slayton*, 413 U.S. 49, 73–74 (1973).
[57] *Id.*, 413 U.S. 49, 84.
[58] *Id.*, 413 U.S. 49, 92.
[59] *Id.*, 413 U.S. 49, 114.
[60] *United Artists Corp. v. Harris*, 363 F. Supp. 857 (W.D. Okla. 1973).
[61] *Hamar Theatres, Inc. v. Cryan*, 365 F. Supp. 1312 (D. N.J. 1973) (Monmouth County, N.J.)
[62] *State ex rel Keating v. A Motion Picture entitled "Vixen,"* 35 Ohio St. 2d 215, 301 N.E. 2d 880 (1973) (Hamilton County, Ohio).
[63] *Redlich v. Capri Cinema, Inc.*, 43 App. Div. 27, 3490 N.Y. S. 2d 697 (1974) (New York City).
[64] *Jenkins v. State*, 230 Ga. 726, 199 S.E. 2d 183 (1973), *reversed, Jenkins v. Georgia*, 418 U.S. 153 (1974).
[65] *United States v. Hamling*, 481 F.2d 307 (9th Cir. 1973), *aff'd., sub nom. Hamling v. United States*, 418 U.S. 87 (1974).
[66] (Orem, Utah) Letter from publisher to the author.
[67] 418 U.S. 87 (1974)

[68] Title 18 U.S.C. §1461. The jury convicted the defendants for the mailing of the brochure advertising an "Illustrated" version of the *Report of the Commission on Obscenity and Pornography* but could not agree on whether the book itself was obscene. The federal court declared a mistrial as to that issue.

[69] 418 U.S. 87, 106. Ironically, as the dissenters led by Justice Brennan pointed out, the trial court in *Hamling* refused to permit evidence offered by the defense of community standards in Southern California generally, and San Diego County more specifically, on the grounds that a *national* standard was required to be applied in federal cases. The U.S. Supreme Court, while disagreeing, said that trial court's ruling was harmless error, apparently on the theory that no local standard, including that of San Diego, could be more permissive than what a national standard would be. See Dissenting Opinion of Brennan, J., 418 U.S. 87, 152.

[70] *Mishkin v. New York*, 383 U.S. 502, 508–509 (1966) [emphasis added].

[71] (1868) L.R. 3 Q.B. 360.

[72] The pertinent portion of the Georgia statute defined obscenity as follows: "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters." Ga. Code Ann. 26-2101 (b) (1972).

[73] 418 U.S. 153, 161.

[74] As noted above, the "patently offensive" element of the *Miller* test does not depend upon the application of contemporary community standards, but rather specific acts of sexual (or excretory) conduct defined by applicable state law.

[75] *Jenkins v. Georgia*, concurring Opinion of Brennan, J., 418 U.S. 153, 64–65 (citations omitted).

[76] 397 U.S. 728 (1970).

[77] 418 U.S. 298 (1974).

[78] The 4-man plurality opinion written by Justice Blackmun also noted that the city could appear to be making endorsements of certain political candidates or political opinions by including their messages on city-owned busses. Justice Douglas, who wrote a concurring opinion, sided with the Blackmun plurality but argued that a political speaker has no constitutional right to force his message upon a captive audience.

[79] 422 U.S. 205 (1975).

[80] The ordinance read in part: "It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense."

[81] The City argued that the ordinance was similar to situations where a party's right of privacy *not* to be spoken to took precedence over a speaker's right to engage in expression. *Cf., Rowan v. Post Office Dept.*, 397 U.S. 728 (1970); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

[82] 422 U.S. 205, 211–212. The *Erznoznik* decision echoed the Court's ruling in *Cohen v. California*, 403 U.S. 15 (1971), where a spectator in a court proceeding was arrested for disorderly conduct for wearing a jacket bearing the words, "Fuck the Draft." The Court had ruled that when people are in a public place, they may have to endure a number of things that offends their esthetic, if not political and moral sensibilities, and that the burden normally falls on the viewer to avert the eyes if he wishes to avoid further bombardment of his sensibilities. 403 U.S. 15, 21.

[83] This argument was first made on appeal, and the Court rejected it on timeliness grounds, but also noted that there was nothing in the record that established the causal connection being argued.

[84] The court was quick to state, however, that a more narrowly drawn ordinance that was clearly designed to protect the government's legitimate interest in the control and flow of traffic would pass constitutional muster. 422 U.S. 205, 217–218.

[85] Justice White also dissented, but only on the grounds that the majority unnecessarily undertook to do a content analysis when the ordinance could have been struck down solely on the basis of being constitutionally overbroad.

[86] 427 U.S. 50 (1975).

[87] The term "regulated uses" applies to 10 different kinds of establishments in addition to adult theaters, including adult bookstores, cabarets, bars, taxi dance halls, and hotels.

[88] The theatre owners did not claim that the definitions did not apply to their activities but that the vagueness inherent in the wording of the ordinances might deter others from engaging in constitutionally protected expression. The Court reasoned that to the extent doubt might exist as to the degree or extent of activity necessary to trigger the ordinance's applicability, there was no evidence that these ordinances were not readily subject to the narrowing construction of the Michigan courts that could and would clarify such matters if future cases presented genuine doubts.

[89] *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

[90] Justice Rehnquist wrote the Opinion of the Court, in which Chief Justice Burger and Justices White, Powell, Stevens and O'Connor joined. Justice Blackmun concurred in result. Justice Brennan wrote a dissent in which Justice Marshall joined.

[91] *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)

[92] Powell cited 427 U.S., at 82, n. 4 at the end of this quotation, which can be found at 475 U.S. 41, 48.

[93] 535 U.S. 222, F.3d 719 reversed and remanded (Case No. 00-799, decided May 13, 2002).

[94] The ordinance ban location of such establishments within 1000 feet of each other. (Los Angeles Municipal Code §12.70(C) (1978); To eliminate a loophole in the language, the ordinance was amended in 1983 to ban the co-location of more than one adult entertainment business within a single building.

[95] Justice Kennedy, frequently the "swing-man" on the Court, wrote a separate opinion agreeing with the result.

[96] Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, dissented on the grounds that the specific issue before the Court—that of whether two adult establishments in one location contributed to greater

criminal activity in the area than a single establishment that featured both books and videos under one roof—had not been addressed by either the 1977 study on which the city relied or the plurality of the Court in upholding the ordinance. There was, they argued, no foundation to support the restraint on expression imposed by the ordinance.

[97] *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968).

[98] 409 U.S. 109, 118 (1972).

[99] The Twenty-First Amendment, ratified by the states in December 1933, repealed the 18th Amendment (Prohibition) and empowered the individual states to enact their own legislation on alcoholic beverages.

[100] 452 U.S. 714 (1981).

[101] "Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts." 452 U.S. 714, 718.

The Court backed off from this absolutistic approach in later cases involving state regulation of alcohol and the First Amendment protection afforded to commercial speech. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), discussed in chapter 10. In a plurality opinion, Justice Stevens stated,

> Without questioning the holding in LaRue, we now disavow its reasoning insofar as it relied on the Twenty-first Amendment. As we explained in a case decided more than a decade after LaRue, although the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, "the Amendment does not license the States to ignore their obligations under other provisions of the Constitution.
>
> * * *
>
> Accordingly, we now hold that the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment. The Twenty-first Amendment, therefore, cannot save Rhode Island's ban on liquor price advertising.

[102] 501 U.S. 560 (1991).

[103] Indiana Code 35-451 (1988) Public Indecency; indecent exposure.

Sec. 1. (a) A person who knowingly or intentionally, in a public place:

(1) engages in sexual intercourse;

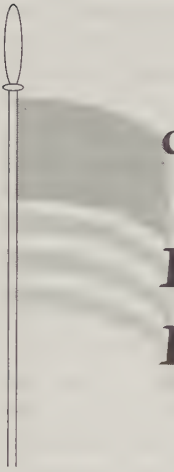
(2) engages in deviate sexual conduct;

(3) appears in a state of nudity; or

(4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor.

b) 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

[104] "Police power," as used by the Courts, means a government's power to regulate and provide for the public's health, safety, and morals.
[105] 501 U.S. 560, 571.
[106] 501 U.S. 560, 572.
[107] 501 U.S. 560, 591.
[108] 390 U.S. 629 (1968).
[109] 458 U.S. 747 (1982).
[110] The statute defined "sexual performance" as any performance that includes sexual conduct by such a child, and "sexual conduct" is in turn defined as actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals. 458 U.S. 747, 751.
[111] Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor joined in the majority opinion. Justices Brennan, Marshall, Blackmun, and Stevens each wrote separate opinions concurring in the result.
[112] In the context of obscenity prosecutions the term, "scienter," (or knowledge) means that the government must prove that the defendant bookseller, movie theater owner, proprietor, or distributor of videos have actual knowledge of the content of the materials he or she is attempting to purvey. It is not necessary, however, to prove that the defendant knew the materials were obscene as a matter of law. *Scienter*, when used in statutes prohibiting the production, sale, and/or distribution of child pornography can mean that the defendant was aware that the subject of the photograph, film, or other material was a minor. See *United States v. X citement Video, Inc.*, 513 U. S. 64 (1994).
[113] 458 U.S. 747, 764–765; *citations omitted.*
[114] 495 U.S. 103 (1990).
[115] 394 U.S. 557 (1969).
[116] Ohio Revised Code, Annotated, §2907.323(A)(3). The statute made two exceptions: (1) the material is presented or sold for a *bona fide* artistic, medical, scientific, education, religious, governmental, judicial, or other proper purpose by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance; and (2) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.
[117] Although the statute did not define the meaning of the term, "minor," the Court gave judicial notice to other portions of Ohio law that defined a minor as anyone under the age of 18.
[118] The Ohio Supreme Court had construed the statute as limiting the "nudity" element to nudity that constitutes "lewd exhibition or a graphic focus on a minor's genitals." 495 U.S. 103, 107–108.
[119] 495 U.S. 103, 125–126.
[120] 18 U.S.C. §2251, *et seq.*
[121] 18 U.S.C. §§2256(8)(B) and (D).
[122] 535 U.S. 234 (2002) 198 F.3d1083, affirmed.
[123] Sigmund Freud, *Civilization and its Discontents* (1930) (translated and edited by James Strachey), W. W. Norton 1962, pp. 42–43.



Chapter Nine

Indecency and the Electronic Media

The terms "obscenity" and "indecency" have come to mean different things under the law. A thing may be "indecent," but not *obscene*. However, the reverse proposition is not true: all things obscene *are* indecent.

The concept of indecency, as a separate offense that could be prosecuted, originated in attempts to proscribe, in certain *contexts*, conduct or works that could not be found "obscene" under the *Roth/Miller* formulation. Although a number of states have followed suit, Congress and the Federal Communications Commission (FCC) have provided the primary impetus for the development of the legal concept of *indecency*.

When the *Radio Act of 1927* was adopted, Congress included a provision prohibiting the utterance of "obscene, indecent or profane language by means of radio communications."[1] The provision was later incorporated into the United States Criminal Code, which made such utterances punishable by fine of up to $10,000, up to two years imprisonment, or both.[2] The FCC issued several rulings regarding program content allegedly in violation of the code. Language used by Charlie Walker, a popular local radio personality on several programs broadcast over WDKD (A.M.), in Kingstree, South Carolina came to the attention of the FCC. It began an investigation and subsequent license renewal hearing following receipt of a number of complaints about coarse language, "suggestive" or *double entendre* stories, and "barnyard humor." The FCC found this material to be both obscene and indecent in *re Palmetto Broadcasting Co.*[3]

Attorneys for Edward Robinson, the licensee of WDKD, argued that the language was not in violation of the standard established in *Roth v. United States*[4] and to hold that it was in violation of 18 U.S.C. §1464 was unconstitutional. The Commission took the position that the *Roth* case was limited to prosecutions under 18 U.S.C. §1461[5] and never intended by the Supreme Court to apply to all media across the board.[6] In addition, the Commission alluded to other earlier Supreme Court cases such as *Burstyn v. Wilson*[7] that had established the principle that each medium of mass communication is unique, and the application of First Amendment principles must take such uniqueness into account. Unlike "adult-oriented" books and other written material, which can be regulated at the point-of-sale so as to prevent such materials from falling into the hands of minors or non-consenting adults who are particularly offended by such material, radio and television are equally accessible "at the flick of a switch to young and old alike, to the sensitive and indifferent, to the sophisticated and the credulous."[8] Accordingly, the Commission concluded that it had a greater duty to protect both minors as well as adults with "highly developed sensibilities" from offensive broadcasts.[9]

The FCC also further distinguished this case from *Roth*, by asserting that, given the nature of broadcasting, the requirement that the work be *taken as a whole* was not necessarily applicable to the broadcast medium. Even fleeting use of erotica or pornography in a broadcast could "seriously prejudice, if not destroy, the general utility of radio and television."[10]

The Early *Pacifica* Cases

Following the *Palmetto* case, the Commission dealt with complaints against a chain of noncommercial stations owned by Pacifica Foundation. The stations had broadcast several programs dealing with homosexual issues, including broadcast of the play *The Zoo Story* by Edward Albee and readings by several homosexual poets and authors. These programs included content alleged to be "filthy." Unlike its action in the *Palmetto* case, the Commission held that most of the material broadcast was a serious treatment of a social problem that was responsive to the needs and interests of persons making up the listening audiences of the stations.[11] Moreover, the Commission noted that the two instances where the material was particularly offensive occurred in broadcasts after the hour of 10:00 P.M., when children were less likely to be in the audience. The Commission concluded that no action other than an admonition to Pacifica was appropriate given these facts.

The early *Pacifica* cases suggested that the FCC had backed away from its earlier position in *Palmetto Broadcasting* that the most sensitive of listeners required protection. Instead, the Commission stated

that while some of Pacifica's programming undoubtedly was offensive to some listeners, this did not mean that such broadcasts could or should be censored. This was in direct contrast to its warning in *Palmetto* that even serious literary works such as James Joyce's *Ulysses* or D. H. Lawrence's *Lady Chatterley's Lover*, could be banned from the airwaves, particularly if the more lurid details were included in any reading or dramatization, even though they could not be found obscene under the *Roth* standard.[12] The different treatment could be explained by the fact that the Pacifica Foundation stations were noncommercial, supported by listener donations. Although quite liberal, both politically and culturally in orientation, the programs complained of were "serious" literary works rather than the smirking innuendo of a broadcast announcer attempting to be clever.

Two other decisions by the FCC fleshed out the legal theory that indecent material broadcast over the airwaves could be prosecuted under 18 U.S.C. §1464. In *Eastern Education Radio (WUHY-FM)*,[13] the Commission admonished a station for broadcasting an interview with Grateful Dead lead singer, Jerry Garcia, whose responses were liberally interspersed with four-letter expletives. The interview was part of a regular program, *Cycle II*, broadcast after 10:00 P.M. *Cycle II* dealt with avant-garde artistic expression, and had frequently included interviews where four-letter words were used.[14] The Garcia interview clearly could not be deemed obscene under *Roth*, since Garcia's use of expletives was in a context that, whether or not taken as a whole, did not appeal to the prurient interest. Moreover, the interview did not focus or dwell on sexual matters.

In maintaining that the limitations of *Roth* did not apply to broadcasting, the Commission again distinguished broadcasting from other forms of media such as books, magazines, and motion pictures. Unlike print media or motion pictures, said the FCC, broadcasting is *episodic in nature*. Listeners are constantly tuning in and out of a program, so that their exposure to a program may not ever be of an entire work. This was especially true in radio,[15] so that the *Roth* requirement that the work be "taken as whole" was not a workable concept in examining broadcast matter. Second, the Commission contended that language need not appeal to the prurient interest in order to be proscribed under the statute. It was enough, the Commission said, that the matter being broadcast was *patently offensive*. It held that Garcia's use of such language was completely gratuitous, and because it did not advance substantive ideas, the words had "no redeeming social value." Further, despite the fact that the FCC received no complaints about the program, it held that the expletives were "patently offensive by contemporary community standards."[16] The Commission concluded that WUHY-FM's broadcast of the interview constituted "indecency" and was a violation of 18 U.S.C. §1464.[17] There are some words that you simply may not say on radio or TV, a concept subsequently tested in the Supreme Court five years later.

Pandering and the Protection of Minors

The *Eastern Education* decision revisited the notions of appropriateness of material for the time of day broadcast and whether the *intent* of the speaker made the material indecent. In *Sonderling Broadcasting Corporation*,[18] initially decided before release of the Supreme Court's opinion in *Miller v. California*, the Commission issued a forfeiture order against Sonderling, licensee of WGLD-FM in Oak Park, Illinois for broadcasting a call-in type program that came to be known in the industry as "topless radio." The program targeted homemakers during afternoons who were invited to call in and discuss problems they had experienced in their sexual relationships with husbands, boyfriends, and so on. The announcer, almost always male, would comment on the problems in what the Commission described as a "leering" fashion that amounted to pandering and indecency. This was not a "serious" treatment of sexual matters, said the Commission, because the intent of the announcer was to elicit responses from women callers that would titillate and appeal to the prurient interests of listeners and generate a larger audience for the station in the Chicago area. Moreover, given the pandering nature of segments of the broadcasts and the prurient appeal, the Commission concluded that the broadcasts had no redeeming social value and were not only indecent but also *obscene* under the *Roth* test.

The Commission relied on earlier Supreme Court pronouncements that given the public nature of the broadcast medium and that the number of frequencies were limited (*scarce*), greater restraints on the content of what is broadcast could be imposed by the government without running afoul of the First Amendment.[19] Additionally, the Commission reiterated its previous position that because of the unique nature of the broadcast medium (broadcasts could be received and sampled by millions without regard to age, background, or degree of sophistication) and because listening behavior was episodic in nature, the government had a greater interest in protecting those listeners who were underage and who were offended by the use of such language and the discussion of such subject matter.

While Sonderling did not appeal the minimal forfeiture ($2,000) imposed by the Commission, several groups wishing to champion the cause of freedom of expression filed petitions asking the FCC to reconsider its ruling. After the Commission routinely denied reconsideration, the groups appealed to the U.S. Court of Appeals for the District of Columbia Circuit.[20]

The D.C. Circuit upheld the FCC's ruling, agreeing with the Commission that the program in question was presented in a titillating and pandering manner and thus obscene (or indecent) under the rationale of *Ginzburg v. U.S.* As to the argument made by the appellants that the ruling was inconsistent with the Supreme Court's recent decision in *Miller v. California*, the Court noted that the programs

were broadcast between the hours of 10:00 A.M. and 3:00 P.M.—hours during which children might be in the audience—bringing the case under the umbrella of *Ginsberg v. New York* and its progeny.[21] The Court also agreed with the FCC that the episodic nature of broadcasting rendered the "taken as a whole" requirement contained in both *Roth* and *Miller* inapplicable to broadcast speech.[22]

The Carlin Monologue

In October 1973, WBAI-FM, another Pacifica Foundation-owned station in New York, broadcast a 12-minute monologue from a recording of a live performance by satiric humorist George Carlin entitled "Filthy Words." Carlin began by referring to his thoughts about "the words you couldn't say on the public . . . airwaves. . . ." He proceeded to list seven "dirty words" and repeat them over and over again in a variety of colloquialisms. A few weeks later a man, who stated that he had heard the broadcast while driving with his young son, wrote a letter complaining to the FCC. He stated that, although he could perhaps understand a record sold for private use, "I certainly cannot understand the broadcast of same over the air that, supposedly, you [the FCC] control."

The complaint was forwarded to the station for comment. In its response, Pacifica explained that the monologue had been played during a program about contemporary society's attitude toward language and that, immediately before its broadcast, listeners had been advised that it included "sensitive language which might be regarded as offensive to some." Pacifica characterized George Carlin as "a significant social satirist" who, like Mark Twain and Mort Sahl before him, examines the language of ordinary people. Carlin was not mouthing obscenities, said Pacifica, "[H]e is merely using words to satirize as harmless and essentially silly our attitudes towards those words."[23]

Sixteen months later, the Commission issued a declaratory order granting the complaint and holding that Pacifica "could have been the subject of administrative sanctions."[24] The Commission took the occasion to "clarify the standards which will be utilized in considering" the growing number of complaints about indecent speech on the airwaves. Advancing several reasons for treating broadcast speech differently from other forms of expression,[25] the Commission stated that its power to regulate indecent broadcasting was found in two federal statutes: 18 U.S.C. 1464 (which prohibits the broadcast of obscene, indecent, or profane language) and 47 U.S.C. 303 (g), which requires the Commission to "encourage the larger and more effective use of radio in the public interest."

The Commission characterized the language used in the Carlin monologue as "patently offensive," though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of nuisance where behavior is

channeled (scheduled at specific times) rather than prohibited, and concluding that,

> [T]he concept of indecent is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."[26]

The Commission noted that the prerecorded language, with the offensive words "repeated over and over," was willful and deliberate, in violation of Section 1464 of the U.S. Criminal Code.

The decision created a great deal of consternation among broadcasters as it was interpreted to mean that if any of the words uttered by Carlin were broadcast at any time, no matter what the circumstances or context, a licensee would be in violation of the statute. The National Association of Broadcasters as well as other groups filed petitions seeking reconsideration of the *Pacifica* ruling and asking the FCC to clarify its opinion by ruling that the broadcast of indecent words as part of a live newscast would not be prohibited. The Commission issued another opinion in which it pointed out that it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it."[27] The Commission also noted that its declaratory order was issued in a "specific factual context" and declined to comment further on various hypothetical situations presented by the petition.[28]

The rulings were appealed to the U.S. Court of Appeals, D.C. Circuit, which reversed by a vote of 2–1, with each judge writing a separate opinion and advancing several theories. Judge Tamm, who announced the ruling, contended it was contrary to the explicit provision in the Communications Act that prohibited the FCC from censoring any programming.[29] Chief Judge Bazelon argued that the Constitution required that Section 1464 be narrowly construed to cover only obscene speech or other speech not protected by the First Amendment. Judge Leventhal dissented, saying he believed that the Commission had properly applied the statute, given its stated objective of protecting children in the audience.

