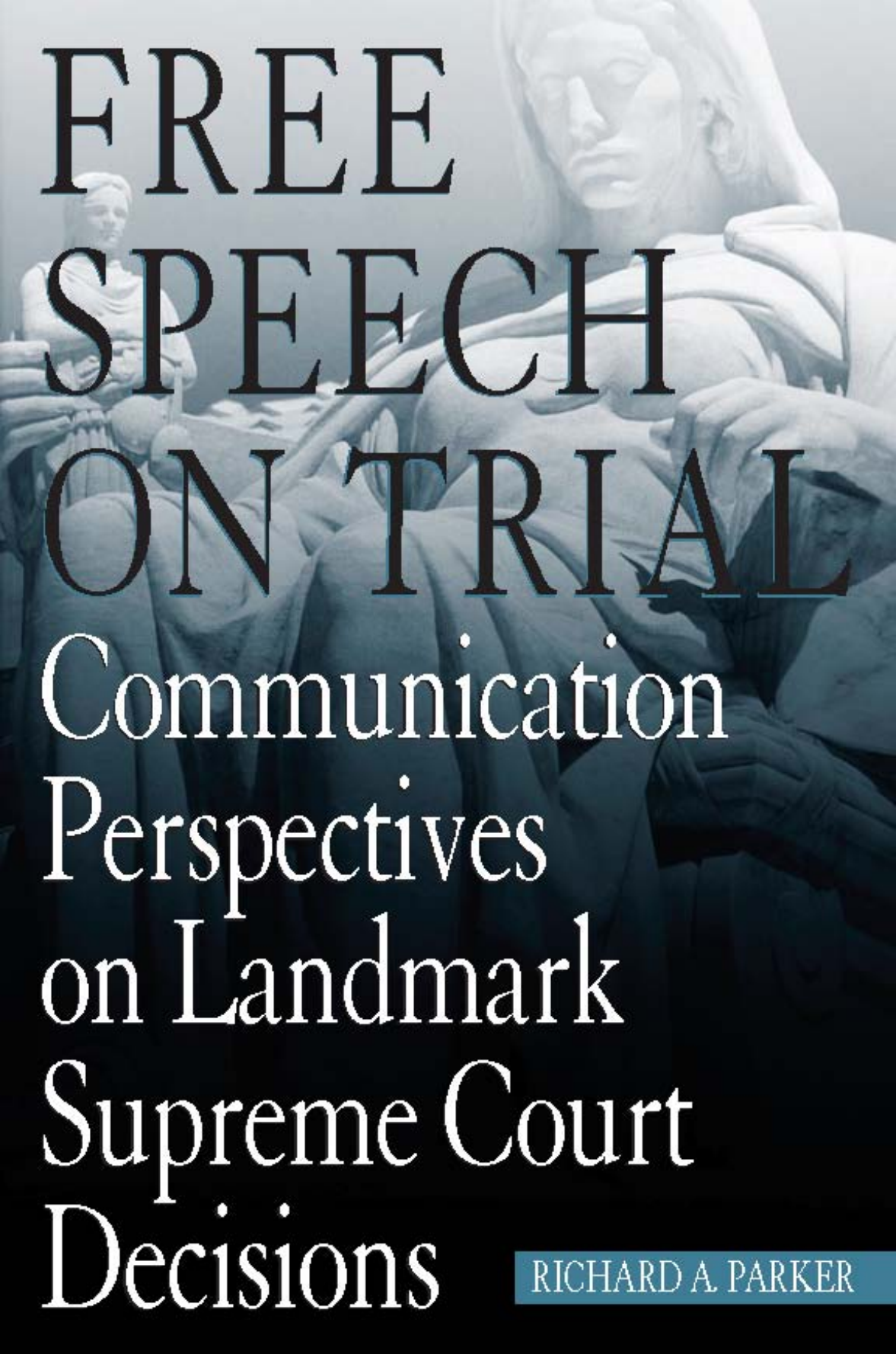

FREE SPEECH ON TRIAL

Communication Perspectives on Landmark Supreme Court Decisions

RICHARD A. PARKER

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EDITED BY RICHARD A. PARKER

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Contents

Preface

This collection of essays evolved from a panel presentation on "The Most Important Free-Speech Decisions of the Supreme Court" at the 1999 convention of the National Communication Association. Happily, eight of the nine scholars who originally presented in Chicago remained with the project; their essays appear in print here for the first time. They are joined by twelve colleagues who share an interest in scholarly investigations at the intersection of communication studies and the law.

Each essay focuses on one or two landmark Supreme Court cases. Contributors were asked to address two questions: Why are these cases important to the evolution of freedom of expression in America? How do communication theory and free speech law interrelate within the context of the cases?

In the introduction to this collection of essays, Franklyn Haiman provides much needed historical perspective to the project as he relives the origins of communication scholarship in First Amendment law. Haiman also explores some of the insights that communication scholars contribute to questions of the law.

My essay "Communication Studies and Free Speech Law" offers a brief theoretical prologue to, and historical survey of, contributors' methodologies. It also summarizes each contributor's theoretical perspective.

The 19 essays that focus on landmark cases in free speech law constitute the heart of the project. The essayists employ three major approaches and frequently combine these in fruitful ways. One procedure is to describe and interpret the situation and context of the communicative events that precipitated the conflict between the state and the accused. A second method is to analyze implicit communication theories that reside in judicial opinions. The third strategy is to demonstrate how judicial opinions have advanced our understanding of what communication is and how it functions in a democratic society.

The scholar or student of communication seeking a coherent explanation of the development of case law in freedom of expression may find no better discussion than that contained in the essay which concludes this volume. Ann Gill weaves the work of the contributors into the fabric of the law with an appreciation of the grand design implicit in the work of the framers of the First Amendment.

I extend my gratitude to those who contributed to the completion of this volume and my appreciation to the many whose support may have gone unrecognized. First and foremost, two scholars influenced the approach to research emphasized in this collection of essays. William A. Linsley of the University of Houston taught a course in freedom of expression and wrote extensively about the development of free speech law; his efforts sparked the academic interests of many students, including me. William Bailey of the University of Arizona was arguably the first communication scholar to contend that the courts have an obligation to revise or abandon pragmatic assumptions about the communication process that fail to accord with contemporary knowledge. This project is, in many ways, a product of these mentors' influences.

Many others have helped make this collection of essays a reality. The faculty and administrators of the School of Communication at Northern Arizona University—especially former and current Deans Sharon Porter, Paul Helford, and Roger Lavery—provided invaluable support for various aspects of the project. Nick Burnett's eloquent insistence that communication theory and research should be a focal point of the essays helped define the book. Juliet Dee, John Gossett, Frank Haiman, and Andrew Utterback stepped in at critical moments with timely assistance. The ad parody that appears in Ed Brewer's essay on *Hustler Magazine, Inc. v. Falwell* is copyrighted and is used with the express written permission of Larry Flynt Publications, Inc. Paul Siegel graciously provided a file copy of the ad parody. The knowledgeable and capable staff at the University of Alabama Press, as well as copyeditor Sandra Williamson, have performed the remarkable task of converting an idea into a publication.

My deepest appreciation, however, is reserved for my wife and scholarly soul mate, Lea Parker, who has encouraged, advised, consoled, and energized me throughout this project's development. This work would not be in readers' hands without her unfailing assistance.

Free Speech on Trial

Introduction

Franklyn S. Haiman

The time was the fall of 1960. The place, a coffeehouse in St. Louis's Gaslight Square. A group of about seven young refugees from the day's events at the annual convention of the National Communication Association (then known as the Speech Association of America) had gathered for an evening of relaxation, beer, and idle talk. All of us were either members of the American Civil Liberties Union or supportive of its views on freedom of speech.

This informal session took place during a period of significant transitions in American public life. John F. Kennedy had just been elected president of the United States, the first Roman Catholic to achieve that position. Six years earlier, Senator Joseph McCarthy—whose zealous anticommunism stifled dissent during the Red Scare—was censured by the U.S. Senate, and he died three years after that. The House Un-American Activities Committee—an investigative agent of Congress designed to interrogate Americans suspected of disloyalty—was still in existence and would continue to be for another fifteen years, but its activities were already under a cloud, and its influence in the country was beginning to diminish. Earl Warren became chief justice of the United States Supreme Court in 1953 and, with the support of Justices Hugo Black, William O. Douglas, and William Brennan Jr. (Brennan having been appointed by President Eisenhower in 1956), was about to lead the Court through the turbulent 1960s with far-reaching decisions that would affect the political landscape of the nation in profound ways.

The two legal precedents most protective of free speech in the entire century—*New York Times v. Sullivan* (1964) and *Brandenburg v. Ohio* (1969)—had not yet been established, but movies had somewhat recently been brought within the ambit of the First Amendment's guarantees of freedom of speech (*Burstyn v. Wilson,* 1952), and the right *not* to speak (whether verbally or symbolically) had been a part of free speech doctrine for nearly 20 years as a result of the Court's landmark decision in *West Virginia State Board*

of Education v. Barnette (1943). Although flag burning would not be recognized as protected speech for another three decades (*Texas v. Johnson,* 1989), the right of the public to use streets and parks for expressive purposes (*Hague v. C.I.O.,* 1939) and the heavy burden on government to justify prior restraints on most expressive activity (*Near v. Minnesota,* 1931) were long established. Only prior restraints on so-called obscenity were exempt from this stringent standard, because such communication was not recognized as covered by the First Amendment (*Roth v. United States,* 1957). (It continues in that second-class status until this very day, whether the cases concern prior restraints [e.g., *Paris Adult Theatre I v. Slaton,* 1973] or post facto criminal prosecutions [e.g., *Miller v. California,* 1973].) The momentous principle that students do not leave their First Amendment rights at the schoolhouse door (*Tinker v. Des Moines School District,* 1969) was not yet established, and the important narrowing of the *Chaplinsky v. New Hampshire* (1942) "fighting words" exception to freedom of speech was more than a decade away (*Cohen v. California* [1971] and *Gooding v. Wilson* [1972]).

It was in this context that the coffeehouse bull session suddenly turned serious, as the members of the group began to bemoan the fact that nowhere in the structure or programs of our national association, much less in the course offerings in communication in our respective departments or in the research being conducted by our colleagues, was any attention being given to issues of freedom of speech and press. Noting that schools and departments of journalism had long offered courses in press law, it seemed logical to us that schools and departments of speech should also be offering courses in speech law. Surely, we agreed, students and scholars of communication have knowledge and perspectives that might extend and enrich our understanding of the First Amendment's provisions on freedom of speech and press beyond what was sometimes the tunnel vision of the legal profession.

We resolved on the spot to do something about this, and I volunteered to start the ball rolling by helping establish a committee or commission on freedom of speech in our national association that would offer convention programs and encourage the development of course offerings in this area. Little did we expect that the established leadership of the association would perceive us as some kind of politically subversive cabal intent on undermining the scholarly objectivity and sacred traditional boundaries of the profession. It could not have been that they saw an analogy between our initial setting and Hitler's Munich beer hall, or other revolutionary plots that have been hatched in taverns and coffeehouses around the world, for they did not know where we initiated our mission. All they knew—or thought they knew—was that the First Amendment was the exclusive property of lawyers and

judges. It did not occur to them, as it had to us, that our discipline could make important contributions to free speech scholarship and to extending our students' intellectual horizons. Many of those students were intercollegiate debaters who would go on to become the nation's political leaders, often via law schools which might expose them to First Amendment issues in just a few sessions of a broad constitutional law course. Surely an undergraduate pre-law exposure, at greater length and from the perspective of their own rhetorical training, would be an invaluable supplement to their education.

It took two or three years to convince the association establishment that we were serious and respectable scholars and teachers, but the Commission on Freedom of Speech was finally approved. It started offering convention programs and publishing annually a *Free Speech Yearbook* containing scholarly essays on First Amendment issues. Its members gradually began introducing undergraduate and graduate courses, or segments of courses, on freedom of speech in their home departments, sometimes coupled with consideration of the ethical responsibilities of those who engage in freedom of speech. Textbooks for these courses came into being over the next four decades, along with more scholarly publications; many were used as references by our colleagues in journalism, political science, and even law (Haiman, 1965; Haiman, 1976; O'Neil, 1981; Tedford, 1997; Fraleigh & Tuman, 1997). My own *Speech and Law in a Free Society,* published by the University of Chicago Press in 1981, received a Silver Gavel Award from the American Bar Association, and my 1972 *Northwestern University Law Review* article, "Speech v. Privacy: Is There a Right Not to Be Spoken To?" was referenced in the body of Justice Lewis Powell's opinion for a majority of the Supreme Court in *Erznoznik v. City of Jacksonville* (1975). This despite the fact that, fortunately or not, I have never been to law school. The discipline has even entered the world of cyberspace with the creation by Professor Stephen Smith of the Amend-1 listserv.

What is most surprising about the initial resistance from the leaders of the Speech Association of America to embrace the study of freedom of speech is that in the name of defending the field's traditions they were denying their own heritage. It was, after all, the Sophists of ancient Greece who wrote the first rhetorical treatises and used the knowledge of those texts to teach practitioners of forensic and deliberative discourse—the forerunners of today's lawyers and legislators—the skills required for the functioning of a free marketplace of ideas in a democratic society. And I am certain that, being good rhetorical scholars, they knew very well that the terms "sophist" and "sophistry" had erroneously come to be associated in the popular mind and current usage with duplicity in communication when in fact they had more

respectable roots. *The American Heritage Dictionary of the English Language* (1992), for example, offers as its first definition of "sophist" the phrase "One skilled in elaborate and devious argumentation," providing only as alternative definitions the words "A scholar and thinker" and "A Greek philosopher of pre-Socratic times who specialized in dialectic, argumentation, and rhetoric" (p. 1719).

Classical rhetoric, having been overshadowed by the elocutionism of the nineteenth century, had its renaissance in the early decades of the twentieth century, primarily in the state universities of midwestern America. In 1960 the Speech Association's leaders were not only aware of this, they were grateful for it. James M. O'Neill, the foremost leader of that renaissance, the first president of the association, and the first editor of our first journal, served for some years as chair of the American Civil Liberties Union's Committee on Academic Freedom. Indeed, it was a guest lecture by Professor O'Neill which I heard as a graduate student at Northwestern in 1946 that first made me aware of the ACLU and its central role in the development of First Amendment law.

What kinds of insights, then, do scholars nurtured in the disciplines of rhetoric and communication bring to the First Amendment conversation to which judges and professors of law may not be as attentive? I hope the chapters in this volume will provide more complete answers to that question than are appropriate for an introductory essay such as this. However, I shall suggest, very briefly, a few of my own.

Probably the most significant of those insights is that the meaning of a message is in the eyes and ears of its beholders more than in the words or symbols of the messenger. Thus, for example, the *Chaplinsky v. New Hampshire* (1942) notion that there are certain words "which *by their very utterance* [italics added] inflict injury or tend to incite an immediate breach of the peace" (p. 572) is exposed as quite naive. It simplistically assumes that certain utterances will inevitably be understood by all who hear or read them in an identical manner. It ignores the reality that people of different backgrounds, experiences, and sensitivities are likely to respond in quite different ways to that utterance. Justice John Marshall Harlan was far more discerning. He sounded more like a scholar of communication than of the law when he wrote for the Supreme Court in *Cohen v. California* (1971) that "one man's vulgarity is another's lyric" (p. 25). Justice Harlan's opinion in *Cohen* contained another basic principle of rhetorical theory upon which the decision in that case was heavily dependent, namely that "much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emo-

tions as well. . . . We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated" (p. 26).

Just one year after *Chaplinsky,* Justice Robert H. Jackson, speaking for the Court in *Barnette,* likewise displayed an uncommon degree of rhetorical sophistication. Upholding the right of public school students not to participate in the pledge of allegiance to the American flag, Jackson declared: "There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas . . . , a short cut from mind to mind" (1943, p. 632). Perhaps it is no accident that Justice Jackson's skill as a practitioner of rhetoric matched his theoretical understanding. Relatively rare in Supreme Court opinions is the eloquence of some of the other words he penned in the *Barnette* decision. Consider the following example: "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as evil men. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard" (pp. 640–641).

Who but rhetoricians would be most sensitive to the powerful impact of such metaphorical language on how one views the world, whether through the lens of court opinions or any other medium of communication (Bosmajian, 1992)? This effect is well illustrated by the language choice of Judge Learned Hand, from the bench of a federal district court in New York. Ruling in the famous case of *Masses Publishing Co. v. Patten* (1917), he distinguished protected advocacy from illegal incitement by describing the former as the use of "keys to persuasion" in contrast to the latter's "triggers of action" (p. 540). This distinction was further illustrated in a series of decisions making use of a "fire" metaphor—ranging from Justice Oliver Wendell Holmes's description in *Schenck v. United States* (1919) of "falsely shouting fire in a theater and causing a panic" (p. 52), to the *Gitlow v. New York* (1925) decision that the radical manifesto at issue presented a clear and present danger because "a single revolutionary spark may kindle a fire" (p. 669), to the upholding of the conviction of communist activists in *Dennis v. United States* (1951) because of "the inflammable nature of world conditions" (p. 511).

The profound influence of the "trigger" and "fire" metaphors in excluding incitement from First Amendment protection is the implication, as I said in *Speech and Law in a Free Society,* that

> in response to some communication, human beings can be moved to action in the same way an inanimate object, like a gun, is triggered—that is, without the mediation of conscious choice or the exercise of free will. . . . [Also] like a trigger, a lighted match sets off an inevitable and humanly uncontrollable chain of events for which the puller of the trigger or lighter of the match is held responsible. . . . [But] unless deceived, coerced, or mentally deficient, human beings are *not* inanimate objects who are "triggered" by others; they are *not* piles of kindling waiting for a spark to ignite them. (1981, pp. 268–269, 277–278)

Justice Holmes started to put this issue straight in his *Gitlow* dissent: "Every idea is an incitement. It offers itself for belief, and if believed, it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between an expression of opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result" (1925, p. 673). But then he too succumbed to the allure of the fire metaphor in his ensuing caveat: "Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration" (p. 673).

One need not hark back to the 1920s through the 1970s, much less to ancient Greece, to see the important nexus between communication scholarship and the development of free speech law. One need only have been seated in a federal courtroom in Philadelphia as recently as March–April 1996, where a three-judge panel was hearing arguments in the case of *ACLU v. Reno* (1996), a challenge to certain provisions of the Communications Decency Act (1996) adopted by Congress only one month earlier. During five full days of trial the judges were given the equivalent of a graduate school seminar in the intricacies of the Internet—the present and possible future of its technology, how Web sites are created and accessed, and the software programs available for parents to screen out sites they do not want their children to visit.

That court's lengthy opinion, striking down relevant provisions of the Communications Decency Act on First Amendment grounds, was itself in large part a scholarly treatise on communication and a document that educated the U.S. Supreme Court when the case proceeded there on appeal. The Supreme Court's unanimous affirmation of the lower court's ruling, in *Reno v. ACLU* (1997), established the first and most significant precedents for dealing with the brave new world of cyberspace as we prepared to move from the twentieth to the twenty-first century.

Happily, until now, a solid majority of the Supreme Court has not heeded

the call of the Robert Borks, Antonin Scalias, and Clarence Thomases to accept an "originalist" approach to the U.S. Constitution that would freeze its provisions into an eighteenth-century mold or tether its amendments to the environment that existed at the time of their adoption. So long as the Court continues in the twenty-first century to regard the Constitution as a living and growing document to be interpreted and reinterpreted in the light of cultural changes, technological developments, and new understandings of human behavior, we can presume that scholarship in rhetoric and communication will continue to inform in a useful way its First Amendment decisions and opinions. At least that can be our hope.

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Communication Studies and Free Speech Law

Richard A. Parker

At the intersection of communication and First Amendment law reside two enduring questions: What is the speech we ought to protect? Why should we protect it? Contributors to this volume propose various answers to these questions. They are scholars of legal communication who share an abiding concern with a constitutional guarantee of free speech and its symbiotic relationship with communication practices. The essays are designed to fill a visible gap between textbooks that summarize the law of freedom of expression in the United States on the one hand, and intensive analyses and critiques of case law or legal theory on the other. Nevertheless, the burgeoning scholarship in contemporary legal studies raises important and challenging questions about the legal process. These questions suggest a promising locus of departure for justifying the approach to law and communication pursued by contributors to this book.

The questions raised in many current discussions regarding the epistemic status of law are fashioned by the debate between formalists—who believe that law is a system of neutral, objective rules mechanically applied to cases—and critical legal scholars—who contend that law is a product of politics and the exercise of power. However, this debate tends to obscure two important starting places for analysis that are familiar to communication scholars. First, the general processes of constructing, interpreting, applying, and critiquing law are intrinsically and thoroughly communicative (Nelken, 1996), because these processes are designed to shape—and in fact profoundly affect—political and social communities (Lewis, 1994, p. 8; Lucaites & Weithoff, 1994, p. 1). This perspective transcends the debate on the pragmatic ground that regardless of the perspectives we adopt regarding the origins of legal rules or the procedures for their application, the implications of the law for communities—how law "functions to produce and reproduce power and

legitimacy in the context of an active rhetorical culture" (Lucaites, 1990, p. 446)—reveal law's communicative essence. This is so even for legal formalists, for two reasons. First, the law and its relevance to cases and controversies must be communicated to a community enmeshed in cultures, and the resulting communicative relationship must be symbiotic, evolving and adaptable (Scallen, 1994). Formalists' recognition of this communicative function of law invites scholars to demonstrate the relevance of rhetorical and communication theory to the legal system. Second, even from the perspective of the most formal conceptions of legal institutions, the uninformed, the skeptics, and the dissenters must be recognized, appeased, and (hopefully) persuaded. Therefore, because some must be informed and others convinced, the law inherits rhetorical functions inherent in its responsibilities to community.

The second starting place for analysis resides in recognizing that the specific controversies that generate case law regarding freedom of expression are explicitly communicative in scope, and "the legal issues" raised in these cases "are specifically rhetorical" (Lewis, 1994, p. 7). In contrast to most other areas of the law, in First Amendment jurisprudence "language is not only the vehicle but the subject-matter of the law" (Streeter, 1995, p. 34). When communication is the subject matter of a discipline, its theoretical work addresses—implicitly if not explicitly—theories of rhetoric and communication as these are employed within that discipline. This general conclusion accurately describes a significant body of analytical and critical work in jurisprudence. Theories of free expression address our conceptions of what constitutes speech in the legal sense and why we should protect such speech. Thus all theories of free speech are communication theories.

The complaint that free speech scholars should be doing something *different from what legal scholars do* (i.e., something other than describing judicial decision-making processes, discussing precedent law, analyzing justifications for judicial decisions, and so on) is trivial because allegations of a boundary separating legal scholarship from communication scholarship are historically inaccurate (Rieke, 1982) and logically untenable. This is so even though communication scholars are quite capable of bringing to the table insights into communication processes and rhetorical implications that elude legal scholars. The simple fact is that students and professors of law and jurisprudence have been performing rhetorical analyses and investigating communication processes of courts for more than a century. Some disciplinary confusion arises because they have conducted these activities under the guise of legal scholarship. However, this observation entails no justification for fortifying barriers between the academic disciplines involved. Rather, it pro-

vides historical ammunition to scholars intent upon transcending disciplinary boundaries in order to advance interdisciplinary inquiry: We should work together on common ground (Benson, 1991, p. 393; Rieke, 1970, p. 56; Shmukler, 1970, p. 46). Occasionally scholars collaborate explicitly in coauthored investigations (see, e.g., Smolla & Smith, 1988). More frequently, however, scholars in one discipline implicitly cooperate by taking into account the work of investigators in the other. Contributors to this volume cite relevant legal resources and illustrate with precision the symbiosis between communication scholarship and law. They foster awareness of interdisciplinary common ground.

The scholarship presented herein is the product of a sustained enterprise within the disciplines of communication and rhetoric. Warren Wright (1964) was the first communication scholar to present a detailed argument for the claim that judicial rhetoric constitutes fertile ground for communication studies. However, he overlooked the connection between free speech law and rhetorical theory and practice. The founders of the Commission on Freedom of Speech of the Speech Communication Association (now the National Communication Association) redressed this oversight by creating opportunities for presentations at national and regional conventions, by initiating the publication of *Free Speech Yearbook,* and by fostering a climate of receptivity to free speech scholarship in the 1960s and 1970s (see Franklyn Haiman's essay in this volume). The progress made during these years is evident in a representative collection of essays published prior to 1985 (Tedford, Makay, & Jamison, 1987). Three additional contributions merit mention. Haiman's 1967 analysis of "the rhetoric of the streets" proffered a connection among theories of symbolic communication, evolving precedents in free-speech law, and the rhetoric of dissent. His monumental *Speech and Law in a Free Society* (1981) identified essential contexts for free speech controversies and developed interrelated theoretical approaches to address each of these contexts. William Bailey (1981) insisted that the courts have an obligation to revise or abandon pragmatic assumptions that fail to accord with contemporary understandings of communication processes. Bailey's analysis assigns scholars a critical role in holding judges accountable for identifying and justifying their own implicit communication theories (Benson, 1991).

