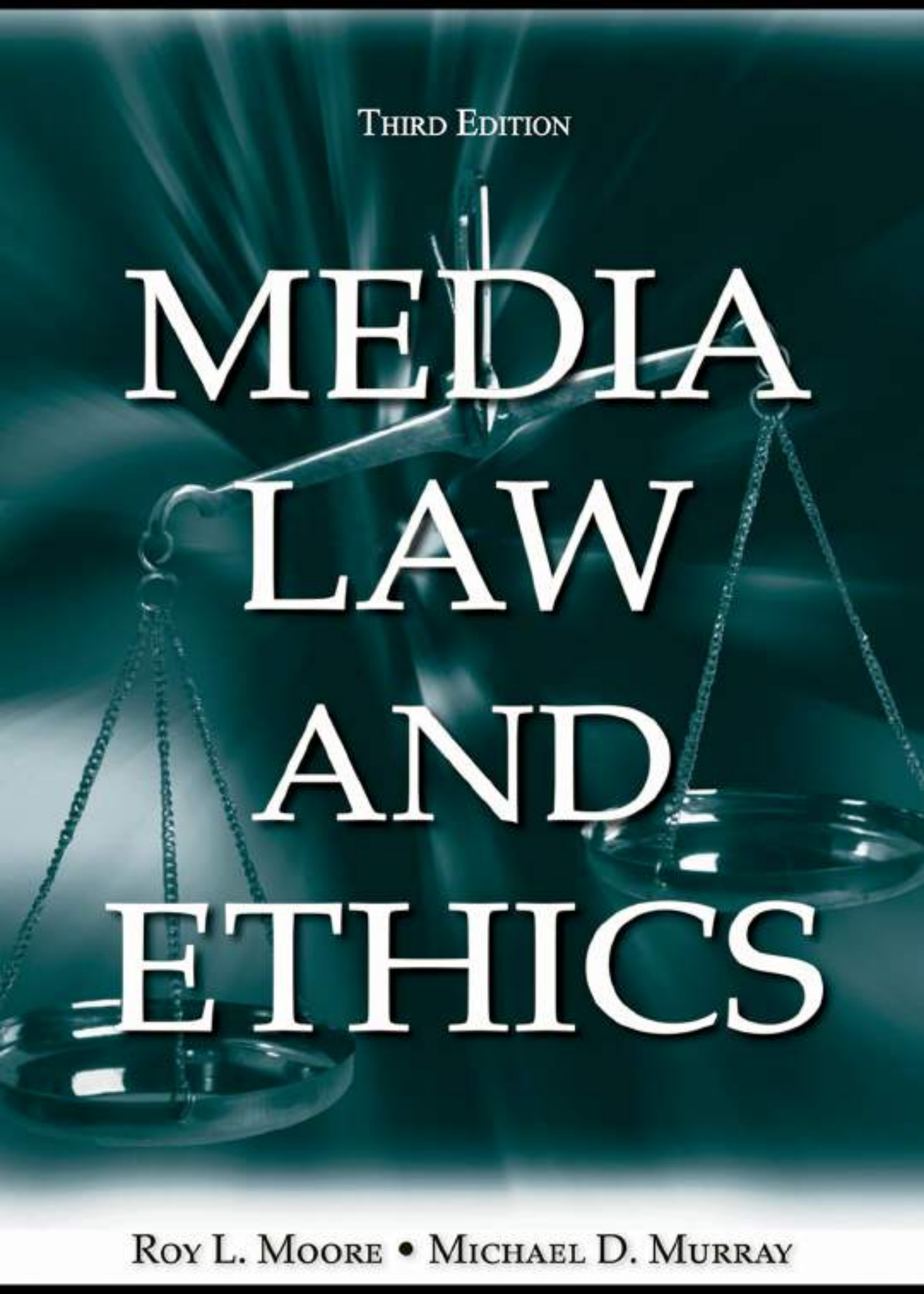
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MEDIA LAW AND ETHICS
ROY L. MOORE • MICHAEL D. MURRAY

CHAPTER

5

Prior Restraint

Freedom is not easy. Freedom is uncomfortable. The First Amendment is a tragic amendment in that it infiicts a great deal of pain on a lot of people.[1]

—writer Kurt Vonnegut

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press.[2]

—majority in *Near v. Minnesota* (1931)

Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.[3]

—British jurist Sir William Blackstone (1723–1780)

Sometimes the First Amendment drives me crazy. The only thing worse than all this clamor is silence. . . . We do not have to fear dissenting voices or even hostile voices. . . . What we have to fear is silence.[4]

—CBS newsman Charles Kuralt (1989)

• On December 1, 1997, 14-year-old Michael Carneal walked into the lobby of Heath High School in Paducah, Kentucky, and shot at a crowd of his fellow students, killing three and wounding flve. Carneal was later convicted of murder. During the investigation process, offlcials discovered Carneal frequently played violent computer games such as "Doom," "Quake," "Redneck Rampage," "Resident Evil," and similar games. He had also apparently watched a video of "The Basketball Diaries" movie whose plot includes a high school character who dreams about shooting to death a teacher and several of his fellow students. When the investigators examined Carneal's computer, they found that he had visited various pornographic Web sites on the Internet.[5] The families of the murder victims of the Heath High School shootings flled a civil suit

Figure 5.1 Although a permit may be required to distribute materials in a "First Amendment Expression Area" on public property such as at this welcome center in Gatlinburg, Tennessee, the U.S. Supreme Court ruled that a governmental entity may not discriminate based on content. The Court, however, said that reasonable time, place, and manner restrictions may be imposed so long as they are "content-neutral." (Photo by Roy L. Moore.)

for wrongful deaths against the manufacturers of the video games, the production company of the movie, and several Internet service providers, claiming their products desensitized Carneal to violence and caused him to commit the crimes for which he was convicted. The plaintiffs also claimed that the companies marketed defective products and thus should be held strictly liable under state law for the harm that occurred to the murder victims.[6] The U.S. District Court judge in the case granted the defendants' motion to dismiss the case on the grounds that the plaintiffs had failed to state a claim on which relief could be granted. On appeal, the 6th Circuit U.S. Court of Appeals upheld the trial court's dismissal.[7] Upon appeal of the appellate court's decision, the U.S. Supreme Court denied certiorari in January 2003.[8]

• Following the terrorist attacks of September 11, 2001, the major U.S. television networks agreed not to broadcast any videotaped messages from Osama bin Laden without screening them flrst—after National Security Adviser Condoleezza Rice (who later succeeded Colin Powell as Secretary of State in January 2005) asked them to consider such a policy. The purpose of the screening was to make sure the tapes contained no coded messages to bin Laden supporters about conducting terrorist attacks.[9]

• In 2003 during the war in Iraq, the Dixie Chicks had their songs banned from country music radio stations around the country and were denounced by commentators and

others as traitors. They received tons of hate mail—electronically and in hard copy—after one of the members of the trio, Natalie Maines, a native Texan, told a London audience on the eve of the confiict that she was "ashamed" that President Bush was from her home state. As a result of the blacklisting, sales of the group's albums dropped considerably, and their concerts were picketed as part of an anti-Dixie Chicks campaign.[10]

• According to an article published in 2003 in the *Journal of Epidemiology and Community Health* that reviewed 42 studies, when news stories are published about the suicides of popular entertainment and political flgures, it is 14.3 times more likely that copycat suicides will follow than when such stories appear about non-celebrities.[11]

• In 2002 in a 6 to 5 *en banc* decision, the 9th Circuit U.S. Court of Appeals held that the First Amendment does not protect "wanted" posters placed on the Internet by anti-abortion groups to indicate doctors who perform abortions. The Web pages for the groups included the names of and personal information about each of the doctors with lines drawn through the photos of those who had been murdered.[12]

• In 2004, military contractor Maytag Aircraft flred a Kuwait-based employee who had photographed fiag-draped coffins of American soldiers killed in Iraq as they were loaded onto a cargo plane. The cargo worker's photos were flrst published in the *Seattle Times* and later in other publications. Under a U.S. government policy in effect since 1991 journalists have been prohibited from taking such photos.[13]

On April 16, 2007, a Virginia Tech University student, Seung-Hui Cho, murdered 32 people and wounded 25 before killing himself. On the same day as the massacre, Cho sent a multimedia manifest of photos, videos, and writings to NBC News. While the network prepared for saturation coverage by sending their news anchors to the Blacksburg, Virginia campus, the material sent to NBC News set off an internal debate about whether to air any of the material sent by the killer. Fortunately, NBC decided to take a cautious approach with limited exposure. An analysis of the top ten mass shootings covered by the U.S. network news (August 1987–April 2007) showed that nine, including Virginia Tech and Columbine, had occurred in just the past ten years. While the Virginia Tech massacre was still fresh in the minds of viewers, an on-campus poster read: "VT STAY STRONG — MEDIA STAY AWAY."[13]

As each of the above examples illustrates, prior restraint takes many forms. Three of the situations do not directly involve prior restraint. In the second example, the networks volunteered to screen the bin Laden videos. One of the requirements of impermissible prior restraint is that it must be compulsive, not voluntary. Granted, the networks agreed on a policy only after being pressured by government offlcials, but that pressure was not sufflciently coercive to make the networks' actions become involuntary. In the case of the Dixie Chicks, the government was not directly involved. One requirement of unconstitutional prior restraint is that it must originate with the government. However, as discussed later in this chapter, government action can be broadly interpreted within the context of prior restraint because it is such an abhorrent abridgement of freedom of expression.

Copycat suicides and murders represent a serious problem, but dealing with them is an ethical issue, not a legal one. The First Amendment would never allow a newspaper or other media outlet to be barred from publishing accurate details about suicides,

but that does not prevent news or entertainment media from voluntarily adopting ethical standards that discourage reporting the details of celebrity suicides.

Only the remaining three examples—the Heath High School case, the Web page "wanted" posters case, and the coffln photos—involved direct prior restraint. In the case of the coffln photos, it is highly unlikely that a court challenge of the policy would have been successful because the courts have generally deferred to the government when access is denied to military property, whether the ban applies to the public or to the news media or to both.

Not surprisingly, the two court cases led to two different results, illustrating the difflculty courts typically have in determining permissible and impermissible prior restraint. What is the difference between a Web page that appears to glorify the murders of physicians who perform abortions and a video game or movie that glorifles violence and murder of flctional individuals or cartoon characters? In the majority opinions in both cases, the appellate courts referred to the legal doctrine of *foreseeability*—whether a reasonable person would foresee that a particular statement or act could be perceived as a serious intent to harm someone or that it could result in serious harm. Note that each court came to a different conclusion.

Here is another illustration of how inconsistent prior restraint decisions can be. In 1988, a federal jury in Texas returned a $9.4 million verdict against *Soldier of Fortune* magazine for running a classifled ad that prompted a husband to hire an assassin to murder his wife. The 5th Circuit U.S. Court of Appeals overturned the verdict, holding that the magazine had no duty to withhold publication of a "facially innocuous ad."[14] One year later, the U.S. Supreme Court denied certiorari. The classifled ad read: "Ex-Marines—67–69 'Nam Vets, Ex-DI, weapons specialist—jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas." The appellate court did say that the magazine owed a duty of reasonable care to the public and that the ad posed "a risk of serious harm," but it noted that such daily activities as interstate driving involved risks as well. "Given the pervasiveness of advertising in our society and the important role it plays, we decline to impose on publishers the obligation to reject all ambiguous advertisements for products or services that might pose a threat of harm," the court said.[15]

Two years after the federal circuit court ruled in its favor, *Soldier of Fortune* lost a round in a trial court when a U.S. District Court jury in Alabama awarded two brothers $2.375 million in compensatory damages and $10 million in punitive damages for the death of their father.[16] The judge in the case reduced the punitive damages to $2 million. Michael and Ian Braun's father was gunned down by a man hired by Braun's business partner after the following ad appeared in the magazine: "GUN FOR HIRE. 37-year-old professional mercenary desires jobs. Vietnam Veteran. Discreet and very private. Body guard, courier, and other special skills. All jobs considered." The classifled ad also included an address and phone number. Citing the earlier 5th Circuit decision, the Alabama federal judge ruled, in denying a motion for summary judgment, that this ad, unlike the earlier one, was not facially innocuous and that the magazine had breached its duty of reasonable care. The 11th Circuit U.S. Court of Appeals afflrmed the district court decision in 1992, and the U.S. Supreme Court denied certiorari the next year.[17]

Contempt of Court

Contempt of court is, without doubt, one of the most serious prior restraint problems facing journalists in the 21st century. Most other types of prior restraint have become less of a threat than in the past, thanks to generally favorable rulings from the U.S. Supreme Court and other courts.

At first glance, contempt of court may appear to be unrelated to prior restraint. After all, contempt is generally either used to attempt to coerce an individual into complying with a court order, such as to provide the identity of a confidential source, or as a means of punishing someone for demonstrating disrespect for the court or the judicial process. However, a fairly frequent use of what is known as *criminal contempt* is to punish individuals for disobeying a court order—such as a gag order prohibiting attorneys and witnesses from discussing a case with reporters. Thus, news sources are effectively restrained from speaking out.

Contempt of court is generally defined as "any act which is calculated to embarrass, hinder, or obstruct court in administration of justice, or which is calculated to lessen its authority or its dignity."[18] There are two different ways of classifying contempt. First, contempt can be either *civil* or *criminal*. Unfortunately, this classification can be quite confusing because the distinction of civil versus criminal for purposes of contempt does not precisely parallel the traditional criminal versus civil division in law. Instead, the categorization is a rather artificial one that has been known to confuse journalists. *Civil contempt* involves the failure or refusal to obey a court order granted for the benefit of one of the litigants in a case. The offense, in other words, is not against the dignity of the court but against the party for whom the order was issued. The confusion is compounded by the fact that civil contempt can occur in both civil and criminal cases. *Criminal contempt*, on the other hand, is indeed an affront to the court and the purpose of any fine and/or jail term imposed is to punish the offender.

Civil Contempt

The purpose of a fine or sentence for civil contempt is to coerce an individual into complying with a court order. Thus the penalty imposed must be lifted once the person obeys or once the judicial deliberations have ended. However, civil contempt orders can remain in effect indefinitely in some cases, as dramatically demonstrated in the case of Dr. Elizabeth Morgan, who served longer (25 months) than any other U.S. woman not convicted of a crime.

What was the former affluent plastic surgeon and medical writer's offense? She refused to obey District of Columbia Superior Court Judge Herbert Dixon's order to disclose the whereabouts of her young daughter in a contentious custody battle with the girl's father, whom Morgan accused of sexually abusing the child. He strongly denied the claims. A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit ruled 2 to 1 that Morgan should have been released because it appeared highly unlikely that she would disclose the location of her daughter and thus the efforts to force Morgan to comply with the trial court judge's order

served no further purpose. However, the Circuit Court, meeting *en banc* (i.e., as the full court) soon overturned the appeal panel's decision so that Morgan was never released from jail. The full court did rule that she was entitled to a new hearing on her appeal of the civil contempt citation.

Morgan was freed on September 25, 1989, after the U.S. Congress passed a bill, specifically aimed to free her, limiting imprisonment for civil contempt in the District of Columbia to 12 months. The senior President George Bush signed the bill on September 23, 1989, and the D.C. Court of Appeals ordered her released two days later. She still faced possible civil contempt charges again because the bill limited the maximum term on a *single citation*, and the judge could have issued a new contempt citation so long as she refused to obey the order. However, the judge chose not to do so. The bill affected only *civil contempt citations* and only those in the District of Columbia. No court ever determined whether Morgan's spouse had abused the daughter.

In 1992, ABC-TV broadcast a made-for-TV movie entitled *A Mother's Right: The Elizabeth Morgan Story* about the case. Although the mother was permitted to return to the United States, it took another act of Congress to permit her to return with her daughter without facing contempt for not allowing the daughter to see her father. In 1996, both houses of Congress approved legislation—tacked onto a transportation bill—that forbids the father from visiting his daughter unless the child gives her consent, which she refused to do.[19] After she was freed from prison, Morgan had flown to New Zealand to be with her daughter, who was staying with her grandparents.

The person jailed the longest for civil contempt is Odell Sheppard, whose contempt citation was upheld by the Illinois Supreme Court in November 1994.[20] Sheppard served more than 10 years in jail from October 1987 to January 1998 because he refused to comply with a judge's order that he inform authorities of the whereabouts of his then-five-year-old daughter. He had served a three-year prison sentence for kidnapping the girl. He was released after the death of the child's mother, who had been granted the protective order that led to the contempt citation. Norelle Sanders died without ever learning the whereabouts of her daughter.[21]

Journalists are most often faced with civil contempt when they refuse to reveal confidential information or sources. Although most civil contempt citations against journalists usually result in incarceration for a few days, freelance Texan journalist Vanessa Leggett served 168 days in jail—the record at that time for a journalist for civil contempt. Leggett was cited for contempt after she refused to turn over her notes to a federal grand jury investigating the murder of a Houston socialite. She was doing research for a possible magazine article about the case at the time. The article was never published, but Leggett conducted confidential interviews with various individuals connected with the case, including police and the brother of the victim's husband, who confessed to the murder. In one interview, the brother said he had acted alone, but in another interview his account varied. Leggett gave prosecutors tapes of the interviews containing inconsistent confessions, but they were not used at trial. After the brother was acquitted on state charges, federal prosecutors

flled federal charges and subpoenaed Leggett's notes and tapes from other interviews. She refused and was cited for contempt.[22] Leggett appealed her citation, but the U.S. Supreme Court denied certiorari in 2002. Leggett later published a book about the case. She was released after the grand jury's term ended. Freelance videographer Josh Wolf holds the current record for a journalist jailed for civil contempt. He was released in April 2007 after serving 224 days for refusing to turn over to federal authorities a videotape he had made of a violent protest in California. He also refused to appear before a grand jury investigating the event. He was freed after he turned over the tape, which he had posted in his Web site. He did not have to testify before a grand jury, as originally ordered.[28]

As discussed in the previous chapter, *New York Times* reporter Judith Miller was released from jail after 85 days for refusing to reveal a confldential source to a federal grand jury in 2005 investigating the leak concerning undercover CIA offlcer Valerie Plame. Plame's husband, Joe Wilson, had been asked by the CIA to go to Africa to try to determine the veracity of a report that Niger had sold uranium to Iraq, whose president then was Saddam Hussein. When Wilson returned, he wrote a *New York Times* piece in which he claimed the report was false. Almost a week later, Robert Novak revealed in his syndicated column that two "senior administration offlcials" informed him that Plame was a CIA agent. Miller was released after she obtained a voluntary waiver from her source, who turned out to be Vice President Dick Cheney's chief of staff, I. Lewis "Scooter" Libby. Miller later resigned from the *Times* amid criticism from the newspaper's publisher and other journalists for the manner in which she handled her sourcing. Libby was indicted by a grand jury for perjury for allegedly lying about what he knew in the case. In 2007 Libby was convicted of perjury and obstructing justice by a jury and sentenced to 30 months in prison. Four months later, President George W. Bush commuted Libby's sentence, calling it "excessive." A $250,000 flne remained, which Libby paid. He never served a day in jail or prison for his offenses.

In 1970 William Farr,[24] a *Los Angeles Herald-Examiner* reporter, was assigned to cover the trial of the notorious mass murderer, Charles Manson. To ensure that Manson received a fair trial, the judge issued a *restrictive* or *gag order* prohibiting out-of-court statements by attorneys and witnesses. *Gag order* is a pejorative term used by the press to label what courts usually call *restrictive orders*. The judge also ordered the jury sequestered. Although the gag order was not aimed speciflcally at journalists, Farr was ordered by the judge to identify his sources for a story based on pretrial statements of a witness to whom Farr had promised confldentiality. The story attracted considerable attention because it contained grisly details allegedly revealed by one defendant, Susan Atkins, about the so-called Tate–Labianca murders and others planned by the Manson "family" against movie stars such as Elizabeth Taylor and Frank Sinatra. It was clear that some of the information reported by Farr in his stories could have been obtained only from sources the judge had ordered not to discuss the case publicly or with the media.

California Superior Court Judge Charles Older queried Farr about the source of his information, but Farr, claiming protection under a California shield law, steadfastly refused to disclose the name. Judge Older took no further action until

the trial was over when he ordered Farr again to reveal the name. By this time, Farr had obtained a new position as an assistant to a county district attorney. Farr still refused to provide the information, although he did indicate that he had received the information from two of the six attorneys involved. However, he would not identify the specific two, and thus the judge cited him for civil contempt with an indefinite jail sentence. The judge noted that the former reporter could no longer claim protection under the state's shield law because he now did not meet the definition of journalist under the statute. Some 46 days later, Farr was released when a state appellate court vacated the district court judge's contempt order, but only pending appeal. A cloud of doubt loomed over his fate, however, because if the judge's ruling were ultimately upheld by the appellate courts, Farr could have faced an indefinite jail term as long as he continued to refuse to obey the order to disclose. In late 1976, the California Court of Appeals permanently lifted the contempt order, five years after the case had begun and after the California Supreme Court[25] and the U.S. Supreme Court[26] refused to hear Farr's appeals. In 1980, California residents, apparently largely in reaction to the Farr case, approved Proposition 5, which for the first time gave state constitutional protection for journalists in protecting confidential sources.[27]

The Farr case illustrates a "Catch 22" for states that have chosen to grant protection for journalists against prior restraints imposed by restrictive orders and contempt citations. No matter how strong the protection the legislation or constitutional provision may be designed to offer, the courts always have the authority to limit the protection or even strike the law down on the grounds that it violates the separation of powers of the U.S. Constitution. Although, as one U.S. constitutional scholar has noted, "As an examination . . . readily reveals, separation was not intended to be total and airtight,"[28] both state and federal courts have been very reluctant to allow legislators to restrict their authority to regulate judicial proceedings, including the ability to cite individuals for contempt. The California Court of Appeals in the Farr case no doubt reflected the reasoning of the vast majority of state and federal courts when it clung to the long-standing constitutional premise that courts have an inherent power to control judicial proceedings free from any interference. In sum, even when its use may mean serious prior restraint, contempt power is near and dear to the hearts of judges and justices, and thus courts will almost inevitably uphold its constitutionality except in extreme cases such as *Nebraska Press Association v. Judge Stuart*,[29] discussed *infra*.

Efforts to enact a national shield law continue to fail despite fairly broad bipartisan support in Congress and apparently strong public approval, as reflected in a 2005 poll commissioned by the First Amendment Center in collaboration with *American Journalism Review*.[30] The poll found that 69 percent of Americans either strongly agree or mildly agree that "journalists should be allowed to keep a news source confidential."[31]

Dickinson Rule

Probably the most serious "Catch 22" situation facing journalists in the area of prior restraint is the so-called Dickinson rule formulated by the U.S. Court of

Appeals for the 5th Circuit in 1972.[32] The case began when two Louisiana newspaper reporters were covering a hearing in a U.S. District Court in which a black civil rights VISTA volunteer challenged his indictment by a state grand jury for conspiracy to murder the local mayor. During the hearing, the judge issued a verbal order prohibiting publication of any information about the testimony given at the hearing even though the information had been disclosed in open court. The judge's order permitted the reporters to publish that the hearing had been held, but essentially nothing more.

In spite of the order, both reporters wrote news stories giving details of the hearing. For their deflance of his order, the judge in a summary hearing found them guilty of criminal contempt and flned both $300. Although the reporters were never jailed and the flnes were relatively minimal, the *Baton Rouge Morning Advocate and State Times* newspaper chose to appeal the convictions. Most First Amendment experts would probably have concluded that the order was indeed unconstitutional, and, in fact, the U.S. Court of Appeals for the 5th Circuit agreed and sent the case back to the District Court judge for further consideration. Not surprisingly, the judge reinstated the flnes, and the newspaper flled another appeal. The Circuit Court then upheld the citations by reasoning that even constitutionally invalid restrictive orders require compliance because (citing an earlier decision), "people simply cannot have the luxury of knowing that they have a right to contest the correctness of the judge's order in deciding whether to willfully disobey it."[33]

The court also reasoned that if individuals including journalists are permitted to disobey court orders, the judicial process would be seriously affected. After all, the court noted, such orders are to be used only "sparingly."[34] A journalist can request expedited review by the appeals court, but reviews are rare and unlikely to be granted in a case such as this one. The upshot is that journalists face the dilemma of disobeying an order, risking flnes and even jail sentences and getting the story published, or complying with the order by withholding the information from the public while waiting months or longer for the appeal to be heard. The Dickinson decision was appealed to the U.S. Supreme Court, but the court denied certiorari in 1973.[35]

Direct versus Indirect Contempt

Contempt can also be categorized into direct and constructive or indirect. *Direct contempt* is committed in or near the presence of the court ("so near thereto as to obstruct the administration of justice").[36] *Indirect* or *constructive contempt*, on the other hand, occurs or relates to matters outside the courtroom. Although such a distinction may seem artiflcial or even contrived at flrst glance, there are major differences in the procedures followed in the two types of contempt and in the constitutional and statutory rights involved.

Suppose a judge issues a restrictive order forbidding all news media in the area from publishing or broadcasting the details of testimony given at the trial of a grandfather accused of sexually abusing his grandchildren. The judge exercises discretion

under state statutes and the rules of criminal procedure by closing the testimony of the young victims to the public and the press. The judge had earlier issued an order barring all trial participants including witnesses, jurors, and attorneys from discussing the case with anyone including journalists.

In this hypothetical case, a reporter for the local television station nevertheless convinces one of the social workers who accompanied the children to the trial and sat in the courtroom while the children testifled to disclose the details of the testimony. The reporter broadcasts a summary of the testimony on the six o'clock news. What is the judge likely to do?

First, there are two potential violations leading to contempt—the broadcast and the disclosure of information by the social worker. Assuming the reporter refuses to disclose the confldential source of her information, there is even a third possible contempt. Let's begin with the flrst. When the reporter is called before the judge to explain why she violated the judge's order and is ordered to name her source but refuses, her refusal constitutes direct criminal contempt. That is because (a) the contempt has occurred within the presence of the court and (b) her refusal can be considered an affront to the dignity of the court (i.e., an interference with the orderly administration of justice). What can the judge do? The judge has the clear authority in this case to exercise summary jurisdiction in a summary proceeding. The judge can immediately cite the reporter for contempt and immediately punish her within certain constitutional parameters. Within a matter of minutes or even seconds after she refuses to disclose her source, the judge can accuse her of contempt, determine that contempt has occurred and sentence her to jail. Journalists are often shocked by the swiftness of the summary proceeding, but state and federal rules of criminal and civil procedure grant this authority to judges and the courts have consistently upheld its constitutionality.

What are the reporter's options? Obviously, she can plead with the judge not to flnd her in contempt, but, assuming that the judge does not accept the reporter's plea, she can appeal her conviction to a higher court or serve her time in jail. Can the judge also punish her for broadcasting the report in deflance of the order? Yes, but the punishment would be for indirect criminal contempt because the broadcast interferes with the administration of justice (criminal contempt), and the action occurred outside the courtroom. With indirect contempt, unlike direct contempt, the accused is entitled to notice of the alleged offense and to a formal, separate hearing on the matter. The reporter thus would have the opportunity to mount some type of defense, although the judge is still likely to ultimately punish her and probably even flne the station for defying the restrictive order.

