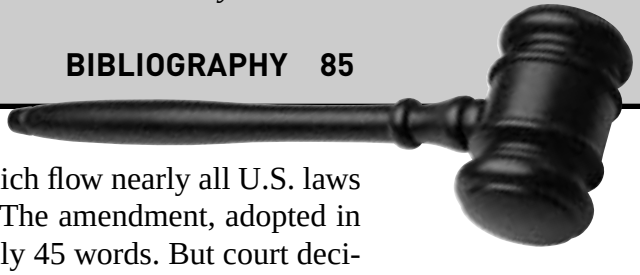
Chapter 2

THE FIRST AMENDMENT
The Meaning of Freedom



The First Amendment is the wellspring from which flow nearly all U.S. laws on freedom of speech and freedom of the press. The amendment, adopted in 1791 as a part of the Bill of Rights, comprises only 45 words. But court decisions during the past two-plus centuries have added substantial meaning to this basic outline. In this chapter we explore the evolution of the centuries-old notion of freedom of expression, outline the adoption of the First Amendment, and examine the development of some elements of the fundamental meaning of freedom of speech and press.

HISTORICAL DEVELOPMENT

Freedom of expression is not exclusively an American idea. It grew from crude beginnings traced back to Socrates and Plato. The concept developed more fully during the past 400 years. The modern history of freedom of the press began in England during the 16th and 17th centuries as printing developed. Today the most indelible embodiment of the concept is the First Amendment to the U.S. Constitution, forged in the last half of the 18th century by individuals who built upon their memory of earlier experiences and unchanged in its wording for more than 215 years. To understand the meaning of freedom of the press and freedom of speech, it is necessary to understand the meaning of censorship, for viewed from a negative position freedom of expression can be simply defined as the absence of censorship or a freedom from government control.

FREEDOM OF THE PRESS IN ENGLAND

When William Caxton set up the first British printing press in Westminster in 1476, his printing pursuits were restricted only by his imagination and ability. There were no laws governing what he could or could not print—he was completely free. For more than five centuries, the British and Americans have attempted to regain the freedom that Caxton enjoyed, for shortly after he started publishing, the British Crown began to regulate the printing presses in England. Printing developed during a period of great religious struggle in Europe, and it soon became an important tool in that struggle. Printing presses made communication with hundreds of people fairly easy and in doing so gave considerable power to small groups or individuals who owned or could use a printing press.

The British government soon realized that unrestricted publication and printing could seriously dilute its own power. Information is a potent tool in any society, and those who control the flow and content of information exercise considerable power. The printing press broke the Crown's monopoly of the flow of information, and therefore control of printing was essential.

Between 1476 and 1776 the British devised and used several means to limit or restrict the press in England. **Seditious libel** laws were used to punish those who criticized the government or the Crown, and it did not matter whether the criticism was truthful or not. The press also suffered under **licensing** or **prior restraint** laws, which required printers to obtain prior approval from the government or the church before printing their handbills, pamphlets or newspapers. Printers were often required to deposit with the government large sums of money called **bonds.** This money was forfeited if material appeared that the government felt should not have been published. And the printer was forced to post another bond before printing could be resumed. The British also granted special patents and monopolies to certain printers in exchange for their cooperation in printing only acceptable works and in helping the Crown ferret out other printers who broke the publication laws.

As ideas about democracy spread throughout Europe, it became harder and harder for the government to limit freedom of expression.

British control of the press during these 300 years was generally successful, but did not go unchallenged. As ideas about democracy spread throughout Europe, it became harder and harder for the government to limit freedom of expression. The power of the printing press in spreading ideas quickly to masses of people greatly helped foster the democratic spirit. Although British law regulated American printers as well during the colonial era, regulation of the press in North America was never as successful as it was in Great Britain.

FREEDOM OF THE PRESS IN COLONIAL AMERICA

There were laws in the United States restricting freedom of the press for almost 30 years before the first newspaper was published. As early as 1662, statutes in Massachusetts made it a crime to publish anything without first getting prior approval from the government, 28 years before Benjamin Harris published the first—and last—edition of Publick Occurrences. The second and all subsequent issues of the paper were banned because Harris had failed to get permission to publish the first edition, which contained material construed to be criticism of British policy in the colonies, as well as a report that scandalized the Massachusetts clergy because it said the French king took immoral liberties with a married woman (not his wife).

Despite this inauspicious beginning, American colonists had a much easier time getting their views into print (and staying out of jail) than did their counterparts in England. There was censorship, but American juries were reluctant to convict printers prosecuted by the colonial authorities. The colonial governments were less efficient than the government in England. Also, the British had only limited control over the administration of government in many of the colonies.

The British attempted to use licensing, taxes, and sedition laws to control American printers and publishers. Licensing, which ended in England in 1695, lasted until the mid-1720s in the American colonies. Benjamin Franklin's older brother James was jailed in 1722 for failing to get prior government approval for publishing his New England Courant. The unpopular government move failed to daunt the older Franklin, and licensing eventually ended in the colonies as well. The taxes levied against the press, most of which were genuine attempts to raise revenues, were nevertheless seen as censorship by American printers and resulted in growing hostility toward Parliament and the Crown. Most publishers refused to buy the tax stamps, and there was little retribution by the British.

Undoubtedly, the most famous case of government censorship in the American colonies was the seditious libel trial of immigrant printer John Peter Zenger, who found himself involved in a vicious political battle between leading colonial politicians in New York. Zenger published the *New York Weekly Journal*, a newspaper sponsored by Lewis Morris and James Alexander, political opponents of the unpopular colonial governor, William Cosby. Zenger was jailed in November 1734 after his newspaper published several stinging attacks on Cosby, who surmised that by jailing the printer—one of only two working in New York—he could silence his critics. There is little doubt that Zenger was guilty under 18th-century British sedition law. But his attorneys, including the renowned criminal lawyer Andrew Hamilton, were able to convince the jury that no man should be imprisoned or fined for publishing criticism of the government that was both truthful and fair. Jurors simply ignored the law and acquitted the German printer. It was an early example of what today is called **jury nullification**—the power of a jury in a criminal case to ignore (and thereby to "nullify") a law and to return a verdict (typically a not guilty verdict) according to its conscience. While certainly controversial and relatively rare, jury nullification can be seen as an essential part of the legislative process because a law that is repeatedly nullified by juries probably should be revised or discarded by the legislative body that created it.

The verdict in the Zenger case was a great political triumph but did nothing to change the law of seditious libel. In other words, the case did not set an important legal precedent. But the revolt of the American jurors did force colonial authorities to reconsider the use of

Source: © Bettmann/CORBIS

The trial of John Peter Zenger in New York in 1734. The printer was defended by attorney Andrew Hamilton and the acquittal of the printer put the British Crown on notice that American jurors were not inclined to convict those who criticized British officials.

sedition law as a means of controlling the press. While a few sedition prosecutions were initiated after 1735, there is no record of a successful prosecution in the colonial courts after the Zenger case. The case received widespread publicity both in North America and in England, and the outcome of the trial played an important role in galvanizing public sentiment against this kind of government censorship.

The Zenger trial today is an accepted part of American journalism mythology, but it doesn't represent the end of British attempts to control the press in the American colonies. Other means were substituted for sedition. Rather than haul printers and editors before jurors hostile to the state, the government instead hauled them before colonial legislatures and assemblies that were usually hostile to journalists. The charge was not sedition, but breach of parliamentary privilege or contempt of the assembly. There was no distinct separation of powers then, and the legislative body could order printers to appear, question them, convict them and punish them. Printers and publishers were thus still being jailed and fined for publications previously considered seditious. Only the means of exacting this punishment had changed.

Yet despite these potent sanctions occasionally levied against publishers and printers, the press of this era was remarkably robust. Researchers who have painstakingly read the newspapers and pamphlets and handbills produced in the last half of the 18th century are struck by the seeming lack of concern for government censorship. Historian Leonard Levy notes in his book "Emergence of a Free Press" the seeming paradox uncovered by scholars who seek to understand the meaning of freedom of expression during that era.[1] "To one [a scholar] whose prime concern was law and theory, a legacy of suppression [of the press] came

1. Levy, *Emergence of a Free Press.*

into focus; to one who looks at newspaper judgments on public men and measures, the revolutionary controversy spurred an expanding legacy of liberty," he wrote. What Levy suggests is that while the law and legal pronouncements from jurists and legislatures suggest a fairly rigid control of the press, in fact journalists and other publishers tended to ignore the law and suffered little retribution.

But the appearance of such freedom can be deceptive, as political scientist John Roche points out in his book "Shadow and Substance,"[2] for the community often exerted tremendous, and sometimes extralegal, pressure on anyone who expressed an unpopular idea. The belief of many people that freedom was the hallmark of society in America ignores history, Roche argues. In colonial America the people simply did not understand that freedom of thought and expression meant freedom for the other person also, particularly for the person with hated ideas. Roche points out that colonial America was an open society dotted with closed enclaves—villages and towns and cities—in which citizens generally shared similar beliefs about religion and government and so forth. Citizens could hold any belief they chose and could espouse that belief, but personal safety depended on the people in a community agreeing with a speaker or writer. If they didn't, the speaker then kept quiet—an early example of self-censorship or what scholars today call a "chilling effect" on speech—or moved to another enclave where the people shared those ideas. While there was much diversity of thought in the colonies, there was often little diversity of belief within individual towns and cities, according to Roche.

The belief of many people that freedom was the hallmark of society in America ignores history.

The propaganda war that preceded the Revolution is a classic example of the situation. In Boston, the patriots argued vigorously for the right to print what they wanted in their newspapers, even criticism of the government. Freedom of expression was their right, a God-given right, a natural right, a right of all British subjects. Many people, however, did not favor revolution or even separation from England. Yet it was extremely difficult for them to publish such pro-British sentiments in many American cities after 1770. Printers who published such ideas in newspapers and handbills did so at their peril. In cities like Boston the printers were attacked, their shops were wrecked, and their papers were destroyed. Freedom of the press was a concept with limited utility in many communities for colonists who opposed revolution once the patriots had moved the populace to their side.

Community Censorship Then and Now

The plight of the pro-British printer in Boston in the 1770s is not a unique chapter in American history. Today such community censorship still exists—and in some instances is growing. In recent years extreme pressure has been exerted on many retailers, for example, to exclude so-called men's magazines like Playboy from their newsstands. Students at some universities have attempted to block the appearances of right-wing speakers with whom they disagree. For instance, in March 2004, after word had spread on campus that President George W. Bush would welcome the chance to be the commencement speaker at the University of Arizona, "it was faculty, staff and graduate students who raised a ruckus, with nearly 400 signing a letter arguing that his appearance would be inappropriate in an election year. The White House later

2. Roche, *Shadow and Substance.*

Filmmaker Michael Moore was a controversial speaker on college campuses during the presidential election year of 2004. He is shown here criticizing a heckler during an on-campus speech.

said Bush would be unavailable."[3] But such instances of nongovernmental community censorship also run in the opposite political direction, as when The New York Times' Chris Hedges, "a war correspondent who sharply criticized the war in Iraq, had to cut his speech short after he was repeatedly interrupted by boos and his microphone was unplugged twice" during a commencement address at Rockford College in Illinois.[4] This is an example of what attorneys sometimes call a **heckler's veto**—when a crowd or audience's reaction to a speech or message is allowed to control and silence that speech or message. In an ideal world, of course, speakers from *both* the right and the left would be allowed to speak freely on college campuses in order to expose students to competing viewpoints. This was the case, for instance, when Pennsylvania State University played host on the same day shortly before the presidential election of 2004 to both liberal filmmaker Michael Moore of "Fahrenheit 9/11" fame and conservative talk-radio host Michael Gallagher, who made his own rebuttal movie, cleverly called "Fahrenhype 9/11."[5] Unfortunately, such instances in which universities live up to the ideal of a diverse marketplace of ideas are rare; indeed, California State University San Marcos president Karen Haynes revoked an invitation in September 2004 to the left-leaning Moore to speak on campus, purportedly because Moore's speech would create a partisan appearance on the state-funded campus in a presidential election year.[6] But community censorship is not just a problem on college campuses; it was famously present when radio stations across the country, in response to outraged conservatives, stopped playing songs by the

3. Marklein, "It's Not Easy."
4. Young, "The Tyranny of Hecklers."
5. O'Connor, "Packed Crowd Gets First Look."
6. Vargo, "Speaking Tonight." In an interesting side note, after Haynes revoked Moore's invitation, students at Cal State San Marcos raised $45,000 to sponsor an appearance by Moore off campus at the nearby Del Mar Fairgrounds in October 2004. Moore ended up speaking there to a crowd of 10,000 (he drew about 7,350 people during his appearance at Penn State mentioned in the text above) as part of his Slacker Uprising Tour—"10 times the audience he would have had if he had not been banned from Cal State San Marcos." Petrillo and Burge, "Slacker Tour."

Dixie Chicks, a Dallas-based country music trio, in early 2003 after lead singer Natalie Maines told an audience in London, England, that "we're ashamed the President of the United States is from Texas."[7] In 2006, a Utah theater refused to show the movie "Brokeback Mountain."

Libraries continue to be the target of those who seek to ban books that they find objectionable. For instance, the American Library Association announced in 2005 that Robert Cormier's book "The Chocolate War" was the most challenged book of 2004 due to its sexual content and offensive language. In many of these instances the general public finds little cause for concern about such censorship. Public malaise about such conditions is dangerous. No individual's freedom is secure unless the freedom of all is ensured. This last point—that the freedom of speech must be ensured for *all* people, not simply those on one side of the political spectrum—is critical. As Nadine Strossen, president of the American Civil Liberties Union, told one of the authors of this textbook, "the notion of neutrality is key. You cannot have freedom of speech only for ideas that you like and people that you like."[8] Those who would engage in community censorship because they don't like what someone has to say would be wise to remember this principle of viewpoint neutrality embodied in the freedom of speech.

SUMMARY

Freedom of the press is part of the great Anglo-American legal tradition, but it is a right that has been won only through many hard-fought battles. The British discovered the power of the press in the early 16th century and devised numerous schemes to restrict publication. Criticism of the government, called seditious libel, was outlawed. Licensing or prior censorship was also common. In addition, the Crown for many years used an elaborate system of patents and monopolies to control printing in England.

While under British law for more than 100 years, American colonists enjoyed somewhat more freedom of expression than did their counterparts in England. Censorship laws existed before the first printing press arrived in North America, but they were enforced erratically or not at all. Licensing ended in the United States colonies in the 1720s. There were several trials for sedition in the colonies, but the acquittal of John Peter Zenger in 1735 by a recalcitrant jury ended that threat. Colonial legislatures and assemblies then attempted to punish dissident printers by using their contempt power. By the time the American colonists began to build their own governments in the 1770s and 1780s, they had the history of a 300-year struggle for freedom of expression on which to build.

THE FIRST AMENDMENT

In 1781, even before the end of the Revolutionary War, the new nation adopted its first constitution, the Articles of Confederation. The Articles provided for a loose-knit confederation of the 13 colonies, or states, in which the central or federal government had little power. The Articles reflected the spirit of the Declaration of Independence, adopted five years earlier,

7. Parks, "Chicks Face 'Landslide.'"
8. Richards and Calvert, "Nadine Strossen and Freedom of Expression," 202.

which ranked the rights of individuals in the society higher than the needs of a government to organize and operate a cohesive community. The Articles of Confederation did not contain a guarantee of freedom of expression. In fact, it had no bill of rights of any kind. The individuals who drafted this constitution did not believe such guarantees were necessary. Guarantees of freedom of expression were already a part of the constitutions of most of the 13 states. Virginia, for example, had adopted a new constitution that contained a declaration of rights in June 1776, five years before the Articles of Confederation were written. Freedom of the press was guaranteed as a part of that declaration of rights. Other states soon followed Virginia's lead.