The FCC petitioned the Supreme Court for *certiorari* to review the Circuit Court's reversal. Judge John Paul Stevens delivered the opinion of the Court, which reversed the Court of Appeals and upheld the original decision by the FCC.[30] He limited the scope of the decision to four issues: (1) whether the scope of judicial review encompasses more than the Commission's determination that the monologue was indecent "as broadcast"; (2) whether the Commission's order was a form of censorship forbidden by §326 of the Communications Act; (3) whether the broadcast was indecent within the

meaning of §1464; and (4) whether the order violates the First Amendment of the United States Constitution. We examine each point in order since they are crucial to understanding the current constraints placed on broadcasters regarding indecent material.

Judge Stevens began his opinion by saying that the Court's decision was limited to the specific facts of the Carlin case and would not deal with the issues raised in the Commission's *Clarification Order.* The ruling on this issue reflects a long-standing policy by the Supreme Court to limit the scope of its decisions in order to avoid making unnecessary decisions, particularly in the area of constitutional law where the actions of Congress or state legislatures are frequently at issue. This is part of the doctrine known as "judicial restraint."[31]

In addressing the second issue—whether the Commission's action constituted censorship under §326 of the Communications Act—the Supreme Court concluded that the Commission's "undoubted right" to take note of past program content when considering a licensee's renewal application does not constitute "censorship."[32] The Court has consistently held that there is a difference between *censorship*, which is "prior restraint," and a statute or ordinance that punishes the utterance of certain kinds of speech. The former entails requiring the speaker, publisher, or broadcast station to submit to some person or group of persons the content of the proposed work for review.

The censor can allow or ban the actual speech, publication, or broadcast. Prosecuting and punishing someone after the fact is a different form of government action, in that the prohibited act has already occurred and was not "restrained." To the speaker, this may seem like a distinction without a difference—since in both cases a work has been suppressed. However, in terms of real-world application, there is a significant difference.

For example, a publisher who is skating close to the line may, in fact, desire the security found in submitting the work to a censorship board for a ruling as a way of avoiding the negative consequences if she guesses wrong. However, this desire for security is offset by the fact that the censor board may deliberately err on the side of prohibiting the publication rather than being responsible for allowing an obscene work to be published and distributed. This all-too-human tendency has been aptly portrayed by the old adage, "It is easier to obtain forgiveness than permission."

If there is no censorship, but only the possibility of subsequent prosecution, the publisher becomes her own "censor." She may well err on the side of caution, engaging in self-censorship, rather than run the risk of prosecution if wrong. Where statutes are vague or ambiguous about what speech is allowed and what is not, speaker self-censorship becomes more likely. The tendency of some statutes to cause this behavior is what is known as the *chilling effect*: the speaker not only refrains from uttering speech that could be legiti-

mately covered by the statute; she also refrains from uttering legitimate speech because the line is not precise.

The third issue addressed by the Court was whether the federal statute could be deemed to prohibit the kind of speech broadcast by Pacifica. Here, the Court focused on several words that referred to excretory or sexual activities or organs identified by the Commission as offensive, and that the repetitive, deliberate use of those words in an afternoon broadcast when children are in the audience became "patently offensive," making the broadcast *indecent*. Pacifica did not dispute the FCC's conclusion that the broadcast was patently offensive. Rather, Pacifica argued that since the broadcast did not have any *prurient appeal*, it was not indecent within the meaning of the statute.

The Court disagreed with Pacifica. The reasons supporting *Hamling*'s construction of 1461 do not apply to 1464. Although the history of the former revealed a primary concern with the prurient, the Commission has long interpreted 1464 as encompassing more than the obscene. The former statute deals primarily with *printed* matter enclosed in sealed envelopes mailed from one individual to another; the latter deals with the content of public *broadcasts*. It is unrealistic to assume that Congress intended to impose precisely the same limitations on the dissemination of patently offensive matter by such different means.[33]

However, Justice Stevens admitted that offensive language by itself is not sufficient to justify the curtailment of a person's First Amendment rights. "If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words—First Amendment protection might be required."[34] Here, however, argued the Court, the Commission was punishing speech *not* because it disagreed with Carlin's *opinion* that such language is harmless, but rather because of Carlin's use of the offensive words to support his opinion.

Many would find this argument less than persuasive. As we saw in chapter 4, the Court a few years earlier had thrown out a conviction under a disturbance of the peace ordinance of a man who wore a jacket into a courtroom emblazoned with the words, "Fuck the Draft."[35] Justice Stevens attempted to distinguish the case by noting that (1) after Cohen entered the courtroom, he removed his jacket and folded it, (2) that there was no evidence submitted that any person was offended by Cohen's use of the epithet, whereas, in the *Pacifica* case, the FCC was responding to a listener's strenuous complaint.[36] This argument also seems weak, especially in light of Justice Harlan's observation in the *Cohen* case that:

> Much linguistic expression serves a dual communicative function . . . . [W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Con-

> stitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[37]

Finally, the Court relied on a series of cases that had previously held that the same words uttered in different *contexts* or *media* could be treated differently under the First Amendment. Justice Stevens referenced the 1952 case of *Burstyn v. Wilson*[38] (censorship of motion pictures) as first establishing this principle. Noting that of all forms of communication, "[I]t is broadcasting that has received the most limited First Amendment protection,"[39] Justice Stevens went on to compare the Supreme Court's decision in *Miami Herald Publishing Co. v. Tornillo*,[40] which struck down a Florida statute requiring newspapers to publish replies of those persons attacked in newspaper editorials, with the Court's decision five years earlier upholding the FCC's "personal attack rule" requiring broadcasters to air the replies of individuals whose character had been criticized during the discussion of controversial issues of public importance (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)).

The reasons for the lesser First Amendment protection afforded broadcast speech were quite complex, said the Court, but two reasons were pertinent to the Carlin case. First, broadcast is a *uniquely pervasive presence* in the lives of all Americans, *intruding* even into the privacy of the home, where the individual's right to be let alone "plainly outweighs the First Amendment rights of an intruder."[41] Second, the broadcast medium is uniquely accessible to children—even to those who are too young to read. As noted by Justice Stevens, "Although Cohen's written message [in *Cohen v. California*] might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant."[42]

The Court concluded by admonishing that its holding was very narrow: the case did not involve a two-way radio conversation between a cab driver and a dispatcher, or the telecast of an Elizabethan comedy. "We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important."[43]

The Court's ruling in *Pacifica* was far from unanimous. Justice Brennan, joined by Justice Marshall, dissented on the grounds that to restrict the airwaves to what was fit only for children, unconstitutionally deprived the right of adult listeners to receive the kind of material denoted by the Carlin monologue. Moreover, despite the majority's assurance that the holding was limited to the specific facts of the case, Justice Brennan expressed his concern that no standards were articulated for judging which works could be banned from broadcast and which could not:

> Taken to their logical extreme, these rationales would support the cleansing of public radio of any "four-letter words" whatsoever, regardless of their context. The rationales could justify the banning from radio of a myriad of literary works, novels, poems, and plays by the likes of Shakespeare, Joyce, Hemingway, Ben Johnson, Henry Fielding, Robert Burns, and Chaucer; they could support the suppression of a good deal of political speech, such as the Nixon tapes; and they could even provide the basis for imposing sanctions for the broadcast of certain portions of the Bible.[44]

The FCC's Initial Policy Following *Pacifica*

In the aftermath of *Pacifica*, many broadcasters were in a panic over what direction the Commission would take with respect to regulating broadcast indecency. Despite Justice Stevens' *dicta* that the holding did *not* mean that henceforth stations would be prosecuted under 18 U.S.C. §1464 for broadcasting a production of *Hamlet* or an Edward Albee play, licensees asked for assurance from the FCC that a witch hunt would not take place. The Commission insisted that actions taken would be consistent with the Court's ruling in *Pacifica* and limited to situations where patently offensive language or images are broadcast seemingly for their shock value. The Commission said it understood that live broadcasts of news events could, upon occasion, include a four-letter word that could not be edited out, and that no licensee need be concerned with the occasional epithet that might slip past the tape delay or other editorial review.

For practically a decade following *Pacifica,* prosecutions by the FCC under 18 U.S.C. §1464 were in fact limited to the deliberate, repeated use of Carlin's "seven dirty words." Thus, any case not similar to the facts of *Pacifica* escaped the long arm of the FCC. This policy left open the question of whether the much broader application of the concept of indecency to include Jerry Garcia's gratuitous use of epithets in an interview, or the use of innuendo and pandering by talk show hosts of "Topless Radio" programs announced by the Commission before the Carlin case, were still prohibited under the statute.

In the vacuum of Commission regulation, a number of licensees began to take greater risks with program content. This practice did not go unnoticed by members of Congress who started receiving complaints from outraged constituents. Individual senators and representatives began to pressure the FCC to take some forthright action before the airwaves became "open sewers" of lewd and licentious behavior.

Action was finally taken with the release of a trio of FCC rulings on complaints filed against Pacifica's west coast station, KPFK,[45] public radio station KCSB-FM, licensed to the Regents of the University of California,[46] and against WYSP-FM, owned by Infinity Broadcasting Corporation of Pennsylvania.[47] All three cases were released the same day and were also accompanied by a policy statement by

the Commission announcing that new standards for judging indecency complaints would thereafter be employed.[48]

The KPFK case concerned complaints received about a program called, "I am Are You?" dealing with themes of homosexuality, and the program included excerpts from the play, *The Jerker*, which contained explicit references to sexual and excretory activities. The program was broadcast after the hour of 10:00 P.M. local time and was preceded by an advisory that some listeners might find portions of the content objectionable. In response to the Commission's initial directive to the station to respond to the complaint, Pacifica argued that the explicit passages describing homosexual activity were part of a play about AIDS, which was a significant issue of public importance for both the gay community and the general public.

The Commission imposed no direct sanctions against Pacifica for the broadcast but said that the broadcast might be criminally obscene under the statute, and thus referred the case to the Justice Department, which took no action.[49] Having said that, the Commission went on to announce its new enforcement standards for 18 U.S.C. §1464 and to warn broadcasters that neither the "seven dirty words" test nor the broadcast of such material after the hour of 10:00 P.M. would constitute a safe harbor against prosecution.

The second case dealt with the airing of a song, "Makin' Bacon" by KCSB-FM, a noncommercial station owned by the Regents of the University of California. The song, while it contained no specific "dirty words," did contain sexual innuendo that the Commission said was "rendered explicit" by the surrounding context so as to make it patently offensive for the broadcast medium.[50] Moreover, said the Commission, the available evidence indicates that there is a reasonable risk that children may still be in the listening audience after 10 P.M.[51] Accordingly, the previous standard that permitted indecent but not obscene material to be broadcast after the hour of 10:00 P.M. would no longer be used, and it was up to the licensee to determine and establish, with convincing evidence, what hours of the day in its own market there was a low likelihood of children being in the audience.[52]

The third case involved the first of many forfeiture actions imposed against Infinity Broadcasting, the group owner of a number of stations that featured syndicated morning talk show host and radio personality Howard Stern. Many of Stern's remarks during the fall of 1986 consisted of innuendo and double entendre. The Commission found, however, that *the surrounding references rendered the material explicit*, and thus patently offensive for the broadcast medium. The broadcasts were replete with references to sexual and excretory matters,[53] the Commission found were made "in a pandering and titillating" fashion.[54] It was also broadcast in the morning, a time of day where there was a reasonable risk that children were in the audience.[55]

Since the Commission was announcing a shift from its prior policy of bringing indecency actions against only those licensees that broadcast one or more of the seven dirty words, it imposed no monetary forfeiture against Infinity. However, the Commission made clear in the accompanying *Public Notice*[56] that it was expanding its enforcement of 18 U.S.C. §1864 to include suggestive language amounting to patently offensive references to sexual or excretory activities or organs. Further, material broadcast after 10 P.M. would not automatically be insulated from FCC review or sanction. Each licensee was responsible for determining when there was not a reasonable risk that children would be in the audience.[57]

Preparatory to what would be a series of legal battles between Congress and the Commission on the one hand, and licensee and public interest organizations on the other, a joint group of petitioners asked the Commission to reconsider its policy statement, contending that it imposed an impossible burden on licensees to second-guess the Commission and thus chilled legitimate and meritorious speech.[58] The Commission refused to retreat from its initial position but did act to clarify and expand upon what was stated in its policy statement.[59]

Rejecting the petitioners' argument that the standards were impossibly vague, the Commission stated that because the *context* of each case was determinant, enforcement actions must by necessity be on a case-by-case basis. Since this was the same basis used by the Courts, it was not unconstitutionally vague.[60] However, the Commission stated that the "contemporary community standards" that would be used to judge indecency would be a *national* one *for the broadcast medium*, and not a local one (as the Supreme Court announced in *Miller*). As to the hours of the day when indecent speech might safely be broadcast, the Commission relented somewhat and observed that the period of midnight to six o'clock A.M. could be presumed to be hours where such programming could be broadcast without a reasonable risk of exposure to children.[61]

The "ACT" Cases

Action for Children's Television (ACT), along with a number of other public interest groups, the networks, and NAB, petitioned for review of the Commission's *Reconsideration Order* in the U.S. Court of Appeals. Three bases for overturning the new Indecency Policy were cited. First, the petitioners challenged the FCC's decision to abandon its post-*Pacifica* policy of limiting enforcement of broadcast indecency to the seven dirty words in the Carlin monologue and contended that the broader definition was facially invalid because it was unconstitutionally vague. Second, the generic definition of broadcast indecency announced by the Commission was unconstitutionally overboard because the definition failed to exempt material which

had serious literary, artistic, political, or scientific (LAPS) value,[62] thereby bringing within its jurisdiction material that was constitutionally protected in addition to material that could be deemed to be without such protection. Finally, the Commission was arbitrary and capricious, it was argued, in abandoning the 10 P.M. "safe harbor," which had been employed by the Commission for over 12 years.

The D.C. Circuit rejected the facial validity challenges to the policy and held that the Commission's new indecency policy was neither unconstitutionally vague nor overboard. However, it vacated the two cases that involved broadcasts occurring after 10 P.M. and remanded them back to the Commission on the ground that the Commission had not established a reasonable basis for moving the safe harbor time to 12:00 midnight from 10:00 P.M.[63]

The Court sustained the Commission's position that the relative literary, artistic, political, or scientific value would be a contextual factor in determining whether material is "patently offensive"; its presence would not *per se* exclude the determination that a program was indecent. Unlike the criteria used to determine obscenity under *Miller*, indecent, but not obscene, speech is constitutionally protected even if it has no serious merit of any kind. Rather, the Court said, the issue is the reasonableness of the channeling regulation, since the validity of the regulation rests upon the government's compelling interest in protecting children from exposure to indecent materials.

> Some material that has significant social value may contain language and descriptions as offensive, from the perspective of parental control over children's exposure, as material lacking in such value.[64] Since the overall value of a work will not necessarily alter the impact of certain words or phrases on children, the FCC's approach is permissible under controlling case law: merit is properly treated as a factor in determining whether material is patently offensive, but it does not render such material per se not indecent.[65]

Although the Court upheld the Commission's definition of broadcast indecency, and affirmed that definition as being consistent with the definition approved by the U.S. Supreme Court in the 1978 *Pacifica* case, it did not agree with the Commission's somewhat casual treatment of the "safe harbor" issue. With respect to the two cases on appeal that had involved broadcasts between 10 P.M. and 12 midnight, the Circuit Court remanded back to the Commission with instructions to provide further explanation as to why it had reduced the safe harbor from 10 P.M. to the hours between midnight and 6 A.M.

Inherent in the notion of channeling (alluded to by the Supreme Court in the *Pacifica* case), said the Court, was the requirement that a reasonable balance must be struck between the interest in protecting children on the one hand against the curtailment of broadcaster freedom and adult listener choice on the other. The Court also told

the Commission that channeling may not be done on a case-by-case basis because of the chilling effect that action likely would have on broadcaster freedom.

It was during this time that Congress enacted legislation directing the Commission to enforce its indecency policy on a 24-hour a day basis—that is, there should be no safe harbor at all for indecency on the public airwaves.[66] The legislation's sponsor, Senator Jesse Helms, contended that since the broadcast obscenity statute did not indicate that the time of broadcast was a consideration, the law should be enforced on a 24-hour basis. "Garbage is garbage, no matter what the time of day may be."[67] The Commission immediately complied with Congress's directive by adopting Section 73.3999 of the Rules.[68]

Communications and ACT II

The Commission's ruling was immediately appealed back to the D.C. Circuit, which issued a *stay* on enforcement of the legislation pending a report from the Commission after a full and fair hearing on the constitutionality of the 24-hour statutory ban on broadcast indecency. The Commission released its report in July 1989. In reconfirming its 24-hour ban on broadcast indecency, the Commission alluded to the U.S. Supreme Court's Opinion in *Sable Communications of California, Inc. v. FCC*,[69] which struck down a federal law making it a crime to make indecent telephone messages available commercially in interstate commerce.[70] Although *Sable* had held that the absolute ban on indecent commercial telephone messages was constitutionally impermissible, it alluded to the *Pacifica* case in doing so. More important, the Supreme Court considered *Pacifica* to be distinguishable from the issue in *Sable* because *Pacifica* did not involve a total ban on indecent material, but rather the FCC sought to channel such programming to times of the day when children most likely would not be exposed to it.[71] The "dial-a-porn" legislation struck down in *Sable* sought to effect a total ban on all such communication, whether or not obscene, thus depriving consenting adults access to material unless it was also fit for children.[72]

Despite this language, the Commission, faced with a Congressional mandate to enforce the indecency provisions of 18 U.S.C. §1464, concluded that nothing short of a 24-hour ban on indecent programming would be effective in preventing broadcast indecency. The Commission supported its conclusion with statistics showing that, nationwide, there were significant numbers of children present in the listening audience at all times. For example, the Commission stated that, based upon commercial audience sampling data for all major markets, a projected 716,000 children (ages 12–17) were awake and listening to the radio during any quarter-hour between the hours of 12 midnight and 6:00 A.M. While as a percentage of the total population this number was small, the FCC nevertheless concluded

that it was a significant number of children who could be harmed by being exposed to indecent broadcasts—thus justifying a 24-hour ban.

However, recognizing that this was a national average and that not every community would have a proportionate share of children in the late night audience, the Commission stated that a broadcaster could broadcast indecent material after midnight if it could demonstrate with reliable audience data that a much smaller percentage of children were in its local audience after midnight. The burden of proof was, however, on the broadcaster to rebut the *presumption* made by the FCC that sufficient numbers of children were awake and listening to radio at all hours of the day.

In dealing with the objection that a total ban was equivalent to bringing the content of radio and television down to the level of what is safe for children, thus depriving consulting adults access to indecent programming, the Commission responded that adult viewers and listeners have alternative sources of indecent material apart from broadcasting and that, unlike dial-a-porn, a total ban on the broadcast of indecent material was the only way the government's interest could be protected.

On appeal, the D.C. Court of Appeals again reversed, holding that Congress had exceeded constitutional bounds in enacting a total ban on indecent but non-obscene speech.[73] The Court pointed out that its previous holding in *ACT I* that the Commission must identify some reasonable period of time during which indecent material may be broadcast meant that neither Congress nor the FCC could ban such broadcasts entirely from the airwaves.[74] The Court said Congress had ignored the teaching of *Pacifica* that indecent but non-obscene speech cannot be banned—only *channeled* to a time frame where the risk of exposure of such material to minors is the least. Under the Constitution, the reach of 18 U.S.C. §1464 (and any derivative legislation) could not be extended beyond the *Miller* definition of obscenity. Only reasonable restrictions on the "time, place and manner" of such speech could be the subject of regulation.

ACT III

Undaunted by the D.C. Circuit Court's holding, and the subsequent denial of *certiorari* by the Supreme Court,[75] Congress enacted the Public Telecommunications Act of 1992,[76] section 16(a) of which directed the FCC to promulgate regulations prohibiting the broadcast of indecent material:

> (1) between 6 A.M. and 10 P.M. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
>
> (2) between 6 A.M. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).

Pursuant to this authority, the Commission adopted new regulations implementing the midnight to 6:00 and 10:00 to 6:00 restrictions mandated by Congress. Once again, the constitutionality of the provisions were challenged in Court.

The D.C. Circuit Court rejected the petitioners' arguments that the government's interest in supporting parental supervision of children and its independent interest in shielding them from the influence of indecent broadcasts were fundamentally in conflict; that is, by restricting the access of minors to indecent programming, the government was preventing parents from exercising supervision over their children by allowing them to see or hear indecent material.

The Court then took up the petitioners' remaining arguments concerning whether or not the statute was the "least restrictive means" of advancing the Government's interests. The petitioners had argued that the class of persons to be protected—children—was drawn too broadly by Congress and the FCC and that "children" should be limited to persons aged 12 and under.

In rejecting the petitioners' argument, the Court noted that it had previously directed the Commission in *ACT II* to address the question of the appropriate definition of children. The FCC's 1990 *Report* had, in fact, defined the term of children as persons age seventeen and under and had provided three reasons in support: (1) other federal statutes designed to protect children from indecent speech used the same standard; (2) state statutes also used age 17 as the dividing line in protecting minors from exposure to sexually explicit though nonobscene materials; and (3) past Supreme Court decisions, *e.g.*, *Sable* and *Ginsberg*, had sustained the constitutionality of statutes protecting children age 17 and under. Summarizing the FCC's rationale contained in its *Report*, the Court concluded that age 17 and under was a reasonable definition of "children." It also noted that the legislative history of Section 16(a) also supported that interpretation.

With respect to the disparate notion of the "safe harbor" time frame contained in Section 16(a), the Court concluded that the creation of a safe harbor of midnight to 6:00 A.M. was a reasonable channeling regulation supported by empirical research as to the numbers of non-adults in the viewing and listening audience.

As to whether Congress had stepped over the line by defining the safe harbor as beginning at midnight rather than 10:00 P.M., the Court concluded that it would not second-guess Congress on the precise point at where to draw the line, so long as the line being drawn could meet the "narrowly tailored" test of the First Amendment.