Since the mid-1980s, investigators have pursued numerous interdependent threads of inquiry that, taken together, constitute a web of interdisciplinary analysis of free speech law. Communication scholars have played important roles in the evolution of these lines of analysis and interpretation. Some of the more important strands, and representative examples of recent scholarship that illustrates these approaches, include:

1. Descriptions and analyses of judicial decisions and opinions, including how and why decisions are made and what justifications are provided (or not provided) for specific court decisions (Fraligh & Tuman, 1997; Hemmer, 2000; Siegel, 2002; Tedford & Herbeck, 2001).

2. Critiques and criterial analyses, such as monographs investigating how court decisions fare when measured against optimal levels of protection for freedom of speech (Haridakis, 2000; Hemmer, 1996; Huffman, Mills, & Trauth, 1994; Linsley, 1989), and essays advocating the extension of responsibility beyond the courts to other policy makers and to citizens (Calvert, 1997; Haisan & Delgado, 1998).

3. Historical approaches to the origins of First Amendment theory in eighteenth-century political, social, and legal thought (Smith, 2000; Smith, 1991), or in twentieth-century case law (Fishman, 1996; Herbeck, 1990). Historical approaches may reveal implicit communication theories resident in the work of courts or explicit commitments to free speech principles that constitute the fourth strand.

4. Analyses of philosophies of free speech, especially free speech justifications, that focus either on the justifications themselves, such as the marketplace of ideas (Bailey, 1995; Hopkins, 1995), or today's theorists, including Robert Post (Haiman, 1998), Richard Posner (Haisan & Panetta, 1994), and postmodern critics (Bunker, 2001).

5. Rhetorical and communication theory specifically applied to free speech issues: e.g., metaphor (Bosmajian, 1992; Hübler & Lessl, 2000; Lybarger, 1999; Tallman, 1996), argument theory (Cos & Schatz, 1998), and semiotics (Cavanagh, 1996; Hundley, 1997).

Contributors to this book employ an amalgam of these strands of inquiry. Because generalizations are unlikely to do justice to the breadth and diversity of their approaches, the remainder of this essay summarizes each contributor's theoretical perspective. The studies are analyzed sequentially as they appear in this book; the cases are presented in chronological order. (Because the contributors cite the cases in their essays, these citations are not repeated in the "Works Cited" section of this chapter.)

In his analysis of the founding cases in contemporary American free speech law, *Schenck v. United States* and *Abrams v. United States,* Stephen A. Smith demonstrates how Justice Oliver Wendell Holmes labored to construct a free speech justification that repudiated the predominant communication theory of the early twentieth century. The "magic bullet" theory presumed that mass media messages have direct and immediate effects upon receivers. Smith contends that Holmes challenged this simplistic premise and sanc-

tioned governmental regulation of political speech only when such speech was likely to produce immediate danger to the safety of the nation.

Juliet Dee confronts the implications of Justice Louis Brandeis's advocacy of "more speech" as an alternative to governmentally imposed silence in his concurring opinion in *Whitney v. California.* Dee contends that the more speech principle inspired the Court to endorse a "marketplace of ideas" for speech and challenged the magic bullet theory's implication that dissent harms the polity.

The Court first addressed the equivalence of speech and nonverbal symbols in *Stromberg v. California.* John S. Gossett demonstrates how the Court's decision in *Stromberg* has evolved into a contemporary judicial distinction between "pure speech" and "speech plus," with the "plus" including some form of symbolic action. Gossett explores and critiques two theoretical approaches designed to illuminate the distinction: identifying the intent of the speaker and determining whether or not the audience recognizes the communicative element of the message.

In *Near v. Minnesota,* the Court rejected the claim that governments have wide latitude to censor communications prior to their publication. It limited the imposition of prior restraints to exceptional cases where the harms to government are clear. John S. Gossett and Juliet Dee invoke "gatekeeping" theory to support their observation that judges who uphold prior restraints against publication regulate the flow of communication.

Chaplinsky v. New Hampshire ushered in a doctrine of "categorical exceptions" to the First Amendment: Certain categories of speech—lewd and obscene expressions, profane communications, libels, and "fighting words" (that inflict injury or incite receivers to unlawful action)—merit regulation because they harm the social fabric of the community. Dale Herbeck critiques contemporary restatements of the doctrine on the ground that they contradict two fundamental postulates of communication: (1) The communicator's choice of language determines the intent, meaning, and value of the message sent. (2) Receivers participate in the construction of the effects of speech and therefore inherit responsibility for their own actions.

Warren Sandmann revisits the role of symbolic communication in fostering political and religious freedom in a democracy. He employs a theory of "metaphor" to illustrate the symbolic implications of refusing to salute the American flag, the speech protected in *West Virginia State Board of Education v. Barnette.* He also uses "spiral of silence" theory to illustrate the democratic principle that because only a few dissenters dare to express opinions opposing the majority, the courts must protect them.

In *New York Times v. Sullivan,* the Court issued a sustained defense of

seditious libel: the criticism of government, its officials, and its policies. Nicholas F. Burnett promotes the view that Justice William Brennan's *Sullivan* opinion is a rhetorical document designed to reconstruct prevailing perceptions of the history and meaning of the First Amendment.

In his analysis of *United States v. O'Brien,* Donald A. Fishman maps the Court's continuing struggle to distinguish protected from unprotected symbolic expression. He invokes Franklyn Haiman's 1981 categorical analysis to facilitate our understanding of the complexities inherent in formulating a set of general principles for determining when symbolic speech merits constitutional protection.

Should speakers be held responsible when their communications incite receivers to commit unlawful acts? In *Brandenburg v. Ohio,* the Court reconsidered this enduring legal question, requiring prosecutors to prove that the speech is likely to produce imminent lawless action in order to convict the speaker. Richard A. Parker reverses the traditional practice of using theory to evaluate judicial decisions, employing the *Brandenburg* rule to critique William Bailey's proposal for blanket immunity to speakers who incite receivers to commit illegal acts.

When Paul Robert Cohen entered a public building in 1968 wearing a jacket bearing the phrase "Fuck the Draft," he was arrested and convicted for breach of the peace. Writing for a majority of the Court, Justice John Marshall Harlan composed a stirring defense of free speech. Susan J. Balter-Reitz uses the theory of "verbal hygiene" to illustrate how Harlan transcended debate about what can be said in order to examine a larger question: Who should exercise the authority to control the content of speech in an open society?

Metaphor theory is one of the most promising avenues for the analysis of the implicit communication theories in judicial opinions. Mary Elizabeth Bezanson invokes "metaphoric" analysis to contrast the majority and dissenting opinions in *Kleindienst v. Mandel.* Bezanson concludes that Justice Thurgood Marshall's dissenting opinion better protects the right to receive information because his metaphor is the more apt description of the communicative processes and values at stake in the case.

Joseph Tuman also employs metaphoric analysis to critique a majority opinion of the Court. He targets the case identifying contemporary standards for obscenity, *Miller v. California.* Tuman predicts that the Court might need to reexamine *Miller* because of the tension between its reliance upon community standards to determine obscenity and the development of new technologies that disseminate content without regard to jurisdictional regulations.

Craig R. Smith constructs new readings of the numerous opinions in *Buckley v. Valeo,* a case that set the constitutional parameters for campaign fund-raising and spending. Smith's readings rhetorically reconstitute the arguments in this complex case, illustrating the relationships between the opinions and the communities of persons affected by the Court's rulings.

FCC v. Pacifica Foundation addressed the right of broadcasters to disseminate indecent but nonobscene language on the air. From *Pacifica* to the present, the Court has restricted this right on the grounds that indecent speech constitutes a "speech act": a form of communication akin to conduct and susceptible to the same regulations as offensive conduct. R. Wilfred Tremblay questions whether the Court should create a new categorical exception to the First Amendment absent any grounding of its analysis in communication theory.

In many Supreme Court opinions, particularly in *Central Hudson Gas & Electric v. Public Service Commission,* commercial speech constitutes another categorical exception to the First Amendment's guarantee of free expression. Joseph J. Hemmer Jr. takes the Court to task for implicitly subscribing to the theory that only certain categories of expression merit full protection, identifying the problems that commercial speech inherits as a result.

Andrew H. Utterback deconstructs the Court's opinion in *Hazelwood School District v. Kuhlmeier* in order to demonstrate how a legal text reveals the ideology of its authors. Utterback shows how the *Hazelwood* opinion, establishing the right of school administrators to censor the content of a high school newspaper, redefined freedom as outside the school rather than within it. He explores the ramifications of this ruling for American identity, the domain of the communicable, and the right of the community of students to express their views and be heard by others.

In *Hustler v. Falwell,* the Court unanimously endorsed the right of communicators to publish outrageously offensive political opinions, despite their harmful consequences. Edward C. Brewer explores some of the implications of this decision for the protection of emotional content in speech. Brewer also challenges the Court to establish consistency in its rulings regarding the legal distinction between fact and opinion, and he advocates absolute protections for opinion.

Texas v. Johnson established the right of dissenters to burn the American flag as a means of political expression. This controversial opinion sparked a national debate regarding the symbolic value of the flag. David J. Vergobbi analyzes congressional debates, entertaining questions regarding the communicative nature of flag burning and the blurred distinction between symbolic communication and conduct.

Douglas Fraleigh examines *Reno v. ACLU,* the Court decision establishing a standard of strict scrutiny for Internet regulation. He considers the implications of a theory of "construction of shared meaning" for the lessons the Court offered in this controversial case. Fraleigh also notes with approval the Court's reluctance to apply existing constitutional standards for regulating broadcasting media to the Internet, emphasizing the confluence of the Court's reasoning with two theories of "new media technologies."

In addition to presenting theoretical perspectives, these essays serve the very important purpose of providing convenient access to analyses of pivotal free speech cases that shaped the contours of expressive freedoms in the United States. Students of First Amendment law will find the essays valuable introductions to seminal controversies in freedom of expression as well as insightful explorations of enduring issues of fact, law, and the process of judicial justification. Space and page limitations demand that the contributors focus upon the implications of these theories for free speech law, often at the expense of a broader development of the theories themselves. Readers who find these theoretical introductions tantalizing are encouraged to explore them by consulting the references within each essay and by contacting the contributors to this volume, who are educators dedicated to the project of enlightening the law via insights into the principles and processes of effective communication.

Oliver Wendell Holmes once opined that the life of the law has been experience rather than logic. The essays contained in this volume suggest collectively that the life of free speech law is communication. The contributors reveal how the Supreme Court's free speech opinions constitute discursive performances that fashion, deconstruct, and reformulate the contours and parameters of the Constitution's guarantee of free expression and that ultimately reconstitute our government, our culture, and our society.

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Schenck v. United States and Abrams v. United States

Stephen A. Smith

Scholarship on the origins of the First Amendment, analysis of free speech theory articulated in response to the Sedition Act of 1798, and more recent exposition of First Amendment jurisprudence during the late nineteenth century demonstrate that since the beginnings of the nation, Americans have struggled to resolve the tensions between order and liberty, between the demands of the community and the rights of the individual. Modern First Amendment interpretation by the United States Supreme Court dates from 1919, when Justice Oliver Wendell Holmes Jr. wrote the unanimous opinion for the majority in *Schenck v. United States* (1919) and the dissenting opinion in *Abrams v. United States* (1919).

The series of Espionage Act and Sedition Act cases from *Schenck* to *Abrams* may well be "the most anthologized cases in American constitutional law" (White, 1996, pp. 312–313), but they are more often noted than explained. While some legal scholars have concluded that "the hope that humanistic theory will be able to provide a source of intellectual authority for law is largely a vain one" (Collier, 1991, p. 194), this essay is grounded on the premise that communication scholars are uniquely qualified to assess the nuances of judicial rhetoric, especially those First Amendment decisions that turn on linguistic constructions and legal assumptions about the nature of communication as an interactive process. Justice Holmes's arguments in *Schenck* and *Abrams* provide fertile ground for just such an analysis.

The Path of *Schenck*

On August 28, 1917, federal agents raided the Socialist Party headquarters at 1326 Arch Street in Philadelphia, seizing copies of a leaflet that challenged the constitutionality of conscription, questioned the reasons for American

involvement in the World War, and solicited membership in the Socialist Party. One side of the leaflet was headed, "Long Live the Constitution of the United States. Wake Up, America. Your Liberties are in Danger," and the other side was titled, "Assert Your Rights." On uncontested evidence indicating that a few of the 15,000 circulars had been mailed to local men subject to the draft, indictments were handed down on Constitution Day, September 17, against William J. Higgins, Jacob H. Root, Charles Sehl, General Secretary Charles T. Schenck, and Dr. Elizabeth Baer, the recording secretary, for obstruction of the draft in violation of the Espionage Act of 1917.

At the trial, the government offered no evidence that the leaflets induced anyone to avoid military service, and it was revealed that several of the recipients brought the letters to the attention of the authorities. Because of lack of evidence regarding their participation, directed verdicts were ordered for the acquittal of Higgins, Root, and Sehl. The jury returned verdicts of guilty against Schenck, who was responsible for printing the materials, and Baer, who recorded the motion to do so in the minutes.

The appeals by Schenck and Baer were argued before the Supreme Court on January 9–10, 1919, and the decision was announced two months later, on March 3, 1919. Associate Justice Oliver Wendell Holmes Jr. was assigned the task of writing the opinion that has been credited with introducing "the Supreme Court to the tentative first steps of First Amendment theory within the context of judicial deliberations and the complex intricacies of the American legal system" (Cohen, 1989, p. 117). Before the decision was announced, Holmes admitted to Harold Laski that he had hoped the case would be assigned to him, yet it "wrapped itself around me like a snake in a deadly struggle to present the obviously proper in the forms of logic" (Holmes, February 28, 1919). Within two weeks after the opinions in *Schenck* and two other cases were delivered, he again wrote to Laski, confessing, "I greatly regret having to write them" (Holmes, March 16, 1919).

Holmes's crafting of the opinion in *Schenck* was constrained both by Supreme Court precedent in earlier cases and by his own judicial career. Examining the tenor of the times, one scholar concluded, "no group of Americans was more hostile to free speech claims before World War I than the judiciary, and no judges were more hostile than the justices on the United States Supreme Court" (Rabban, 1997, p. 15). During his career as a member of the Supreme Judicial Court of Massachusetts, Holmes showed little consideration for freedom of expression, as evidenced by his opinions in *Cowley v. Pulsifer* (1884), *McAuliffe v. Mayor and Aldermen of New Bedford* (1892), *Hanson v. Globe Newspaper Company* (1893), and *Commonwealth v. Davis* (1895), the

Boston Commons case. The Supreme Court's crabbed view of the history and meaning of the First Amendment was revealed in dicta during the same decade when Justice Henry Brown wrote:

> The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation. (*Robertson v. Baldwin,* 1897, p. 281)

Furthermore, during Holmes's tenure the Court summarily dismissed what were essentially First and Fourteenth Amendment claims by defendants in *Halter v. Nebraska* (1907) and *Mutual Film Corporation v. Industrial Commission of Ohio* (1915), and, more importantly, in Holmes's own opinions in the cases of *Patterson v. Colorado* (1907) and *Fox v. Washington* (1915). The *Schenck* case, however, presented the Court with a clear and present First Amendment challenge to a federal statute.

Henry J. Gibbons and Henry John Nelson, the attorneys for the plaintiffs in error, Schenck and Baer, filed a brief clearly challenging the statute and the convictions on First Amendment grounds. "How can a speaker or writer be said to be free to discuss the actions of Government," they asked, "if twenty years in prison stares him in the face if he makes a mistake and says too much? Severe punishment for sedition will stop political discussion as effectively as censorship." Freedom of speech, they implied, was essential to informed citizens participating in the democratic process, and they asked rhetorically, "How can the citizens find out whether a war is just or unjust unless there is full and free discussion" (cited in Cohen, 1989, p. 34)? Then, in words Holmes would presently ignore but appears to have remembered, they argued, "The spread of truth in matters of general concern is essential to the stability of a republic. How can truth survive if force is to be used, possibly on the wrong side? Absolutely unlimited discussion is the only means by which to make sure that 'truth is mighty and will prevail'" (p. 35).

Rather than seizing upon this opportunity to examine thoughtfully the scope and meaning of the constitutional command that Congress shall pass no law abridging the freedom of speech, or of the press, Holmes approached *Schenck* by the familiar path of the common law and the theory of criminal attempts. In five of the six paragraphs in the opinion, he embraced the government's arguments, upheld the validity of the search warrant, considered the sufficiency of the evidence, expanded the statutory language to include opposition to the draft, treated words as acts, measured those acts against the prohibitions of the statute, and affirmed the convictions of Schenck and Baer.

In the only paragraph acknowledging the First Amendment claims, Holmes's opinion offered a theoretical assertion that freedom of speech could be abridged without offering a reasoned argument for that conclusion. He began the discussion by making an important concession, admitting, "It well may be that the prohibition of laws *abridging the freedom of speech is not confined to previous restraints* [italics added], although to prevent them may have been the main purpose" (*Schenck,* 1919, pp. 51–52), as he had intimated in an earlier opinion (*Patterson v. Colorado,* 1907, p. 462). Yet in making the point he provided no data and no warrant for either claim, no evidence of the framers' intention nor illumination from the meaning of the words. Holmes then offered the constitutional proposition "that, in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights. . . . 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" (*Schenck,* 1919, p. 52). Again, the basis for that temporally malleable judicial view of First Amendment freedom was pronounced without a constitutionally plausible explanation, although Holmes could well have cited his earlier, equally ungrounded opinion in *Moyer v. Peabody* (1909) as precedent to cover his assertions masquerading as logic.

Conflating words and acts in this instance, Holmes declared that "the character of every act depends upon the circumstances in which it is done" (*Schenck,* 1919, p. 52). In support of that conclusion he offered the precedent of his own opinion in *Aikens v. Wisconsin* (1904) and the opinion of Justice L. Q. C. Lamar in *Gompers v. Bucks Stove & Range Company* (1911), both of which likewise treated truthful words as unprotected acts. It is in this context that Holmes offered his often-quoted but quite inappropriate aphorism that the "most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic" (*Schenck,* 1919, p. 52).

The cute but inapposite claim did not go unnoticed. Zechariah Chafee Jr., writing shortly after the *Schenck* opinion was delivered, asked: "How about the man who gets up in a theater between the acts and informs the audience honestly but perhaps mistakenly that the fire exits are too few or locked? He is a much closer parallel to Schenck or Debs" (1919, p. 944). Richard Polenberg later refined the analogy when he suggested Holmes would have been more accurate if he had said, "The most stringent protection of free speech would not protect a man falsely advising theatregoers that a 'no smoking' ordinance deprived them of their rights, and causing the audience to turn him in as a troublemaker" (1987, p. 216).

The lasting importance of Holmes's opinion in *Schenck* is that it presented the first judicial formulation of the "clear and present danger test." Although suffering from the same lack of specificity in either the constitutional source of the authority for the test or the grounds for evaluating the evidence in its application as do all such First Amendment tests, Holmes proposed that 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" (*Schenck,* 1919, p. 52). In applying his new test to the fact situation presented in *Schenck,* Holmes found it sufficient justification for finding Schenck's speech unprotected by the First Amendment, a conclusion subsequently confirmed by Holmes's opinions the following week in *Frohwerk v. United States* (1919) and *Debs v. United States* (1919), as well as by the Court's majority in every case it considered involving convictions for violations of the Espionage Act of 1917 and the Sedition Act of 1918.

While purporting to offer a new test to measure the degree of protection afforded speech, Holmes was actually applying the prevailing "bad tendency" test. The government only had to show some remotely possible negative result, and the courts would find that the speaker must have intended this result. Compounding this judicial fallacy, the courts also treated words as acts and, reflecting the rudimentary state of communication theory at the time, applied the conception, if not the language, of a mechanistic "magic bullet" theory of message effects: the helpless audience was assumed to have no choice but direct response, even in cases where there was no evidence of *any* response to the messages.

The magic bullet theory, also known as the hypodermic needle theory, was prevalent in both popular and scholarly thinking during Holmes's years on the Court (Bineham, 1988; Chaffee, 1988; Peters, 1989; Sproule, 1989)

and was dominant until after World War II, when it was gradually replaced by the limited-effects model resulting from Paul Lazarsfeld's studies of elections and campaigns (Lazarsfeld, Berelson, & Gaudet, 1944/1968). The primary tenet of the magic bullet theory was that mass media served as a supreme weapon that allowed originators of messages to shoot ideas into a passive, uncritical audience, thereby resulting in the easy shaping of a unified and universal public opinion.

America had changed greatly since the antebellum days when Holmes was a student at Harvard. The population was more mobile and increasingly of foreign birth, the country was becoming more urban, the economy had become industrialized, and traditional mechanisms of social control were weaker. Holmes was not alone in his recognition of these changes and their consequences. The emerging social psychology of Edward Ross (1908), Gustave LeBon (1914), Gabriel Tarde (1969), and Winfred Trotter (1917) posited a new mass society that "fostered an imitative and potentially irrational credulity which created, in turn, the propensity to accept suggestions uncritically" (Bineham, 1988, p. 234). Contemporary public intellectuals such as John Dewey (1922) and Walter Lippmann (1922) surveyed the scene and had little "confidence in the cognitive competence of the public," because modern conditions "rendered the public inherently less competent to reason in the realm of social conduct" (Sproule, 1989, p. 234). The political response to these conditions in the years before World War I was manifested in the suspicions articulated by both Theodore Roosevelt and Woodrow Wilson against "hyphenated Americans," as well as the xenophobia of the reborn Ku Klux Klan.

The concept that mass media messages have immediate effects on receivers gained wide acceptance. It assumed that the injection of persuasive messages into susceptible audiences would trigger a specific desired response. It also engendered the plausible fear that the response created would be potentially devastating to the comfort and stability of American civilization. Such thinking was implicit as early as Anthony Comstock's 1880s crusade against pornography (Comstock, 1883/1967). It informed the efforts of the government's propaganda efforts during World War I (Creel, 1920; Lasswell, 1927; Mock & Larson, 1939), and it fueled the advertising and public relations strategies of the era (Bernays, 1923, 1928).

Under the prevailing public and professional assumptions about media effects, it was hardly surprising that the newly articulated clear and present danger test proved to offer no protection for the expression of Schenck or other defendants when applied by the Court in March 1919. Nonetheless,

almost immediately it was criticized, appropriately, as a speech-restrictive rather than a speech-protective instrument in its application and as a justification for affirming the jury decisions instead of a basis for reaching them.

Holmes's opinion has also been attacked for its methodological process, the oblique way in which it was crafted. "In essence," noted one communication scholar of First Amendment history, "Holmes reached a conclusion that had a very direct bearing on the First Amendment without providing a serious discussion of the First Amendment prohibition against the abridgment of speech. Holmes never explained *why* the First Amendment allows speech to be abridged. He only explained when speech may be abridged" (Cohen, 1989, p. 100). And even that Holmes did without offering a convincing judicial rationale.

The Detour to *Abrams*

Within weeks after the decision announcing and applying the clear and present danger test, Holmes complained to his friend Sir Frederick Pollack that his *Schenck* opinion was being criticized by "fools, knaves, and ignorant persons." There was, he scoffed, "a lot of jaw about free speech, which," he acknowledged, "I dealt with somewhat summarily" (Holmes, April 5, 1919)—an error compounded by his dismissive references to *Schenck* as authority to dispose of the First Amendment claims in the *Frohwerk* and *Debs* cases.

Associate Justice Louis Brandeis, who had been a member of the unanimous Court in *Schenck, Frohwerk,* and *Debs,* and who was a close friend of Justice Holmes, later remarked to Felix Frankfurter: "I have never been quite happy about my concurrence in the *Debs* and *Schenck* cases. I had not then thought the issues of freedom of speech out. I thought at the subject, not through it" (cited in Cohen, 1989, p. 21). Undoubtedly, that described Holmes's situation as well. Until forced to consider the issues and the briefs in those cases, there is no indication that Justice Holmes ever gave much thought to the constitutional dimensions and implications of freedom of speech. The *Schenck* case served as a catalyst to bring political theory for the first time into the realm of judicial consideration regarding the application of the First Amendment to federal statutes, and subsequent events and cases would bring those issues into a clearer focus for both Holmes and Brandeis.