But the system of government created by the Articles of Confederation did not work very well. In the hot summer of 1787, 12 of the 13 states sent a total of 55 delegates to Philadelphia to revise or amend the Articles, to make fundamental changes in the structure of the government.

THE NEW CONSTITUTION

It was a remarkable group of men; perhaps no such group has gathered before or since. The members were merchants and planters and professionals, and none were full-time politicians. As a group these men were by fact or inclination members of the economic, social and intellectual aristocracy of their respective states. They shared a common education centered on history, political philosophy and science. Some of them spent months preparing for the meeting—studying the governments of past nations. While some members came to modify the Articles of Confederation, many others knew from the start that a new constitution was needed. In the end that is what they produced, a new governmental charter. The charter was far different from the Articles in that it gave vast powers to a central government. The states remained supreme in some matters, but in other matters they were forced to relinquish their sovereignty to the new federal government.

No official record of the convention was kept. The delegates deliberated behind closed doors as they drafted the new charter. However, some personal records remain. We do know, for example, that inclusion of a bill of rights in the new charter was not discussed until the last days of the convention. The Constitution was drafted in such a way as not to infringe on state bills of rights. When the meeting was in its final week, George Mason of Virginia indicated his desire that "the plan be prefaced with a Bill of Rights. . . . It would give great quiet to the people," he said, "and with the aid of the state declarations, a bill might be prepared in a few hours." Few joined Mason's call. Only one delegate, Roger Sherman of Connecticut, spoke against the suggestion. He said he favored protecting the rights of the people when it was necessary, but in this case there was no need. "The state declarations of rights are not repealed by this Constitution; and being in force are sufficient." He said that where the rights of the people are involved Congress could be trusted to preserve the rights. The states, voting as units, unanimously opposed Mason's plan. While the Virginian later attempted to add a bill of rights in a piecemeal fashion, the Constitution emerged from the convention and was placed before the people for ratification without a bill of rights.

The new Constitution was not without opposition. The struggle for its adoption was hard fought. The failure to include a bill of rights in the document was a telling complaint raised against the new document. Even Thomas Jefferson, who was in France, lamented, in a

letter to his friend James Madison, the lack of a guarantee of political rights in the charter. When the states finally voted on the new Constitution, it was approved, but only after supporters in several states had promised to petition the First Congress to add a bill of rights.

James Madison was elected from Virginia to the House of Representatives, defeating James Monroe only after promising his constituents to work in the First Congress toward adoption of a declaration of human rights. When Congress convened, Madison worked to keep his promise. He first proposed that the new legislature incorporate a bill of rights into the body of the Constitution, but the idea was later dropped. That the Congress would adopt the declaration was not a foregone conclusion. There was much opposition, but after several months, 12 amendments were finally approved by both houses and sent to the states for ratification. Madison's original amendment dealing with freedom of expression states: "The people shall not be deprived or abridged of their right to speak, to write or to publish their sentiments and freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." Congressional committees changed the wording several times, and the section guaranteeing freedom of expression was merged with the amendment guaranteeing freedom of religion and freedom of assembly. The final version is the one we know today:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

The concept of the "first freedom" is discussed often. Historical myth tells us that because the amendment occurs first in the Bill of Rights it was considered the most important right. In fact, in the Bill of Rights presented to the states for ratification, the amendment was listed third. Amendments 1 and 2 were defeated and did not become part of the Constitution. The original First Amendment called for a fixed schedule that apportioned seats in the House of Representatives on a ratio many people thought unfair. The Second Amendment prohibited senators and representatives from altering their salaries until after a subsequent election of representatives. Both amendments were rejected, and Amendment 3 became the First Amendment. In 1992, the economy-minded legislatures in three-fourths of the United States finally approved the original Second Amendment, and it became the 27th amendment to the Constitution.

Passage of Amendments 3 through 12 did not occur without struggle. Not until two years after being transmitted to the states for approval did a sufficient number of states adopt the amendments for them to become part of the Constitution. Connecticut, Georgia, and Massachusetts did not ratify the Bill of Rights until 1941, a kind of token gesture on the 150th anniversary of its constitutional adoption. In 1791 approval by these states was not needed, since only three-fourths of the former colonies needed to agree to the measures.

FREEDOM OF EXPRESSION IN THE 18TH CENTURY

What did the First Amendment mean to the people who supported its ratification? Technically, the definition of freedom of the press approved by the nation when the First Amendment was ratified in 1791 is what is guaranteed today. To enlarge or narrow that definition requires another vote of the people, a constitutional amendment. This notion is referred to today as

"original intent" of the Constitution; that is, if we knew the meaning intended by the framers of the First Amendment, then we would know what it means today.

Most people today consider this notion so much legalistic poppycock. The nation has changed dramatically in 215 years. Television, radio, film and the Internet did not exist in 1791, for example. Does this mean that the guarantees of the First Amendment should not apply to these mass media? Of course not. Our Constitution has survived more than two centuries because it has been somewhat elastic. The Supreme Court of the United States, our final arbiter on the meaning of the Constitution, has helped adapt the document to changing times.

Still, it is important that we respect the document that was adopted more than two centuries ago. If we stray too far from its original meaning, the document may become meaningless; there will be no rules of government. The Constitution will mean only what those in power say it means. Thus the judicial philosophy of historicism, despite what law professor Rodney Smolla correctly calls "the obstinate illusiveness of original intent in the free speech area,"[9] remains an important consideration for some judges and justices. "The experience of the framers will never give us precise answers to modern conflicts," Smolla writes, "but it will give us a sense of how deeply free speech was cherished, at least as an abstract value."[10]

Most everyone agrees that freedom of expression meant at least the right to be free from prior restraint or licensing.

What was the legal or judicial definition of the First Amendment in 1791? Surprisingly, that is not an easy question to answer. The records of the period carry mixed messages. There was really no authoritative definition of freedom of the press and freedom of speech rendered by a body like the Supreme Court. And even the words used by people of that era may have meant something different than they mean in the 21st century. Most everyone agrees that freedom of expression meant at least the right to be free from prior restraint or licensing. Sir William Blackstone, a British legal scholar, published a major four-volume summary of the common law between 1765 and 1769. In this summary, "Commentaries on the Law of England," Blackstone defined freedom of expression as "laying no previous restraints upon publication." Today we call this no prior censorship. Many scholars argue that freedom of expression surely meant more than simply no prior censorship, that it also protected persons from punishment *after publication* or, as First Amendment Scholars might put it, from subsequent punishments. In other words, the First Amendment also precluded prosecutions for seditious libel. After all, they argue, one of the reasons for the American Revolution was to rid the nation of the hated British sedition laws.

The truth is that we probably don't know what freedom of the press meant to American citizens in the 1790s. The written residue of the period reveals only a partial story. It's very likely that it meant something a little different to different people, just as it does today. Even those individuals who drafted the Bill of Rights probably held somewhat different views on the meaning of the First Amendment.

Has the meaning of freedom of expression changed over the past two centuries? Surely, in many small and fairly obvious ways. But some scholars today suggest that a more subtle but profound change has taken place as well. They argue persuasively that many persons see a difference in the values that should be protected by the First Amendment. In the late 18th century freedom of expression was designed to protect the rights of the speaker; the value of the First Amendment was to allow individuals the fullest possible right to say or publish what

9. Smolla, *Free Speech in an Open Society*, 28.
10. Ibid., 39.

they wished. Scholars like Steven Helle at the University of Illinois argue that it is the protection of the public's right to know, or society's right to be informed, that today is the central value in the First Amendment.[11] This subtle shift in what is being protected manifests a different interpretation of what and how much speech is protected under the Constitution. Only serious harm to other individuals or to the community will justify an interference with First Amendment freedoms if the rights of the speaker or publisher are paramount. But when societal interests are put ahead of those of the speaker or publisher, substantially more censorship will be tolerated in order to preserve the wider rights of the community. Those who advocate tougher sanctions on obscenity because it demeans women, or stricter limits on racially or ethnically insulting speech because it denigrates members of racial or ethnic minority groups, do so from the position of this latter interpretation of the First Amendment. We will encounter instances of the advocacy of this new proposition throughout this book.

FREEDOM OF EXPRESSION TODAY

If we are not certain what the First Amendment meant in 1791, do we know what it means today? More or less. The First Amendment means today what the Supreme Court of the United States says it means. The Supreme Court and, occasionally, lower courts define the meaning of the First Amendment to the Constitution.

The First Amendment means today what the Supreme Court of the United States says it means.

The Supreme Court is a collection of nine justices, not a single individual. Consequently, at any given time there can be nine different definitions of freedom of expression. This has never happened—at least not on important issues. What has happened is that groups of justices have subscribed to various theoretical positions regarding the meaning of the First Amendment. These ideas on the meaning of the First Amendment help justices shape their vote on a question regarding freedom of expression. These ideas have changed during the past 85 years, from the point at which the First Amendment first came under serious scrutiny by the Supreme Court.

Legal theories are sometimes difficult to handle. Judge Learned Hand, a distinguished American jurist known as the most important judge *never* to have served on the U.S. Supreme Court, referred to the propagation of legal theory as "shoveling smoke." With such cautions in mind, here are seven important First Amendment theories or strategies that have been used or are used today to help judges develop a practical definition of freedom of expression.

SEVEN FIRST AMENDMENT THEORIES

1. Absolutist theory
2. Ad hoc balancing theory
3. Preferred position balancing theory
4. Meiklejohnian theory
5. Marketplace of ideas
6. Access theory
7. Self-realization

11. Helle, "Public's Right," 1077.

Absolutist theory: Some people have argued that the First Amendment presents an absolute or complete barrier to government censorship of speech or press. When the First Amendment declares that "no law" shall abridge freedom of expression, the framers of the Constitution meant *no law*. This is the essence of the **absolutist theory.** The government cannot censor the press for any reason. There are no exceptions, no caveats, no qualifications.

Few have subscribed to this notion wholeheartedly. Supreme Court justices Hugo Black, who sat on the high court from 1937 to 1971, and William O. Douglas, whose term lasted from 1939 to 1975, claimed adherence to this philosophy, but they were unable to persuade their brethren that this idea had much merit. A majority of the Supreme Court *never* has adopted an absolutist position. In fact, as this book later illustrates, the Supreme Court has held that there are several types of speech that fall outside the scope of First Amendment protection and thus can be abridged without violating the freedoms of speech or press. As Justice Anthony Kennedy wrote for the court in 2002, when striking down a federal law prohibiting virtual child pornography, "[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children."[12] Other categories of speech also fall outside the ambit of First Amendment protection, including fighting words (see pages 143–147) and true threats of violence.[13]

Ad hoc balancing theory: Freedom of speech and press are two of a number of important human rights we value in this nation. These rights often conflict. When conflict occurs, it is the responsibility of the court to balance the freedom of expression with other values. For example, the government must maintain the military to protect the security of the nation. To function, the military must maintain secrecy about many of its weapons, plans and movements. Imagine that the press seeks to publish information about a secret weapons system. The right to freedom of expression must be balanced with the need for secrecy in the military.

This theory is called *ad hoc* balancing because the scales are erected anew in every case; the meaning of the freedom of expression is determined solely on a case-by-case basis. Freedom of the press might outweigh the need for the government to keep secret the design of its new rifle, but the need for secrecy about a new fighter plane might take precedence over freedom of expression.

Ad hoc balancing is really not a theory; it is a strategy. Developing a definition of freedom of expression on a case-by-case basis leads to uncertainty. Under ad hoc balancing we will never know what the First Amendment means except as it relates to a specific, narrow problem (e.g., the right to publish information about a new army rifle). If citizens cannot reasonably predict whether a particular kind of expression might be protected or prohibited, they will have the tendency to play it safe and keep silent. This is known as a "chilling effect" on speech. This will limit the rights of expression of all persons. Also, ad hoc balancing relies too heavily in its final determination on the personal biases of the judge or justices who decide a case. Ad hoc balancing is rarely invoked as a strategy these days except by judges unfamiliar with First Amendment law.

Preferred position balancing theory: The Supreme Court has held in numerous rulings that some constitutional freedoms, principally those guaranteed by the First Amendment, are

12. *Ashcroft* v. *Free Speech Coalition,* 535 U.S. 234, 245–46 (2002).
13. *Watts* v. *United States,* 394 U.S. 705, 708 (1969).

fundamental to a free society and consequently are entitled to more judicial protection than other constitutional values are.[14] Freedom of expression is essential to permit the operation of the political process and to permit citizens to protest when government infringes on their constitutionally protected prerogatives. The Fourth Amendment guarantee of freedom from illegal search and seizure surely has diminished value if citizens who suffer from such unconstitutional searches cannot protest such actions. Freedom of expression does not trump all other rights. Courts, for example, have attempted to balance the rights of free speech and press with the constitutionally guaranteed right of a fair trial. On the other hand, courts have consistently ruled that freedom of expression takes precedence over the right to personal privacy and the right to reputation, neither of which is explicitly guaranteed by the Bill of Rights.

Giving freedom of expression a preferred position *presumes* that government action that limits free speech and free press to protect other interests is usually unconstitutional. This presumption forces the government to bear the burden of proof in any legal action challenging the censorship. The city, county, state or federal government must prove to the court that its censorship is, in fact, justified and is not a violation of the First Amendment. In most instances the government must only prove that the accused violated the law, not that the law itself is constitutional. Were it not for this presumption, the persons whose expression was limited would be forced to convince a court that they had a constitutional right to speak or publish. This difference sounds minor, but in a lawsuit this presumption means a great deal.

While this theory retains some of the negative features of ad hoc balancing, by tilting the scales in favor of freedom of expression, it adds somewhat more certainty to our definition of freedom of expression. By basing this balancing strategy on a philosophical foundation (the maintenance of all rights is dependent on free exercise of speech and press), it becomes easier to build a case in favor of the broad interpretation of freedom of expression under the First Amendment.

Meiklejohnian theory: Philosopher and educator Alexander Meiklejohn presented the legal community with a rather complex set of ideas about freedom of expression in the late 1940s.[15] Meiklejohn looked at the First Amendment in a pragmatic manner and argued that freedom of expression is worth little as an abstract concept; that its primary value is as a means to an end. That end is successful self-government or, as Meiklejohn himself put it, "the voting of wise decisions." Freedom of speech and press are protected in the Constitution so that our system of democracy can function, and that is the only reason they are protected. Expression that relates to the self-governing process must be protected absolutely by the First Amendment. There can be no government interference with such expression. Expression that does not relate to the self-governing process is not protected absolutely by the First Amendment. The value or worth of such speech must be balanced by the courts against other rights and values. Meiklejohnian theory thus represents a hierarchical approach to First Amendment theory, with political speech placed at the top of this hierarchy.

Expression that relates to the self-governing process must be protected absolutely by the First Amendment.

14. See *United States* v. *Carolene Products,* 304 U.S. 144 (1938) and *Palko* v. *Connecticut,* 302 U.S. 319 (1937). See also Justice Holmes' opinions in both *Lochner* v. *New York,* 198 U.S. 45 (1905) and *Abrams* v. *United States,* 250 U.S. 616 (1919).

15. Meiklejohn, *Free Speech.*

Critics of this theory argue in a telling fashion that it is not always clear whether expression pertains to self-government (public speech) or to other interests (private speech). While not providing the specific definition sought by critics, Meiklejohn argued that a broad range of speech is essential to successful self-government. He included speech-related education (history, political science, geography, etc.), science, literature and many other topics. This theory has been embraced by some members of the Supreme Court of the United States, most notably former justice William Brennan. American libel law was radically changed when Brennan led the Supreme Court to give First Amendment protection to persons who have defamed government officials or others who attempt to lead public policy, a purely Meiklejohnian approach to the problem.