Ironically, the reporter could also face civil contempt charges for failing to identify her source and thus be conflned for an indeflnite time in jail and be forced to pay flnes as a means of coercing her to testify. Her conflnement, as already indicated, could continue until the judge determined it was fruitless to keep her in jail any longer, the name was disclosed by someone else, the trial ended or, of course, she relented and testifled.

If the reporter does disclose her source's identity or the judge somehow determines that the social worker has violated the earlier order, what are the possible consequences for the social worker? Although the social worker may have actually communicated the information to the reporter outside the courtroom, the worker would in all likelihood be cited for *direct criminal contempt* because "so near thereto" can be broadly interpreted to include such deflance. Because the purpose of citing the worker would be as punishment, criminal contempt has occurred. (There is nothing to coerce the worker to do.)

In some cases, civil contempt can ultimately turn into criminal contempt, as illustrated in the case of a Providence, Rhode Island television reporter. In early 2001, WJAR-TV reporter Jim Taricani broadcast part of a videotape that had been sealed as evidence in an FBI investigation. The tape showed a city offlcial taking a bribe from an FBI undercover informant. More than three years later, after Taricani refused to name his source for the tape in court, the judge held him in civil contempt. The station owner, NBC, paid $85,000 in flnes, but the judge still held the reporter in criminal contempt and sentenced him to jail for six months, of which he served four.[37]

Constitutional Limits on Contempt Power

Bridges v. California and *Times-Mirror Co. v. Superior Court* (1941)

Although judges have considerable power to cite and punish individuals including journalists for contempt, some First Amendment limits have been recognized by the courts. The greatest protection is for information disseminated outside the courtroom. In 1941, the U.S. Supreme Court held in *Bridges v. California* and *Times-Mirror Co. v. Superior Court* (the two appeals were decided together by the Court)[38] that a judge may not cite journalists for contempt for publishing information about pending court cases unless there was a "clear and present danger" to the administration of justice. The Court noted that this clear and present danger standard was "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[39]

In *Bridges*, a union offlcial sent a telegram to the U.S. Secretary of Labor that was published in local newspapers in California. In the telegram, sent while the ruling on a motion for a new trial in a labor dispute was pending, Harry Bridges threatened to have his union strike if the judge's "outrageous" decision were enforced. The lower appellate courts upheld the leader's conviction for contempt as an interference with the "orderly administration of justice."

In *Times-Mirror*, while a decision was pending in the sentencing of two union members convicted of assaulting nonunion employees, the *Los Angeles Times* published a series of editorials in which it called the two "sluggers for pay" and "men who commit mayhem for wages" and contended that the judge would be committing a "serious mistake" if he granted probation. The paper was convicted of contempt and

flned. The lower appellate courts, including the California Supreme Court, upheld the conviction. But the U.S. Supreme Court reversed the convictions of both Bridges and the *Times* on the ground that no clear and present danger had been shown.

Post-*Bridges* Decisions

In three more major cases since *Bridge*s, the Court elaborated on the clear and present danger standard. First, in 1946, in *Pennekamp v. Florida*,[40] the Court reversed the contempt convictions of the *Miami Herald* and its associate editor for a series of editorials and an editorial cartoon accusing local judges of being more interested in assisting criminals than serving the public. The Court noted that the editorials had been based on false information, but it characterized the errors as relatively minor in light of the need for permissible commentary on the judiciary. No clear and present danger could be demonstrated, according to the majority.

In the second case, *Craig v. Harney*,[41] the Court also acknowledged that newspaper criticism aimed at a judge had been based on inaccuracies. "The fact that the discussion at this particular point in time was not in good taste falls far short of meeting the clear and present danger test," the majority asserted. The newspaper severely criticized in an editorial and articles the judge's handling of a civil case in which he directed a jury three times to flnd for a plaintiff in a landlord–tenant dispute. The flrst two times the jury found for the defendant; he was stationed overseas in the military and had failed to pay rent to the landlord, who was now seeking repossession of the building. Each time the Texas judge sent the jurors back to decide in favor of the plaintiff. Finally, they found for the plaintiff but made their objections known to the judge. The defendant's attorney flled a motion for a new trial. While the Court was deciding on whether to grant it, the newspaper published the articles and an accompanying editorial that Justice William O. Douglas, writing for the majority, characterized as "unfair" because of the inaccuracies. But Justice Douglas said the articles and editorial did not warrant the contempt citation and consequent three-day jail sentence imposed on the editor.

According to the Court, "the vehemence of the language used is not alone the measure of the power to punish for contempt. The flres which it kindles must constitute an imminent, not just likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."[42] The majority said, "Judges are supposed to be made of fortitude, able to thrive in a hardy climate." The Court is saying judges must be able to withstand criticism, no matter how harsh or unfair. Justice Robert H. Jackson, in a strongly worded dissent, contended that the majority "appears to sponsor the myth that judges are not as other men are."

In the last case in which the Court directly applied the clear and present danger test in a contempt case within a First Amendment context, Chief Justice Earl Warren, writing for the majority in *Wood v. Georgia*,[43] reversed the conviction for contempt of a Bibb County, Georgia sheriff. The sheriff issued a news release criticizing a judge's actions in a grand jury investigation of a voting scandal. Upset because the judge ordered the grand jury to investigate rumors and accusations of "Negro

bloc voting," Sheriff James I. Wood launched a news release calling the investigation "one of the most deplorable examples of race agitation to come out of Middle Georgia in recent years. . . . Negro people will flnd little difference in principle between attempted intimidation of their people by judicial summons and inquiry and attempted intimidation by physical demonstration such as used by the KKK."[44]

A month later, Wood was cited for contempt for creating a "clear, present and imminent danger" to the investigation and "to the proper administration of justice in Bibb Superior Court."[45] The defendant issued another press release the next day, essentially repeating his previous claims, and his contempt citation was amended to include this release as well. The U.S. Supreme Court noted that there were no witnesses at the contempt hearing and no evidence was presented to demonstrate a clear and present danger to the administration of justice. The Court reversed the convictions that had been afflrmed by the Georgia Court of Appeals except for a contempt charge based on an open letter the sheriff sent to the grand jury, set aside by the state appellate court. According to the U.S. Supreme Court:

> Men are entitled to speak as they please on matters vital to them; errors in judgment or unsubstantiated opinions may be exposed, of course, but not through punishment for contempt for the expression. [In] the absence of some other showing of substantive evil actually designed to impede the course of justice in justiflcation of the exercise of the contempt power to silence the petitioner [Wood], his utterances are entitled to be protected.[46]

The *Bridges–Pennekamp–Craig–Wood* line-up offers strong but not absolute constitutional insulation for journalists from contempt citations when they publish information about the judicial process, especially criticism of judges and information obtained in open court, even when such information is based on inaccurate data. Nevertheless, the contempt power of judges remains strong, including coercion and punishment for refusing to reveal confldential information. The greatest protection appears to be for overt prior restraint, such as prohibiting someone from speaking out rather than when information is actually being sought for disclosure.

The Classic Case: *Near v. Minnesota* (1931)

The most signiflcant prior restraint case decided by the U.S. Supreme Court is *J.M. Near v. Minnesota ex rel. Floyd B. Olson, County Attorney of Hennepin County, Minnesota*,[47] otherwise known as *Near v. Minnesota*. No other prior restraint case has been cited as often, and the Supreme Court consistently cites the holding in this case as controlling whenever it issues an opinion in any prior restraint case even though *Near* was decided six decades ago by a very slim 5 to 4 majority. Even the rather conservative court headed by Chief Justice William H. Rehnquist generally upheld the principles flrst enunciated in *Near*.

This case demonstrates how extreme actions are sometimes necessary to ascertain the outer limits of the First Amendment—the Larry Flynts, the J.M. Nears, the

fiag burners, and the cross burners of the world give the courts the opportunity to enunciate how far our constitutional rights extend.

As the late Fred Friendly pointed out in his superb account of the *Minnesota Rag* case,[48] Minneapolis was a politically corrupt city in the 1920s and politicians had little tolerance for outspoken publications like J.M. Near's *The Saturday Press*. Near and his co-publisher, Howard Guilford, accused various local politicians and offlcials, including the police, of ignoring widespread racketeering, bootlegging, and illegal gambling. According to the newspaper in a series of blatantly sensational, anti-Semitic articles, a "Jewish gangster" controlled these activities. The Minnesota legislature passed a statute in 1925 that allowed authorities to halt publication of any "obscene, lewd and lascivious . . . or malicious, scandalous, and defamatory newspaper, magazine, or other periodical" as a public nuisance. Anyone guilty of such a nuisance could be enjoined from further publication (except presumably with the approval of a judge).

A quick look at old issues would probably convince most people even today that indeed the paper met all the criteria of a scandalous and defamatory newspaper. One of the editorials introduced into evidence at the trial referred to "Jew gangsters, practically ruling Minneapolis" and contended "practically every vendor of vile hooch, every owner of moonshine still, every snake-faced gangster and embryonic yegg in the twin cities is a JEW" (capital letters in the original).[49]

Hennepin County Attorney Floyd Olson, who years later was elected state governor as a Populist, flled a criminal complaint against the paper and its publishers. It charged that nine issues of the paper from September to November 1927 contained "malicious, scandalous and defamatory articles" making false accusations against police and various public offlcials. After the prosecution presented its side and the defense immediately rested its case without presenting any evidence, the Minnesota trial court determined that Near and Guilford had violated the statute by creating a public nuisance. The judge then ordered that the paper be abated and that the defendants be "perpetually enjoined" from publishing "under the title of *The Saturday Evening Press* or any other name or title . . . any publication whatsoever which is a malicious, scandalous or defamatory newspaper." In other words, Near and Guilford were prevented not only from publishing any more issues of the *Press* but essentially any other newspapers of that type.

On appeal one year later, the Minnesota Supreme Court held the statute was constitutional under both the state and federal constitutions as a valid exercise of the broad police power of the state and that the order did not prevent Near and Guilford from "operating a newspaper in harmony with the public welfare." In a 5 to 4 decision that could have gone the other way had it not been for a few twists of fate such as the death of an associate justice,[50] the U.S. Supreme Court reversed the order and struck down the statute as unconstitutional.

In delivering the majority opinion of the Court, Chief Justice Charles Evans Hughes characterized the statute as "unusual, if not unique." The decision, as fate would have it, was read as the last one on the last day of the Court's 1930–1931 term.[51] Drawing heavily on the ideas of British legal scholar Sir William Blackstone

(1723–1780), the court quoted the English jurist. It said, "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published."[52] Justice Hughes' opinion reasoned that the First Amendment ban on prior restraint is "not absolutely unlimited" but that there are "exceptional cases" when prior restraint would be constitutional:

> When a nation is at war, many things that may be said in time of peace are such a hindrance to its effort that their utterance will not be endured. . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency might be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government[53] [cites omitted].

This decision offers the first hint of the later versions of reasonable time, place, and manner restrictions that the Court has permitted on speech. These exceptions also point to more modern limitations usually grouped under the rubrics of obscenity, national security, and military secrets. Did any of the exceptions apply in this case? According to the Court, "These limitations are not applicable here. . . . We hold the statute, so far as it authorized the proceedings in this action . . . to be an infringement of the liberty of the press guaranteed by the 14th Amendment."[54] Why did the Court invoke the 14th Amendment?

The U.S. Supreme Court has over the decades selectively incorporated various rights under the Constitution's Bill of Rights, including those granted under the First Amendment. Until the *Near* decision, the Court had not specifically ruled whether First Amendment rights applied to the states. If this fact seems strange, closely examine the wording of the First Amendment, especially the reference that "Congress shall make no law." State and local governments are not mentioned. Theoretically, one's First Amendment rights could not be trampled upon by the federal government, but a state agency could infringe on those rights so long as it did not violate the state constitution or state or federal statutes.

However, the Supreme Court went beyond its traditional turf by asserting, "It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the 14th Amendment from invasion by state action."[55] In other words, according to the Court, section 1 of the 14th Amendment ("nor shall any State deprive any person of life, liberty, or property without due process of law") includes freedom of speech and of the press.[56]

A close reading of the majority opinion, especially the reasoning, provides a portentous glimpse at troubling decisions such as the Pentagon Papers case[57] emerging decades later from the Court. *Near* was a strong affirmation of First Amendment rights. The Court reasoned (a) "Remedies for libel remain available and unaffected" (officials had the option of suing for libel, perhaps criminal as well as civil, after the publication appeared); (b) the statute is too broad because it bans not only "scandalous

and defamatory statements" aimed at private citizens but also charges against public offlcials of "corruption, malfeasance in offlce, or serious neglect of duty" (a preview of the *New York Times v. Sullivan* "actual malice" rule?)[58]; (c) "the object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical" (that is, prior restraint is the real evil); and (d) "the statute not only operates to suppress the offending newspaper or periodical, but to put the publisher under an effective censorship." The kiss of death for the statute is that the prior restraint can be indeflnite.[59]

The Court made two more major points that have stood the test of time. First, the Court indicated, "In determining the extent of the constitutional protection [of the First Amendment], it has generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication."[60] The majority opinion then traced the historical background of freedom of the press, liberally quoting Blackstone and his progeny as well as his critics. The obvious purpose of the analysis was to attempt to delineate the primary meaning of the First Amendment. *Near* was a major step toward accomplishing this task. As indicated later, the Supreme Court continues to struggle with the boundaries of the freedom that undergirds all other constitutional rights.

Second, the Court effectively killed the idea that a prior restraint statute can be justifled if it includes, as the Minnesota law did, a provision that permits the accused to use the defense that the information published was true and that it was "published with good motives and for justiflable ends." According to the Court, if this exception to the unconstitutionality of prior restraint were allowed, "it would be but a step to a complete system of censorship" because legislatures could thus arbitrarily determine what constituted justiflable ends. Clearly, if *Near* has any meaning, it is that legislatures cannot have unbridled discretion in determining permissible versus impermissible speech and publication. In actions involving prior restraint, the burden, as discussed shortly, always rests on the government to show that the communication falls into one of the exceptions, *not* on the speaker or publisher to show that the communication is justifled.

In analyzing the *Near* case, legal scholars usually include some discussion of the dissenting opinion of Associate Justice Pierce Butler, with which three of the other justices concurred. Although Justice Butler's view has yet to be shared by a majority of justices, it does represent a perspective that has some following among jurists and other legal scholars. Justice Butler contended that because the state clearly had the right to punish the "transgressions" that occurred as a result of the publication of the newspaper, there is no reason the state should not be permitted to prevent continuance of the harm. According to Justice Butler, "The Minnesota statute does not operate as a previous restraint on publication . . . [because] . . . [i]t does not authorize administrative control in advance . . . but prescribes a remedy to be enforced by a suit in equity."[69] He was concerned that the doctrine espoused in the majority opinion in *Near* "exposes the peace and good order of every community and the business and private affairs of every individual to the constant and protracted false and malicious assaults" of ill-motivated publishers.[61]

Whereas Butler's reasoning may appear, at flrst reading, to expose a major weakness of the *Near* rationale, his reasoning begins to crumble under scrutiny when one realizes, as Chief Justice Hughes pointed out, that legislators and offlcials would have enormous power in silencing unpopular views. These might include religious, political, or social views. All of this censorship would be accomplished with the blessing of courts beholden to the public that elected them or to the offlcials who appointed or hired them. The real evil of prior restraint arises when unpopular views or views simply perceived by offlcials as unpopular or threats to their authority are arbitrarily silenced with no opportunity for society to accept or reject them. In a democracy such as ours, we must take the risk that some individual or other entity may suffer harm from the publication of false information in order to ensure that all views have opportunities to be heard. As Sir Blackstone believed, it is better to allow the potentially harmful information to be disseminated and then punish the offender, if justifled, than to prohibit the publication.

There is an interesting footnote to the story of the *Saturday Press*. J.M. Near went virtually unmentioned in news accounts of the Supreme Court's decision, but more than a year later, the newspaper reappeared under Near's editorship with a front-page proclamation that said, "The only paper in the United States with a United States Supreme Court record of being right; the only paper that dared flght for freedom of the press and won."[62]

New York Times Co. v. United States (1971)

Some 40 years after the U.S. Supreme Court's decision in *Near*, the Court agreed to hear an appeal in a case that had the potential of answering many of the questions surrounding prior restraint that had not been answered in *Near*. From the beginning, the case had the makings of a landmark decision, although the pinnacle was never reached.

In June 1967, U.S. Secretary of Defense Robert S. McNamara commissioned what ultimately became a 47-volume, 7,000 page study of America's Vietnam policy since World War II. In his book, *In Retrospect: The Tragedy and Lessons of Vietnam*, McNamara noted:

> . . . It [the study] had shortcomings, in part refiecting the natural limitations of history written so close to the event and in part because Les [Leslie H. Gelb, who directed the study] and his team in fact lacked access to the White House flles and some top-level State Department materials. But overall the work was superb, and it accomplished my objective: almost every scholarly work on Vietnam since then has drawn, to varying degrees, on it.[63]

Daniel Ellsberg, a political scientist and military defense expert, was among those working on the study. Ellsberg gained access to the classifled study titled *History of U.S. Decision-Making Process on Viet Nam Policy* that was completed in 1969 and later became known as the "Pentagon Papers." Ellsberg spent several months reading the volumes and other documents he carried from the Washington, D.C. fleld

offlce of the Rand Corporation where he worked to company headquarters in Santa Monica. According to one account, Ellsberg had access to all 47 volumes and sole but temporary custody of 27 of the volumes.[64]

After Ellsberg read the papers, he was convinced "beyond any doubt that the information in the Pentagon Papers, if widely available, would be explosive."[65] After several unsuccessful attempts to have members of Congress including U.S. Senator and Democratic presidential candidate George McGovern accept the papers and presumably make them public, Ellsberg, in March 1971, delivered photocopies of all but the last four volumes to Neil Sheehan, a Washington correspondent for the *New York Times*. He apparently considered those too sensitive to disclose.[66]

For the next three months, Sheehan and other *Times* staffers spent hundreds of hours reading and digesting the documents into article form—usually while squirreled away in a hotel suite away from the hubbub of the offlce. The ultimate decision was to publish the report in a comprehensive series of articles. Much of the writing for "Project X" (as the secret effort became known at the *Times*) was done in group headquarters at the New York Hilton, with security guards to watch the three-room suite when no one was there.[67]

On Monday, June 13, 1971, the *Times* published the flrst installment of what was intended to be a series of ten articles summarizing and analyzing the Pentagon Papers. The next day, the second article appeared, and U.S. Attorney General John Mitchell asked the newspaper to voluntarily stop publication of the top secret documents. (Mitchell later would serve 19 months in a federal minimum security prison for his involvement in criminal activities in the Watergate affair.) When the *Times* rebuffed him, Mitchell began a series of legal maneuvers to halt further publication. He claimed prior restraint was justifled under the Espionage Act of 1918 because publication would create an unwarranted infringement on national security.

On Tuesday, the third article appeared, but the government was able to convince Judge Murray Gurfein of the U.S. District Court for the Southern District of New York to issue a temporary restraining order (TRO) to prevent further publication in the *Times* until a hearing could be set on a permanent injunction. A TRO can be granted without hearing from the opposing side if it can be shown that irreparable harm will occur if such an order is not granted and that a reasonable effort was made to notify the other side. The TRO would be issued, pending a hearing at which both sides appear—before either a temporary or permanent injunction could be issued. Both appeared and the judge ruled in favor of the government. Thus, for the flrst time in U.S. history, a judge imposed prior restraint on a media outlet to prevent it from publishing speciflc content. In *Near*, the judge prevented the editor from publishing any further issues of that or similar papers that constituted a public nuisance. Thus the injunction was not against a speciflc article.

In the meantime, the *Washington Post* obtained photocopies of most of the Pentagon Papers and, after a protracted debate among its editors, reporters, and lawyers, on Friday, June 17, published the flrst of a planned series, much along the lines of those in the *Times*. As expected, Attorney General Mitchell immediately requested the *Post* to voluntarily cease publication. The *Post* refused his request, and

he immediately sought a TRO in the U.S. District Court for the District of Columbia. Judge Gerhard Gesell rejected Mitchell's request, and the government immediately flled an appeal with the U.S. Court of Appeals for the District of Columbia Circuit. After a hearing in which both sides participated, that appeals court upheld the lower court refusal.

During this same period, the federal trial court judge in New York, Judge Gurfein, denied the federal government's request for a permanent injunction. The government immediately appealed to the U.S. Court of Appeals for the Second Circuit. In a controversial 2 to 1 decision, that court reversed Judge Gurfein and reinstated the injunction. The court ruled that the ban should remain until a hearing could be conducted at which the government would have the opportunity to demonstrate why further publication would pose a serious threat to national security.

As a result of these decisions in two different appeals court circuits, the *Times* was legally prevented from any further publication of the Pentagon Papers and the *Post* effectively had the court's blessing to continue. Other newspapers, including the *Boston Globe*, the *St. Louis Post Dispatch*, the *Chicago Sun-Times* and the *Los Angeles Times*, entered the fray. In another illustration of how inconsistent federal courts and the government can be in prior restraint cases, the *Globe* and the *Post Dispatch* were enjoined by the courts, but the government chose not to seek injunctions against the other two newspapers.

On June 24, one day after the federal appeals court in New York ruled against the newspaper, the *Times* flled a motion for expedited review and a petition for a writ of certiorari with the U.S. Supreme Court. The next morning (Saturday), at the government's urging, in an unprecedented 5 to 4 decision, the Supreme Court temporarily banned *all* further publication of the Pentagon Papers, not only in the *Times* and the *Post*, pending an expedited review. The Court rarely deliberates on weekends, indicating this was no ordinary case. The Court's action was without precedent: The U.S. Supreme Court had never granted an injunction, even a temporary one, against a news medium.

In another unusual move, the Supreme Court heard oral arguments on Sunday. The arguments were predictable. The U.S. Solicitor General, representing the government, contended that further publication of the documents would have a potentially serious adverse impact on the course of the Vietnam War and cause irreparable harm to national security. The newspaper lawyers asserted that the government failed to show that such harm would occur and that such prior restraint violated the First Amendment. With surprising swiftness, the Supreme Court rendered its decision flve days later, on Thursday, June 30, 1971.[68] For those who awaited a strong reaffirmation of *Near* and a ringing victory for First Amendment rights, the Court's decision was a hollow win and, to many, a major disappointment.

In a brief *per curiam* opinion, the Court merely held that the government failed to meet the heavy burden required in justifying prior restraint. The 6 to 3 decision in favor of the *Times* and the *Post* included separate opinions from each of the nine justices. In the unsigned opinion, the Court quoted a 1963 decision involving prior restraint—*Bantam Books, Inc. v. Sullivan*:[69] "Any system of prior restraints of expression comes to

this Court bearing a heavy presumption against its constitutional validity." The opinion then went on to note that "the government thus carries a heavy burden of showing justiflcation for the enforcement of such restraint" (citing a decision earlier in the year, *Organization for a Better Austin v. Keefe*).[70] The citations also included *Near*, but none of the opinions, including the *per curiam* opinion, shed light on the limits for prior restraint. No consensus was reached regarding whether the injunctions had been constitutional, only that a heavy evidentiary burden had not been met.

Both the concurring justices and the dissenters looked to *Near*, but none of them went to great lengths to reafflrm the principles in *Near*. Instead they used the reasoning in *Near* to bolster their opinions. Justice William O. Douglas, who had a long and distinguished record of defending First Amendment rights, was joined by Justice Hugo Black (serving his last term on the Court; he died three months later) in one concurring opinion, and Black wrote another separate opinion joined by Douglas.

Black, joined by Douglas, argued that "in seeking injunctions against these newspapers and its presentation to the Court, the executive branch seems to have forgotten the essential purpose and history of the First Amendment." According to Black, "In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do." He claimed that ruling that prior restraint may be imposed on news, as several of the justices advocated, "would make a shambles of the First Amendment."[71]

Douglas, joined by Black, took an absolutist view that "no law" means "no law." The First Amendment means there is "no room for governmental restraint on the press," according to Douglas. Even though disclosures such as those made by the newspaper in this case "may have a serious impact . . . that is no basis for sanctioning a previous restraint on the press," he argued. "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion on public issues are vital to our national health."[72]

In a third concurring opinion, Justice William J. Brennan, Jr., also known for his unwavering support of a strong First Amendment, vociferously argued, "The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise." He noted that "never before has the United States sought to enjoin a newspaper from publishing information in its possession." Brennan freely cited *Near* as afflrming that prior restraint should be imposed in only the rarest of cases.[73]

Justices Potter Stewart and Byron R. White each wrote separate concurring opinions with which the other joined. Stewart, joined by White, made it clear that he did not share an absolutist view of the First Amendment on prior restraint. His opinion included a now famous quote, "For when everything is classifled, then nothing is classifled," arguing that governmental secrecy must not be secrecy for secrecy's sake. "I am convinced that the executive is correct with respect to some of the documents involved," Justice Stewart concluded. "But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people." In his view, the government failed to overcome the heavy burden imposed by the Constitution to demonstrate that the prior restraint was justifled under the circumstances.[74]

In his concurring opinion, White, joined by Stewart, went beyond the previous concurring opinion with Stewart to note that whereas the government had not been able to show the constitutionally mandated "unusually heavy justifIcation" for prior restraint, the "failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication."[75] White did not rule out the possibility that the government may have been able to seek criminal sanctions provided in the statutes *after* the publication even though it could not prevent publication.

In the flnal concurring opinion, Justice Thurgood Marshall focused on the doctrine of separation of powers, concluding that "this Court does not have authority to grant the requested relief [sought by the executive branch]. It is not for this Court to fiing itself into every breach perceived by some government offIcial."

If read carefully, the dissenting opinions present a narrow view of First Amendment rights. In his dissent, Chief Justice Warren Burger noted, "The prompt setting of these cases refiects our universal abhorrence of prior restraint. But prompt judicial action does not mean unjudicial haste." The Chief Justice characterized the Pentagon Papers as "purloined documents," pointing out "it is not disputed that the *Times* has had unauthorized possession of the documents for three to four months." Burger criticized the newspaper for not submitting the materials to government offIcials so the parties could negotiate declassifIcation. "The consequence of all this melancholy series of events is that we literally do not know what we are acting on," according to the Chief Justice.

On the surface, Burger's arguments may seem reasonable. However, a closer look reveals that he is advocating that the newspaper impose self-censorship and submit the "stolen property" to governmental authorities so they could determine what, if anything, could be declassifIed. Barring such voluntary action by the *Times*, the Chief Justice would permit the trial court to continue the injunction until all of the facts were in and the case could be resolved at trial. Further, although he would have directed that "the district court on remand give priority to the *Times* case to the exclusion of all other business of that court . . . [he] would not set arbitrary deadlines." Throughout his opinion, Burger expresses his distaste for the speedy manner in which the case was granted certiorari and ultimately decided by the Court.[76]

Justice John M. Harlan, joined by Burger and Justice Harry A. Blackmun, also chided the majority for the swiftness with which the case was decided. He felt that the Court had been "almost irresponsibly feverish" in hearing and deciding the case. "This frenzied train of events took place in the name of the presumption against prior restraints created by the First Amendment," he complained. "Due regard for the extraordinarily important and difIficult questions involved in these litigations should have led the Court to shun such a precipitate timetable." Harlan raised seven major questions to be considered before deciding the case on its merits, including whether the newspapers were entitled to retain and use the "purloined" documents and "whether the unauthorized disclosure of any of these particular documents would seriously impair the national security."[77] These three dissenters would have continued the injunctions at least until the lower courts could decide the cases on their merits. They make no mention of the fact that such deliberations,

even if expedited, could take months or years while the documents continued to be suppressed.