Another case was already on its way to the Supreme Court, one which would provide the opportunity for a more thoughtful and focused consideration of the constitutional issue in play. Jacob Abrams, Samuel Lipman, Mollie Steimer, Jacob Schwartz, Hyman Lachowsky, Hyman Rosansky, and Gabriel Prober, all Russian immigrant factory workers, were arrested in New York

City on August 23, 1918, and indicted in September 1918, for violation of the Sedition Act of 1918. They were charged with printing and distributing 2,500 copies of two leaflets, "The Hypocrisy of the United States and Her Allies" and "Workers—Wake Up," critical of President Wilson and the decision to send United States troops to crush the Russian Revolution. The leaflets disavowed any sympathy for the German cause; however, they did call for a general strike by workers, including by implication those in munitions factories. Schwartz died, allegedly as a result of police brutality, before the trial began in October. Abrams, Lipman, and Lachowsky were convicted and given 20-year sentences; Steimer was sentenced to 15 years; and Rosansky, who cooperated with the government, was sentenced to three years.

By the time the appeal of Abrams, Lipman, Lachowsky, and Steimer reached the Supreme Court for oral arguments on October 21–22, 1919, the thinking of Justices Holmes and Brandeis had evolved considerably since the Espionage Act case decisions only seven months earlier. Published articles by, and conversations and correspondence with, an intellectual circle that included Felix Frankfurter, Harold Laski, Judge Learned Hand, Zechariah Chafee Jr., Ernst Freund, and Sir Frederick Pollock practically constituted a campaign that shaped and changed Holmes's views of the meaning of the First Amendment (Alschuler, pp. 78–79; Gunter, 1994, pp. 151–170; Polenberg, 1987, pp. 218–228; White, 1993, pp. 412–454). This is especially remarkable when considering that Holmes had demonstrated a rather consistent approach to the law for the last 40 years and was then 78 years old.

In his brief for Abrams and the other plaintiffs in error, Harry Weinberger argued, "The discussion of public questions is absolutely immune under the First Amendment to the Constitution, when that is the only intention in the discussion." Quoting Thomas Jefferson that the state has no authority over ideas but only over overt acts—a position beyond even contemporary incitement standards—he insisted that the framers intended to guarantee "the unabridged liberty of discussion as a natural right" (cited in Polenberg, 1987, p. 229). Probably more confidently, however, Assistant Attorney General Robert P. Stewart's brief for the government contended that "no liberty of the press was conceived of which included the unlimited right to publish a seditious libel. No claim of that sort was ever made by any respectable person" (cited in Polenberg, 1987, pp. 232–233).

Justice Holmes was a respectable person, and the circulation of his draft dissent in *Abrams* caused considerable concern among some members of the Court, three of whom called on him at home in an unsuccessful effort to dissuade him from breaking with the majority. When the decision was announced on November 10, 1919, the majority of seven Justices affirmed

the convictions of Abrams and the others, while Holmes and Brandeis announced the first of their dissenting views that were to shape the future of First Amendment jurisprudence.

Justice John Clarke's opinion for the majority read like one Holmes might have written the previous March, giving almost no attention to Weinberger's First Amendment argument. Clarke noted impatiently:

> On the record thus described, it is argued, somewhat faintly, that the acts charged against the defendants were not unlawful because within the protection of that freedom of speech and of the press which is guaranteed by the First Amendment to the Constitution of the United States, and that the entire Espionage Act is unconstitutional because in conflict with that Amendment. This contention is sufficiently discussed and is definitely negatived in *Schenck v. United States* and *Baer v. United States,* and in *Frohwerk v. United States* [citations omitted]. (*Abrams,* 1919, pp. 615–616)

Moreover, Justice Clarke's opinion also revealed that the majority shared the prevailing assumptions about the cognitive competence of audiences and the magic bullet theory's conclusions about the presumed effects of messages. "Men must be held to have intended, and to be accountable for, *the effects which their acts were likely to produce,*" Clarke asserted, and in this case "*the obvious effect of this appeal,* if it should become effective, as they hoped it might, *would be to persuade persons of character such as those whom they regarded themselves as addressing* [italics added], not to aid government loans, and not to work in ammunition factories" (p. 621).

Unlike his earlier opinions, Justice Holmes's dissent here represented a much more sophisticated analysis of the First Amendment; he modified both his views on the framers' intent and the nature of the clear and present danger test. Holmes approached his fundamentally changed view of the First Amendment by engaging in traditional, yet clearly more sympathetic, statutory construction. "It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other," he said. For example, he opined, "A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet, even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime" (p. 627). Moving on quickly to the essence of his constitutional argument, he concluded the paragraph

with an acknowledgment: "I admit that my illustration does not answer all that might be said, but it is enough to show what I think, and to let me pass to a more important aspect of the case. I refer to the First Amendment to the Constitution, that Congress shall make no law abridging the freedom of speech" (p. 627).

Masking the rhetorical move to come, Holmes pointedly professed, "I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck, Frohwerk* and *Debs* . . . were rightly decided" (p. 627). Despite considerable attention to Holmes's opinions, it is impossible to know for certain the reasons for this disclaimer. Most likely, he was somewhat embarrassed by the lack of sophistication and imagination in the *Schenck* analysis and was attempting to provide a facade of consistency in support of precedent and the rule of law.

Leading with another example of what he would consider beyond the protection of the First Amendment as he did with the instance of falsely shouting fire in a theater and causing a panic, Holmes provided a much-revised but unannounced change in his previously articulated clear and present danger test: "*I do not doubt for a moment that, by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent* [italics added]" (p. 627).

In this deft but subtle restatement, Holmes made two very important changes. First, clear and present danger, which in the past was applied as merely a bad tendency test, became (1) a clear and *imminent* danger that it will bring about (2) *forthwith* certain substantive evils that (3) the *United States* (not only Congress) may (4) *constitutionally seek* to prevent (not has a right to prevent). Though still contemplating prior restraint or subsequent punishment without overt acts, Holmes seems to have linguistically morphed his clear and present danger test from *Schenck* to read very much like the incitement test—imminent and likely lawless action—advocated by Judge Learned Hand in *Masses Publishing Co. v. Patten* (1917) and later adopted by the Supreme Court in *Brandenburg v. Ohio* (1969).

Writing a year after the Armistice, Holmes still maintained that the government's "power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times. But, as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same" (*Abrams,* 1919, pp. 627–628). He then reiterated that "It is *only the present danger of immediate evil or an intent to bring it about* [italics added] that warrants Congress in setting a limit to the expression of

opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country" (p. 628).

Applying this new standard to the leaflets at issue in *Abrams,* Holmes discounted the probability of *any* danger by suggesting, "Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. . . . I do not see how anyone can find the intent required by the statute in any of the defendants' words" (p. 628).

Elaborating on this point, Holmes also revealed a new twist with regard to the harsh punishments meted out by judges and juries under the wartime acts of 1917 and 1918: "In this case, sentences of twenty years' imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them" (p. 629). Holmes suggested: "Even if I am technically wrong, . . . I will add, even if what I think the necessary intent were shown, the most nominal punishment seems to me all that possibly could be inflicted, *unless the defendants are to be made to suffer not for what the indictment alleges, but for the creed that they avow* [italics added]—a creed that I believe to be the creed of ignorance and immaturity when honestly held, . . . but which, although made the subject of examination at the trial, no one has a right even to consider in dealing with the charges before the Court" (pp. 629–630). Without an admission of error, Holmes here appears to have moved away from his opinion in *Debs* (1919), where he considered Socialist Party doctrine to support the conviction and 20-year sentence given to Eugene Debs.

Concluding his dissenting opinion in *Abrams* with one of the most elegant expressions of his long career on the bench, Holmes demonstrated his understanding of the motives behind much of the enterprise to suppress dissent in society.

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. 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. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system *I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country* [italics added]. (p. 630)

Rejecting the government's contention and revising his own historical assumptions regarding the framers' intentions, Holmes asserted: "I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States, through many years had shown its repentance for the Sedition Act of 1798 by repaying fines that it imposed" (p. 630). "Then, presaging Brandeis's later preference for deliberation and "more speech," Holmes announced his position: "Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law . . . abridging the freedom of speech'" (pp. 630–631).

Holmes was eloquent even in his despair as he admitted regretting "that I cannot put into more impressive words my belief that, in their conviction upon this indictment, the defendants were deprived of their rights under the Constitution of the United States" (p. 631). The opinion was impressive enough for anyone who engaged in a close reading of Holmes's opinions. As Sheldon Novick concluded, "It is as if we are reading the work of two men. . . . Plainly, there is something in Holmes's great constitutional opinions that we admire and that was not present in his earlier writings" (1994, pp. 347–348).

One clear and very important difference in the Holmes opinion in *Abrams* is that he appears to have rejected the mechanistic paradigm of the magic bullet theory and now implicitly recognized that audiences are competent to assess the ethos of the source and the content of the message in personally judging the utility of the arguments for their own social responses. In sharp contrast to Justice Clarke's articulation of presumed consequences in the ma-

jority opinion, Holmes countered dismissively, "Now nobody can suppose that the surreptitious publishing of a *silly leaflet by an unknown man,* without more, would present any immediate danger that its opinions would hinder the success of the government arms or *have any appreciable tendency to do so* [italics added]" (*Abrams,* p. 628).

The Rocky Road to the Future

The immediate public response to Holmes's dissenting opinion in *Abrams* was as forceful as the reaction to his majority opinions in *Schenck, Frohwerk,* and *Debs;* yet it was much more diverse. Chafee's *Freedom of Speech* (1920) almost immediately secured Holmes's position as a bold advocate of an important new doctrine, and his intellectual circle of close friends shared that enthusiasm. Interestingly, however, Holmes and Brandeis, though frequently dissenting or concurring together in First Amendment cases during the remaining 13 years they served together on the Court, at times revealed their theoretical differences by dissenting separately (*United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson,* 1921) or even alone, as Brandeis did when he dared to go farther than Holmes was prepared to go in support of freedom of speech (*Gilbert v. Minnesota,* 1920). On the other hand, prominent academic figures such as Dean John Wigmore of Northwestern Law School and Professor Edwin Corwin of Princeton University employed prominent legal journals to launch vigorous attacks on the underlying assumptions and potential consequences of Holmes's new theory of First Amendment freedoms (Wigmore, 1920; Corwin, 1920).

Even today, 80 years after Holmes proposed his revised clear and present danger test and 30 years after it was superseded by the incitement test of *Brandenburg* (1969), the Holmes test and his free speech jurisprudence provide a convenient rhetorical foil for criticism by authors advocating various alternative positions. Louise Weinberg charges Holmes with intellectual rigidity and timidity, as compared with Justice Harlan, even in issues related to the First Amendment and freedom of expression (1997, pp. 715–716). Vincent Blasi, who is generally sympathetic to Holmes, acknowledges that "the problem remains that the *Abrams* dissent reads too much like a personal philosophy of no conceivable constitutional pedigree. One searches for a reading of the opinion that is better grounded in the text, tradition, and philosophy of the Constitution" (1997, p. 1345). Those who profess to understand the essential elements of the clear and present danger test as articulated in the *Abrams* dissent have also challenged its potential consequences. Stanley Fish finds the "basic absolutism of Holmes's position" to be objectionable when opposed to other social values (1993, p. 1075). Other schol-

ars argue strongly that the test is flawed because it is too restrictive. David Dow and Scott Shieldes, for example, contend that the central defect of the clear and present danger test, which is central to interpreting the free speech clause of the First Amendment, "rests on the morally-unacceptable proposition that words alone can overcome human will. The test ignores the morally salient distinction between speech and action, between saying and doing" (1998, pp. 1217–1218). Furthermore, they argue that "the jurisprudential core of Free Speech Clause doctrine is a constitutional embarrassment because it is philosophically untenable. The clear and present danger test has been used for three-quarters of a century, in one form or another, to determine which utterances the government may legitimately restrain. This test, however, is inimical to our core values. While it is thought to be expansive, it in fact protects too little speech" (pp. 1218–1219).

Perhaps what these views reveal is that all such artificial tests become vehicles for supporting the Court majority's personal preferences regarding outcomes rather than a comprehensible and consistent instrument for protecting the fundamental core values of freedom of expression. Nonetheless, the construction and application of such First Amendment tests tell us much about the theoretical assumptions regarding the communication process, as well as the core values, of those holding interpretive power in our constitutional scheme. And, as Holmes's own intellectual journey demonstrates, those assumptions can evolve, and those value schemes are subject to rhetorical negotiation in the conversation between liberty and order, between the expressive rights of the individual and the demands of the community.

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Whitney v. California

Juliet Dee

Sometimes the importance of a case does not reside in the issue at stake, the decision rendered, or the arguments of the majority. Occasionally, an argument developed in a dissenting or concurring opinion is sufficiently striking to resonate in many subsequent opinions. Such is the case in *Whitney v. California* (1927), which, four decades after it was decided, the Supreme Court explicitly overturned in *Brandenburg v. Ohio* (1969). This paper will focus more on Justice Louis Brandeis's concurring opinion in *Whitney* rather than on the majority opinion in *Whitney* because, in the final analysis, Brandeis's thoughts about protecting "dangerous" speech have had greater impact on subsequent approaches to First Amendment law.

In his concurring opinion in *Whitney* (1927, pp. 372–380), Justice Brandeis cautioned: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence" (p. 377). This directive has become a cornerstone of First Amendment doctrine since Brandeis wrote it 75 years ago. This discussion will focus only on those Supreme Court and U.S. Courts of Appeals cases that rely on Brandeis's opinion because the idea that "more speech" is preferable to "enforced silence" has influenced subsequent High Court decisions and has been instrumental in forging First Amendment policy.

The Facts of the Controversy

Charlotte Anita Whitney was a 64-year-old philanthropist and the niece of Justice Stephen Field, who served on the U.S. Supreme Court from 1863 to 1897. She was a member of the Oakland, California, branch of the Socialist Party and a delegate to its national convention in Chicago in 1919. This

convention was marred by a split between the "radical group" and the old-line Socialists. The Oakland delegates were allied with the radical group, which later that year formed the Communist Labor Party (CLP) of America. The CLP's platform included a statement saying that its purpose was "to create . . . a unified revolutionary working class movement" with the goal of overthrowing "capitalist rule" (*Whitney v. California,* 1927, p. 363). At a subsequent convention in Oakland, Whitney participated in organizing the Communist Labor Party of California (CLPC), a branch of the national organization. She wrote for its platform a plank that "urged workers who are possessed of the right of franchise to cast their votes for the . . . CLP" (p. 365). But her comrades rejected this plank and included a statement of intent to organize general strikes in which the workers would seize power by violent means.

Although Whitney herself had argued against the proposals for seizing power by force, she was charged with violating California's Criminal Syndicalism Act after she attended the Oakland convention. Even though she testified that "it was not her intention that the CLPC should be an instrument of terrorism or violence" (p. 366), the State of California argued that the CLPC was created to teach criminal syndicalism, and thus, as a member of the CLPC, Whitney had participated in the crime. She appealed her conviction (*People v. Whitney,* 1922) to the Supreme Court.

Legal Background of Constitutional Issues Raised in *Whitney*

The Supreme Court had made three significant decisions involving freedom of speech in the decade before *Whitney.* In *Schenck v. United States* (1919), Justice Oliver Wendell Holmes enunciated his "clear and present danger" test and upheld Charles Schenck's conviction under the Espionage Act for urging young men to resist the draft. In *Abrams v. United States* (1919), Holmes dissented from the majority. He argued that five Russian immigrants who wrote anonymous circulars denouncing President Woodrow Wilson for sending American troops into Russia during World War I posed no danger to national security. In *Gitlow v. New York* (1925), the Supreme Court held that the due process clause of the Fourteenth Amendment guaranteed First Amendment rights to all citizens. In other words, states and cities could not proscribe freedom of speech or press because the First Amendment applied to individuals through the Fourteenth Amendment.

Decision of the Supreme Court

Although Whitney argued that the criminal syndicalism statute violated her right of freedom of expression, Justice Edward Sanford, writing for the majority, rejected her First Amendment claim for three reasons.

Whitney's speech or membership in the CLPC comprised "evidence" of a "bad tendency."[1] In *Abrams* and *Gitlow* the Court subscribed to the "bad tendency test." In *Whitney,* Justice Sanford cited *Gitlow* and concluded that the claim "that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, *tending* [italics added] to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question" (p. 371). Justice Sanford presumed that the California Criminal Syndicalism Act was constitutional.[2] Furthermore, he concluded that it did not violate the Fourteenth Amendment.

The majority held that Whitney's act of joining the CLPC amounted to a criminal conspiracy because California's criminal syndicalism statute forbade the advocacy of violence to bring about political change. Put simply, this statute made criminals of people who, even though they themselves did not teach or advocate anything, belonged to a group that professed belief in the violent or unlawful overthrow of the government. Thus, even though Whitney herself had tried to persuade her comrades that they should accomplish political reform through use of the ballot rather than through industrial strikes, her failure or refusal to resign from the CLPC ultimately resulted in her conviction.

Justice Sanford did not apply the "clear and present danger" test. This test had fallen out of favor with the majority of the Court. Moreover, the bad tendency test that Sanford relied upon, citing *Gitlow* (1925), was incommensurable with the clear and present danger test. Furthermore, Justice Sanford apparently believed that it was entirely unnecessary for the Court to consider Whitney's speech or associations if independent evidence of a conspiracy existed. He simply accepted the jury's conviction of Whitney as independent evidence of a conspiracy: "The offense . . . is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy" (p. 371). Whether Sanford purposely chose to ignore the First Amendment issue of freedom of association or to finesse it is not clear.

Justices Holmes and Brandeis concurred with the majority, but only because the question of freedom of expression had not been raised sufficiently

at trial to qualify as an issue on appeal. Brandeis questioned California's Criminal Syndicalism Act: "The mere act of . . . forming a society for teaching syndicalism [or] of becoming a member of it . . . is given the dynamic quality of crime. . . . Thus [Whitney] is to be punished, not for attempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely" (p. 373). Brandeis continued: "Advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement." There is a great difference, he explained, "between advocacy and incitement, between preparation and attempt, between assembling and conspiracy" (p. 376). Brandeis elaborated on Justice Holmes's clear and present danger test introduced in *Schenck,* arguing that the government is justified in proscribing speech only to prevent the clear and imminent danger of a substantive evil.

Legal Implications of *Whitney*

Following an analysis of the types of speech for which *Whitney* set such a valuable precedent, this discussion will now deal with the question of how the doctrine of *more speech* can be even further expanded as a practical solution—or as a welcome "rope ladder"—by which we can climb out of even the deepest of First Amendment quagmires. During the past 50 years, U.S. Courts of Appeals have made eight major decisions, and the Supreme Court has issued ten major decisions, invoking Justice Brandeis's call for more speech, not enforced silence.

As courts have invoked Justice Brandeis's more speech principle over the past seven decades, it is apparent that its application has shifted from criminal to civil cases involving political speech. In recent years, it has been applied most frequently in cases involving commercial speech, and it has been applied to a great variety of types of speech, especially by U.S. Courts of Appeals. The following discussion will include a closer examination of these three aspects of *Whitney v. California.*

Shift from Criminal to Civil Cases

Although the *Whitney* decision itself involved a criminal charge, only one of the eight U.S. Courts of Appeals cases and three of the ten Supreme Court cases focusing on the more speech doctrine involved criminal charges; the others involved civil disputes. In *Dennis v. United States* (1951), the Supreme Court upheld the convictions of 11 Communist Party members who were charged with violating the Smith Act by advocating the overthrow of the U.S.

government by force. Justice William O. Douglas dissented, quoting two full paragraphs from Justice Brandeis's *Whitney* opinion and ending with the more speech passage. A decade later Douglas again cited Brandeis's more speech passage in his concurring opinion in *Gibson v. Florida Legislative Investigation Committee* (1963). This time the Supreme Court reversed the criminal contempt conviction of the president of the Miami chapter of the National Association for the Advancement of Colored People (NAACP) for refusing to turn over a list of the NAACP's members to the Committee.

Although in the 1960s the Supreme Court began to reflect the fading paranoia regarding Communist Party members in this country, the U.S. Court of Appeals for the District of Columbia Circuit was more conservative in *Carlson v. Schlesinger* (1975). A majority of the court upheld the convictions of three servicemen stationed in Vietnam after they were arrested for circulating a petition from the Vietnam Veterans Against the War. Chief Judge David Bazelon dissented, concluding his argument with Brandeis's more speech passage.

Although the idea of circulating unauthorized petitions on a military base was too much for the U.S. Court of Appeals in *Carlson,* the Supreme Court refused to uphold Gregory Lee Johnson's conviction for burning the American flag in violation of Texas law (Desecration of Venerated Object, 1989). The Supreme Court held that to convict Johnson for flag desecration would be "inconsistent with the First Amendment" (*Texas v. Johnson,* 1989, p. 397). Justice William Brennan wrote the majority opinion; it concluded with Brennan's explanation that "the way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong" (p. 419). Brennan then quoted Brandeis's more speech directive, explaining: "We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by . . . according its remains a respectful burial" (p. 420).

Except for the criminal charges in *Dennis, Gibson, Carlson* and *Johnson,* however, all the cases citing the more speech passage involved civil disputes, most of which pertained to political speech. Chief Justice Fred Vinson, who wrote the majority opinion in *Dennis* upholding the 11 Communist Party members' convictions, later upheld a National Labor Relations Board ruling that required leaders of labor unions to sign affidavits confirming they were not communists in order to collect their pensions (*American Communications Association v. Douds,* 1950). Ironically, Vinson acknowledged Brandeis's more speech passage in a footnote in *Douds,* but he did not consider freedom of

speech or association to be the issue at stake; rather, he believed that requiring union leaders to sign non-communist affidavits was necessary to protect "the free flow of commerce" (p. 396).

Turning from Supreme Court to U.S. Courts of Appeals decisions, one finds a similar resistance to permitting speech which, albeit offensive or irritating, could hardly be said to present any "clear and present danger" to anyone. In *Norton v. Discipline Committee of East Tennessee State University* (1969), the U.S. Court of Appeals for the Sixth Circuit refused to reinstate 25 students who were expelled for circulating an offensive and puerile flyer calling vaguely for students to "assault the bastions of administrative tyranny" (p. 198). Judge Anthony Celebrezze dissented, citing Justice Brandeis's more speech passage (p. 207). The following year the Fifth Circuit demonstrated greater tolerance when it held that the University of Mississippi could not bar a militant black student leader from Mississippi Valley State College from speaking on campus at the invitation of the Young Democratic Clubs of Mississippi; this time it was the majority which cited the more speech passage (*Fortune v. Molpus,* 1970, p. 805).

Young adults in 2002 seldom consider the length of their hair to be a social statement, but a generation ago Albert Glines was so strongly opposed to Air Force requirements for short hair that he circulated an unauthorized petition objecting to mandatory crew cuts. The Air Force immediately removed Glines from active duty, effectively barring him from completing his navigator instructor training. When Glines filed suit, the U.S. Court of Appeals for the Ninth Circuit upheld his reinstatement as a captain in the Air Force Reserves. The court cited Justice Brandeis's more speech passage, explaining that "The First Amendment reflects a conscious choice to prefer citizen autonomy to conformity" (*Glines v. Wade,* 1978, p. 680). The Supreme Court overturned this decision, however, in *Brown v. Glines* (1980), citing the government's interest in military readiness as the justification for denying Glines the right to circulate a petition, even about an issue as insignificant as the length of one's hair.

More recently the Ninth Circuit cited Justice Brandeis's more speech passage in striking down as unconstitutional a Hawaii regulation (Election Campaign Contributions and Expenditures Act, 1979) prohibiting disclosure of information concerning investigations undertaken by Hawaii's Campaign Spending Commission (*Lind v. Grimmer,* 1994). Like *Lind, Brown v. Hartlage* (1982) involved speech during an election campaign. In *Hartlage,* the Supreme Court refused to order a new election after Carl Brown possibly violated a Kentucky statute (Kentucky Corrupt Practices Act, 1974) when he promised to lower commissioners' salaries if he were elected commissioner

of Jefferson County (candidates were not permitted to offer material benefits to voters in consideration for their votes). But when his opponent Earl Hartlage pointed out his error, Brown immediately retracted his promise well before the election. The Supreme Court held that the election was fair: "In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent. The preferred First Amendment remedy of 'more speech, not enforced silence,' thus has special force" (p. 61).