Marketplace of ideas theory: The marketplace of ideas theory, writes professor Matthew Bunker, "represents one of the most powerful images of free speech, both for legal thinkers and for laypersons."[16] It embodies what First Amendment scholar Daniel Farber calls "the truth-seeking rationale for free expression."[17] Although the theory itself can be traced back to the work of poet John Milton and John Stuart Mill, it was U.S. Supreme Court Justice Oliver Wendell Holmes Jr. who introduced the marketplace rationale for protecting speech to First Amendment case law more than 85 years ago. In his dissent in *Abrams* v. *United States,*[18] Holmes famously wrote:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[19]

Today, the economics-based marketplace metaphor "consistently dominates the Supreme Court's discussion of freedom of speech."[20] For instance, in writing for a unanimous Supreme Court in 2003 in *Virginia* v. *Hicks,* Justice Antonin Scalia described how overbroad laws—laws that are drafted so broadly that they punish a substantial amount of protected free speech along with unprotected speech—are unconstitutional because they harm "society as a whole, which is deprived of an *uninhibited marketplace of ideas*."[21]

The marketplace theory, however, is often criticized by scholars. Common condemnations are that much shoddy speech, such as hate speech (see pages 143–147), circulates in the marketplace of ideas despite its lack of value and that access to the marketplace is *not* equal for everyone. In particular, those having the most economic resources (today, large conglomerates such as Viacom, News Corp. and Clear Channel) are able to own and to control the mass media and, in turn, to dominate the marketplace of ideas. Nonetheless, law professor Martin Redish observes that "over the years, it has not been uncommon for scholars or jurists

16. Bunker, *Critiquing Free Speech,* 2.
17. Farber, *The First Amendment,* 4.
18. 250 U.S. 616 (1919).
19. 250 U.S. 616, 630 (Holmes, J., dissenting).
20. Baker, *Human Liberty,* 7.
21. 539 U.S. 113, 119 (2003).

to analogize the right of free expression to a marketplace in which contrasting ideas compete for acceptance among a consuming public."[22] The premise of this idealistically free and fair competition of ideas is that truth will be discovered or, at the very least, conceptions of the truth will be tested and challenged.[23]

Access theory: Essayist and social critic H. L. Mencken wrote that freedom of the press belonged to the man who owned one. What the iconoclast meant was that a constitutional guarantee of freedom of expression had little meaning if a citizen did not have the economic means to exercise this right. Owners of magazines, newspapers and broadcasting stations could take advantage of the promises of the First Amendment, whereas the average man or woman lacked this ability. Put differently, access to the metaphorical marketplace of ideas is *not* equal for all, but is skewed in favor of those with the most economic resources. What Mencken wrote more than half a century ago is still true today, although the evolution of the Internet has at least given millions more Americans the opportunity to share their ideas as "bloggers" with a wider audience than was accessible in the past. Still, the audience for the vast majority of Web sites is small in comparison with the number of people reached by a television network or a national magazine or even a metropolitan newspaper.

In the mid-1960s some legal scholars, most notably Professor Jerome Barron, former dean of the National Law Center at George Washington University, argued that the promise of the First Amendment was unfulfilled for most Americans because they lacked the means to exercise their right to freedom of the press.[24] To make the guarantees of the First Amendment meaningful, newspapers, magazines and broadcasting stations should open their pages and studios to the ideas and opinions of their readers and listeners and viewers. Only in this way will all citizens have the opportunity to be heard by more than the few persons they can talk with in a conversation or at a meeting hall. If the press will not do this voluntarily, the obligation falls upon the government to force such access to the press. The access theory thus can be seen as a remedy to correct some of the flaws of the marketplace of ideas theory described earlier. These ideas received a wide and generally welcome hearing in academic circles. Needless to say, the owners and editors of the press were not as enthusiastic. And the courts tended to echo these sentiments.

The Supreme Court unanimously rejected this notion in 1974 in *Miami Herald* v. *Tornillo.*[25] Chief Justice Warren Burger, writing for the court, said that the choice of material to go into a newspaper and the decisions made as to limitations on the size of the paper and to content and treatment of public issues and public officials are decisions that must be made by the editors. The First Amendment does not give the government the right to force a newspaper to publish the views or ideas of a citizen. The *Tornillo* case sounded the legal death knell for this access theory for print media. (See *South Wind Motel* v. *Lashutka*[26] for an example of how courts have rejected the access theory since the *Tornillo* ruling.)

At the same time that federal courts were rejecting the access theory as it applied to the printed press, many courts were embracing these notions to justify the regulation of American

22. Redish and Kaludis, *The Right of Expressive Access,* 1083.
23. Chemerinsky, *Constitutional Law,* 753.
24. Barron, "Access to the Press."
25. 418 U.S. 241 (1974).
26. 9 M.L.R. 1661 (1983).

radio and television. In 1969 the Supreme Court ruled in the famous case of *Red Lion Broadcasting* v. *FCC*[27] that "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences, which is crucial here." The apparent contradiction in accepting the access theory for broadcast media but rejecting its application to the printed press was based on what many broadcasters regarded as an ill-conceived notion of differences in the two media forms. There could be an unlimited number of voices in the printed press, it was argued, but technological limits in the electromagnetic broadcast spectrum controlled the number of radio and television stations that could broadcast, and the government was required to protect the public interest in the case of the latter. The flaw in this assumption, they argued, was that it failed to take into account 20th-century economic limits that sharply curtailed the number of printing presses.

The regulation of broadcasting by the government has been turned on its head in the past three decades with the emergence of technologies such as cable and direct broadcast and, indirectly at least, the Internet. Little remains of the comprehensive set of rules that were developed in the last half of the 20th century (see Chapter 16). Hence, the access theory has substantially diminished resonance even in relation to telecommunications regulation. At the same time, however, the proponents of this view of the meaning of the First Amendment argue that with the ever-increasing collapse of mass media ownership into fewer hands,* now, more than ever, the courts should be defining freedom of expression in such a way as to protect the voice of the individual as opposed to the voice of the corporate owner.

Self-realization/self-fulfillment theory: While the primary goal of Meiklejohnian theory is successful self-government and the main objective of the marketplace theory is discovery of the truth, it may be that speech is important to an individual *regardless* of its impact on politics or its benefit to society at large. For instance, the act of transcribing one's thoughts in a private diary or a personal journal can be beneficial to the writer, even though no one else ever will (at least the writer hopes!) read them. Speech, in other words, can be inherently valuable to a person regardless of its effect on others—it can be an end in itself. An individual who wears a shirt with the name of his or her favorite political candidate on it may not change anyone else's vote or influence the discovery of the truth, yet the shirt-wearer is realizing and expressing his or her own identity through speech. As law professor C. Edwin Baker writes, "to engage in a speech act is to engage in self-definition."[28]

Speech is important to an individual regardless of its impact on politics or its benefit to society at large.

The seven theories or strategies just outlined guide jurists across the nation as they attempt to fathom the meaning of these seemingly simple 13 words: "Congress shall make no law abridging freedom of speech or of the press." In the remainder of this book, an attempt will be made to outline what the courts—using these theories—say the First Amendment means.

*The most recent example of this took place in 2003 when the Federal Communications Commission altered rules on the ownership of broadcast properties permitting an even greater concentration of media voices into fewer hands. Although many of those rules were later enjoined by a federal appellate court, the FCC continues to consider similar deregulatory measures. See Chapter 16.

27. 395 U.S. 367 (1969).

28. Baker, *Human Liberty*, 53.

SUMMARY

The nation's first constitution, the Articles of Confederation, did not contain a guarantee of freedom of speech and press, but nearly all state constitutions provided for a guarantee of such rights. Citizens insisted that a written declaration of rights be included in the Constitution of 1787, and a guarantee of freedom of expression was a part of the Bill of Rights that was added to the national charter in 1791.

There is a debate within the legal-historical community over the meaning of the First Amendment when it was drafted and approved in the late 18th century. Some people argue that it was intended to block both prior censorship and prosecution for seditious libel. Others argue that it was intended to prohibit only prior censorship. We will never know what the guarantee of freedom of expression meant to the persons who drafted it, but it is a good bet that citizens had a wide variety of interpretations of the First Amendment when they voted to approve it.

The meaning of the First Amendment today is largely determined through interpretation by the Supreme Court of the United States. Jurists use legal theories to guide them in determining the meaning of the constitutional guarantee that "Congress shall make no law abridging freedom of speech or of the press." Seven such theories are (1) absolutist theory, (2) ad hoc balancing theory, (3) preferred position balancing theory, (4) Meiklejohnian theory, (5) marketplace of ideas, (6) access theory, and (7) self-realization. Theories 2, 3 and 5 have the most supporters on the Supreme Court, and all the theories have assisted members of the high court to shape the meaning of the First Amendment.

THE MEANING OF FREEDOM

The struggle since 1791 to define the meaning of freedom of expression has involved a variety of issues. Three topics are at the heart of this struggle: the power of the state to limit criticism or published attacks on the government; the power of the state to use taxation to censor the press; and the power of the government to forbid the publication of ideas or information it believes to be harmful. Each of these classic battles will be considered in the remainder of this chapter.

SEDITIOUS LIBEL AND THE RIGHT TO CRITICIZE THE GOVERNMENT

The essence of a democracy is participation by citizens in the process of government. At its most basic level, this participation involves selecting leaders for the nation, the state and the various local governments through the electoral process. Popular participation also includes examination of government and public officials to determine their fitness for serving the people. Discussion, criticism and suggestion all play a part in the orderly transition of governments and elected leaders. The right to speak and print, then, is inherent in a nation governed by popularly elected rulers.

Whether or not the rights of free expression as defined in 1791 included a broad right to criticize the government, this kind of political speech has emerged as a central element of our modern understanding of the First Amendment.

The right to discuss, criticize and oppose the government is at the center of our political philosophy today. This is certainly not the case everywhere in the world, even in so-called free countries. Not long ago the New York Times Co. and the Washington Post Co., co-publishers of the Paris-based International Herald Tribune, were forced to pay nearly $700,000 in damages for publishing comments supposedly critical of the government of Singapore. The Asian printing plant for the Herald Tribune is located in this small independent republic located on the Malay Peninsula. Failure to pay the damages would have forced the relocation of this printing plant and eliminated the opportunity for the newspaper to continue to do business in Singapore.

Even in the United States it is not always possible to criticize the government or advocate political change without suffering reprisals from the government.

Even in the United States it is not always possible to criticize the government or advocate political change without suffering reprisals from the government. For instance, in February 2003, a public high school junior in Dearborn, Mich., named Bretton Barber was prohibited from wearing a T-shirt to school that displayed a photograph of President George W. Bush with the caption "International Terrorist." In this case, the public school principal was the government actor who stopped speech critical of another government actor, President Bush. Fortunately for young Mr. Barber, a federal judge ruled later that same year that his unpopular dissenting political speech—he attempted to wear the shirt to school shortly before the United States invaded Iraq in order, he said, to express his feelings about President Bush's foreign policies—was protected by the First Amendment (see pages 102–104).[29] And in 2004, during the presidential election season, Jeff and Nicole Rank were arrested, handcuffed and jailed on trespassing charges for peacefully wearing anti-Bush T-shirts (one shirt carried the message "Love America, Hate Bush" and the other read "Regime Change Starts at Home") to a rally for President Bush at the West Virginia State Capitol grounds.[30] Although the charges were later dropped, the Ranks filed a lawsuit, with the help of the American Civil Liberties Union, alleging a violation of their fundamental First Amendment right to engage in dissenting political expression. Neither Barber nor the Ranks, it should be noted, yelled, screamed or heckled; they each merely engaged in passive (nonspoken) expression. Many Americans are troubled today when asked to support a broad definition of freedom of expression in light of the growing militancy by right-wing hate groups and radical Islamic terrorists. Can the use of force or violence be advocated as a means of changing the government? Can a citizen use the essence of democracy, free expression, to advocate the violent abolition of democracy and the establishment of a repressive state in which the rights of free speech and free press would be denied? Americans familiar with the history of the past 215 years know that these are more than academic questions. Some of the fiercest First Amendment battles have been fought over exactly these issues.

29. *Barber* v. *Dearborn Public Schools*, 286 F. Supp. 2d 847 (E.D. Mich. 2003).
30. Herman, "Suit Alleges Protesters Are Muzzled."

CRITICAL DATES IN THE HISTORY OF SEDITION LAW IN THE UNITED STATES

1735	Acquittal of John Peter Zenger
1791	Adoption of First Amendment
1798	Alien and Sedition Acts of 1798
1917	Espionage Act
1918	Sedition Act
1919	Clear and present danger test enunciated
1927	Brandeis sedition test in *Whitney* v. *California*
1940	Smith Act adopted
1951	Smith Act ruled constitutional
1957	Scope of Smith Act greatly narrowed
1969	Sedition test in *Brandenburg* v. *Ohio* substantially curbs sedition prosecutions

ALIEN AND SEDITION ACTS

The United States wasn't even 10 years old when the nation's resolve in protecting freedom of expression was first tested. Intense rivalry between President John Adams' Federalist party and Thomas Jefferson's Republican* or Jeffersonian party, coupled with the fear that the growing violence in the French Revolution might spread to this country, led to the adoption by the Federalist-dominated Congress of a series of highly repressive measures known as the **Alien and Sedition Acts of 1798.**[31] Three laws dealt with aliens, extending the period of residence prior to naturalization and giving the president extraordinary powers to detain and deport these noncitizen residents of the United States. A sedition law forbade false, scandalous and malicious publications against the U.S. government, Congress and the president. The new law also punished persons who sought to stir up sedition or urged resistance to federal laws. Punishment was a fine of as much as $2,000 and a jail term of up to two years. This latter statute was aimed squarely at the Jeffersonian political newspapers, many of which were relentless in their attacks on President Adams and his government.

There were 15 prosecutions under this law. This doesn't sound like many, but among those prosecuted were editors of eight Jeffersonian newspapers, including some of the leading papers in the nation. Imagine the federal government bringing sedition charges today against the editors of The New York Times, Washington Post, Miami Herald, and Chicago Tribune. Also prosecuted was a Republican member of Congress, Matthew Lyon. The so-called

*This Republican political party was not the forerunner of the contemporary Republican party, which was formed in 1854.

31. Smith, *Freedom's Fetters.*

seditious libel that was the basis for the criminal charges was usually petty and hardly threatened our admittedly youthful government. But Federalist judges heard most of the cases and convictions were common.

Far from inhibiting dissent, the laws succeeded only in provoking dissension among many of President Adams' supporters. Many argue that Adams lost his bid for re-election in 1800 largely because of public dissatisfaction with his attempt to muzzle his critics. The constitutionality of the laws was never tested before the full Supreme Court, but three members of the court heard Sedition Act cases while they were on the circuit. The constitutionality of the provisions was sustained by these justices. The Sedition Act expired in 1801 and newly elected President Thomas Jefferson pardoned all persons convicted under it, while Congress eventually repaid most of the fines. This was the nation's first peacetime sedition law and it left such a bad taste that another peacetime sedition law was not passed until 1940.

Most historians of freedom of expression in the United States focus on two eras in the 19th century during which censorship was not uncommon: the abolitionist period and the Civil War. A wide range of government actions, especially in the South, were aimed at shutting down the abolitionist press in the years between 1830 and 1860. And both the U.S. government and the Confederate States government censored the press during the Civil War. But in his book, "Free Speech in Its Forgotten Years," author David M. Rabban argues that there were also extensive censorship efforts in the latter half of the 19th century against radical labor unionists, anarchists, birth control advocates and other so-called freethinkers. And there was little meaningful public debate about such activities. "In the decades before World War I," Rabban wrote, "Americans generally needed to experience repression of views they shared before formulating a theory of free speech that extended to ideas they opposed."[32]

The issue of political dissent did not enter the national debate again until the end of the 1800s, when hundreds of thousands of Americans began to understand that democracy and capitalism were not going to bring them the prosperity promised as an American birthright. The advancing rush of the new industrial society left many Americans behind and unhappy. Tens of thousands were attracted to radical political movements such as socialism and anarchism, movements that were considered by most in the mainstream to be foreign to the United States. Labor unrest in the late 19th century often turned violent; radical protests turned bloody. President William McKinley was assassinated in 1901, shot by a man most historians describe as an anarchist. Revolution, clearly unlikely, nevertheless arose as a specter in the minds of millions of Americans. Hundreds of laws were passed by states and cities across the nation to try to limit this kind of political dissent. War broke out in Europe in 1914; the United States joined the conflict three years later. This pushed the nation over the edge and anything that remained of our national tolerance toward political dissent and criticism of the government and economic system vanished. At both the state and the federal level, government struck out at those who sought to criticize or suggest radical change.