Finally, in a separate dissent not joined by any of the other justices, Blackmun carefully avoided criticizing any judges or lawyers in the case. He indicated he "would remand these cases to be developed expeditiously, of course, but on a schedule permitting the orderly presentation of evidence from both sides, with the use of discovery, if necessary." Blackmun had studied the affidavits and portions of the Pentagon Papers. He believed that if the newspapers published the documents because of the majority opinion in the case, soldiers would be killed, alliances destroyed, negotiations with the enemy would be more difficult, and the war would be prolonged, resulting in "further delay in the freeing of United States prisoners."[78]

Minus the four missing volumes that Daniel Ellsberg initially considered too sensitive to disclose and that were never officially declassified, the Pentagon Papers were eventually published by newspapers throughout the United States, including the *Times* and the *Post*. At least three versions of the 43 volumes were published in book form—the official version made available to the press and other interested parties by the Government Printing Office, a Bantam Books paperback edition based on the *New York Times* stories, and a Beacon Press "Gravel" edition; the latter was named after Senator Mike Gravel (D-Alaska), who managed, over the opposition of many of his colleagues, to have the documents officially entered into the record of a subcommittee hearing. Gravel was one of several members of Congress who had the opportunity to gain access to copies of the Pentagon Papers before they were eventually published, but he was the only one willing to publicly disclose them.[79]

By most, if not all, accounts, publication of the Pentagon Papers had virtually no impact on the Vietnam War. The Nixon administration chose to prosecute Ellsberg and Anthony J. Russo, Jr., who had helped Ellsberg photocopy the documents, charging them primarily with violating the U.S. Espionage Act[80] and for stealing government property. Both were indicted based on evidence presented by the U.S. Justice Department to a federal grand jury in Los Angeles. The first trial court jury impaneled in the case in July 1972 was dismissed after some complicated legal maneuvering. Charges were dismissed on May 11, 1973, after it became known that President Nixon's Watergate "plumbers" burglarized the offices of Ellsberg's psychiatrist and conducted illegal wiretaps against individuals from 1969 through 1971 in an effort to plug government "leaks."

The fates of the two major players in the Pentagon papers case could not have been more different. In 1975, Attorney General Mitchell was convicted of conspiracy, perjury, and obstruction of justice for his participation in the planning of the Watergate break-in and subsequent cover-up. He became the first and, so far, only U.S. Attorney General to be convicted of criminal acts and sent to prison. Three decades after the Pentagon Papers case, Ellsberg switched his criticism from the Vietnam War to the Iraq War, pointing out the parallels he saw between the two.[81]

Although most media hailed the Court's decision as a triumph for the press, at least some First Amendment scholars saw the decision as a hollow victory at best. Prior restraint had been imposed on major news media for two weeks with the

consent of the federal courts, including the U.S. Supreme Court. The ultimate decision was merely that the U.S. government had failed to meet the heavy evidentiary burden in demonstrating that the prior restraint was constitutionally permissible. There is also little solace in the fact that each of the nine justices took somewhat different views of the meaning of the principles established in *Near v. Minnesota*.

Impact on the Vietnam War was minimal. There was no public clamor over the Court's ruling or over the ultimate publication of the Pentagon Papers. Apparently few people other than journalists read the Papers in detail, although the *Times* book version sold more than a million copies.[82] Thousands of U.S. soldiers died in the Vietnam War. The war continued until a cease-flre agreement was signed in 1973. U.S. troops made a relatively quick withdrawal. The war ended in 1975 when the North Vietnamese gained military control over the south with its flnal offensive against the South Vietnamese forces. Offlcially, 47,393 U.S. soldiers died in combat, 10,800 died from other causes, and 153,363 were wounded.[82] Thousands of others were missing in action and presumed dead.

Ethical Concerns in the Pentagon Papers Case

The legal battle over the Pentagon Papers was certainly complex and even convoluted. It also raised serious ethical questions that make the case even more complicated. Putting the legalities aside (they were never resolved), was it ethical for the newspapers to agree to accept stolen government property? It can be argued that Daniel Ellsberg had legal access to the classifled materials. There is no doubt that he did not have authority to disclose the documents to the *Times* or to others (such as members of Congress). Should a journalist agree to accept such documents knowing they are classifled and illegally photocopied? When do the ends justify the means? Interestingly, the *Code of Ethics of the Society of Professional Journalists* and all of the other major media codes of conduct are silent on this issue.

Twenty years after the Pentagon Papers case, the U.S. Supreme Court held that a journalist who innocently obtained and then broadcast an illegally recorded cellular phone conversation could not be held liable for civil damages. In *Bartnicki v. Vopper* (2001),[84] a radio commentator played a tape on his talk show of a cell phone discussion between a local teacher's union president and the chief union negotiator concerning ongoing collective bargaining negotiations. The person who secretly recorded the call and the broadcaster clearly violated a provision of the federal Omnibus Crime Control and Safe Streets Act of 1968[85] as well as state statutes. No one was able to determine who had surreptitiously recorded the conversation because the tape was anonymously delivered. The *Bartnicki* Court held that the First Amendment protected such disclosures even if the journalist knew or had reason to know the interception was unlawful—so long as the topic of the conversations was a matter of public concern. Bartnicki was handed down two decades after the Pentagon Papers decision but presumably could justify the publication of documents like the Pentagon Papers—if the journalist played no direct

role in illegally obtaining them and publication posed no serious threat to national security.

Most newspapers would probably not have been able to endure the agony and expense of the Pentagon Papers case. The *Times* spent $150,000 in legal fees in the two weeks between the time the injunction was sought and the U.S. Supreme Court issued its decision, and the *Post* faced a $70,000 bill.[86] Obviously, the expenses involved for the *Times* in researching the Papers and writing the articles were also high. Smaller newspapers and newspapers with weaker flnances could ill afford to flght such a battle, and even the *Times* and the *Post* could not tackle many such matches. Every media outlet should adopt a consistent policy for dealing with such ethical issues, including who has authority to review such materials and who will oversee publication. The Pentagon Papers were historical documents whose ultimate disclosure caused apparently no harm to U.S. security and diplomatic matters. What if there were a chance that such harm would occur but there was no way of determining precisely what would happen? Should a newspaper or magazine go ahead and publish the materials?

These are thorny questions that were raised again, but never answered, in the strange and almost unbelievable *Progressive* magazine story in the next section. It was inevitable that, at some point, a case would arise to test the constitutionality of prior restraint involving national security matters outside the historical context of the Pentagon Papers.

United States v. The Progressive, Inc. (1979)

Under the U.S. Atomic Energy Act of 1954:

> Whoever, lawfully or unlawfully, having possession of, access to, control over, or being entrusted with any document, writing, sketch, photograph, plan, model instrument, appliance, note, or information involving or incorporating Restricted Data. . . .
>
> (b) communicates, transmits, or discloses the same to any individual or person, or attempts or conspires to do any of the foregoing, with reason to believe such data will be used to injure the United States or to secure an advantage to any foreign nation, shall, upon conviction, be punished by a fine of not more than $10,000 or imprisonment for not more than ten years, or both.[87]

Every aspiring journalist planning to write about nuclear weapons and nuclear energy should read the Act, still in effect. The basic provisions of the act are quite broad. Its definition of restricted data is: "all data concerning (1) design, manufacture or utilization of atomic weapons; (2) the production of special nuclear material; or the use of special nuclear fuels in the production of nuclear energy."[88] The Act grants the U.S. Attorney General the authority to seek "a permanent or temporary injunction, restraining order, or other order" in court

to prohibit "any acts or practices" that violate or would violate any provision of the act.[89]

In early 1979, *The Progressive*—a relatively small circulation monthly magazine founded in 1909 by Robert M. LaFollette as the offlcial organ of the Progressive political party—hired a freelancer, Howard Morland, to write an article about the ease with which an H-bomb could be made. Morland and magazine editor Erwin Knoll claimed that all the material for the article, "The H-Bomb Secret: How We Got It, Why We're Telling It," came from public documents and sources. The U.S. government, on the other hand, claimed the article revealed secret technical concepts whose dissemination would violate the Atomic Energy Act, although the government conceded during the trial that much of the information appeared in documents available to the public at the Los Alamos (New Mexico) Scientiflc Laboratory Library. When this fact became known, the government removed the documents from public circulation and had them classifled as secret.

How did the government learn about the article in advance? Morland circulated a rough draft among several scientists for criticism on the technical accuracy of the article, and eventually the government learned of the article's existence. The U.S. Attorney General, citing the provisions of the Atomic Energy Act discussed earlier, moved immediately to stop publication of the article by seeking an injunction in federal court in Madison, Wisconsin, where the magazine, which specializes in social and political commentary, is published. The federal government took this legal action after editor Knoll refused to delete approximately one-tenth of the article the government contended endangered national security.

In March 1979, after hearing evidence presented by U.S. attorneys in a closed hearing in Milwaukee, U.S. District Court Judge Robert W. Warren granted the government's request for a temporary restraining order. The TRO was soon replaced by a preliminary injunction on March 26 after Judge Warren heard arguments on both sides. He based his decision on grounds that the information, if published, would violate the Atomic Energy Act and that even though the article was not a "'do-it-yourself' guide for the hydrogen bomb . . . [it] could possibly provide sufflcient information to allow a medium size nation to move faster in developing a hydrogen weapon."[90]

Judge Warren seemed concerned that the article could start a nuclear war. While noting the First Amendment ramiflcations were quite serious (he cited the case as "the flrst instance of prior restraint against a publication in this fashion in the history of this country"), he believed that a "mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot."[91]

What precedents did Judge Warren cite in his decision? As expected, *Near* set the standard, although the judge also reverted to the test proposed by Justice Stewart in the Pentagon Papers decision. This test holds value as precedent because only Justice White joined the concurring opinion. Ironically, Justice Stewart found that in applying the test ("direct, immediate, and irreparable damage to our Nation or its people"), the *Times* and the *Post* should not have been enjoined because he was not convinced that publication would cause such harm. *The Progressive*'s attorneys

contended that the purpose of the article was not to enable someone to build an H-bomb, but instead was to make the public aware of the dangers of nuclear war by demonstrating how easy it was to construct such weapons. Judge Warren called this goal a "laudable crusade" but still held that the portions of the article found objectionable by the U.S. government "fall within the narrow area recognized by the Court in *Near v. Minnesota* in which a prior restraint on publication is appropriate." *Near*, of course, makes no mention of hydrogen bombs, but Judge Warren drew a parallel between the troop movement exception ("publication of the sailing dates of transports or the number and location of troops") and bomb information:

> Times have changed signiflcantly since 1931 when *Near* was decided. Now war by foot soldiers has been replaced in large part by war by machines and bombs. No longer need there be any advanced warning or any preparation time before a nuclear war could be commenced. In light of these factors, this court concludes that publication of the technical information of the hydrogen bomb contained in the article is analogous to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint.[92]

How was this case different from the Pentagon Papers? Judge Warren contended that the Pentagon Papers were "historical data," whereas *The Progressive* article involved "the most destructive weapon in the history of mankind, information of sufflcient destructive potential to nullify the right to free speech and to endanger the right to life itself."[93] He noted the U.S. government had simply failed to meet its heavy evidentiary burden in the earlier case. Although no federal statute applied in the Pentagon Papers, a speciflc federal statute (the Atomic Energy Act) granted the government authority to seek the injunction.

The preliminary injunction kept the article from being published. The magazine appealed the judge's decision to the 7th Circuit U.S. Court of Appeals in Chicago, seeking a writ of mandamus from the U.S. Supreme Court to order the trial court to conduct an expedited review. On July 2, the Supreme Court, in a 7 to 2 *per curiam* opinion that was a decision only on the request for expedited review, not a decision on the merits of the prior restraint, denied the motion. (Only Justices White and Brennan dissented.) The Court denied the motion primarily on the grounds that *The Progressive* had spent almost three months preparing the required briefs arguing the merits of the case and, in the eyes of the Court, negated any need for expedited review. On September 13, six months after the initial prior restraint had been imposed on the magazine, the U.S. Court of Appeals flnally heard oral arguments on both sides, which essentially were the same as those made prior to the earlier decision.

Three days later on September 16, the case took a particularly bizarre turn. A small circulation newspaper, the *Madison* (Wisconsin) *Press Connection*—published by a group of employees then on strike against the two daily newspapers[94]—published a letter from a 32-year-old computer programmer and freelance writer who had developed a keen interest in the hydrogen bomb. The letter from Charles Hansen

was addressed to liberal U.S. Republican Senator Charles Percy of Illinois and copies were sent to various newspapers around the country. Hansen was miffed at what had happened to *The Progressive* and included essentially the same information—including a diagram of how the bomb works and a description of the process involved in manufacturing the device—in his letter that had been repressed from the magazine.

The U.S. government's reaction was immediate. Instead of hopping to court to seek another injunction or to criminally prosecute the magazine, the government dropped all efforts to seek a permanent injunction. Why? Offlcially, the U.S. Justice Department indicated that because the letter exposed most of the information the United States was seeking to prevent *The Progressive* from publishing, there was no longer any need for the injunction. The secrets were out and the damage was done.

Would the government have ultimately prevailed had this case gone to the U.S. Supreme Court on its merits? No one knows. If the Court chose, it could certainly have distinguished this case from the Pentagon Papers case, just as U.S. District Court Judge Warren had done. Once again, many questions were left unanswered; the Republic apparently was not harmed and life went on. Several newspapers published the letter later, and in its November 1979 issue, *The Progressive* flnally published the original article under the title, "The H-Bomb Secret: To Know How Is To Ask Why." Judge Warren did not formally dismiss the case against the magazine until September 4, 1980, but the government's request that the case be dismissed effectively blocked any obstacles to publication.

Was this a victory for the press? No. But it was not a defeat. Press reaction to the case was mixed. The *New York Times* editorially supported the magazine, and the *Washington Post* (the same newspaper that fought to publish the Pentagon Papers) criticized the publication. Journalists feared that if the U.S. Supreme Court heard the case on its merits, an adverse ruling would have emerged with dire consequences for First Amendment rights. Ignorance may be bliss, they reasoned.

When *The Progressive* Editor Erwin Knoll died in 1994, most of the obituaries recalled his First Amendment battle with the government over the article. He had been editor of the magazine since 1973.

Judicial Prior Restraints

Most prior restraints occur when an agency of the executive branch such as the U.S. Justice Department or a local prosecutor seeks a court order to prohibit publication, but prior restraint can originate from any branch of government including the judiciary. In 1976, for the flrst and thus far only time, the U.S. Supreme Court confronted the constitutionality of restrictive orders imposed on the press in attempting to preserve the constitutional rights of criminal defendants.

Nebraska Press Association v. Stuart (1976)

On October 18, 1975, six members of the Henry Kellie family were viciously murdered in their home in Sutherland, a Nebraska hamlet of about 850 people. The state

later charged that the murders occurred in the course of a sexual assault, including that of a 10-year-old girl. The case attracted widespread attention from local, regional, and national news media. Police released a description of a suspect who was quickly arrested and arraigned in Lincoln County Court. The suspect, Ervin Charles Simants, through his attorney and joined by the county attorney, moved to close the judicial proceedings to the press and the public. The county court judge heard oral arguments (probably a misnomer here because both attorneys supported a restrictive order and no attorney for the news media was there to protest) and granted the motion for the restrictive order on October 22.

As requested, the order strictly prohibited anyone at the hearing from releasing or authorizing for public dissemination in any form or matter whatsoever any testimony given or evidence and required the press to adhere to the Nebraska bar–press guidelines. These are sometimes called bench–bar–press guidelines, drawn up in many states to provide guidance to the media on how criminal trials and other judicial proceedings should be covered. Guidelines are *voluntary* and bear no sanctions or penalties for violation. However, the county court judge ordered the press to abide by the guidelines.

Surprisingly, the judge did not close the preliminary hearing for the defendant although he made the hearing subject to the restrictive order. In other words, the news media were permitted to attend the hearing but prohibited from reporting anything that had taken place. The judge's justifIcation for the broad order was to preserve the 6th Amendment right of the defendant to "a speedy and public trial, by an impartial jury."

The county court bound Simants over to the district court for further proceedings. On October 23, members of the news media including the Nebraska Press Association, publishers, and reporters flled a motion for leave to intervene in the district court, requesting that the restrictive order be lifted. After a hearing that included testimony from the county court judge and admission into evidence of news articles about the case, District Court Judge Hugh Stuart granted the motion to intervene. On October 27, however, he issued his own restrictive order to be tentatively applied until the trial court jury was selected and could have been extended longer at the judge's discretion. The order was broad, prohibiting the news media from reporting:

> (1) the existence or contents of a confession Simants had made to law enforcement offIcers, which had been introduced in open court arraignment; (2) the fact or nature of statements Simants had made to other persons; (3) the contents of a note he had written the night of the crime; (4) certain aspects of the medical testimony at the preliminary hearing; and (5) the identity of the victims of the alleged sexual assault and the nature of the assault.[95]

As with the prior one, this order required the press to follow the Nebraska bar–press guidelines and even prohibited publication of the exact nature of the order. The order prohibited public dissemination of virtually any information that could possibly prejudice potential jurors.

On October 31, the Nebraska Press Association and its supporters simultaneously asked the district court to vacate its order and flled a writ of mandamus, a stay, and an expedited appeal with the Nebraska Supreme Court. The prosecuting attorney and Simants' attorney intervened and the state supreme court heard oral arguments on November 25. One week later, the state supreme court issued a *per curiam* opinion that modifled the district court order but still prohibited dissemination of: "(a) the existence and nature of any confessions or admissions made by the defendant to law enforcement offlcers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts 'strongly implicative' of the accused."[96]

Although this version of the order was not quite as restrictive as the original, the restraint on the press was still very broad. The Nebraska Supreme Court applied a balancing test pitting the standard enunciated in the Pentagon Papers ("heavy presumption against . . . constitutional validity" of governmental prior restraint) against the 6th Amendment rights of the defendant. The court found that Simants' right to trial by an impartial jury outweighed the First Amendment considerations. The state supreme court did not use the state bar–press guidelines as justifIcation, but instead referred to state statutory law permitting closure in certain circumstances. The Nebraska Supreme Court specifIcally rejected the "absolutist position" that prior restraint by the government against the press is never constitutionally permissible.

The Nebraska Press Association and the other petitioners quickly appealed the state supreme court decision to the U.S. Supreme Court, and in late 1975 the Court granted a writ of certiorari to hear the case. In the meantime, Simants was tried and convicted of flrst degree murder and sentenced to death in January 1976. On April 19, 1976, the U.S. Supreme Court heard oral arguments in the appeal of the restrictive order and issued its decision on June 30. The Court had jurisdiction to hear the case despite the fact Simants was already convicted because the particular controversy was "capable of repetition." In other words, the Court felt this case was important enough to decide because of its implications for future cases even though the decision would have no impact on the case from which it originally arose.

The U.S. Supreme Court held that the restrictive order was unconstitutional. In the unanimous opinion written by Chief Justice Warren E. Burger, the Court contrasted the impact of prior restraint versus the after-the-fact impact of punishment on press freedom. "A prior restraint, by contrast and by deflnition, has an immediate and irreversible sanction," according to the Court. "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."[97]

The Court saw three major issues that had to be addressed before the constitutionality of the order could be determined: "(a) the nature and extent of pretrial coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."[98] Although the Court felt "that the trial judge was justifled in concluding that there would be intense and pervasive pretrial publicity . . . [and] . . . that publicity might impair the defendant's right to a fair

trial . . .," it characterized the judge's conclusions regarding the effect on potential jurors as "speculative, dealing as he was with factors unknown and unknowable."[99] The major problem, as the Court viewed the case, resulted because the judge did not demonstrate that measures short of the restrictive order would not have prevented or mitigated any potential violations of the defendant's 6th Amendment rights. The Court listed several examples of measures that should have been attempted flrst by the judge before issuing the restrictive order. These included:

> (a) change of trial venue to a place less exposed to the intense publicity that seemed imminent in Lincoln County [footnote omitted]; (b) postponement of the trial to allow public attention to subside; (c) use of searching questions of prospective jurors . . . to screen out those with flxed opinions as to guilt or innocence; (d) the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court.[100]

Other measures mentioned by the Court were sequestration of jurors and restricting what the lawyers, police, and witnesses could say outside the courtroom. Most of these measures were flrst enunciated in a 1966 case, *Sheppard v. Maxwell*,[101] discussed in Chapter 11.

As in *Near* and the Pentagon Papers case, the Court made it clear that whereas the burden of overcoming the strong presumption against the constitutionality of prior restraint had not been met in the case at bar, "this Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that prior restraint can never be employed."[102]

Because the composition of the Court has changed almost entirely since this case was decided in 1976 (with only Justice John Paul Stevens remaining), it is difflcult to predict how the Court would decide other prior restraint cases involving restrictive orders imposed on the press, especially if such an order were narrowly tailored to protect the rights of a defendant when those rights were in very serious jeopardy and other measures would be highly unlikely to be effective.

United States v. Noriega (In re Cable News Network, Inc.) (1990)

On November 7, 1990, the Cable News Network (CNN) aired an audiotape it obtained through an anonymous source that included a conversation between former Panamanian dictator Manuel Noriega and one of his attorneys. At the time, General Noriega was in federal jail in Florida awaiting trial on various federal charges, including drug trafflcking. He had been captured a year earlier in a U.S.-led invasion of Panama. The tape was one of several recorded by prison offlcials who argued that the monitoring and recording of outgoing phone calls was in line with established policies and procedures. Noriega's lawyers denied the federal government's claim that the former dictator had been aware of the taping. In the story about the tape, CNN included an interview with one of the defendant's attorneys who indicated the tape was authentic.

Noriega's defense team immediately requested a temporary restraining order in U.S. District Court before the judge presiding over the criminal case, but CNN aired additional tapes before a hearing could be conducted the next day. At the hearing, the attorneys argued that further broadcasts of the tapes could jeopardize the deposed leader's 6th Amendment right to a fair trial and would violate attorney–client privilege. At the hearing Judge William Hoeveler granted the request and later the same day ordered the network to turn over all tapes in its possession so he could determine through an *in camera* inspection whether broadcast of the tapes constituted "a clear, immediate and irreparable danger" to Noriega's 6th Amendment rights.[103]

After conferring with its attorneys, CNN defled both the restraining order and the order to relinquish the tapes, claiming First Amendment protection. The network sought relief from the 11th Circuit Court of Appeals, but two days later, the appellate court upheld the trial court's orders and, in a decision that severely criticized CNN, held that it must immediately produce the tapes for Judge Hoeveler.[104]

In an expedited review, the U.S. Supreme Court in a 7 to 2 vote on November 18, with Justices Marshall and O'Connor dissenting, denied certiorari,[105] thus allowing the 11th Circuit decision to stand. Two days later, CNN complied by delivering the tapes to the district court. One week later, after hearing arguments on both sides regarding Noriega's request for a permanent injunction and listening to the tapes, Judge Hoeveler ruled that further airing of the recorded conversations would not interfere with Noriega's right to a fair trial.[106] The tapes were then returned to CNN. Noriega was eventually tried and convicted. In 2007 he was released from prison as a free man.

During a four-day trial in September 1994, CNN claimed it had the right to broadcast the Noriega tapes under the First Amendment, and the government argued simply that CNN had a responsibility to abide by a gag order until it was overturned. The next month, Judge Hoeveler convicted the network of criminal contempt. In December he told CNN it had two options in accepting punishment for contempt—it could pay a flne of up to $100,000 plus the $85,000 cost of prosecuting the case, or it could apologize on the air and pay only the prosecution cost. CNN chose the latter and aired the following apology each hour for 22 hours beginning on December 19, 1994: "CNN realizes that it was in error in defying the order of the court and publishing the Noriega tape while appealing the court's order."

Ten years after the CNN case, the U.S. Supreme Court again allowed prior restraint to be imposed on the news media covering a criminal trial. This time it involved the rape trial of National Basketball Association star Kobe Bryant. After a court reporter mistakenly emailed the transcript of an *in camera* hearing concerning details of the alleged victim's sexual past, the Colorado trial court judge imposed a ban on publication of the transcript and ordered the press to destroy all electronic and hard copies.[107] On appeal, the Colorado Supreme Court in a 4 to 3 decision upheld the trials court's ban on publication but reversed the order that copies be destroyed.[108] The charges were eventually dropped after the alleged victim refused to testify at trial.

Strategic Lawsuits against Public Participation (SLAPPs)

The last provision of the First Amendment grants citizens the right "to petition the Government for a redress of grievances." This right received renewed attention in 1996 with the publication of the results of a national project initiated in the mid-1980s by University of Denver Professors George W. Pring and Penelope Canan. In a landmark book entitled *SLAPPs: Getting Sued for Speaking Out*,[109] the authors describe how individuals and organizations "are now being routinely sued in multimillion-dollar damage actions for . . . circulating a petition, writing a letter to the editor, testifying at a public hearing, reporting violations of law, lobbying for legislation, peaceably demonstrating, or otherwise attempting to infiuence government action."[110] They call such legal actions "strategic lawsuits against public participation" (SLAPPs) and characterize them as "a new breed of lawsuits stalking America."

The California Anti-SLAPP Project that was formed to help both attorneys and members of the public flght SLAPPs notes on its Web site, "While most SLAPPs are legally meritless, they effectively achieve their principal purpose: to chill public debate on speciflc issues."[111] Twenty-four states now have anti-SLAPP statutes, but they vary considerably in scope from broad protection to very limited protection.[112] The Society of Professional Journalists is promoting a model anti-SLAPP statute that it hopes will be adopted by the states.[113] Two media law attorneys have characterized Georgia's statute enacted in 1996 as "a powerful weapon to protect Georgia citizens and organizations from lawsuits designed to silence the exercise of First Amendment freedoms."[114]

According to Pring and Canan, the largest categories of SLAPPs involve real estate development, zoning, land use, and criticism of public offlcials and employees.[115] They point out that most SLAPP suits are eventually dismissed but only after an average of 40 months of litigation.[116] To avoid a chilling effect on citizens and groups who speak out, anti-SLAPP statutes usually permit defendants who win to recover attorney fees and court costs and a quick review by the court.

SLAPP suits will undoubtedly continue to increase, posing serious risks to First Amendment rights unless more states pass effective anti-SLAPP legislation. Although freedom of speech and freedom of press have attracted far more attention than the allied right to petition the government for a redress of grievances, the latter right is just as important in protecting not only individuals and organizations but the news media as well. The mass media are by no means immune from such suits but have simply been able to generally avoid facing SLAPPs because they usually have substantial resources to fend off the litigation.

Prior Restraint on Freedom of Speech

The First Amendment grants not only freedom of the press but freedom of speech and the right to peaceably assemble as well. Some of the most controversial cases to be decided by the U.S. Supreme Court evolved from free speech and free assembly confiicts. Troublesome speech cases often produce inconsistent and confusing

opinions. This section deals only with noncommercial speech because commercial speech is the focus of the next chapter.