However, Congress had also drawn a distinction between commercial radio and television stations and those noncommercial stations that signed off the air before midnight: the latter were permitted to air indecent programming beginning at 10:00 P.M. The D.C. Circuit noted that neither Congress nor the FCC had provided

any rationale for such a distinction other than that of accommodating the schedules of public broadcasting stations whose limited budgets might require a restricted schedule of operation. Such a distinction, said the Court, made no sense in light of the other findings made by Congress and the FCC that significant numbers of children were in the audience after 10:00 P.M. so that a midnight safe harbor rather than an earlier one was constitutionally justified. The case was then remanded back to the FCC with instructions to limit the ban on the broadcast of indecent programs to the period from 6:00 A.M. to 10:00 P.M. The Commission acted to modify its indecency policy to reflect the Court's admonition.[77] No further legislative attempts too reduce the safe harbor period were successful, and it remains as 10:00 P.M. to 6:00 A.M.

Industry Guidance on FCC Decisions

Under the chairmanship of Michael Powell, the Commission issued a Policy Statement entitled, *Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency.*[78] After reviewing the history of FCC enforcement of Section 1464 with regard to the broadcast of indecent matters, the Commission noted that its approach to an indecency complaint first involves an analytical determination of whether or not the broadcast in question falls within the scope of the FCC's indecency definition; that is, does the material "describe or depict sexual or excretory organs or activities."[79] If the material, either plainly or by innuendo, does not contain such descriptions or depictions, it falls outside of the statute and cannot be prosecuted.

Secondly, the Commission stated that such descriptions or depictions must be "patently offensive as measured by contemporary community standards for the broadcast medium."[80] This standard is not a local one, nor does it encompass a specific geographical area. Rather, said the Commission, the "patently offensive" standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant.[81]

As to what is patently offensive, the Commission initially noted that the full *context* in which the material appeared is critically important. Explicit terms or descriptions in the context of a *bona fide* newscast, for example, might not be patently offensive under the statute while sexual innuendo might be if it persists and is sufficiently clear to make the sexual meaning inescapable. However, the Commission said that an attempt to catalog in any comprehensive fashion all of the possible contextual factors would prove an insurmountable task. Instead, by comparing cases superficially similar in facts but which resulted in differing determinations about whether

the rules had been violated, certain features could be deduced and articulated as guiding principles.

The Commission listed three principal factors that have proved significant in its decisions to date: (1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; and (3) *whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value*.[82]

The Commission went on to describe its enforcement procedure and what information was necessary to include in any complaint of broadcast indecency before the Commission would take further action. In order for a complaint to be considered, the FCC stated that it must include: (1) a full or partial tape or transcript or significant excerpts of the program; (2) the date and time of the broadcast; and (3) the call sign of the station involved. If a complaint does not contain this supporting material, or if it indicates that a broadcast occurred during the "safe harbor" hours, or the material cited does not fall within the indecency definition, it will generally be dismissed by a letter to the complainant advising of the deficiency.

If, however, the FCC staff determines that a documented complaint meets all the requirements, then it will evaluate the broadcast for patent offensiveness. If the staff determines that the broadcast is not patently offensive, the complaint will be denied.

The Enforcement Bureau, in conjunction with other Commission offices, examines the material and decides upon an appropriate disposition, which might include any of the following: (1) denial of the complaint by staff letter based on a finding that the material, in context, is not patently offensive and therefore not indecent; (2) issuance of a Letter of Inquiry to the licensee seeking further information or an explanation of the circumstances surrounding the broadcast; (3) issuance of a Notice of Apparent Liability (NAL) for monetary forfeiture;[83] and (4) formal referral of the case to the full Commission for its consideration and action. Generally, the last of these alternatives is taken in cases where issues beyond straightforward indecency violations may be involved or where the potential sanction for the indecent programming exceeds the Bureau's delegated authority.[84]

Where a letter inquiry is issued, the licensee's comments are generally sought concerning the allegedly indecent broadcast to assist in determining whether the material is actionable and whether a sanction is warranted. If it is determined that no further action is warranted, the licensee and the complainant will be so advised. Where a *preliminary* determination is made that the material was aired and was indecent, a Notice of Apparent Liability is issued. If the Commission previously determined that the broadcast of the same material was indecent, the subsequent broadcast constitutes *egregious* misconduct and a higher forfeiture amount is warranted.[85]

The licensee is afforded an opportunity to respond. Once the Commission or its staff has considered any response by the licensee, it may order payment of a monetary penalty by issuing a Forfeiture Order. Alternatively, if the licensee successfully rebuts the preliminary finding of violation, the NAL may be rescinded. If a Forfeiture Order is issued, the monetary penalty assessed may either be the same as specified in the NAL or it may be a lesser amount if the licensee has demonstrated that mitigating factors warrant a reduction in forfeiture.

A Forfeiture Order may be appealed by the licensee through the administrative process under several different provisions of the Commission's rules. The licensee also has the legal right to refuse to pay the fine and to litigate the matter in court. In such a case, the Commission may refer the matter to the U.S. Department of Justice, which can initiate a trial *de novo* in a U.S. District Court. The trial court may start anew to evaluate the allegations of indecency.

Regulation of Indecency in Other Media

We have already alluded to the issue of indecency in other forms of media and the government's attempts to regulate it. The *Sable*[86] case dealt with whether the government could impose an outright ban on indecent but not obscene "dial-a-porn" telephone communications. But is the concept of "indecency" as a separate punishable offense under federal or state criminal statutes applicable across the board in any media such as cable television or the Internet? A number of rulings have clarified the extent to which indecent speech can be prosecuted when it is presented in media other than radio and television broadcasting.

Indecency and Cable Television

We saw in chapter 5 that the FCC sought to extend its regulatory hand to cable television programming on the grounds that it was related to broadcasting. While the Supreme Court agreed, it reserved judgment on whether or not the regulation of cable could be coextensive with broadcasting.[87] In a close 5–4 vote the Supreme Court upheld the FCC's programming *obligations* on larger cable systems in *U.S. v. Midwest Video Corp.*[88] Again, the majority of the Court agreed with the FCC that such regulations were justified because cable is an extension of broadcasting (under the concept of "ancillary jurisdiction" enunciated in *Southwestern Cable)*. However, when the FCC attempted to require new cable systems with 20 or more channels to allocate four of their channels to public, educational, local government, and leased access programming, the Court ruled that the FCC had exceeded its authority.[89]

Then in *Cruz v. Ferre*,[90] a U.S. Circuit Court upheld a decision by the lower federal district court that struck down a Miami ordi-

nance banning indecent programming on cable. The district court noted a number of differences between cable television programming and over-the-air broadcast programming that justified a different result than in *Pacifica*. A cable subscriber must make the affirmative decision to bring the cable signals into his or her home; thus, cable "intrudes" into the home only at the express invitation of the homeowner. Second, parents may take advantage of the "lockbox" technology available from the cable supplier to lock out or screen children from offensive programming. Non-consenting adults may also avoid unpleasant programming by consulting the program guides provided by the cable company, or by asking the cable company to block the "adult" channels altogether. These means, said the Court, are less restrictive of First Amendment rights than a flat ban on indecent programming such as that set forth in the ordinance. The Supreme Court declined to hear the case and the *Cruz* decision remains law today.

In 1992 Congress overrode a presidential veto and passed the Cable Television Consumer Protection and Competition Act,[91] which permitted the cable operator to allow or prohibit programming that it "reasonably believes . . . depicts sexual . . . activities or organs in a patently offensive manner." Under Section(s) 10(b), which applied only to leased access channels, operators were required to segregate "patently offensive" programming on a single channel, to block that channel from viewer access, and to unblock it (or later to re-block it) within 30 days of a subscriber's written request. Between 1984, when Congress authorized municipalities to require operators to create public access channels, and the Act's passage, federal law prohibited operators from exercising any editorial control over the content of programs broadcast over either type of access channel. These provisions, and the accompanying regulations put in place by the FCC as directed by the Act, finally made their way to the Supreme Court in 1996.

A coalition of organizations sought review of the FCC's regulations, claiming that they violated the First Amendment.[92] The Supreme Court granted *certiorari* and then partly affirmed the lower court's ruling.[93] Justice Stephen Breyer announced the opinion of the Court that Section 10(b) violated the First Amendment. The requirement that cable operators "segregate and block" indecent programming had obvious speech-restrictive elements, wrote Justice Breyer, and was not "narrowly tailored" to achieve its basic, legitimate objective of protecting children from patently offensive, but not obscene, programs. Less restrictive means utilized by Congress elsewhere to protect children from such material on cable channels support the conclusion as to Section 10(b)'s overbreadth. The Telecommunications Act of 1996, for example, uses blocking without written request; the "V-chip" allows the viewer to lock out overly violent television programming.

With respect to sections of the 1992 Act dealing with private-leased and government access cable channels, a majority of the

Court affirmed the D.C. Circuit's decision sustaining their validity. Thus, a cable operator may enforce a written and published policy of prohibiting programming on government-reserved and private leased access channels that the operator "reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."

Justice Breyer, joined by Justices Stevens, O'Connor, and Souter said that the provisions permitting (but not requiring) the cable operator to exercise editorial discretion over leased and government channels was an acceptable balance between the interests of government in protecting children and the First Amendment rights of local governments and private parties leasing channels and was similar, in principle to the kind of balance struck by the Court with respect to broadcasting in the *Pacifica* case.[94]

Indecency and the Internet

In addition to the broad-sweeping changes made in the Communications Act by provisions of the Telecommunications Act of 1996, the Congress also adopted the Communications Decency Act of 1996 (CDA).[95] The Act was designed to extend the concept of indecency as applied to broadcasting to the Internet. Section 223(a)(1) criminalized the "knowing" transmission of "obscene or indecent" messages to any recipient less than 18 years of age. Section 223(d) prohibits the knowingly sending or displaying to a person under 18 of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[96]

A number of plaintiffs including the American Civil Liberties Union filed suit challenging the constitutionality of those sections of the Act. The federal district court issued a preliminary injunction against Attorney General Janet Reno from enforcing the provisions of the law on the grounds that the CDA violated both the First Amendment because it was overboard and the due process clause of the Fifth Amendment because it was too vague.[97]

In a 7–2 decision, the Supreme Court upheld the findings of the lower court and ruled that the provisions in question violated the First Amendment.[98] Justice Stevens delivered the Court's opinion in which all but Chief Justice Rehnquist and O'Connor joined. After discussing the history and phenomenal growth of the Internet, Justice Stevens, quoting from the district court's opinion, noted that:

> Unlike communications received by radio or television, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended."[99]

The Court also found that the *Pacifica* ruling did not help the government's case. First, the order in *Pacifica*, issued by an agency that had been regulating radio stations for decades, targeted a specific broadcast that represented a rather dramatic departure from traditional program content in order to designate *when*—rather than *whether*—it would be permissible to air such a program in that particular medium. The CDA's broad categorical prohibitions, on the other hand, were not limited to particular times, nor were they dependent on any subsequent evaluation by an agency familiar with the unique characteristics of the Internet. Second, unlike the CDA, the FCC's declaratory order was not *punitive;* the Court expressly refused to decide whether the indecent broadcast would support a criminal prosecution. Finally, the FCC's order applied to a medium that as a matter of history had received the least amount of First Amendment protection—particularly because warnings could not adequately protect the listener from unexpected program content.

The Internet, however, has no comparable history of limited protection. Moreover, the risk of encountering indecent material by accident is remote because of the series of affirmative steps required to access specific material. The Court also stated that no decision had ever upheld legislation that constituted an absolute ban on such speech, particularly where alternative means of protecting minors were available. It therefore affirmed the district court's injunction and ruled that the pertinent provisions of the CDA were unconstitutional.

Regulation of Indecency in Public Libraries

About the same time as the *Reno* case was being handed down by the Supreme Court, a similar issue concerning control of indecent material on the Internet was being contested in the Eastern District of Virginia. In October of 1997 the Board of Trustees of Loudoun County Public Libraries adopted a policy on "Internet Sexual Harassment," which required that Web site-blocking software be installed on all computers made available to library patrons so as to: "(a) block child pornography and obscene material (hard core pornography)"; and "(b) block material deemed harmful to juveniles under applicable Virginia statutes and legal precedents (soft core pornography)." To implement the policy, the Board chose "X-Stop," a commercial software product.

A group of citizens filed suit in federal district court against the board[100] and its individual members, alleging that the implementation of the policy impermissibly blocked their access to protected speech such as "Quaker Home Page," the Zero Population Growth Web site, and the site for the American Association of University Women, Maryland Chapter. The board defended itself on a number of procedural grounds, including that they had legislative immunity under Virginia law, as well as under the CDA[101] and that the plaintiffs lacked stand-

ing because they failed to allege any injury. The district court rejected all of these procedural defenses and addressed the main issue of whether or not the library policy violated the First Amendment.

The Court concluded that, absent a compelling state interest and means narrowly drawn to achieve that end, the Library Board was precluded by the First Amendment from adopting and enforcing content-based restrictions on access to protected Internet speech. Citing the recently decided *Reno* (CDA) case by the Supreme Court, the district court ruled that the Library Policy limited the Internet speech available to adults to what is fit for juveniles, and accordingly it was fatally overboard.[102] However, in June 2003, the Supreme Court modified the ruling in *U.S. v. American Library Association* (slip op.), which said that libraries that receive federal funds are subject to the rules Congress attaches to these funds. Writing for a 6–3 majority, Chief Justice Rehnquist cited the Supreme Court's 1998 holding that the National Endowment for the Arts (see below) was subject to the Congressional mandate that it hold grant recipients to standards of decency. Thus, the same standards could be imposed by Congress on funds to libraries.

Indecency and the Arts

Since 1965 the federal government has provided grants for the encouragement and development of artistic expression. The National Foundation on the Arts and Humanities Act[103] created the National Endowment for Arts to administer public grants designed to "help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of . . . creative talent."[104] The enabling statute vests the NEA with substantial discretion in the awarding of grants, identifying only the broadest funding priorities, including "artistic and cultural significance, giving emphasis to American creativity and cultural diversity," "professional excellence," and the encouragement of "public knowledge, education, understanding, and appreciation of the arts."[105] Advisory panels of experts in the relevant artistic field initially review applications for NEA funding. The panels, in turn report to the National Council on the Arts, which advises the NEA Chairperson.

In 1989, controversial photographs that appeared in two NEA-funded exhibits[106] prompted public outcry over the agency's grant-making procedures. Congress reacted to the controversy by inserting an amendment into the authorization bill for NEA's 1990 funding. The amendment directs the chairperson to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[107] Congress also enacted an amendment providing that no NEA funds "may be used to promote, disseminate, or produce

materials which in the judgment of [the NEA] may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value."[108] The NEA implemented Congress' mandate by instituting a requirement that all grantees certify in writing that they would not utilize federal funding to engage in projects inconsistent with the criteria in the 1990 appropriations bill. The central California federal district court in *Bella Lewitzky Dance Foundation v. Frohnmayer* subsequently invalidated this certification requirement as unconstitutionally vague,[109] and the NEA did not appeal the decision. The language directing the chairperson to use procedures in judging the artistic merit of grant applications to "take into consideration general standards of decency and respect for diverse beliefs and values of the American public" was not affected by the *Frohnmayer* decision.

In 1990 four individuals who had applied for grants and had received recommendations from the NEA advisory panels were subsequently told that the National Council for the Arts, which reviews the advisory panel recommendations, had voted to deny funding. They filed suit, alleging that the NEA had violated their First Amendment rights by rejecting their applications on political grounds, had failed to follow statutory procedures by basing the denial on criteria other than those set forth in the NEA's enabling statute, and had breached the confidentiality of their grant applications through the release of quotations to the press, in violation of the Privacy Act of 1974.[110] When later that year Congress enacted §954(d)(1), the plaintiffs amended their complaint to challenge the provision as void for vagueness and impermissibly viewpoint based.

The U.S. Circuit Court of Appeals in a divided opinion said that the "decency and respect" criteria contained in the 1990 amendment gave rise to the danger of arbitrary and discriminatory application of funding awards and was thus void for vagueness under the First and Fifth Amendments. Alternatively, the criteria violated the viewpoint-based restrictions provisions of the First Amendment and the government had not shown a compelling state interest in imposing such restrictions.[111]

The U.S. Supreme Court granted *certiorari* and reversed the holdings of the district court and the Ninth Circuit. The Court ruled that the "decency and respect" criteria simply added additional considerations to the grant-making process and did not impose mandatory criteria on either the NEA chairperson or the advisory bodies established to review grant applications. Justice O'Connor, writing for the majority of the Court, stated that the additional criteria, although content-based and seemingly vague in their meaning, nevertheless passed constitutional muster because they were simply listed

as factors to consider, rather than absolute standards that must be met to secure funding. Their vagueness is neither greater nor less than that of the primary criterion of "artistic excellence." Thus the lower court's determination that the amendment was invalid on its face must be reversed. As to whether or not the criteria were unconstitutional as applied, the Court noted that the plaintiffs had offered no evidence that any particular funding decision had been made as a means of suppressing any particular form of expression or viewpoint.

Conclusion

In the last two chapters we have explored one of the most difficult and perplexing subjects of the law surrounding freedom of expression. What is "obscene" or "indecent" is a highly subjective matter that resists attempts by even the most rigorous legal and logical analysis to define or describe. We may agree on limiting the concept to matters involving sexual or excretory activities or organs, but what may be "serious" artistic expression for one person can be highly offensive and vulgar to another. Like the character Dr. Frankenstein in Mary Shelly's famous novel by the same name, the late Justice Brennan, author of the *Roth* definition of obscenity, may be correct in ultimately disowning his creation and admitting the Court's failure to develop a legal doctrine that provides a clear standard of what is obscene. However, even if the concept of obscenity were scrapped, the legal and moral issues involving how children might be protected from potentially harmful and destructive material of a sexual nature would remain.

Study Questions

1. Do you agree with the Court and the FCC that speech labeled "indecent" (such as the George Carlin monologue on Seven Dirty Words) should not be broadcast over radio or television before 10:00 P.M.?

2. The National Cable Television Association reports that over 66% of American households are connected to a cable television system, almost all of them having a channel capacity of 25 channels or greater. As the percentage of connected households continues to increase, does it any longer make sense to make constitutional distinctions between over-the-air broadcast and cable television service on the basis that the former is "pervasive" and "intrusive," while the latter is not?

3. In ruling that the Communications Decency Act was unconstitutional, both the district court and the Supreme Court alluded to the fact that most "pornographic" Web sites, being commercially

motivated and charging a subscription fee, had sufficient motivation to block out underage Web surfers, or at least imposed several layers of protection so that the casual Web user would not stumble on such sites by accident. Is this true today? If not, do you believe Congress should attempt once again to regulate pornographic sites by making filtering and blocking mandatory and by restricting the number of "links" to such sites from other non-pornographic sites? If so, how would those sites operated by persons and originating from locations outside of the United States be affected?

4. On a related issue, can Internet traffic be regulated in any meaningful way under state law? For example, could the state of Kansas prosecute a Web site author living in New York under its anti-pornography law? What about a subscription television service that is delivered by satellite transmissions?

Simulation Exercises

1. *Trial Case 9-1:* Smallville Community College has a number of classes carried over the leased access channel on the Smallville cable system. One of the classes, "The Art of East Asia" deals with the painting, architecture, and sculpture in a number of Asian cultures including India, Thailand, Laos, Tibet, and China. A major unit in the two-semester course discusses Hindu art from ancient times to the present. The program airs at 9:30 P.M. to 11 P.M. Included in the lectures are a number of photos of Hindu sculptures displaying male and female figures engaged in a variety of sexual positions and activities, some of them quite "acrobatic." The lecturer's voice-over narration notes the importance of sex in the ancient Hindu religion, not only in sculpture but in architecture as well.

   The Smallville Public Decency Association pressures the town council to enact an ordinance that would prohibit the display of any form of nudity on the leased access channels of the cable television system. Faced with the prospect of not having its cable franchise renewed by the town council, the college accedes to the ordinance and takes the East Asian Art program off the air. The academic community is enraged by the action, and a group of students, represented by the local ACLU attorney, files a suit against both the cable operator and the town council seeking a permanent injunction against the removal of any academic program offered over the cable system. The Smallville city attorney, joined by the cable company, file a motion for summary judgment to dismiss the suit, citing Section 10(a) and 10(c) of the Cable Television Consumer Protection and Competition Act of 1992. When the summary judgment is denied the case is

appealed to the Supreme Court. Side one = the town council; side two = concerned students. Supreme Court: How do you rule on the arguments presented?

2. *Trial Case 9-2:* Self-confessed "shock jock" Henrietta Sturm regularly makes sexual allusions during her morning drive time (7 A.M. to 10 A.M.) morning radio show in Los Angeles. The station is owned by the Big Stick broadcasting company in Denver, which syndicates the show across the country. During several morning shows, Sturm makes remarks that draw complaints from listeners. These remarks include the following: "When I get nude in front of a gay guy, they get so hot that they can't control themselves. . . . Those stupid, bastard Russians are so lazy they can't produce anything. . . . I'm completely aroused by Brad Pitt, who is here today. I don't think he's wearing underpants. Let me look. OOOeeee. . . . I just heard the commissioner of the FCC has prostate cancer. I hope it runs through his whole body. I pray for his death. . . . I hate Mark and Brian. I want to just strip and rape their wet bodies. . . . Malcolm X would throw up if he saw Eddie Murphy's movies. I've never seen such an ass-kisser in my life. Is he sleeping with Arsenio or what?"

   Sturm's ratings are the highest in the LA area; and she's second in the Philadelphia market. One radio listener, Ms. Judy Trump, is surprised when her daughter tunes in to Sturm's show on her way to her daughter's school. "All the kids listen," the daughter reports. Ms. Trump is so outraged, she files a formal complaint with the FCC. It turns out that Ms. Trump never listens to that station but that her 12-year-old daughter tunes it in on her Walkman when she gets to school because her friends think Sturm is "cool." Citing *FCC v. Pacific*, and the ACT II and ACT III cases, the FCC fines Sturm $105,000 and fines Big Stick broadcasting $600,000 for repeated violations of the FCC's indecency code in several markets where Sturm's show is syndicated. Sturm and Big Stick immediately appeal the decision to the Supreme Court seeking to overturn the *Pacifica* case and ACT II and ACT III. Side one = Mrs. Trump and the FCC; side two = Sturm and Big Stick Broadcasting. Supreme Court: Do you find for Sturm and Big Stick or the FCC?