Five years later, however, in *Meese v. Keene* (1987), the Supreme Court held that it was perfectly acceptable for the Department of Justice to label three Canadian films (*If You Love This Planet,* which addressed the effects of nuclear war, and two films about acid rain) as "political propaganda," over the objections of California State Senator Barry Keene. The Supreme Court cited Justice Brandeis's more speech passage, explaining that the "propaganda" label simply constituted more speech on the part of the Department of Justice (p. 481).

Cases Involving Commercial Speech

Although *Whitney* itself dealt with political speech, in recent years the Supreme Court has most frequently cited Justice Brandeis's more speech passage in cases involving commercial speech. In *Linmark Associates v. Township of Willingboro* (1977), the Supreme Court struck down a Willingboro, New Jersey, ordinance prohibiting homeowners from putting "For Sale" or "Sold" signs on their front lawns. Although those who passed the ordinance were motivated by the desire to deter "white flight" encouraged by sleazy realtors as African American families moved into "white" neighborhoods, the Supreme Court ruled that truthful commercial speech cannot be banned, despite Willingboro's "good motive" of discouraging white flight. The Court cited the more speech passage to support its conclusion (p. 498). In *Friedman v. Rogers* (1979) the Supreme Court upheld a Texas statute banning the practice of optometry under a trade name, but Justices Harry Blackmun and Thurgood Marshall dissented, citing the more speech passage (p. 25).

A year after *Friedman* the Supreme Court outlined its "commercial speech doctrine" in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* (1980). In *Central Hudson* Justices Blackmun, Brennan and John Paul Stevens cited Justice Brandeis's more speech rationale in two different concurring opinions (pp. 577, 582). Their reliance on the more speech doctrine infuriated Justice William Rehnquist, who dissented (p. 598).

Despite Justice Rehnquist's misgivings about protecting commercial speech in *Central Hudson,* the Supreme Court expanded First Amendment protec-

tion for commercial speech in *44 Liquormart v. Rhode Island* (1996); here the High Court struck down as unconstitutional a Rhode Island law banning the advertisement of liquor prices except at the place of sale. The Court's opinion again cited the more speech passage (p. 498), suggesting that if Rhode Island wished to reduce consumption of hard liquor, it could increase taxes on liquor, limit per capita sales of liquor, or launch educational campaigns about the dangers of alcohol abuse; but the First Amendment would not permit banning truthful information about prices.

From Political Speech to Nude Dancing

Although the Supreme Court has frequently applied the more speech doctrine in commercial speech cases during the past 25 years, U.S. Courts of Appeals have in fact invoked the suggestion for more speech with regard to a wider variety of types of speech than has the Supreme Court. For example, in *National Socialist White People's Party v. Ringers* (1973), the U.S. Court of Appeals for the Fourth Circuit applied public forum analysis in its ruling that the Arlington County School Board in Virginia was required to permit a group of neo-Nazis to use a high school auditorium for a meeting during non-school hours. Explaining its decision, the Fourth Circuit cited Brandeis's more speech passage as the basis on which "we have staked our all" (pp. 1018–1019).

Whereas the Fourth Circuit managed to finesse the hate speech issue by applying public forum analysis in *National Socialist White People's Party,* the Eighth Circuit applied Brandeis's more speech principle in a libel case against author Peter Matthiessen and his publisher Viking Penguin (*Price v. Viking Penguin,* 1989). In separate actions, FBI agent David Price and former South Dakota Governor William Janklow sued Viking Penguin,[3] alleging that Matthiessen defamed them in his book *In the Spirit of Crazy Horse.* In response, Viking Penguin withdrew the book from circulation, thus permitting Price and Janklow to effect a de facto prior restraint of the book. Although Matthiessen reported rumors that Price killed a Native American woman, Matthiessen made it clear he believed the rumors to be unfounded. But the Eighth Circuit upheld a federal district court decision to dismiss Price's libel suit: "In this setting, we have decided that the Constitution requires more speech rather than less. Our decision is an anomaly in a time when tort analysis increasingly focuses on whether there was an injury, for in deciding this case we have searched diligently for fault and ignored certain injury. But there is a larger injury to be considered, the damage done to every American when a book is pulled from a shelf, as in this case, or when an idea is not circulated" (pp. 1446–1447). In *Price* the Eighth Circuit was

clearly aware that its decision was "an anomaly" in that it calls for more speech as a solution to a libel action rather than punishing the publisher (p. 1446).

Just as it is a surprise to see Brandeis's more speech rationale applied in a defamation case, it is perhaps also unexpected to see it turn up in a case involving nude dancing. In *Miller v. Civil City of South Bend* (1990), the U.S. Court of Appeals for the Seventh Circuit struck down as unconstitutional an Indiana statute (Public Indecency Statute, 1976) as applied to non-obscene nude dancing in barrooms. It held that nude dancing constituted a form of expression "entitled to limited protection under the First Amendment" (p. 1081). The U.S. Court of Appeals for the Seventh Circuit explained: "To those who understandably find objectionable the type of conduct sought to be condemned, . . . we offer the prescription of Justice Brandeis, . . . to wit: ' . . . the remedy to be applied is more speech, not enforced silence'" (p. 1088).

More Speech as an Alternative to Paternalism

Since *Whitney* was decided 70 years ago, the Supreme Court has gradually moved away from the paternalistic approach toward speech so painfully evident in *Schenck, Abrams, Gitlow,* and *Whitney.* Instead, the Court has promoted the laissez-faire "marketplace of ideas" Justice Holmes suggested in his dissent in *Abrams,* and acceptance of more speech in this marketplace, as Justice Brandeis suggested in *Whitney* (at least in theory if not in practice). In moving away from such paternalism, the Supreme Court adopted an approach which assumes greater responsibility on the part of the adults who are the receivers of the speech in question. In *Schenck, Abrams, Gitlow,* and *Whitney,* it was as if the Supreme Court assumed that the pamphlets written by Charles Schenck, Jacob Abrams, and Benjamin Gitlow, and the Communist Party's stated intent to bring about working-class ownership of the factories, would suddenly become a "magic bullet" with immediate, powerful, uniform, and direct effects on anyone who read them (Lasswell, 1927, p. 214; Folkerts & Lacy, 2001, pp. 453–454; Lowery & DeFleur, 1983, p. 23; DeFleur & Dennis, 1996, pp. 540–541).[4]

In other words, the pamphlets and Communist Party platform alarmed the Supreme Court justices so much that it was as if they feared immediate, direct, and uniform effects on everyone who read the pamphlets or party platform. Although the justices who decided *Schenck, Abrams, Gitlow,* and *Whitney* would not have known the magic bullet theory of media effects by name, their majority decisions clearly reflect the fear that if even a few people responded positively, the result would constitute a clear and present danger

to national security. Indeed, the Supreme Court has been more inclined to ignore the more speech rationale in cases that touch—however remotely—on national security, beginning with *Whitney* and continuing through *Douds* (fear of communist influence among leaders of labor unions), *Dennis* (conviction of 11 Communist Party leaders in California), *Carlson* (conviction for circulating unauthorized petition of Vietnam Veterans Against the War in a combat zone), and *Glines* (military readiness cited as rationale for regulating circulation of a petition opposing crew cuts). In other words, one could find a national security exception to the more speech rationale: the Supreme Court might not permit more speech whenever that communication appears to threaten national security.

Although *Douds, Dennis, Carlson,* and *Glines* were decided between 1950 and 1980 and suggest a certain fearfulness of media messages among Supreme Court justices, communication researchers had already begun to discount the magic bullet theory many decades before. In the 1940s Hadley Cantril (1940, pp. 96–103), Paul Lazarsfeld, Bernard Berelson and Hazel Gaudet (1948), and other communication researchers established that media messages do indeed affect *some* people but not *all* people in the same way. Lazarsfeld, Berelson, and Gaudet formulated the "two-step flow" theory of mass media effects by which "ideas often flow *from* radio and print *to* the opinion leaders and *from* them *to* the less active sections of the population" (1948, p. 151).

Raymond Bauer explained that the "*scientific model* of communication . . . views communication as a two-way transaction between communicator and audience in which each party is engaged in problem solving, and in which each party both gives and gets something" (1965, p. 1). Later communication researchers established that even the most objective reporters interpret events selectively, leading to the theory of "selective perception" (DeFleur & Dennis, 1996, pp. 391–392). Furthermore, individuals respond to media messages in very selective ways, leading to the theory of "selective exposure" (DeFleur & Dennis, 1996, pp. 556–557).

As researchers learned that the two-step flow and theories of selective perception and exposure more accurately predicted individuals' responses to media messages, they also recognized the naïveté and oversimplifications of the magic bullet theory. Of course, judges and Supreme Court justices have not tended to turn to communication researchers for guidance regarding media effects, preferring instead to rely on their own assumptions in this regard. William Bailey explained that "the Supreme Court has . . . assumed a very mechanistic model of speech efficacy" (1987, p. 91). "In holding the speaker responsible for the consequences of the speech," Bailey continued, the Su-

preme Court "makes clear the completeness of its commitment to the view of the speaker as the sole cause of whatever effects accrue" (p. 98).

When the Supreme Court explicitly overturned *Whitney* in *Brandenburg v. Ohio* (1969), its decision suggested that it was perhaps dividing responsibility between the speaker and the audience. *Brandenburg* requires both that a speaker must *intend* violence to occur (speaker's role) and also that the violence *actually does* occur (audience's role). Thus the Court in this case was distancing itself from the paternalism of its decisions during the first half of the twentieth century.

The magic bullet theory assumes that recipients of media messages are childlike and credulous, willing to believe and act upon even "a silly leaflet by an unknown man," as Justice Holmes said in his dissent in *Abrams* (1919, p. 628). However, by 1969 when the Supreme Court decided *Brandenburg,* it was more willing to assume that readers and listeners were rational adults, capable of discerning the difference between good ideas and bad ones. It was also more willing to assume that readers and listeners were adults responsible for their own actions, regardless of the intentions of a speaker or pamphleteer who was attempting to incite them. Franklyn Haiman inquired, "Where is the lack of capacity on the part of the listeners to decide not to act as the speaker urges? Where is the control of will that can be described as triggering an *inevitable* chain of events?" (1981, p. 279).

Although Haiman demands that those who listen to an incendiary speech must be responsible for their own actions following that speech, he is also concerned that First Amendment protection for minority viewpoints is sometimes fragile: "[We must] stand up and do battle whenever the tides of majoritarianism threaten to drown out the voices of dissent. We cannot depend on the Supreme Court . . . to do that job for us" (2000, p. 281).

With regard to the U.S. Courts of Appeals cases discussed above, the most unexpected application of Justice Brandeis's more speech principle occurs in *Price,* involving defamation. Of course, some First Amendment absolutists would completely dispense with an individual's right to sue for libel; they argue that the person who has been defamed should exercise the more speech option rather than suing for damages. Haiman does not propose throwing out all existing libel laws, but he does call for limiting their scope: "Let us limit [the law of defamation] . . . to emergency situations where the democratic process does not have time to function or where those accused of defamation would rather take their chances in a lawsuit than assume responsibility for providing the channel for a reply" (1981, p. 60). Commenting on communication theory and the law of defamation, Thomas Ben-

son has argued that a libelous statement "defames a person not because he or she hears it, but because others hear it and because of what follows from their hearing it. In this sense, a libel is different from an insult that is directed to us privately. . . . Bad communication theory makes bad law" (1991, p. 392).[5] Although the Eighth Circuit's decision in *Price* did not cite communication theory per se, it did defer to the marketplace of ideas. However, this was an exception; the law of defamation generally continues to assume the need for actual (and sometimes for punitive) damages rather than for more speech.

The U.S. Court of Appeals for the Seventh Circuit applied the more speech principle in *Miller v. Civil City of South Bend* (1990) which involved nude dancing. Except for the Seventh Circuit's ruling in *Miller* (1990), however, neither the Supreme Court nor any U.S. Court of Appeals has expressly cited Justice Brandeis's more speech doctrine in cases dealing with pornography, despite the fact that permitting more speech would appear to be a workable solution. Rather than, for instance, setting up elaborate systems of censorship of pornography or using taxpayers' money for obscenity prosecutions, those who oppose pornography can use their more speech option and speak out against its harmful effects. Some radical feminists even prefer to effectuate the more speech option by making their own erotic films from a woman's rather than from a man's point of view.

Turning from pornography to hate speech, instead of attempting to devise elaborate university campus speech codes, educational institutions can employ the more speech option provides for education to combat hate speech. This strategy also allows counter-demonstrations, as in New York City when the Ku Klux Klan held a march in the fall of 1999; thousands of demonstrators protested against the Klan, but no violence occurred. But neither the Supreme Court nor any U.S. Court of Appeals has applied Justice Brandeis's more speech principle in hate speech cases.

Looking at the broader picture, why has the Supreme Court most frequently applied the more speech rationale in cases involving either political or commercial speech? A possible explanation is that in these two areas at least, the Court would not anticipate any significant danger from more political or commercial speech. In contrast, the Court may be skittish about encouraging more speech in cases involving national security, obscenity, or hate speech, all of which can instigate real harm. For example, when former CIA agent Philip Agee published two books naming more than 1,000 alleged CIA officers in Europe and Africa, this allegedly led directly to the 1975 assassination of CIA station chief Richard Welch in Greece (Watkins, 1990, p. 340; also see the chapter on *Near v. Minnesota* in this volume). College

men who watched a sexually explicit film showing a woman being raped and pretending to "enjoy" it (a prevalent scenario in male-dominated pornography) were more likely to report that they might commit rape themselves if they were sure they would not be caught (Check & Guloien, 1989). Matthew Hale, the "pontifex maximus" of the World Church of the Creator, in which Benjamin Smith was an active member, fanned the flames of Smith's racism until he shot and killed an African American and a Korean; then Smith wounded nine others, including Orthodox Jews, African Americans, and an Asian (Holt, 1999).

If we say that speech can never cause harm, we are kidding ourselves. The problem, of course, is that there are simply too many variables in human behavior for any particular communication theory to predict who will be the next Ted Bundy (allegedly incited by pornography) or the next Benjamin Smith. No communication theory can predict how or when the hate speech of a Matthew Hale will incite the next Benjamin Smith to commit mass murder. Under such circumstances, one can understand why the Supreme Court would not immediately turn to more speech as an obvious solution to pornography or hate speech. When dealing with nascent mass murderers, the problem is that no one knows how much time there is to "avert the evil by the processes of education" (*Whitney,* 1927, p. 377).

Just as no communication theory can accurately predict all human behavior, perhaps no legal doctrine can neatly solve every First Amendment case. However, in most cases the more speech doctrine provides a far more effective solution than restraint of speech. In the next millennium, we can hope that both the Supreme Court and lower courts will apply Justice Brandeis's more speech principle in a range of cases that extends beyond political or commercial speech where it has most often been applied in the past. As judges have gradually come to realize that the general public does not need paternalistic protection from "silly leaflets" espousing communism, from angry protestors who burn the American flag, or even from the Internet with all its excesses (*Reno v. ACLU,* 1997; *Free Speech Coalition v. Reno,* 1999), these jurists have wisely stepped back in order to permit adults to seek truth in the marketplace of ideas.

The attraction of exercising Justice Brandeis's more speech option as opposed to punishing speech after it occurs is that encouraging additional communication is generally easy and inexpensive when compared with prosecuting communicators for various forms of offensive speech. In the coming millennium we should hope that courts will more often turn to Justice Brandeis's concurring opinion calling for more speech. It is without question one of the most elegant of all First Amendment doctrines.

Notes

1. Zechariah Chafee Jr. described the "bad-tendency test" as an eighteenth-century English doctrine wholly at variance with any true freedom of discussion, because it permits the government to go outside its proper field of acts, present or probable, into the field of ideas, and condemn them by the judgment of a judge or jury, who, human nature being what it is, consider a doctrine they dislike to be so liable to cause harm some day that it had better be nipped in the bud (1941/1948, p. 322).

In *Gitlow v. New York,* the majority spelled out the "bad-tendency test" as follows: "The immediate danger is none the less real because the effect of a given utterance cannot be accurately foreseen" (1925, p. 669).

2. Justice Sanford wrote: "Every presumption is to be indulged in favor of the validity of the statute" (citing *Mugler v. Kansas,* 1887), "and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State" (*Whitney v. California,* 1927, p. 371). Justice Sanford did not indicate how any statute might be overturned if this interpretation is applied.

3. *Janklow v. Viking Press* (1985). See also *Janklow v. Newsweek* (1986). Both cases focus on Matthiessen's account of accusations that William Janklow raped a 15-year-old Native American girl who babysat his children.

4. Harold Lasswell, describing the function of propaganda, was quoting George William Curtis, who said "Thoughts are bullets" (1927, p. 214). Lasswell's theory eventually came to be known as the "magic bullet theory," summarized by media scholars such as Jean Folkerts and Stephen Lacy (2001, pp. 453–454) and Melvin DeFleur and Everette Dennis (1996, pp. 540–541). Shearon Lowery and DeFleur summarize the "magic bullet theory" of mass media effects in the following terms: "1) The media present messages to the members of the mass society who perceive them more or less uniformly. 2) Such messages are stimuli that influence the individual's emotions and sentiments strongly. 3) The stimuli lead individuals to respond in a somewhat uniform manner, creating changes in thought and action that are like those changes in other persons. 4) Because individuals are not held back by strong social controls from others, such as shared customs and traditions, the effects of mass communication are powerful, uniform and direct" (1983, p. 23).

5. Benson is discussing Thomas I. Emerson's attempt to redefine libel as "action" rather than "speech" (1966, pp. 68–69), but Benson believes that this is unreasonable and illogical. Benson suggests that if an action is capable of being true or false, then a symbolic action falls within the domain of speech and communication and must "thereby have a claim on the protection of the First Amendment" (1991, pp. 390–392). Benson refers readers to Haiman (1981, pp. 16–40) for a discussion of the speech/action distinction as it applies to freedom of expression; cited in Benson (1991, pp. 392, 396).

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Stromberg v. California

John S. Gossett

American history is replete with examples supporting the proposition that when the nation feels threatened, especially by noxious political sentiment, it responds to the perceived threat by enacting sedition laws. These laws severely restrict a citizen's ability to criticize our form of government, policies enacted by government, or the economic system supporting that government. Consequently, it is not surprising that during and immediately following World War I, fearing that the United States might face the same fate Russia suffered during the Bolshevik Revolution of 1917–1918, Congress and many state legislatures enacted sedition laws. While their details varied, the laws generally proscribed actions or symbols showing opposition to organized government or any type of propaganda supporting anarchy as a means of changing the form of government. Passage of these sedition laws created the context for challenges to government suppression of expression in the early part of the twentieth century.

The Facts of the Controversy

In 1929, Yetta Stromberg, a 19-year-old American-born woman of Russian parentage, worked as a supervisor at a summer camp for children aged 10 to 15 located in the foothills of the San Bernardino mountains in California. The camp was supervised by the Pioneer Summer Camp Conference, an independent association of organizations, some of which were communistic in nature (*People v. Mintz,* 1930, p. 95). Stromberg was a member of the Young Communist League, and each day she led the students in a ceremony where they raised a red flag, "a camp-made reproduction of the flag of Soviet Russia, which is also the flag of the Communist Party in the United States" (*Stromberg v. California,* 1931, p. 362). Under Stromberg's direction, the stu-

dents saluted the flag and recited a pledge of allegiance "to the worker's red flag" (p. 362).

Stromberg was convicted of violating Section 403a of the Penal Code of California, which stated: "Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window (1) as a sign, symbol or emblem of opposition to organized government or (2) as an invitation or stimulus to anarchistic action or (3) as an aid to propaganda that is of a seditious character is guilty of a felony [parenthetical numbers added]" (*Stromberg,* 1931, p. 361). The District Court of Appeals affirmed the judgment (*People v. Mintz,* 1930), and the Supreme Court of California denied a request for a hearing. The U.S. Supreme Court granted Stromberg's request for a hearing (*Stromberg,* 1931, p. 361). In addressing the question of whether a state could legally prohibit the display of a symbol that constituted opposition to organized government or served as an invitation or stimulus to anarchistic action or functioned as an aid to propaganda that was seditious in nature, the U.S. Supreme Court ruled, 7–2, in favor of Stromberg (p. 370).

Legal Status of Symbolic Speech Prior to *Stromberg*

Beginning in the late nineteenth century and continuing through World War I, the United States underwent profound changes in the way people thought about the nation's economic and political system. Even before the armistice was signed in 1917, radical critics proclaimed that the war effort against Germany was nothing more than an attempt to prop up the capitalist system which oppressed working men and women around the world. These radicals attempted to exploit the rapid changes in the U.S. workforce by consolidating the power of unskilled labor into a potent mechanism for exhibiting the existence of class struggle and what Zechariah Chafee Jr. referred to as "the eternal antagonism" of the haves and the have-nots (1941/1969, p. 141).

During the period 1917–1920, many states strengthened existing laws prohibiting criminal anarchy by enacting legislation against criminal syndicalism. Many of these new laws embodied California's view of the crime of syndicalism as the doctrine "advocating teaching, or aiding and abetting the commission of crime, sabotage, or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change" (Chafee, 1941/1969, p. 165). In direct challenge to the passage of these state syndical-

ism statutes, groups such as the Industrial Workers of the World proclaimed syndicalism as a central tenet of their ideology and openly explained that their unwillingness to support the United States in World War I was based on America's blatant subjugation of its workers (pp. 142–143).

Of the various state sedition laws, the simplest was the red flag law, adopted in 32 states by 1920 (Goldstein, 1996, p. 43). Some states limited the ban on red flags to public places where the flag was displayed as a symbol "of any organization or association, or in furtherance of any political, social, or economic principle, doctrine, or propaganda" (Chafee, 1941/1969, p. 159). Others, however, prohibited the display of a red flag anywhere, and some states even banned the wearing of red clothing or the display of any color that was "distinctive of bolshevism, anarchism, or radical socialism" (p. 159). Civilian opposition to the display of a red flag was intense. Testimony presented before a committee of the United States Senate suggested that persons in sympathy with the carrying of a red flag were greatly enthused and energized by its display, while, conversely, for a large number of Americans, the display of a red flag made them want to kill the persons carrying that flag (p. 160). The intensity and range of emotions generated by display of a red flag suggest that nonverbal stimuli can serve to influence and motivate human behavior. One such stimulus, a flag, constitutes an artifact that traditionally implies symbolic authority, and humans view flags as potent symbols of nations and political causes to be cherished, revered, hated, and/or feared (*West Virginia State Board of Education v. Barnette,* 1943, pp. 632–633). In addition to the flag as nonverbal stimulus, research in nonverbal communication recognizes color as another powerful nonverbal stimulus, and the color red conveys meanings that can vary by culture (DeVito, 2000, p. 148).

Critics initiated numerous challenges to passage of these sedition laws. The litany of cases involving challenges to the Espionage Act of 1917 and the 1918 amendments to it (e.g., *Schenck v. United States,* 1919; *Frohwerk v. United States,* 1919; *Debs v. United States,* 1919; *Abrams v. United States,* 1919), as well as challenges to state sedition laws (e.g., *Gitlow v. New York,* 1925; *Whitney v. California,* 1927), are well known to First Amendment scholars. In these cases, as well as in some pre–World War I decisions, the Supreme Court "generally rejected free speech claims, often by refusing even to recognize or address them" (Rabban, 1983, p. 1207).

The Supreme Court's Reasoning in *Stromberg*

The three purposes mentioned in Section 403a of the Penal Code of California were treated differently at various points in Stromberg's trial. At the out-

set, the district attorney, looking to the purposes for which Stromberg raised the red flag, treated the three purposes conjunctively. In other words, if the jury found that Stromberg's actions included all three purposes stated in the law, then a conviction was warranted. However, after all testimony was completed, the trial judge, in his instructions to the jury, described the three purposes mentioned in the statute disjunctively, "holding that [Stromberg] should be convicted if the flag was displayed for *any one* [italics added] of the three purposes named" (*Stromberg,* 1931, p. 363). Therefore, according to the judge's instructions to the jury—and contrary to the district attorney's case presentation—a finding by the jury that Stromberg violated any one of the three purposes mentioned in Section 403a would warrant a conviction.