32. Rabban, *Free Speech.*

SEDITION IN WORLD WAR I

World War I is probably the most unpopular war this nation has fought, easily rivaling the Vietnam conflict in terms of public protest. The war was a replay of the imperial wars of the 18th and 19th centuries in Europe, except that it was fought with deadly new weapons. Industrialists and farmers saw the opportunity for vast economic gains in supplying war goods, and superpatriots were thrilled that the United States was actually going to have the opportunity to fight in a real war on the Continent. But to millions of immigrants in this nation, the war was being fought in their homelands. Their families were dying; their relatives were now our enemies. The economically dispossessed rightly feared as well that the outbreak of war signaled the beginning of a period of internal political repression for those with little power.

Suppression of freedom of expression reached a higher level during World War I than at any other time in our history.

Suppression of freedom of expression reached a higher level during World War I than at any other time in our history.[33] Government prosecutions during the Vietnam War, for example, were minor compared with government action between 1918 and 1920. Vigilante groups were active as well, persecuting when the government failed to prosecute.

Two federal laws were passed to deal with persons who opposed the war and U.S. participation in it. In 1917 the **Espionage Act** was approved by Congress and signed by President Woodrow Wilson. The measure dealt primarily with espionage problems, but some parts were aimed expressly at dissent and opposition to the war. The law provided that it was a crime to willfully convey a false report with the intent to interfere with the war effort. It was a crime to cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the armed forces. It also was a crime to willfully obstruct the recruiting or enlistment service of the United States. Punishment was a fine of not more than $10,000 or a jail term of not more than 20 years. The law also provided that material violating the law could not be mailed.

In 1918 the **Sedition Act,** an amendment to the Espionage Act, was passed, making it a crime to attempt to obstruct the recruiting service. It was criminal to utter or print or write or publish disloyal or profane language that was intended to cause contempt of, or scorn for, the federal government, the Constitution, the flag or the uniform of the armed forces. Penalties for violation of the law were imprisonment for as long as 20 years or a fine of $10,000 or both. Approximately 2,000 people were prosecuted under these espionage and sedition laws, and nearly 900 were convicted. Persons who found themselves in the government's dragnet were usually aliens, radicals, publishers of foreign-language publications and other persons who opposed the war.

In addition the U.S. Post Office Department censored thousands of newspapers, books and pamphlets. Some publications lost their right to the government-subsidized second-class mailing rates and were forced to use the costly first-class rates or find other means of distribution. Entire issues of magazines were held up and never delivered, on the grounds that they violated the law (or what the postmaster general believed to be the law). Finally, the states were not content with allowing the federal government to deal with dissenters, and most adopted sedition statutes, laws against **criminal syndicalism,** laws that prohibited the display of a red flag or a black flag, and so forth.

Political repression in the United States did not end with the termination of fighting in Europe. The government was still suspicious of the millions of European immigrants in the

33. See Peterson and Fite, *Opponents of War.*

nation and frightened by the organized political efforts of socialist and communist groups. As the Depression hit the nation, first in the farm belt in the 1920s, and then in the rest of the nation by the next decade, labor unrest mushroomed. Hundreds of so-called agitators were arrested and charged under state and federal laws. Demonstrations were broken up; aliens were detained and threatened with deportation.

But what about the First Amendment? What happened to the rights of freedom of expression? The constitutional guarantees of freedom of speech and freedom of the press were of limited value during this era. The important legal meaning of freedom of expression had developed little in the preceding 125 years. There had been few cases and almost no important rulings before 1920. You will note as we proceed through this book that the words of the First Amendment—"Congress shall make no law"—are not nearly as important as the meaning attached to those words. And that meaning was only then beginning to develop through court rulings that resulted from the thousands of prosecutions for sedition and other such crimes between 1917 and the mid-1930s.

THE SMITH ACT

Congress adopted the nation's second peacetime sedition law in 1940 when it ratified the **Smith Act,** a measure making it a crime to advocate the violent overthrow of the government, to conspire to advocate the violent overthrow of the government, to organize a group that advocated the violent overthrow of the government, or to be a member of a group that advocated the violent overthrow of the government.[34] The law was aimed directly at the Communist party of the United States. While a small group of Trotskyites (members of the Socialist Workers party) were prosecuted and convicted under the Smith Act in 1943, no Communist was indicted under the law until 1948 when many of the nation's top Communist party leaders were charged with advocating the violent overthrow of the government. All were convicted after a nine-month trial and their appeals were denied. In a 7-2 ruling in 1951, the Supreme Court of the United States rejected the defendants' arguments that the Smith Act violated the First Amendment.[35]

Government prosecutions persisted during the early 1950s. But then, in a surprising reversal of its earlier position, the Supreme Court in 1957 overturned the convictions of West Coast Communist party leaders.[36] Justice John Marshall Harlan wrote for the 5-2 majority that government evidence showed that the defendants had advocated the violent overthrow of the government but only as an abstract doctrine, and this was not sufficient to sustain a conviction. Instead there must be evidence that proves the defendants advocated actual *action* aimed at the forcible overthrow of the government. This added burden of proof levied against the government prosecutors made it extremely difficult to use the Smith Act against the Communists, and prosecutions dwindled. The number of prosecutions diminished for other reasons as well, however. The times had changed. The cold war was not as intense. Americans looked at the Soviet Union and the Communists with a bit less fear. The Communist party of the United States had failed to generate any public support. Its membership had fallen precipitously. In

34. Pember, "The Smith Act," 1.
35. *Dennis* v. *U.S.,* 341 U.S. 494 (1951).
36. *Yates* v. *U.S.,* 354 U.S. 298 (1957).

fact, political scientist John Roche has remarked with only a slight wink that it was the dues paid to the party by FBI undercover agents that kept the organization economically solvent in the mid-to-late 1950s.

With the practical demise of the Smith Act, sedition has not been a serious threat against dissent for more than 45 years. No sedition cases were filed against Vietnam War protesters, and the last time the Supreme Court heard an appeal in a sedition case was in 1969 when it overturned the conviction of a Ku Klux Klan leader (*Brandenburg* v. *Ohio*).[37] The federal government has filed sedition charges several times in recent years against alleged white supremacists, neo-Nazis and others on the fringe of the right wing. While juries have been willing to convict such individuals of bombing, bank robbery and even racketeering, the defendants have been acquitted of sedition. The federal government had greater success in the 1990s using a Civil War–era sedition statute to prosecute Muslim militants who bombed the World Trade Center in New York City in 1993. Sheikh Omar Abdel Rahman and nine of his followers were found guilty of violating a 140-year-old law that makes it a crime to "conspire to overthrow, or put down, or to destroy by force the Government of the United States." Although the government could not prove that Abdel Rahman actually participated in the bombing, federal prosecutors argued that his exhortations to his followers amounted to directing a violent conspiracy. The sheikh's attorneys argued that his pronouncements were protected by the First Amendment. In August 1999 the 2nd U.S. Circuit Court of Appeals disagreed, noting that the Bill of Rights does not protect an individual who uses a public speech to commit crimes. Abdel Rahman's speeches were not simply the expression of ideas; "in some instances they constituted the crime of conspiracy to wage war against the United States," the court ruled. "Words of this nature," the three-judge panel wrote, "ones that instruct, solicit, or persuade others to commit crimes of violence—violate the law and may be properly prosecuted regardless of whether they are uttered in private, or in a public place."[38] In the wake of the terror attacks on September 11, 2001, federal prosecutors in New York said they were looking into the possibility that the attacks included a seditious conspiracy to levy war against the United States. This accusation means that individuals suspected of playing a part in the attacks could be charged under the same seditious conspiracy statute that was used against the previously convicted Trade Center bombers. No such charges were filed. Also, the USA Patriot Act, which was passed as a part of the anti-terrorism bill adopted in 2001, defines terrorism as any "attempt to intimidate or coerce a civilian population" or change "the policy of the government by intimidation or coercion." Some civil libertarians argue that this definition could include some kinds of political dissent and that it closely resembles what traditionally has been called sedition.

Another controversial section of the Patriot Act that pits free speech against the war on terrorism makes it a crime to provide "expert advice or assistance" to terrorists. In June 2004, a federal jury acquitted a Saudi-born computer doctoral student at the University of Moscow, Sami Omar Al-Hussayen, of charges under this provision that he spread terrorism by "designing websites and posting messages on the Internet to recruit and raise funds for terrorist missions in Chechnya and Israel. His attorneys argued that he was being prosecuted for expressing views protected by the First Amendment."[39] Georgetown University law professor

37. 395 U.S. 444 (1969).
38. *U.S.* v. *Rahman*, 189 F. 3d 88 (1999).
39. Schmitt, "Acquittal in Internet Terrorism Case."

David Cole remarked after the verdict that it was a "case where the government sought to criminalize pure speech and was resoundingly defeated."[40] And David Nevin, lead attorney for Al-Hussayen, told the Associated Press that "the message is that the First Amendment is important and meaningful in this country."[41]

This brief narrative does not begin to tell the story of the struggle for the right of political dissent in this nation. Books listed in the bibliography at the end of this chapter help to fill in many holes for students seeking a better understanding of the battles to exercise the right of free expression fought by Americans for two centuries. Historian David Shannon's reminder that the present is only the cutting edge of the past is especially apt when looking at American law. What has happened has a great impact on what will happen.

DEFINING THE LIMITS OF FREEDOM OF EXPRESSION

Remarkable as it may seem, the first time the Supreme Court of the United States seriously considered whether a prosecution for sedition violated the First Amendment was in 1919. The Philadelphia Socialist party authorized Charles Schenck, the general secretary of the organization, to publish 15,000 leaflets protesting against U.S. involvement in World War I. The pamphlet described the war as a cold-blooded and ruthless adventure propagated in the interest of the chosen few of Wall Street and urged young men to resist the draft. Schenck and other party members were arrested, tried and convicted of violating the Espionage Act (see page 55). The case was appealed all the way to the Supreme Court, with the Socialists asserting that they had been denied their First Amendment rights of freedom of speech and press. Justice Oliver Wendell Holmes penned the opinion for the court and rejected the First Amendment argument. In ordinary times, he said, such pamphlets might have been harmless and protected by the First Amendment. "But the character of every act depends upon the circumstances in which it is done. . . . The question in every case is whether the words used, are used in such circumstances and are of 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."[42]

"The question in every case is whether the words used . . . create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

How can prosecutions for sedition be reconciled with freedom of expression? According to the Holmes test, Congress has the right to outlaw certain kinds of conduct that might be harmful to the nation. In some instances words, through speeches or pamphlets, can push people to undertake acts that violate the laws passed by Congress. In such cases publishers or speakers can be punished without infringing on their First Amendment freedoms. How close must the connection be between the advocacy of the speaker or publisher and the forbidden conduct? Holmes said that the words must create a "clear" (unmistakable? certain?) and "present" (immediate? close?) danger.

Holmes' test means less in the abstract than it does when connected to the facts of the *Schenck* case. In the abstract, an endless debate might be conducted over whether a speech or book presented the requisite clear and present danger. But in rejecting Schenck's appeal, the high court ruled that these 15,000 seemingly innocuous pamphlets posed a real threat to the

40. Ibid.
41. Fick, "Jury Acquits Saudi Graduate Student."
42. *Schenck* v. *U.S.,* 249 U.S. 47 (1919).

legitimate right of Congress to successfully conduct the war. To many American liberals this notion seemed farfetched, and Holmes was publicly criticized for the ruling. But the magic words "clear and present danger" stuck like glue on American sedition law, and for more than 30 years American jurists had to work their way around this standard. Holmes changed his mind about his test in less than six months and broke with the majority of the high court to outline a somewhat more liberal definition of freedom of expression in a ruling on the Sedition Act in the fall of 1919.[43] But the majority of the court continued to use the Holmes test to reject First Amendment appeals.

Justice Louis Brandeis attempted to fashion a more useful application of the clear and present danger test in 1927, but his definition of "clear and present danger" was confined to a concurring opinion in the case of *Whitney* v. *California.*[44] The state of California prosecuted Anita Whitney, a 64-year-old philanthropist who was the niece of Justice Stephen J. Field, a member of the Supreme Court from 1863 to 1897. She was charged with violating the state's Criminal Syndicalism Act after she attended a meeting of the Communist Labor party. She was not an active member in the party and during the convention had worked against proposals made by others that the party dedicate itself to gaining power through revolution and general strikes in which workers would seize power by violent means. But the state contended that the Communist Labor party was formed to teach criminal syndicalism, and as a member to the party she participated in the crime. After her conviction she appealed to the Supreme Court.

Justice Edward Sanford wrote the court's opinion and ruled that California had not violated Miss Whitney's First Amendment rights. The jurist said it was inappropriate to even apply the clear and present danger test. He noted that in *Schenck* and other previous cases, the statutes under which prosecution occurred forbade specific actions, such as interference with the draft. The clear and present danger test was then used to judge whether the words used by the defendant presented a clear and present danger that the forbidden action might occur. In this case, Sanford noted, the state of California law forbade specific words—the advocacy of violence to bring about political change. The Holmes test was therefore inapplicable. In addition, the California law was neither unreasonable nor unwarranted.

Justice Brandeis concurred with the majority, but only, he said, because the constitutional issue of freedom of expression had not been raised sufficiently at the trial to make it an issue in the appeal. (If a legal issue is not raised during a trial it is often impossible for an appellate court to later consider the matter.) In his concurring opinion, Brandeis disagreed sharply with the majority regarding the limits of free expression. In doing so he added flesh and bones to Holmes' clear and present danger test. Looking to the *Schenck* decision, the justice noted that the court had agreed that there must be a clear and imminent danger of a substantive evil that the state has the right to prevent before an interference with speech can be allowed. Then he went on to describe what he believed to be the requisite danger:

> 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

43. *Abrams* v. *U.S.*, 250 U.S. 616 (1919).
44. 274 U.S. 357 (1927).

Source: © Bettmann/CORBIS

Justice Louis Brandeis, author of an important concurring opinion in Whitney *v.* California *and other First Amendment rulings.*

> 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 law-breaking heightens it further. But even advocacy of violation, however reprehensible morally, is not a justification 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 assembling and conspiracy, must be borne in mind. In order to support a finding 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.[45]

Brandeis concluded that if there is time to expose through discussion the falsehoods and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech,

45. *Whitney* v. *California,* 274 U.S. 357 (1927).

not enforced silence. Put differently, Brandeis believed that counterspeech is the ideal, self-help remedy (i.e., adding more speech to the marketplace of ideas in order to counterargue), not censorship.

The next major ruling in which the high court attempted to reconcile sedition law and the First Amendment came in 1951 in the case of *Dennis* v. *U.S.*[46] (see page 56). Eleven Communist party members had been convicted of advocating the violent overthrow of the government, a violation of the Smith Act. The defendants raised the clear and present danger test as a barrier to their convictions; the actions of a small band of Communists surely did not constitute a clear and present danger to the nation, they argued. Chief Justice Vinson, who wrote the opinion for the court, used a variation of the clear and present danger test enunciated by Holmes in the *Schenck* case. He called it a clear and probable danger test. Surely the Congress has a right to prevent the overthrow of the government, Vinson said. How likely is it that the words spoken or written by the defendants would lead even to an attempted overthrow? "In each case [courts] must ask whether the gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger," Vinson wrote, quoting a lower-court opinion written by Judge Learned Hand.