Endnotes

[1] Radio Act of 1927, §29, 44 Stat. 1172 (1927).

[2] The current language is found in Title 18, Section 1464 of the United States Code:

> Whoever utters any obscene, indecent or profane language by means of radio communications shall be fined not more than $10,000 or imprisoned not more than two years or both.

Similar provisions were adopted that prohibit the sending of obscene, indecent, or profane matter over wire communications media. See 47 U.S.C. §§223, 230.

[3] 33 FCC 265 (1961).

[4] 354 U.S. 476 (1957). See discussion of the *Roth* case in chapter 8.

[5] See discussion of 18 U.S.C. §1461 (mailing of obscene material) above.

[6] *Palmetto Broadcasting Co.*, 33 FCC 265, 297 (1961).

[7] 343 U.S. 495 (1952).

[8] 33 FCC 265, 298.

[9] This standard harkened back to the "most sensitive person" test employed in *Regina v. Hicklin* but specifically rejected by the Supreme Court in *Roth*.

[10] *Palmetto Broadcasting Co.*, 33 FCC 265, 299. The Commission concluded that, because Station WDKD had broadcast the offensive programs for a considerable period, and even after the Licensee had received numerous complaints from offended listeners, Palmetto's license to operate the station would not be renewed.

[11] *In re Pacifica Foundation*, 36 FCC 147 (1964).

[12] *Palmetto Broadcasting Co.*, 33 FCC 265, 298.

[13] 24 FCC 2d 408, 18 RR 2d 870 (1970).

[14] The Commission had been monitoring *Cycle II* following receipt of several complaints; however, it had received no complaints about the Garcia interview.

[15] The 1938 broadcast of *War of the Worlds* read by Orson Wells is a case in point. Prior to the broadcast it was announced that the program, broadcast on Halloween night, was only a play—a dramatization of the science fiction story written by British novelist H. G. Wells at the turn of the century. Many people in the northeast listening to the CBS broadcast however, tuned in too late to hear the introduction and believed that the U.S. was under attack by Martians. Panic set in as word spread by telephone and more people tuned in to listen to the broadcast, which was written in the form of a series of newscasts.

[16] 24 FCC 2d 408, 410. The Commission reasoned that the widespread use of such language on the radio would undermine the usefulness of the broadcast medium for millions of people because listeners would never know whether or not their children would be exposed to such "vile expressions" whenever they tuned in to a station's broadcast. This, in turn, would severely curtail their use of radio, which was not in the public interest. *Id.*, 24 FCC 405, 411.

[17] The licensee was given a nominal fine of $100, making it uneconomical for Eastern to appeal the ruling to the courts.

[18] 41 FCC 2d 919 (1973).

[19] *Associated Press v. United States*, 326 U.S. 1 (1945); *Red Lion Broadcasting, Inc. v. FCC*, 395 U.S. 367 (1969); see also, *Burstyn v. Wilson*, 343 U.S. 495 (1952).

[20] *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (1975). The D.C. Circuit of the U.S. Court of Appeals normally hears appeals of federal agency rulings. As a consequence, the judges of that circuit have developed considerable expertise in federal regulatory matters.

[21] 390 U.S. 629 (1968). As we saw in chapter 8, the *Ginsberg* case established the principle that the state had a greater interest in protecting

minors and could therefore restrict children's access to non-obscene materials and punish those who knowingly distributed such materials to minors or who exploited children in the making of pornographic materials.

[22] The Court did disagree with the Commission's conclusion that the program was "utterly lacking" in any redeeming social value, meaning it was not obscene under the old *Roth-Memoirs* test. However, the Court concluded that because the program failed the "serious literary, artistic, political or scientific value" test of *Miller*, and because the program constituted *pandering*, it could still be held obscene.

[23] Quoted in the Opinion. Pacifica said it was unaware of any complaints and had received none until the FCC made its inquiry.

[24] 56 FCC 2d 94, 99. The Commission did not impose any formal sanctions on Pacifica, but stated that the order would be "associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress." *Id.*, at 99. The sanctions are (1) revocation of license; (2) cease and desist orders; (3) denial of renewal of license; and (4) granting renewal for less than a standard term.

[25] The Commission recited that broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference (*citing Rowan v. Post Office Dept.*, 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. 56 FCC 2d 94, 97 (1975).

[26] 56 FCC 2d, 94, 98. Given the importance of the first criteria, the Commission observed that if an offensive broadcast had literary, artistic, political, or scientific value, and were preceded by warnings, it might not be indecent in the late evening but would be so during the day when children are in the audience. *Id.*

[27] 59 FCC 2d 892 (1976).

[28] The Commission did acknowledge that under circumstances where public events likely to produce offensive speech are covered live, and there was no opportunity for journalistic editing, "it would be inequitable for us to hold a licensee responsible for indecent language. . . . We trust that under such circumstances a licensee will exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes." 59 FCC 2d, 892, 893 n. 1.

[29] 47 U.S.C. §326.

[30] *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

[31] The "doctrine" was first articulated by Justice Felix Frankfurter who pointed out that Article III of the Constitution that set up the federal courts stated that the review of the courts was "cases and controversies." As we saw in *Miller v. California*, however, the doctrine has not kept the Court in the past from making pronouncements many would argue are legislative in nature. See, especially, *Roe v. Wade*, 410 U.S. 113 (1973), wherein the Court ruled that a woman had a constitutional right to terminate a pregnancy by abortion.

[32] 438 U.S. 726, 737. The Court noted that this view was consistent with early rulings by the FCC upheld by the U.S. Court of Appeals.
[33] 438 U.S. 726, 741–742.
[34] Justice Stevens argued in a footnote that Carlin's opinion that society's attitude towards the use of "four-letter words" did not mean that they could be used in all contexts: "The belief that these words are harmless does not necessarily confer a First Amendment privilege to use them while proselytizing, just as the conviction that obscenity is harmless does not license one to communicate that conviction by the indiscriminate distribution of an obscene leaflet." 438 U.S. 726, 742.
[35] *Cohen v. California*, 403 U.S. 15 (1971).
[36] 438 U.S. 726, 742, note 25.
[37] 403 U.S. 15, 26.
[38] 343 U.S. 495 (1952).
[39] *FCC v. Pacifica Foundation, Inc.*, 438 U.S. 726, 748.
[40] 418 U.S. 241 (1974).
[41] 438 U.S. 726, 748. Justice Stevens cited *Rowan v. Post Office Department*, 397 U.S. 728 (1970).
[42] 438 U.S. 726, 749.
[43] 438 U.S. 726, 750–751.
[44] 438 U.S. 726, 771.
[45] *In re KPFK-FM, Pacifica Foundation, Inc.*, 2 FCC Rcd 2698 (1987).
[46] *In re KCSB-FM, Regents of the University of California*, 2 FCC Rcd 2703 (1987).
[47] *In re WYSP-FM, Infinity Broadcasting Corporation of PA*, 2 FCC Rcd 2705 (1987).
[48] *Public Notice*, "New Indecency Enforcement Standard to Be Applied to All Broadcast and Amateur Radio Licensees," 62 RR 2d. at 1218 (1987).
[49] 2 FCC Rcd 2701.
[50] 2 FCC Rcd 2703.
[51] *Id.*, at n. 10. The data, however, was quite sketchy. The Commission cited the Arbitron Ratings Service, which showed that there were 1200 children listeners between the ages of 12 and 17 per average quarter hour in the Santa Barbara area between the hours of 7 and 10 P.M. This was out of a total population of 4900 children of those ages inside the Santa Barbara city limits and 27,800 in the county of Santa Barbara.
[52] 2 FCC Rcd at 2699, 2703.
[53] The specific program cited by the Commission, dealt with lesbianism, and contained "explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles." 2 FCC 2d 2706, 62 RR 2d 1206.
[54] *In re: Infinity Broadcasting Co. of Pennsylvania (WYSP(FM))*, 2 FCC Rcd. 2706, 2706 (1987).
[55] *Id.*
[56] *Public Notice*, "New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees," 62 RR 2d 1218 (1987).
[57] *Id.*
[58] Specifically, the petitioners asked the Commission to (1) clarify further the standards that would be used under the "patently offensive" test and the "contemporary community standards for the broadcast medium" test;

(2) consider the literary, artistic, political or scientific (LAPS) value of the programming in making a determination as to whether it is indecent; (3) exempt news and informational programming from a finding of indecency (on theories similar to those supporting the bona fide news exemptions under Section 315(a) of the Communications Act); (4) defer to reasonable, good faith judgments of licensees in applying the indecency standards (as was done during enforcement of the Fairness Doctrine); (5) apply sanctions prospectively, not punishing individual licensees until after they have been put on notice that particular programming is considered indecent; and (6) adopt a fixed time of day after which non-obscene, adult-oriented programming may be aired, or articulate a similar "bright line" or "safe harbor" rule. *In re: Infinity Broadcasting Corporation,* 64 RR 2d 211, 214 (1987) (*"Indecency Reconsideration Order"*).

59 *Indecency Reconsideration Order, supra.*

60 *Id.*

61 *Id.*, 64 RR 2d at 218, n. 27. The Commission expressed the view that the midnight hour balanced the various competing interests between (1) the government, which had a compelling interest in protecting children from indecent material; (2) parents, who are entitled to decide whether their children are exposed to such material if aired; (3) broadcasters, whose first amendment rights entitle them to broadcast such material at times when there is no reasonable risk that children may be in the audience; and (4) adult listeners, who have a right to see and hear programming that is inappropriate for children but not obscene. *Id.*

62 Brief of Intervenor American Civil Liberties Union (Case No. 88-1064), pp 30–31. For a discussion of the LAPS test, see Chapter 7.

63 *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*"ACT I"*).

64 The Court offered some of the descriptions of the doings of Gargantua and Pantagruel in Rabelais' classic, certain passages in the works of Joyce, certain words and phrases found in the writings of D. H. Lawrence, James Baldwin, and Frank Harris, and even the Carlin monologue itself, as examples of where a work has recognized merit but was still offensive, and, presumably, subject to the regulation under the FCC's Indecency policy. *ACT I, supra*, 852 F.2d 1340, n.13.

65 852 F.2d 1340. The Court went on to note that the FCC had assured the judges during oral argument, that it would continue to give weight to reasonable licensee judgments when deciding to impose sanctions in a particular case. Thus, it reasoned, the potential chilling effect of the generic definition would be tempered by the Commission's restrained (but unarticulated) enforcement policy. 852 F.2d 1340, n.14.

66 *Federal Appropriations for Fiscal Year Ending Sept. 30, 1989*, P.L. 100-459, §608, 102 Stat. 2186, 2288 (1988) (*"1989 Appropriations Legislation"*). The statute stated:

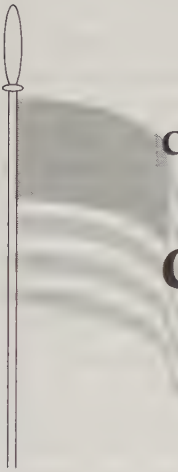
> By January 31, 1989 the Federal Communications Commission shall promulgate regulations in accordance with Section 1484, Title 18, United States Code to enforce the provisions of such section on a twenty-four hour per day basis."

67 134 Cong. Rec. 9913 (July 28, 1988).

68 *Order in Enforcement of Prohibitions Against Broadcasting Obscenity and Indecency in 18 U.S.C. §1464.*, 4 FCC Rcd 457 (1988).

[69] 492 U.S. 115 (1989).
[70] Pub. L. 100-297, 102 Stat. 424 (April, 1988); the act was further amended in November of 1988 to make the enforcement of the ban through the Justice Department and not through any FCC administrative proceedings. See Pub. L. 100-690, 102 Stat. 4502, *codified as* 47 U.S.C. §223(b) (1988).
[71] 492 U.S. 115, 127.
[72] 492 U.S. 115, 128. The Justice Department had argued that nothing short of a total ban on dial-a-porn could prevent children from gaining access to such messages. The Supreme Court rejected this argument, citing the FCC's own Report that its proposed rules requiring credit card, access code, and scrambling of the signal were a satisfactory solution to the problem of access to indecent messages by minors. The U.S. Court of Appeals had agreed with the FCC. *Sable Communications of California, Inc. v. FCC*, 837 F 2d 555 (1988).
[73] 932 F2d 1504 (D.C. Cir. 1991) ("ACT II").
[74] 932 F2 1509.
[75] The Supreme Court denied a petition for *certiorari* to review ACT II. 112 S. Ct. 1281 (1992).
[76] Pub. L. No. 102-356, 106 Stat 949 (1992).
[77] *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. §1464, Memorandum Opinion and Order*, 10 FCC Rcd 10558 (1995), 60 FR 44439 (Aug. 28, 1995).
[78] FCC 01-90 (File No. EB-00-IH-0089), (released April 6, 2001).
[79] *Id.*, ¶7 *(citing, WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV)*, 15 FCC Rcd 1838, 1840-41 (2000)).
[80] *Id.*, ¶8.
[81] *Id., (quoting, WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd at 1841 (2000)). The Commission noted that this analysis was derived from the U.S. Supreme Court's decision in *Hamling v. United States*, 418 U.S. 87 (1974), an obscenity case that held that fact finders in federal cases need not use any precise geographic area in evaluating material and that the decision had to be based not on the decision maker's personal opinion nor by the effect of the material on the most sensitive person, but rather the average person in the community. *Id.* note 15.
[82] *Id.*, ¶10.
[83] The staff can also recommend that an evidentiary hearing be held in cases where certain critical facts about the broadcast are in dispute.
[84] Under 47 C.F.R. § 0.311 of the Commission's rules, the staff is limited in the extent of enforcement actions it may take without specific authorization from the five Commissioners. In the case of imposing monetary forfeitures, the Staff is limited to imposing fines of $25,000 or less.
[85] *KGB, Inc. (KGB-FM)*, 13 FCC Rcd 16396 (1998).
[86] *Sable Communications of California v. FCC*, 492 U.S. 115 (1989).
[87] In *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968), the Supreme Court rejected a challenge to the FCC's assertion that it had ancillary jurisdiction over cable TV to ensure that uncontrolled expansion of cable systems and the importation of distant television signals did not disrupt over-the-air television service, particularly the fledgling UHF television service. The Court did not address the issue of whether the FCC also had authority to regulate the programming over cable systems.
[88] 406 U.S. 649 (1972) ("*Midwest Video I*").
[89] Under Section 163(h) of the Communications Act. *FCC v. Midwest Video Corp. ("Midwest Video II")*, 440 U.S. 689 (1979).

[90] 755 F. 2d 1415 (11th Cir., 1985).
[91] 106 Stat. 1486, 47 U.S.C. §§530 *et seq.* (1992). See sections, 47 U. S. C. §§532(h), 532(j), and note following Section 531.
[92] A panel of the District of Columbia Circuit agreed with the petitioners that the provisions violated the First Amendment. The entire Court of Appeals, however, heard the case *en banc* and reached the opposite conclusion. It held all three statutory provisions (as implemented) were consistent with the First Amendment. Four of the eleven judges dissented. Two of the dissenting judges concluded that all three provisions violated the First Amendment. Two others thought that either one, or two, but not all three of the provisions, violated the First Amendment.
[93] *Denver Area Educational Telecommunications Consortium, Inc. et al. v. FCC*, 116 S.Ct. 2374 (1996).
[94] *FCC v. Pacifica Foundation*, 438 U.S. 726 (1975).
[95] 47 U.S.C. §223(a)(1)(B)(ii) (Supp. 1997).
[96] Affirmative defenses are provided for those who take "good faith, . . . effective . . . actions" to restrict access by minors to the prohibited communications (§223(e)(5)(A)), and those who restrict such access by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number (§223(e)(5)(B)).
[97] *ACLU v. Reno, et al.* 929 F.Supp. 824 (E.D. Pa. 1996).
[98] *Reno v. American Civil Liberties Union, et al.*, 117 S.Ct. 2329 (1997).
[99] 117 S.Ct. 2329 (1997).
[100] *Mainstream Loudoun et al. v. Board of Trustees of the Loudoun County Library, et al.*, F.Supp. (E.D. Va. 1997).
[101] Section 230(c)(2) of the CDA provides that, "No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."
[102] The district court also ruled that the board's "unblocking" procedure whereby an adult patron of the library might request that a restricted site be unblocked upon written request had a chilling effect on the exercise of such patron's First Amendment rights. Accordingly the unblocking policy did not save the library policy from otherwise being struck down.
[103] 20 U.S.C. §950, *et seq.*
[104] 20 U.S.C. §951(7).
[105] 20 U.S.C. §§954(c)(1)-(10).
[106] The exhibits at issue were the photographs of Robert Mapplethorpe, which contained a number of homoerotic subjects condemned by many members of Congress as lurid and pornographic, and certain photographs of Andres Serrano, in particular the work entitled "Piss Christ," portraying a crucifix immersed in urine.
[107] 20 §954(d)(1).
[108] Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. 101-121, 103 Stat. 738, 738–742.
[109] 754 F. Supp. 774 (CD Cal. 1991).
[110] 5 U.S.C. § 552(a). The plaintiffs also asked for restoration of the recommended grants or reconsideration of their applications, as well as damages for the Privacy Act violations.
[111] *NEA v. Finley et al.*, 100 F.3rd 671 (9th Cir. 1996).



Chapter 10

Commercial Speech

Aside from personal communication, no communication is more pervasive in our lives than commercial discourse. It fills newspapers, magazines, television programs, and billboards. It pops up on computers and annoys us on the telephone. Logos for products are prominently placed in motion pictures. Though no injunction against commercial speech can be found in the First Amendment or even in the debates surrounding its ratification, in this century commercial speech has not been given equal status with other forms of speech. There has been a tendency among legislators and courts to consider advertising "merely" about commercial transactions, as the Supreme Court said in 1942 in *Valentine v. Chrestensen* (see below). Currently, federal, state, and local governments are attempting to regulate or ban some forms of commercial speech, such as billboard advertising of alcohol and tobacco products.

The purpose of this chapter is twofold. First, it looks at current constitutional protections for commercial speech and measures them against the original intent of the founders. Second, the chapter provides guidelines for examining commercial speech by analyzing current case law.

The Historic Context

The Declaration of Independence holds "these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." The colonists fought a rev-

olution to secure individual rights and civil liberties and enshrined them in a written constitution to ensure that no government could ever take them away.

Although every word spoken or printed originates in the human thought process, the founders failed to recognize explicitly the simple fact that, in addition to citizens, all speech is created equal. This omission has allowed the government to categorize speech according to the message and the medium used to disseminate it—and to extend varying degrees of First Amendment freedom to the different categories. As we have seen, words appearing as opinion in print receive greater protection than those same words when read as part of the evening newscast. Moreover, advertisements for contraceptives and abortion clinics are protected by the Constitution while commercials for cigarettes and gambling are subject to restrictions imposed by federal, state, and local regulators and the courts.

Those opposed to the regulation of advertising of legal products often point out that the framers of the Constitution and the Bill of Rights believed commercial expression to be essential to life, liberty, and the pursuit of happiness. For example, George Mason's Virginia Declaration of Rights claimed that the Revolution was fought to secure "the enjoyment of life and liberty, with the means of acquiring and possessing property. . . ." In his call for a bill of rights, Richard Henry Lee claimed that "a free press is the channel of communication to mercantile and public affairs."[1] The anonymous *Cato Letters*, a popular source for political ideas in the colonial period, stated: "the security of property, and the freedom of speech, always go together."[2]

When the Pennsylvania *Evening Post* printed the first copy of the Declaration of Independence on Saturday, July 6, 1776, a full page of advertising immediately followed it. Citizens used these advertisements to determine what products to buy and where to buy them. In fact, many prominent newspapers of the day included the word advertiser in their masthead. The founders were not simply trying to protect political speech; they were, after all, merchants, farmers, inventors, and men and women of commerce who believed that making a living was essential to the pursuit of happiness.[3] Commercial advertising pervaded the eight daily newspapers that were published in the United States in 1791 at the time the First Amendment was ratified. Advertising was certainly recognized by the framers as an important avenue for pursuing one's livelihood. Interfering with the livelihood of a colonist was something that the founders pledged their sacred honor to prevent. It seems clear that commercial speech was not a separate category of discourse in the minds of the framers of the Constitution.

As we have seen, governments have not always lived up to the founders' standards. For example, in 1915 just as the film industry was becoming commercially viable, the Supreme Court ruled that state boards of censorship could review films for unsavory depic-

tions. Interestingly, the Court justified its position based on the proposition that "the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of the country or as organs of public opinion."[4] The motion picture industry was not freed from this prior restraint until 1952, and the words used to justify the content control were precursors to the commercial speech doctrine that would emerge in 1942 with *Chrestensen* (see below).

Even before regulation of the film industry, the Court had upheld regulation of telegraph and telephone communications on the grounds that the companies were monopolies. Anti-trust goals were viewed as more important than First Amendment policy. The tension among anti-trust law, media content controls, and the First Amendment is nowhere more apparent than in the building of the "information superhighway." Information is provided to us through many different media. You can link your computer to the World Wide Web through the use of a phone modem or a cable line. You can watch 24-hour news services on cable television. You can hear weather and traffic reports on your car radio or listen to talk radio. You can receive television signals through an antenna, through cable, or via satellite. You can read the news in your newspaper, your favorite news magazine, or on-line. You can even watch the evening news in the morning if you programmed your VCR to record the program. Media outlets continue to explode as cable companies merge with movie companies and/or telephone and computer companies.