One of the earliest U.S. Supreme Court decisions on free speech was *Jay Fox v. State of Washington* in 1915 in which a unanimous court ruled that a Washington State statute banning speech "having a tendency to encourage or incite the commission of any crime, breach of the peace, or act of violence" did not violate the First or 14th Amendments. According to the decision written by the famous Justice Oliver Wendell Holmes, "In this present case the disrespect for law that was encouraged was disregard of it, an overt breach and technically criminal act."[117] The defendant published an article encouraging a boycott of offlcials and others who were arresting members of a local nudist colony for indecent exposure. He was charged with inciting indecent exposure under a statute that made such an act a misdemeanor. This was an early indication of a distinction made many years later between speech versus action or symbolic speech versus action speech.

Schenck v. United States (1919)

One of the most famous of the early free speech cases was *Schenck v. United States* (combined with *Baer v. United States*)[118] in 1919 in which the U.S. Supreme Court for the flrst time applied the "clear and present danger" test in determining impermissible speech. Charles T. Schenck and Elizabeth Baer, members of the U.S. Socialist Party, were indicted and ultimately convicted by a federal jury of three counts of violating the federal Espionage Act of 1917. This act provided criminal penalties of up to a $10,000 flne and/or imprisonment for up to 20 years for conviction of various offenses during wartime including "willfully obstruct[ing] the recruiting or enlistment service of the United States, to the injury of the service or of the United States." Both defendants were involved in sending brochures to potential draftees during World War I that characterized a conscript as little better than a convict and "in impassioned language . . . intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few."[119] According to Justice Holmes and the Court:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting flre in a theatre and causing a panic. The question in every case is whether the words are used in such circumstances and are such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[120]

The Court upheld the convictions on the grounds that the state was within its rights to punish Schenck and Baer because of the possibility that the circulars could have obstructed recruiting even though no such obstruction was demonstrated by the

state. According to the unanimous opinion, "If the act (speaking, or circulating a paper), its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime."[121]

The clear and present danger test has had many advocates among the U.S. Supreme Court justices over the years, and the example of falsely shouting flre in a crowded theater has been frequently cited by the public and jurists alike in supporting restrictions on certain kinds of speech. But is it an appropriate test? Can it be fairly and consistently applied or does it become merely arbitrary? In *Schenck*, the Court emphasized that the country was at war and that Congress had speciflc authority under the federal statute to prohibit such actions. What if there had been no war at the time? What if no federal statute covered the speech?

Abrams v. United States (1919)

On May 16, 1918, Congress amended the 1917 Espionage Act to include a series of additional offenses such as promoting curtailment of the production of war materials. That same year Jacob Abrams and four other defendants, all Russian emigrants, were convicted in a federal court in New York of violating the act, including the 1918 amendments, for publishing information "intended to incite, provoke and encourage resistance to the United States" during the war and for conspiring "to urge, incite and advocate curtailment of production [of] ordnance and ammunition, necessary [to] the prosecution of the war."[122] What were their speciflc acts? They printed and distributed two different leafiets printed in English and Yiddish and threw copies out of the window of a building to passers-by. One of the leafiets, as described in Justice Holmes' dissent (joined by Justice Louis D. Brandeis), said:

> The President's [Woodrow Wilson] cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington. . . . The other leafiet, headed 'Workers - - Wake Up,' with abusive language says that America together with the Allies will march for Russia to help the Czecko-Slovaks in their struggle against the Bolsheviki, and that this time the hypocrites shall not fool the Russian emigrants and friends of Russia in America.[123]

In a 7 to 2 decision, with Justices Holmes and Brandeis dissenting, the Court upheld the trial court convictions, noting, "All flve of the defendants were born in Russia. They were intelligent, had considerable schooling, and at the time they were arrested they had lived in the United States for terms varying from flve to ten years, but none of them had applied for naturalization."[124]

In his dissent, Justice Holmes applied the clear and present test that he had formulated in the majority opinion in S*chenck* to the acts committed by Abrams and his co-defendants, but found a lack of proof of intent on the part of the defendants "to cripple or hinder the United States in the prosecution of the war." According to Justice Holmes: "I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless

they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[125]

Does this case indicate the arbitrariness with which the clear and present danger test can be applied? The majority essentially applied the clear and present danger test but upheld the convictions anyway, whereas the architect of the test, Justice Holmes, applied the test but found no imminent danger. In several other cases decided by the Court in 1919 and 1920, a majority of the justices consistently upheld convictions for speech, usually involving the distribution of pamphlets or attempts to obstruct recruiting under the Espionage Act of 1917.[126]

Applying the First Amendment through the 14th Amendment: *Gitlow v. New York* (1925)

In 1925, the U.S. Supreme Court tackled the flrst of a long series of cases that eventually broadened free speech rights and established much clearer guidelines on permissible versus impermissible speech. In *Gitlow v. New York*,[127] the Court upheld the conviction of Benjamin Gitlow for the distribution of 16,000 copies of *The Revolutionary Age*, the house organ of the radical left wing section of the Socialist Party. Gitlow, an active member of the left wing who made speeches throughout New York State, served on the board of managers of the paper, and as its business manager, was indicted and later convicted under the state's criminal anarchy statute. The law, enacted in 1902 after the assassination of President William McKinley in Buffalo by an anarchist a year earlier, made it a felony for anyone to advocate criminal anarchy in speech or in writing. Anarchy was deflned as advocating, advising, or teaching "the duty, necessity or propriety of overthrowing or overturning organized government by force or violence."[128]

There was no question regarding Gitlow's guilt. He freely admitted violating the statute, but he contended that (a) his conviction was a violation of the due process clause of the 14th Amendment[129] and (b) "as there was no evidence of any concrete result fiowing from the publication of the Manifesto or of the circumstances showing the likelihood of such a result, the statute . . . penalizes the mere utterance . . . of 'doctrine' having no quality of incitement, without regard either to the circumstances of its utterance or to the likelihood of unlawful consequences."[130] In a 7 to 2 decision with Justices Holmes and Brandeis dissenting, the Court held that even though there "was no evidence of any effect resulting from the publication and circulation of the Manifesto," the jury was "warranted in flnding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end."

According to the Court, Gitlow's First Amendment rights were not violated because the statute did not penalize communication of abstract doctrine or academic discussion but instead prohibited language that implied an urging to action, of which Gitlow was judged guilty by the trial court. This was the Court's flrst hint

of a distinction that was to come many years later between advocacy to action versus mere abstract doctrine.

What about the 14th Amendment? The Court agreed that it applied in this case: "For present purposes, we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the 14th Amendment from impairment by the States."[131]

For the flrst time, the Court incorporated First Amendment rights into the 14th Amendment so that citizens of all states would have the same freedom of speech and of the press because the 14th Amendment prohibits both federal and state abridgement of these rights as originally granted in the Constitution.

Gitlow won his argument that the First Amendment applied to the states (the statute was a New York law) through the 14th, but he lost the argument that his First Amendment rights had been violated. Thus, his convictions stood. The majority applied a *bad tendency test* (implying an urging to action, as just mentioned), whereas Justices Holmes and Brandeis applied the clear and present danger test, noting in their dissent that "there was no present danger of an attempt to overthrow the government by force. . . . The only difference between an expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result."[132]

Gitlow served three years of his flve- to ten-year sentence. New York Governor Alfred E. Smith, who later ran unsuccessfully for the U.S. presidency, pardoned him. Gitlow became an anti-Communist informer during the 1940s and died in 1965.[133]

Two years after *Gitlow*, the U.S. Supreme Court had another opportunity to expand freedom of speech but chose once again not to do so. In *Whitney v. California* (1927),[134] the Court upheld the conviction of a Communist Labor Party (CLP) member for violating California's 1919 Criminal Syndicalism Act. What was Anita Whitney's crime? She attended a 1919 Chicago convention of the Socialist Party at which a radical right wing of the party—the Communist Labor Party—was formed. The state statute provided that any individual who "organizes or assists in organizing, or is or knowingly becomes a member of any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism . . . [i]s guilty of a felony and punishable by imprisonment." Criminal syndicalism was deflned "as any doctrine or precept advocating, teaching or aiding and abetting the commission of a crime, sabotage . . . or unlawful acts of force and violence or unlawful methods of terrorism."

Whitney admitted that she had joined and helped organize the CLP of California but argued that "the character of the state organization could not be forecast when she attended the convention" and that she did not intend to create "an instrument of terrorism and violence." Furthermore, she contended that the CLP's endorsement of acts of criminal syndicalism took place over her protests. The majority opinion rejected Whitney's argument that her First and 14th Amendment rights had been violated because "her mere presence in the convention, however violent the opinions expressed therein, could not truly become a crime."[135]

With Justice Louis D. Brandeis (joined by Justice Holmes) concurring in a separate opinion, the Court ruled that the jury had the authority to convict Whitney

because the state statute as applied was not "repugnant to the due process clause." Citing *Gitlow*, the majority held that a state may punish those who abuse freedom of speech "by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means."[136] What about the clear and present danger test? The majority refused to apply the test in this case, but Justice Brandeis strongly argued that the test should apply in such cases, and he greatly clarifled the conditions necessary to meet the test. Why did Justices Brandeis and Holmes then concur with the majority? According to Justice Brandeis, Whitney had not adequately argued her case on constitutional grounds at the time of her trial:

> Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature . . . [Whitney] claimed below that the statute as applied to her violated the Federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil.[137]

This concurring opinion illustrates a fatal fiaw that even modern appeals of trial court decisions involving First Amendment issues sometimes suffer—the failure to attack a statute or state action on sufflcient constitutional grounds. Although it is unlikely that Whitney's conviction would have been reversed if the arguments at trial had met the criteria enunciated in Justice Brandeis' opinion, in other cases it could have made a difference. How should the clear and present danger test be applied? Justice Brandeis reflned the test considerably:

> Fear of serious injury cannot alone justify suppression of free speech and assembly. . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of lawbreaking heightens it further. But even advocacy of violation, however reprehensible morally, is not a justiflcation for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembly and conspiracy, must be borne in mind. In order to support a flnding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.[138]

Justice Brandeis' formulation was part of a concurring opinion rather than the majority opinion that rejected the test. His opinion was apparently a major infiuence on

a decision 42 years later in which the Court, in a *per curiam* decision, unanimously overruled *Whitney*. In *Brandenburg v. Ohio*,[139] the Court overturned the conviction of a Ku Klux Klan (KKK) leader who had been flned $1,000 and sentenced to one to ten years in prison for violating Ohio's criminal syndicalism statute, quite similar to the statute in *Whitney*. Brandenburg telephoned an announcer–reporter for a Cincinnati television station and invited him to attend a KKK rally at a nearby farm. With the cooperation of the KKK, the reporter and a camera person attended and fllmed the events that included a cross burning and speeches denouncing Jews and Blacks that included such phrases as "Send the Jews back to Israel" and "Bury the Niggers." Portions of the fllm were broadcast by the station and on network television. The Court held that the statute under which the defendant was prosecuted was unconstitutional because it "by its own words and as applied, purports to punish mere advocacy and to forbid . . . assembly with others merely to advocate the described type of action."[140]

The concept of "flghting words" flrst emerged in 1942 in *Chaplinsky v. New Hampshire*[141] in which the Court unanimously held that such words have no First Amendment protection if, as the New Hampshire Supreme Court ruled earlier in the case, they are "likely to cause an average addressee to flght." The Court upheld the conviction of a Jehovah's Witness who provoked a city marshal to flght with him on a sidewalk after he called the offlcial "a God damned racketeer" and "a damned Fascist" and characterized the whole government of Rochester, New Hampshire as "Fascists or agents of Fascists."[142] Fighting words, according to the majority opinion, are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[143]

In 1951, the U.S. Supreme Court tackled another free speech case involving Jehovah's Witnesses. Several members of the religious sect held a meeting in a city park in Havre de Grace, Maryland after they had been denied a permit by the park commissioner. Two speakers were immediately arrested, convicted, and flned $25 each for violating a state "practice" (no statute was involved) or tradition for anyone to seek a permit before holding a meeting in a public park. In a unanimous opinion, the Court held that such an arbitrary and discriminatory refusal to issue a permit was a clear violation of equal protection under the 14th Amendment.[144]

In another case[145] decided on the same day as the one just mentioned, the U.S. Supreme Court upheld the disorderly conduct conviction of a college student who told a group of approximately 75 African Americans and whites that President Harry S. Truman and the mayor of Syracuse, New York, were "bums" and that the American Legion was a "Nazi Gestapo." He also said, "The negroes don't have equal rights; they should rise up in arms and flght them." Why was Irving Feiner arrested? A man in the crowd told a police offlcer, "If you don't get that son of a bitch off, I will go over and get him off there myself." At the trial, the police offlcer testifled that he "stepped in to prevent it resulting in a flght." That was enough for the trial court to flnd that police "were motivated solely by a proper concern for the preservation of order and protection of the general welfare." The Supreme Court concluded that Feiner "was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered."[146]

It is unlikely today that Feiner's conviction would be upheld, especially based on evidence that one person's reaction might cause an adverse impact on the public welfare. The decision does illustrate how easily states can legally suppress freedom of speech. Indeed, 14 years after *Feiner*, the U.S. Supreme Court faced a similar set of circumstances. In two cases commonly known as *Cox I*[147] and *Cox II*,[148] the Court appeared to back substantially away from *Feiner*, although the majority opinion called the circumstances a "far cry" from those of *Feiner*. In *Cox I*, the Court held that a civil rights minister's conviction under a Louisiana disturbing-the-peace statute was an unconstitutional restraint on his freedom of speech and assembly. The minister, a fleld secretary for the Congress of Racial Equality (CORE), was arrested and convicted for breach of the peace and for obstructing a sidewalk after he gave a speech protesting the arrests of 23 African American college students after they picketed stores with segregated lunch counters. Reverend Cox encouraged a group of about 2,000 students to sit in at lunch counters, while a group of 100 to 300 whites gathered on the opposite sidewalk. When some members of the crowd reacted with muttering and grumbling, Reverend Cox was arrested and ultimately convicted. The defendant was also convicted of violating a state statute banning courthouse demonstrations, and this conviction was reversed in *Cox II* by the Supreme Court on the same grounds as *Cox I*.

One more case decided prior to *Brandenburg* that deserves attention is *Dennis v. United States*[149] in which the Court applied a variation of the clear and present danger test, *ad hoc* balancing, to uphold the convictions of 11 members of the U.S. Communist Party for violating the conspiracy provisions of the Smith Act of 1940—a peacetime sedition act enacted by Congress. The Court voted 6 to 2 to uphold the convictions, but only four justices could agree on the speciflc test to be applied. Party members were convicted for "willfully and knowingly conspiring (1) to organize as the Communist Party . . . a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government . . . by force and violence and (2) knowingly and willfully to advocate and teach the duty and necessity of overthrowing and destroying the Government . . . by force and violence."[150] The plurality opinion written by Chief Justice Fred M. Vinson applied the test articulated by Chief Judge Learned Hand in the 2nd Circuit U.S. Court of Appeals decision in the case: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifles such invasion of free speech as is necessary to avoid the danger."[151]

In *Dennis*, the trial court judge reserved the question of whether there was a clear and present danger for his own determination rather than submitting the issue to the jury. The defendants argued that the question should have been a jury issue because it was a question of fact. The U.S. Supreme Court agreed with the trial judge that the presence or absence of such a danger is a question of law and thus for the judge to determine. The distinction is extremely important because juries are often more lenient with defendants in free speech cases than judges are. In a criminal case such as *Dennis*, a jury verdict in favor of the defendant cannot be overruled by the judge, and a judge's decision can only be reversed by an appellate court.

The thesis mentioned earlier—that extreme examples often provide the courts with the opportunity to delineate the outer boundaries of our First Amendment rights was well illustrated in a 1977 U.S. Supreme Court decision involving the National Socialist Party, otherwise known as the American Nazis. The Village of Skokie, Illinois would seem on a map to be a fairly typical, small Midwestern town, but appearances can be deceiving. During the Holocaust of 1933 through 1945, more than 6 million European Jews were systematically murdered in Nazi Germany while held in concentration camps. During the 1970s, more than 100,000 survivors were scattered around the world, with about 600 living in Skokie.[152] Frank Collins, a leader of the National Socialist Party, chose to march with his band of Nazi followers in Skokie after his request was strongly rebuffed by Skokie offlcials who told him he would have to purchase a $350,000 insurance bond to cover any damages. Shortly after the Nazis announced their plans to demonstrate in protest of the insurance requirement, the village council authorized its attorney to sue to obtain an injunction to prevent the march. An Illinois trial court judge granted the request and banned the party from conducting a number of actions from parading in uniform to distributing leaflets. The Nazis appealed the decision to the Illinois Appellate Court, which refused to stay the injunction, and then to the state Supreme Court, which denied their petition for expedited review. The party wanted a quick review so it could seek approval to demonstrate while the media attention was focused on its planned actions.

When the Illinois Supreme Court rendered its decision, the party flled a petition to stay the decision pending expedited review in the U.S. Supreme Court. In a 5 to 4 *per curiam* decision, the U.S. Supreme Court treated the stay petition as a petition for a writ of certiorari and summarily reversed the Illinois Supreme Court ruling. The Court said the injunction would deprive the Nazis of First Amendment rights during the appellate review process, which the Court noted could take at least a year to complete. The Court went on to hold, "If a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards . . . including immediate appellate review. Absent such review, the State must instead allow a stay."[153]

The Court did *not* hold that the village could not ultimately have halted the march, but instead that the Nazis should have been granted an expedited decision rather than having to wait the usual long period involved in appealing trial court decisions. By refusing to grant expedited review on a First Amendment matter as serious as this one, the Illinois appellate courts infringed on the party's freedom of speech and freedom of assembly.

Following the dictates of the U.S. Supreme Court, the Illinois Appellate Court set aside the original injunction except for a provision banning the marchers from displaying the swastika.[154] On appeal, the state Supreme Court lifted the complete injunction on grounds that the ban was unconstitutional prior restraint.[155]

The battle was not over, however. While the case was on appeal, the Village of Skokie enacted several ordinances effectively banning demonstrations such as that proposed by the National Socialist Party. After flghting the ordinances in the federal courts—including the 7th Circuit U.S. Court of Appeals that ruled against the village and the U.S. Supreme Court that refused to stay the Court of Appeals decision—the

march was presumably ready to begin. However, three days before the march was scheduled, Nazi leader Collins canceled plans for the rally. Instead two demonstrations were held in downtown Chicago, one at the Federal Plaza and the other in a public park more than two weeks later. Both marches involved a relatively small band of uniformed Nazis surrounded by thousands of police and counterdemonstrators. After short speeches, each was over almost as quickly as it had begun and the front page and lead stories in television newscasts about the marches faded away.

The ability of the government to impose prior restraint on private citizens appears rather limited, but such censorship is routinely permitted against the government's own employees. A long line of cases in the Supreme Court has established the principle that the government can impose criminal penalties and recover civil damages when employees disclose classifled information, but the Court had never determined until 1980 whether the government can punish or recover damages from ex-employees who disclose nonclassifled information after signing prepublication review agreements as conditions for employment.

Frank Snepp, a former CIA intelligence expert during the Vietnam War, wrote a book titled *Decent Interval*, which was sharply critical of U.S. involvement in Vietnam, especially during the interval in which U.S. troops were withdrawn. Snepp's book was published in 1977, four years after U.S. troops began withdrawing and two years after the Communists defeated the South Vietnamese Army. When hired by the agency in 1968, Snepp signed a prepublication review agreement, typically signed by CIA workers, specifying that he would submit to the agency for approval any materials to be published that were based on information he acquired as an employee. Such agreements, which are now commonplace for federal employees with access to sensitive information, require prepublication review for the rest of the employee's life, even if the person is no longer employed by the government. This type of contract is obviously prior restraint because it involves governmental censorship of individuals, but is it unconstitutional?

It was undisputed in the case that Snepp did not seek CIA preclearance of his manuscript and he knowingly signed the contract. Apparently, no classifled information was published because the agency never made any claim that secrets were disclosed. Instead, the government argued that Snepp intentionally breached his contract with the CIA and was therefore obligated to pay all royalties to the agency. The CIA asserted that he should also be subject to punitive damages. The U.S. government successfully sought an injunction in U.S. District Court[156] to prohibit Snepp from committing any further violations of his agreement with the CIA. The injunction also imposed a *constructive trust* on all previous and future royalties from the book. A *constructive trust* is a legal mechanism created to force an individual or organization to convey property to another party on the ground that the property was wrongfully or improperly obtained.

The 4th Circuit U.S. Court of Appeals[157] upheld the trial court's injunction but ruled there was no basis for a constructive trust, although the court did hold that punitive damages could be imposed. In a 6 to 3 *per curiam* opinion,[158] the U.S. Supreme Court held that Snepp could not be forced to pay punitive damages but that a constructive trust was permissible because he had breached a flduciary duty

he owed to the government. *Fiduciary duty* simply means the duty of an individual or organization acting as a trustee for another after having agreed to undertake such a duty. By signing the agreement, Snepp created a duty to act on behalf of the CIA in protecting and withholding information from public disclosure that he acquired during the course of his work for the agency. By publishing the book, he breached that duty and could therefore be held accountable for the proflts or gains from the book because he was not legally entitled to the proceeds.

Although Snepp argued that his First Amendment rights were violated by this prior restraint, the Court mentioned First Amendment rights only once in its unsigned opinion—in a footnote that said: "The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confldentiality so essential to the effective operation of our foreign intelligence service. The agreement that Snepp signed is a reasonable means of protecting this vital interest."[159] Although oral arguments are traditional in most Supreme Court cases heard under the grant of a writ of certiorari, the Court declined to hear oral arguments in this case.

Symbolic Speech

Burning Cards, Flags, and Crosses

Most of the cases discussed previously involved the communication of verbal information such as publishing classifled materials or some direct action such as making an infiammatory speech or mounting a demonstration, but some of the most troublesome and controversial free speech decisions have involved so-called symbolic speech. Symbolic speech can range from wearing a black arm band to desecration of the American fiag.

United States v. O'Brien (1968): Burning Cards

During the turbulent 1960s, the free speech case that evoked the most public controversy was *United States v. O'Brien* (1968).[160] The decision came in the same year as the Tet offensive in which the North Vietnamese Communists scored a major psychological victory over U.S. and South Vietnamese troops in the Vietnam War by demonstrating how easily they could invade urban areas of the south. Two years before the Tet offensive, at a time when the United States was becoming politically polarized by the war, David Paul O'Brien and three other war protesters burned their Selective Service registration certifIcates (draft cards) on the steps of the South Boston Courthouse in clear and deliberate deflance of the Universal Military Training and Service Act of 1948. The act, as amended by Congress in 1965, required Selective Service registrants to have the certifIcates in their personal possession at all times and provided criminal penalties for any person "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certifIcate."[161]

O'Brien was indicted, tried, convicted, and sentenced in the U.S. District Court for the District of Massachusetts. He did not deny burning the card, but instead

argued that he was attempting to publicly infiuence other people to agree with his antiwar beliefs and his act was protected symbolic speech under the First Amendment. The U.S. Court of Appeals essentially agreed with O'Brien by ruling that the 1965 amendment was unconstitutional because it singled out for special treatment individuals charged with protesting. In a majority opinion written by Chief Justice Earl Warren, the U.S. Supreme Court disagreed. The Court held:

> 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. . . . This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufflciently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufflciently justifled 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. We flnd that the 1965 Amendment to §12(b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.[162]

A Matter of Scrutiny

Considerable criticism of the Court's reasoning arose in this case, although the particular test enunciated has stood the test of time. In the decades following the decision, the Court frequently applied the "O'Brien test" in those First Amendment cases in which the justices felt an *intermediate* level of judicial scrutiny was appropriate. This level of scrutiny falls somewhere on the scale between *strict* scrutiny in which the Court requires that the government demonstrate a compelling interest and simply *heightened* scrutiny in which only a strong governmental interest must be shown. Seasoned observers know that when the Court applies a strict scrutiny test, the odds are high that the government will be on the losing side in the decision, but when the Court adopts heightened scrutiny, the government will often come out a winner. When the justices choose intermediate scrutiny, all bets are off, with one side just a likely as the other to win.

What was the "substantial government interest" in *O'Brien*? According to the Court, the country "has a vital interest in having a system for raising armies that functions with maximum efflciency and is capable of easily and quickly responding to continually changing circumstances."[163] The continuing availability of the draft certiflcates, the Court asserted, is essential to preserving this substantial interest, and destroying them frustrates this interest. Would burning a registration card

today be punishable under the Constitution? O'Brien burned his card during the Vietnam War era when men were drafted into the armed forces. The draft has now been eliminated although all men are required to immediately register when they reach 18 years of age. Is there still a substantial government interest to be protected in preserving nondraft registration cards?

Street v. New York (1969): Flag Burning Protected

One year after *O'Brien*, the U. S. Supreme Court tackled another thorny case involving prior restraint of symbolic speech. In *Street v. New York* (1969),[164] the Court split 5 to 4 in reversing the conviction of an African American man for protesting the sniper shooting in Mississippi of civil rights leader James Meredith by burning an American fiag at a public intersection in Brooklyn, New York. After the defendant burned the fiag he owned, a police offlcer arrested him. The Court held that the provision in the state statute under which Street was punished was unconstitutionally applied in his case because it allowed the defendant to be punished simply for uttering deflant or contemptuous words about the American fiag.

The majority opinion contended that none of four potential governmental interests were furthered by the statute in this case, including (a) deterring the defendant from vocally inciting other individuals to do unlawful acts, (b) preventing him from uttering words so infiammatory as to provoke others into retaliating against him and thus causing a breach of the peace, (c) protecting the sensibilities of passers-by, and (d) assuring that the defendant displayed proper respect for the fiag. The four dissenting justices, including Chief Justice Earl Warren, characterized Street's burning of the fiag as action, not mere words.

Flag Desecration Protection Continues

In 1974, the U.S. Supreme Court decided yet another fiag desecration case. On May 10, 1970, a college student was arrested for violating a Washington State statute that banned the display of any American fiag to which any word, flgure, mark, picture, design, drawing, or advertisement had been attached. The student attached large peace symbols made of removable tape to both sides of a fiag he owned and displayed the altered fiag from a window of his apartment.

At trial, he testifled that he had done so to protest the invasion of Cambodia on April 30, 1970, by U.S. and South Vietnamese soldiers and the killing of four students by national guardsmen at Kent State University in Ohio during a war protest on May 4. "I felt there had been so much killing and that this was not what America stood for," he testifled. "I felt that the fiag stood for America and I wanted people to know that I thought America stood for peace." He also testifled that he used removable tape to make the peace symbols so the fiag would not be damaged.[165] The defendant was convicted under a so-called *improper use statute* rather than the state's fiag desecration statute because the desecration statute required a public mutilation, defacing, deflling, burning, or trampling of the fiag, and the

other statute merely required placing a word, flgure, and so forth, on a fiag that was publicly displayed.