The California District Court of Appeals reviewed the trial court ruling, examining the three purposes in Section 403a collectively, and affirmed the trial court ruling, holding that Stromberg's flag raising activities violated the combined purposes in the statute (*People v. Mintz,* 1930, p. 96). In examining these three purposes on appeal, Chief Justice Charles Evans Hughes, writing for seven members of the United States Supreme Court, differed from the California appellate court. He acknowledged that because the trial judge instructed the jury to view the three statutory purposes separately, and because Stromberg did not contest the judge's instructions, the Supreme Court was obligated in the interest of fairness to examine each of the clauses rather than examining the statute as a whole. In short, the majority contended that because it was impossible to determine under which specific clause of Section 403a Stromberg was convicted, the Court would analyze each of them. If one of the clauses was determined to be unconstitutional, this determination would necessitate overturning Stromberg's conviction (*Stromberg,* 1931, p. 365).

Looking at the first clause, Chief Justice Hughes stated that it was unconstitutionally vague because the word *opposition* was very broad in its meaning and not all persons would concur in the meaning of the term envisioned by the California legislature. In addition, the word *opposition,* when used in the context of "opposition to organized government," might include a wide range of activities suggesting peaceful and orderly means of opposing organized government, such as voting against an incumbent or writing a letter to the editor denouncing some policy enacted by government (Tiersma, 1993, p. 1531). Using the language of the California appellate court, Chief Justice Hughes explained: "Progress depends on new thought and the development of original ideas. All change is, to a certain extent, achieved by the opposition of the new to the old, and in so far as it is within the law, such peaceful opposition is guaranteed to our people and is recognized as a symbol of in-

dependent thought containing the promise of progress. It may be permitted as a means of political evolution, but not of revolution" (*Stromberg,* 1931, p. 366). Because the word *opposition* in the first clause could be interpreted to include not only the type of violent revolutionary opposition to organized government assumed by the legislature in writing the statute, but also peaceful, orderly, progressive, and constitutional opposition to the existing order, the Court determined that the clause was overbroad. The proscription embodied in the first clause went beyond a legitimate legislative concern for nonviolence; in doing so, it proscribed peaceful, orderly, and legal behavior (Henderson, 1996, p. 548).

Chief Justice Hughes examined the second and third clauses of Section 403a and determined that they did not suffer from vagueness or overbreadth and that they served legitimate functions (*Stromberg,* 1931, p. 366). Thus, having found the first clause vague and overbroad, the Court was left with the task of deciding if this finding constituted grounds for ruling the statute unconstitutional.

In addressing whether the first clause constituted a violation of Stromberg's right to freedom of speech, the Court acknowledged the obligation to confront the concept of what a state may punish in the exercise of its police power within the parameters of the rulings in *Gitlow* (1925), *Whitney* (1927), and *Fiske v. Kansas* (1927). Admitting that states have the constitutional power to proscribe violent criminal action aimed at overthrowing the existing government, Chief Justice Hughes concluded that the trial judge's construction of the first clause might have been the reason for Stromberg's conviction. If so, then Stromberg's speech rights under the First and Fourteenth Amendments were violated by the State of California. Hughes concluded by announcing:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. The first clause of the statute being invalid upon its face, the conviction of the appellant [Stromberg], which so far as the record discloses may have rested upon that clause exclusively, must be set aside. (*Stromberg,* 1931, p. 369)

Concepts Emerging from the *Stromberg* Ruling

Does *Stromberg* Protect Symbolic Speech?

Chief Justice Hughes's opinion did not declare explicitly that flags constitute symbolic speech protected by the First Amendment. Some researchers have suggested that, in fact, the *Stromberg* ruling does not protect symbolic speech. Employing a strict construction perspective of the opinion, Joshua Waldman noted that the Court did not state explicitly that the red flag display constituted "symbolic speech" or "protected symbolic speech" (1997, p. 1865); indeed, David Currie referred to the Court's "silent holding" in *Stromberg* (1987, p. 828). Despite these claims, subsequent court decisions and scholarly research have recognized that the *Stromberg* ruling is the first Supreme Court case implying this protection. In their discussion of symbolic expression, Douglas Fraleigh and Joseph Tuman acknowledged, "The Supreme Court first noted the possibility that a nonverbal symbol could be the equivalent of speech in *Stromberg*" (1997, p. 283), and Michael Henderson noted that in *Stromberg* "the concept of nonverbal expression as a protected form of communication under the First and Fourteenth Amendments first emerged as a United States Supreme Court principle" (1996, p. 548).

Several reasons support the more libertarian conclusion. First, prior to 1931, no cases involving symbolic speech were decided by the Supreme Court. Beginning with *Stromberg* the Court acknowledged that nonverbal speech could be accorded First Amendment protection in the same manner as oral or written speech is protected (Dyer, 1991, p. 903), and scholars contend that artifacts (such as decorations and uniforms) are common symbols identified as nonverbal speech (Fraleigh & Tuman, 1997, p. 281; Merriam, 1971, p. 111). Hence, a variety of nonverbal artifacts may constitute speech capable of communicating a message.

Second, one can conclude from the decision in *Stromberg* that symbolic action or conduct, in addition to the tangible artifact, may communicate nonverbally. The public display of a flag, as well as the flag as an artifact, can be considered speech (Tiersma, 1993, p. 1531). While to some extent this conclusion implicates the public display versus private possession of an artifact and may be relevant in considering the degree of First Amendment protection afforded symbols and symbolic action, the conclusion also implicates questions related to the public display of artifacts other than flags that have been used as a part of the political discussion in a free society (Tedford, 1997, pp. 278–279). One poignant example of uniforms as symbolic political expression occurred in 1977, when the National Socialist Party attempted to

march through the village of Skokie, Illinois, which had a large Jewish population. Skokie enacted a series of ordinances to prevent the Nazi march, and one of the ordinances forbade the wearing of military-style uniforms in the village. In striking down the ordinance for overbreadth, the Federal District Court, relying on *Stromberg,* wrote: "The use of symbolic forms of expression, including the wearing of distinctive clothing, is protected by the First Amendment[,] . . . and the banning of a symbol which is repugnant to a 'tradition' which all Americans are free to reject and openly criticize is clearly unconstitutional" (*Collin v. Smith,* 1978, p. 700). The clear implication from the *Stromberg* ruling is that "freedom of speech extends beyond purely verbal utterances to encompass also, at least to some degree, conduct with symbolic overtones" (Goldstein, 1996, p. 59). One might be tempted to conclude from this discussion that because symbols can function as speech, symbolic expression is always protected by the First Amendment. Such a conclusion would be hasty, however, because despite the clear command of the First Amendment, the United States Supreme Court has never stated that every idea expressed through speech is protected.

When Is Symbolic Conduct Protected?

The previous section examined whether nonverbal messages, including artifacts that convey a message, can constitute symbolic expression deserving some consideration as speech. One of the criticisms of *Stromberg* is that the ruling recognized that symbols can function as speech but failed to develop a set of clear standards for when symbols should be viewed as speech (Goldstein, 1996, p. 59). This section examines the extent to which symbolic activity enjoys First Amendment protection, and it surveys suggestions by various scholars concerning appropriate standards for determining the degree of protection. Ultimately, any analysis of the concepts in this section must address the question: When does human symbolic behavior become sufficiently imbued with elements of communication to fall within the scope of the First Amendment (Tiersma, 1993, p. 1538)?

Scholars recognize that it is difficult to develop and articulate a comprehensive framework of standards for determining when symbolic conduct deserves First Amendment protection (Goldstein, 1996, p. 59). This difficulty is understandable when one attempts to imagine the virtually infinite number of forms and variations of symbols that could be used to convey meaning.[1] Symbols are wrought with infinite variety (Merriam, 1971, p. 116), and a particular symbol may have a large number of meanings. It may convey a particular message to one person, different messages to others, and perhaps no meaning to some (Krout, 1971, p. 16). While a comprehensive set of stan-

dards may be lacking, Fraleigh and Tuman framed the issue by asking: (1) What are the criteria in deciding when nonverbal action constitutes speech; and (2) what test should be used to determine when symbolic conduct should be protected (1997, p. 286)?

Initial efforts to develop standards focused on the attempt to distinguish between speech and conduct. This notion emerged from the contention that speech and conduct must be separated in order to preserve the undiluted strength of First Amendment protection of speech. Franklyn Haiman noted that persons who adhere to this view contend "that certain types of speech are really speech acts and should therefore be treated differently from 'pure' speech, that is subjected to the same scrutiny and possible regulation by society as other kinds of regulable action, behavior, or conduct" (1993, p. 2). Those who support punishment for persons espousing expressions of hate toward minority or traditionally underrepresented groups usually embrace the speech-versus-action distinction.[2] The U.S. Supreme Court has found the speech-versus-action dichotomy useful and has employed it as the foundation for its distinction between *pure speech* and *speech plus* (Tedford, 1997, p. 277). A discussion of the Court's pure speech versus speech plus framework will be presented in the conclusion of this chapter as a legacy of the *Stromberg* decision.

While some adhere to the speech-versus-action dichotomy, criticisms abound. Harry Kalven Jr. noted that "all speech is necessarily *speech plus*. If it is oral, it is noise and may interrupt someone else; it is written, it may be litter" (1965, p. 23). Similarly, P. M. Tiersma reported the conclusions of several legal scholars who reject the speech/conduct distinction because all communicative behavior involves both speech and conduct (1993, pp. 1527–1528). Haiman contended that the "flapping of vocal chords, the scratching of a pen, the display of a picture, or the hoisting of a banner" constitute symbolic behaviors that should not be unprotected merely because they involve action (1993, p. 4). He also asserted that if society decided to punish speech, society must do so not because the speech is confused with "injurious 'acts'" but because of a societal decision that some types of First Amendment behavior justify punishment (1981, p. 21). Thus, while the speech-versus-action dichotomy may have been a useful starting point for deciding when symbolic acts should be protected as speech under the First Amendment, the distinction fails to account fully for when speech and action are functionally equivalent.

Accepting that standards are needed and that the speech-versus-action concept is not adequate, what standards will be? Over the years, legal scholars and some courts have articulated two determinants that appear to be

helpful: (1) To what extent does the speaker intend to convey a message using symbolic conduct? (2) To what extent does the audience recognize and understand the speaker's conduct as communication? (Berger, 1980, p. 152; Bosmajian, 1968, pp. 131–133; Fraleigh & Tuman, 1997, pp. 281–282; *Spence v. Washington,* 1974, pp. 410–411; Stone, 1989, p. 114; Tiersma, 1993, pp. 1525, 1556).

The speaker's intent to convey a message. The first standard for protecting symbolic conduct is that the speaker must intend to convey a message via the symbolic conduct. Despite controversy among communication studies scholars over the issue of communicator intent, legal scholars and some courts insist that if the speaker engages in conduct but does not intend to communicate a message through that conduct, the conduct would not constitute speech warranting First Amendment protection. When a person wears a green shirt on Earth Day or a red shirt on May Day but does not intend by choice of clothing to make a statement, we would say that the person is not engaging in symbolic conduct. The choice of the particular shirt may have been accidental or it may have been chosen because it was the only clean shirt in the closet or for myriad other reasons. But the fact that the person did not intend to communicate a message by wearing a particular colored shirt (conduct) necessitates the conclusion that the behavior would not constitute speech deserving of First Amendment protection. Conversely, if a shirt of a particular color was worn to show support for a particular cause or movement, one might conclude that the standard of speaker intent to convey a message via conduct had been met. In deciding whether the conduct is protected by the First Amendment, one would need to examine the second standard.

The audience's recognition and understanding of communication. The second standard contends that the audience must recognize and understand the speaker's conduct as communicative. As is true in every communicative exchange, a critical element in making a determination about audience recognition and understanding is context, and the various components of context (e.g., chronology, culture, norms, rules, vocabulary, and so on) influence how audiences receive and understand messages. An individual watching a parade may see various flags and banners and not know what they represent—or whether they represent anything. The flags and banners on display may represent national, organizational, corporate, or municipal entities, or they may represent nothing, having been chosen merely because the displayer liked the particular array of colors. Regardless of what, if anything, the displayer may have intended (standard #1), unless the audience recognizes that the symbolic conduct (display of the flag) is an attempt to convey a message,

and unless the audience understands, to some extent, what is being communicated, this standard argues that the symbolic conduct would not warrant First Amendment protection.

In *Spence v. Washington* (1974), a case that involved a state conviction for violating an improper use statute by attaching a peace symbol to a privately owned American flag, the U.S. Supreme Court employed the two standards articulated above. While it may be heartening to see the Court relying on criteria that go beyond the distinction between pure speech and speech plus, a great deal of uncertainty persists. First, the extent to which an audience understands specifically what message is being conveyed by symbolic conduct is uncertain. Imagine during the Vietnam conflict, a person standing on a street corner holding a sign that reads "peace." Clearly this is symbolic conduct, and the speaker intends to convey a message via the conduct. But how would the audience know whether the person supported President Richard Nixon's view of peace (bomb North Vietnam into submission), or Senator George McGovern's view of peace (withdrawal of all U.S. forces within 90 days), or a variety of other possible points of view?[3]

Second, audiences may recognize and understand unintended messages. In 1999 a Mississippi middle school official ordered a student to remove a Star of David necklace he was wearing because a local gang used the Star of David as its main symbol. Despite the student's declaration that the necklace was a gift from a relative and was worn for religious reasons, not as a gang symbol, the school official insisted the student remove it because the school district did not allow gang symbols to be worn on campus. While the student intended to communicate a religious message via symbolic conduct, one member of the audience—the school official—recognized and understood the conduct as communicative of a different particularized message ("School Board Retracts," 1999, p. A21).

Neither of the justices who used the two standards in cases after *Spence*—William Brennan and Thurgood Marshall—is on the Court today, and current justices have shown no willingness to develop these criteria into a workable test (Tiersma, 1993, p. 1537). Today, the Court relies on its pure speech versus speech plus categorization, deciding in some cases that the symbolic conduct is "closely akin to 'pure speech'" and deserving of "comprehensive protection" under the First Amendment (*Tinker v. Des Moines School District,* 1969, pp. 505–506); yet in other cases the Court has decided that the symbolic conduct involves nonspeech elements that can justify incidental limitations on speech (*United States v. O'Brien,* 1968, p. 377). While the Supreme Court recognized in *Stromberg* that symbols can function as part of the political discussion in this nation, there has been no clear indication that

the justices are anxious to develop and articulate comprehensive criteria for determining when symbolic conduct functions as speech deserving First Amendment protection.

The Legacy of *Stromberg*

This chapter has discussed the shortcomings of contemporary perceptions of the *Stromberg* decision: primarily that the ruling failed "clearly to define symbolic speech or to outline the extent of the protection it enjoys" (Goldstein, 1996, p. 59). However, to discount the impact of the decision on subsequent cases and on the communication studies discipline would be misleading.

Stromberg carved a niche that has developed into one of the most interesting areas of First Amendment study. First, it represents the starting point in the Supreme Court's pure speech versus speech plus controversy. Pure speech can be considered as the type of communication Alexander Meiklejohn envisioned as being protected by the First Amendment—critical speech related to the process of self-government (cited in Haiman, 1981, p. 17)—and viewed by Thomas Tedford as "verbal expression, as in a traditional public speech or a newspaper editorial" (1997, p. 277). On the other hand, speech plus is a term used by the Court to refer to speech conjoined with conduct, including a wide range of symbolic behaviors such as "marching in front of an army recruitment office chanting 'no more war,' the marching being the 'plus' in the matter" (p. 277).

The Supreme Court began its development of case law distinguishing pure speech from speech plus in the 1940s labor union picketing cases. In *Giboney v. Empire Storage and Ice Co.* (1949), the Court ruled that simply because labor union picketing included elements of speech did not mean that a state was barred from making a course of conduct illegal (p. 502); and in *International Brotherhood of Teamsters, Local 695 v. Vogt* (1957), the Court ruled that a state can prohibit labor picketing directed at creating a union shop that violated state law (p. 290). The Court continued this categorization of speech and conduct in the civil rights arena in *Cox v. Louisiana* (1965), ruling that states can enact and enforce statutes designed to prohibit obstruction of public passages. In reversing the convictions of black college students who were demonstrating peacefully, the Court's opinion, written by Justice Arthur Goldberg, stated: "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing . . . as those amendments afford to those who communicate ideas

by pure speech" (pp. 554–555). Ironically, during the same era as the *Cox* ruling, the Supreme Court recognized picketing as near-*pure speech* when a group of high school and college students held a peaceful civil rights demonstration on the grounds of the State House in Columbia, South Carolina. Writing for the Court in *Edwards v. South Carolina* (1963), Justice Potter Stewart wrote, "The circumstances in this case reflect an exercise of these basic [First Amendment] constitutional rights in their most pristine and classic form" (p. 235). Despite criticism that reliance on the pure speech/speech plus distinction is partly to blame for the lack of a comprehensive theory for protecting symbolic speech, the Court continues to rely on this scheme in deciding symbolic speech cases (Berger, 1980, p. 149).

Second, *Stromberg* established the principle that a symbol can function as part of the nation's political discussion; as a consequence, every symbolic speech case that reaches the Supreme Court begins with *Stromberg.* This is evident in the picketing cases from both the labor union strand and the civil rights strand, and it is especially evident in the numerous cases where the Supreme Court ruled on the scope of protection afforded particular examples of symbolic conduct.

In 1943, only twelve years after the *Stromberg* ruling, the Supreme Court held, in *West Virginia State Board of Education v. Barnette,* that refusal to salute the flag was symbolic utterance deserving First Amendment protection. In *Barnette,* the Court developed more fully the approach begun in *Stromberg,* noting that "symbolism is a primitive but effective way of communicating ideas" (p. 632). In *O'Brien* (1968), the Court upheld a conviction for burning a draft card, characterizing O'Brien's expressive act not as pure speech, but rather as speech mixed with conduct (p. 376). In this case the Court announced a four-prong test for determining when government regulation of speech mixed with conduct, or speech plus, would be justified (p. 377).

All speech is mixed with conduct, but the central question should address whether the regulation is sufficiently justified because it furthers an important or substantial government interest that is unrelated to the suppression of free expression. In *Tinker,* Justice Fortas, writing for the Court, declared that wearing black armbands to school to demonstrate opposition to the Vietnam conflict was "closely akin to 'pure speech'" and thus deserving of comprehensive protection (1969, pp. 505, 506). Finally, in *Texas v. Johnson* (1989) and in *United States v. Eichman* (1990), the Court struck down state and federal statutes prohibiting burning a U.S. flag, thereby recognizing that expressive conduct related to treatment of a flag was protected by the First Amendment. In each of these landmark cases, the issue presented rests upon analysis

implicit in *Stromberg:* To what extent is symbolic conduct protected by the First Amendment?

Implications for the Discipline of Communication Studies

The U.S. Supreme Court's 1931 decision in *Stromberg* remains important for several reasons. While the decision will be remembered in the area of constitutional law as the foundation for the development of standards specifying when symbolic speech warrants First Amendment protection, the *Stromberg* decision also has implications for the discipline of communication studies. This section explores some ideas that connect elements of the *Stromberg* decision with contemporary concepts in communication studies.

First, the pure speech versus speech plus controversy mirrors an internal controversy within the communication studies discipline during the last half of the twentieth century. The preceding section of this essay noted that pure speech refers to verbal expression as in a traditional public speech, and that speech plus refers to a wide range of symbolic behaviors. In the same way that the Supreme Court wrestles with determining which of these forms of expression constitutes "speech" within the meaning of the First Amendment, the communication studies discipline wrestles with determining the appropriate focus of scholarship. During its first 30-plus years, the Speech Communication Association focused its efforts on supporting research on the study of *speech,* the various facets of public speaking. In the post–World War II era, and with the growth of social science research in communication, the discipline has experienced a shift of emphasis from the study of pure speech to the study of communication behaviors and relationships, including interpersonal communication, mass communication, organizational behavior, nonverbal communication, gender issues, intercultural communication, and many others (Cohen, 1994, pp. 323–327; Phillips & Wood, 1990, pp. vii–viii). Ironically, at the same time the Supreme Court is expanding the scope of communicative behaviors regarded as speech, scholars in communication studies view the term speech as restricting the boundaries of the field. In a move away from this limiting view of the word speech, the Speech Communication Association changed its name to the National Communication Association during the 1990s (Phillips & Wood, 1990, p. vii; Rubin, Rubin, & Piele, 2000, p. 7). One can anticipate that both the Court and scholars in the discipline will continue to investigate the meaning of the word speech.

Second, the *Stromberg* case provides an interesting means for investigating how nonverbal symbols function as communication. Certainly, this essay does not contend that the decision in *Stromberg* launched the study of non-

verbal symbols in communication, for the use of symbols, signs, and icons was recorded more than 6,000 years ago as picture images on clay tablets in the Middle East (Sassoon & Gaur, 1997, pp. 9–11). However, investigating how nonverbal symbols function contributes to the study of the way in which humans develop relationships. The study of symbols contributes to our understanding of the move from word-centered to meaning-centered theories of language. In doing so, the study of symbolic speech assists us in understanding how humans construct relationships with other people and with orientations to the world around us, and a comprehensive study of human communication necessarily involves the study of various symbols (Sillars & Gronbeck, 2001, pp. 142–145). A fundamental principle of communication states that meanings vary depending on the context of the communication event, and this is true for nonverbal meanings as well as verbal ones (Knapp & Hall, 1992, p. 27). Understanding this notion is essential to any contemporary study of communication because of the influence of cultural factors. Cultural groups create symbols. They endow artifacts with symbolic significance. And culture is built on symbolic meanings. In order to understand other cultures we must study the symbols used, the meanings attached to them, and the context in which they are used (Krout, 1968, pp. 15–16). Scholars in nonverbal communication should not overlook the opportunity to investigate how symbols function and the meanings and contexts associated with them when studying other nonverbal components.

The issues raised in *Stromberg* invite scholars in the field of communication to examine the scope and depth of protection for symbolic expression in the United States. Such scholarship should provide a more thorough understanding of the Court's decisions and opinions.

Notes

1. Thomas Tedford (1997, p. 278) discusses how an almost limitless number of symbolic forms and variations makes it difficult to formulate a comprehensive legal theory in this area.

2. Franklyn Haiman illustrates this way of thinking by telling the story of an incident at Brown University when a student was expelled for "shouting racist, anti-Semitic, and homophobic epithets outside a campus dormitory" (1993, p. 1). Responding to newspaper criticism that the school's action functioned as a curb on freedom of speech, Brown's president noted that the university's code of conduct prohibited actions, not speech.

3. This uncertainty became apparent when I watched oral argument in the flag burning case of *United States v. Eichman* (1990). When William Kunstler, attorney

for the respondent, argued that use of a flag to communicate a political idea had been recognized as protected speech as far back as *Stromberg,* Justice Scalia interrupted Kunstler and asked how an observer, watching an individual burn a U.S. flag, would recognize and understand the particular message being communicated by the speaker. Kunstler answered by explaining that the respondents, Eichman and Haggerty, intended to communicate slightly different messages by burning flags, but that any observer would conclude that the respondents were dissatisfied with something the United States was doing.

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Near v. Minnesota

John S. Gossett and Juliet Dee

Near v. Minnesota (1931), one of the earliest twentieth-century free speech cases, is also one of the most significant, for two reasons. First, the case challenged presumptions against constitutional protection for seditious libel: the practice of criticizing government, its officials, or its policies. Second, *Near* raised two important questions regarding prior restraints against publication. A prior restraint—also known as a "previous restraint," especially in older texts—occurs when an agent of the government attempts to prevent communication from occurring (Friendly, 1981, p. 129). The questions raised were: Does the First Amendment prohibit *all* prior restraints against publication? If not, then: What exceptions pass constitutional muster?

The Supreme Court's determinations regarding seditious libels and its answers to these enduring questions regarding prior restraint have resonated throughout the modern history of free expression in the United States. Thus Chief Justice Charles Evans Hughes's majority opinion in the *Near* case is rightly celebrated as "a landmark in First Amendment law" (Tedford, 1997, p. 213).

Historical Background

A rich deposit of iron ore brought mining companies and prospectors to the Mesabi Mountain range in northern Minnesota in the 1880s, and mining towns attracted gambling houses, saloons, and prostitution. As the miners and speculators migrated to nearby cities they expected to find these same recreational activities available to them, and the criminal elements did not disappoint. Their expectations created a dilemma for local politicians and law enforcement officers. They wanted to reap the political benefits of providing services for the new constituents who would be voting in future elections, but they could reap those benefits only by turning a blind eye to the

gambling houses, saloons, and bordellos (Friendly, 1981, pp. 6–7). The dilemma was quickly resolved, and governmental corruption flourished.