Corporate Advocacy of Public Issues

Corporate speech concerning matters of public importance should receive the same protections as political, non-commercial speech, according to the Supreme Court.[5] To restrict such speech, the government must prove that it has an overriding interest. Editorial advertisements concerning public issues are protected by the First Amendment regardless of whether the comments promote the economic interest of the corporate speaker.[6] The Supreme Court reaffirmed its position on corporate issue discussion in *Pacific Gas and Electric v. Public Utility Commission of California*.[7] The question the Court faced was whether a state regulatory agency could require a privately owned utility to include the speech of third parties, with which it disagreed, in the utility's monthly billing envelopes. Pacific Gas and Electric ("PG&E") had for 62 years distributed a newsletter to its customers in its billing envelopes. The newsletter included political editorials, feature articles, tips on energy conservation, and information on rates and services. In 1980, a special interest group petitioned the California State Public Utility Commission, arguing that PG&E should not be allowed to distribute political edito-

rials at the ratepayers' expense. The California PUC ruled that any "extra" envelope space was ratepayer property, and it required PG&E to allow outside groups to use the extra space to raise funds and disseminate counter editorials. PG&E believed that its First Amendment rights had been violated and appealed to the U.S. Supreme Court.

The Supreme Court sided with Pacific Gas and Electric, holding that speech does not lose its protection because of the corporate identity of the speaker. Forcing PG&E to provide space in its envelopes for the expression of particular views with which it disagreed was "antithetical to the free discussion that the First Amendment seeks to foster." Moreover, the Court stated that PG&E had "the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents."[8]

Editorial or informational content in an advertisement is entitled to full First Amendment protection. Furthermore, states and the federal government are not allowed to suppress commercial speech in invidious ways. It is protected by the same precedents that protect other forms of speech from economic punishment. For example, *City of Los Angeles v. Taxpayers for Vincent* (1984) states that attempts to suppress speech because of its content—in this case the mentioning of a tobacco product—are unconstitutional. The government may not regulate speech in a way that is prejudicial to some ideas at the expense of others; regulations must be content neutral. This position was clearly laid out in *Police Department v. Mosley* in 1972 when the Supreme Court ruled that a Chicago ordinance forbidding picketing was based on the content of the protest.[9] Remember that *R.A.V. v. St. Paul* (1992) ruled that a law is unconstitutional on its face if it prohibits otherwise permitted speech solely on the basis of the content of that speech.[10] The government may not restrict speech based on its content, nor may it use content to discriminate in favor of one message over another. Furthermore since the 1973 decision in *Committee for Public Education & Religious Liberty v. Nyquist*, the Court has held that it does not matter whether the financial burden imposed on the targeted speech is direct or indirect.

State and local regulation of certain kinds of advertising over the broadcast media may be pre-empted by federal rules. For example, in *Capital Cities Cable v. Crisp* (1984), the Court held that the state of Oklahoma did not have jurisdiction over broadcast signals imported by cable operators.[11] But the Supreme Court has been less clear when it comes to the issue of banning purely commercial speech outright.

Commercial Speech: A Definition

Although defining commercial speech has not been easy, it is generally recognized as advertising that does *no more* than solicit a commercial transaction.[12] Commercial speech is sometimes subject

to government restrictions that would be unconstitutional if applied to most non-commercial speech. Indeed, in 1932 in *Packer Corp. v. State of Utah*, the Supreme Court ruled that the state could restrict billboard advertisements for Chesterfield cigarettes. More important, in 1942 the Supreme Court stripped commercial speech of protection under the First Amendment in *Valentine v. Chrestensen*.[13] *Chrestensen* involved a New York businessman who was arrested for distributing handbills advertising a submarine exhibition. New York City's Sanitary Code explicitly provided dichotomous treatment of commercial and non-commercial speech: it forbade the distribution of commercial and business advertising material but permitted the distribution of handbills devoted to "information or public protest."[14] Chrestensen's double-faced handbill consisted of both a commercial solicitation and a protest against the City Dock Department for refusing to provide wharfage facilities for his exhibit. But the Court held that the purpose in affixing the issue-protest to the handbill was to evade the prohibition of the ordinance and that "[i]f that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command."[15] In conclusion, the Court emphatically declared that the First Amendment simply did not apply "as respects purely commercial advertising."

Chrestensen gave rise to the commercial speech doctrine, which holds that speech promoting goods and services is less deserving of constitutional protection than speech promoting issues or ideas. As late as 1973, the Supreme Court was still adhering to this two-tiered approach to speech. In that year the Court ruled that although newspapers have editorial discretion to select and place advertisements, that discretion did not allow them to publish commercial advertising if their placement violated a local ordinance proscribing employment discrimination.[16]

Various industries sometimes contributed to the belief that advertising of legal products did not deserve full First Amendment protection. For example, starting in 1936 the liquor industry agreed not to promote its products on radio and television. This step was supported by the National Association of Broadcasters until 1983, when the courts ruled such an agreement violated anti-trust laws.[17]

In 1975, however, a breakthrough for protection of advertising occurred when the Court departed from this bipolar approach and recognized that commercial speech should be accorded significantly more First Amendment protection. The motivations for this shift included new research that revealed the role of advertising in early American newspapers (see above). In *Bigelow v. Virginia*, for example, the Supreme Court overturned the conviction of a Virginia newspaper editor who was found guilty of running advertisements for a New York abortion referral service at a time when abortions were

illegal in Virginia. One reason the Court decided to extend limited protection to these advertisements was because it believed that Virginians had a right to receive the information. The Court rejected the contention that an advertisement for abortion services was unprotected because it was commercial: "Our cases . . . clearly establish that speech is not stripped of First Amendment protection merely because it appears in [commercial] form."[18]

By rejecting the "rigid two-tier typology" of *Chrestensen*, the Court in *Bigelow* made clear that simply labeling expression as "commercial" did not end the matter. Instead, it began an inquiry into how much protection such speech is entitled to, or how much regulation could be imposed by government. That inquiry is essentially a balancing test, which the Court described as "the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."[19] *Bigelow* did not answer this inquiry explicitly other than to note that "advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest." Although *Bigelow* marked the first movement away from the commercial speech doctrine, the precedential value of the case was questionable because the advertisement at issue did contain non-commercial information of public interest.[20]

The *Virginia Pharmacy* Ruling

If there were any doubts as to the viability of *Chrestensen*, however, they were put to rest the following year in the landmark case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*. In *Virginia Pharmacy*, the Supreme Court reaffirmed *Bigelow* in the context of a purely commercial advertisement. *Virginia Pharmacy* involved a group of consumers who argued that the First Amendment prohibited the state from banning advertisements carrying prescription drug prices. The state claimed that this regulation of commercial speech was necessary to maintain high professional standards for pharmacists. Rejecting the state's asserted interest, the Court said that the essential issue was not whether this regulation was well-intentioned but rather whether the speech being regulated was protected by the First Amendment. The Court went on to reject the idea that commercial speech "is wholly outside the protection of the First Amendment."[21] It repudiated "the highly paternalistic view that government has complete power to suppress or regulate commercial speech."[22]

Virginia Pharmacy thus rejected the premise of the commercial speech doctrine as enunciated in *Chrestensen*—that commercial advertising may be regulated on the same terms as any other aspect of the marketplace. Even though the advertiser's interest is purely

"economic," the Court wrote, "that hardly disqualifies him from protection under the First Amendment." The Court also recognized in *Virginia Pharmacy* that consumers had a right to receive commercial information: "As to the particular consumer's interest in the free flow of consumer information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[23] Moreover, in commenting on Virginia's desire to encourage its citizens to patronize "professional" pharmacists by suppressing price information, the Court demonstrated a sophisticated grasp of how the market for information works:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.[24]

The state's regulatory goals were meant to raise public esteem for the profession, encourage more small pharmacies, and lessen the demand for potentially dangerous drugs. While these goals were well-meaning, the state's regulatory approach—an outright advertising ban—was detrimental to consumers.

The justices of the Supreme Court have tried to legitimatize some controls over commercial speech that also apply to other forms of speech. For example, fraud and libel are not allowed. The justices reason that if one side of the coin is limited protection, the other side is limited regulation. *Bigelow* declared that commercial speech may be subject to "reasonable" regulation. *Virginia Pharmacy* mentioned some of the ways in which commercial speech may be restricted as to time, place, and manner. Advertising that proposes illegal activities can be banned; untruthful or misleading speech may be restricted. Moreover, the First Amendment does not prohibit government "from insuring that the stream of commercial information flow cleanly as well as freely."[25] So there should be no question that states and the federal government can regulate and restrict advertising *in the same manner* that they restrict unlawful and deceptive business practices, such as fraud and swindling. What the Court faced and overruled in *Virginia Pharmacy*, however, was not regulation of commercial speech, but its complete suppression. This, the Court ruled, was impermissible under the Constitution whenever the speech was truthful and concerned legal activity.

The *Central Hudson* Test

Four years later in *Central Hudson Gas v. Public Service Commission*, the Court articulated a four-part test for evaluating the constitutionality of restrictions on commercial speech. The first part

established criteria for determining whether commercial speech was protected at all. To be entitled to protection, (1) speech "must concern lawful activity and not be misleading."[26] The next three parts set standards for determining the degree of regulation permissible: (2) "whether the asserted governmental interest is substantial;" (3) "whether the regulation directly advances the governmental interest asserted;" and (4) "whether it is not more extensive than is necessary to serve that interest."[27]

In this case a regulation by a state public service commission prohibited all public utility advertising that promoted the use of electricity. The state argued that this ban on commercial advertising supported the national policy favoring conservation of energy resources. In applying their test, the Supreme Court held that total suppression of public utility advertising was more restrictive than was necessary to promote energy conservation. In other words, commercial speech enjoys protection but a degree of regulation that is *proportional* to the governmental interest it promotes may be allowed if it is *no more* than is necessary to accomplish the task.

The Court reaffirmed the *Central Hudson* standard in 1982. In *re RMJ*, the Court elaborated on how much regulation may be imposed in an attempt to halt false, unfair, or deceptive advertising, which falls under the purview of the Federal Trade Commission. It established a standard analogous to a sliding scale where the degree of regulation is proportional to the degree of deception. The remedy may be no more restrictive than necessary.[28] The Federal Trade Commission has avoided involvement unless "a grave misrepresentation such as an advertisement depicting people drinking and driving or a claim that wine had medicinal qualities."[29] Even this latter clause is suspect given the health benefits now claimed for the consumption of red wine and "lite" beer.

Confusion on the Supreme Court

Given the elevation of commercial speech from 1975 to 1986, the Supreme Court's decision in *Posadas v. Tourism Company of Puerto Rico* surprised many constitutional scholars. *Posadas* involved a challenge to the constitutionality of a statute that restricted advertising of casino gambling in the local media in Puerto Rico. In an effort to deter gambling by residents while encouraging gambling by tourists, Puerto Rico authorized casinos to advertise their "games of chance . . . through newspapers, magazines, radio, television and other publicity media *outside* Puerto Rico."[30] Thus, casinos in Puerto Rico were free to advertise to tourists in official tourist guides and in outside media such as the *New York Times* or network television, but not to local inhabitants, *who were by law permitted to gamble in local casinos*.

After noting that the particular kind of commercial speech at issue in the case concerned a lawful activity and was neither misleading nor fraudulent, the Supreme Court applied the four-part test it had established in *Central Hudson Gas*. A bare majority on the Court found that the government of Puerto Rico had a substantial interest in reducing the demand for casino gambling by local residents because gambling tended to disrupt family units, foster prostitution, and increase local and organized crime. The Court held that the restrictions on advertising directly advanced the government's interest because advertising served "to increase the demand for the product advertised."[31] Moreover, the Court asserted that the advertising restrictions were no more extensive than necessary to serve the government's interest in reducing demand for casino gambling.

The decision in *Posadas* created confusion because of the way that the majority departed from the Court's earlier precedents. In *Posadas* the Court narrowed the extent of the constitutional protection accorded commercial solicitations by allowing a government to prohibit the advertising of any lawful activity as long as that government possessed the greater power to ban the underlying activity promoted in the advertising.[32] The Court regarded an advertising ban as a valid "intermediate kind of response" that was not prohibited by anything in the First Amendment. Accordingly, for the advertising to be fully protected, the underlying activity had to be constitutionally protected. Contraceptives and abortion clinics were two examples cited by the Court where the government could not prohibit the advertising.[33]

The decision was criticized strongly in the dissenting opinions. Justice William Brennan believed that the majority had misapplied the *Central Hudson Gas* test when they endorsed the reasonableness of the government's position that casino gambling was a substantial evil.[34] Brennan noted that Puerto Rico had legalized gambling casinos and allowed its citizens to patronize them; therefore, the legislature had already determined that serious harm would not result if residents were allowed to gamble. Furthermore, Brennan argued that it was "unclear whether banning casino advertising aimed at residents would affect local crime" or the other "serious harmful effects" that the legislature sought to control.[35] To Brennan, Puerto Rico's ban on advertising clearly violated the First Amendment; the ban was not a reasonable fit with the goal.

In his dissent, Justice John Paul Stevens concentrated on the discrimination engendered by the advertising ban. Stevens found that "Puerto Rico blatantly discriminates in its punishment of speech depending on the publication, audience, and words employed."[36] In Stevens' view, that discrimination clearly violated the First Amendment.[37]

Cases since Posadas

Since 1986, the Supreme Court has tried to establish a consistent position on the rights of commercial speakers. A review of these cases reveals the modifications made in the criteria that were first laid out in the *Central Hudson Gas* case.

Board of Trustees of the State of New York v. Fox (1989)

A resolution of the State University of New York prohibits private commercial enterprises from operating in SUNY facilities. Campus security used the resolution to bar American Future Systems (AFS) from selling housewares at student parties held in the dormitories. AFS and a student took the campus to court. The District Court ruled in favor of the campus, arguing basically that restrictions of time, place, and manner applied. The university had a right to prevent its dormitories from becoming shopping malls. Applying the *Central Hudson Gas* test, the Court of Appeals overturned the decision. It concluded that it was unclear whether the resolution directly advanced the state's asserted interests and whether, if it did, it was the least restrictive means.

The Supreme Court took up the case and held for the state, reversing the appeals court in a six-to-three decision. In the process Justice Antonin Scalia, writing for the majority on Supreme Court, claimed:

> Although *Central Hudson* and other decisions have occasionally contained statements suggesting that government restrictions on commercial speech must constitute the least restrictive means of achieving the governmental interests asserted, those decisions have never required that the restriction be absolutely the least severe that will achieve the desired end. Rather, the decisions require only a reasonable "fit" between the government's end and the means chosen to accomplish those ends.[38]

Many viewed this shift from "least restrictive" to "reasonable" as a reinforcement of the *Posadas* standard. However, the majority added that the means used must be "narrowly tailored to achieve the desired objective." Furthermore, Scalia made clear that SUNY dormitories did not constitute a public forum and therefore were open to restriction:

> The Court of Appeals held, and we agree, that the governmental interests asserted in support of the Resolution are substantial: promoting an educational rather than commercial atmosphere . . . promoting safety and security, preventing commercial exploitation of students, and preserving tranquility.[39]

Nonetheless, Scalia went on to say that the decision should not be construed so as to interrupt the "free flow of commercial informa-

tion." The Supreme Court stopped short of deciding whether the resolution was valid and ordered lower courts to reconsider the regulation under the standard of whether it is "reasonable." In short, because of the setting, this case was not a real test of commercial speakers' rights. The restriction in *SUNY* involved a ban on all commercial *activity*, not purely speech about the sale of products.

Austin v. Michigan Chamber of Commerce (1990)

In this case the Supreme Court again seemed to weaken protection for commercial speech. In a six-to-three decision, the Court upheld a Michigan law that prohibits the state chamber of commerce from buying a newspaper advertisement on behalf of a political candidate. *Buckley v. Valeo* (see chapter 4) upheld many of the restrictions placed on federal campaigns in the wake of Watergate, particularly corporate contributions to candidates. The Michigan law bars corporations from spending their own funds on behalf of candidates but does allow them to support or oppose ballot propositions. Ironically, it exempts media corporations from these restrictions in what must be considered a tip of the hat to the First Amendment. The problem here is that the case centers on political advertising rather than commercial advertising. One would think that political advertising would enjoy a high degree of First Amendment protection, but the Court found otherwise.

Peel v. Attorney Registration and Disciplinary Commission of Illinois (1990)

In this case, an Illinois commission prohibited lawyers from advertising. Peel violated the rule by stating on his letterhead that he was a certified civil trial specialist. In a five-to-four decision the Supreme Court held for Peel saying he could not be censured for truthful advertising. Because his advertising was truthful, it was entitled to First Amendment protection.

This decision re-affirmed a series of earlier decisions protecting professionals who wish to advertise their services. For example, in *Bates v. State Bar of Arizona* (1977), the Supreme Court overturned a ban on price advertising by lawyers: "[Commercial] speech serves individual and social interests in assuring informed and reliable decision making. . . ."[40] More important, in *Zauderer v. Office of Disciplinary Counsel* (1985), the Court struck down bans on the content of lawyer's commercials with these words: "[T]here is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment. . . . [Legal advertising] tend[s] to acquaint persons with their legal rights who might otherwise be shut off from effective access. . . . [It is] undoubtedly more valuable than many other forms of advertising."[41] In *Shapero v. Kentucky Bar Association* in 1988

the Court expanded the constitutional prohibition against regulation of problem-specific advertising by holding that "targeted" direct-mail solicitation was constitutionally protected.[42]

In April of 1993, the Supreme Court ruled 8–1 in *Endenfield v. Fane*[43] that accountants have a constitutional right to convey "truthful, non-deceptive information" about their services.[44] Arguing that "the general rule is that the speaker and the audience, not the government, assess the value of the information presented,"[45] the Court struck down the legislation using the third part of the *Central Hudson Gas* test, that the law must advance the government interest to a significant material degree.[46] Important to the *Posadas* precedent, the Court also said that legal speech could not otherwise be restricted unless the government could demonstrate that such a restriction would directly curtail a proven harm.[47] The Court claimed that "[t]he commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish."[48]

City of Cincinnati v. Discovery Network (1993)

A month earlier, the Court held 6–3 in *Cincinnati v. Discovery Network* that cities may not restrict the *space* available for commercial papers if they allow newspaper stands for regular newspapers. This is an important time, place, and manner decision.[49] The most important principle is that distinctions of time, place, and manner cannot be made on the basis of content unless that content is illegal, obscene, fighting words, or a clear and present danger. Writing for the majority, Justice Stevens wrote:

> In our view, the city's argument attaches more importance to the distinction between commercial and non-commercial speech than our cases warrant and seriously underestimates the value of commercial speech. . . . In sum, the city's newsrack policy is neither content-neutral nor . . . "narrowly tailored." Thus, regardless of whether or not it leaves open ample alternative channels of communication, it cannot be justified as a legitimate time, place, or manner restriction on protected speech.[50]

Concurring Justice Blackmun drew the issue clearly: "[T]here is no reason to treat truthful commercial speech as a class that is less 'valuable' than noncommercial speech . . . the Court should . . . hold that truthful, non-coercive commercial speech concerning lawful activities is entitled to full First Amendment protection."[51] The Court thereby rejected the city's claim because it provided "an insufficient justification for the discrimination against respondents' use of news racks that are no more harmful than the permitted news racks."[52]

A related case, *City of Ladue v. Gilleo* (1994), examined a statute that was struck down by the Eighth Circuit Court of Appeals for impermissibly discriminating in favor of certain messages and

thereby violating First Amendment guarantees.[53] The ordinance in question allowed "for sale" and "for lease" signs to be posted on residential property, but it prohibited residents from displaying all other signs except small identification signs on their property. For example, political speech was prohibited under the law if the sign exceeded a certain size. Margaret Gilleo's sign opposing the Gulf War, which she placed in a window, was in violation of the law. At the same time, churches, schools, and businesses were allowed to put up signs that inform the public about various activities. In short, the ordinance was not content neutral. The Supreme Court agreed 9–0, ruling that signs may not be forbidden entirely: "It is common ground that governments may regulate the physical characteristics of signs, within reasonable bounds and absent censorial purpose. . . . We are confident that more temperate measures could in large part satisfy Ladue's state regulatory needs without harm to the First Amendment rights of its citizens."

The First Amendment was given a higher priority than the Fourth in a related case that struck down a city ordinance against door-to-door solicitation in the village of Stratton, Ohio. The town passed an ordinance that required door-to-door solicitors to obtain a permit. As we saw in chapter 4, the Jehovah's Witnesses are often targets of such laws, and they usually file a lawsuit to strike down the law. In an eight to one decision, the Supreme Court ruled in *Watchtower Bible & Tract Society v. Village of Stratton* (2002) that the law was too broad. Writing for the majority, Justice Stevens pointed out that the way the ordinance was written it would apply to trick or treaters or a neighbor trying to borrow an egg. In his lone dissent, Chief Justice Rehnquist reminded the Court of the two Dartmouth College professors killed by two teenagers pretending to be polling, but actually seeking entry to rob credit cards. Rehnquist sided with the village because the ordinance would provide a degree of safety, security, privacy, and accountability not currently available.

U.S. v. Edge Broadcasting (1993)

Although the Court ruled somewhat consistently in the cases discussed above, another ruling sent lawyers scurrying for new arguments. On June 25, 1993, the Court voted 7–2 to uphold a law that prohibits broadcast stations in states without lotteries from broadcasting commercials for lotteries in neighboring states.[54] WMYK (FM) in Moycock, North Carolina, is near the Virginia border; in fact, 90% of its listeners live in Virginia, which has a lottery. WMYK accepted advertising for it. But North Carolina has no lottery and ordered the station to stop. In upholding the North Carolina law, Justice Byron White wrote, "The government has a substantial interest in supporting the policy of non-lottery states as well as not interfering with the policy of states that permit lotteries. The activity

underlying the relevant advertising—gambling—implicates no constitutionally protected right; rather, it falls into a category of 'vice' activity that could be, and frequently has been, banned altogether."[55] As in *Posadas*, the Court demonstrated a bias against gambling. Justice Stevens once again strongly objected: "The United States has selected the most intrusive, and dangerous, form of regulation possible—a ban on truthful information regarding a lawful activity imposed for the purpose of manipulating, through ignorance, the consumer choices of some of its citizens."[56]

But what about the federal ban on the advertising of legal gambling? In *Valley Broadcasting Co. v. United States*, the Ninth Circuit affirmed a lower court ruling that the federal ban on advertising gambling on television was unconstitutional as applied to legal casino advertising in Nevada.[57] The Supreme Court denied *certiorari* without comment. This ruling was a major breakthrough for broadcasters because it overturned a provision of the 1934 Communications Act that prohibited the advertising of gambling.