In a 6 to 3 *per curiam* decision, the Court reversed the conviction on grounds that "there was no risk that appellant's acts would mislead viewers into assuming that the Government endorsed his viewpoint. To the contrary, he was plainly and peacefully [footnote omitted] protesting the fact that it did not. . . . Moreover, his message was direct, likely to be understood, and within the contours of the First Amendment."[166] The Court also noted that the fiag was privately owned and displayed on private property. The dissenters, led by then-Associate Justice (later Chief Justice) William H. Rehnquist, contended that Washington State "has chosen to set the fiag apart for a special purpose, and has directed that it not be turned into a common background for an endless variety of superimposed messages."[167]

Texas v. Johnson (1989) and *United States v. Eichman* (1990): More Flag Burning

Twenty years after *Street v. New York*, the U.S. Supreme Court returned to fiag burning. In *Texas v. Johnson*,[168] the Court reversed the conviction of a Revolutionary Communist Youth Brigade member in Texas for burning the American fiag at the 1984 Republican National Convention in Dallas. In a split 5 to 4 decision in 1989 that surprised many politicians and legal scholars, the Court held that when Gregory Lee "Joey" Johnson burned an American fiag in a nonviolent demonstration against President Reagan's administration, he was engaging in symbolic speech protected by the First Amendment. During the demonstration of approximately 100 protestors, the participants chanted, "America, the red, white and blue, we spit on you." Johnson was the only individual charged with a criminal offense. He was arrested and sentenced to a year in jail and flned $2,000 for violating a Texas fiag desecration statute, similar to a federal statute and laws then existing in all states except Alaska and Wyoming.[169] Such laws typically prohibit desecration of a venerated object such as a state or national fiag, a public monument, or a place of worship or burial. The Texas Court of Criminal Appeals overturned the trial court decision, holding that the First Amendment protected Johnson's fiag burning as expressive conduct and the statute was not narrowly drawn enough to preserve the state's interest in preventing a breach of the peace.

The U.S. Supreme Court afflrmed the Texas appeals court decision to overturn the conviction. The Court did not invalidate the Texas statute nor any of the federal and state statutes. It merely ruled that the Texas law as applied in this case was unconstitutional. The majority opinion written by Associate Justice William J. Brennan, Jr. speciflcally pointed out that statutes banning fiag desecration and similar acts when such acts provoke a breach of the peace and incitement to riot were not affected by the decision.

The line-up of the justices and the way in which the decision was delivered were somewhat surprising as well. Justice Brennan, the most senior member of the Court at 83 and the most liberal, wrote the majority opinion, but he was joined by two

justices considered among the more conservative on the Court—Justices Anthony M. Kennedy and Antonin Scalia, both appointed by President Ronald Reagan. According to the majority:

> If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society flnds the idea itself offensive or disagreeable. . . .
>
> We have not recognized an exception to this principle even where our flag has been involved. . . . The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. . . . We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag-burner's message than by saluting the flag that burns. . . . We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.[170]

The majority reasoned that because no violence or disturbance of the peace erupted at the demonstration, the state was banning "the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence." The Court also contended that a government cannot legislate that the flag may be used only as a symbol of national unity so that other messages cannot be expressed using that symbol.

Justice Kennedy wrote a brief concurrence with the majority, noting, "The hard fact is that sometimes we must make decisions we do not like. We must make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."[171] This contention prompted one expert to quip that, translated, Justice Kennedy is saying, "You hold your nose and follow the Constitution."[172] Justice Kennedy went on to assert, "It is poignant but fundamental that the flag protects those who hold it in contempt."

Certainly the most elaborate, eloquent, and emotional plea came from Chief Justice Rehnquist in his dissent. The Chief Justice quoted extensively from Ralph Waldo Emerson's "Concord Hymn," Francis Scott Key's "The Star Spangled Banner," and John Greenleaf Whittier's "Barbara Frietchie" poem that describes how a 90-year-old woman bravely flew the Union flag when Stonewall Jackson and his Confederate soldiers marched through Fredericktown during the Civil War. According to Chief Justice Rehnquist:

> The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. . . . The flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political or philosophical beliefs they have. . . .
>
> Far from being a case of 'one picture being worth a thousand words,' flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express a particular idea, but to antagonize others.[173]

The U.S. Supreme Court decision in *Texas v. Johnson* did not end the controversy over fiag desecration. The senior President George Bush pushed strongly for a constitutional amendment to prohibit fiag desecration in a variety of forms. President Bush had the strong support of most political conservatives and certainly the general public in his efforts to secure a constitutional amendment, but at least two traditionally conservative political writers, *Washington Post* syndicated columnist George F. Will and syndicated Washington columnist James J. Kilpatrick,[174] opposed such an amendment. Will believed the case was wrongly decided by the Supreme Court, whereas Kilpatrick said, "given the undisputed facts, the Texas law and the high court precedents, the case was properly decided."[175]

A proposed amendment quickly garnered 51 votes in the U.S. Senate, but that was 15 short of the two-thirds necessary to pass it on to the states. Before becoming part of the U.S. Constitution, the amendment required ratifIcation by at least 38 of the state legislatures. Congress then enacted the Flag Protection Act of 1989 that became law without President Bush's signature. The President chose not to sign the bill because he believed it would eventually be struck down by the U.S. Supreme Court as unconstitutional, just as the Court had done the previous year in *Texas v. Johnson*. Thus, for the President, the remedy was a constitutional amendment.

On June 11, 1990, President Bush was proven correct. In *United States v. Eichman* and *United States v. Haggerty*,[176] Justice Brennan, joined by Justices Marshall, Blackmun, Scalia, and Kennedy (the exact same line-up as *Texas v. Johnson*), struck down the federal statute on essentially the same grounds employed in the earlier decision. This time, though, Justice Stevens' dissent lacked much of his impassioned rhetoric of the *Johnson* decision, and he did not read it from the bench.

The case began when Shawn Eichman and two acquaintances deliberately set flre to several U.S. fiags on the steps of the Capitol building as a protest of U.S. domestic and foreign policy. They were arrested and charged with violating the criminal statute that provided:

> (a)(1) Whoever knowingly mutilates, defaces, physically deflles, burns, maintains on the fioor or ground, or tramples upon any fiag of the United States shall be flned under this title or imprisoned for not more than one year, or both. (2) This subsection does not prohibit any conduct consisting of the disposal of a fiag when it has become worn or soiled.
>
> (b) As used in this section, the term 'fiag of the United States' means any fiag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.[177]

Mark John Haggerty and three other individuals were also prosecuted by the federal government for setting flre to a U.S. fiag to protest the passage of the federal Flag Protection Act. The convictions of both Eichman and Haggerty were dismissed by separate federal trial courts as unconstitutional. The U.S. District Court for the Western District of Washington and the U.S. District Court for the District of Columbia Circuit, respectively, cited *Johnson* as precedent. On appeal by the United

States, the Supreme Court consolidated the two cases. The government bypassed the U.S. Court of Appeals by invoking a clause in the 1989 Federal Flag Protection Act that provided for a direct appeal to the Supreme Court and expedited review under certain conditions.

The Court expressly rejected the government's argument that the U.S. statute, unlike the Texas law in *Johnson*, did not "target expressive conduct on the basis of the content of its message." According to the majority opinion, "The Act still suffers from the same fundamental flaw: it suppresses expression out of concern for its likely communicative impact."[178] The government also asserted that the statute should have been viewed as an expression of a "national consensus" supporting a ban on flag desecration. "Even assuming such a consensus exists, any suggestion that the government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment,"[179] according to the Court.

President Bush and a number of prominent politicians, principally Republicans, immediately called for a constitutional amendment to overturn *Texas v. Johnson* and *U.S. v. Eichman*, but the clamor gradually subsided after the measure appeared doomed.

A proposed amendment to the Constitution is by no means dead. In 1995, 1997, 1999, 2001, and 2003, the Republican-controlled U.S. House of Representatives approved by more than 300 votes a proposed amendment that reads: "The Congress shall have power to prohibit the physical desecration of the flag of the United States."[180] The vote was more than the two-thirds needed. However, each time the proposal has failed to garner the necessary two-thirds approval of the Senate, even though the Senate is controlled by Republicans. Once approved, then the proposal would need to be ratified by 38 state legislatures within 7 years to become the 28th Amendment to the Constitution. It would be the first amendment to the Bill of Rights since it was ratified in 1792. Even some leading conservatives oppose the amendment. For example, syndicated columnist Cal Thomas wrote: "Those who would ban flag burning have placed the American flag in a category and context that is idolatrous."[181] Conservative Senator Mitch McConnell (R-Ky.) has also consistently opposed such an amendment.

Public support for the amendment appears to be growing. One survey showed that 80 percent of those polled would vote for such an amendment and by the fact that every state legislature except Vermont's has passed a resolution recommending that Congress adopt an anti-flag desecration amendment.[182]

Cross Burning and the First Amendment: *R.A.V. v. City of St. Paul, Minnesota* (1992) and *Virginia v. Black* (2003)

In 1992 the U.S. Supreme Court handed down one of the most controversial free speech decisions of that decade. In *R.A.V. v. City of St. Paul, Minnesota*,[183] the

justices unanimously ruled a city ordinance unconstitutional that provided criminal penalties for placing "on public or private property a symbol, object appellation, characterization or grafflti, 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."[184]

The case originated on June 21, 1990, when several teenagers allegedly burned a cross made by taping together broken chair legs inside the fenced yard of an African American family in St. Paul, Minnesota. When charged with violating the ordinance as a result of the incident, one of the juveniles flled a motion to dismiss, claiming that the law was too broad and impermissibly based on content and thus facially invalid under the First Amendment. A trial court judge granted the motion, but the Minnesota Supreme Court reversed on the ground that the provision simply regulated *fighting words* that can be punished as previously afflrmed by the U.S. Supreme Court. The Minnesota Supreme Court particularly cited *Chaplinsky v. New Hampshire* (1942),[185] in which the U.S. Supreme Court held that words "likely to provoke the average person to retaliation, and thereby cause a breach of the peace" (known as *fighting words*) were not protected by the First Amendment.[186]

Justice Scalia wrote the majority opinion for the U.S. Supreme Court. He was joined by Chief Justice Rehnquist and Associate Justices Kennedy, Souter, and Thomas. The majority indicated it was bound by the construction given the ordinance by the Minnesota Supreme Court, including the interpretation that the law restricted only expressions that would be considered flghting words. However, the opinion skirted the issue of whether the ordinance was substantially too broad, as the petitioner (R.A.V.) contended. Instead, the Court said: "We flnd it unnecessary to consider this issue. Assuming, *arguendo*, that all of the expression reached by the ordinance is proscribable under the 'flghting words' doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[187] According to the Court:

> Although the phrase in the ordinance, 'arouses anger, alarm or resentment in others,' has been limited by the Minnesota Supreme Court's construction to reach only those words or displays that amount to 'flghting words,' the remaining unmodifled terms make clear that the ordinance applies only to 'flghting words' that insult or provoke violence, 'on the basis of race, color, creed, religion or gender.' Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specifled disfavored topics. Those who wish to use 'flghting words' in connection with other ideas—to express hostility, for example, on the basis of political affllliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.[188]

The Court made it clear that "burning a cross on someone's front yard is reprehensible. But St. Paul has sufflcient means at its disposal to prevent such behavior without

adding the First Amendment to the flre." In a footnote earlier in the decision, the majority indicated that the conduct at issue in the case might have been punished under statutes banning terroristic threats, arson, or criminal damage to property.

In a concurring opinion joined by Justices Blackmun, O'Connor, and Justice Stevens in part, Justice White strongly disagreed with the majority's standard for evaluating the ordinance. According to Justice White, the ordinance should have been struck down on overbreadth grounds. He characterized the decision as "an arid, doctrinaire interpretation, driven by the frequently irresistible impulse of judges to tinker with the First Amendment. The decision is mischievous at best and will surely confuse the lower courts."

The St. Paul ordinance was enacted at a time of considerable concern about so-called hate speech and what has become known as "politically correct" (PC) speech. In a proliferation of incidents including many on college and university campuses, members of racial, ethnic, and sexual preference minority groups were targeted with epithets, anonymous hate letters, slogans painted on doors and walls, and other forms of hate speech. To counter this behavior, a number of cities and private and public universities instituted codes of conduct that speciflcally ban this type of behavior.

At the same time, political correctness has become a buzzword for the idea that both oral and written communications including those of the mass media should demonstrate greater sensitivity to race and gender bias, leading to guides such as *The Dictionary of Bias-Free Usage: A Guide to Nondiscriminatory Language, The Handbook of Non-Sexist Writing*, and *The Elements of Non-Sexist Usage: A Guide to Inclusive Spoken and Written English.* Critics view the PC speech campaign with disdain because they believe it inhibits freedom of speech and freedom of the press, whereas PC supporters see the movement as a legitimate means of persuading writers and speakers to abhor sexist, racist, and other biased speech.

Prior Restraint in the 21st Century: Cross Burning II

Hate speech and PC speech are two sides of the coin and the controversies they stir revolve around prior restraint. Can political and social hate groups be muzzled without denying their members their First Amendment rights? On the other hand, can policies and codes that either punish or strongly discourage sexist, racist, or other biased language pass constitutional muster? What about a policy that simply strongly encourages bias-free speech as a means of consciousness raising? Journalists appear to be splintered on these issues, as are civil rights and civil liberties groups. Some view the PC movement and the anti-hate speech campaign as unjustifled attempts to restrict freedom of speech and freedom of the press, and others contend that the rights of minorities to be free of hatred and bias directed toward them should take precedence over any First Amendment right that may exist in such contexts. It was inevitable that the U.S. Supreme Court would have the opportunity to wrestle with some of these issues.

Virginia v. Black (2003)

In 2003 in *Virginia v. Black*,[189] the U.S. Supreme Court held that states may outlaw cross burnings that are clearly intended to intimidate. In afflrming the conviction of two men who burned a cross in a family's yard without permission, the Court ruled that state statutes banning such cross burning do not violate the First Amendment. At the same time, the Court overturned the conviction under the same Virginia statute as a Ku Klux Klan leader who burned a cross at a rally on a willing owner's property because the statute, as written at the time, said cross burning on its face was evidence of intent to intimidate. The statute was subsequently revised. The majority opinion written by Associate Justice O'Connor said such a presumption would violate the First Amendment: "It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufflcient to ban all cross burnings."[190]

The ruling produced flve different opinions, refiecting the complexity of the struggle the justices had with this controversial issue. In upholding the state statute, the Court split the difference, handing both sides limited, symbolic victories. The advocates for strong First Amendment protection for speech could claim victory because the Court made it clear that an intent to intimidate must have been demonstrated, not simply presumed, to warrant punishment of cross burning. On the other hand, those who opposed hate speech now had a tool in their arsenals.

Citing *Chaplinsky*, the majority emphasized that the "protections the First Amendment affords speech and expressive conduct are not absolute. This Court has long recognized that the government may regulate certain categories of expression consistent with the Constitution."[191] Noting that a state is permitted under the First Amendment to ban real threats, the Court said it is not necessary for a speaker to actually carry out a threat in order for such speech to be prohibited. The problem is the intimidation: "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[192] The Court went on to note that Virginia was allowed under the First Amendment to ban "cross burnings done with the intent to intimidate because cross burning is a particularly virulent form of intimidation," pointing to "cross burning's long and pernicious history as a signal of impending violence."[193]

During oral arguments, Justice Clarence Thomas, the only African American on the Court, was unusually outspoken. Thomas, who has a reputation for rarely asking questions or speaking during oral arguments, strongly condemned cross burning. Pointing to a decade of lynchings of African Americans in the South, Thomas said cross burning "is unlike any symbol in our society. It was intended to cause fear and terrorize a population." Interrupting one of the attorneys for the state of Virginia, who was arguing in favor of the statute, Thomas said, "My fear is that you're actually understating the symbolism and effect of the burning cross." His dissent in the case refiected the same concerns. Thomas noted at the outset of his dissenting

opinion that although he agreed with the majority that cross burning can be constitutionally banned when carried out with the intent to intimidate, he believed the majority erred "in imputing an expressive component" to cross burning. After detailing the history of the Ku Klux Klan's use of cross burning to intimidate and harass racial minorities and other groups, Justice Thomas concluded:

> It is simply beyond belief that, in passing the statute now under review, the Virginia legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.
>
> Accordingly, this statute prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.[194]

In a note, the majority opinion acknowledged Justice Thomas' point that cross burning is conduct rather than expression but contended that "it is equally true that the First Amendment protects symbolic conduct as well as pure speech."[195]

Prior Restraint in the Classroom

Tinker v. Des Moines Independent Community School District (1969)

In *Tinker v. Des Moines Independent Community School District* (1969),[196] the U.S. Supreme Court held that the wearing by students of black armbands in a public school was a symbolic act protected by the First Amendment. With the support of their parents, two high school students and one junior high school student wore black armbands to class in December 1965 to protest the Vietnam War. Two days earlier, local school principals met to issue a regulation specifically prohibiting the armbands after a high school student in a journalism class asked his teacher for permission to write an article on Vietnam for the school newspaper. As the Court noted in its 7 to 2 opinion, students in some of the schools in the district had been allowed to wear political campaign buttons and even the Iron Cross, the traditional Nazi symbol.

A federal district court upheld the regulation as constitutional because school authorities reasonably believed that disturbances could result from the wearing of armbands. Indeed, a few students were hostile toward the students outside the classroom. However, according to the U.S. Supreme Court, "There is no indication that the work of the schools or any class was disrupted."[197] The official memorandum prepared by the school officials after the students were suspended was introduced at trial; it did not mention the possibility of disturbances.

The test, the Court said, for justifying such prior restraint would be whether "the students' activities would materially and substantially disrupt the work and discipline of the school." The Court held:

> These petitioners [students] merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve, a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the

> Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the state to deny their form of expression.[198]

In a sharp attack on the majority opinion, Justice Hugo L. Black appeared to compare the public classroom to a church or synagogue and settings such as the Congress and the Supreme Court: "It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Uncontrolled and uncontrollable liberty is an enemy of domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age."[199]

Hazelwood School District v. Kuhlmeier (1988): A Retreat from Tinker?

In 1988, the Court issued a decision in *Hazelwood School District v. Kuhlmeier*[200] that generated considerable concern and comment among First Amendment scholars and journalists. The case began innocently enough when the May 13, 1983, edition of the Hazelwood (St. Louis, Missouri) East High School student newspaper, *Spectrum*, was ready to go to press. The paper was produced by the Journalism II class under the supervision of a faculty adviser. This particular edition of the paper featured a special, two-page report with the headline, "Pressure Describes It All for Today's Teenagers." The two articles in the report touched on a variety of topics such as teenage pregnancy, birth control, marriage, divorce, and juvenile delinquency.

On the day before the paper was ready to be printed, the new faculty adviser, Howard Emerson, took the page proofs to the school principal, Robert E. Reynolds who deleted the special report. Reynolds did not consult with the students and later said the article focusing on the pregnancies of three students was too sensitive for younger students. He was concerned that the students quoted in the article would suffer from invasion of privacy although pseudonyms were used. He killed the second article analyzing the effects of divorce on teenagers because he said the father of one student quoted as criticizing him as abusive and inattentive was not given an opportunity to respond to the allegations.[201] Reynolds ordered the adviser, who had been appointed only ten days earlier, to publish the paper without the special section. None of the articles contained sexually explicit language, although they included discussions of sex and contraception. Most of the information in the articles was garnered from questionnaires completed by the students at the school and personal interviews conducted by the newspaper staff. All the respondents had given permission for their answers and comments to be published.

With assistance from the American Civil Liberties Union (ACLU), three of the students on the *Spectrum* staff—a layout editor and two reporters—filed suit against the school district and school officials in the U.S. District Court (E.D. Mo.) three months after the incident. The students unsuccessfully tried to convince

the principal to allow the articles to be published. The complaint alleged that the students' First Amendment rights had been violated and requested declaratory and injunctive relief and monetary damages. ACLU attorneys argued in the federal trial court that the newspaper constituted a public forum and thus deserved full First Amendment protection and, as government offlcials, school authorities could impose prior restraint on the paper only if it were obscene or libelous or could cause a serious disruption of normal school operations as the Court held in *Tinker* in 1969.[202] Attorneys for the school district argued that, because the newspaper staff was taking the journalism class for credit, just as any other course would be taken for credit, the newspaper was, therefore, not a public forum but merely part of the school curriculum.

In May 1985, the U.S. District Court decided in favor of the school and denied all relief requested. On appeal by the students, the 8th Circuit U.S. Court of Appeals reversed the U.S. District Court ruling. The appeals court held in a 2 to 1 decision that the newspaper was a public forum even though the faculty adviser maintained considerable editorial control over the paper. According to the majority opinion, prior restraint was permitted, in line with *Tinker*, only if the school offlcials could demonstrate that such censorship was "necessary to avoid material and substantial interference with school work or discipline" (citing *Tinker*).[203]

In a move that surprised many First Amendment scholars, the U.S. Supreme Court granted certiorari on appeal of the decision by the school board. Oral arguments were heard in October 1987 and exactly three months later, the Court handed down its decision that provoked a torrent of criticism from professional journalism organizations such as the Society of Professional Journalists, the Reporters Committee for Freedom of the Press, the Student Press Law Center, and the Association for Education in Journalism and Mass Communication, all of which either flled or joined *amicus curiae* ("friend of the court") briefs with the Supreme Court to support the students and the federal appeals court decision.

Fate was not on the side of the students, however. In a 5 to 3 decision written by Justice Byron R. White, the Court reversed the U.S. Court of Appeals and held that the First Amendment rights of the students had not been violated.[204] The Court began by reaffirming its 1969 principle in *Tinker* that it "can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[205] The Court went on to say that *Tinker* applies only to "educators' ability to silence a student's personal expression that happens to occur on the school premises" so that prior restraint is permitted when it is "reasonably related to pedagogical concerns." In other words, expression that occurs within the context of the school curriculum can be censored unless the restrictions have "no valid educational purpose."

The Court reasoned that the school was the publisher of the newspaper and it had not manifest an intention to make the *Spectrum* a public forum. As publisher, the school could impose greater restrictions so that students "learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of

the school are not erroneously attributed to the school."[206] The majority went on to note:

> A school must be able to set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world—and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics.[207]

As expected, Justice William J. Brennan, Jr., wrote a very strong dissent to the majority decision. He was joined in his dissent by Justices Thurgood Marshall and Harry A. Blackmun. "In my view, the principal . . . violated the First Amendment's prohibition against censorship of any student expression that neither disrupts class work nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose," Justice Brennan wrote. He reasoned, unlike the majority, that *Tinker* did apply to this case and thus the paper could be censored only if its content materially and substantially disrupted the educational process or interfered with the rights of others (such as the right of privacy). According to Justice Brennan, *Tinker* should have applied to all student expression, not only to personal expression, as the majority ruled.

One of the most surprising aspects of the majority opinion was the extension of its holding to include virtually all school-sponsored activities, not only laboratory newspapers. The U.S. Supreme Court, especially the Rehnquist Court, usually limited its rulings on the First Amendment to the particular issue at hand, but in *Hazelwood* the Court chose to substantially broaden the scope of the activities affected by the decision. The Court provided no direct indication as to why it had taken this unusual step in *Hazelwood*, but it is likely that the Court wanted to avoid having to tackle prior restraint on student expression on a situation-by-situation basis. The Court may have been attempting to forestall a fiood of litigation on the issue that was quite likely to arise if the Court narrowed the scope of the decision to include only laboratory newspapers.

What is covered by *Hazelwood*? According to the Court, any public school has a constitutional right to disassociate itself from all speech that others, including students, parents, and the general public "might reasonably perceive to bear the imprimatur of the school."[208] The Court cited examples such as theatrical productions, but it is apparent that other activities such as art shows, science fairs, debates, and research projects come under the aegis of *Hazelwood*. As the Student Press Law Center indicated in its legal analysis of the case, "Any school-sponsored, non-forum student activity that involves student expression could be affected."[209]

The impact of *Hazelwood* was both immediate and long term. Literally within hours, high school and even college newspapers felt the heavy hand of censorship. According to one report, a high school principal in California ordered a school newspaper not to publish a story based on an interview with an anonymous student who

tested positive for AIDS. Less than two hours after the Court's decision, the principal told the newspaper staff, "You won't run that story now."[210] In the months and years that followed, headlines such as "Concern Rises over High School Journalism"[211] and "Censorship on Campus: Press Watchers Fear Rise"[212] were not unusual.

A survey of high school principals in Missouri found that while 61.5 percent of them considered their student newspapers to be open forums and only 35.6 percent kept material from being printed in student publications, almost 90 percent of them said they might suppress "dirty language" in a student publication if they found it objectionable. More than 60 percent said they might suppress content dealing with sex. Articles on drugs might have been censored by 56.8 percent of the principals, and almost 42 percent might have restrained content dealing with student pregnancy.[213] A 1988 report jointly sponsored by the American Library Association and the American Association of School Administrators listed four major categories of motivation for school censorship—family values, political views, religion, and minority rights,[214] all common topics in school newspapers.

One thorough analysis of the case concluded, "The [Supreme] Court's view of the state's permissible role in restricting student expression has gone from expansive to narrow and back, culminating in its broad discretion to school authorities in *Hazelwood*."[215] The law review note suggests that school offlcials be required to conform to written regulations that would permit discretion while offering students the opportunity "to learn the full responsibilities of the flrst amendment through using it responsibly."[216]

As discussed in Chapter 1, states can always expand those rights recognized by the Court under the First Amendment. Although the states made no mad dash to enact legislation to expand high school student rights after *Hazelwood*, a few states offer broader protection. For example, Section 48907 of the California Education Code provided extensive protection ten years before *Hazelwood*. Under the code, public school students have the right to exercise an extensive array of speech and press activities regardless of whether such activities are flnancially supported by the school, except "obscene, libelous, or slanderous" expression or "material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school."[217]

Massachusetts had a statute even earlier than the California law, but the provision affecting school publications was optional until it became mandatory in July 1988.[218] In May 1989, Iowa became the flrst state to enact legislation speciflcally geared to respond to the concerns of *Hazelwood*.[219] The statute is very similar to that of California, especially in its exceptions.[220]

The *Hazelwood* Court speciflcally avoided the question of whether its ruling would apply to college newspapers. In a footnote, the majority opinion stated, "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored activities at the college or university level."[221]

The ripples from *Hazelwood* continue to be felt. In 1996, the 7th Circuit U.S. Court of Appeals ruled that the policy of a public elementary school in Racine, Wisconsin on

non-school-sponsored publications did not violate the First Amendment. In *Muller v. Jefferson Lighthouse School,*[222] the appellate court held that the school had the right to prohibit a student from giving his classmates fiiers inviting them to his church. In 2001, the 6th Circuit U.S. Court of Appeals held in an *en banc* (full panel) decision in *Kinkaid v. Gibson*[223] that the First Amendment rights of students at Kentucky State University were violated when university offlcials banned the distribution of a yearbook they found offensive. The court said the yearbook was a limited public forum and noted that *Hazelwood* did not apply to college students.

A much different result occurred in 2005 when the 7th Circuit U.S. Court of Appeals in an *en banc* 7 to 4 decision in *Hosty v. Carter* held "that *Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools."[224] Two years earlier, a three-judge panel of the same court unanimously ruled[225] that college students, unlike high school students, enjoy First Amendment protection. The panel said the editors of *The Innovator*, a student newspaper at Governors State University, a public institution in University Park, Illinois, could sue the dean of students for requiring the newspaper's printer to obtain the dean's approval before publishing. The court held that the dean did not enjoy qualifled immunity that would protect her from such suits. The court also said *Hazelwood* did not apply to college students.