The test went only slightly beyond the original Holmes test, and the court ruled that the defendants' First Amendment rights had not been violated. If the Brandeis test from *Whitney* had been applied, however, it is likely the convictions would have gone out the window.

It has been more than 35 years since the Supreme Court heard the case of *Brandenburg* v. *Ohio* (see page 57) and made its last and probably best attempt to resolve the apparent contradiction between sedition law and freedom of expression. A leader of the Ku Klux Klan was prosecuted and convicted of violating an Ohio sedition law for stating: "We're not a revengent [revengeful] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white Caucasian race, it's possible there might have to be some revengeance [revenge] taken." In reversing the conviction, the high court said the law must distinguish between the advocacy of ideas and the incitement to unlawful conduct. "The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except *where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions*."[47]

"The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions."

This test, which represents the current and modern version of Justice Holmes' old clear-and-present-danger standard, can be broken down into four components. First, the word "directed" represents an intent requirement on the part of the speaker: Did the speaker actually intend for his or her words to incite lawless action? Second, the word "imminent" indicates that the time between the speech in question and the lawless action must be very close or proximate. Third, the conduct itself must be "lawless action," requiring that there be a criminal statute forbidding or punishing the underlying action that is allegedly advocated. Finally, the word "likely" represents a probability requirement—that the lawless action must be substantially likely to occur and not merely a speculative result of the speech. All four of these elements must be proven before the speech can be considered outside the scope of First Amendment protection.

46. 341 U.S. 494 (1951).
47. 395 U.S. 444 (1969).

The legal theory behind the law of sedition was outlined previously; if someone publishes something that incites another person to do something illegal, the publisher of the incitement can be punished. While charges of sedition are rarely filed today, it is not uncommon for private persons to sue the mass media on the grounds that something that was published or recorded or exhibited incited a third person to commit an illegal act. These cases are similar to sedition prosecutions in many ways, and the constitutional shield developed by the courts that protects the mass media against convictions for sedition is applied in these cases as well.

The Book Made Me Do It

In the late 1870s Boston police arrested what some believe to be America's first serial killer, a teenage boy who began torturing children when he was 11 and began killing kids three years later. After the arrest of Jesse Pomeroy many persons blamed his killings on the dime novels that were published at the time, graphically violent stories with titles like "Desperate Dan" and "The Pirates of Pecos," even though the young killer testified that he never read such books.[48] This may have been the first time, but surely not the last, that books or movies or magazines or recordings were said to be responsible for someone's death or injury.

Courts are frequently asked to rule in wrongful death, negligence, and product liability lawsuits whether a media artifact like a film or recording played some part in inciting the actual perpetrator of the crime to commit illegal acts. To determine the liability in such cases the courts often use the *Brandenburg* test for incitement to violence outlined earlier in this chapter. For example, in 2002 the 6th U.S. Court of Appeals ruled that the producers of the film "The Basketball Diaries," the makers of several video games and some Internet content providers were not liable in a lawsuit brought by the parents of students who were killed and wounded when teenager Michael Carneal went on a shooting rampage in the lobby of Heath High School in Paducah, Ky. The plaintiffs argued, among other things, that Carneal had watched the film, which depicts a student daydreaming about killing a teacher and several classmates. "We find it is simply too far a leap from shooting characters on a video screen (an activity undertaken by millions) to shooting people in a classroom (an activity undertaken by a handful, at most) for Carneal's activities to have been reasonably foreseeable to the manufacturers of the media Carneal played and viewed," the court ruled. The material in this case falls far short of the standard required by *Brandenburg,* the judges added.[49] Why did they reach this conclusion? First and foremost, the movie was not "directed" to cause violence. As the appellate court wrote in *James* v. *Meow Media,* "while the defendants in this case may not have exercised exquisite care regarding the persuasive power of the violent material that they disseminated, they certainly did not 'intend' to produce violent actions by the consumers, as is required by the *Brandenburg* test."[50] In addition, the appellate court reasoned that "it is a long leap from the proposition that Carneal's actions were foreseeable to the *Brandenburg* requirement that the violent content was 'likely' to cause Carneal to behave this way."[51]

48. Schechter, "A Movie."
49. *James* v. *Meow Media Inc.*, 300 F. 3d 683 (2002).
50. Ibid. at 698.
51. Ibid. at 699.

Source: © The Everett Collection

Leonardo Dicaprio, right, and James Madio, in a scene from "The Basketball Diaries," which was the focus of a lawsuit in 2002.

In 2001 a Louisiana trial court dismissed a lawsuit against Warner Brothers and other defendants brought by plaintiffs who claimed that a robbery and shooting at a convenience store was the result of the thieves' attempting to mimic characters in the film "Natural Born Killers."[52] Cases like those just outlined are typical of the way the courts have handled claims that the mass media have incited a criminal act by a reader or a viewer. It is very difficult for a plaintiff ever to prove the intent ("directed") prong of the *Brandenburg* test against the media. The media simply don't intend for violence to occur as a result of viewing, playing or reading their products. Rather, the typical intent is to entertain and to make a profit! But of course, there are exceptions to the rule.

In 1996 the families of Mildred and Trevor Horn and Janice Saunders filed a wrongful death suit against Paladin Enterprises and its president, Peter Lund. The company published a book titled "Hit Man: A Technical Manual for Independent Contractors." Lawrence Horn hired James Perry to kill his ex-wife, their 8-year-old quadriplegic son, and the son's nurse to gain access to the proceeds of a medical malpractice settlement. Both Perry and Horn were arrested and convicted of the murders; Perry was sentenced to death, Horn to life in prison. The plaintiffs contended that Perry used the Paladin publication as an instruction manual for

52. *Delgado* v. *American Multi-Cinema Inc.,* 85 Cal. Rptr. 2d 838 (1999) and *Byers* v. *Edmondson,* 29 M.L.R. 1991 (2001). See also *Pahler* v. *Slayer,* 29 M.L.R. 2627 (2001).

the killings. A U.S. District Court in Maryland ruled in August 1996 that the book was protected by the First Amendment. "However loathsome one characterizes the publication, 'Hit Man' simply does not fall within the parameters of any recognized exceptions to the First Amendment principles of freedom of speech." The book failed to cross the line between permissible advocacy and impermissible incitation to crime or violence, Judge Williams wrote.[53]

Fifteen months later the 4th U.S. Circuit Court of Appeals reversed the lower-court ruling. The defendant had agreed to a stipulation in the case that stated Paladin provided its assistance to Perry with both the knowledge and the intent that the book would immediately be used by criminals and would-be criminals in the solicitation, planning and commission of murder and murder for hire. The court said the book was not an example of abstract advocacy but a form of aiding and abetting a crime. The book "methodically and comprehensively prepares and steels its audience to specific criminal conduct through exhaustively detailed instructions on planning, commission, and concealment of criminal conduct," the panel ruled. There is no First Amendment protection for such a publication. The court noted that this case was unique and should not be read as expanding the potential liability of publishers and broadcasters when third parties copy or mimic a crime or other act contained in a news report or a film or a television program.[54] An appeal to the U.S. Supreme Court was denied and the case was returned to the U.S. District Court for trial. In May 1999 Paladin Press settled the case out of court. In spite of this case, the stringent requirements of the *Brandenburg* test make it difficult, bordering on impossible, for a plaintiff to win a lawsuit that alleges a play or book or song or movie was responsible for causing someone's illegal acts. The case law is highly one-sided in this regard.[55]

One media product—the video game—is under increasing legislative attacks from governmental entities across the United States. Both Indianapolis, Indiana, and St. Louis County, Missouri, as well as the state of Washington, enacted legislation in recent years that was designed to limit and restrict minors' access to video games that depict graphic images of violence. The rationale for restricting access to the games is that they allegedly cause the children who play them to aggress against others. But video games tell stories and have plots, however graphic they might be, and thus are subject to First Amendment protection as speech. All three laws were declared unconstitutional by federal courts.

In July 2004, a federal court issued an order[56] striking down, on First Amendment grounds, a Washington state law that restricted minors' access to video games containing "realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer."[57] The decision was anything but surprising. It followed in the footsteps of opinions issued by two federal

53. *Rice* v. *Paladin Enterprises Inc.*, 940 F. Supp. 836 (1996).
54. *Rice* v. *Paladin Enterprises Inc.*, 128 F. 3d 233 (1997).
55. See *Yakubowicz* v. *Paramount Pictures Corp.*, 404 Mass. 624 (1989) and *Herceg* v. *Hustler,* 814 F. 2d 1017 (1987).
56. Order Granting Plaintiffs' Motion for Summary Judgment and Granting in Part Defendants' Cross-Motion, *Video Software Dealers Ass'n* v. *Maleng* (W. D. Wash. 2004) (No. C03-1245L).
57. Wash. Rev. Code § 9.91.180 (2004).

appellate courts that held unconstitutional similar legislation regulating minors' access to fictional images of violence in video games.[58]

In striking down Washington's video game law, U.S. District Court Judge Robert S. Lasnik articulated a veritable laundry list of flaws that fatally plagued the statute.

- The current state of social science research was seriously lacking and failed to provide substantial evidence to support "the Legislature's belief that video games cause violence." In particular, the judge wrote that "neither causation nor an increase in real-life aggression is proven by these studies."
- The Washington law was "both over-inclusive and under-inclusive" in its attempt to single out "just one type of violence" for regulation, namely game-related aggression toward law enforcement officers. As Judge Lasnik reasoned, the law "sweeps too broadly in that it would restrict access to games that reflect heroic struggles against corrupt regimes" or "involve accidental injuries to officers," while it simultaneously "is too narrow in that it will have no effect on the many other channels through which violent representations are presented to children."
- The law's limitations on game-related violence "impact more constitutionally protected speech than is necessary to achieve the identified ends and are not the least restrictive alternative available." The judge observed that regulation was "not limited to the ultra-violent or the patently offensive and is far broader than what would be necessary to keep filth like Grand Theft Auto III and Postal II out of the hands of children."
- The law was "unconstitutionally vague." Judge Lasnik pointed out that attorneys for Washington state were unable, during oral argument, to answer the seemingly simple question of whether a firefighter would be a "public law enforcement officer" as that term is used in the statute.

It seems unlikely that anti-access video game legislation will ever survive judicial scrutiny.

It seems unlikely that anti-access video game legislation will ever survive judicial scrutiny. Nonetheless, attacking video games is a politically popular move—what politician doesn't want to stop violence?—so more unconstitutional legislation is likely to be produced throughout the rest of the decade.

For instance, in July 2005 Illinois Gov. Rod Blagojevich (D.) signed into law the "Safe Games Illinois Act" that bans the rental and sale to minors—defined as those under the age of 18 years—of video games depicting "violent" and "sexually explicit" content. The law also requires the labeling of packages for such games with a solid white "18" outlined in black that must be at least two inches tall and two inches wide. A federal lawsuit was immediately filed against the new law by the leading trade associations for the video game industry, including the Entertainment Software Association. In December 2005 a federal judge held that the Illinois law violated the First Amendment protection of free speech.

58. See *Interactive Digital Software Ass'n* v. *St. Louis County*, 329 F. 3d 954 (8th Cir. 2003), petition for reh'g en banc denied, 2003 U.S. App. LEXIS 13782 (2003) (striking down, on First Amendment grounds, a St. Louis County, Mo., ordinance that regulated minors' access to graphically violent video games); *American Amusement Machine Ass'n* v. *Kendrick*, 244 F. 3d 572 (7th Cir. 2001), petition for reh'g en banc denied, 2001 U.S. App. LEXIS 11010 (2001), cert. den. 534 U.S. 994 (2001) (declaring unconstitutional an Indianapolis, Ind., ordinance limiting minors' access to games deemed to be "harmful to minors" because of their "graphic violence").

Michigan Gov. Jennifer Granholm (D.) signed a similar law in 2005 barring access to "ultra-violent explicit video games," as did California Gov. Arnold Schwarzenegger (R.). Lawsuits were quickly filed by the video game industry against the laws in both Michigan and California, claiming the measures violated the First Amendment speech rights of both game creators and game players. In November 2005, a federal judge ruled in favor of the video game industry and issued a preliminary injunction against the Michigan law in the case of *Entertainment Software Association* v. *Granholm*, reasoning in part that the law would have a chilling effect on speech and that the social science evidence used to support it was too weak to show any harms allegedly caused by playing the games. And in December 2005 a federal judge issued an injunction against the enforcement of the California law. Every politician in 2005, it seemed, was jumping on the bandwagon of parent-pandering, video game legislation. Ultimately, best-selling games like "Grand Theft Auto: San Andreas," which was found in July 2005 to have secret sex scenes that can be accessed by savvy gamers through a "hot coffee" modification, will continue to draw the wrath of politicians and spawn legislation.

One of the most widely publicized recent cases involving the application of the *Brandenburg* test involved Web postings by anti-abortion activists that branded doctors who performed abortions as "baby butchers." The Web postings were prepared by a group called the American Coalition of Life Activists. They included dossiers—so-called Nuremberg files (a reference to the war crimes trials held after the Second World War)—on abortion rights supporters, including doctors, clinic employees, politicians and judges. The group said the files could be used to conduct Nuremberg-like war crime trials in "perfectly legal courts once the tide of this nation's opinion turns against the wanton slaughter of God's children." On the site the names of abortion supporters who had been murdered were struck through and the names of those wounded were grayed out. A Planned Parenthood affiliate in Oregon sued, claiming that the material constituted threats against the persons named. A jury agreed and awarded more than $100 million in actual and punitive damages. A three-judge panel of the 9th U.S. Court of Appeals overturned this verdict in 2001. The court said the postings may have made it more likely that third parties would commit violent acts against the physicians, but they did not constitute a direct threat from the anti-abortion activists against the doctors.[59] The plaintiffs petitioned for a rehearing by the court and 14 months later, in a 6-5 vote, the court changed its ruling, declaring that there was no First Amendment protection for the Web postings. "While advocating violence is protected," wrote Judge Pamela Ann Rymer, "threatening a person with violence is not." She noted that three abortion providers had been murdered after similar "wanted posters" had been circulated regarding them. By the time the posters at issue were published, the poster format itself had acquired currency as a death threat for abortion providers, she added. The postings connote something they do not literally say, Judge Rymer wrote, yet both the actor and the recipient get the message.[60] The Supreme Court denied a petition to review the case in June 2003.[61]

59. *Planned Parenthood at Columbia/Willamette, Inc.* v. *American Coalition of Life Activists,* 244 F. 3d 1007 (2001).
60. *Planned Parenthood of the Columbia/Willamette, Inc.* v. *American Coalition of Life Activists,* 290 F. 3d 1058 (2002).
61. 539 U.S. 958 (2003).

Source: Bettman/CORBIS

Benjamin Gitlow, the leader of a dissident faction of the Socialist party, was prosecuted by New York state for publishing thousands of copies of a "Left Wing Manifesto." While the Supreme Court of the United States upheld his conviction, the high court ruling nevertheless declared that the First Amendment protected individuals from prosecutions by the states as well as the federal government.

The Gitlow *Ruling and the Incorporation Doctrine*

Before leaving the discussion of sedition, one additional case must be noted, not for its impact on the law of sedition but for its impact on the civil liberties enjoyed by all Americans. In 1925 Benjamin Gitlow, a small-time, left-wing agitator, asked the U.S. Supreme Court to reverse his conviction for violating the New York criminal anarchy statute. Gitlow was a member of a radical left-wing splinter group within the Socialist party. The group adopted a "Left Wing Manifesto" that condemned the dominant "moderate socialism" and advocated a far more militant posture that called for mass political strikes for the destruction of the existing government. Gitlow arranged for the printing and distribution of 16,000 copies of the "Manifesto." While the description of the publication sounds somewhat threatening, legal scholar Zechariah Chafee, one of Gitlow's contemporaries, said that any agitator who read the pamphlet to a mob would "not stir them to violence, except possibly against himself. This manifesto would disperse them faster than the Riot Act."[62] Gitlow was nevertheless convicted by the state.