44 Liquormart v. Rhode Island (1996)

The Court finally seemed to have reached a consensus on these issues in 1996 when *44 Liquormart v. Rhode Island* directly addressed a state's attempt to ban the advertising of beer, wine, and liquor prices. Writing for the unanimous Court, Justice Stevens ruled that "[a] complete ban on truthful non-misleading commercial speech" is unconstitutional. The decision took direct aim at *Posadas* and *Edge* by arguing that there is "no vice exception" such as alcohol or gambling to the First Amendment's protections. Justice Stevens put it this way:

> The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what government perceives to be their own good. . . . [T]he scope of any "vice" exception to the protection afforded by the First Amendment would be difficult, if not impossible to define. Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to "vice activity." . . . [A] "vice" label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide principled justification for the regulation of commercial speech about that activity.[58]

The decision struck down a Rhode Island statute and similar regulations in ten other states. Furthermore, to those who might cite the infamous *Posadas* decision of 1985, Stevens wrote:

> [O]n reflection, we are now persuaded that . . . *Posadas* clearly erred in concluding that it was "up to the legislature" to chose suppression over a less speech-restrictive policy. The *Posadas*

> majority's conclusion can not be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, non-misleading advertising when non-speech-related alternatives were available. . . . [W]e reject the assumption that words are necessarily less vital to freedom than actions, or that logic somehow proves that the power to prohibit an activity is necessarily "greater" than the power to suppress speech about it.[59]

Thus, *44 Liquormart* not only revived the *Central Hudson* test, it sent a strong warning that lawmaking bodies were not free to impose their values on the purchase of such legal products and services as liquor and gambling. The Rhode Island restriction was unconstitutional because "alternative forms of regulation that would not involve any restriction on speech" were available.[60]

However, the issue was not entirely laid to rest because the Supreme Court in May of 1997—a year after *44 Liquormart*—let stand a lower court decision that allowed the City of Baltimore to ban alcohol and tobacco billboard advertising where it might be exposed to minors. Furthermore, the Court said that the Federal Cigarette Labeling and Advertising Act did not preempt a city ordinance that limited the location of billboards based on their content.[61] In these two cases of April 28, 1997, *Anheuser-Busch, Inc. v. Mayor and City Council* and *Penn Advertising of Baltimore, Inc. v. Mayor and City Council*, the City argued that advertising increases consumption and the restriction was narrowly tailored to advance a compelling interest, contentions clearly rejected in *44 Liquormart*.

The ruling was also contrary to several other precedents. For example, an ordinance allowing outdoor signs for the Olympics in non-industrial areas of Atlanta where no other signs were allowed was struck down because it was a content-based rule.[62] A Minnesota ordinance prohibiting "point of sale" advertising of tobacco products was struck down because the Court believed it was preempted by the Federal Cigarette Labeling and Advertising Act.[63] In fact, even the policy of the transportation authority of Boston not to allow ads in their subway and trolley cars that contain sexually explicit or patently offensive language to convey substantive messages was deemed not content neutral and, therefore, unconstitutional.[64] The transportation authority had refused to run condom ads that used words it found to be obscene. The courts, however, found that the ads had significant redeeming social value and that restricting their use to certain areas was a violation of the First Amendment. Furthermore, the trolleys and subways of Boston by allowing advertising on many different subjects had in effect become a "public forum" for policy debate. Therefore, the fact that some sexual language and innuendo would offend passengers was not enough of a justification to ban the ads.[65] Taken together these lower court rulings flowing from *44 Liquormart* certainly would seem to bode well for anyone

wishing to advertise any legal product in general and on a billboard in particular, especially where the billboard had existed for a period of time and had carried diverse messages.

Billboard Advertising

Recently a spate of municipalities has proposed banning of billboards that advertise alcohol or tobacco products. These ordinances also raise Fifth Amendment concerns. New York,[66] Chicago,[67] San Francisco, Los Angeles, Oakland, Baltimore, Milwaukee, Detroit, and Cleveland have all considered and most have passed such proposals. In 2001 the Supreme Court ruled on a Massachusetts case in which billboard advertising of tobacco products had been banned. In this instance, the state of Massachusetts prohibited small tobacco advertisements in and around retail outlets and forbade tobacco advertisements in sports stadiums and retail stores if they could be seen in an area within 1,000 feet of a playground or school. The ordinance was almost a mirror image of those passed in Los Angeles, San Diego, San Francisco, and many other municipalities.

Historically municipal, county, and state governments have been allowed to ban billboards under only two rationales. First, they must be a public nuisance that is subject to laws restricting items that interfere with public health, safety, peace, comfort, or convenience. Second, they usually carry advertising; therefore, they may be restricted in any ways that commercial speech is restricted.

The courts have upheld land-use restrictions that are content neutral and advance the goals of a community. In 1911, for example, the courts allowed a restriction on billboards because they provided hiding places for criminals.[68] The Supreme Court's second major foray into this area came in *Village of Euclid v. Ambler Realty Co.*[69] in 1926. The Court upheld a zoning ordinance based on its policing power to serve the general welfare of its citizens. The decision significantly weakened property rights of private citizens while also limiting commercial speech.

Then, with regard to bans justified by aesthetics, the courts refused restrictions on billboards, understanding that beauty is in the eye of the beholder and therefore, arbitrary.[70] In *Berman v. Parker*,[71] however, the Supreme Court did recognize the public's interest in beautifying certain areas in the name of "spiritual as well as physical" factors.[72] Soon after that the Supreme Court linked aesthetic qualities to economic prosperity arguing, for example, that tourism is affected by aesthetic attributes and therefore tourist areas are open to zoning laws as long as they are content neutral. That is to say, all billboards must be banned, not just those carrying certain messages unless those messages are unprotected by the First Amendment for other reasons.

This issue was reinforced in *Metromedia v. City of San Diego*,[73] wherein a plurality of justices held that the ordinance of San Diego was unconstitutional. San Diego sought to allow companies to advertise on site as a means of informing consumers and soliciting business, but not off site on billboards. Justice Byron White writing for the plurality, held that messages of billboards *could not be the grounds for prohibition* unless the ban could be justified on other First Amendment grounds, for example, that it was obscene: "Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages."[74]

The Court has been less clear on the second rationale for billboard bans: that commercial speech can be restricted. As we have seen, the resurrection of commercial speech protection began with the *Bigelow* case, continued in *Virginia Pharmacy*, and culminated in the four-part test provided in *Central Hudson Gas*. The *Central Hudson* test was vigorously re-asserted by the Supreme Court in *44 Liquormart*, *New Orleans Broadcast*, and *Lorillard v. Reilly*. In the next section, we will look at the four parts of the test and the arguments that the majority embraced, using the case of banning the advertising of alcohol products on billboards.[75]

Case Study: Alcohol Advertising on Billboards

1. *Is the advertising in question misleading or concerned with an illegal product*? This threshold requirement holds that the advertising in question must be legal and not misleading in order to qualify for protection under the next three parts of the test. For example, since alcohol beverages are legal products and their advertising is not misleading, proposed billboard bans of advertising of alcohol must pass the next three parts of the *Central Hudson* test.

2. Is *the government interest compelling or substantial*? Of course the government has a substantial interest in reducing alcohol abuse and its related problems such as driving under the influence of alcohol, spousal abuse, and lack of productivity. However, there are programs at all levels of government aimed at solving these problems; statistics indicate that progress has been made in reducing alcohol abuse despite an increase in spending on alcohol advertising.

However, in the case of billboard bans, state and local governments have argued that billboards carrying advertising for alcohol beverages should be banned where children are likely to see them. Those supporting the bans have the burden of proof to demonstrate that billboard advertising leads to an increase in the consumption of

alcohol products by minors. In fact, the Marin Institute Study of 1995, which many advocates of billboard bans cite, demonstrates that in countries where advertising of tobacco products was banned, the percent of young people starting to smoke continued to increase. The American Council of Education together with U.C.L.A.'s Higher Education Research Institute surveyed 261,217 freshmen and found that after the two-year decline, less than a sixth of freshmen are smoking and only half are occasionally drinking beer.[76] In fact, the survey found that drinking among college freshmen is at its lowest level since 1966. These studies indicate that legislation restricting advertising barks up the wrong tree. Peer pressure and parental behavior are far more influential than advertising.

3. *Does the banning of billboard advertising directly advance the asserted government interest*? We know that minors do not have the same level of First Amendment protection as adults and that the sale of alcohol to minors is illegal. Thus, government restrictions aimed exclusively at limiting exposure of minors to alcohol advertising may well constitute a legitimate time, place, and manner restriction. However, the government may not reduce adults to the status of children by regulating expression directed primarily at adults on the grounds that minors may be exposed to it.[77] In overturning the Communications Decency Act in 1997 (see chapter 9), the Supreme Court said that the government's interest in protecting children from harmful materials "does not justify an unnecessary broad suppression of speech directed to adults. . . . [T]he government may not reduce the adult population to only what is fit for children."[78] If the government may not use this rationale to prohibit indecency from the Internet, how much less likely is the rationale to apply to billboards advertising alcohol beverages? This was the reasoning when the majority struck down the ban on tobacco advertising in Massachusetts in 2001.

Furthermore, advocates of billboard bans have the burden of proving that banning of advertising will lead to a significant reduction in alcohol abuse. In the case of the Baltimore ban, the city was under the obligation to show that a reduction in billboard advertising near schools and playgrounds would reduce alcohol consumption. No such evidence was presented. The fact of the matter is that the hard evidence from the Department of Health and Human Services, the Federal Trade Commission, and many others shows that this legislation will not materially and directly advance its goals. For example, Health and Human Services said, "research has yet to document a strong relationship between alcohol advertising and alcohol consumption."[79] The Federal Trade Commission found "no reliable basis on which to conclude that alcohol advertising significantly affects alcohol abuse."[80] While advertising expenditures for beer indexed to 1971 have increased more than 100%, per capita consumption has remained at basically the same level into the 90s and then began to plummet.[81]

In 1997, beer companies spent $718 million on television and radio advertising; wine companies spent $67 million. However, in California, for example, the State Board of Equalization reports that consumption of beer, wine, and hard liquor dropped significantly in the ten-year period from 1988 to 1998.[82] Californians were consuming 36% less wine per person, 34% less hard liquor, and 21% less beer despite more billboards and commercials encouraging them to use various brands.

Many anti-advertising advocates claim that teenagers are a particular target of billboard and television advertising. However, the most extensive survey of young persons shows that amidst all the billboards and media advertising that went on in 1998 and 1999, smoking and beer drinking steadily declined among college freshman in both years. Perhaps that is why a Senate investigation and the Assistant Director of the Social Science Institute at Washington University, among others, came to the conclusion[83] that advertising leads to shifts in the *choices* of those already in the market;[84] it does not increase the market size nor can it be shown to have an impact on teenagers. In the majority opinion in *44 Liquormart*, Justice Stevens referred to this evidence and applied it to the state of Rhode Island.

Remember it is objective evidence of a causal relationship that is required according to the ruling in *44 Liquormart*. Thus, the Court has ruled that billboard bans of alcohol advertising currently flunk the third part of the *Central Hudson Gas* test; banning advertising is not the way to reduce alcohol abuse because no causation exists between advertising and the abuse.

4. *Is this legislation narrowly tailored to achieve a reasonable fit with the asserted government interest*? According to the Court, the legislation banning alcohol advertising on billboards goes after the wrong target and is too "extensive" to meet the *Central Hudson* test. It affects advertising to a wide audience in an effort to protect a small segment of that audience. You cannot pass a law that says all dogs must be killed to make sure that dangerous pit bulls are eliminated from society. The law must be tailored to meet only its goal, particularly in this case in which a second consumer interest can be argued.

Central Hudson as modified by later decisions holds that commercial speech can only be restricted if the product or service is illegal or makes false claims, or if there is a substantial government interest that is advanced "directly and materially" by an ordinance that achieves a reasonable fit with its goal. In the case of alcohol, it is clear that abuse is better controlled by labeling cans and bottles, by enforcing drunk driving laws, and by instituting educational programs.[85] Since these products are legal and in some cases beneficial, it makes no sense to restrict their advertising for the vast bulk of society that uses the product in a responsible way, especially when no correlation has been established between banning advertising and

reduced in take of alcohol.[86] Thus, a majority of the Court in the *Lorillard* case argued that targeting billboards on a product-specific basis violates the Constitution and does not serve the public interest. The Supreme Court overruled Massachusetts on the grounds that their restrictions violated the First Amendment rights of advertisers. In the majority decision, Justice Sandra Day O'Connor ruled that banning billboards that are within one thousand feet of schools, parks, and the like, makes for "nearly a complete ban" on advertising, which is overly broad. Relying on an earlier ruling regarding the Internet and films, O'Connor claimed that "Protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults." Furthermore, the federal law "precludes state or localities from imposing any requirement or prohibition based on smoking and health with respect to advertising and promotion of cigarettes."

The majority reinforced its position from *44 Liquormart* by reaffirming that there was "no vice exception" to the First Amendment. And three of the justices in their concurrences, Scalia, Kennedy, and Thomas, argued that advertising restrictions of any kind on legal products are always unconstitutional. For this reason, foes of alcohol and tobacco advertising have turned to other methods to "chill" this type of commercial speech.[87] These methods include direct taxes on a product-specific basis and the disallowance of advertising tax deductions for certain products. Advocates of these schemes may have read the words of Daniel Webster in *McCulloch v. Maryland* (1819) wherein he attacked Maryland's attempt to destroy the national bank: "An unlimited power to tax involves, necessarily, a power to destroy because there is a limit beyond which no institution and no property can bear taxation."[88]

The Fifth Amendment prohibits taking of revenue or other resources in an unjust manner. The government must compensate those from whom it takes. Thus, some billboard advocates argue that restrictions on billboard advertising constitute an unjust taking. Earlier we examined cases in which it was determined that when a city regulates private property within its bounds of policing power, no compensation is necessary. Thus, the crucial question is what is within the legitimate policing power of a local government; those challenging restrictive regulations often cite the use of these bounds as being too elastic.

For example, in *Lucas v. South Carolina Coastal Council* in 1992,[89] the Court ruled that depriving an owner of all economically beneficial use of his property is an unjust taking. After Lucas purchased of piece of property, the South Carolina legislature enacted a beachfront control act that effectively destroyed the property's value by prohibiting construction. Despite the fact that environmental concerns were apparent, the deprivation of economic reward had to be compensated. The impact of the *Lucas* case on billboards is still

being worked through the courts. Following the *Lucas* standard, if a city enacts a law abolishing billboards, thus depriving their owners of all economic benefit, that would constitute an unjust taking. Compensation would then have to be provided to billboard companies.

Conclusion

This chapter demonstrates that the First Amendment protects commercial speech, but there are times when the Supreme Court believes that a substantial government interest supported by a "narrowly tailored law" may take precedence. A misinterpretation of these phrases can have dire consequences particularly if the Court, as it did in *Posadas* and *Edge Broadcasting*, or the Congress, as it does with beer and wine advertising, relegates a perfectly legal product to a lower rung on the societal value scale. The Bill of Rights was not added to the Constitution to protect the majority; it was added to protect minorities, the accused, and the outcast. Some expression is more free than others because different levels of First Amendment protection have been accorded to different categories of speech. Yet all speech should be afforded equal treatment unless the government can *demonstrate* that the *speech itself* is harmful.[90] Whether it is printed or broadcast, whether it concerns how much a product costs or presents a particular editorial view, it is speech pure and simple under the First Amendment. To say that some speech is more valuable than other speech assumes that the government can impose a hierarchy on human thought. We all place different values on things, and speech is no exception; however, unless a clear and present danger can be demonstrated, the Supreme Court has moved to the position that commercial speech, regardless of its societal value at the time, should be allowed to compete in an open arena where reason and truth are free to combat fallacy and falsehood.

Study Questions

1. In what year was the "commercial speech doctrine" established? How did the Supreme Court define "commercial speech."
2. Can corporations and advertisers mingle political speech with "commercial speech" to assure that it is protected by the First Amendment?
3. What 1976 case increased the First Amendment protection afforded to commercial speech?
4. What is the four-part test established in the *Central Hudson Gas* ruling? How was this test modified in *SUNY v. Fox*?
5. Was the *Posadas* ruling an aberration?

6. Only one major commercial speech ruling has gone against attorneys seeking to advertise their services. What was the rule and what was the rationale of the Supreme Court?

7. If you were to make a case for banning the advertising of alcohol beverages within 1000 feet of a public school, what would you use for evidence of a compelling government interest?

Simulation Exercises

1. *Trial Case 10-1:* Mr. Tupac Tokay, a salesperson for the Broadleaf Birth Control Company, has approached Ms. Eliza Trinity, a student at Slippery Rock University. His company manufactures birth control pills and devices, which Mr. Tokay sells on campus to students who live in college dormitories. Tokay tells Trinity that if she will host a dorm party in her room for Broadleaf products, he will give her a $50 certificate to Victoria's Secret on-line shopping center. She agrees and the party is held at 2 in the afternoon in her dorm room. A half hour into Tokay's spiel, the campus security guard arrives and shuts down the party under a rule of Slippery Rock U. that no commercial activity may be carried on in the dormitories. Tokay refuses to give Ms. Trinity her gift certificate. She then sues the University arguing that her and Tokay's First Amendment rights have been violated. She says, "My dorm is my home, and I should be free to do and say what I want there. They wouldn't have pulled the plug on Home Shopping Network if I had been watching it in the student lounge. Furthermore, students are allowed to have televisions and computers in their dorm rooms, and they shop through them." The university seeks to uphold the *SUNY v. Fox* decision as precedent; Trinity and Tokay seek to have it overturned relying in part on *44 Liquormart* and other cases. Side one = the University; side two = Ms. Trinity and Mr. Tokay. Supreme Court: How do you rule?

2. *Trial Case 10-2:* In 2003 Congress passes and the president signs a bill requiring that three mandated warnings must be rotated "in an alternating sequence" in all television advertising of any alcoholic beverage. The label/announcements include warnings about consuming alcohol while pregnant, driving while under the influence of alcohol, and operating machinery while under the influence of alcohol. Some of the warnings run over 30 words and include an 800 number for information. In television advertising, the legislation says that the warning must be "read . . . in an audible and deliberate manner and in a length of time that allows for a clear understanding. . . ." Television stations, networks, beer, wine, and advertising companies are outraged. They argue that the legislation would eliminate most 15

and 30 second advertising. That would do tremendous damage to the already shrinking budgets of free television networks and stations, since such advertising provides $612 million a year for television and radio. It could mean the end to free coverage of the Olympic Games and many other sporting events. They appeal to the Supreme Court for relief under the First Amendment. Side one = beer companies, networks, and advertisers; side two = federal government. Supreme Court: Do you find for Congress or for the advertisers and networks?

Endnotes

[1] Letter XVI, January 20, 1788 in *Letters from the Federal Farmer to the Republican* (Tuscaloosa, AL: University of Alabama Press, 1978), p.151.

[2] "Essay No. 15, Of Freedom of Speech, February 4, 1720," in John Trenchard & Thomas Gordon, *Cato's Letters* (1733), pp. 95–103. See also Frank Presbrey, *The History and Development of Advertising* (Garden City, NY: Doubleday, 1929), p. 154.

[3] See David Anderson, "The Origins of the Press Clause," *U.C.L.A. Law Review*, 30 (1983), pp. 455, 533–37 (1983); see also L. Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985), pp. vii–xix. In the preface, Levy acknowledges that his earlier work, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge: Harvard University Press, 1960), "gave the misleading impression that freedom of the press meant to the framers merely the absence of prior restraints."

[4] See *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230 (1915); *Mutual Film Corp. of Missouri v. Hodges*, 236 U.S. 248 (1915).

[5] *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 562 n.5 (1980). This landmark case will be examined in full later in the chapter and applied to current legislation.

[6] See, for example, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983); *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975); *Ginzburg v. United States*, 338 U.S. 463, 474 (1966); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

[7] 106 S. Ct. 903 (1986).

[8] *Pacific Gas* 106 S.Ct. 903, 911–912.

[9] 408 U.S. 92 (1972). In this decision, the Court quoted from its 1964 ruling, *New York Times Co. v. Sullivan*: "Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" (408 U.S. 92, 96).

[10] 112 S. Ct. 2538.

[11] 467 U.S. 691 (1984).

[12] Thomas H. Jackson & John C. Jeffries, Jr., "Commercial Speech: Economic Due Process and the First Amendment," *Virginia Law Review*, 65 (1979), pp. 1–42.

[13] 316 U.S. 52 (1942).

[14] 316 U.S. 52, 53.

[15] 316 U.S. 52, 55.