The *en banc* court, on the other hand, decided the dean did enjoy qualifled immunity. The court said the evidence presented to the trial court, when considered in the light most favorable to the plaintiff (the standard when attempting to establish a constitutional claim), "would permit a reasonable trier of fact [i.e., a judge or jury] to conclude *The Innovator* operated in a public forum and thus was beyond the control of the University's administration." However, the court went on to conclude, "Qualifled immunity nonetheless protects Dean Carter from personal liability unless it should have been 'clear to a reasonable [public offlcial] that his conduct was unlawful in the situation he confronted'" (citing an earlier U.S. Supreme Court decision).

The student journalists appealed the 7th Circuit's opinion, but in 2006 the U.S. Supreme Court denied certiorari, allowing the lower court decision to stand.[226] Critics of the decision such as Mark Goodman, executive director of the Student Press Law Center, and John K. Wilson, founder of the College Freedom website, expressed concern that the 7th Circuit's decision, while technically applicable only to public institutes of higher education in Wisconsin, Indiana, and Illinois, might be used to censor colleges and universities nationally. Goodman contended the Supreme Court's refusal to hear the appeal "may be interpreted as a green light by some college administrators."[227] Wilson said the dismissal of the appeal, coupled with the then ongoing controversy concerning anti-Muslim cartoons in college newspapers and other publications, "should make us worry about how the new power to censor granted to administrators will be used."[228]

Hosty concerned activities within the classroom. What about activities outside the classroom? In 2007 the U.S. Supreme Court held in *Morse v. Frederick*[229] that a high school principal did not violate the First Amendment rights of a student when she conflscated a banner held up during an Olympic torch run that read "Bong

Hits 4 Jesus." The Court ruled in a 5-4 decision that the Juneau, Alaska, principal could reasonably conclude that the banner promoted drug use, in violation of school policy.

Prior Restraint and National Security

When President George W. Bush initiated the attack on Iraq in 2003 that led to a rather quick military victory with the removal of Saddam Hussein as president, the Pentagon approved the embedding of about 600 U.S. and international reporters within American armed forces flghting in Iraq. The result was extensive, direct media coverage of the war that was in sharp contrast to the coverage of the Persian Gulf Confiict in early 1991 under the senior President George Bush. Only one embedded reporter was formally pressured by the military to leave during the 2003 Iraq War—Fox TV's Geraldo Rivera who drew a map in the sand pointing to U.S. troop locations.

During the 1991 war, a ban was imposed on press access to the war zone. A few journalists were killed during the Iraq war, either in accidents or during hostile flre, but the press made little criticism regarding access. However, from the 1980s through the 2000s, national security issues provided the federal government with opportunities to impose prior restraint on the mass media.

Until 1985 no one in this country had ever been convicted of a crime for leaking national security information to the press; in October of that year, Samuel Loring Morison was convicted in U.S. District Court in Baltimore[230] for providing three classifled photographs to the British magazine *Jane's Defence Weekly* in 1984. The magazine published the photos and then made them available to various news agencies. One of the photos also appeared in the *Washington Post*.[231] Morison was not employed by the magazine at the time, although he worked for *Jane's Fighting Ships*, another magazine owned by the same company. He gained access to the classifled photos when he previously worked for the U.S. Navy as an intelligence analyst. His prosecution came during a campaign under President Ronald Reagan to halt unauthorized leaks of sensitive government information.

Morison freely admitted to furnishing the pictures to the magazine, but he contended that he was not paid for the materials even though he had been paid by the magazine for his writing. His confession was ruled inadmissible at trial, and thus the government did not argue that he had been compensated for providing the materials. In his defense, Morison claimed that the statute under which he was prosecuted did not apply in his case but instead was intended to apply to the disclosure of classifled information to foreign governments and thus not the press. Morison was sentenced to two years at a federal medium security prison in Danbury, Connecticut for violating two sections of the U.S. Espionage Act of 1917.[232] He appealed the decision to the 4th Circuit U.S. Court of Appeals, but on April 1, 1988, a three-judge panel upheld the trial court decision, rejecting all Morison's major contentions: he had not used the documents for personal

gain, he did not know the documents were classifled, and Congress intended to restrict application of the law to traditional spying rather than disclosures to the press.[233]

In October 1988, the U.S. Supreme Court denied certiorari,[234] effectively closing the case, while Morison continued to serve his prison term. As discussed in Chapter 2, denial of certiorari does not necessarily mean the Supreme Court agrees with a lower court's decision. It does indicate that at least six justices did not feel a case deserves consideration because at least four justices must agree to hear a case before a writ of certiorari can be granted.

Prior Restraint on Crime Stories

"Son of Sam" Laws: *Simon & Schuster v. New York State Crime Victims Board* (1991)

In 1977, the New York legislature enacted a statute that, as later amended, required that any income received by convicted or accused criminals for sales of their stories be placed in an escrow account for flve years during which their victims would have the right to sue in civil actions for damages. The statute also mandated that any publisher contracting with an accused or convicted criminal must submit a copy of the contract to the Crime Victims Board. If a victim won a civil judgment against the criminal, the person would then be entitled to a share of the proceeds from the sale of the story. The law also permitted the use of proceeds from such sales under certain circumstances for other uses such as legal fees and for payments to creditors of the accused or convicted person. The statute was popularly know as the "Son of Sam" law because it was initiated in reaction to stories that David Berkowitz, convicted of killing six people in New York City after a highly publicized and sensationalized arrest and trial, planned to sell his story.

The statute was challenged in the courts as unconstitutional prior restraint. In 1991 in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*,[235] the U.S. Supreme Court ruled 8 to 0 that through the "Son of Sam law, New York has singled out speech on a particular subject for a flnancial burden that it places on no other speech and no other income. The State's interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam law is not narrowly tailored to advance that objective."[236]

The justices noted that any statute that imposes a flnancial burden on a speaker because of the content of the speech "is presumptively inconsistent with the First Amendment." The law in this case was so broad, the Court said, that a person who had never been accused or convicted of a crime but who admitted in a book or other publication that she or he had committed a crime would be included. The case arose after the board ordered publisher Simon & Schuster to turn over all monies payable to admitted organized crime flgure Henry Hill for his book *Wiseguy* (which later inspired a flm called *Goodfellas* that won an award for best flm in 1990). Hill was also ordered to turn over monies he had already received.

Simon & Schuster sued the board, seeking a declaratory judgment that the law was unconstitutional. A U.S. District Court judge ruled against the publisher and the 2nd Circuit U.S. Court of Appeals afflrmed. The Court reversed, pointing out that works such as the *Autobiography of Malcolm X*, Henry David Thoreau's *Disobedience*, and even the *Confessions of St. Augustine* would have fallen under the shadow of the law if the law had been on the books when they were written. The Court cited other constitutional means of obtaining such proceeds such as securing a judgment against the criminal's assets in a civil suit.

All but about ten states[237] have "Son of Sam" laws designed to overcome the constitutional problems of the original New York Statute. California is among the states that have such statutes, but in 2002 the California Supreme Court unanimously struck down that state's statute. The law was challenged by a felon convicted in the 1963 kidnapping of 19-year-old Frank Sinatra, Jr., who was released unharmed after his family paid a ransom of nearly a quarter of a million dollars. The convict, Barry Keenan, would have received $485,000 of the $1.5 million offered for fllm rights to a magazine story about the crime, but the statute prevented him from doing so.[238] The law speciflcally barred convicted felons from receiving any funds from movies, books, or other media dealing with their crimes. Any proceeds would instead go to the victims or to the state. The California Supreme Court said the state had a compelling interest in compensating crime victims but the law violated the First Amendment because it restricted speech more than necessary to serve that interest.[239]

In 2004, the Nevada Supreme Court struck down that state's "Son of Sam" law[240] as a violation of the First Amendment on grounds similar to those on which other courts struck down such statutes.[241] The court conducted a strict scrutiny analysis because the restrictions were content-based. The statute was enacted in 1981 and revised in 1993 to attempt to conform with the ruling by the U.S. Supreme Court in *Simon & Schuster.*

Free Speech Rights in a Political Context: Public and Private Protests

Offensive Language on Clothing: *Cohen v. California* (1971)

The distinction between "action speech" and "pure speech" has proven very troublesome for the courts over the decades, despite the Supreme Court's attempts to clarify the difference. How far does an individual have to proceed to transform words into deeds? Suppose an individual were to wear in public a jacket with an expression deemed obscene by some and at least indecent by most. Suppose women and children are present and can clearly read the expression. Can the individual be banned from wearing the jacket? Can he be convicted for maliciously and willfully disturbing the peace by offensive conduct?

In *Cohen v. California* (1971),[242] the U.S. Supreme Court reversed the conviction of a man for wearing a jacket with the clearly visible words, "Fuck the Draft," in a

corridor outside a courtroom of the Los Angeles County Courthouse. The defendant testifled at trial that he wore the jacket to protest the draft and the Vietnam War. He was convicted of violating Section 415 of the state penal code that bans maliciously and willfully disturbing the peace by offensive conduct and was sentenced to 30 days in jail. According to the Court, "There were women and children present in the corridor. . . . The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence."[243]

The majority opinion characterized the situation as involving speech but the dissenters saw it differently. Writing for the majority, Justice John M. Harlan, said:

> The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only 'conduct' which the State sought to punish is the fact of communication. Thus we deal here with a conviction resting solely upon 'speech' . . . not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views. . . . Further the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen . . . [could not] . . . be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.[244]

Citing *Chaplinsky*, the Court noted that states "are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'flghting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[245] The Court also concluded that (a) the words were not obscene because they were in no way erotic, (b) no person would reasonably regard the words as a direct personal insult and thereby be provoked to violence, and (c) the jacket was not akin "to the raucous emissions of sound trucks blaring outside . . . residences" because the people in the courthouse could simply turn their eyes to "effectively avoid bombardment of their sensibilities."[246] Justice Harry A. Blackmun, joined by Chief Justice Warren Burger and Justice Hugo Black, called Cohen's effort an "absurd and immature antic" that "was mainly conduct and little speech."[247]

Abortion Protests

At least one abortion protest case seems to crop up every year in the Supreme Court. One of the most important of these cases was handed down in 1994. *National Organization for Women v. Scheidler* (*Scheidler I*) (1994)[248] involved an interpretation of the Racketeer Infiuenced and Corrupt Organizations (RICO) chapter of the Organized Crime Act of 1970. Under Section 1962(a) of the Act, any individual associated with an enterprise is prohibited from operating through a pattern of racketeering activity. NOW, a nonproflt organization promoting the legal availability of abortion, and two health care centers that perform abortions sued Pro-Life Action Network (PLAN), a coalition of anti-abortion groups, Joseph Scheidler, and other

anti-abortion activists in U.S. District Court. NOW claimed that members of PLAN and other protesters violated RICO and other federal statutes in their admitted attempts to shut down abortion clinics and convince women not to have abortions. NOW further asserted that the defendants were part of a national conspiracy to close clinics through a pattern of racketeering activity including extortion.

The federal trial court dismissed NOW's suit, primarily because the court said that RICO required proof that pre-racketeering and racketeering activities were motivated by an economic (proflt generating) motive, which the court said NOW had failed to show. The 7th Circuit Court of Appeals afflrmed, but in a unanimous opinion by Chief Justice Rehnquist, the U.S. Supreme Court held that the statutory language of RICO and the legislative history of the Act make it clear that no economic motive is required:

> We therefore hold that petitioners may maintain this action if respondents conducted the enterprise through a pattern of racketeering activity. The questions of whether the respondents committed the requisite predicate acts, and whether the commission of these acts fell into a pattern, are not before us. We hold only that RICO contains no economic motive requirement.[249]

Nine years later, NOW and Joseph Scheidler and his supporters were again lined up on opposite sides in a U.S. Supreme Court decision regarding the RICO act. However, this time the protesters were on the winning side. In *Scheidler v. NOW* (*Scheidler II*, 2003),[250] the U.S. Supreme Court in an 8 to 1 decision reversed a jury award of more than $85,000 in civil damages against the anti-abortion protesters. The Court also lifted a permanent nationwide injunction[251] imposed by the federal trial court that banned the group from blocking access to abortion clinics, trespassing on and damaging clinic property, and using violence or threats of violence. The Court also held that Scheidler and his Pro-Life Action Network (PLAN) did not commit extortion as NOW had claimed, within the meaning of the Hobbs Act. That federal statute deflnes extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of offlcial right."[252]

The Court agreed that the protesters "interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights."[253] The Court also recognized that some of the conduct was criminal (as acknowledged by the protesters themselves) and that such interference and disruptions may have accomplished their goal of shutting down the clinics. However, the Court said, these acts did not constitute extortion because the protesters did not "obtain" the property. The Court declined to rule whether civil injunctions were available under RICO to private litigants such as NOW because the jury's decision that extortion had been committed had not been supported.

The battle did not end, however. The end did not occur until three years later. In 2006, the U.S. Supreme Court appeared to flnally end the 20-year dispute between NOW and Scheidler and his supporters by ruling 8 to 0 (newly appointed Justice Alito did not participate) that the Hobbs Act and the RICO Act could not be used to prosecute protesters who block abortion clinics even when they commit violence. In *Scheidler v. NOW* (*Scheidler III*),[254] Justice Breyer wrote in the majority opinion,

"Physical violence unrelated to robbery or extortion falls outside the Hobbs Act scope. Congress did not intend to create a freestanding physical violence offense. It did not intend to forbid acts or threats of physical violence in furtherance of a plan or purpose to engage in what the Act refers to as robbery or extortion (and related attempts or conspiracies)." This final case arose after *Scheidler II* was remanded to the U.S. Court of Appeals. That court then remanded the case to the federal district court on the grounds that an alternative argument made by NOW had not been considered. That argument basically was that the original jury's verdict finding the protesters guilty under the Hobbs Act could have been based on threats of physical violence not connected to extortion, not only on extortion-related conduct. The U.S. Supreme Court then jumped into the fray, agreeing to hear the case one more time. Taken together, these three rulings, especially the 2006 holding, make it clear that Congress intended for the RICO and Hobbs statutes to be used to ban such acts or threats of violence only "in furtherance of a plan or purpose to engage in robbery or extortion."

Anti-abortion activists have experienced both victories and defeats in their attempts to obtain First Amendment protection for their acts of protest. One mild blow came in 1994 when the U.S. Supreme Court handed down its 6 to 3 decision in *Madsen v. Women's Health Center.*[255] The case began in September 1992 when a Florida state trial court judge issued an injunction barring anti-abortion groups from blocking or interfering with public access to a clinic in Melbourne. Six months later, the judge broadened the injunction at the request of Women's Health Center, which operates abortion clinics throughout central Florida. The judge believed the protesters were continuing to block access by congregating on the road leading to the clinic and created stress for patients and medical personnel, especially with their noise that included singing, chanting, and speaking with loudspeakers and bullhorns. The protesters also picketed the fronts of private residences of physicians and other clinic workers.

The broader injunction that anti-abortion activist Judy Madsen and others filed suit to overturn prohibited various anti-abortion organizations "and all persons acting in concert" at all times and all days from entering clinic premises, from interfering with access to the building or parking lot, from "congregating, picketing, patrolling, demonstrating or entering" the public right-of-way or private property within 36 feet of the clinic's property line, and from physically approaching anyone visiting the clinic to communicate with the person (unless the person indicated a desire to communicate) within 300 feet of the clinic, and protesting, demonstrating, and using bullhorns and other such devices within 300 feet of the private residence of a clinic employee. The order also banned singing, whistling, and similar noises during certain hours and "sounds or images observable to or within earshot of the patients inside the clinic."

On appeal, the Florida Supreme Court upheld the injunction as content-neutral, "narrowly tailored to serve a significant government interest," and leaving "open ample alternative channels of communication."[256] Around the same time, the 11th Circuit U.S. Court of Appeals struck down the injunction as "content-based and neither necessary to serve a compelling state interest nor narrowly drawn to achieve that end."[257]

The U.S. Supreme Court assumed the task of resolving the confiict. First, the majority opinion written by Chief Justice Rehnquist held that the injunction was not content-based because, although it was written to regulate the activities of a speciflc group, it was based on the past activities of the group. (In a long dissent, Justice Scalia, joined by Justices Kennedy and Thomas, strongly disagreed with this analysis, saying that while the press would characterize the decision as an abortion case, the law books will cite it "as a free speech injunction case—and the damage its novel principles produce will be considerable.") The Chief Justice went on to say that the injunction protected signiflcant government interests including a woman's right to seek lawful services. However, because the case involved an injunction, he said its constitutionality must be analyzed against a stronger standard than a content-neutral standard. The latter test would be whether it was narrowly tailored to serve a signiflcant government interest as a reasonable time, place, and manner restriction. On the other hand, the test here is the more rigorous First Amendment standard: "whether the challenged provisions of the injunction burden no more speech than necessary to serve a signiflcant government interest."

In applying this test, the Court held the 36-foot buffer zone in general was constitutional because the court had few other options to protect access. The portion of the zone at the back and side was not constitutional because there was no evidence that access to the property was obstructed by allowing the protesters to those areas. The Court also ruled that the noise restrictions were constitutional because noise control is particularly important for medical facilities during surgery and recovery of patients. The 300-foot no-approach zone and the prohibition on images observable did not survive the test's scrutiny.

According to the Court, "It is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic."[258] Both the 300-foot zone around private residences and the 300-foot zone around the clinic violated the First Amendment because they were broader restrictions than necessary. The Court said "a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result."[259] Finally, the justices rejected the protesters' argument that the "in concert" provision of the injunction violated their First Amendment right of association: "The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights."[260]

Three years after *Madsen*, protesters won a major victory when the U.S. Supreme Court handed down its decision in *Schenck et al. v. Pro Choice Network of Western New York et al.*[261] In 1990, three physicians and four medical clinics, all of which provided abortion services, and the Pro Choice Network of Western New York, a nonproflt corporation founded to maintain access to family planning and abortion services, flled suit against 50 individuals and three organizations involved in anti-abortion protests. The plaintiffs sought a temporary restraining order (TRO), a permanent injunction, and damages against the defendants who engaged in numerous large scale blockades of the clinics that included protesters marching, standing,

kneeling, sitting, and lying in driveways and doorways. These actions were intended to prevent or discourage patients, physicians, nurses, and other employees from entering the facilities. Other activities outlined in the Supreme Court's discussion of the case included protesters crowding around parked cars, milling around doorways, handing out literature, and shouting at, shoving, grabbing, and pushing women entering the clinics. Some of the protesters followed the women as they walked toward the clinic, handing them literature and talking with them in attempts to persuade them not to have abortions. The tactics were so aggressive and continuous that local police were unable to control the protesters who usually dispersed as soon as police arrived and then returned later. They even harassed police offlcers, both verbally and by mail.

The U.S. District Court judge in the case granted the plaintiffs' request for a TRO three days after the complaint was flled. The TRO enjoined the defendants from physically blocking the clinics, physically abusing or harassing anyone entering or leaving a clinic, and demonstrating within 15 feet of any person entering or leaving the premises. The defendants were allowed to place two "counselors" within the 15-foot "buffer zone" to have "a conversation of a nonthreatening nature" with people entering or leaving the clinic unless the persons indicated they did not want such "counseling." As a result, the protesters cut back on some of their activities but continued to set up blockades and to harass patients and staff entering and leaving the clinics. The District Court changed the TRO to a preliminary injunction after 17 months and eventually cited flve protesters for civil contempt for allegedly violating the terms of the order. The injunction was broader than the TRO, banning demonstrations "within flfteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances" of the clinics.[262]

The Supreme Court called these "flxed buffer zones." The injunction also banned protesters from coming "within 15 feet of any person or vehicle seeking access to or leaving such facilities." The order also said that once the two sidewalk "counselors" had entered the buffer zones, they had to "cease and desist" their "counseling" if the person asked them to stop and then retreat 15 feet from the person and remain outside the buffer zones (characterized by the Court as "fioating buffer zones"). When the defendants asserted that these restrictions constituted a violation of the First Amendment, the district court judge applied the traditional time, place, and manner analysis and found that the injunction did not infringe on the defendants' First Amendment rights.

The court held that the injunction was content-neutral, was narrowly tailored to serve a signiflcant government interest, and left open alternative means of communication. In a split vote, a three-judge panel of the 2nd Circuit U.S. Court of Appeals, applying the *Madsen* test discussed *supra*, reversed the trial court decision. Meeting *en banc*, the Court of Appeals afflrmed the District Court decision in a divided vote. The U.S. Supreme Court held by a 6 to 3 vote that the flxed buffer zone around clinic driveways and entrances was permissible under the First Amendment but ruled 8 to 1 that the fioating buffer zones around patients and vehicles were not permissible.

In a majority opinion written by Chief Justice Rehnquist, the Court, applying the *Madsen* test, reasoned that the same signiflcant government interests applied in this case as in *Madsen*—"ensuring public safety and order, promoting the free fiow of trafflc on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy related services"—and thus the flxed buffer zones did not burden any more speech than was necessary to serve those interests. Chief Justice Rehnquist was joined by Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer in this part of the decision. Justices Scalia, Kennedy and Thomas dissented, as they had done in *Madsen*.

On the issue of fioating buffer zones for people and vehicles, however, all of the justices except Justice Breyer voted to strike down that portion of the injunction. The Court indicated that such prohibitions are too broad and difflcult to enforce and thus burden more speech than is necessary to serve the relevant governmental interests. The Court noted, for example, that protesters might have to go to great lengths to maintain the 15-foot distance from a person entering or leaving the clinic while still communicating with the person. According to the Court, "Leafieting and commenting on matters of public concern are classic forms of speech that lie at the heart of the *First Amendment,* and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum."[263]

The justices had given a hint of how they were likely to rule on the fioating buffer zones during oral arguments the previous October. Noting that the sidewalks near the clinic were only 15 feet wide, the justices questioned whether a 15-foot barrier could be fairly enforced. The Court did not, however, rule out the possibility that a "zone of separation between individuals entering the clinics and protesters, measured by the distance between the two" could be imposed. Instead, the Court said that there had been no justiflcation made for such a zone of privacy in this case. The majority opinion did acknowledge the "physically abusive conduct, harassment of the police that hampered law enforcement, and the tendency of even peaceful conversations to devolve into aggressive and sometimes violent conduct." Thus the justices appeared to be opening the door for further litigation on this issue, which is likely to arrive at the Court's doorsteps someday.

In *Lelia Hill v. Colorado* (2000),[264] the U.S. Supreme Court upheld as constitutional a state statute that made it unlawful for any person who was within 100 feet of a health care facility's entrance to "knowingly approach" within 8 feet of another person without that individuals' consent to hand a leafiet or handbill, display a sign or engage in oral protest, education, or counseling. The Court ruled in a 6 to 3 decision that the statutory provision was a reasonable time, place, and manner regulation that was narrowly tailored to serve a legitimate public interest while also leaving open alternative channels of communication. Citing both *Schenck* and *Madsen*, the Court said the regulation was not unconstitutionally vague.

Signs: *City of Ladue v. Gilleo* (1994)

In *City of Ladue v. Gilleo* (1994),[265] a unanimous U.S. Supreme Court recognized a clear violation of the First Amendment with which few people would disagree. The

Figure 5.2 The city limits sign for Ladue, Missouri, the origin of *Ladue v. Gilleo,* a 1994 U.S. Supreme Court case. (Photo by Roy L. Moore.)

case arose when Margaret P. Gilleo, a resident of Ladue, an affiuent suburb of St. Louis, placed a 24 × 36-inch sign on her front lawn during the 1990 Persian Gulf Confiict that read "Say No to War in the Persian Gulf, Call Congress Now." The sign quickly disappeared and a replacement was knocked down. When Gilleo complained to police, she was informed that the city had an ordinance barring homeowners from displaying signs on their property except "For Sale" and similar signs.

However, under the Ladue ordinance, businesses, churches, and so on were allowed to have certain signs not allowed by private residents. Gilleo sued the city council after it denied her request for a variance. She then successfully sought a preliminary injunction against enforcement of the ordinance in U.S. District Court and placed an 8.5 × 11-inch sign in the second story window of her home that said "For Peace in the Gulf." The Ladue City Council enacted a replacement ordinance that more broadly deflned *signs* and listed ten exemptions. One of the stated reasons for the enactment of the ordinance was:

> . . . proliferation of an unlimited number of signs . . . would create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture, impair property values, substantially impinge upon the privacy and special ambience of the community, and may cause safety and trafflc hazards to motorists, pedestrians, and children.[266]

Gilleo challenged the new ordinance as well, and both the U.S. District Court and the 8th Circuit U.S. Court of Appeals ruled in her favor. The unanimous opinion of the U.S. Supreme Court noted that with this ordinance:

> . . . Ladue has almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious or personal messages. . . . Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the "speaker". . . . Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute.[267]

The justices made it clear this First Amendment right is not absolute:

> Our decision that Ladue's ban on almost all residential signs violates the First Amendment by no means leaves the City powerless to address the ills that may be associated with residential signs. It bears mentioning that individual residents themselves have strong incentives to keep their own property values up and to prevent 'visual clutter' in their own yards and neighborhoods—incentives markedly different from those of persons who erect signs on others' land, in others' neighborhoods, or on public property. Residents' self-interest diminishes the danger of the "unlimited" proliferation of residential signs that concerns the City of Ladue. We are conflident that more temperate measures could in large part satisfy Ladue's stated regulatory needs without harm to the First Amendment rights of its citizens. . . .[268]

These concluding remarks of the Court appear to open the door to private communities imposing their own rules on signs. For example, many new subdivisions now routinely include covenants in the so-called master plans for communities that bar displays of political signs, fiags, religious symbols, and so on and prohibit the erection of outside radio and television antennas. Would such restrictions pass constitutional muster under *Ladue*? This remains to be seen.

The key question would be whether community associations that are responsible for enforcing these rules are acting as governmental or quasi-governmental bodies for purposes of the First Amendment. Because they usually have the authority to enforce their decisions and interpretations in court, it could be argued that they are tantamount to governmental authorities. On the other hand, their authority is limited and can ultimately be enforced only indirectly (i.e., through the judicial system). According to a *New York Times* article, about 50 million Americans live in communities governed by such associations.[269] Most of the lawsuits flled by homeowners associations against residents concern violations such as failures to pay dues and improper parking, but these groups are quite capable of imposing prior restraint on speech, as *Ladue* illustrates.

Workplaces and Restricted Zones

Occasionally, prior restraint in the workplace attracts the attention of the U.S. Supreme Court, sometimes with confusing results. For example, in *Waters v. Churchill* (1994),[270] a nurse was flred from a public hospital for statements she made during a work break that were critical of her employer. Her precise statements are in dispute. The hospital claimed they were disruptive comments critical of her department and the hospital, but she testifled that her conversations were nondisruptive and focused primarily on a speciflc hospital policy she believed threatened patient care.

The plurality opinion said that under an earlier Court decision, *Connick v. Myers*,[271] the First Amendment protects a government employee's speech if it is on a matter of public concern and the employee's interest is not outweighed by any injury the speech could cause to the government's interest. The *Connick* test, the justices said, should be applied to what the employer reasonably thought was said, not what the judge or jury ultimately determines to have been said. The opinion went on to say that circumstances such as those in this case require the supervisor to conduct an investigation to determine whether there is a substantial likelihood that the type of speech uttered was protected under the First Amendment. *Waters* symbolizes the ongoing struggle within the Supreme Court over the limits of the First Amendment, especially in the area of freedom of speech.