In his appeal to the high court, he argued that the statute violated his freedom of expression guaranteed by the U.S. Constitution. In making this plea, Gitlow was asking the court to overturn a 92-year-old precedent.

62. Chafee, *Free Speech.*

In 1833 the Supreme Court of the United States ruled in *Barron* v. *Baltimore* that the Bill of Rights, the first 10 amendments to the U.S. Constitution, were applicable only in protecting citizens from actions of the federal government. Chief Justice John Marshall ruled that the people of the United States established the U.S. Constitution for their government, not for the government of the individual states. The limitations of power placed on government by the Constitution applied only to the government of the United States. Applying this rule to the First Amendment meant that neither Congress nor the federal government could abridge freedom of the press, but that the government of New York or the government of Detroit could interfere with freedom of expression without violating the guarantees of the U.S. Constitution. The citizens of the individual states or cities could erect their own constitutional guarantees in state constitutions or city charters. Indeed, such provisions existed in many places.

As applied to the case of Benjamin Gitlow, then, it seemed unlikely that the First Amendment (which prohibited interference by the federal government with freedom of speech and press) could be erected as a barrier to protect the radical from prosecution by the state of New York. Yet this is exactly what the young Socialist argued.

Gitlow's attorneys, especially Walter Heilprin Pollak, did not attack Chief Justice Marshall's ruling in *Barron* v. *Baltimore* directly; instead they went around it. Pollak based his argument on the 14th Amendment to the Constitution, which was adopted in 1868, 35 years after the decision in *Barron* v. *Baltimore.* The attorney argued that there was general agreement that the First Amendment protected a citizen's right to liberty of expression. The 14th Amendment says, in part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law." Pollak asserted that included among the liberties guaranteed by the 14th Amendment is liberty of the press as guaranteed by the First Amendment. Therefore, a state cannot deprive a citizen of the freedom of the press that is guaranteed by the First Amendment without violating the 14th Amendment. By jailing Benjamin Gitlow for exercising his right of freedom of speech granted by the First Amendment, New York state denied him the liberty assured him by the 14th Amendment. Simply, then, the First Amendment, as applied through the 14th Amendment, prohibits states and cities and counties from denying an individual freedom of speech and press.

The First Amendment, as applied through the 14th Amendment, prohibits states and cities and counties from denying an individual freedom of speech and press.

The high court had heard this argument before, but apparently not as persuasively as Mr. Pollak presented it. In rather casual terms, Justice Edward Sanford made a startlingly new constitutional pronouncement: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states."[63]

The importance of the ruling in *Gitlow* v. *New York* is that the high court acknowledged that the Bill of Rights places limitations on the actions of states and local governments as well as on the federal government. The *Gitlow* case states that freedom of speech is protected by the 14th Amendment. This is known as the incorporation doctrine: The free speech and free press clauses of the First Amendment have been "incorporated" through the 14th Amendment due process clause as fundamental liberties to apply to state and local government entities and officials, not just to "Congress." In later cases the court placed freedom of religion, freedom

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

from self-incrimination and freedom from illegal search and seizure under the same protection. Today, most of the rights outlined in the Bill of Rights are protected via the 14th Amendment from interference by states and cities as well as by the federal government. The importance of the *Gitlow* case cannot be underestimated. It truly marked the beginning of attainment of a full measure of civil liberties for the citizens of the nation. It was the key that unlocked an important door.

In the end Gitlow lost his case anyway. He had won a major constitutional victory but was unable to persuade the high court that his political agitation was harmless. Justice Sanford ruled that New York state had not violated Gitlow's First Amendment rights when it prosecuted him for publishing his "Left Wing Manifesto," which the state contended advocated the violent overthrow of the government.

SUMMARY

Within eight years of the passage of the First Amendment, the nation adopted its first (and most wide-ranging) sedition laws, the Alien and Sedition Acts of 1798. Many leading political editors and politicians were prosecuted under the laws, which made it a crime to criticize both the president and the national government. While the Supreme Court never did hear arguments regarding the constitutionality of the laws, several justices of the Supreme Court presided at sedition act trials and refused to sustain a constitutional objection to the laws. The public hated the measures. John Adams was voted out of office in 1800 and was replaced by his political opponent and target of the sedition laws, Thomas Jefferson. The laws left such a bad taste that the federal government did not pass another sedition law until World War I, 117 years later.

Sedition prosecutions in the period from 1915 to 1925 were the most vicious in the nation's history as war protesters, socialists, anarchists and other political dissidents became the target of government repression. It was during this era that the Supreme Court began to interpret the meaning of the First Amendment. In a series of rulings stemming from the World War I cases, the high court fashioned what is known as the clear and present danger test to measure state and federal laws and protests and other expressions against the First Amendment. The test was rigid and was never used to overturn a lower-court conviction, although in 1927 Justice Louis D. Brandeis did fashion a broad and liberal interpretation of the clear and present danger test in his dissent in the case of *Whitney* v. *California.* In 1925 the court ruled that the guarantees of freedom of speech apply to actions taken by all governments, that freedom of speech under the First Amendment protects individuals from censorship by all levels of government, not just from actions by the federal government. This pronouncement in *Gitlow* v. *New York* opened the door to a much broader protection of freedom of expression in the nation.

The nation's most recent sedition law was adopted in 1940. The Smith Act, as it is known, prohibits the advocacy of the violent overthrow of the government. Following a series of trials and two Supreme Court rulings in the 1950s, the law has become a relatively benign prohibition. The Supreme Court made its last important attempt to reconcile the First Amendment and the law of sedition in 1969 when it ruled in *Brandenburg* v. *Ohio* that advocacy of unlawful conduct is protected by the Constitution unless it is directed toward inciting or producing imminent lawless action and is likely to incite or produce such action.

TAXATION AND THE PRESS

The First Amendment guarantees that the press shall be free from unfair and discriminatory taxes that have an impact on circulation or distribution. In this area the classic case concerns a U.S. senator from a southern state and the daily press of that state.[64]

During the late 1920s and early 1930s, the political leader of Louisiana was Huey P. Long. Long was a demagogue by most accounts and in 1934 held his state in virtual dictatorship. He controlled the legislature and the statehouse and had a deep impact on the judicial branch as well. Long started his career by attacking big business—Standard Oil of California, to be exact. He became a folk hero among the rural people of Louisiana and was elected governor in 1928. In 1931 he was elected to the U.S. Senate, and many people believe that he would have attempted to win the presidency had he not been assassinated in 1935.[65]

In 1934 the Long political machine, which the majority of the big-city residents had never favored, became annoyed at the frequent attacks by the state's daily newspapers against the senator and his political machine. The legislature enacted a special 2 percent tax on the gross advertising income of newspapers with a circulation of more than 20,000. Of the 163 newspapers in the state, only 13 had more than 20,000 subscribers, and of the 13, 12 were outspoken in their opposition to Long. The newspapers went to court and argued that the tax violated the First Amendment as well as other constitutional guarantees. The press won at the circuit court level on other grounds, but the state appealed. Then in 1936 the Supreme Court ruled in favor of the newspapers squarely on First Amendment grounds.

Justice George Sutherland, who wrote the opinion in this unanimous Supreme Court decision, said, that such taxes on newspapers were the direct cause of much civil unrest in England and were one of the chief objections Americans had had to British policy—objections that ultimately forced independence.

The justice wrote:

> It is impossible to concede that by the words "freedom of the press" the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted in immunity from previous censorship. . . . It is equally impossible to believe that it was not intended to bring within the reach of these words such modes of restraint as were embodied in . . . taxation.[66]

Sutherland asserted that the tax not only restricted the amount of revenue the paper earned but also restrained circulation. Newspapers with fewer than 20,000 readers would be reluctant to seek new subscribers for fear of increasing circulation to the point where they would have to pay the tax as well. The justice added that any action by the government that prevents free and general discussion of public matters is a kind of censorship. Sutherland said

64. *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936).
65. Gerald, *The Press and the Constitution.*
66. *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936).

that in this case even the form in which the tax was imposed—levied against a distinct group of newspapers—was suspicious. He then wrote:

> The tax here involved is bad not because it takes money from the pockets of the appellees [the newspapers]. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.[67]

"A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

Therefore, in *Grosjean* v. *American Press Co.,* the Supreme Court struck down a discriminatory tax against the press.

Despite the fact that Justice Sutherland specifically noted in his opinion that the ruling in *Grosjean* did not mean that newspapers are immune from ordinary taxes, some newspaper publishers apparently did not read the opinion that way, but saw it instead as a means of escaping other kinds of taxes. After *Grosjean,* for example, unsuccessful attempts were made to have a sales tax in Arizona declared inapplicable to newspapers because it was a restriction on freedom of the press.[68] Since 1953, when the U.S. Supreme Court refused to hear an appeal from a California decision affirming the constitutionality of a general business tax on newspapers, the matter has been fairly well settled. The California case involved the Corona Daily Independent, which challenged a business tax imposed by the city of Corona. A license tax of $32 had been levied for many years against all businesses. In 1953 the newspaper refused to pay the levy on the grounds that the tax violated its First Amendment rights to freedom of expression. The *Grosjean* case prohibited such taxation, lawyers for the publication argued. The trial court ruled in favor of the newspaper, but the California Appellate Court disagreed and reversed the ruling. Justice Griffin wrote that there is ample authority to the effect that newspapers are not made exempt from ordinary forms of taxation. Justice Griffin said that the newspaper had not shown that the amount of the tax was harsh or arbitrary, that the tax was oppressive or confiscatory, or that the tax in any way curtailed or abridged the newspaper's right to disseminate news and comment:

> We conclude that a nondiscriminatory tax, levied upon the doing of business, for the sole purpose of maintaining the municipal government, without whose municipal services and protection the press could neither exist nor function, must be sustained as being within the purview and necessary implications of the Constitution and its amendments.[69]

The U.S. Supreme Court refused to review the ruling in *City of Corona* v. *Corona Daily Independent,* and most people believed the refusal signaled concurrence with the opinion of the California court.

67. Ibid.
68. *Arizona Publishing Co.* v. *O'Neil,* 22 F. Supp. 117; aff'd. 304 U.S. 543 (1938).
69. *City of Corona* v. *Corona Daily Independent,* 252 P. 2d 56 (1953).

But in 1983 the U.S. Supreme Court did review an unusual tax placed on a handful of Minnesota newspapers.[70] Since 1971 Minnesota had imposed a use tax on the cost of the paper and ink products consumed in the production of a publication. The law was amended in 1974 to exempt from the tax the first $100,000 worth of paper and ink used. After the exemption was adopted, only about 15 newspapers in the state were forced to pay the tax. And the Minneapolis Star and Tribune Company ended up paying about two-thirds of all the revenues collected under the tax. The Star and Tribune Company challenged the tax, and in March 1983 the high court ruled that the levy against the newspapers was invalid.

Justice Sandra Day O'Connor described the tax as a "special tax that applies only to certain publications protected by the First Amendment." She added: "A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected." Such a tax could be used to censor the press, a clear violation of the First Amendment. The tax is also deficient because it ends up hitting only a few of the newspapers in the state. "Whatever the motive of the legislature in this case," Justice O'Connor wrote for the court's majority, "we think that recognizing a power in the State not only to single out the press but also to tailor the tax so it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme."[71]

The Supreme Court voided another tax scheme in 1987 because, Justice Thurgood Marshall said, "the taxing scheme was based solely on the content of the publication."[72] Arkansas had a sales tax on tangible personal property. Several items were exempt from the tax, including newspapers and "religious, professional, trade and sports journals and/or publications printed and published in the state." The publisher of a general interest magazine sued to be exempt from the tax. The publisher argued that his magazine was published in the state and therefore should be exempt. The Arkansas Supreme Court ruled that the publisher had read the statute incorrectly. The law only exempted religious, professional, trade and sports publications that were printed in the state, not all magazines printed in the state. This tax was unconstitutional because it was discriminatory, because its applicability depended solely on the content of the publication, the high court said. This is a violation of the First Amendment. The high court heard arguments in the autumn of 1988 in a similar case, *Texas Monthly, Inc.* v. *Bullock,*[73] in which a Texas statute exempted religious periodicals from the general state sales tax. The publisher of the Texas Monthly argued that the law not only discriminated against certain publications based on their content, but also violated the separation of church and state clause in the First Amendment. In February 1989, by a 6-3 vote, the Supreme Court declared the Texas tax invalid. Justice William Brennan, writing the court's opinion, said the tax violated the establishment clause of the First Amendment. In 1999 a U.S. District Court in California struck down a tax on cable and satellite broadcasters. The state had levied a 5 percent tax on the gross receipts of pay-per-view telecasts of boxing, wrestling, kickboxing and similar contests. Telecasts of movies or concerts or other sporting events were not taxed. The

70. *Minneapolis Star* v. *Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983).
71. *Minneapolis Star* v. *Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983).
72. *Arkansas Writers' Project* v. *Ragland,* 481 U.S. 221 (1987).
73. 489 U.S. 1 (1989).

court ruled that the tax violated the First Amendment because it imposed a financial burden on speakers because of the content of their speech.[74]

The basic rule of First Amendment law regarding taxes on the press is this: Newspapers, broadcasting stations, and other mass media must pay the same taxes as any other business. Taxes that are levied only against the press and tend to inhibit circulation or impose other kinds of prior restraints (such as very high taxes that keep all but very wealthy people from publishing newspapers) are clearly suspect and probably unconstitutional. Also, decisions by the state to tax or not tax cannot be based solely on the content of the publication. In some circumstances, however, states can distinguish between different mass media when levying taxes. This was a ruling by the Supreme Court in 1991 in a case from Arkansas. The state levied a 4 percent sales tax on cable television receipts; magazines and newspapers were exempt from paying this tax.

Justice Sandra Day O'Connor, writing for a 7-2 majority, restated the high court's doctrine that the First Amendment prevents government from singling out the press as a whole for special tax burdens. "The press plays a unique role as a check on government abuse and a tax limited to the press raises concerns about censorship of critical information and opinion," she wrote.[75] Nor may states discriminate among categories of mass media when taxing, if that discrimination is based on content or for purposes of censorship, she added. But "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing particular ideas," O'Connor wrote. Almost 20 other states have taxes on cable television but do not tax the print media, according to The New York Times. In 1995 the Pennsylvania Supreme Court upheld the constitutionality of a state sales tax on magazines but not on newspapers. The court ruled that the tax was based not on content but on format and frequency of publication, a reasonable basis for distinguishing between the two media.[76]

Today some politicians occasionally attempt to punish or to retaliate against the press for unfavorable news coverage by trying to change rules related to taxation. For instance, Missouri law provides a sales tax exemption for newspapers on their purchase of newsprint, ink and other supplies. In 2004, however, Republicans in the Missouri House of Representatives passed a bill that eliminated that tax break, but only for the state's two largest newspapers—the St. Louis Post-Dispatch and the Kansas City Star—based on their operating revenue and daily circulation.[77] Democrats contended the bill was in "retaliation for a Post-Dispatch editorial calling the [Republican] legislators hypocrites for cutting Medicaid when they use a state-subsidized health plan."[78] The editorial was accompanied by the names and photographs of 66 Missouri House Republicans. After the House voted to eliminate the tax exemption, Post-Dispatch columnist Bill McClellan wryly wrote that "it seems that some of these House Republicans will not tolerate criticism. They'll shout you down. They'll use the tax code to get you. Whatever it takes."[79] Fortunately for the Post-Dispatch and the Star, a Missouri Senate committee later voted to remove the House-passed section.