[16] *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 391 (1973).
[17] In November of 1996, the liquor industry ended the agreement, as Seagrams and others began placing advertisements on radio and television. There was an immediate reaction from Congress, the FDA, the FTC, and the FCC. The FCC deadlocked on the issue, but the FTC subpoenaed Seagrams and Schlitz Brewing.
[18] 421 U.S. 809, 818–822 (1975).
[19] 421 U.S. 809, 826 (1975).
[20] 421 U.S. 809, 822. The advertisement published in Bigelow's newspaper did more than propose a commercial transaction. It contained factual material of clear public interest. The advertisements included the words "Abortions are now legal in New York. There are no residency requirements."
[21] 425 U.S. 748, 761 (1976).
[22] 425 U.S. 748, 762.
[23] 425 U.S. 748, 763.
[24] 425 U.S. 748, 770.
[25] 425 U.S. 748, 771.
[26] 447 U.S. 557, 571 (1980).
[27] 447 U.S. 557, 571; 477 U.S. 562, 570–72, 577 (1980).
[28] *In re RMJ*, 455 U.S. 191, 203 (1982).
[29] See "Comment," *UCLA Law Review* 1139, 1154 (1987).
[30] 478 U.S. 328 (1986).
[31] 478 U.S. 328, 332.
[32] 478 U.S. 328, 333.
[33] 478 U.S. 328, 333–4.
[34] 478 U.S. 328, 335.
[35] 478 U.S. 328, 335.
[36] 478 U.S. 328, 337.
[37] 478 U.S. 328, 338.
[38] 492 U.S. 469, 480.
[39] 492 U.S. 469, 480.
[40] 433 U.S. at 364. In *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), the Court did uphold a law forbidding face to face solicitation of clients. And in *Friedman v. Rogers*, 440 U.S. 1 (1979) the Court upheld a prohibition on the use of trade names in the practice of optometry.
[41] 471 U.S. 626, 637, 646.
[42] 486 U.S. 466, 108 S. Ct., 100 L. Ed. 2d 475.
[43] See also *Ibanez v. Florida Department of Business & Professional Regulation*, 114 S. Ct. 2084 (1994). This case also reported the high value of commercial speech to the consumer.
[44] Justice Blackmun in concurring argued that the Court should go further and give commercial speech the same protection as speech about public affairs.
[45] 113 S. Ct. 1792, 1798.
[46] However, the Supreme Court granted certiorari in *Florida Bar v. Went For It* (515 U.S. 618 (1995)), a case involving a lawyer's solicitation of business from an injury victim within thirty days of the accident, which is prohibited by the Florida Bar. In June of 1995 the Court ruled that solicitation by lawyers of accident victims within thirty days of the accident was not protected speech. Justice O'Connor writing for herself and Justices Scalia, Thomas, Rehnquist, and Breyer, argued that the Florida bar

was empowered to protect grieving persons from "conduct that is universally regarded as deplorable and beneath common decency. . . . First Amendment protection, of course, is not absolute [when it comes to] pure commercial advertising. . . ." O'Connor's denigration of commercial speech was a major step backward particularly when one considers that much speech that is "deplorable and beneath common decency" is protected by the First Amendment according to the Court, including violence on television and in pulp fiction. Furthermore, in his dissent Justice Kennedy called the bar's rule "censorship pure and simple. . . . Under the First Amendment the public, not the state, has the right and the power to decide what ideas and information are deserving of their adherence." Justices Souter, Ginsberg, and Stevens joined Kennedy in his dissent.

47 113 S. Ct. 1792, 1800.

48 113 S. Ct. 1792, 1798. In June of 1994, the Court re-affirmed that decision in *Ibanez v. Florida*.

49 See also *Lakewood v. Plain Dealer Publishing* (1988).

50 507 U.S. 410, 428.

51 507 U.S. 410, 450.

52 507 U.S. 410, 451.

53 The ordinance attempted to overcome the barrier established by the Supreme Court in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), which prohibited limitations on for-sale signs because such a rule was content-based. See also *Burson v. Freeman*, 112 S. Ct. 1846, 1855 (1992).

54 509 U.S. 418.

55 509 U.S. 418, 426.

56 509 U.S. 418, 433.

57 February 25, 1997.

58 1996 Lexis 3020, 52–53.

59 1996 Lexis 3020, 48.

60 1996 Lexis 3020.

61 Certiorari granted, vacated, 116 S.Ct. 2575.

62 See *Outdoor Systems Inc. v. City of Atlanta*, 885 F. Supp. 1572.

63 *Chigio v. City of Preston*, Minn. 909 F. Supp. 675.

64 See *AIDS Action Committee of Massachusetts, Inc. V. Massachusetts Bay Transp. Authority*, 42 F. 3d 1.

65 See also *Brockway v. Shepherd*, 942 F. Supp. 1012.

66 See *Greater New York Metropolitan Food Council, Inc. and Advertising Freedom Coalition v. Giuliani*, No. 98 CIV 251 (DAB) (S.D.N.Y. filed Jan. 14, 1998).

67 See *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, No. 97C 7619 (N.D. Ill. Filed October 30, 1997).

68 *St. Louis Gunning Advertising Co. v. City of St. Louis*, 137 W.W. 929, 938 (Mo. 1911).

69 272 U.S. 365, 390–95 (1926).

70 R. Douglas Bond, Note. "Making Sense of Billboard Law: Justifying Prohibitions and Exemptions," 88 *Michigan Law Review*. 2482, 2485 (1990)

71 348 U.S. 26 (1954).

72 P. 33 (1954). This decision was reinforced in *People v. Stover*, 191 N.E. 2d 272 (N.Y.), appeal dismissed, 375 U.S. 42 (1963). The Berman case took place in Washington, D.C. where the Supreme Court resides. The Court may have ruled differently if it did not affect the members' own backyards.

[73] 453 U.S. 490 (1981).
[74] 453 U.S. 490.
[75] This is the approach used by the lower courts since the *44 Liqourmart* decision. See, for example, *A.B.C. Home Furnishings, Inc. v. Town of East Hampton*, 947 F. Supp. 635, and *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162.
[76] *Los Angeles Times* (January 24, 2000): A3.
[77] See, for example, *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 131 (1989); *New York v. Ferber*, 458 U.S. 747 (1982).
[78] *Reno v. ACLU*, 521 U.S. 844 (1997).
[79] See *Seventh Report to Congress on Alcohol and Health*, 1990. Even Surgeon General Koop said in his 1989 Report, "There is no scientifically rigorous study available to the public that provides a definitive answer to the basic question of whether advertising and promotion increase levels of tobacco consumption."
[80] FTC News Release, April 16, 1985.
[81] See Federal Trade Commission, April 16, 1985. For updated figures, 1971 to 1987, see The Beer Institute, *1989 Report*.
[82] As reported in the *Los Angeles Times* (August 10, 1999): A3. State Board of Equalization, Alcohol Research Information Service, based on data from the Centers for Disease Control and Prevention.
[83] "Our subcommittee record contains no facts which would justify legislation to ban/censor advertising of beer and wine products or require counter advertising." U.S. Senator Paula Hawkins, Reporting the findings of the Senate Subcommittee on Alcoholism and Drug Abuse hearings, May 20, 1985. See also Donald E. Strickland, "The Advertising Regulation Issue: Some Empirical Evidence Concerning Advertising Exposure and Teenage Consumption Patterns." Paper presented to conference on Control Issues in Alcohol Abuse Prevent, September, 1981 (Professor Donald Strickland, Ph.D., Washington University). Reginald G. Smart, "Does Alcohol Advertising Affect Overall Consumption? A Review of Empirical Studies," *Journal of Studies of Alcohol* (1988); Alan C. Ogborne and Reginald G. Smart, "Will Restrictions on Alcohol Advertising Reduce Alcohol Consumption?" *British Journal of Addiction*, 75 (1980), 293–296. Linda Sobell, et al., "Effect of Television Programming and Advertising on Alcohol Consumption in Normal Drinkers," *Journal of Studies on Alcohol* (1986).
[84] Another study to make this point, "Advertising and the U.S. Market Demand for Beer", was released on May 24, 1990 by Byunglak Lee and Victor J. Tremblay of the Department of Economics at Oregon State University. They conclude, "Although many respectable groups have argued that advertising promotes beer consumption, the empirical results of this study do not support this hypothesis. If social welfare is best served by reducing alcoholic beverage consumption, policies other than a restriction on advertising should be sought." (p. 9)
[85] It should be noted that since the Cigarette Labeling and Advertising Act of 1965, the courts have consistently ruled that by complying with federal labeling requirements, cigarette manufacturers are immune from regulation by the states. This immunity was watered down in cases of damage suits in *Cipollonne v. Liggett Group, Inc.* but only in the case of fraud or breach of warranty. See *Lorillard v. Reilly*, 2001.

[86] In April 1995, the Supreme Court ruled that the federal government could not bar Coors Brewing from printing the alcohol content of its products on the label. In this case, the Court took a step toward the founders' position that companies have a right to advertise as they see fit, as long as such advertising is truthful and not misleading.

[87] See, for example, A. E. Gerencser, "Removal of Billboards: Some Alternatives for Local Governments," *Stetson Law Review*, 21 (1992): 899–930.

[88] The Supreme Court has regularly returned to this issue. In one important First Amendment case, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Court ruled unanimously against a Louisiana licensing tax levied on the gross advertising receipts of large newspaper companies. The decision was reinforced in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) where the Court struck down an Arkansas law that imposed a sales tax on periodicals but not on newspapers. In this case, the tax was seen as prejudicial.

[89] 112 S. Ct. 2886.

[90] Speech creating a clear and present danger (by its very nature harmful to society) would fall into this category of speech. Justice Holmes provided the best illustration of this in *Schenck v. United States*, 249 U.S. 51 (1919), when he wrote: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic."

Chapter 11

The Future of Freedom of Expression

The Technologies of War and Communication

Two underlying features of most human cultures from prehistoric tribal groups to present nation-states account for change in the development and direction of human civilization: (1) the technology of *war*—or in more basic terms, the invention of tools of aggression and defense, and (2) the technology of *communication*—the invention of ways to extend one person's ideas to others in time and space. War and the necessity to defend against aggression from outside the social group have been the primary spur in Western civilization leading to the rapid development of more and more sophisticated tools of conquest and defense, each new development seeking to increase the odds of success in battle.[1] Many experts in linguistics believe that the ability to speak may have evolved with the use of tools, perhaps in a spiraling process of reciprocal reinforcement as cooperative behavior among humans grew more effective and complex.[2] A common oral language allowed expansion beyond extended family groupings, thus increasing power, influence, and protection over larger spaces and territories—and coincidentally enabling war or defense against aggression from outsiders. The development of a written language allowed a culture to endure and grow in time beyond one or two generations by preserving the essence of that soci-

ety in a more or less permanent record. The development and use of semaphores, drum beats, horn blasts, and "smoke signals"—forms of *specialized and coded language*— also enabled one segment of a group, for example, a "general," to communicate simultaneously and secretly with his troops at greater distances, and thus more effectively deploy those troops against a common enemy.

In essence, the technologies of war and communication have been interdependent. They enable greater control over one's environment, whether that environment consists of weapons, materials, or other people. They also tend to be self-perpetuating and self-evolving. Planted in one technology are the seeds of a better one, with the only natural limiting factor being the imagination of humankind. However, other forces in society tend to provide countervailing pressures to limit, censor, curtail, and suppress.

Government, Orthodoxy, and Suppression of Change

Over the centuries a tension has always existed between the current social order—be it government, organized religion, or less formal social groupings—and pressures for change in that social order—whether in new ideas, values, or a different hierarchy. This social tension is a reflection, it seems, of contradictions in our own natures: the need for security and comfort on the one hand, versus the yearning to improve ourselves and the world around us.[3]

There has never been consensus as to the ideal balance between security and change, between the familiar and the new. Even where a majority within a society might agree on the goal, the individuals comprising that society may not experience the same needs at the same time. Some might feel that an adequate level of comfort and security exists while others might not be satisfied and want more. One thing is universally true, however: without change there can be no growth, and without growth, both the individual and the social organism will stagnate, be left behind, and may eventually die.

Freedom of expression must be viewed in historical context. While the expression of new ideas—whether scientific, artistic, religious, social, or political—is attractive and motivating to some, it is threatening to others. In the history of Western civilization, those currently in power see the introduction of new ideas as threatening to their positions, or at least so unsettling that consequences are unforeseeable and thus unlikely to be controlled by the status quo.

The Greek philosopher Socrates, whose ideas about wisdom, truth, authority, elitism, religion, and the soul attracted a following of Athens' brightest young men, suffered the consequences of this reticent approach to change. Socrates would frequently criticize the ideas of the powerful and influential of Athens, which disturbed and

unsettled them. And so, Socrates was put on trial for "corrupting the morals" of Athenian youth. He refused to recant his disturbing ideas or to promise he would "cease and desist" in the future, so he was convicted and told to choose between exile and death. To demonstrate his commitment to his beliefs, Socrates chose death. Socrates was put to death by the Athenian government. The "corruption" he taught was that democracy was dangerous and that the road to the truth was difficult and introspective. He was condemned for this "elitism," the belief that those who had discovered the truth in their souls were better than those who had not.

Similarly, if we are to believe his disciples, Jesus of Nazareth was put to death for expressing his ideas about God, Heaven, and how people should treat one another while on earth. These ideas were considered blasphemous by high priests, who viewed Jesus as a threat to their positions of power in the religious hierarchy and a threat to the degree of self-governance the Romans had given to Judea. Jesus was tried and put to death as a blasphemer under religious law and as a fomenter of strife and discord under Roman law. Nonetheless, his martyrdom and the martyrdom of many of his followers who spread the gospel in the years following his crucifixion substantially changed the character and growth of Western civilization for the next 2,000 years.

The church established in Jesus's name took on the characteristics of some of the most repressive political regimes throughout history. The expression of religious ideas that varied only in the slightest from the doctrine established by the Roman Church were regarded as heresy and zealously repressed. Persons accused of heresy who did not recant their beliefs—even in the face of extreme physical torture—were put to death, often in cruel ways. The cooperation between the church and the crown allowed this practice to continue in various forms from medieval times up to the beginning of the nineteenth century.[4]

Even more costly in terms of human life were the crusades initiated by Pope Urban II in 1095, which continued for several centuries. Jews and Muslims were slaughtered by the thousands, and many Christian "crusaders" were killed in these "holy wars." After the rise of Protestantism following Martin Luther's open criticism of the Roman Catholic Church, Catholics and Protestants warred on one another for decades, leaving the German provinces and many other locales in ruins. Religious wars between Christian sects and between other religious sects are still common: Northern Ireland, the Middle East, or the Asian sub-continent.

It is tempting to simplify the elements making up the forces of suppression and the forces of change. In societal terms the forces for change are usually those on the *outside*: the disenfranchised and those denied the "perks" that those in power reserve for themselves. Those in power wish to stay in power and use their power to control

the direction of change or to suppress it altogether. In the physical world, we find a close parallel in Newton's First Law of Motion: An object in motion tends to stay in motion, and an object at rest tends to stay at rest unless an *external force* is applied to that object. Similarly, in human society *energy* in the form of a social or political force of some kind is necessary to work a change in that society. That force can take the form of violent civil war, as in the case of the American or French revolutions or a revolution of *ideas* embraced by members of the society, such as the Italian Renaissance or the Eighteenth Century Enlightenment.

Human communication—often in the form of exhortation and persuasion—can supply the necessary social energy to bring about changes in a society. The classic example is Marc Antony's funeral oration for Julius Caesar. The conspirators who had just assassinated Caesar, and who had succeeded in convincing the Roman populace that the assassination was for the good Rome, believed Antony to be harmless. They reasoned that by allowing Antony to say a few words about Caesar, the conspirators would show the citizens that they were fair-minded and did not covet personal power and influence as they alleged Caesar did and for which they killed him. Antony, however, was able to turn the crowd against Brutus, Cassius, and the other conspirators, bringing about a civil war and the defeat of the assassins.[5]

Literacy and Civilization

While many scholars argue about the causes of the decline and fall of the Roman Empire, few would dispute the elements that made Rome a great civilization: a republican form of government that expanded to include the lower class, a system of transportation, a sense of order and discipline guided, at least initially, by a tolerance for local customs and community administration, and a common language—Latin—super-imposed over a variety of local languages and customs to form a network that not only permitted but promoted communications between Rome and the provinces it governed and between provinces as well.

Roman citizenship was not reserved just for the original founders of that Italian city and their descendants; it was available, in principle, to all of the peoples in Europe and the Middle East who lived under Rome's rule.[6] While it was certainly true that the majority of people living in the Western world at the time were illiterate, the Romans were responsible for increasing literacy in Europe and Northern Africa to a significant extent.

When Rome fell, so did major segments of the civilization it had built. The lines of communication that had once been open throughout the Roman civilization via roads, aqueducts, a written universal

language, and common currency—and which had largely been responsible for the spread and maintenance of Roman civilization—were cut. Roads crumbled, great public works and buildings fell into disrepair, and the common language—like the common language in the tale of the Tower of Babel—dissipated.

In the darkness that descended over Europe, a few points of light remained to preserve and protect a small portion of the knowledge that Rome had amassed. The keepers of the knowledge, the clerics and monks of the early Christian Church, dutifully copied and recopied the teachings of the Roman and Greek philosophers, while at the same time jealously guarding these works and denying access to them to all but the select few who committed their lives to the clergy. Literacy and access to written communication (the repository of human wisdom from ages past) became a mechanism of control by the Roman Church to insulate the clerics and the select nobility from the general population and to perpetuate the feudal society that evolved after the fall of Rome. Many of the ideas expressed by the Greek and Roman philosophers were deemed to be "dangerous" and could lead to instability and dissension. It was therefore easy for the Church and the ruling classes to justify the discouragement and suppression of efforts to bring literacy to the masses. While we should be thankful that those early clerics preserved the knowledge and ideas of ancient times, we will never know how many other works by more obscure thinkers of Athens and Rome were consigned to the bonfires of "dangerous books."

It is not surprising, then, that a thousand years would pass before the Renaissance (the rebirth) of progress came into bloom. While Renaissance Italy was an exciting place, it was also one of upheaval of the old forms of control. The Church declined as a world power—initially because of its division with the Eastern Orthodox Empire and later because of the rise of new and prosperous city-states that encouraged the use of the vernacular. The sense of nationhood corresponded to a sense of individuality that undermined church control. Ironically, as feudal holdings became more and more consolidated, the nature of everyday life became less fixed, less structured, and less predictable. The comforting certainties of doctrinal knowledge were crumbling in the face of the rediscovery of the Greek and Roman thinkers.[7] As the Byzantine Empire shrunk and then collapsed in 1453, hundreds of Greek scholars fled to Italy.

Education and learning became available not only for the children of nobles, but for the sons of the merchant classes as well. Just three years after the fall of Byzantium, John Gutenberg's invention of a printing press with movable type[8] started a revolution that continues today at an ever-increasing pace.

However, as we saw in chapter 1, both the Church and the government soon reacted with something less than enthusiasm. The ability to print multiple copies of books cheaply and relatively quickly

would motivate many who could not read to learn to do so. If a citizen or serf could read the Bible or some political tract, the authority of the Church on religious doctrine and cosmology and the absolutism of the monarch on political and social affairs could be in jeopardy. So-called "pernicious doctrines" and heretical tracts could spread throughout society, causing dissension, disorder, corruption, and moral turpitude. Monarchs feared the results of a fallacy that exists into our own time: if it appears in print, it must be true. The printing press amplified the soapbox speaker on the corner a thousandfold and marked the beginning of the age of communication technology.

The fears of the clerics and sovereigns were not without foundation: as literacy and the demand for written information spread, each feeding the other, so did the spread of new and disturbing ideas about the nature of humans, society, and the universe. The Age of Enlightenment saw a revolution in a number of realms. Excited by the rediscovered ideas of the Greeks and Romans, current thinkers began to ask more and more questions about the universe and a person's place in it. Asking such questions and posing new "answers" frequently were at odds with the official beliefs and doctrines of the Roman Church. Recognizing that it was losing ground against the philosophers and the scientists, the Church took aggressive action to suppress the spread of these ideas. The story of Galileo Galilei, called by many the father of modern science, illustrates the point.

Like the Polish astronomer Nicolaus Copernicus and others who preceded him,[9] Galileo advanced the theory he supported with celestial observations and mathematical formulas that the heavens did not revolve around the Earth, but rather, that the Earth and the other observable planets all revolved around the sun as well as rotating on their own axes. Using a new optical instrument called the *telescope*, Galileo discovered moons orbiting Jupiter and observed phases in the appearance of Venus analogous to the lunar phases. He also followed the evolution of sunspots on the sun and traced them on paper.

The publication of his discoveries was not well received by some in the papal offices. Galileo was summoned to Rome in 1615 to answer charges that he was espousing potentially heretical views. While Galileo initially backed down and agreed not to teach the Copernican hypothesis, sixteen years later he published a *Dialogue on the Two Chief World Systems*. In that tract he again advanced the Copernican hypothesis against the views of Pope Urban VIII.

Galileo was summoned before the Inquisition and this time tried for heresy. Knowing that thinkers had been tortured and burned to death for espousing far less, he equivocated although not quite recanting all of his views, saying that he had been blinded by "vainglorious ambition." The tribunal spared Galileo's life, but placed him under "house arrest," restricting his social contacts for the rest of his life.[10] Three and half centuries later in 1992, Pope

John Paul II issued an apology and lifted the edict of the Inquisition that condemned Galileo.[11]

The urge for greater freedom to explore and express new ideas in science and technology was also paralleled by the urge for greater freedom of expression in political thought. As with the Roman Church and the Inquisition, the reaction of government was to suppress such efforts and to restrict or punish the expression of new political ideas. Freedom of expression, as we saw in chapter 2 and 3, depends on freedom of religion. Ironically, by opposing and attempting to suppress such expression, the ruling classes ended up encouraging the development of a theory of government where freedom of expression was the guaranteed right of every citizen.

For example, beginning with John Milton's *Areopagitica*,[12] England produced a number of important political works advocating freedom of the press from government censorship. As we saw in chapter 1, in his *Two Treatises of Government* published in 1690, John Locke argued that the state exists to preserve the natural rights of its citizens. When governments fail in that task, citizens had the right, if not the duty, to withdraw their support and rebel. Such an idea was revolutionary and directly contradicted the view of conservative writers of the day such as Thomas Hobbes, who contended that the original state of nature was "nasty, brutish, and short"; that individuals through a social contract surrendered their rights to the sovereign who, in return, provided the protection and security of civilization and order. Locke maintained that the state of nature was a happy and tolerant one, that the social contract preserved the preexistent natural rights of the individual to life, liberty, and property, and that the enjoyment of such rights in a social setting led to the common good of all.[13]

Rousseau pushed Lockean principles toward modern liberalism by contending that man in the state of nature was the ideal and that civilization was a corrupting force that could only blunt the ideal. John Stuart Mill, on the other hand, while defending individual liberty,[14] embraced the utilitarian precepts of Jeremy Bentham: the greatest happiness for the greatest number should be the governing principle of government.[15] Such a notion, however, when extended to its logical conclusion, resulted in the development and promotion of social systems that sacrificed individual liberties to the welfare of the state: socialism, communism, fascism, and other totalitarian theories of government.[16] Thus, Mill included a proviso that the government must protect the individual from harm and allow reasoned dissent.