In this environment, John L. Morrison, a straightlaced prohibitionist, began publishing the Duluth *Rip-saw,* printing reports of corruption by public officials. The October 25, 1925, issue of the *Rip-saw* accused Minnesota State Senator Mike Boylan of threatening Morrison with violence for slanderous remarks printed in the *Rip-saw.* Senator Boylan enlisted the support of State Representative George Lommen and took action against Morrison, not by suing for libel but by introducing a bill in the state legislature criminalizing slanderous seditious libels. As passed by the legislature, the Public Nuisance Law of 1925 provided: "Any person who . . . shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away, (a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or (b) a malicious, scandalous and defamatory newspaper, magazine or other periodical, is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided." The law also provided grounds for a publishers' defense when "the truth was published with good motives and for justifiable ends" (*Near,* 1931, p. 702). Nevertheless, the law constituted an onerous threat to publishers and reporters. Zechariah Chafee characterized the Minnesota gag law as more drastic than a criminal sedition statute because the gag law restrained publication of future issues of a publication, did not require a verdict by a jury concerning the language used in a publication, and was directed at the entire life of a newspaper instead of a particular wrongful passage (1941, p. 376).

Morrison died in 1926 in the midst of a legal battle over enforcement of the law against his newspaper. The task of challenging the legislation fell to two rather disreputable publishers of a Minneapolis newspaper. Howard Guilford and Jay Near established the *Saturday Press* in 1927 and immediately launched an exposé of alleged criminal activities in both the city and county governments. Near's writing was scandalous, racist, and slanderous (Friendly, 1981). Minneapolis Police Chief Frank Brunskill dispatched officers to keep the *Saturday Press* off the newsstands. According to F. W. Friendly, "The ill-fated *Saturday Press* had become the only paper on record ever banned in the United States before a single issue had been published" (p. 37).

Brunskill's efforts did not deter Guilford and Near. On a regular basis, they attacked Floyd B. Olson, the county attorney for Hennepin County, which includes Minneapolis. On November 21, 1927, Olson filed a complaint with Hennepin County District Judge Mathias Baldwin, alleging that the *Saturday Press* defamed the mayor of Minneapolis, Police Chief Brunskill,

two newspapers, the Hennepin County Grand Jury, Olson himself, and all members of the Jewish community. Olson described the *Saturday Press* as malicious, scandalous, and defamatory, and he asked Judge Baldwin to declare the newspaper a nuisance under the Public Nuisance Law of 1925 (Lewis, 1991, p. 91).

Judge Baldwin granted Olson's request and issued a temporary restraining order prohibiting publication and distribution of both past and future issues of the *Saturday Press*. However, he certified the case to the Minnesota Supreme Court for a determination of the constitutionality of the gag law (Friendly, 1981, pp. 51–53).

In April 1928, the state's high court heard oral argument. On May 25, Chief Justice Samuel Bailey Wilson, writing for a unanimous Minnesota Supreme Court, upheld the constitutionality of the 1925 Public Nuisance Law (*Olson v. Guilford,* 1928, p. 466) In addressing the constitutional issues, Chief Justice Wilson held:

> There is no constitutional right to publish a fact merely because it is true. . . . The liberty of the press consists in the right to publish the truth with impunity, with good motives and for justifiable ends. . . . Our constitution was never intended to protect malice, scandal and defamation when untrue or published with bad motives or without justifiable ends. It is a shield for the honest, careful and conscientious press. Liberty of the press does not mean that an evil-minded person may publish just anything any more than the constitutional right of free assembly authorizes and legalizes unlawful assemblies and riots. (pp. 462–463)

After the Minnesota Supreme Court upheld the Public Nuisance Law as constitutional, Olson asked Judge Baldwin to close the *Saturday Press* forever (Friendly, 1981, p. 62).

Jay Near did not have the financial resources to continue his efforts to get the temporary restraining order lifted so he could resume publishing and earning a living. However, publicity about the case attracted two offers of assistance. One source, the American Civil Liberties Union, announced it would appeal the Minnesota gag law to the Supreme Court, challenging the law as a prior restraint in violation of the First and Fourteenth Amendments to the Constitution (Lewis, 1991, p. 92). The second source was Robert Rutherford McCormick, an eccentric conservative isolationist and publisher of the *Chicago Tribune*. McCormick was an enthusiastic defender of the freedom of the press, and he perceived the Minnesota gag law as a potentially

significant precedent. If Illinois passed a similar law, McCormick feared for his livelihood. Consequently, he assigned his attorney, Weymouth Kirkland of Chicago, to work on the case. Colonel McCormick also assumed the financial burden of pursuing the appeal (Friendly, 1981, pp. 66–78; Lewis, 1991, p. 92).

After a brief hearing on October 10, 1928, Judge Baldwin granted Olson's request that the temporary restraining order be made permanent. Soon thereafter, Guilford, frustrated by the lengthy litigation, sold his interest in the *Saturday Press* to Near (Friendly, 1981, pp. 80–82). In early December 1929, Near and his attorneys appeared once again before the Minnesota Supreme Court to appeal Judge Baldwin's finding that the *Saturday Press* was a public nuisance. Eighteen days later, Chief Justice Samuel Bailey Wilson issued a short ruling denying Near's appeal and affirming the charge that the *Saturday Press* was a public nuisance (*Olson v. Guilford,* 1929, pp. 41–42). Near and McCormick appealed to the Supreme Court of the United States.

In April 1930, the Supreme Court agreed to hear *Near v. Minnesota*. Friendly reported: "This marked the first time in U.S. history that a freedom-of-the-press case involving prior restraints had reached the Supreme Court" (1981, p. 91), and Lewis called *Near* the "first great press case" (1991, p. 90).

The Supreme Court's Reasoning in *Near*

On June 1, 1931, the last day of the Supreme Court's 1930 term, Chief Justice Hughes announced a 5–4 decision in *Near v. Minnesota,* reversing the Minnesota Supreme Court (p. 723). He read aloud the entire opinion (Friendly, 1981, p. 149) authored by himself and joined by Justices Oliver Wendell Holmes, Louis D. Brandeis, Harlan F. Stone, and Owen Roberts.

Chief Justice Hughes contended that the Court needed to examine the substance of the state's action, not merely its form. He began by stating that the Minnesota statute was not aimed at redressing individual wrongs, and that those who felt they had been defamed by a publication could pursue traditional remedies available via civil libel law (pp. 708–709). This statute targeted the continued publication of newspapers engaged in the practices of reporting and criticizing official misconduct (p. 710). Hughes claimed that the Minnesota statute authorized suppression of an entire periodical, noting that the Minnesota law placed the burden on the publisher to prove that the material was published with good motives and for justifiable ends (pp. 711–712).

Next, Chief Justice Hughes posed the central question of whether the Minnesota statute authorizing restraint of publication was consistent with

the conception of liberty of the press. He stated that the chief purpose of providing constitutional protection for liberty of the press was to prevent the imposition of prior restraint. He reviewed historical materials on press liberty, including the statement by English jurist William Blackstone that "The liberty of the press . . . consists in laying no previous restraints upon publications" (p. 713). Once again, Hughes reminded the parties that "for whatever wrong . . . [Near] has committed or may commit, by his publications, the State [of Minnesota] appropriately affords both public and private redress by its libel laws" (p. 715).

Chief Justice Hughes confronted the enduring question of whether the Constitution established an absolute prohibition against prior restraints. He replied that "the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases" (p. 716). He cited examples from Chafee where a total prohibition on prior restraint would allow newspapers to publish information that might do irreparable harm to national security, such as printing the sailing dates of troop ships (1941, p. 10). Hughes also excepted obscenity and incitement to unlawful action from the injunction against prior restraints, but he noted that none of these exceptions applied to the case at bar (p. 716).

In his final argument, Chief Justice Hughes responded to the state's claim that governments need to be able to close scandalous newspapers because those publications disturb the public peace and increase crime. Hughes replied that "charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication" (p. 722). The Chief Justice made it clear that prior restraints come to the Supreme Court with a heavy presumption against their constitutional validity and that subsequent punishment is a far better means of protecting public officials from libel.

Justice Pierce Butler, joined by Justices Willis Van Devanter, James McReynolds, and George Sutherland, wrote a dissenting opinion in *Near.* Butler lamented the fact that this decision would leave states powerless to control publications that constituted public nuisances (p. 723). He also claimed that the Minnesota statute did not constitute a prior restraint (defined historically as a license to print) because publishers did not have to apply for a government-issued license prior to publication (p. 735).

However, the dissent did not challenge Chief Justice Hughes's landmark claim that prior restraints are presumptively unconstitutional, save for "exceptional cases" (p. 716). Butler merely argued that criminal libel laws constituted a necessary exception to this principle.

The Legacy of *Near v. Minnesota*

The legacy of *Near* is simultaneously wonderful and terrible for the press. It is wonderful in that *Near* established the constitutional presumption against prior restraint. *New York Times* columnist Anthony Lewis commented that "in ordinary circumstances the decision ruled out prior restraints, defining them broadly to include not only administrative censorship but judicial injunctions. Because of *Near,* judges in this country almost automatically turn down requests for prior restraints on the press" (1991, p. 95). And the legacy of *Near* is terrible for the press (although perhaps welcomed by the Pentagon and the State Department) in that it suggested that prior restraint might be justifiable in cases involving national security, leaving a crack in *Near*'s First Amendment armor. Forty years after *Near* the government tried to widen the crack with a crowbar, with some success.

The following analysis addresses *Near*'s impact in six different areas of First Amendment law. In five of these areas, *Near* set a positive precedent in discouraging prior restraint in Supreme Court cases involving (1) discriminatory taxes against newspapers; (2) "gag orders" imposed against newspapers regarding reports of judicial proceedings; (3) the Court's rejection of the tradition of punishing criticism of government officials through the use of "seditious libel" laws inherited from England; (4) public decency; and (5) the right of the press to publish truthful information if lawfully obtained. In a sixth area of First Amendment law, *Near*'s impact has been negative in that it provided a rationalization for the government to employ prior restraint in cases alleging a threat to national security.

Discriminatory Taxes against Newspapers

A few years after the Supreme Court decided *Near,* the tyrannical Louisiana Governor Huey Long persuaded his acquiescent legislature to pass a newspaper tax on newspapers with circulations exceeding 20,000 copies per week. This tax affected 13 of Louisiana's 124 newspapers; all but one of these 13 newspapers had opposed Long in their editorials. When the 13 newspapers challenged the discriminatory tax, the Supreme Court in *Grosjean v. American Press Co.* (1936, p. 244) unanimously ruled the tax unconstitutional, citing *Near* with approval: "That freedom of speech and of the press are . . . safeguarded by the due process of law clause of the Fourteenth Amendment against abridgement . . . has been settled by a series of decisions of this Court beginning with *Gitlow v. New York* (1925) and ending with *Near v. Minnesota* (1931)."

Gag Orders and Contempt of Court

When the right of freedom of expression guaranteed by the First Amendment conflicts with the right to a fair trial guaranteed by the Sixth Amendment, judges on occasion have tried to silence the press. They have issued restraining orders before information about a trial is published or contempt citations to punish the press after commentary about a trial is published.

A decade after liberating the American press from the threat of prior restraints in *Near,* the Supreme Court relied on this precedent in a decision which greatly strengthened protection for the press to comment on judicial proceedings without the threat of being held in contempt of court. In *Bridges v. California* (1941), the Supreme Court combined the cases of the longshoremen's union leader Harry Bridges, who had been found in contempt for criticizing a judge's decision, and the *Los Angeles Times,* which had been held in contempt for three editorials about pending court cases. Justice Hugo Black wrote the opinion, holding that outside comment on the judicial process could not be punished as contempt unless it raised a "clear and present danger" resulting in "unfair administration of justice" (1941, p. 271). Anthony Lewis commented, "In all the years since 1791 the First Amendment had never been invoked to upset a finding that someone's utterance was in contempt of court" (1991, pp. 98–99); thus, *Bridges* dealt a significant blow for press freedom.

Thirty-five years after *Bridges,* the Supreme Court again relied on *Near* in unanimously reversing restraining orders barring journalists from reporting on testimony at an open preliminary hearing in a ghastly multiple murder case in a small Nebraska town. In *Nebraska Press Association v. Stuart* (1976), the High Court quoted *Near* (1931, p. 718) in reminding lower courts of the presumption against prior restraint: "The fact that for approximately 150 years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional rights" (p. 59).

Two years after *Nebraska Press Association,* the Supreme Court cited *Near* in reversing the conviction of a newspaper for (accurately) reporting the name of a judge being investigated by the state judicial ethics commission (*Landmark Communications v. Virginia,* 1978). The following year, in a setback to the press, the Supreme Court distinguished *Gannett v. DePasquale* (1979) from *Near* in ruling that judges may close pretrial hearings. The Court explained: "The exclusion order [in *Gannett*], by contrast [to *Near*], did not

prevent [Gannett] from publishing any information in its possession. The proper inquiry, therefore, is whether the petitioner was denied any constitutional right of access" (1979, p. 393). Amid widespread alarm among journalists following *Gannett,* the following year the Supreme Court found a presumption of openness regarding press access to criminal trials (as compared with pretrial proceedings in *Gannett*). In *Richmond Newspapers, Inc. v. Virginia* (1980), Justices Brennan and Marshall wrote a concurring opinion in which they cited *Near* (pp. 715–716), commenting that "freedom of expression is made inviolate by the First Amendment, and, with only rare and stringent exceptions, may not be suppressed" (p. 585).

Seditious Libel

Near established that the proper path for public officials whose reputations were sullied was the civil remedy: the libel suit. In *New York Times v. Sullivan* (1964), the Court was asked to assess the degree to which a publisher-critic was protected by the First Amendment against libel judgments brought by a public official. The *Times* had published an advertisement containing admittedly false statements regarding the actions of public officials in civil rights demonstrations in Alabama and elsewhere. The Court held that to punish the *Times* for running an ad with a few trivial errors would discourage the press from covering any public controversy just as surely as discriminatory taxes or contempt of court citations.

In *Sullivan,* the Court also refined and limited its earlier holding in *Near.* Public officials could recover for damages in civil libel suits only when presenting clear and convincing evidence of actual malice on the part of critics. *Sullivan,* like *Near,* was a resounding victory for citizen-critics of government. Taken together, these cases immunize non-malicious seditious libel from civil and criminal prosecution.

Cases Involving Public Decency or Obscenity

In *Near,* Chief Justice Hughes commented that "the protection even as to previous restraint is not absolutely unlimited. . . . [The] primary requirements of decency may be enforced against obscene publications" (1931, p. 716). This dictum provides a potential double-edged sword when applied to obscenity cases, although (fortunately for film producers and the press) courts have leaned more often toward *Near*'s caution against prior restraint.

Two decades after *Near* the Supreme Court ruled that the New York State Board of Regents could not prevent a film distributor from exhibiting Roberto Rossellini's film *The Miracle* on the grounds that it was "sacrilegious." In

Burstyn v. Wilson (1952), the Court explained (citing *Near,* 1931, pp. 503–504) that "such a prior restraint as that involved here is a form of infringement upon freedom of expression to be especially condemned" (p. 496).

Five years after *Burstyn,* however, the Supreme Court ruled on a case involving obscenity rather than sacrilege in *Roth v. United States* (1957). Here the Court commented: "Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that the Court has always assumed that obscenity is not protected by the freedoms of speech and press" (p. 481, citing *Near,* 1931, p. 716).

In 1961, the Supreme Court upheld a Chicago ordinance requiring submission of motion pictures for preview by a board of censors prior to public exhibition in a case involving a film of the opera *Don Juan* (*Times Film Corporation v. Chicago*). Here the Court again turned to *Near*'s dictum (1931, p. 716) that "the primary requirements of decency may be enforced against obscene publications" (*Times Film Corp.,* 1961, p. 47). In *Times Film, Don Juan's* distributor refused to submit the film to the censors, whereas in *Burstyn* the distributor cooperated with censors, which might explain the differing decisions in these two cases.

Just as *Don Juan*'s distributor refused to submit his non-obscene film to the censors, Ronald Freedman refused to submit a non-obscene film for prior approval in *Freedman v. Maryland* (1965). In *Freedman,* the Supreme Court held that (1) the burden of proof to show that a film is obscene is on the censor; (2) the censorship board must either issue a license or seek a restraining order against a film "within a specified brief period of time"; and (3) if a film is censored, there must be prompt judicial review of any decision to censor a film (pp. 58–59). Here the Supreme Court cited *Near*'s qualifying statement (1931, p. 716) that "the protection even as to previous restraint is not absolutely unlimited" (1965, p. 54). A decade later the Supreme Court cited exactly the same passage in *Near* in upholding the constitutionality of cities' use of zoning laws to control the proliferation of pornography in *Young v. American Mini Theatres* (1976).

More recently, when the government used the Racketeering Influence and Corrupt Organizations Act (RICO) to seize nearly $9 million worth of Ferris Alexander's assets following his conviction for selling obscene materials, Alexander argued that application of RICO's forfeiture provisions constituted a prior restraint on speech and hence violated the First Amendment. But Chief Justice William Rehnquist disagreed: "Unlike the injunctions in *Near,* . . . the forfeiture order in this case imposes . . . no prior restraint on

[Alexander's] ability to engage in any expressive activity he chooses. . . . He just cannot finance these enterprises with assets derived from his prior racketeering offenses" (*Alexander v. United States,* 1993, p. 549).

Publication of Lawfully Obtained, Truthful Information

Although the Supreme Court has clearly followed its own presumption against the constitutional validity of prior restraint in cases involving invasion of privacy, lower courts on occasion have issued injunctions to protect individual privacy or to prevent copyright infringement. In *Commonwealth of Massachusetts v. Wiseman* (1969), film producer Frederick Wiseman stumbled upon the limits of judicial tolerance when he made the documentary film *Titicut Follies* about patients and living conditions at the Massachusetts Correctional Institution at Bridgewater for the criminally insane. The film showed identifiable patients naked, being force-fed, and involved in sexual activity. The Massachusetts Supreme Judicial Court upheld a lower court injunction restraining all commercial distribution of *Titicut Follies* in order to protect the patients' privacy (although it modified the lower court's ruling to permit the film to be shown to mental health professionals). Wiseman was denied two separate petitions for certiorari to the Supreme Court (*Wiseman v. Massachusetts,* 1970).

In 1989 the Suffolk Superior Court permitted public exhibition of the film on the condition that the inmates' faces be blurred, but Wiseman refused, arguing that the cost of making such a change would be prohibitive (Anderson & Benson, 1991, p. 129). In 1991 the same court lifted the 1969 injunction completely, permitting public exhibition of the film. Thus, the film that won first prize for best documentary at the Mannheim Film Festival in West Germany in 1967 (Anderson & Benson, 1991, pp. 64–65) could finally be commercially distributed after 22 years of prior restraint ("Follies Can Be Shown," 1991, p. 6).

Just as the Massachusetts Supreme Judicial Court had not hesitated to restrain *Titicut Follies* to protect inmates' privacy, the U.S. Court of Appeals for the Second Circuit did not hesitate to issue an injunction prohibiting the sale of Ian Hamilton's unauthorized biography of author J. D. Salinger on the grounds that 40% of the biography contained copyrighted letters that Salinger had written (*Salinger v. Random House, Inc.,* 1987). Thus, despite *Near's* heavy presumption against prior restraint, lower courts may be swayed by the competing interests of protecting individual privacy or preventing copyright infringement, even in cases involving matters of public concern.

In some cases courts have issued restraining orders or have fined newspapers for publishing lawfully obtained, truthful information in situations

where protecting a juvenile offender's identity was an issue. In *Smith v. Daily Mail* (1979), two newspapers published the name of a 14-year-old student who shot and killed a 15-year-old classmate at school. Both newspapers were indicted for violating a West Virginia statute making it a crime to publish, without written approval of the juvenile court, the name of a juvenile offender. Attorneys for the two newspapers argued that because the statute required court approval prior to publication of a minor's name, it operated as a prior restraint on speech. The Supreme Court agreed (p. 106).

Smith v. Daily Mail became an important precedent in *Florida Star v. B.J.F.* (1989), in which the Supreme Court struck down as unconstitutional a Florida statute that outlawed publication of the name of a rape victim. Here the Court relied on *Near* in the context of the need to balance press freedom with competing interests (p. 532).

Whereas the newspapers in *Smith v. Daily Mail* and *Florida Star* had lawfully obtained the names they printed, there was some question regarding the legality of how CBS's *48 Hours* producers obtained footage from inside a meatpacking factory in South Dakota (an employee of the company used a hidden video camera). When a South Dakota court issued an injunction preventing *48 Hours* from broadcasting the footage, the Supreme Court lifted the injunction, again relying on *Near* (*CBS v. Davis,* 1994, p. 1317). The Court explained that whether CBS obtained the videotape illegally should be the subject of subsequent civil or criminal proceedings rather than prior restraints.

Cases Involving National Security

With regard to the issues discussed above such as discriminatory taxes against newspapers, contempt citations and fair trials, seditious libel, public decency (with a few exceptions involving obscenity convictions), and the press's right to publish lawfully obtained truthful information, the Supreme Court has emphasized *Near*'s presumption against prior restraints. But in cases involving national security, courts have often relied on Chief Justice Hughes's dictum in *Near:* "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops" (1931, p. 716).

A New York district court issued an injunction to prevent the *New York Times* from publishing the "Pentagon Papers"—a 7,000-page history of United States involvement in Vietnam—(*United States v. New York Times,* 1971), and the U.S. Court of Appeals for the Second Circuit upheld the restraining order (*New York Times v. United States,* 1971a). This order marked the first time in our nation's history that a federal judge issued a prior re-

straint against a newspaper article (Fraleigh & Tuman, 1997, p. 126). Although the Supreme Court quoted the aforementioned passage from *Near,* it ultimately held that the government had not factually demonstrated any threat to national security from publication of the Pentagon Papers (*New York Times v. United States,* 1971b, p. 726). However, what initially appeared to be a great decision for the press was at best a Pyrrhic victory. The Supreme Court did not rule that prior restraint was unconstitutional; it merely ruled that prior restraint was unnecessary in the Pentagon Papers case.

The following year the U.S. Court of Appeals for the Fourth Circuit upheld a prior restraint in the form of prepublication review when it upheld an injunction against former CIA agent Victor Marchetti to prevent publication of his article in *Esquire* magazine (*United States v. Marchetti,* 1972). Citing the "location of troops" passage in *Near,* the Fourth Circuit Court of Appeals permitted the CIA to delete classified information from Marchetti's article (p. 1314). Marchetti was the first writer in United States history to be subjected to such a prior restraint.

Several years later a federal district court in Wisconsin issued an injunction to prevent *Progressive* magazine from publishing an article on how to make a hydrogen bomb (*United States v. Progressive,* 1979). The information contained in the article was assembled from unclassified sources, but the information itself was classifiable according to federal law. Federal District Court Judge Robert Warren quoted the "location of troops" passage in *Near:* "In light of these factors, this Court concludes that publication of the technical information on the hydrogen bomb contained in the article is analogous to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint" (p. 995). Yet when other newspapers began to publish the same information about how hydrogen bombs are made, the government dropped its case. However, Judge Warren did not withdraw his opinion; it remains to establish a degree of presumption in favor of a national security exception to the First Amendment.

Two years after the *Progressive* case, the government revoked former CIA agent Philip Agee's passport after Agee published two books revealing the names of more than 1,000 alleged CIA officers in Europe and Africa. The Supreme Court upheld revocation of Agee's passport, again citing the "location of troops" passage in *Near* (*Haig v. Agee,* 1981, p. 481). Outraged by Agee's actions, Congress passed the Intelligence Identities Protection Act (1982), which criminalized the disclosure of identities of CIA agents. The practice of naming CIA agents allegedly led directly to the 1975 assassination of CIA station chief Richard Welch in Greece (Watkins, 1990, p. 340).

Writing the Categorical Approach to Freedom of Expression in Stone

In *Near,* Chief Justice Hughes appeared to be hewing to the "doctrine of original intent," meaning that Justices who interpret the First Amendment should follow the intent of the founding fathers and framers of the Bill of Rights (Cohen & Gleason, 1990, p. 58). Hughes did indeed defer to the founding fathers' hatred of prior restraint in the form of the English practice of licensing printers. Moreover, he gave their intent an expansive interpretation, finding a presumption against prior restraint in the form of court injunctions barring publication in addition to the original meaning of prior restraint as requiring a government-issued license before publication (a practice which the British themselves ended long before *Near*).

Chief Justice Hughes immediately recognized the absurd paternalism of Minnesota's attempt to use a public nuisance statute to shut down a newspaper. Indeed, in *Near,* the Supreme Court appeared to be moving away from the paternalism of some of its earlier decisions such as *Schenck v. United States* (1919) and *Abrams v. United States* (1919).