In *Legal Services Corporation v. Velazquez* (2001),[272] the U.S. Supreme Court declared unconstitutional a restriction imposed by Congress banning funding of any organization that represented individuals in an attempt to change or challenge current welfare law. In a 5 to 4 decision the Court distinguished this case from *Rust v. Sullivan*, handed down ten years earlier. In *Rust*, the Court upheld in another 5 to 4 decision certain regulations imposed by the U.S. Department of Health and Human Services. The regulations banned programs that received federal funding from providing abortion counseling, referral, or advocacy and requiring health care workers on those projects to refer pregnant women to agencies that provided prenatal care but not abortions. The Court said the two cases were different because *Rust* involved governmental speech but *Legal Services Corporation* involved a project "designed to facilitate private speech, not to promote a governmental message. An LSC attorney speaks on behalf of a private, indigent client in a welfare beneflts claim, while the Government's message is delivered by the attorney defending the beneflts decision."[273]

In a case somewhat parallel to *Rust*, the U.S. Supreme Court held in *Rumsfeld v. Forum for Academic and Institutional Rights* (2006)[274] that no First Amendment violation occurs when the federal government requires universities and presumably other institutions that receive federal funding to provide equal access to military recruiters even when it violates a school's antidiscrimination policies.

The case arose in 2003 when FAIR, a group of law schools and law faculties, requested a preliminary injunction to stop enforcement of a federal statute known as the Solomon Amendment that allows the federal government to withhold federal funds from educational institutions if they denied military recruiters the same access

provided to other recruiters on campus. FAIR was opposed to the military's "Don't ask, don't tell" policy against homosexual members. The U.S. District Court denied the request, characterizing recruitment as conduct rather than speech, but also questioned the Department of Defense's interpretation of the amendment. Congress then revised the statute to meet the court's concerns.

On appeal, the Third Circuit U.S. Court of Appeals ruled in favor of FAIR, holding that the revised amendment violated the unconstitutional conditions doctrine by forcing law schools to decide whether to assert their First Amendment rights or receive certain federal funding. The U.S. Supreme Court disagreed, holding that the amendment did not violate the schools' freedom of speech and freedom of association rights under the First Amendment. The Court reasoned that, although the right is not absolute, Congress does have the authority to set conditions for federal funding, and such a requirement is not unconstitutional if it could be constitutionally imposed directly, as it was in this case.

The Court also noted that the amendment regulated conduct, not speech, thus agreeing with the District Court. According to the Supreme Court, "Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what they say about the military's policies."[275]

The Court also said the amendment did not violate the First Amendment's freedom of association rights: "Students and faculty are free to associate to voice their disapproval of the military's message; nothing about the statute affects the composition of the group by making membership less desirable."[276]

One way in which city governments have attempted to reduce crime in certain areas of cities is to turn those areas into restricted zones in which all visitors must obtain permission to enter from appropriate authorities such as the police. In 1997, the Richmond, Virginia City Council turned over the streets of one low-income housing development to the Richmond Redevelopment and Housing Authority, a political subdivision of the state. Under RRHA rules, anyone who wanted to engage in free speech such as distributing leafiets, speaking, or simply visiting family members had to obtain permission from police or a housing authority offlcial. In a unanimous opinion written by Justice Scalia, the U.S. Supreme Court held in *Virginia v. Hicks*[277] that this trespass policy was not overly broad and thus did not violate the First Amendment.

In *Thomas v. Chicago Park District* (2002),[278] the U.S. Supreme Court held in a unanimous decision written by Justice Souter that a city ordinance requiring individuals to obtain permits before conducting large-scale events in public parks did not violate the First Amendment. According to the Court, the restriction was not prior restraint based on subject matter but was instead a content-neutral time, place, and manner regulation of the use of a public forum.

Public Accommodation

Public parades are very effective ways in which groups can express their political, social and religious views, usually to large audiences, with little likelihood of confrontation. But what if individuals with views opposed by the parade organizers want to be part of

the parade? Can the organizers be forced to provide accommodation? In a unanimous opinion delivered by Justice Souter, the U.S. Supreme Court held in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995)[279] that a Massachusetts court's application of a public accommodations statute to require a parade organizer to include marchers for a cause it opposed violated the First Amendment. The ruling is, essentially, a strike against at least some forms of political correctness, but it is clearly a major boost for First Amendment rights. Much of the media coverage focused on the fact that the excluded marchers belonged to an organization of gays, lesbians, and bisexuals. Unfortunately, most of the stories and headlines missed the real signiflcance of the case—its recognition that under the First Amendment speakers cannot be forced to accommodate views with which they disagree. The fact that the group excluded in this case consisted of gays, lesbians, and bisexuals may have been interesting, but it was merely coincidental (i.e., any group could have been excluded including pro-choicers, pro-lifers, Christians, Jews, Muslims, etc.). Also missed in much of the analysis surrounding the decision was the fact that the Court did not declare the state statute unconstitutional; only the manner in which it was applied was a problem.

The case originated when a group known as the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) was excluded from the annual St. Patrick's Day–Evacuation Day Parade in South Boston by the sponsor, the South Boston Allied War Veterans Council led by John Hurley. The parade that typically attracts as many as 20,000 marchers and 1 million spectators is not offlcially sponsored by the city, although the city provides funding for the sponsor and allows it to use the offlcial city seal. No group other than the veterans association has ever applied for the parade permit since the city gave up sponsorship in 1947. When GLIB asked the sponsor for permission to march in the parade in 1992, the veterans council denied the request. GLIB successfully sought a court injunction that required the council to allow it to march. The march, which included GLIB, created no problems, but GLIB was nevertheless denied permission the next year. The group and some of its members then sued the city, the council, and the council leader, claiming their state and federal constitutional rights had been violated.

They also asserted that the denial of their permit violated Massachusetts' public accommodations law that bans "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement."[280] The state trial court ruled in favor of the plaintiffs, holding that the parade met the deflnition of *public accommodation* as deflned under Massachusetts law. Interestingly, the court chided the council for not recognizing that "a proper celebration of St. Patrick's Day and Evacuation Day requires diversity and inclusiveness."[281] The Supreme Judicial Court of Massachusetts afflrmed the trial court decision.

Justice Souter's opinion notes that by the time the case reached the U.S. Supreme Court, only the veterans council was asserting a First Amendment claim. GLIB rested its case solely on the ground that its exclusion from the parade violated the state public accommodations law; it did not claim any violation of its free speech rights. The opinion also noted that the U.S. Supreme Court was required to conduct

a *de novo review*, an independent appellate review in line with *Bose v. Consumers Union* (1984),[282] discussed in Chapter 8.

The Court had no difflculty characterizing parades of this type as "a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches." The court agreed with the state courts that the council had been rather lenient in allowing others to march while excluding GLIB. "But," the Court said, "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 Court had no problem with the public accommodations statute itself, noting that it had a "venerable history" and that its provisions including a variety of types of discrimination were "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or 14th Amendments." The opinion pointed to the peculiar manner in which the law was applied:

> . . . Although the state courts spoke of the parade as a place of public accommodation . . . once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.[283]

The Court rejected the state's argument that *Turner Broadcasting v. FCC* (1994),[284] discussed in Chapter 7, supported the state's position. In *Turner Broadcasting*, which involved the FCC requirement that cable companies set aside channels for designated broadcast stations, the Court applied an intermediate level of scrutiny rather than the traditional strict scrutiny employed in First Amendment cases. "Parades and demonstrations," the *Hurley* Court said, ". . . are not understood to be so neutrally presented or selectively viewed [as channels are on a cable network]." The Court's criticism of the state courts' decisions grew particularly harsh toward the end:

> . . . The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. [cites omitted] While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.[285]

The crystal clear message of *Hurley* is that under the First Amendment a speaker engaging in protected speech cannot be forced to accommodate another speaker with whom he or she chooses not to associate, not matter how worthy the government's goal in forcing the accommodation. The *faux pas* of the Massachusetts courts was converting what was clearly expression or expressive conduct into unprotected conduct (discrimination) simply because the speaker chose not to accommodate the views of a protected group.

Gay and lesbian rights and other interest groups were not universally critical of the decision. For example, the legal director for the Lambda Legal Defense Fund in New York was quoted as saying, "This was a First Amendment decision that didn't have much to say about gay rights. What it does say is actually positive for us."[286]

In 2000, the U.S. Supreme Court tackled the issue of forced public accommodation again—this time in the context of a private, not-for-proflt organization—and homosexual rights were at the center of the case. In *Boy Scouts of America v. Dale* (2000),[287] the Court held in a 5 to 4 decision written by Chief Justice Rehnquist that a New Jersey public accommodations statute requiring the Boy Scouts of America (BSA) to admit a gay Scout violated that organization's First Amendment right of expressive association. The BSA argued that homosexual behavior violated the system of values it tried to instill in young males. An adult assistant scoutmaster for a New Jersey troop flled the suit against the scouts after he was removed from his position when the organization learned that he was a gay rights activist and avowed homosexual. The state statute prohibited discrimination based on sexual orientation in places of public accommodation.

The Court cited *Hurley* extensively in its decision, noting that the standard of review in such cases is the traditional First Amendment analysis or strict scrutiny of *Hurley*, not the intermediate standard of review discussed earlier in this chapter from *United States v. O'Brien*.[288] In its reasoning, the Court said that (1) it disagreed with the New Jersey Supreme Court's view that group's ability to communicate its values would not be signiflcantly affected by the forced inclusion of the gay assistant scoutmaster, (2) even if the BSA discourages its leaders from expressing their views on sexual issues, its method of expression has First Amendment protection, and (3) "the First Amendment does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.'"

Is it forced accommodation if members of a group are assessed a mandatory fee by a public agency that distributes some of the fee to support organizations whose views are contrary to those of some members of the group? That's the question facing the U.S. Supreme Court in *Board of Regents, University of Wisconsin System v. Southworth* (2000).[289] The case involved a required fee paid by students at the University of Wisconsin-Madison that was used to support various campus services and extracurricular activities. Some of the funds were allocated to registered student organizations that engaged in political and ideological expression with which some students strongly disagreed. A group of students flled suit against the university's governing board, claiming that the fee violated their First Amendment rights because they were forced to fund political and ideological speech offensive

to their personal views. In a unanimous opinion written by Justice Kennedy, the U.S. Supreme Court held, "The First Amendment permits a university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech, provided that the program is viewpoint neutral."[290] The Court did say that a university could set up an optional or refund system under which students would not have to subsidize speech they found objectionable, but the Constitution did not impose such a requirement. According to the Court, the key to avoid violating the First Amendment is that the university must maintain viewpoint neutrality in its allocation of funding.

Religious Speech

In *Board of Regents v. Southworth*, the Court cited its 5 to 4 decision flve years earlier in *Rosenberger v. Rector and Visitors of the University of Virginia* (1995).[291] Justice Kennedy wrote the majority opinion in that case as well. In *Rosenberger*, the Court held that the University of Virginia, a state-supported institution, violated the First Amendment right to freedom of speech when it denied a student-run Christian newspaper funds for printing. University guidelines prohibited expending student activities fees to organizations that promoted or manifested beliefs in a deity or "an ultimate reality" (i.e., religious organizations). The case involved a publication called *Wide Awake: A Christian Perspective*. The university collects mandatory fees from each student that are then placed into a Student Activities Fund to support a wide range of student activities including printing costs associated with student newspapers. When the university refused a request for reimbursement for printing costs because the paper was sponsored by a religious organization, the publisher appealed on the grounds that the action abridged the First Amendment right to freedom of speech and freedom of religious expression. The U.S. District Court issued a summary judgment for the school, and the Fourth Circuit Court of Appeals afflrmed, holding that even though the university's discrimination violated freedom of speech, the Establishment Clause forced the university to do so.

The U.S. Supreme Court cited its 1993 decision in *Lamb's Chapel v. Center Moriches Union Free School District*[292] in which it held that it was a violation of the First Amendment for a public school to allow its premises to be used for all forms of speech except those dealing with religion. The justices also cited *R.A.V. v. City of St. Paul,* discussed earlier, as well as a line of similar prior restraint cases, to support the principle that a public university does not violate the Establishment Clause when it provides access to its facilities and resources on a content-neutral basis to student groups, even if some of them espouse religious views.

In another case involving religious speech, *Good News Club v. Milford Central High School* (2001),[293] the Court held that a public high school violated the First Amendment when it refused to allow a Christian organization for 6- to 12-year-olds to hold after-school weekly meetings using the school's facilities. Under school policy, other nonreligious groups (but not religious organizations) were permitted to meet. The school argued that meetings of religious groups would violate

the Establishment Clause of the U.S. Constitution, but the U.S. Supreme Court held that such exclusion discriminated against the club on the basis of its religious viewpoint and thus violated the Free Speech Clause.

Political Communication

The Supreme Court has also devoted considerable attention over the decades to prior restraint on communication within political contexts. This is not surprising in light of the Court's consistent recognition of the importance of political speech.

The First Amendment rights of taxpayers or, more accurately, "Concerned Parents and Taxpayers" were at stake in a 1995 case—*McIntyre v. Ohio Elections Commission*.[294] In a decision written by Justice Stevens (with only Chief Justice Rehnquist and Justice Scalia dissenting), the Court held that a provision of the Ohio Code[295] barring the dissemination of anonymous campaign literature violated the First Amendment. Margaret McIntyre (who died before her appeal reached the U.S. Supreme Court) handed out leafiets at a public meeting at an Ohio middle school in 1988. The leafiets, which expressed opposition to a proposed school tax levy, had been word processed and printed on McIntyre's home computer. There was one problem—some of the circulars omitted her name and instead were signed by "CONCERNED PARENTS AND TAXPAYERS." When a school offlcial who supported the tax told McIntyre that her leafiets violated Ohio law because they were anonymous, she ignored him and handed out more at a meeting the next evening. When the levy passed after flrst failing in two elections, the offlcial flled a complaint against McIntyre with the Ohio Elections Commission. The commission flned her $100, but a state trial court reversed on the grounds that the statutory provision violated the First Amendment and that McIntyre did not "mislead the public nor act in a surreptitious manner." The Ohio Court of Appeals reinstated the flne in a divided vote, and the Ohio Supreme Court afflrmed in a divided vote.

The Ohio appellate courts viewed the mandatory disclosure as a minor inconvenience that provided voters a means of evaluating the validity of political messages and helped prevent fraud, libel, and false advertising. In his opinion, Justice Stevens pointed to the role anonymous publications had played in history, and he cited the principles established the previous year in *Ladue*, discussed above. His opinion stressed the strong protection afforded political communication by the First Amendment. The Court rejected both arguments advanced by the state, noting "the identity of the speaker is no different from other components of the document's content that the author is free to include or not include." The Court was not convinced that the identiflcation requirement would prevent fraud and libel, noting "the prohibition encompasses documents that are not even arguably false or misleading." According to the *McIntyre* Court:

> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. [cite omitted] It thus exemplifles

> the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation *and their ideas from suppression* at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. [cites omitted] Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifles a prohibition of all uses of that speech. The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented. One would be hard pressed to think of a better example of the pitfalls of Ohio's blunderbuss approach than the facts of the case before us.[296]

McIntyre is a resolute afflrmation of First Amendment rights—in this case, those connected with political speech, a category that has traditionally had particularly strong protection against prior restraint. This decision illustrates how First Amendment rights often emerge in the courts in cases involving private individuals. Margaret McIntyre was flned only $100, but her appeal, which was ultimately heard by the U.S. Supreme Court, must have cost her and her estate many times the amount of the flne. She died before the appeal reached the high court, but her contribution to the cause of freedom of speech lives on. As the majority opinion noted, "Mrs. McIntyre passed away during the pendency of this litigation. Even though the amount in controversy is only $100, petitioner, as executor of her estate, has pursued her claim in this Court. Our grant of certiorari . . . refiects our agreement with his appraisal of the importance of the question presented."[297] Unlike many other First Amendment cases, this case received little attention in the mass media.

In *Colorado Republican Federal Campaign Committee et al. v. Federal Election Commission* (1996),[298] the U.S. Supreme Court held that the provision of the Federal Election Campaign Act (FECA) of 1971 that restricts the amount of funds a political party can spend in the general election campaign of a congressional candidate was a violation of the First Amendment, at least as applied in the particular case at hand. The facts in the case were quite simple: the Federal Election Commission charged the Colorado Party with violating the "party expenditure" provision of FECA after the party exceeded the expenditure limits when it bought radio ads attacking the likely opponent of a candidate the party had endorsed. The opinion refiects the general stance of the Court in limits on political campaign expenditures—reasonable limits on candidate expenditures are permissible but limits on spending by political parties and groups usually fail constitutional muster.

A 1997 Supreme Court decision dealt with whether a state could prohibit multiple party or "fusion" candidates for elected offlce. In *Timmons et al. v. Twin Cities Area New Party*,[299] the Court in a 6 to 3 vote upheld Minnesota's laws preventing a person from appearing on a ballot as a candidate for more than one party. The laws did not violate either the First or the 14th Amendments, according to the

majority opinion written by Chief Justice Rehnquist. The Court said states' interests in protecting the integrity, fairness, and efflciency of their ballots and the election processes are sufflciently strong to justify such restrictions. Furthermore, the fusion ban did not severely burden the party's associational rights nor its ability to endorse, support, or vote for any candidate, according to the majority opinion.

In 2000, in *Nixon v. Shrink Missouri Government PAC*,[300] the Court upheld as constitutional Missouri's limits on political campaign contributions for state candidates that ranged from $275 to $1075. In the 6 to 3 decision written by Justice Souter the Court applied a strict scrutiny test, as it had done in an earlier decision, *Buckley v. Valeo* (1976),[301] which upheld the provisions of the Federal Election Campaign Act limiting contributions to federal candidates to $1000 per election. In *Buckley*, the Court did strike down limits on how much candidates could spend.

A year later in *Federal Election Committee v. Colorado Republican Federal Campaign Commission* (2001),[302] the Court answered a question about the Federal Election Campaign Act of 1971 that had been left open in previous Court decisions: does the First Amendment allow coordinated election expenditures by political parties to be treated as contributions, just as coordinated expenditures are treated for other groups? The Republican Party in this case argued such spending in which the party works closely with the candidate is essential because "a party's most important speech is aimed at electing candidates and is itself expressed through those candidates."[303] Thus political parties should have greater freedom to engage in coordinated spending with the candidates themselves. The Court held that coordinated election expenditures were contributions for purposes of the law and thus could be limited, noting that the FEC presented sufflcient evidence that such limits could help to prevent corruption of the political process.

In *Republican Party of Minnesota v. White* (2002)[304] the Court held in a 5 to 4 decision that a state statute prohibiting judicial candidates from announcing their views on disputed legal and political issues was unconstitutional. Minnesota and eight other states then had such statutes that were similar to a provision in the American Bar Association's Model Code of Judicial Conduct. The ABA Code was revised after the decision to state that judicial candidates could not make pledges or promises that commit or appear to commit them on issues that could come before the courts. In other words, candidates can express their views on issues but cannot promise to vote a particular way on an issue. In *Minnesota Republican Party*, the Court had not ruled on the provision that banned promises or pledges on issues.

A year later the Court ruled in *Federal Election Commission v. Beaumont* (2003)[305] that the federal statutory provision that bans direct contributions to candidates in federal elections by corporations including nonproflt advocacy groups did not violate the First Amendment. The Court reasoned that such a ban was important in preventing political corruption and that corporations could still make contributions through PACs (political action committees).

In 2002 Congress amended the Federal Election Campaign Act (FECA) of 1971 to impose strict limits on political donations, especially "soft money"—contributions not made directly to candidates and used instead to support activities such as get-out-the-vote drives, generic party ads, and ads supporting speciflc legislation.

The Bipartisan Campaign Reform Act (BCRA) of 2002, also known as the McCain-Feingold Act, attempted to close a major loophole in FECA. The loophole allowed parties and candidates to spend unlimited funds on issue ads that were designed to infiuence election outcomes but nevertheless could skirt restrictions by avoiding so-called "magic words" such as "Vote for Jack Smith" or "Vote Against "Mary Jones." The BCRA strictly regulated without banning the expenditure of soft money by political parties, politicians, and political candidates. It barred corporations and unions from spending general treasury funds for advertisements and other forms of public communication that were intended to impact or would actually affect federal elections.

In *McConnell v. Federal Election Commission* (2003),[306] the U.S. Supreme Court essentially upheld all the main provisions of the BCRA. There were three majority opinions in the case as well as flve other opinions—either concurring, dissenting or concurring in part and dissenting in part. When the dust settled, it was clear that the Act had withstood constitutional challenge.

Clingman v. Beaver,[307] handed down by the U.S. Supreme Court in 2005, was technically a freedom-of-assembly or right-to-associate case (". . . the right of the people peaceably to assemble") rather than a traditional prior restraint case, but it has implications for political communication including prior restraint.

The case involved an Oklahoma statute that permits only registered members of a particular political party and registered Independents to vote in the party's primary. The Libertarian Party of Oklahoma and members of other political parties flled suit against the state election board, claiming this so-called "semiclosed primary" violated their association rights under the First Amendment.

In a decision written by Justice Thomas, the Supreme Court ruled the statute did not violate the Constitution because any burden it imposed on associational rights was not severe and justifled by legitimate state interests. The Court agreed with the state that such a primary "preserves the political parties as viable and identifiable interest groups, insuring that the results of a primary election, in a broad sense, accurately refiect the voting of the party members."[308] The Court also said the system helped parties' electioneering and party-building efforts "by retaining the importance of party affllliation" and the state had an interest in preventing "party raiding, or 'the organized switching of blocs of voters from one party to another to manipulate the outcome of the other party's primary election.'"[220]

In a plurality opinion written by Chief Justice John G. Roberts, the U.S. Supreme Court in 2007 appeared to strike down the section of the Bipartisan Campaign Reform Act of 2002 that banned corporations and unions from broadcasting ads that refer to a candidate for federal office within 30 days of a federal primary election or 60 days of a federal general election. In *Federal Election Commission v. Wisconsin Right to Life* (2007),[308] the Court said the decision was applicable only to the speciflc campaign involved, but noted that the section was subject to strict scrutiny. The Federal Election Commission had held that the ad at issue was a thinly veiled attack on Wisconsin Senator Russ Feingold (a co-sponsor of the BCRA), but the Court's plurality opinion said the ad was more like a "genuine issue ad."[309]

Nontraditional Speech Contexts

The courts, including the U.S. Supreme Court, have also looked at speech in contexts outside the traditional protest and political arenas. For example, in *Lebron v. National Railroad Passenger Corporation* (1995),[310] the U.S. Supreme Court focused on a simple but signiflcant question: is Amtrak (the National Railroad Passenger Corporation) a government corporation for purposes of the First Amendment? In an 8 to 1 opinion written by Justice Scalia (with only Justice O'Connor dissenting), the Court said "yes." Michael Lebron, who creates controversial billboard displays, signed a contract to display a lighted billboard 103 feet long and 10 feet high in Amtrak's Pennsylvania Station in New York City, subject to content approval by Amtrak. When the corporation learned Lebron's display was a satirical takeoff of a Coors Beer ad, it backed out of the agreement. Captioned "Is It the Right Beer Now?" (a play on Coors' "Right Beer" campaign), the display showed Coors drinkers juxtaposed with Nicaraguan villagers toward whom a can of Coors was aimed like a missile. The text criticized the Coors family for backing right wing causes such as the Nicaraguan contras.

Lebron sued Amtrak, claiming it had violated his First and 5th Amendment rights. A U.S. District Court granted his request for an injunction and ordered Amtrak to display his billboard. The trial court held that Amtrak was a government corporation for purposes of the First Amendment. On appeal by the railroad company, the U.S. Court of Appeals for the 2nd Circuit reversed on the basis that Amtrak was not created as a government corporation and thus its actions could not be considered state actions.

Although Lebron did not speciflcally argue in his original suit in trial court that Amtrak was a government entity for purposes of the First Amendment, the Supreme Court said he could still make such an argument at the appellate level, which he had done. The Court traced the history of Amtrak and other agencies created by Congress and concluded:

> We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.[311]

The Court did not determine whether Lebron's First Amendment rights had been violated, but left that judgment to the lower court.

Lebron is an important First Amendment victory because it clarifles that when government-created entities are established to fulflll governmental objectives and are effectively controlled by the government, it does not matter, for purposes of the First Amendment, what the enabling statute says about an agency's status. In colloquial terms, if it walks like a duck and quacks like a duck, it is a duck for purposes of the First Amendment. *For purposes of the First Amendment* is a crucial limitation of this precedent, which does not affect the status of such an agency for other purposes such as its independence in conducting certain business activities. Nevertheless, the Court's broad interpretation of *governmental agency* appears to encompass a wide range of entities.

In *United States v. National Treasury Employees Union* (1995),[312] the Court ruled that a provision of the Ethics Reform Act of 1989 was unconstitutional because the government failed to meet its heavy burden of proof that a ban on government employees accepting honoraria was justifled. The majority opinion written by Justice Stevens (joined by Justices Kennedy, Souter, Ginsburg, and Breyer, with Justice O'Connor concurring in part and dissenting in part) struck down the provision that prohibited all members of Congress, government offlcers, and all other federal employees from accepting payments for any appearances, speeches, and articles even when such activities had no connection to their offlcial duties.

The suit was brought by a union representing all executive branch workers below grade GS-16. The Court said that when a provision such as this one serves as "a wholesale deterrent to a broad category of expression by a massive number of potential speakers," the government must show that the interests of both the employees and their potential audiences is outweighed by the expression's "necessary impact on the actual operation" (quoting from an earlier decision by the Court) of the Government. The Court acknowledged that Congress' interest in curbing abuses of power of government employees who accept honoraria for their unofflcial and nonpolitical communication activities was "undeniably powerful." But, the Court said, the government had not demonstrated evidence of a problem with the particular group of employees represented by the union in its suit. The Court did reverse the portion of the lower court's decision that applied to senior federal employees. The Supreme Court said this interpretation was too inclusive, thus it conflned the holding to the group of employees for whom the union had flled suit.

National Treasury Employees Union is a fairly narrow holding, but it illustrates once again the Court's reluctance to approve governmental prior restraint, even if the purpose of the restriction may be noble, especially when the government fails to demonstrate substantial harm. Under the ruling, Congress is still free to fashion a provision more friendly to the First Amendment—for example, one that would more effectively deflne the connection or "nexus" between government employment and the restricted speech. Justice Stevens noted that at least two of our great American literary flgures, Herman Melville and Nathaniel Hawthorne, were government employees who wrote when they were not at work. The conservative defectors in this case were Justices Kennedy and O'Connor (with her partial concurrence in the judgment). The diehard conservatives—Chief Justice Rehnquist and Justices Thomas and Scalia—dissented.

United States v. National Treasury Employees Union and *Waters v. Churchill,* discussed earlier, were both cited several times in a decision handed down by the Court in 1996 that decided the extent to which the First Amendment protects independent contractors from flring under termination-at-will contracts for exercising their free speech rights. In *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr* (1996),[313] the Court held that the First Amendment provides such protection and the appropriate test for determining the extent of the protection is a balancing test, known as the *Pickering* test, adjusted to consider the government's interests as contractor rather than employer.