We also have seen that with each new communication technology (printed books, tracts and newspapers, motion pictures, radio, television, cable networks and now the Internet), efforts have been made to control the content of those media or suppress them altogether. The advent of broadcasting—the transmission of spoken and

written words as well as images through the airwaves to all those who had a device to receive it, began to reshape the world for better *and* worse. The negative side of such technology is that where totalitarian states had absolute control over the electronic media within their boarders, such media were employed to "educate" and control their captive populations with government propaganda as envisioned in George Orwell's *1984*. The positive side of electronic communication technology is that radio and television signals are no respecters of political borders and can bring countervailing messages to those same captive populations. During World War II, both the Axis Powers and the Allied Powers used radio to broadcast propaganda to the other side. Charles de Gaulle exiled in Great Britain used radio to broadcast messages of hope to German-occupied France and the French Underground. During the Cold War, Radio Free Europe and the Voice of America brought messages from the West to peoples in the Soviet Union who had to rely on such outside sources to find out what was going on in the world, and ironically, even in their own countries. Such linking of peoples and cultures of the world continues today. For good or ill, the global village envisioned by Marshall McLuhan[17] has been achieved through the power of radio and television, and is now being reinforced by the Internet.

The Technological Transformation of Communication

With the surfacing of the Internet in the late 1980s, freedom of expression has reached a new plateau. Anyone with access to a computer connected to a phone, cable, or satellite has access to a seemingly infinite amount of information available electronically in a matter of seconds. Moreover, anyone can express his or her opinions to the vast global audience that accesses the Internet at any particular moment during the day. As with any new technology, the Internet has both benefits and dangers. A few examples suffice to make the point.

An Avalanche of Information

In 1970 *Future Shock* written by Alvin Toffler, a popular writer and cultural sociologist, warned that consumers of information, rather than being more and more limited in their choices by the homogeneity of the information and entertainment media would instead be overwhelmed by an avalanche of complex data. While not all of Toffler's predictions of over thirty years ago have been realized, his observations on the effects of "overchoice" were clearly prophetic.

Motion picture houses that used to exhibit one or two motion pictures for a week or more at a time, now offer eight, fourteen, or

more separate mini-theatres inside one building, all showing different films that may be rotated in and out far more frequently.

In the United States, more and more communities are being "wired" with cable television that often offers more than 300 channels of information and entertainment. With many of these channels now being distributed via satellite, their availability to other parts of the world depends only on the availability of a receiving antenna, downconverter,[18] and tunerbox to select among the hundreds of channels available.[19]

With the rise of the Internet, true overchoice became available to anyone who owned or had access to a computer linked by telephone lines or wireless service to an Internet Service Provider ("ISP"). Because so much data is available, the skills necessary to retrieve only what is sought after and to reject or screen out what is not needed require more and more technical knowledge. The development of extremely sophisticated search engines such as *Google*® has helped, but not every researcher understands the "logic" of formulating word or string searches to retrieve what is wanted. Even if the logic of search engines is known, the researcher may not know exactly what he or she is looking for. Hours of time can go by checking out site references that end up being red herrings or dead ends. The need to obtain complete, accurate, and relevant data in a short period of time has reached the point where only the use of highly sophisticated programs (written with "fuzzy logic" instructions designed to imitate human thought processes) can hope to provide the desired answers. Even then the search engine may come back with hundreds of thousands of "hits" to a search string query.[20]

An Explosion of Self-Expression

The explosion of information has been matched by an explosion of self-expression. Today, for a few dollars a month, any person with computer access can create and maintain his or her own Web site. Private individuals with a message to present to the world have created millions of "dot-com" or "dot-org" Web sites. Some of these messages are nothing more than "statements" made to define or create personal identity—in the same way adolescents and young adults wear certain kinds of clothing or display body tattoos and "piercings" as a means of differentiating themselves from others (or, at least, from previous generations). Freud taught us that the ego seeks verification; the computer provides a new means to achieve it—anyone can be the person they want to be on the World Wide Web.

Message Boards. From the earliest days of the Internet, computer bulletin board systems ("BBS") operated as part of academic or commercial sites or individually as dial-ups. The operator of the bulletin board (or "sysop") would post an opening gambit, often deliberatively provocative, and invite other participants to respond with their

own comments as well as comments about other members' comments. These "threads" would continue until the sysop sensed that the topic had run its course and it was time to start another thread.

For the academic community, message boards remain extremely useful to test ideas and to sharpen the focus of a current investigation or line of research. Prior to the Internet, the pace of academic interactivity was much slower, dependent on written correspondence back and forth or periodic meetings among a particular group where papers were presented to colleagues for response. Now, a thesis can be presented, developed, critiqued, rewritten, and published in print and electronic media in a fraction of the time such projects used to take. In some fields of endeavor such as medicine, this can make the difference between life and death for a patient with a perplexing diagnosis.

Anonymity, Fantasy, and Self-Expression. The availability of "chat rooms" on most of the ISPs such as America On-Line, Microsoft Network, Yahoo! and Earthlink provides subscribers a chance to be someone else—an electronic "incarnation" of their "ideal person," a fantasy character whose traits or actions they admire—without fear of exposure or embarrassment. And unlike daydreaming, these fantasy characters are "real": they have an existence separate and apart from the daydream. At least inside the chat room these personas interact with other fantasy characters created by other individuals. From the early days of the Internet and private computer on-line subscription services such as CompuServe®, a variety of chat rooms or "CB Channels," each devoted to a particular social or lifestyle interest, permitted the acting out of group fantasies or even online multi-participant fantasy games such as *Dungeons and Dragons®*.[21]

Anonymity has allowed participants the opportunity to say or "do" things on-line that they would never say or do in real life. While for some this is therapeutic in that it can build self-esteem and confidence in one's social skills, it can also be a trap for the naive and unwary. As noted in chapters 8 and 9, anonymity has permitted deviant sexual groups to reinforce each other's self-destructive fantasies and to lure the young and impressionable. *As the technology advances, the law faces the challenge of keeping pace while remaining constitutional.*

Blogs and Web cams. At the opposite pole are the Web sites that loudly proclaim the identity and personal habits of their sponsors. Exhibitionists young and old are now able to "netcast" their thoughts and images literally to the world. Many of the larger ISPs such as AOL and MSN provide the opportunity to their subscribers to create their own Web sites. These sites can take the form of lengthy biographies interspersed with photos, or even live action real time displays

of the persons going about their daily activities in and around the computer through the use of "Web cams."

Somewhere in between have evolved the "blogs" or weblog. According to *Salon.com*, an on-line literary magazine,

> A blog or weblog is a personal Web site updated frequently with links, commentary, and anything else you like. New items go on top and older items flow down the page. Blogs can be political journals and/or personal diaries; they can focus on one narrow subject or range across a universe of topics. The blog form is unique to the Web—and highly addictive.[22]

A number of shareware and proprietary programs are available for purchase on the Web that allow individuals to create and maintain their own blog Web page. *Salon.com*, for example, devotes a significant amount of Web space for the hosting of blogs. Any number of other ISPs are also host to these public diaries. At *Salon.com*, for example, there is even a blog devoted to reviewing and commenting on the other blogs maintained on *Salon.com's* Web pages.[23]

In addition to the running commentary of its author, a blog usually has the feature of *links*. Some have even contended that the important feature of a blog is the number and variety of links, with the author's commentary using them for support of whatever thesis happens at the time to be espoused. One commentator has ventured the opinion that the blog is the future of journalism:

> The cool thing about blogs is somebody can say something, or point to a story in *Time* magazine or CNN, and other people can have at the story, and almost debug it. . . . What this does is takes information and it puts it out before a community of users who will, in effect, crash test it. Hold every single fact up to the light and make sure that it all works.
>
> It's democratic journalism . . . it's journalism by the masses. And if you have an interest in a subject matter—anything—find the blog! Because you're going to learn more then, you're going to stay totally up to date on your subject matter by going to that blog every day.[24]

Innovation, the Law, and the Constitution

Given this rapid development in means and modes of communication, it is not difficult to predict that by the time this book reaches the students for which it is intended, new forms of communication will have evolved. That is why we have grounded our examination of the First Amendment in historic context. Aside from examining the clear, plain language of the First Amendment in context, it is useful to interpret it in terms of its evolution. In a world in which innovation undercuts stability, it is important to save a few bedrocks on which

to rest. No matter how much forms of communication advance, protecting the four freedoms of the First Amendment—freedom of religion, speech, press, and the right to assemble and petition the government about our grievances—will safeguard citizens against the "brave new world" of government or global control.

However, as we have seen, these freedoms have been compromised in the name of national security, states rights, or balancing rights accorded by other parts of the Constitution. We began our explorations by examining how religious freedom came to be one of the primary freedoms in the United States. Many had fled religious persecution. Religious leaders had defended the revolution and argued for a bill of rights. Most important, founders such as James Madison and Thomas Jefferson believed that religious tolerance was necessary if the states were to be united. Over time the tension between preventing the government from establishing a state religion and protecting the right of the individual to exercise religion freely led to Supreme Court decisions that remain arguable to our time, particularly when considering the rights of Native Americans.

The right to a free press was clear until the government moved in the twentieth century to place controls over the content of broadcasters of radio and television signals. Only in 1987 were rules about "fairness" of content removed; and not until 2000 were rules governing political editorials and personal attacks removed. Broadcasters are still subject to equal time and equal access provisions of the 1934 Communications Act.

The motion picture industry was not free of government censorship until the 1950s and even then many writers were blacklisted for affiliating with Communist front organizations, though the right of assembly should have protected them.[25] Yet even today, the motion picture industry has bowed to pressure to follow a ratings code, and many in Congress and out would impose government restrictions on violent content.

The Supreme Court has had a long and confused record on the issues of obscenity and indecency. Despite the fact that there is very little evidence that adults dealing with obscene materials are harmed, the courts have bowed to public pressure to impose limits on adult obscene material. Even more controversial has been the courts' record with the regard to indecency. Definitional issues aside, the Supreme Court continues to support its ruling in the *Pacifica* case by allowing the FCC to penalize broadcasters for putting "indecent" material on the air. On the other hand, the courts freed the Internet of such regulation after the Congress had imposed regulations with the Communication Decency Act.

If there was any freedom the founders most sought to protect, it was political speech. Yet today, political contributions, which are tantamount to political endorsements and a way of assembling and petitioning the government, are restricted. Provisions of the campaign

reform act of 2002 prohibit special interest groups from advertising on broadcast media for 30 and 60 days respectively before primaries and general elections. While these provisions are likely to be stricken down by the Supreme Court, they were voted into place by majorities in the senate and the house and signed by the president.

Restrictions have also been imposed on commercial speech, even though commercial speech is part of the freedom of the press the founders protected in 1791. Local governments have not been reticent about imposing controls on commercial advertising based on its content, even if the product in question is legal and the advertising is not misleading. Recently, the Supreme Court has tended to strike down these laws, but it has not always been that way.

These are only the most obvious cases of governments trying to sort out the meaning of the First Amendment on the one hand and the needs and desires of the community on the other. Perhaps then it might be beneficial to examine the ways in which our First Amendment rights have been strengthened over the years as a way of closing this text on a positive note.

In most cases, our freedoms have been strengthened by the Supreme Court after we have survived a First Amendment crisis. After the Alien and Sedition crisis of the late 1790s, the United States was much less likely to impose such laws on its public. Though they did recur during World War I, they were quickly quashed once the war ended. In fact, in both the case of the Alien and Sedition Acts and the Red Scare of 1918 and 1919, the instigating party lost power. Clear thinkers on the Supreme Court, such as Oliver Wendell Holmes, differentiated between a "clear and present danger" and the ravings of ideological rhetors.

Once the Civil War ended, the Supreme Court ruled that Abraham Lincoln's suspension of the writ of *habeas corpus* outside of war zones was clearly unconstitutional. Once Senator Joseph McCarthy was revealed to be a demagogue, the Supreme Court ruled that membership in the Communist Party was not sufficient cause for incarceration. During the war in Vietnam, the Supreme Court regularly ruled on behalf of the media seeking to obtain and publish information about the government's decision making.

Regularly the courts have come down on the side of individuals when it comes to religious belief. School prayers are not allowed at public schools to protect those who worship differently than the majority, or worship not at all. Individuals have great rhetorical leeway in verbal attacks on groups before they cross the line into action, which is restricted legally and can result in incarceration. The threat must be clear, present, true, directed at a specific individual, and imminent before it is subject to regulation. To prosecute someone for sexual harassment, the prosecutor must demonstrate that the speech was repeated, that a record of it was kept, and that it created a "hostile working environment." To collect damages for defamation,

a public person must show that the speech flagrantly disregarded the truth and was uttered with "actual malice."

In other words, those seeking to restrict the speech and writing of others have a huge burden of proof. Although the victims of such rhetoric may feel persecuted, the burden of proof is the price of a viable free press and a free marketplace of ideas.

It should also be clear that there is much to argue about in First Amendment jurisprudence. The lines are fuzzy at times, as are the definitions. Thus, skill in argumentation is essential to advocates on all sides of the issue. Since Aristotle, that has been the model that most justifies a system permeated with freedom of expression. Let all sides make the best case they can; all things being equal, the truth will prevail. Thomas Jefferson put it this way in his First Inaugural:

> [H]ere we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it.

It would help if each citizen knew their rights and how they were defined and should be exercised. We hope students who have studied this book will be both informed and inspired to exercise the precious rights guaranteed by the First Amendment.

Endnotes

[1] See Martin Van Creveld, *Technology and War*, 11th ed. (Free Press: New York, 1991).

[2] See, for example, Adrian Akmajian, et al., *Linguistics: An Introduction to Language and Communication*, 5th ed. (Cambridge: MIT Press, 2001).

[3] Being children of the Enlightenment, James Madison and other founders believed in the ultimate perfectibility of humankind; yet Madison was enough of a realist to recognize that without some hierarchy of social structure and order in which some individual rights were subordinated to the general good, the Lockean ideals of individual freedom and liberty could not be attained. Even though Jefferson was more optimistic about humans than Madison, he still premised his version of democracy on an educated, land-owning, male population.

[4] What became known as the "Medieval Inquisition" was established around 1233. Inquisitors were appointed by the pope and traveled to various locations where heresies were thought to be prevalent. After a brief period of something like "amnesty," the inquisitor then held inquiries on suspected heretics. Proceedings were in secret, but punishments, at least initially, had to be approved by the local bishop or archbishop. Torture was seldom used at the beginning, but as the inquisition grew stronger in power, torture became a vehicle to secure confessions. In 1492 Ferdinand and Isabella officially sanctioned the Spanish Inquisition, an organized system of Catholic courts, headed by the Inquisitor General who was appointed by the Crown. The property of condemned heretics was often seized by the government, with a share going to the inquisitor or his order. It is the Spanish Inquisition that is best known for its excesses, and the name of Torquemada, the first Grand Inquisitor, is associated

with these extreme measures. Although the Spanish Inquisition declined in power as a result of Rome's lack of support and the refusal of some local officials to cooperate, it spread to other European countries, including parts of Italy. It was not officially abolished by Spain until 1820.

[5] While William Shakespeare's *The Tragedy of Julius Caesar* was a product of its time much removed from the Roman era, it is clear that Shakespeare had access to the written works of Roman historians who lived contemporaneously with or shortly after the events they recounted, and Shakespeare's plan is quite faithful to these historical accounts. See, for example, "Life of Antony" written approximately 100 years after Antony's death by the Roman Historian, Plutarch:

> As Caesar's body was conveyed to the tomb, Antony, according to the custom, was making his funeral oration in the market-place, and perceiving the people to be infinitely affected with what he had said, he began to mingle with his praises language of commiseration, and horror at what had happened, and, as he was ending his speech, he took the under-clothes of the dead, and held them up, showing them stains of blood and the holes of the many stabs, calling those that had done this act villains and bloody murderers. All which excited the people to such indignation, that they would not defer the funeral, but, making a pile of tables and forms in the very market-place, set fire to it; and every one, taking a brand, ran to the conspirators' houses, to attack them.
>
> (From the translation by John Dryden.)

[6] It should be noted that Saint Paul was a Roman citizen and a Pharisee before his conversion to Christianity.

[7] Even before that time humanists had rediscovered lost texts of the ancients throughout the Mediterranean basin and in Islamic centers of learning.

[8] As we noted in chapter 1, the invention of printing recedes far back into ancient history, from the Sumerians who used seals to impress upon clay tablets and the Chinese who started using wooden blocks. While evidence suggests that the first printing press with movable type originated in Korea, the invention will forever be associated with Gutenberg who, in 1456 printed the first book using this method—the Bible.

[9] Copernicus's (1473–1543) seminal work *De revolutionibus orbium coelestium* (*On the Revolutions of the Heavenly Spheres*), published in 1543, had in turn built on the theories of Aristarchus of Samos and Ptolemy, and posited that the planets revolved around the sun while at the same time rotating on their own axes.

[10] Ironically, Galileo went blind and died soon afterward, in 1642.

[11] Just in case we think that we have put behind us the heavy hand of suppression of new ideas and inventions, we need only look in yesterday's newspaper to find evidence of the continuing tension between new ideas and current beliefs. The on-going debate concerning the wisdom or propriety of cloning human cells, gene splicing, and genetic manipulation of crops and livestock reveal significant legal, medical, and ethical issues that have no easy answers. Nor are all of the objections to such experimentation based on religious or ethical beliefs. Fears of contamination of the world's food supply or the launching of devastating plagues against which we have no immunity, are often cited as reasons to avoid or at least proceed extremely slowly in certain areas of biological research.

[12] As noted in chapter 1, *Areopagitica* (the complete title was, "A Speech of Mr. John Milton for the Liberty of Unlicens'd Printing to the Parlament of England") was written in 1644 in response to the Press Licensing Order of 1643, which decreed that all journalistic writing would have to be approved by the government for publication.

[13] Locke's notion of government was therefore a very limited one: the checks and balances among branches of government and true representation in the legislature would maintain the correct balance between the state and the individual.

[14] As did Locke and Rousseau, Mill argued in his essay, *On Liberty* (1859) that government should be *limited* with respect to its governance over the individual, and that the sole justification for the state to exercise compulsion over the individual is the protection of others from harm. Unlike Locke, Mill had come to realize that "tyranny by the majority" is tyranny, nevertheless, reflecting the observations of contemporary social philosopher, Alexis de Tocqueville, who after studying the newly-formed government of the United States, found the emphasis on egalitarianism to be a danger to individual liberty. See *Democracy in America*, 1835, 1940.

[15] Although both Mill and Bentham believed that pleasure constituted happiness, Bentham had argued that all pleasures, physical or intellectual, were of equal value. Mill, on the other hand, argued for a hierarchy of pleasures, saying that the pleasures of the mind were of a higher order. See, *Utilitarianism* (1863).

[16] See, for example, the philosophical writings of Georg Wilhelm Friedrich Hegel (1770–1831) whose theories on the dialectical principle in history had a major influence on the development of both socialism and communism on the one hand (such as Karl Marx and Friedrich Engels, *The Communist Manifesto* (1848)) and Nazism and other forms of fascism in the twentieth century on the other.

[17] See Marshall McLuhan, *Understanding Media* (MIT Press: Cambridge, 1962); *The Gutenberg Galaxy* (University of Toronto Press: Toronto, 1962).

[18] A "downconverter" is a device that converts extremely high frequency satellite signals in the Mega- or Gigahertz range, to the much lower VHF analog signals that can be interpreted and displayed by an ordinary television set.

[19] Many, but certainly not all, of the satellite signals are now encrypted to prevent (or at least make more difficult) the "pirating" of such signals by non-subscribers.

[20] For example, one of the authors input the string "fuzzy logic" in the Google.com® search engine, which produced a list of about 262,000 separate sites in 0.15 seconds.

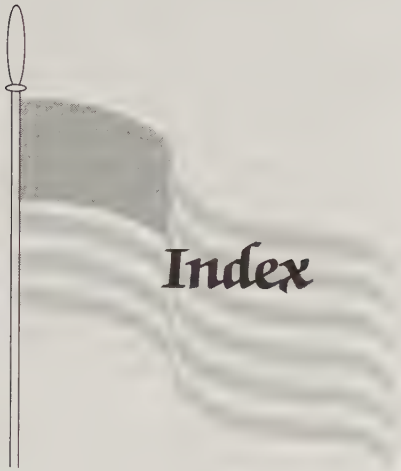
[21] Today, many commercial computer games such as *Doom®*, *Quake®*, *Myst®* and *Civilization®* can be played by multiple computer gamesters separated by thousands of miles.

[22] http://www.salon.com/blogs/

[23] http://blogs.salon.com/ maintained by Scott Rosenberg, managing editor of *Salon.com*, a literary cultural Internet magazine ("webzine") based in San Francisco. The number of active blogs on *Salon* varies considerably, depending upon current events and/or the input that a blogger is willing to upload. The high-water mark was 99 active blogs in March 2003; the low-water mark was zero in July 2002.

[24] http://www.cnn.com/2002/TECH/internet/05/09/blog/index.html interview posted 5-10-02 with Josh Quittner, editor of Business 2.0 [www.business2.com/], an on-line magazine devoted to business topics and part of the Fortune Publishing Group of Time, Inc. But see Tim Cavanaugh, "Let Slip the Blogs of War," *USC On-Line Journalism Review* [http://www.ojr.org/ojr/workplace/1017770789.php], posted 4-2-02, who belittles the significance of blogging as a journalistic endeavor, comparing it to something like "armchair quarterbacking."

[25] As we saw, the *Yates* case of 1957 essentially undercut the Smith Act of 1940, which prohibited advocating the overthrow of the government by violent means.



Index

THE FOUR FREEDOMS OF THE FIRST AMENDMENT

The First Amendment grants the freedoms of religion, speech, press, and assembly—freedoms to *do* something—and protection from government intrusion. After setting the historical context for the First Amendment, the book explores the issues that center around those freedoms. Should we pledge our allegiance to one nation, under God? Can we express our opinions when they are harmful to others? Do all groups have the right to assemble peaceably? Should the Internet be regulated? The book is a springboard for a thoughtful and informed look into our rights. The issue chapters conclude with hypothetical cases, inviting readers to become advocates on differing sides of the case and to perform the duties of a Supreme Court justice. From explanations of the landmark cases to outlines of potential future conflicts, this text involves the reader with the vital task of identifying and preserving the four freedoms of the First Amendment.

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