Chief Justice Hughes's rejection of prior restraints was not absolute; rather, it was premised upon a categorical approach to freedom of expression. This assumes that certain kinds of speech are considered to be wholly outside First Amendment protection. While some types of speech receive less constitutional protection than others, each category is treated differently (Cohen & Gleason, 1990, p. 65). Hughes made it clear that speech threatening national security, obscene publications, "incitements to acts of violence and the overthrow by force of orderly government," or "uttering words that may have all the effect of force" might indeed be subject to prior restraints (*Near,* 1931, p. 716). The Chief Justice did not invent these categories but, by identifying them in *Near,* he reinforced them. Thus, several decades later lower courts would turn to *Near* to provide a rationale for restraining the *New York Times* from publishing the Pentagon Papers or *Progressive* magazine from publishing its article on how to make an H-bomb.

In areas of speech such as free press/fair trial, seditious libel, intrusion or violation of privacy, and even public decency, the Supreme Court appears to have moved away from the premise or paradigm—sometimes termed the "magic bullet" theory—that media messages have immediate, powerful, uniform, and direct effects on anyone exposed to them (DeFleur & Dennis, 1996, pp. 540–541; Lowery & DeFleur, 1983, p. 23). In the area of national security, lower courts have remained somewhat more paternalistic, however, assuming dire consequences would result if the Pentagon Papers, an article

on how to make an H-bomb, or even a book by a former CIA agent were published.

One aspect of gatekeeping theory (Lewin, 1947) might shed some light on lower courts' skittishness regarding national security cases. Gatekeeping theory is the study of the decision-making process which news editors use in deciding what news stories will run each day, and a few gatekeeping studies have dealt with the gatekeepers' mental image of the general public (Gieber, 1956; Lindley, 1974). Judges have never cited gatekeeping theory in their decisions, whether speculating on the effects of the Pentagon Papers, the *Progressive* H-bomb article, or Marchetti's article on being a CIA agent. However, judges are indirectly playing the role of "super-gatekeepers" in the sense that their prior restraints prevent information from reaching the public. The question then becomes, what is the judges' mental image of the public? In his decision in *United States v. Progressive* (1979), Judge Warren was clearly concerned not with the typical, mildly curious American reader but with terrorists in third world countries having access to information about making a hydrogen bomb. In their dissent in *New York Times v. United States* (1971b), Justices Blackmun and Harlan expressed great concern about damage to foreign relations that publication of the Pentagon Papers might cause; again, their concern was less with the curious American reader than with foreign governments who might perceive lax security at the Pentagon as a problem. In *Haig v. Agee* (1981), a very sad possibility exists that in this one instance the "magic bullet" theory translated into real bullets if the assassination of CIA station chief Richard Welch in Athens did indeed result from Philip Agee's publication of Welch's name; thus, in this one case, the Supreme Court's fear of consequences from foreign terrorists may have been justified.

Communication theory and research are not yet precise enough to predict specific effects from news stories on national security. Jeremy Cohen and Timothy Gleason (1990, p. 129) commented: "First Amendment theorists analyze social contexts within the parameters of paradigms no more based on science than is fortune-telling."

Although *Near* maintained the categorical approach to freedom of expression, Chief Justice Hughes's strong stance against prior restraint has generally served us well over the past 70 years. The general presumption against prior restraint is evidence of a basic faith in the American public to sift through information in order to arrive at truth.

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Chaplinsky v. New Hampshire

Dale Herbeck

Walter Chaplinsky was a Jehovah's Witness who attempted to distribute religious literature on the streets of Rochester, New Hampshire. Because his message was controversial—he promised to preach the "true facts of the Bible," and he denounced organized religion as a "racket" (*Chaplinsky v. New Hampshire,* 1942, p. 570)—he was quickly surrounded by a hostile crowd. Fearing that violence was imminent, a traffic officer asked Chaplinsky to accompany him back to the police station for his own protection. Along the way the twosome met the Rochester City marshal, whom Chaplinsky denounced as follows: "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists" (p. 569).

Chaplinsky was immediately arrested and subsequently prosecuted under a New Hampshire statute that made it a crime to "address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place" (Public Laws of New Hampshire). At the trial that followed, several witnesses attested to the language they heard, and Chaplinsky himself admitted that he used the language in question, although he claimed not to have used the word "God" to modify "damned." In his defense, Chaplinsky attempted to argue that he denounced the police because they failed to make a reasonable effort to control the crowd and because the marshal called him a "damned bastard." The trial court excluded these justifications, however, reasoning that provocation did not justify Chaplinsky's insulting the marshal anymore than it justified the marshal's insulting him (*State v. Chaplinsky,* 1941, p. 314). Absent these defenses, Chaplinsky was duly convicted.

Chaplinsky appealed on a variety of grounds, including the claim that the New Hampshire statute was an unconstitutional infringement on his freedom of speech. While cognizant that "the fundamental basis of the consti-

tutional rule is the necessity for full and free discussion of all subjects which affect ways of life, including religion, social and governmental questions" (p. 315), the Supreme Court of New Hampshire was nonetheless unwilling to extend constitutional protection to Chaplinsky's utterance. After reviewing the available precedents, the New Hampshire Court concluded that Chaplinsky's diatribe against the marshal was not worthy of First Amendment protection. In the words of Justice Edwin L. Page:

> The only competition for acceptance in that market of opinion to be found in this record is this: The defendant admittedly called the Marshal a damned racketeer and Fascist, in exchange, as the defendant says, for the Marshal's calling him a damned bastard. . . . Such face-to-face reviling is not remotely necessary in the debate of public questions. It is not argument. It has no persuasive power. Its only power is to inflame, to endanger that calm and useful consideration of public problems which is the protection of free government. Its tendency is to useless and dangerous disorder in which the object of free speech is lost to view. (pp. 315–316)

Further, Justice Page reasoned, even if Chaplinsky's speech had some incidental value, the United States Supreme Court had already recognized that "there are limitations to the right of even abusive speech" (p. 316). To prove this point, Justice Page approvingly cited *Schenck v. United States* (1919), in which Justice Oliver Wendell Holmes Jr. held speech may be penalized when "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" (p. 52).[1]

It might have been expected that Chaplinsky would appeal to the U.S. Supreme Court for relief, but it was surprising that the High Court unanimously upheld his conviction. In retrospect, the unanimity is difficult to explain, for the Supreme Court of the Roosevelt era was clearly divided into two hostile wings: the liberal activists who favored government intervention and were led by Justices Hugo Black and William O. Douglas, and the conservatives who cherished judicial restraint and were led by Justice Felix Frankfurter (Urofsky, 1988). Given the thorny issues raised by Chaplinsky's diatribe, it is remarkable that the Supreme Court apparently arrived at a shared understanding of the constitutional questions in this case.[2]

Justice Frank Murphy, perhaps the most liberal of the justices then sitting on the bench, authored the opinion in *Chaplinsky v. New Hampshire* (1942). Given the facts of the case, he might have quickly dispensed with the appeal

by affirming the reasoning of the lower court. This would have required Murphy to characterize Chaplinsky's speech as a series of abusive epithets, invoke the "clear and present danger" test, and then argue that the language in question was likely to provoke physical retaliation. By following this reasoning, Murphy might have placed *Chaplinsky* squarely in the line of cases that started in *Schenck v. United States* (1919) and culminated years later in *Brandenburg v. Ohio* (1969).

However, Justice Murphy did not pursue this narrow line of argument in his brief five-page opinion. Instead he penned a broader opinion containing sweeping language that has haunted First Amendment jurisprudence for more than fifty years.[3] In order to uphold the New Hampshire statute, all Murphy needed to assert was that language which posed a threat to public safety was not protected by the First Amendment. Yet in dicta his opinion suggested that several broad categories of speech fell beyond the scope of the First Amendment. In the pivotal passage, Murphy argued:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality* [italics added]. (pp. 571–572)

These dicta, more than the discussion of fighting words, have influenced the evolution of First Amendment protection of speech. To illustrate this, it is necessary to consider the development of the fighting words doctrine since *Chaplinsky* as well as the broader legacy of the dicta in this landmark decision.

Fighting Words

According to the *Chaplinsky* opinion, fighting words comprise two classes of speech: words which by their very utterance inflict injury and words that tend to incite an immediate breach of peace. In the years since *Chaplinsky,* there have been two important developments in the concept of fighting words (Greenawalt, 1995).

First, beginning with *Cohen v. California* (1971), the Supreme Court nar-

rowed the definition of fighting words. In this case, decided during the height of the Vietnam War, the Supreme Court considered the possibility that an antiwar protester might be punished for criticizing the government. The case came about when Paul Robert Cohen entered the Los Angeles County Courthouse wearing a jacket bearing the words "Fuck the Draft." Although there was no disturbance, Cohen was arrested and charged with breach of peace. While there was no doubt that he wore the jacket, on appeal Cohen argued that his conviction violated the freedom of speech guaranteed by the First Amendment.

In one of his finest opinions, Justice John Harlan noted that the phrase on Cohen's jacket was neither obscene nor likely to provoke a violent reaction. As Harlan saw the case, Cohen was being punished for the offensive content of his message, not because the message might trigger a violent response. In the words of Harlan: "While the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual" (p. 25). As Thomas Tedford and Dale Herbeck note, by distinguishing between language that offends and speech that is likely to incite, "the Court [in *Cohen*] narrowed the definition of 'fighting words' stated in *Chaplinsky* to words that actually are directed to another in such a way as to create a danger of breach of peace" (2001, p. 171). Because reasonable people might find different words objectionable, Justice Harlan concluded, it was unconstitutional to punish speech on the theory that its very utterance might inflict injury.

Second, the Supreme Court has invalidated a variety of statutes aimed at offensive speech on the grounds that they were either vague or overbroad. This was the case, for example, in *Gooding v. Wilson* (1972), where the Court considered a Georgia statute which provided that "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor" (Georgia Code Ann. § 26–6303). In this instance, Johnny Wilson was convicted of making the following threats against police officers: "White son of a bitch, I'll kill you"; "You son of a bitch, I'll choke you to death"; and "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces" (*Gooding v. Wilson,* 1972, p. 534).

Although Wilson's speech was clearly more menacing than Chaplinsky's allusion to fascists, Justice William Brennan was nonetheless troubled by the phrases "opprobrious words" and "abusive language" in the Georgia statute.

As Brennan read *Chaplinsky,* it did not ban broad classes of offensive expression but rather words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed" (*Gooding v. Wilson,* 1972, p. 524). Because the Supreme Court of Georgia historically failed to make this distinction when interpreting the statute, Brennan concluded that the Georgia statute was overbroad and therefore unconstitutional.

Taken together, *Cohen* and *Gooding* dramatically narrowed the definition of fighting words set out in *Chaplinsky.* The significance of this narrowing is readily apparent in the "motherfucker decisions" of the early 1970s—three cases in which authorities sought to prosecute speakers for uttering this offensive word in public. In *Rosenfeld v. New Jersey* (1972), the appellant used the word four times while addressing a school board meeting attended by 150 people, including 40 children. In *Brown v. Oklahoma* (1972), the appellant used the word twice in reference to police who were posted at a speech delivered at the University of Tulsa. Finally, in *Lewis v. City of New Orleans* (1972), the appellant used the word to admonish police who were attempting to arrest her son.

The Supreme Court vacated all three convictions and remanded the cases for reconsideration given the holdings in *Cohen* and *Gooding.* Since the Court had renounced one definition of fighting words—words which by their very utterance inflict injury—the only question was whether the word motherfucker tended to incite an immediate breach of the peace. In all three instances, the Court questioned whether the language at issue threatened imminent violence. In *Brown* and *Rosenfeld,* the remarks were part of a public diatribe directed to no one in particular. In *Lewis* the words were addressed to the police, and "a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to 'fighting words'" (*Lewis v. City of New Orleans,* 1972, p. 135).

In the light of these decisions, Harry Kalven Jr. wondered "if there are any fighting words left" (1988, p. 17). Since *Chaplinsky,* the Supreme Court has narrowed the fighting words exception to include only language that tends to incite an immediate breach of the peace. This would seem to require an abusive personal epithet, addressed to a specific individual and delivered in a face-to-face context, under circumstances likely to result in violence. It is difficult to imagine how written words—language addressed to large audiences or broad classes of people, or speech mediated through the Internet—could ever be suppressed under the reformulated *Chaplinsky* test.

The definition of fighting words is so narrow, in fact, that the Supreme Court has not upheld a single conviction for the use of fighting words since

Chaplinsky.[4] However, it is important to remember that while *Cohen* and *Gooding* clearly narrowed the definition of fighting words, the Court has never renounced the *Chaplinsky* decision. "The fighting-words exception," Lee Bollinger concluded, "has been kept rather penned in, though its retention has continued over time to be justified primarily on the basis that such speech possesses little if any 'social value'" (1986, p. 181).

While some critics have suggested that the absence of subsequent cases proves the *Chaplinsky* decision was an unfortunate aberration, a more accurate reading of the record suggests that the Supreme Court intended to exempt a narrow range of abusive speech from constitutional protection. Although the *Chaplinsky* dicta create the unfortunate impression that broad classes of speech lie outside the bounds of the First Amendment, in later decisions the Court has narrowed the fighting words exception so that it cannot be used to reach protected expression. From this perspective, it can be persuasively argued that the *Chaplinsky* decision laid the foundation for later efforts to distinguish between insulting speech that is offensive from an ideological perspective and provocative speech that is likely to trigger a violent response.

The *Chaplinsky* Dicta: A Two-Tier Theory of the First Amendment

While the *Chaplinsky* decision dealt with the narrow question of fighting words, the dicta in Justice Murphy's opinion raised broader issues. Kalven lamented that rather than limiting itself to the narrow questions raised by Chaplinsky's attack on the marshal, Murphy's sweeping language created a "two-tier theory" of the First Amendment: "At one level there are communications which, even though odious to the majority opinion of the day, even though expressive of the thought we hate, are entitled to be measured against the clear-and-present-danger criterion. At another level are communications apparently so worthless as not to require any extensive judicial effort to determine whether they can be prohibited" (1960, p. 11). Lest there be any doubt about which speech lacks redeeming social value, the Supreme Court set out four categories neatly divided by punctuation: the lewd and obscene, the profane, the libelous, and the insulting or fighting words.

"The impact of *Chaplinsky,*" John Wirenius wrote, "cannot be overestimated" (1995, p. 333). Instead of remaining an isolated case about fighting words, the dicta in *Chaplinsky* laid the foundation for a categorical approach to the First Amendment and initiated a lively debate about the desirability of restricting speech based on its social value. To illustrate the enduring legacy

of *Chaplinsky,* it seems appropriate to briefly comment on each of the categories of speech singled out by Justice Murphy for reproach.

The Lewd and Obscene

The first obscenity case to rely heavily on *Chaplinsky* was *Roth v. United States* (1957). In a decision that he later came to regret, Justice Brennan built a theory of obscenity premised on the two-tier theory. Working from *Chaplinsky*'s assumption that "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial issues, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees," Brennan found that obscenity was outside the First Amendment because it was "utterly without redeeming social importance" (p. 484).

In the years since *Roth,* the Supreme Court has never revisited this core assumption. Instead, it has been increasingly obsessed with devising a workable definition of obscenity. The most recent effort is contained in *Miller v. California* (1973), a case that sets out a three-part test based on prurient appeal, offensiveness, and absence of redeeming value. Once a work is judged to be obscene, the two-tier theory places it outside the First Amendment. By the same logic, sexually explicit speech that is not obscene cannot be suppressed because it qualifies for First Amendment protection.

The Profane

At first glance it may seem that the profane should be grouped with the lewd and obscene, since such speech often contains sexual references. But as was noted in *Cohen* and the motherfucker cases, profanity seldom includes the prurient appeal of obscenity. Indeed, because the phrase on Cohen's jacket could not be construed as sexually arousing, Justice Harlan properly concluded that "it cannot possibly be maintained that this vulgar allusion to the Selective Service System would conjure up psychic stimulation with anyone likely to be confronted with Cohen's crudely defaced jacket" (*Cohen v. California,* 1971, p. 20).

More than any of the other categories set out in the *Chaplinsky* dicta, the Supreme Court has been willing to revisit the question of whether profanity deserves constitutional protection. While Justice Harlan began his opinion in *Cohen* by noting that "this case may seem at first blush too inconsequential to find its way into our books" (1971, p. 15), he clearly recognized that the language was indistinguishable from the underlying political message. As Franklyn Haiman has observed, it is not always possible to achieve the same sentiment by substituting different words. No matter what alternative phrase is used, "something is lost in the translation" (1981, p. 17).

While *Cohen* challenged the *Chaplinsky* dictum, the decision had less to say about government efforts to regulate profanity using time, place, and manner restrictions. In *FCC v. Pacifica Foundation* (1978), for example, the Supreme Court upheld a regulation on indecent language broadcast over the airwaves during a time of day when children would likely be in the audience. To square this decision with *Cohen,* the Court had to draw a tenuous distinction between wearing a jacket bearing offensive language in a public building and broadcasting the same language over public airwaves.

The Libelous

In *New York Times v. Sullivan* (1964), the Supreme Court considered the constitutionality of an Alabama law that allowed public officials to sue for defamation if the words are such as to "injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust" (p. 267). Unlike the *Roth* decision, however, Justice Brennan's opinion in *Sullivan* denied the *Chaplinsky* categories their "talismanic immunity" (p. 269).[5] Instead of assuming that libel falls outside the First Amendment, Brennan started from the premise that the "freedom of expression upon public questions is secured by the First Amendment [and] has long been settled by our decisions" (p. 269). Since the speech at issue was protected political criticism, Brennan fashioned an "actual malice" rule that would require public officials to prove that a defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not" (p. 280).

While the *Sullivan* decision has been applauded—Alexander Meiklejohn proclaimed it an occasion for "dancing in the streets" (Kalven, 1964, p. 221)—it is important to note that the Supreme Court has never held that libelous speech as a class is worthy of constitutional protection. In *Gertz v. Welch* (1974), for instance, the Court used language eerily reminiscent of *Chaplinsky* when it suggested that "neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide open' debate on public issues" because "there is no constitutional value in false statements of fact" (p. 340).

Rereading the Dicta: *Chaplinsky* and Communication Theory

As the preceding discussion demonstrates, the *Chaplinsky* dicta loom large in any discussion of the First Amendment. For this reason, the dicta have achieved a certain notoriety among legal scholars. Rather than reiterating their discussion of the case, it seems consistent with the larger theme of this

book to consider the *Chaplinsky* dicta from the perspective of communication theory. Under closer examination, it appears that this is a productive exercise as the dicta violate several well-established theoretical principles. While much might be said on this point, it seems appropriate to focus on three of these issues.

First and foremost, from the perspective of communication theory, "low-value speech" is an inherently problematic concept. One of the axioms of communication suggested by Paul Watzlawick, Janet Beavin, and Don Jackson is that "one cannot not communicate" (1967, p. 51). While this axiom seems to be tautological, the point is that all human behavior resonates with meaning. Even the decision not to communicate, to remain totally silent, sends a powerful message.

With all due respect to Justice Murphy, the problem with low-value speech is not that "such utterances are no essential part of any exposition of ideas" or that they "are of such slight social value as a step to truth." In fact, the problem is exactly the opposite. Murphy singled out the lewd and obscene, the profane, the libelous, and the insulting or fighting words precisely because such speech clearly communicates messages that he finds objectionable.

This was, nonetheless, a deft rhetorical ploy by Justice Murphy, for it framed the debate over low-value speech in terms sympathetic to the government. By claiming such speech is unworthy of First Amendment protection, he was able to summarily dispense with four troublesome classes of expression. Had he acknowledged that such speech is rich with meaning, Murphy would have been forced to denounce the speech on the basis of its content. This would have been a considerably more difficult line of argument because, as the Court later asserted, "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas" (*FCC v. Pacifica Foundation,* 1978, pp. 745–746).

Second, the decision in *Chaplinsky* is based on a discredited theory of communication: the notion that there is a direct causal connection between speech and action. In this instance, the Court ignored the sequence of events leading to Chaplinsky's arrest, made no substantive effort to determine the likely effect of Chaplinsky's words on the marshal, and summarily concluded that violence was the probable result. In the words of William Bailey, "if there is to be any kind of meaningful presupposition of innocence for a speaker prosecuted for incitement, recognition of the audience as a causal factor in speech situations must be made" (1980, p. 7).

Fortunately for the freedom of expression, subsequent Supreme Court justices have rejected the mechanistic theory underlying the *Chaplinsky* decision. In *Cohen* (1971), for example, the Court rightly noted that no one in the

courthouse other than the arresting officers objected to the phrase on Cohen's jacket. While the language in question might fit the technical definition of fighting words, the lack of response suggested a minimal probability of violence prior to Cohen's arrest. So too, in the "motherfucker decisions," the Court was sensitive to the lack of audience reaction and to the idea that police are trained not to respond to such epithets.

"In none of the fighting words cases litigated in the United States Supreme Court," Stephen W. Gard observed, "has the personally abusive epithet uttered by the defendant been followed by violence from the person addressed" (1980, p. 573). More than anything else, the absence of any demonstrable reaction suggests that the Court's assumption that fighting words *necessarily* trigger violence is flawed. "It is improbable," the Eighth Circuit noted in *Tollett v. United States* (1973), "that most scurrilous or offensive speech, even though directed at a specific person, will result in anything more than public inconvenience, annoyance or unrest" (p. 1093).

Finally, the *Chaplinsky* decision ignores the important role that emotion plays in communication. In this instance, the problem was not Chaplinsky's criticism of the marshal but the epithets he used in his denunciation. In this sense, the Court's reasoning in *Chaplinsky* foreshadowed a famous footnote in Justice John Paul Stevens's opinion in *FCC v. Pacifica Foundation:* "There are few, if any, thoughts that cannot be expressed by the use of less offensive language" (1978, p. 743).

The problem with such reasoning is that it naively assumes that language is composed of a box of interchangeable parts. Communication scholars, of course, recognize that this is not the case. Although it is possible to convey the same thought in different ways, the choice of language necessarily influences the unique meaning attached to a particular utterance. As Haiman argued, "it can hardly be maintained that phrases like 'Repeal the Draft,' 'Resist the Draft,' or 'The Draft Must Go' convey essentially the same message as 'Fuck the Draft.' Clearly something is lost in the translation" (1972, p. 189).

Conclusion

The Supreme Court last revisited the fighting words doctrine in *R.A.V. v. St. Paul* (1992), a case based on a local ordinance prohibiting the display of symbols known to "arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender" (St. Paul Bias-Motivated Crime Ordinance, 1990). While all nine of the justices agreed that the ordinance was

unconstitutional on its face, their seeming unanimity splintered over the appropriate rationale for this holding. More than anything else, their disagreement exemplifies the legacy of *Chaplinsky*.

Writing for the majority, Justice Antonin Scalia (joined by Chief Justice William Rehnquist and Justices Anthony Kennedy, David Souter and Clarence Thomas) reaffirmed the neutrality principle, which holds that the government may not select or choose among ideas when regulating speech. While this was a basic tenet of First Amendment jurisprudence, Scalia extended the neutrality principle to include low-value speech. To square this reasoning with *Chaplinsky,* Scalia explained that it is "sometimes said that these categories of expression are 'not within the area of constitutionally protected speech,' or that the 'protection of the First Amendment does not extend' to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity 'as not being speech at all' [citations omitted]" (*R.A.V. v. St. Paul,* 1992, p. 383). According to Scalia, low-value speech is not "invisible to the Constitution" (p. 383). In other words, while the state can regulate low-value speech because of its proscribable content, the state cannot violate the neutrality principle when regulating such expression.

The same logic would also apply to fighting words. The exclusion of "fighting words" from the scope of the First Amendment," Justice Scalia continued, "simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a 'nonspeech' element of communication" (p. 387). The government can regulate fighting words, but it cannot "regulate use based on hostility—or favoritism—towards the underlying message expressed" (p. 387). The St. Paul ordinance failed not because fighting words qualified for First Amendment protection but because the ordinance privileged one political viewpoint in the marketplace of ideas.

Justice Byron White authored the concurring opinion, joined by Justices Harry Blackmun and Sandra Day O'Connor, and in large part by Justice John Paul Stevens. Though it came to the same holding, it rejected "the folly of the [majority] opinion" (p. 415). Instead of relying on the neutrality principle, White suggested that the ordinance should be struck down because it was poorly phrased. If the statute was limited to fighting words—words that tend to incite an immediate breach of the peace—it would be constitutional. The St. Paul statute was fatally flawed, White reasoned, because it reached beyond fighting words to criminalize protected expression. This was unconstitutional because "the mere fact that expressive activity causes hurt feel-

ings, offense, or resentment does not render the expression unprotected" (p. 414).