74. *United States Satellite Broadcasting Co.* v. *Lynch*, 41 F. Supp. 2d 1113 (1999).
75. *Leathers* v. *Medlock*, 499 U.S. 439 (1991).
76. *Magazine Publishers of America* v. *Pennsylvania*, 654 A. 2d 519 (1995).
77. Young, "Newspapers Would Retain Tax Benefit."
78. Ibid.
79. McClellan, "Criticizing the State's GOP."

SUMMARY Governments have traditionally used taxation as a means of controlling the press. Since the 1930s and the U.S. Supreme Court ruling in *Grosjean* v. *American Press Co.,* the First Amendment has posed a substantial barrier to such efforts by governments in the United States. Newspapers, broadcasting stations and other mass media must surely pay the same taxes imposed on other businesses. But taxes that are levied only against the press and tend to inhibit circulation or impose other kinds of restraints are unconstitutional. Also, taxes levied against mass media that are based solely on the content of the particular medium are generally regarded as unconstitutional.

PRIOR RESTRAINT

The great compiler of the British law, William Blackstone, defined freedom of the press in the 1760s as freedom from "previous restraint," or prior restraint. Regardless of the difference of opinion on whether the First Amendment is intended to protect political criticism or to protect the press from unfair taxation, most agree that the guarantees of freedom of speech and press were intended to bar the government from exercising prior restraint. Despite the weight of such authority, the media in the United States in the 2000s still face instances of prepublication censorship.

Prior restraint comes in many different forms. The most obvious are those instances in which the government actually insists on giving prior approval before something may be published or broadcast, or simply bans the publication or broadcast of specific kinds of material. There are examples of these varieties in this chapter and the next. Similar kinds of prior restraint occur when the courts forbid the publication of certain kinds material before a trial (see Chapters 11 and 12) or when a court issues an order forbidding the publication of material that might constitute an invasion of privacy (Chapters 7 and 8). But there are subtler forms of prior restraint as well. For example, many states have laws aimed at discouraging convicted criminals from profiting from their crimes by making money from books or films that detail their exploits (see pages 138–139). These are called Son of Sam laws because the first state statute enacted was aimed at stopping a notorious New York serial murderer, David Berkowitz, nicknamed the Son of Sam, from earning money by selling an account of his rampage. Such laws are permissible, but broadly worded statutes have been ruled to be a prior restraint because they may stop the convicted felon from expressing his or her views on a variety of subjects. And some courts have considered laws that limit how or how much a political candidate can spend during an election campaign to be prior censorship as well (see pages 147–150). The discussion in this chapter focuses on the most blatant kind of prior restraint, direct government restrictions on publication.

NEAR v. *MINNESOTA*

The Supreme Court did not directly consider the constitutionality of prior restraint until more than a decade after it had decided its first major sedition case. In 1931, in *Near* v. *Minnesota,*[80] the high court struck an important blow for freedom of expression.

80. 283 U.S. 697 (1931).

City and county officials in Minneapolis, Minn., brought a legal action against Jay M. Near and Howard Guilford, publishers of the Saturday Press, a small weekly newspaper. Near and Guilford were self-proclaimed reformers whose ostensible purpose was to clean up city and county government in Minneapolis. In their attacks on corruption in city government, they used language that was far from temperate and defamed some of the town's leading government officials. Near and Guilford charged that Jewish gangsters were in control of gambling, bootlegging and racketeering in the city and that city government and its law enforcement agencies did not perform their duties energetically. They repeated these charges over and over in a highly inflammatory manner.[81]

Minnesota had a statute that empowered a court to declare any obscene, lewd, lascivious, malicious, scandalous or defamatory publication a public nuisance. When such a publication was deemed a public nuisance, the court issued an injunction against future publication or distribution. Violation of the injunction resulted in punishment for contempt of court.

In 1927 county attorney Floyd Olson initiated an action against the Saturday Press. A district court declared the newspaper a public nuisance and "perpetually enjoined" publication of the Saturday Press. The only way either Near or Guilford would be able to publish the newspaper again was to convince the court that their newspaper would remain free of objectionable material. In 1928 the Minnesota Supreme Court upheld the constitutionality of the law, declaring that under its broad police power the state can regulate public nuisances, including defamatory and scandalous newspapers.

The case then went to the U.S. Supreme Court, which reversed the ruling by the state Supreme Court. The nuisance statute was declared unconstitutional. Chief Justice Charles Evans Hughes wrote the opinion for the court in the 5-4 ruling, saying that the statute in question was not designed to redress wrongs to individuals attacked by the newspaper.[82] Instead, the statute was directed at suppressing the Saturday Press once and for all. The object of the law, Hughes wrote, was not punishment but censorship—not only of a single issue, but also of all future issues—which is not consistent with the traditional concept of freedom of the press. That is, the statute constituted prior restraint, and prior restraint is clearly a violation of the First Amendment.

The object of the law, Hughes wrote, was not punishment but censorship—not only of a single issue, but also of all future issues—which is not consistent with the traditional concept of freedom of the press.

One maxim in the law holds that when a judge writes an opinion for a court, he or she should stick to the problem at hand and not wander off and talk about matters that do not really concern the specific issue before the court. Such remarks are considered **dicta,** or words that do not really apply to the case. These words, these dicta, are never really considered an important part of the ruling in the case. Chief Justice Hughes' opinion in *Near* v. *Minnesota* contains a good deal of dicta.

In this case Hughes wrote that the prior restraint of the Saturday Press was unconstitutional, but in some circumstances, he added, prior restraint might be permissible. In what kinds of circumstances? The government can constitutionally stop publication of obscenity, material that incites people to acts of violence, and certain kinds of materials during wartime. (It is entirely probable that the chief justice was forced to make these qualifying statements in order to hold his slim five-person majority in the ruling.) Hughes admitted, on the other hand,

81. Friendly, *Minnesota Rag.*
82. *Near* v. *Minnesota,* 283 U.S. 697 (1931).

that defining freedom of the press as only the freedom from prior restraint is equally wrong, for in many cases punishment after publication (i.e., subsequent punishment) imposes effective censorship upon the freedom of expression.

Near v. *Minnesota* stands for the proposition that under American law prior censorship is permitted only in very unusual circumstances; it is the exception, not the rule. Courts have reinforced this interpretation many times since 1931. Despite this considerable litigation, there remains an incomplete understanding of the kinds of circumstances in which prior restraint might be acceptable under the First Amendment, as the following cases illustrate.

AUSTIN v. *KEEFE*

A case that to some extent reinforced the *Near* ruling involved the attempt of a real estate broker to stop a neighborhood community action group from distributing pamphlets about him. The Organization for a Better Austin was a community organization in the Austin neighborhood of Chicago. Its goal was to stabilize the population in the integrated community. Members were opposed to the tactics of certain real estate brokers who came into white neighborhoods, spread the word that blacks were moving in, bought up the white-owned homes cheaply in the ensuing panic, and then resold them at a good profit to blacks or other whites. The organization received pledges from most real estate firms in the area to stop these blockbusting tactics. But Jerome Keefe refused to make such an agreement. The community group then printed leaflets and flyers describing his activities and handed them out in Westchester, the community in which Keefe lived. Group members proclaimed that Keefe was a "panic peddler" and said they would stop distributing the leaflets in Westchester as soon as Keefe agreed to stop his blockbusting real estate tactics. Keefe went to court and obtained an injunction that prohibited further distribution by the activists of pamphlets, leaflets and literature of any kind in Westchester on the grounds that the material constituted an invasion of Keefe's privacy and caused him irreparable harm. The Organization for a Better Austin appealed the ruling to the U.S. Supreme Court. In May 1971, the high court dissolved the injunction. Chief Justice Warren Burger wrote, "The injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights." The injunction, as in the *Near* case, did not seek to redress individual wrongs, but instead sought to suppress on the basis of one or two handbills the distribution of any kind of literature in a city of 18,000 inhabitants. Keefe argued that the purpose of the handbills was not to inform the community but to force him to sign an agreement. The chief justice said this argument was not sufficient cause to remove the leaflets and flyers from the protection of the First Amendment. Justice Burger added:

> Petitioners [the community group] were engaged openly and vigorously in making the public aware of respondent's [Keefe's] real estate practices. Those practices were offensive to them, as the views and practices of the petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.[83]

The *Keefe* case did a good job of reinforcing the high court's decision in *Near* v. *Minnesota.*

83. *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971).

PENTAGON PAPERS CASE

While it is more famous, another 1971 decision is not as strong a statement in behalf of freedom of expression as either *Near* or *Keefe.* This is the famous Pentagon Papers decision.[84] The case began in the summer of 1971 when The New York Times, followed by the Washington Post and a handful of other newspapers, began publishing a series of articles based on pilfered copies of a top secret 47-volume government study officially entitled "History of the United States Decision-Making Process on Vietnam Policy." The day after the initial article on the so-called Pentagon Papers appeared, Attorney General John Mitchell asked The New York Times to stop publication of the material. When The Times' publisher refused, the government went to court to get an injunction to force the newspaper to stop the series. A temporary restraining order was granted as the case wound its way to the Supreme Court. The government also sought to impose a similar injunction on the Washington Post after it began to publish reports based on the same material.

At first the government argued that the publication of this material violated federal espionage statutes. When that assertion did not satisfy the lower federal courts, the government argued that the president had inherent power under his constitutional mandate to conduct foreign affairs to protect the national security, which includes the right to classify documents secret and top secret. Publication of this material by the newspapers was unauthorized disclosure of such material and should be stopped. This argument did not satisfy the courts either, and by the time the case came before the Supreme Court, the government argument was that publication of these papers might result in irreparable harm to the nation and its ability to conduct foreign affairs. The Times and the Post consistently made two arguments. First, they said that the classification system is a sham, that people in the government declassify documents almost at will when they want to sway public opinion or influence a reporter's story. Second, the press also argued that an injunction against the continued publication of this material violated the First Amendment. Interestingly, the newspapers did not argue that under all circumstances prior restraint is in conflict with the First Amendment. Defense attorney Professor Alexander Bickel argued that under some circumstances prior restraint is acceptable—for example, when the publication of a document has a direct link with a grave event that is immediate and visible. Apparently, both newspapers decided that a victory in that immediate case was far more important than to establish a definitive and long-lasting constitutional principle. They therefore concentrated on winning the case, acknowledging that in future cases prior restraint might be permissible.[85]

On June 30 the high court ruled 6-3 in favor of The New York Times and the Washington Post and refused to block the publication of the Pentagon Papers. But the ruling was hardly the kind that strengthened the First Amendment. In a very short per curiam opinion, the majority said that in a case involving the prior restraint of a publication, the government bears a heavy burden to justify such a restraint. In this case the government failed to show the court why such a restraint should be imposed on the two newspapers.[86] In other words, the government failed to justify its request for the permanent restraining order.

84. *New York Times* v. *U.S.; U.S.* v. *Washington Post,* 403 U.S. 713 (1971).
85. Pember, "The Pentagon Papers," 403.
86. *New York Times* v. *U.S.; U.S.* v. *Washington Post,* 403 U.S. 713 (1971).

Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U. S. Involvement

By NEIL SHEEHAN

A massive study of how the United States went to war in Indochina, conducted by the Pentagon three years ago, demonstrates that four administrations progressively developed a sense of commitment to a non-Communist Vietnam, a readiness to fight the North to protect the South, and an ultimate frustration with this effort—to a much greater extent than their public statements acknowledged at the time.

The 3,000-page analysis, to which 4,000 pages of official documents are appended, was commissioned by Secretary of Defense Robert S. McNamara and covers the American involvement in Southeast Asia from World War II to mid-1968—the start of the peace talks in Paris after President Lyndon B. Johnson had set a limit on further military commitments and revealed his intention to retire. Most of the study and many of the appended documents have been obtained by The New York Times and will be described and presented in a series of articles beginning today.

Three pages of documentary material from the Pentagon study begin on Page 35.

Though far from a complete history, even at 2.5 million words, the study forms a great archive of government decision-making on Indochina over three decades. The study led its 30 to 40 authors and researchers to many broad conclusions and specific findings, including the following:

¶That the Truman Administration's decision to give military aid to France in her colonial war against the Communist-led Vietminh "directly involved" the United States in Vietnam and "set" the course of American policy.

¶That the Eisenhower Administration's decision to rescue a fledgling South Vietnam from a Communist takeover and attempt to undermine the new Communist regime of North Vietnam gave the Administration a "direct role in the ultimate breakdown of the Geneva settlement" for Indochina in 1954.

¶That the Kennedy Administration, though ultimately spared from major escalation decisions by the death of its leader, transformed a policy of "limited-risk gamble," which it inherited, into a "broad commitment" that left President Johnson with a choice between more war and withdrawal.

¶That the Johnson Administration, though the President was reluctant and hesitant to take the final decisions, intensified the covert warfare against North Vietnam and began planning in the spring of 1964 to wage overt war, a full year before it publicly revealed the depth of its involvement and its fear of defeat.

¶That this campaign of growing clandestine military pressure through 1964 and the expanding program of bombing North Vietnam in 1965 were begun despite the judgment of the Government's intelligence community that the measures would not cause Hanoi to cease its support of the Vietcong insurgency in the South, and that the bombing was

Continued on Page 38, Col. 1

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Front page from The New York Times, June 12, 1971. The so-called Pentagon Papers.

The decision in the case rested on the preferred position First Amendment theory or doctrine (see pages 46–47). The ban on publication was *presumed* to be an unconstitutional infringement on the First Amendment. The government had to prove that the ban was needed to protect the nation in some manner. If such evidence could be adduced, the court would strike the balance in favor of the government and uphold the ban on the publication of the articles. But in this case the government simply failed to show why its request for an injunction was vital to the national interest. Consequently, the high court denied the government's request for a ban on the publication of the Pentagon Papers on the grounds that such a prohibition was a violation of the First Amendment. Note: The court did not say that in all similar cases an injunction would violate the First Amendment. It did not even say that in this case an injunction was a violation of the First Amendment. It merely said that the government had not shown why the injunction was needed, why it was not a violation of the freedom of the press. Such a decision is not what one would call a ringing defense of the right of free expression.

What many people initially called the case of the century ended in a First Amendment fizzle. The press won the day; the Pentagon Papers were published. But thoughtful observers expressed concern over the ruling. A majority of the court had not ruled that such prior

restraint was unconstitutional—only that the government had failed to meet the heavy burden of showing such restraint was necessary in this case.

What many people initially called the case of the century ended in a First Amendment fizzle.

PROGRESSIVE MAGAZINE CASE

The fragile nature of the court's holding became clear in 1979 when the government went to court to block the publication of material it claimed could endanger the national security.[87] Free-lance writer Howard Morland had prepared an article entitled "The H-Bomb Secret: How We Got It, Why We're Telling It." The piece was scheduled to be published in the April edition of the Progressive magazine, a 70-year-old political digest founded by Robert M. LaFollette as a voice of the progressive movement.

Morland had gathered the material for the article from unclassified sources. After completing an early draft of the piece, he sought technical criticism from various scholars. Somehow a copy found its way to officials in the federal government. With the cat out of the bag, Progressive editor Erwin Knoll sent a final draft to the government for prepublication comments on technical accuracy. The government said the piece was too accurate and moved into federal court to stop the magazine from publishing the story.

The defendants in the case argued that all the information in the article was from public sources, that any citizen could have gotten the same material by going to the Department of Energy, federal libraries and the like. Other nations already had this information or could easily get it. Experts testifying in behalf of the magazine argued that the article was a harmless exposition of some exotic nuclear technology.

The government disagreed. It said that while some of the material was from public sources, much of the data was not publicly available. Prosecutors and the government's battery of technical experts argued that the article contained a core of information that had never before been published. The United States also argued that it was immaterial where Morland had gotten his information and whether it had come from classified or public documents. Prosecutors argued that the nation's national security interest permitted the classification and censorship of even information originating in public if, when such information is drawn together, synthesized and collated, it acquires the character "of presenting immediate, direct and irreparable harm to the interests of the United States." The United States was arguing, then, that some material is automatically classified as soon as it is created if it has the potential to cause harm to the nation. The information in Morland's article met this description, prosecutors argued.