The case involved Keen A. Umbehr, a man who had been hired as an independent contractor to haul the trash for a county government. His contract was not renewed after six years of service during which he openly and extensively criticized the local board of county commissioners at board meetings and in letters and editorials in local newspapers. His targets of criticism included landflll user rates, alleged violations of the state's Open Meetings Act, and alleged mismanagement of taxpayers' funds. Umbehr sued the two members of the three-member board who voted against renewal of the contract, claiming that their action was in retaliation for his outspokenness.

In an opinion written by Justice O'Connor and joined at least in part by all the other justices except Justices Thomas and Scalia, the Court said the appropriate test is a modifled version of one flrst enunciated by the Court in 1968 in *Pickering v. Board of Education, Township High School District 205, Will County.*[314] In order for the plaintiff to win in this case, according to the Court, he must flrst show that his contract was terminated because he spoke out on a matter of public concern, not simply that the criticism occurred before he was flred. In its defense, the board could prove, however, by preponderance of the evidence that the members would have terminated the contract regardless of his speech.

The majority opinion made it clear that the holding in this case was narrow but did acknowledge that, subject to limitations outlined in the decision, "we recognize the right of independent government contractors not to be terminated for exercising their First Amendment rights."[319] Thus the decision effectively expands the conditions under which First Amendment rights against governmental prior restraint apply.

In 1996, the Supreme Court dealt with a similar situation in *O'Hare Truck Service, Inc. et al. v. City of Northlake et al.*[315] in which a towing company owner sued the local government after his company was taken off the list of businesses approved to provide towing services for the city. The owner claimed the removal was in retaliation for his failure to contribute to the mayor's reelection campaign and support for the mayor's opponent. The 7 to 2 decision, written by Justice Kennedy, held that government offlcials may not flre public employees, including a contractor or someone who regularly provides services, for exercising their "rights of political association or the expression of political allegiance." The Court did indicate, however, that the person or company could still be terminated if the government "can demonstrate that party affllliation is an appropriate requirement for the effective performance of the public offlce involved" (citing an earlier Court decision).[316]

Prior Restraint: Post 9/11

The terrorist attacks of September 11, 2001 and the wars that followed in Afghanistan and Iraq have had adverse impacts on freedom of the press and freedom of speech in the United States. Much of the impact has appeared in the form of self-censorship, often under pressure from the government. The Dixie Chicks episode described at the beginning of this chapter is by no means an isolated event. In 2003, telecommunications giant MCI was pressured to stop its television ads featuring *Lethal Weapon* star Danny Glover after he spoke out publicly against the Iraq War and

U.S. policies toward Cuba.[317] In October 2001, a month after the 9/11 attacks, the Bush administration—primarily then-National Security Advisor Condoleezza Rice (who later became Secretary of State)—successfully pushed the major U.S. television networks to carefully review videotaped messages from Osama bin Laden before airing them to make sure our national security was not at risk.[318]

Sinclair Broadcasting, owner of 62 television stations in this country, told seven of its stations not to carry an April 30, 2004, ABC-TV Nightline show in which ABC News anchor Ted Koppel recited the names of more than 700 U.S. service men and women who died in the Iraq War.[319] Sinclair had openly supported the Bush administration and made political contributions. Among the critics of Sinclair's actions was Republican Senator John McCain, who had been a prisoner of war in Vietnam.[320] A New Mexico teacher was suspended by his school after some of the students in his ninth grade made posters protesting the Iraq War, and he refused to take them down.[321]

Public support for the First Amendment continues to decline, as illustrated in a national poll conducted for the *Chicago Tribune* in 2004 that found that about half of the public felt that some form of prior restraint should have been imposed on media coverage of the Abu Ghraib prisoner abuse scandal in Iraq that eventually led to the convictions and punishments of several U.S. soldiers.[322] According to Charles Lewis, a former CBS News producer and head of the Center for Public Integrity, "This ambivalence, in which at least half the country equates draconian security and secrecy measures with its own safety, is quite serious and very possibly insurmountable."[323]

Some of the censorship appears in the form of private censorship, which does not meet the legal deflnition of prior restraint, and thus is legally permissible. For example, the world's largest retailer, Wal-Mart, has banned various forms of content over the years including magazines such as *Maxim*, *Stuff*, and *FHM*[324] and an infamous anti-Semitic book (generally considered a fake) that it sold online until it received complaints from Jewish groups.[325]

The Internet has added a new wrinkle to the prior restraint picture as illustrated by the case of the publication of the alleged confession of Timothy McVeigh who was sentenced to death in 1997 for the Oklahoma City bombing. Apparently fearing that the defendant might seek a temporary restraining order to prevent the paper from reporting what it claimed were the details of a confession made by McVeigh to his attorneys, the *Dallas Morning News* immediately put the story on its web site on the afternoon of the day before it actually appeared in print. This was supposedly the flrst time a major newspaper had taken such a step, but it could become a trend. Obviously ethical issues are involved in such a case, but nothing was illegal about the action of the Dallas newspaper. The story was never mentioned at the trial and no serious attempts were made to prevent publication once the story appeared on the Internet.

Conclusions

Even in the aftermath of 9/11, the government's burden in justifying prior restraint remains substantial. With public support declining for the First Amendment, which is not unusual during wartime, freedom of the press and freedom of speech can

be expected to continue to come under flre as local, state, and federal government agencies challenge the public dissemination of information, especially criticism and exposure of corruption and wrongdoing, on grounds of national security and safety. Freedom of speech, especially political communication, continues to enjoy more protection under the First Amendment than freedom of the press. However, some erosion of such rights has occurred in recent years as illustrated in *Virginia v. Hicks*, *Thomas v. Chicago Park District*, and *McConnell v. Federal Election Commission*. On the other hand, in some contexts the U.S. Supreme Court and other courts have been broadening First Amendment rights, as demonstrated in the 7th Circuit's decision in *Hosty v. Carter* and the 6th Circuit's ruling in *Kinkaid v. Gibson*, both of which signiflcantly expanded the rights of the college press.

We still lack deflnitive answers to certain simple questions: What is symbolic speech? What is "government" for purposes of prior restraint? What is prior restraint? Why is wearing a black armband in a public school protected speech, when burning a draft card is not symbolic speech and therefore can be punished? Why is burning an American fiag a protected expression while the publication of information obtained from publicly available sources (such as in the *Progressive* case) is apparently not covered by the First Amendment?

Some trends are discernible, however. Journalists and students, especially in elementary and secondary public schools, appear to have the least protection of all against prior restraint. *Hazelwood* made it clear that the high school press is perceived by the U.S. Supreme Court as essentially a training ground for budding journalists, not an opportunity for them to exercise First Amendment rights enjoyed by adults. *Morison* and similar cases such as *Snepp* illustrate how easily the government can justify prior restraint including criminal prosecution in certain contexts such as national security matters even though disclosure of such information probably would have limited, if any, impact on national security. Finally, speech within a public forum and individual public speech generally have the strongest protection of all against governmental censorship as *City of Ladue v. Gilleo, Skokie, Lebron v. National Railroad Passenger Corporation, Texas v. Johnson, U.S. v. Eichman*, and *Tinker* demonstrate, but even this principle must be tempered by the Court's stand in *Rust v. Sullivan* that the government can selectively censor information about activities it does not wish to promote when it has subsidized another activity. Furthermore, as *Rumsfeld v. Forum for Academic and Institutional Rights* indicates, there is no First Amendment violation when the federal government requires universities and presumably other institutions that receive federal funding to provide equal access to military recruiters even when such access violates the schools' antidiscrimination policies.

The Court also appears to be broadening the protection for public protesters, although still specifying limits under the First Amendment, as illustrated in *Madsen v. Women's Health Center, Schenck v. Pro Choice Network*, *Scheidler I, Scheidler II,* and *Scheidler III*. However, the U.S. Supreme Court has had no problem drawing some demarcations for First Amendment protection including "fioating buffer zone" versus "flxed buffer zone" in abortion protests and "contributions" versus "expenditures" in political campaigns.

Even U.S. Supreme Court justices sometimes face personal encounters with the First Amendment, as Justice Antonin Scalia can attest. In April 2004, he faced intense criticism from the press after an incident in Hattiesburg, Mississippi in which a federal marshal assigned to protect him ordered two reporters to erase audio recordings of a speech he made to high school students about the importance of the U.S. Constitution. Justice Scalia had a policy at that time, of which the journalists were unaware, that prohibited all electronic recordings of his public presentations. He has since changed that policy.

Endnotes

1. Shenck: *Duty to One's Country* (Conversation with Kurt Vonnegut), 1 CV 58 (Apr. 1989).
2. *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357, 1 Med.L.Rptr. 1001 (1931).
3. W. Blackstone, *Commentaries on the Laws of England* (1820), 151.
4. Charles Kuralt, Annual Joe Creason Lecture at the University of Kentucky Honors Day, Apr. 28, 1989 (reprinted in booklet published by the University of Kentucky School of Journalism and Telecommunications First Amendment Center). The veteran CBS newsman died unexpectedly at the age of 62 on July 4, 1997.
5. *James et al. v. Meow Media, Inc. et al.*, 300 F.3d 683, 30 Med.L.Rptr. 2185 (6th Cir. 2002).
6. *Id.*
7. *Id.*
8. *James et al. v. Meow Media, Inc. et al.*, cert. denied, 537 U.S. 1159, 123 S.Ct. 967, 154 L.Ed.2d 893, (2003).
9. *See* Sumana Chatterjee, *TV Networks Agree to Review bin Laden Tapes before Airing*, Lexington (Ky.) Herald-Leader, Oct. 11, 2001, at A5.
10. *See* Mark Washburn, *Audience Cheers Chicks on First Return Gig in U.S.*, Lexington (Ky.) Herald-Leader), May 2, 2003, at A2.
11. Simon Stack, 57 J. Epidemiol. Commun Health (April 2003), at 238.
12. *Planned Parenthood of Columbia/Willamette Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002). *See* also Stephanie Francis Cahill, *Threatening Posters Banned*, ABA J. eReport (May 24, 2002).
13. Ben Grossman, *The Impact of Virginia Tech on the News,* Broadcasting & Cable, April 23, 2007, and *Tyndall Report: The History of Saturation Coverage,* Broadcasting & Cable, April 23, 2007.
14. *Eimann v. Soldier of Fortune Magazine Inc.*, 880 F.2d 830 (5th Cir.), 16 Med.L.Rptr. 2148 (1989), cert. denied, 493 U.S. 1024, 110 S.Ct. 729, 107 L.Ed.2d 748 (1990).
15. *Id.*
16. *Braun v. Soldier of Fortune Magazine Inc.*, 757 F.Supp. 1325, 18 Med.L.Rptr. 1732 (M.D. Ala. 1991).
17. *Id.*, 968 F.2d 1110, 20 Med.L.Rptr. 1777 (11th Cir. 1992), cert. denied, 506 U.S. 1071, 113 S.Ct. 1028, 122 L.Ed.2d 173 (1993).
18. *Black's Law Dictionary*, 5th ed. (1979), 288.
19. *Congress Passes Bill To Allow Mother, Child Back into U.S.*, Lexington (Ky.) Herald-Leader, Sept. 19, 1996, at A4.
20. *Sanders v. Shepard*, 258 Ill.App.3d 626 (1994). *See* Sharon Cohen and Sarah Nordgren, *Seven Years for Keeping Mum*, 80 A.B.A. J. (Feb. 1995), at 16.
21. Cindy Richards, *A Mother's Long Nightmare Comes to an End in Tragedy* (editorial), Chicago Sun-Times, Jan. 30, 1998, at 33.
22. David D. Kirkpatrick, *Book Contract for Writer Jailed for Contempt*, New York Times, Apr. 30, 2002, at A26.

23. Jesse McKinley, *8-Month Jail Term Ends as Maker of Video Turns Over Copy,* New York Times, April 4, 2007, at A9.
24. *Farr v. Superior Court of Los Angeles County*, 22 Cal.App.3d 60, 99 Cal.Rptr. 342, 1 Med. L.Rptr. 2545 (1971).
25. 22 Cal.App.3d. 60 (1971).
26. Cert. denied, 409 U.S. 1011, 93 S.Ct. 430, 34 L.Ed.2d 305 (1972).
27. California Constitution, §2, subd. (b). Farr's troubles did not end with the California Court of Appeals decision. Two of the six lawyers Farr named when he refused to identify specific sources sued him for libel but were unsuccessful because they failed to file suit within California's five-year statute of limitations.
28. G. Gunther, *Constitutional Law*, 5th ed., Foundation Press, Stamford, CT (1980), 384.
29. *Nebraska Press Association v. Judge Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683, 1 Med.L.Rptr. 1064 (1976).
30. Rachel Smolkin, *A Source of Encouragement*, Am. Journal. Rev., Aug.–Sept. 2005, at 30.
31. *Id.*
32. *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972, cert. denied, 414 U.S. 979, 94 S.Ct. 270, 38 L.Ed.2d 223 (1973).
33. *Id.*
34. *Id.*
35. *United States v. Dickinson*, cert. denied, 414 U.S. 979, 94 S.Ct. 270, 38 L.Ed.2d 223 (1973).
36. 18 U.S.C.A. §401.
37. *Jail Birds (Drop Cap)*, Am. Journal. Rev. Aug.–Sept. 2005, at 18. The report is based on information from the Reporters Committee for Freedom of the Press.
38. *Bridges v. California*, 314 U.S. 252, 625 S.Ct. 190. 86 L.Ed. 192 (1941).
39. *Id.*
40. *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed.2d 1295 (1946).
41. *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947).
42. *Id.*
43. *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 568 (1962).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Near v. Minnesota.*
48. F. Friendly, *Minnesota Rag,* Random House (1981).
49. *See* note 1 of Associate Justice Pierce Butler's dissent.
50. *See* Friendly and Elliott, *supra*, for a telling account of circumstances surrounding the decision.
51. *Id.* at 46.
52. *Near v. Minnesota.*
53. *Id.*
54. *Id.*
55. *Id.*
56. The Fourteenth Amendment also states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States [known as the privileges and immunities clause]; nor shall any State deprive any person of life, liberty, or property, without due process of law [due process clause]; nor deny to any person within its jurisdiction the equal protection of the laws" [equal protection clause]; §5 grants Congress the authority to enforce the amendment.
57. *New York Times Co. v. U.S.* and *U.S. v. The Washington Post Co.*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822, 1 Med.L.Rptr. 1031 (1971).

58. *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 110, 11 L.Ed.2d 686, 1 Med.L.Rptr. 1527 (1964). *See* Chapter 8, this volume.
59. *Near v. Minnesota.*
60. *Id.*
61. *Id.*
62. *See* Friendly and Elliott, *supra*, at 49.
63. Robert S. McNamara, *In Retrospect: The Tragedy and Lessons of Vietnam,* New York: Random House (1995), at 281.
64. S. Ungar, *The Papers and the Papers*, (New York: E.P. Dutton, 1989), at 69. This is a highly informative account of the legal and political battles in the Pentagon Papers case.
65. *Id.* at 65. .
66. *Id.* at 83.
67. *Id.* at 95
68. *New York Times Co. v. United States* and *United States v. The Washington Post.*
69. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584, 1 Med.L.Rptr. 1116 (1963).
70. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d. 1, Med. L.Rptr. 1021 (1971).
71. *New York Times Co. v. United States* and *United States v. The Washington Post.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *See* chapter 3 in S. Ungar, supra, for an insightful account of Gravel's efforts including a fllibuster that was cut short after he began crying while he was trying to read "a section of the Papers describing the severing of arms and legs in battle" (p. 262).
80. 18 U.S.C. §641.
81. For example, he told an audience at Eastern Kentucky University in March 2004, "Vietnam would have been avoided if the truth had been told. The biggest lie of this year is that the war against Iraq is connected to the war against terror." See Adam Baker, *Against the Grain*: *Whistle-Blower Sees Similarities in Iraq, Vietnam*, The Eastern Progress (Eastern Kentucky University), Apr. 1, 2004, at A10.
82. Ungar, *supra*, at 301.
83. *The World Almanac and Book of Facts* (1989), at 209.
84. *Bartnicki v. Vopper*, 532 U.S. 514, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001).
85. 18 U.S. C. §2511(1)(a).
86. Ungar, *supra*, at 306.
87. 42 U.S.C. §2011 et seq.
88. *Id.* at §2014 (y).
89. *Id.* at §2280.
90. *U.S. v. The Progressive, Inc.* 467 F.Supp. 990 (W.D. Wisc. 1979), appeal dismissed as moot, 610 F.2d 819 (7th Cir. 1979).
91. *Id.*
92. *Id.*
93. *Id.*
94. The *Wisconsin State Journal* and the *Capital-Times*.

95. *Nebraska Press Association v. Judge Hugh Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683, 1 Med.L.Rptr. 1059 (1970).
96. *Id*.
97. *Id*.
98. *Id*.
99. *Id*.
100. *Id*.
101. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, 1 Med.L.Rptr. 1220 (1966).
102. *Nebraska Press Association v. Judge Stuart*, supra.
103. *United States v. Noriega*, 752 F.Supp. 1045 (S.D. Fl. 1990).
104. *In re Cable News Network, Inc*., 917 F.2d 1543 (11th Cir. 1990).
105. *In re Cable News Network, Inc*., cert. denied, 498 U.S. 976, 111 S.Ct. 451, 112 L.Ed.2d 432, 18 Med.L.Rptr. 1359 (1990).
106. *United States v. Noriega*.
107. *Associated Press v. District Court for the Fifth Judicial District of Colorado*, 542 U.S. 1301, 125 S.Ct. 159 L.Ed.2d 800 (2004) (stay denied).
108. *The People of the State of Colorado v. Kobe Bean Bryant*, 94 P.3d 624, 32 Med.L.Rptr. 1961 (Colo. 2004).
109. George W. Pring and Penelope Canan, *SLAPPs: Getting Sued for Speaking Out,* Philadelphia: Temple University Press (1996).
110. *Id*.
111. http://www.casp.net/into.html.
112. Margaret Graham Tebo, *Offended by a SLAPP*, 91 A.B.J. (Feb. 2005), at 16.
113. *Id*.
114. *Id*. at 32.
115. *See* Alexander D. Lowe, *The Price of Speaking Out*, 82 A.B.J. (Sept. 1996), at 48.
116. *Id*.
117. *Jay Fox v. State of Washington*, 236 U.S. 273, 35 S.Ct. 383, 59 L.Ed. 573 (1915).
118. *Schenck v. United States* and *Baer v. United States*, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919).
119. *Id*.
120. *Id*.
121. *Id*.
122. *Jacob Abrams v. United States*, 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919).
123. *Id*. (Holmes dissent).
124. *Id*. (majority opinion).
125. *Id*. (Holmes dissent).
126. *See*, for example, *Jacob Frohwerk v. United States*, 249 U.S. 204, 39 S.Ct. 249, 63 L.Ed. 561 (1919); *Eugene V. Debs v. United States*, 249 U.S. 211, 39 S.Ct. 252, 63 L.Ed. 566 (1919); *Peter* Schafer v. United States, 251 U.S. 466, 40 S.Ct. 259, 64 L.Ed. 360 (1920); and Clinton H. *Pearce v. United States*, 252 U.S. 239, 40 S.Ct. 205, 64 L.Ed.542 (1919).
127. *Benjamin Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925).
128. New York Penal Law §§160, 161 (as cited in *id*.).
129. Clause 1: "nor shall any State deprive any person of life, liberty or property, without due process of law. . . ."
130. *Gitlow v. New York*, *supra*.
131. *Id*.
132. *Id*.
133. *See* F. Friendly and M. Elliott, *supra*, at 79.

134. *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927).
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Clarence Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).
140. *Id.*
141. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).
142. *Id.*
143. *Id.*
144. *Daniel Niemotko v. Maryland* and *Neil W. Kelly v. Maryland*, 340 U.S. 268, 71 S.Ct. 303, 95 L.Ed. 295 (1951).
145. *Irving Feiner v. New York*, 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 295 (1951).
146. *Id.*
147. *Cox v. Louisiana* (Cox I), 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965).
148. *Cox v. Louisiana* (Cox II), 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965).
149. *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951).
150. *Id.*
151. *Id.*
152. *Nationalist Socialist Party v. Village of Skokie*, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977). *See* F. Friendly and M. Elliott, *supra*, at 81. Chapter 5 gives a detailed and colorful account of the Skokie case.
153. *Nationalist Socialist Party v. Village of Skokie.*
154. 366 N.E.2d 347 (1977).
155. 373 N.E.2d 21 (1978).
156. *United States v. Snepp*, 456 F.Supp. 176 (E.D. V. 1978).
157. *Snepp v. United States*, 595 F.2d 926 (4th Cir. 1979).
158. *Frank W. Snepp v. United States* and *United States v. Frank W. Snepp*, 444 U.S. 507, 100 S.Ct. 763, 62 L.Ed.2d 704 (1980).
159. *Id.*
160. *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).
161. 50 U.S.C. §462(b)(3) of the Universal Military Training and Service Act of 1948 and §12(b)(3) of the amendment.
162. *United States v. O'Brien.*
163. *Id.*
164. *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).
165. *Spence v. Washington*, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974).
166. *Id.*
167. *Id.*
168. *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).
169. Epstein, *High Court Upholds Right to Burn Flag*, Lexington (Ky.) Herald-Leader, June 22, 1989, at A1.
170. *Texas v. Johnson.*
171. *Id.*
172. Media Access Project's Andy Schwartzman, quoted in *And the First Shall Be First*, Broadcasting (July 3, 1989), at 25.
173. *Texas v. Johnson.*

174. George F. Will, *The Justices Are Wrong—But Keep Off the Constitution*, syndicated column published in Lexington (Ky.) Herald-Leader, July 2, 1989, at F7.
175. James J. Kilpatrick, *First Amendment: It Ain't Broke, So Don't Fix It*, syndicated column published in Lexington (Ky.) Herald-Leader, June 29, 1989, at A19.
176. *United States v. Eichman et al.* and *United States v. Haggerty et al.*, 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990).
177. 103 Stat. §777, 18 U.S.C. §700 (Suppl. 1990).
178. *Id.*
179. *Id.*
180. *See Flag Amendment Flies Again*, CBSNews.com, June 3, 2003.
181. Cal Thomas, *A Flag Amendment Would Defeat Its Purpose*, syndicated column published in Lexington (Ky.) Herald-Leader, July 9, 1995, at E3.
182. *Id.*
183. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).
184. St. Paul, Minn. Legis. Code §292.02 (1990).
185. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).
186. *In re Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991).
187. *R.A.V. v. City of St. Paul.*
188. *Id.*
189. *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003).
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* (Thomas dissent).
195. *Id.* (note 2).
196. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).
197. *Id.*
198. *Id.*
199. *Id.*
200. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592, 14 Med.L.Rptr. 2081 (1988).
201. *October 13: The Student Press's Turn*, 3 Student. Press L. Ctr. Rep. (Winter 1987–1988), at 3.
202. *Id.*
203. *Kuhlmeier v. Hazelwood School District*, 795 F.2d 1368 (8th Cir. 1986).
204. *Hazelwood School District v. Kuhlmeier.*
205. *Tinker v. Des Moines School District.*
206. *Hazelwood School District v. Kuhlmeier.*
207. *Id.*
208. *Id.*
209. *See* Hazelwood: *A Complete Guide to the Supreme Court Decision*, 9 Student Press L. Ctr. Rep. (Spring 1988), at 3 for a detailed analysis of the decision including Model Guidelines for Student Publications.
210. P. Parsons, *Student Press Censorship Reborn within Hours of Hazelwood Ruling*, 15 Media L. Notes (Winter 1988), at 12.
211. Anderson, 11 Presstime (Feb. 1989), at 6.
212. Johnson, Louisville (Ky.) Courier-Journal, Nov. 13, 1988.

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215. *Only the News That's Fit to Print: Student Expressive Rights in Public School Communications Media after Hazelwood v. Kuhlmeier* [note], 11 Hastings Comm. Ent. L.J. 35 (1988).
216. *Id*. at 74.
217. Cal. Educ. code §48907 (West Suppl. 1987).
218. Mass. Gen. L., Chap. 71, §§82, 86 (Suppl. 1988).
219. *Iowa Expression Law Loosens Hazelwood's Grasp*, 10 Student Press L. Ctr. (Fall 1989), at 3.
220. *Id*. at 4.
221. *Hazelwood v. Kuhlmeier*, note 7.
222. *Muller v. Jefferson Lighthouse School*, 604 F. Supp. 655 (7th Cir. 1996); cert. denied, 117 S.Ct. 1335, 137 L.Ed.2d 495 (1997).
223. *Kinkaid v. Gibson*, 236 F.3d 342, 29 Med.L.Rptr. 1193 (6th Cir. 2001).
224. *Hosty v. Carter*, 412 F.3d 731, 33 Med.L.Rptr. 1897 (7th Cir. 2005).
225. *Hosty v. Carter*, 325 F.3d 945, 31 Med.L.Rptr. 1577 (7th Cir. 2003).
226. *See* Gina Holland, *Court Won't Hear Campus Newspaper Appeal*, Seattle Post-Intelligencer, Feb. 21, 2006, online edition.
227. *Hosty v. Carter*, cert. denied, 546 U.S. 169, 126 S.Ct. 1330, 164 L.Ed.2d 47 (2006). *Also see* Sara Lipka, *Stopping the Presses*, Chron. Higher Educ. Mar. 3, 2006, at A35.
228. *See* John K. Wilson, *A Threat to Freedom*, insidehighered.com., Feb. 23, 2006, online edition.
229. *Deborah Morse v. Joseph Frederick*, 127 S.Ct. 2618, 168 L.Ed. 2d 290 (2007).
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231. *See* C. Crystal, *Media Fight Man's Sentence in Navy 'Leaks' Case, 1987–1988*, Sigma Delta Chi Freedom of Info. Rep., at 24. D.M. Brenner, Sigma Delta Chi Freedom of Info. Rep. 1988–1989, at 20.
232. 8 U.S.C. §641, 793 (1953).
233. 844 F.2d 1057, 15 Med.L.Rptr. 1369 (4th Cir. 1988).
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236. *Id*.
237. *See* David Kravets, *Cashing in on Crimes*, A.B.A. J. eReport (Mar. 1, 2002).
238. *Id*.
239. *Keenan v. Superior Court*, 27 Cal. 4th 413, 40 P.3d 718, 30 Med.L.Rptr. 1385 (Cal. 2002).
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241. *Seres v. Lerner*, 102 P.3d 91, 33 Med.L.Rptr. 1139 (2004).
242. *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).
243. *Id*.
244. *Id*.
245. *Id*.
246. *Id*.
247. *Id*.
248. *National Organization for Women v. Scheidler (Scheidler I)*, 510 U.S. 249, 114 S.Ct.798, 127 L.Ed.2d 99 (1994).
249. *Id*.
250. *Scheidler v. National Organization for Women (Scheidler II)*, 537 U.S. 393, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003).

251. Such injunctions are permitted under 18 U.S.C. §1964 of the Racketeer Infiuenced and Corrupt Organizations Act.
252. *See* 18 U.S.C. §1951(b)(2).
253. *Scheidler II*.
254. *Scheidler v. NOW (Scheidler III)*, 547 U.S. 9, 126 S.Ct. 1264, 164 L.Ed.2d 10 (2006).
255. *Madsen v. Women's Health Center*, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994).
256. *Operation Rescue v. Women's Health Center*, 626 So.2d 664 (Fl. 1993).
257. *Cheffer v. McGregor*, 41 F.3d 1422 (11th Cir. 1994).
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