It fell to U.S. District Judge Robert Warren to evaluate the conflicting claims and reach a decision on the government's request to enjoin the publication of the piece. In a thoughtful opinion in which Warren attempted to sort out the issues in the case, the judge said he agreed with the government that there were concepts in the article not found in the public realm—concepts vital to the operation of a thermonuclear bomb. Was the piece a do-it-yourself guide for a hydrogen bomb? No, Warren said, it was not. "A number of affidavits make quite clear that a sine qua non to thermonuclear capability is a large, sophisticated industrial capability coupled with a coterie of imaginative, resourceful scientists and technicians."[88] But the article could provide some nations with a ticket to bypass blind alleys and help a medium-sized nation to move faster in developing a hydrogen bomb.

87. *U.S.* v. *Progressive*, 467 F. Supp. 990 (1979).
88. Ibid.

To the Progressive's argument that the publication of the article would provide people with the information needed to make an informed decision on nuclear issues, Warren wrote, "This Court can find no plausible reason why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on this issue."

Looking to the legal issues in the case, Warren said he saw three differences between this case and the Pentagon Papers ruling of 1971.

- The Pentagon Papers were a historical study; the Morland article focuses on contemporary matters.
- The government failed to advance cogent national security interests in the Pentagon Papers case; the national security interest was considerably more apparent in the Progressive case.
- The government lacked substantial legal authority to stop the publication of the Pentagon Papers; in other words, there were no statutes or orders that specifically forbid such publication. There are several laws that specifically limit the disclosure of restricted data related to the design, manufacture or utilization of atomic weapons.

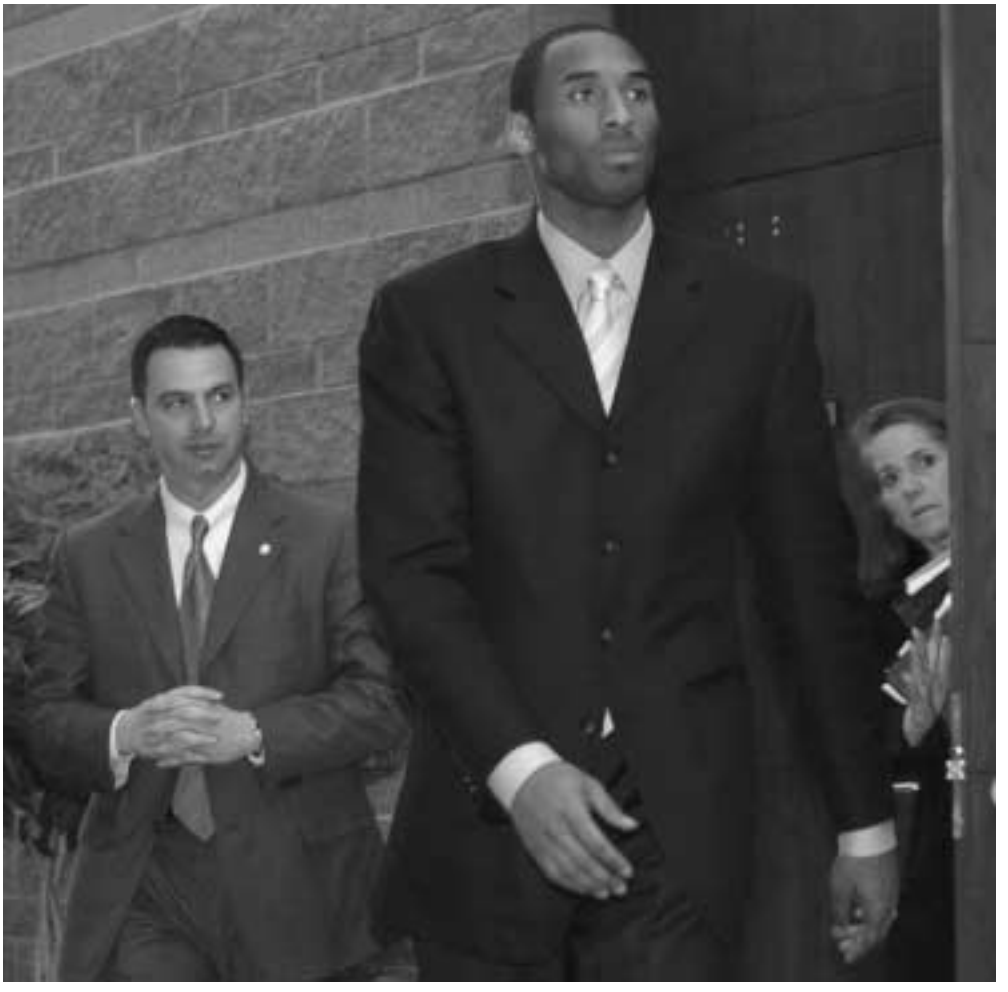
Warren concluded that the government had met the heavy burden of showing justification for prior restraint. The judge added that he was not convinced that suppression of the objected-to technical portions of the article would impede the Progressive in its crusade to stimulate public debate on the issue of nuclear armament. "What is involved here," Warren concluded, "is information dealing with the most destructive weapon in the history of mankind, information of sufficient destructive potential to nullify the right to free speech and to endanger the right to life itself."[89]

When the injunction was issued, the editors of the Progressive and their supporters inside and outside the press vowed to appeal the ruling. In September 1979, as the *Progressive* case began its slow ascent up the appellate ladder, a small newspaper in Madison, Wis., published a story containing much of the same information as was in the Morland article. When this occurred, the Department of Justice unhappily withdrew its suit against the Progressive. But the victory in the *Progressive* case was bittersweet at best. The publication of the article had been enjoined. A considerable body of legal opinion had supported the notion that the injunction would have been sustained by the Supreme Court, rightly or wrongly. It must be remembered that as a legal precedent the decision in the *Progressive* case has limited value. It was, after all, only a U.S. District Court ruling and doesn't carry the weight of the *Near* decision, for example. From a political standpoint, however, the case had important implications. Prior restraint, which had seemed quite distant in the years succeeding *Near* v. *Minnesota* and in the afterglow of the press victory in the Pentagon Papers case, took on realistic and frightening new proportions.

KOBE BRYANT CASE

The unfortunate media circus that was the criminal sexual assault case against basketball superstar Kobe Bryant in 2004 also involved a very different form of a prior restraint on the media. The prior restraint controversy began in June 2004 when a court reporter accidentally and

89. Ibid.



Los Angeles Laker Kobe Bryant, shown here leaving a Colorado court house, became inadvertently involved in a prior restaint case when private documents about the sexual history of the woman who accused him of rape were mistakenly sent to reporters via e-mail.

mistakenly sent sealed transcripts of private, *in camera* (meaning "in private") proceedings by electronic transmission to seven media entities via an electronic mailing list. The transcripts, which went to media outlets such as the Associated Press and CBS News, related to and contained information about the alleged victim's sexual conduct before and after her encounter with Kobe Bryant in a hotel in Colorado.

Such evidence of prior and subsequent sexual conduct is presumed to be irrelevant and thus typically is inadmissible in court in sexual assault cases under what are known as rape shield laws. The primary policy behind rape shield laws such as the one in Colorado is to protect the privacy interests of the alleged victim, who technically is called a "complaining witness" in sexual assault cases. In addition, rape is a severely underreported crime, and some

women might be deterred from reporting sexual assaults upon them if they thought that their entire sexual history would be exposed in court and, in turn, in the mass media. Rape shield laws thus keep evidence of sexual conduct that is irrelevant and not material for the case at hand from being publicly reported.

An *in camera* proceeding, however, allows a judge to consider, in his or her private chambers and out of public view, whether there is any possibility that the prior or subsequent sexual conduct of the alleged victim is, in fact, relevant to the case at hand and thus should be admitted into evidence despite the presence of the shield law. Such a hearing took place in the Kobe Bryant case, and it was the record of that private hearing that was accidentally sent to the news media.

The seven media outlets that received the private and confidential transcripts wanted, of course, to publish their contents. There already had been much gossip and speculation about the alleged victim's sexual conduct before and after her encounter with Bryant, and the official records would either prove or disprove the rumors. Furthermore, the media had lawfully obtained the documents; the news outlets had neither stolen the documents nor taken them without permission. In brief, the seven news organizations that received the sealed transcripts had lawfully obtained truthful information about a matter of public significance, namely the rape case against one of the most high-profile basketball players in the United States. Under the U.S. Supreme Court's 1989 decision in *Florida Star* v. *B.J.F.*[90] (see page 321), if the media lawfully obtain truthful information about a matter of public significance, then they may publish it unless there is a government interest of the highest order that trumps the right to publish.

The trial court judge, however, wanted to protect the privacy of the alleged victim, and he immediately issued an order before the media published the contents of the document that read:

> It has come to the Court's attention that the *in camera* portions of the hearings in this matter . . . were erroneously distributed. These transcripts are not for public dissemination. Anyone who has received these transcripts is ordered to delete and destroy any copies and not reveal any contents thereof, or be subject to contempt of Court.

Such an order, however, constitutes a prior restraint on the media because it stops them from publishing information that they already possess. The order thus was presumptively an unconstitutional abridgment of the First Amendment right of a free press, and the news organizations that received the private transcripts of the *in camera* proceedings went to court to have the judge's order reversed. On July 19, 2004, the Supreme Court of Colorado, in a 4-3 split decision, upheld that part of the trial court's order preventing the media from revealing the contents of the documents.[91] The four-judge majority initially acknowledged that it was dealing with a prior restraint on speech, which it defined as a court order "forbidding certain communications when issued in advance of the time that such communications are to occur." The majority also recognized that such orders are presumptively unconstitutional, and it

90. 491 U.S. 524 (1989).
91. *Colorado* v. *Bryant*, 94 P. 3d 624 (2004).

identified a three-part test that such an order must pass or clear in order to be constitutional. In particular, the majority of the Supreme Court of Colorado wrote that a prior restraint is constitutional only if it

- serves a government interest of the "highest order" ;
- is the narrowest possible order available to protect that interest; and
- is "necessary to protect against an evil that is great and certain" to result from the reportage and that cannot be mitigated by less intrusive measures.

In applying this three-part test to the facts of the *Bryant* case, the majority began by emphasizing that it was forced to balance the "conflict between truthful reporting and state-protected privacy interests." The majority found that the privacy interests of sexual assault victims that are protected by rape shield laws constitute interests of the highest order. It wrote that if the trial court judge were "to allow publication of the mistakenly transmitted transcripts, it would abrogate all of its duties under the rape shield statute." The majority stated:

> The state's interests of the highest order in this case not only involve the victim's privacy interest, but also the reporting and prosecution of this and other sexual assault cases. Revealing the *in camera* rape shield evidence will not only destroy the utility of this very important legal mechanism in this case, but will demonstrate to other sexual assault victims that they cannot rely on the rape shield statute to prevent public airing of sexual conduct testimony the law deems inadmissible. This would directly undercut the reporting and prosecution of sexual assault cases, in contravention of the [Colorado] General Assembly's legislative purposes.

Turning to the second part of the test, the majority of the Supreme Court of Colorado found that the portion of the trial judge's order preventing the news media from revealing the contents of the transcripts was the narrowest possible method for protecting the privacy interests at stake. To its credit, however, the majority struck down that part of the trial judge's order that required the news media outlets "to delete and destroy any copies" of the transcripts. In other words, the news media organizations got to keep the transcripts, but they just couldn't publish or reveal their contents—a frustrating position for the news media. Finally, the court found that great and certain harm was sure to occur to the victim if the documents' contents were published, writing that "the harms in making these *in camera* judicial proceedings public would be great, certain, and devastating to the victim and to the state. These harms justify the remedy we fashion in this case."

The Supreme Court of Colorado thus upheld a prior restraint on the news media forbidding them from publishing information that they lawfully received and that concerned a matter of intense public interest. There was, however, a vigorous three-judge dissent that would have declared the prior restraint unconstitutional. In particular, the dissent wrote that

> two striking facts about this case make it obvious that the prior restraint issued by the district court is an unconstitutional violation of the freedom of the press guaranteed by the First Amendment. First, most of the private details of the alleged victim's sexual conduct around the time of the alleged rape, which is also the subject matter of the confidential hearings in this case, are already available through public court documents and other

> sources and have been widely reported by the media. Second, the media did nothing wrong in obtaining the transcripts. Under well-established prior restraint doctrine, these two factors alone require this Court to direct the district court to vacate its order immediately.

Despite the dissent's passionate argument, it failed to carry the day in court and the majority allowed the prior restraint to remain in place. The media quickly asked the U.S. Supreme Court to step in and to prevent the enforcement of the prior restraint, but the nation's high court refused to do so.[92] Justice Breyer wrote that "the trial court's determination as to the relevancy of the rape shield material will significantly change the circumstances that have led to this application [for a stay of the prior restraint]. As a result of that determination, the trial court may decide to release the transcripts at issue here in their entirety, or to release some portions while redacting others. Their release . . . is imminent." In essence, the U.S. Supreme Court passed on the issue.

Ultimately, the trial court judge later did release most of the transcripts, with the exception of 68 lines relating to the alleged victim's name and sexual history. Yet the harm to the media was done; the Supreme Court of Colorado had upheld a prior restraint on the press despite the fact that the press had lawfully obtained truthful information of public interest. It is a terrible precedent from the perspective of anyone in the news media.

In the wake of the attacks on the World Trade Center and the Pentagon in 2001, and the subsequent wars in Afghanistan and Iraq, the question of prior restraint was again brought to the fore. Concerns about national security—the protection of the nation from further terrorist attacks—and war itself open the door to a reading of the First Amendment that will permit the kinds of prior restraints that would not be tolerated in more peaceful and secure periods. Legal historians would recall the words of the great liberal Justice Oliver Wendell Holmes written more than 85 years earlier: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right."[93] Or the fact that another liberal member of the high court, Chief Justice Charles Evans Hughes, declared in 1931 that information that threatened national security fell outside the general prohibition against prior restraint.[94] (The matter of military censorship is addressed in Chapter 3.) Shortly after the 9/11 terrorist attacks, many journalists were critical of a request by the U.S. government to television broadcasters that they resist telecasting the videotaped statements that Al Qaeda leader Osama bin Laden was providing to Arab broadcasting stations. The government noted that these were requests, not orders. But could the government restrain such broadcasts if the requests were ignored? That proposition was never tested; the statements were either heavily edited by the broadcasters or eliminated altogether. At this time, however, the very fragile nature of the ruling in the Pentagon Papers case once again became apparent.

92. *Associated Press* v. *District Court,* 125 S. Ct. 1 (2004).
93. *Schenck* v. *U.S.,* 249 U.S. 47 (1919).
94. *Near* v. *Minnesota,* 283 U.S. 697 (1931).

SUMMARY

While virtually all American legal scholars agree that the adoption of the First Amendment in 1791 was designed to abolish prior restraint in this nation, prior restraint still exists. A reason it still exists is the 1931 Supreme Court ruling in *Near* v. *Minnesota* in which Chief Justice Charles Evans Hughes ruled that while prior restraint is unacceptable in most instances, there are times when it must be tolerated if the republic is to survive. Protecting the security of the nation is one of those instances cited by Hughes and in the past quarter century in two important cases, the press has been stopped from publishing material the courts believed to be too sensitive. While the Supreme Court finally permitted The New York Times and the Washington Post to publish the so-called Pentagon Papers, the newspapers were blocked for two weeks from printing this material. And in the end the high court merely ruled that the government had failed to make its case, not that the newspapers had a First Amendment right under any circumstance to publish this history of the Vietnam War. Eight years later the Progressive magazine was enjoined from publishing an article about thermonuclear weapons. Only the publication of the same material by a small newspaper in Wisconsin thwarted the government's efforts to permanently stop publication of this article in the Progressive.

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