Neither opinion is entirely satisfying. While Justice Scalia recast *Chaplinsky* to mean that low-value speech had some claim to First Amendment protection, his opinion clearly states that the *Chaplinsky* categories are "no essential part of any exposition of ideas" (p. 571). This is frightening because Scalia's analysis suggests that the Court may be moving toward a sliding scale for regulating speech based on the perceived value of that expression. While Scalia's opinion asserts that low-value speech has a legitimate claim to some constitutional protection, his analysis also implies that such speech has only the most minimal value and may be regulated with the assertion of any legitimate state interest.

At the same time, Justice White was also unwilling to revisit the basic assumption that fighting words fall outside the First Amendment. Instead, he used overbreadth doctrine to gloss over constitutional issues raised by the *Chaplinsky* dicta. Indeed, his opinion contributes to the unfortunate illusion that there are clearly defined categories of speech that do not deserve constitutional protection. Under closer scrutiny, however, it becomes readily apparent that these categories have never been adequately defined. Nor has the Court fully considered the assumption underlying Justice Murphy's influential dicta: some speech has no value.

R.A.V. v. St. Paul offered the Supreme Court an ideal opportunity to revisit the fighting words doctrine set out in *Chaplinsky v. New Hampshire*. Given the complexity of these issues, it is not surprising that the Supreme Court deftly avoided returning to *Chaplinsky*. Justice Scalia accomplished this feat by cleverly recasting *Chaplinsky* to protect low-value speech, while Justice White finessed the issue with overbreadth doctrine. Unfortunately, both approaches exemplify the confusion over fighting words that has plagued the Court since Justice Murphy first addressed the issue in 1942.

Notes

1. Charles Schenck, general secretary of the Socialist Party, was convicted under the Espionage Act of 1917 for circulating a leaflet which urged resistance to the draft. In upholding Schenck's conviction, Justice Holmes announced the "clear and present danger" test for assessing speech that might incite an audience to lawless action against the government. The situation in *Chaplinsky* was slightly different: The issue was violence directed against the speaker.

2. Years later, Professor Franklyn Haiman wrote to Justice Black and asked about

his concurrence. In a reply to Haiman dated January 7, 1964, Justice Black wrote: "I have just received your letter asking why there was no dissent in the case of *Chaplinsky v. New Hampshire*. . . . Besides the fact that the case was decided twenty-two years ago, it would hardly be proper for me to discuss reasons that may have been responsible for the decision. I suppose you will just have to guess" (1976, p. 91).

3. A Lexis-Nexis search revealed more than 1,000 law review articles that cite *Chaplinsky*. Articles focusing primarily on the fighting words doctrine include Anthony D'Amato (1991), "Demise of *Chaplinsky*" (1993), Eric Freedman (1986), Stephen Gard (1980), Michael Mannheimer (1993), Jeffrey Shamam (1995), Aviva Wertheimer (1994), and John Wirenius (1995).

4. Gard found that "the status of the fighting words doctrine in the state courts is dramatically different" than in the Supreme Court. "At this level of the judicial system one finds an extraordinary number of cases invoking the doctrine and, in the words of Justice Douglas, 'State courts . . . have consistently shown either inability or unwillingness to apply its teaching'" (1980, p. 564).

5. The full passage from *Sullivan* reads as follows: "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment" (1964, p. 269).

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West Virginia State Board of Education v. Barnette

Warren Sandmann

In 1940 the United States Supreme Court ruled that public schools could require all enrolled students to engage in a ceremony saluting the flag of the United States (*Minersville School District v. Gobitis*). School authorities were authorized to take disciplinary measures, including expulsion, against students who did not take part in the flag salute. Once a student was expelled, that student and his or her family were often found in violation of mandatory school attendance laws. In 1943, however, the Court overturned its 1940 decision and ruled that mandatory flag salutes were a violation of a student's First Amendment rights (*West Virginia State Board of Education v. Barnette*). Though this chapter is titled "West Virginia State Board of Education v. Barnette," it is almost impossible to discuss *Barnette* without first looking at *Gobitis*.

The First Flag Salute Case

The facts of the case were relatively simple. In the late 1930s, Lillian and William Gobitis were students attending the Minersville School District in Pennsylvania. They and their family were members of the Jehovah's Witnesses, a religion that preaches and practices the authority of the Bible, not the state. According to the tenets of their religion, the Gobitis children were not to take part in any ceremony demonstrating obedience to an authority other than God; they were to reserve their obedience for God alone. However, Pennsylvania had a statute requiring compulsory attendance and another mandating school districts to provide education in certain subjects, including civics, a part of which study included the inculcation of loyalty to the state (Manwaring, 1962, p. 76). As part of this instruction, the Minersville School District included a compulsory flag salute.

The Gobitis children were in a bind. Their religion forbade them from

saluting the flag. The state mandated school attendance, and the school mandated a flag salute. The Gobitis children refused to salute. With the support of the state, the school district expelled the Gobitis children for their refusal to take part in the flag salute (Manwaring, 1962, p. 83). Following the expulsion, a legal battle commenced between the Gobitises—who were supported by the Jehovah's Witnesses—and the Minersville School District.

The case wound its way through Federal District Court (*Gobitis v. Minersville School District,* 1938) and the Circuit Court of Appeals (*Minersville School District v. Gobitis,* 1940a), with both courts finding in favor of the Gobitises. The Minersville School District was somewhat reluctant to continue the appeal process, but bolstered by the support of the Association of Patriotic Societies of Schuylkill County and the 13th District of the American Legion, it filed another appeal. On March 4, 1940, the Supreme Court granted certiorari (Manwaring, 1962, pp. 116–117).

Constitutional Issues

Two key issues were at the heart of the case. Was the compulsory flag salute an infringement of the freedom of religion of the Gobitis children? If this was an infringement, was it done on a secular basis—was it a secular regulation? In other words, did the state have a compelling interest in prohibiting the expression of religion for the promotion of greater good?

The Court had previously ruled in *Pierce v. Society of Sisters* (1925) that the state may not require all children to attend public schools, as this would be an infringement of freedom of religion. However, in a number of cases the Court had also ruled that religion does not always trump the right of the state to impose and enforce regulations on the conduct and practice of United States citizens.

The key precedent in this instance was *Reynolds v. United States* (1878). In this case, the Court ruled that George Reynolds, who claimed membership in the Mormon Church, was guilty of bigamy under the laws of the United States. The Court found that Reynolds's religious beliefs did not exempt him from adherence to the laws of the United States regarding plural marriages. In the language of the Court, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices" (p. 166). In sum, religious practice could be prohibited, but not religious belief. The argument was whether or not *Reynolds* held in *Gobitis.*

The second issue in *Gobitis* concerned the power of the state to regulate religious practice. Footnote 4 of *United States v. Carolene Products* (1938)

notes that when laws appear to prohibit specific rights granted under the Constitution, greater scrutiny should be applied to determining if those laws are in violation of the Constitution. If it were found that the flag salute practice was a legal regulation of a religious practice, should the state be held to a higher standard in attempting to prohibit that practice?

The Decision

Justice Felix Frankfurter delivered the opinion for the Court and overturned the lower courts' decisions. His opinion consisted of three main arguments. First—and perhaps more judicial philosophy than argument—was his claim of and belief in judicial deference. Justice Frankfurter framed many of his opinions in this mold, hesitant to use the power of judicial review to overturn legislative acts (Manwaring, 1962, p. 136). Second, he argued on behalf of the secular regulation concept found in *Reynolds* (1878) and *Hamilton v. Regents* (1934), as well as the *Selective Draft Law Cases* (1918). Finally, Frankfurter argued that the flag, as a national symbol of the unity of the United States, represented a principle that made religious liberty possible: the power of a functioning democratic republic.

Justice Frankfurter's deference to legislative and other public forum acts is clear throughout the opinion. He wrote that this case must be viewed "as though the legislature of Pennsylvania had itself formally directed the flag-salute for the children of Minersville" (*Gobitis,* 1940b, p. 598).

In arguing that the flag salute ceremony is best understood as an activity designed to inculcate values of citizenship central to the functioning of an effective democracy—a democracy necessary for the support of religious liberties—Frankfurter aligned *Gobitis* with a series of cases supporting the concept of secular regulation. In essence, he argued that the flag salute ceremony is a necessary civic ceremony, one that does not impinge upon religious freedom or freedom of expression. As Frankfurter noted, "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities" (pp. 594–595). This support for the secular regulation principle dovetailed nicely into Frankfurter's third argument, the unifying symbol of the flag and the ceremony involved in the flag salute.

In this final argument, Justice Frankfurter incorporated both his philosophy of judicial deference and his support of secular regulation. In essence, he argued that individual liberty is meaningless without the support and the boundaries of a unified national vision. Frankfurter continued this argument by noting the symbolic nature of the flag and its unifying role in creating a

common heritage. Without the flag salute ceremony, or at least so argued the legislature of Pennsylvania (and Frankfurter already deferred to legislative action), the ties that bind the country together may disappear. And when these ties disappear, so too disappears individual liberty. Therefore, the flag salute ceremony is required to sustain religious liberty. The framework for individual liberty is more important than the individual liberty itself; an individual's religious exemption from the flag salute ceremony would threaten the continued existence of religious liberty on a larger scale.

Justice Harlan Stone dissented in *Gobitis*. His argument was relatively basic. First, the flag salute law was clearly an infringement upon the constitutional guarantees of freedom of speech and freedom of religion, he asserted (p. 601). Second, even granting the government a legitimate interest in promoting national unity through the flag salute ceremony, there remained to the government other, less prohibitive means by which to attain the same goal. Finally, Stone argued against Justice Frankfurter's adherence to a policy of legislative deference. Stone's position, which he attributed to the framers of the Constitution, was that they were aware that persons holding differing beliefs and engaging in different actions than the majority would always be victims of the majority opinion as enacted by legislatures and other public bodies. As such, any actions taken on behalf of the majority that appeared to infringe upon the rights of the minorities deserved far greater scrutiny from the courts (p. 606).

Using this standard, Justice Stone denied the power of the government to infringe upon the liberties of the Gobitis children. More importantly, he challenged the framework of Justice Frankfurter's opinion—the principle of judicial deference. Stone argued that in cases where the acts of the majority infringe upon the minority, legislative deference is tantamount to tyranny of the majority.

The Interim

The period between the *Gobitis* decision and the *Barnette* case produced some interesting events. In his seminal work on the flag salute cases, author David Manwaring detailed these events. First, the number and ferocity of attacks on Witnesses increased significantly in 1940, just after the announcement of the *Gobitis* decision; however, there was no clear causal relationship (1962, p. 163). Attacks on Witnesses had occurred prior to the decision, and 1940 also saw a large increase in Witness street corner proselytizing, as well as a heightened sense of national insecurity as Hitler's Germany continued its expansionist policies.

Legal commentary of the period was largely opposed to compulsory flag salute ceremonies. The *Gobitis* decision itself was routinely denounced in the majority of legal and academic commentary of the period (Manwaring, 1962, pp. 148–152). Much of the commentary focused on the religious freedom aspect of the decision, claiming that the decision amounted to official approval for state regulation and prohibition of religious liberties in cases of a clear national interest. Fewer commentaries attacked the decision on the secular regulation principle; many attacked the opinion because Justice Frankfurter grounded it in a practice of judicial deference. The decision also seemed to foster an increase in compulsory flag salute practices (p. 187).

In 1942, with the passage of Public Law 623, Congress codified rules regarding respect for the flag. Drafted with the help of the American Legion —an organization that at least tacitly approved of Witness persecution for refusal to salute the flag (Manwaring, 1962, p. 173)—the law used language that seemed to relieve civilians of the duty to use the raised hand salute to the flag (Public Law 623, p. 380). As Manwaring notes, this was a questionable interpretation, given the context of the law (1962, p. 188). However, the Civil Rights Section of the Office of the Attorney General used this interpretation as a means to put pressure on groups persecuting Witnesses.

Persecution and prosecutions of Witnesses continued. There were signs, however, that the judicial community was also questioning the *Gobitis* decision. A county district court in Minnesota issued an injunction restraining a local flag salute ordinance (*Brown v. Skustad,* 1942). The Supreme Courts of Kansas and Washington also issued opinions that flatly defied the *Gobitis* decision (*State v. Smith,* 1942; *Bolling v. Superior Court,* 1943).

Most notable during this period was the Court's treatment of the *Gobitis* decision. The case that most clearly indicated the Court's distaste for and possible rethinking of *Gobitis* was *Jones v. Opelika* (1942). This concerned the practice of requiring the payment of an occupational license tax for a variety of purposes. While not written specifically with the Witnesses in mind, an occupational license tax was a tactic often used by municipalities as a means to prosecute Witnesses (Manwaring, 1962, p. 196). The Court upheld the license tax, but with a 5–4 vote. Within the opinion, however, both the majority and the dissenters indicated that *Gobitis* appeared to be bad precedent (Manwaring, 1962, p. 201). Perhaps just as important was the change in Court personnel following the *Opelika* decision. Justice James Byrne left to work with the Roosevelt administration and was replaced by Justice Wiley Rutledge. Together, the reconsideration of *Gobitis* announced in *Opelika,* the change in justices, and the quick overturning of the *Opelika* decision in *Murdock v. Pennsylvania* (1943) made the *Gobitis* decision ripe for rehearing.

The Second Flag Salute Case

Following the *Opelika* decision, legal counsel for the Witnesses took advantage of the questionable nature of *Gobitis* and began legal proceedings in the State of West Virginia. The location was chosen partially for the sake of convenience, with petitioners and counsel ready to appear, and partly because of the West Virginia judiciary's readily apparent distaste for both *Gobitis* and compulsory flag salute ceremonies.

The hearing was held before a three-judge tribunal of the district court, which allowed for immediate appeal to the Supreme Court following the decision. On October 6, 1942, the tribunal issued a permanent injunction prohibiting the state from compelling students to engage in the flag salute and from expelling students who declined to take part in the flag salute ceremony (*Barnette v. West Virginia State Board of Education,* 1942). The unanimous decision was based largely on the questionable status of the *Gobitis* precedent following the *Opelika* decision. West Virginia school authorities complied with the injunction; they also moved to appeal the decision, though rather reluctantly (Manwaring, 1962, p. 214).

The facts in *Barnette* were similar to the facts in *Gobitis*. The brief filed by counsel W. Holt Wooddell on behalf of the West Virginia State Board of Education essentially reiterated the opinion in *Gobitis,* arguing that the case should be dismissed because nothing in it varied from *Gobitis,* and the *Gobitis* precedent was still valid law. An amicus curiae brief was also filed on behalf of West Virginia. The American Legion formally announced its support for the flag statutes, stating that Public Law 623 did not change the need for or the procedure involved in the compulsory flag salute (Manwaring, 1962, p. 217).

Three briefs were filed on behalf of the Witnesses. The main brief, filed by the legal office of the Jehovah's Witnesses by Hayden Covington, offered three claims: First, the compulsory flag salute practice was a violation of religious freedom as protected by the First and Fourteenth Amendments; second, the regulation was a due process violation, independent of the religious beliefs of the Witnesses; and third, the effects of the *Gobitis* decision, with the increase in attacks on Witnesses, demonstrated the inherent flaw in the decision (Manwaring, 1962, p. 217).

The Bill of Rights Committee of the American Bar Association filed an amicus curiae brief in support of the Witnesses' position. Zechariah Chafee Jr. largely wrote this brief (Manwaring, 1962, p. 220), which contained three basic claims. First, the issue here was clearly the question of religious liberty, with the flag salute practice seen as requiring individuals to engage in behav-

ior that violated their religious beliefs and practices. Second, the argument was made that the Court needed to be consistent in its treatment of all First Amendment freedoms, placing religious liberty on an equal footing with freedom of speech and press. Finally, the argument was made that in the aftermath of the *Gobitis* decision, the majority of legal commentary opposed the decision and the practice of compulsory flag salutes. Added to this argument was the claim that the *Gobitis* decision placed families of the Witnesses in an untenable position, subject to either compromising their religion or facing punishment by the state (Manwaring, 1962, pp. 220–221).

A third brief was filed on behalf of the Witnesses by the American Civil Liberties Union. As in the others, this one contained an argument concerning the infringement of religious liberty by the flag salute practice and by the *Gobitis* decision. Additionally, it was argued that the practice of judicial deference supported by Justice Frankfurter was unsupported in this case, given the persecution and minority status of the Witnesses. Finally, the brief contained an argument stating that when Congress endorsed Public Law 623, it changed the rules concerning respect for the flag. Flag salute ceremonies were on their face in opposition to Public Law 623 (Manwaring, 1962, pp. 222–224).

Constitutional Issues

According to Justice Jackson, the *Barnette* case essentially rested on one key issue: Does the Constitution grant to the government the power to compel public affirmation of the government? (*West Virginia State Board of Education v. Barnette,* 1943, p. 636). Nevertheless, Jackson did consider other elements in the case in his decision, as noted below.

Justice Stone's dissent in *Gobitis* also provided ammunition for *Barnette*. As noted in the discussion of *Gobitis,* Stone argued that the principles of religious liberty and personal freedom granted by the First Amendment and reaffirmed to citizens of all states by the Fourteenth Amendment created the need for the state to consider reasonable accommodations in support of these principles when they come in conflict with state interests. In *Gobitis,* according to Stone, it was clear that requiring all students to salute the flag was not a reasonable accommodation (p. 604).

The Decision

As noted above, Justice Jackson stated his belief that the decision in *Barnette* rested on one question, and he answered that question in the negative. In

framing his decision, however, Jackson also considered the First Amendment claims of religious freedom and freedom of speech, and the Fourteenth Amendment claims of infringement of due process and the equal protection clause.

In the decision, essentially a straightforward refutation of Justice Frankfurter's opinion in *Gobitis,* Justice Jackson first identified several key elements of the *Barnette* case that make it unique. First, the freedom sought by the Witnesses to refrain from saluting the flag can be had without infringing upon the rights of others. Additionally, Jackson noted, the freedom sought by the Witnesses is enacted in a peaceful and orderly fashion. Refusal to salute the flag can be accomplished simply by doing nothing (*Barnette,* p. 631).

The purpose of the flag salute ceremony, Justice Jackson noted, is to help instill knowledge of the government. However, the flag salute ceremony is at least one step beyond knowledge, or even done without knowledge: "Here . . . we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means" (p. 631).

Next, Justice Jackson distinguished *Barnette* from the holding in *Hamilton v. Regents* (1934). In *Hamilton,* the Court ruled that students who voluntarily enrolled in a college could not then opt out of a required military training program. In *Hamilton,* college enrollment was voluntary. In *Barnette,* school attendance was compulsory. Jackson hinted at his distaste of the compulsory power of the government when he called for application of an even stronger test than "clear and present danger" when the government is compelling action (p. 634). He called for added protection to expression that he saw as specifically protected by the First Amendment, such as religious expression. In such cases, Jackson suggested, even clear and present danger may not be sufficient.

In the remainder of the opinion, Justice Jackson completed his argument against governmental authority by refuting the *Gobitis* decision. First, he differed with Justice Frankfurter's use of Lincoln's query: "Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?" (*Gobitis,* 1940, p. 596). Frankfurter's interpretation, Jackson claimed, would automatically default to the power of the government. He preferred to rest the strength of the government on the individual liberties of the people: "Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support" (*Barnette,* 1943, p. 636).

Second, Justice Jackson argued that the Court needed especially to con-

sider the actions of school boards and other smaller governmental entities, even at the possible expense of becoming the "school board for the country" (*Gobitis,* 1940, p. 598). As governmental bodies, school boards are bound by the dictates of the Constitution, even if they may be less aware of its words and less concerned with possible violations. "There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution (*Barnette,* 1943, p. 638).

Next, Justice Jackson disputed the underlying framework of Justice Frankfurter's decision in *Gobitis,* judicial deference. First, Jackson claimed that the Bill of Rights contains within its making a call for opposing the majority wishes of the legislature. "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections" (p. 638). Second, he asserted that the due process clause of the Fourteenth Amendment is much more clear and strict when it involves claims that touch upon the First Amendment (p. 639). Finally, Jackson refuted Frankfurter's argument that the judiciary lacks the knowledge to make decisions better left to the legislature: "We act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed" (p. 640).

In his concluding comments, Justice Jackson used some of the more memorable language of the opinion. He accepted the need for the creation of a unified national identity but denied the suitability of a compelled affirmation. "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard" (p. 641).

Justice Jackson essentially called in *Barnette* for a distinct change in the manner in which the Court should deal with issues of individual liberty when they confront the power of the government. Jackson would apply the clear and present danger test to most of these issues, would largely invalidate the concept of secular regulation, and would place added emphasis on due process claims under the Fourteenth Amendment when these claims touched upon specific prohibitions in the First Amendment.

Justice Frankfurter could not let this decision go without a long and impassioned defense of his opinion in *Gobitis.* His dissent primarily focused on two key issues. First, Frankfurter decried the attempt to banish the secular regulation principle, arguing that to do so would call into question numerous

precedents and lead to a voluminous increase in cases brought to the Court. Second, he continued his defense of the concept of judicial deference, arguing at length that the Court was not and should not be in the business of questioning legislative decisions unless there were clear errors in the law.

Ramifications of *Barnette*

Two key principles will be examined in looking at the ramifications of *Barnette:* Justice Jackson's use of the freedom of thought principle and his enhancement of the religious freedom principle. Both these principles worked largely to weaken the concept of secular regulation.

The *Barnette* principles received little and mixed use in the years immediately following the decision. The decision was cited in *Taylor v. Mississippi* (1943), where the Court ruled that if the state lacked the authority to compel a flag salute, it also lacked the authority to make illegal the teaching of refusal to salute the flag. For *In Re Summers* (1945), the Court failed to use the reasoning in *Barnette,* as it affirmed state authority to deny an applicant a place in the state Bar due to conscientious objector status. However, the Court cited *Barnette* when, in *Prince v. Massachusetts* (1944), it affirmed a state's authority to impose child labor laws on religious activities (*Commonwealth v. Prince,* 1942). The religious nature of the activity was seen as less important than the state's concern with the welfare of the child. Thus both the concept of secular regulation and a balancing test between individual liberty and state authority were maintained.

The religious freedom argument remained available for the Court to use, and it did so in a mixed way. In *Braunfeld v. Brown* (1961), the Court cited *Barnette* in affirming a lower court decision (*Braunfeld v. Gibbons,* 1959) supporting state authority to keep certain businesses closed on Sunday. The case involved Orthodox Jews who, because of religious belief, closed their businesses on Saturday and then, because of state law, were also forced to close on Sundays. Essentially upholding the secular regulation principle, the Court ruled that the state was applying a neutral law for legitimate purposes.

However, the religious liberty argument later won the adherence of the majority of the Court. In 1993, in the case of *Church of Lukumi Babalu Aye v. Hialeah,* the Court ruled that religious freedoms must be considered more important than competing concerns of state power due to the protection of the First Amendment. (This argument was introduced and supported both in Justice Jackson's decision in *Barnette* and Justice Stone's dissent in *Gobitis.*)

Concerning the freedom of thought standard raised by Justice Jackson,

the more activist Courts of the late 1950s and 1960s started to adopt his views of the importance of individual liberty and freedom of thought. In a series of cases concerning loyalty oaths, the Court routinely cited *Barnette* as forbidding the requirement of oaths that were seen as religious in nature. In *First Unitarian Church v. Los Angeles* (1958), the Court reversed a lower court decision denying tax-exempt status to a church because church members and officials refused to take a loyalty oath to the United States. In *Torcaso v. Watkins* (1961), the Court overturned a Maryland law denying public office to an applicant because that applicant refused to affirm a belief in God. The Court found the law a violation of freedom of belief and expression protected by the First and Fourteenth Amendments.

In *Connell v. Higginbotham* (1971), the court cited *Barnette* in a Florida loyalty oath case. The Court affirmed that part of the oath which required applicants for public employment in Florida to affirm their belief in and support of the Constitution, but reversed the part requiring applicants to affirm their refusal to participate in overthrowing the established government. The Court decreed that this element of the oath must to be considered in the light of due process, and employees may not be dismissed without a hearing for refusal to utter this element of the oath.

The Court continued to employ the freedom of thought argument in the decades following *Barnette*. In *Baird v. State Bar of Arizona* (1971), the Court cited *Barnette* in reversing a lower court decision supporting Arizona's right to deny membership in the Bar to an applicant who refused to state whether she belonged to any organizations committed to the overthrow of the United States government. The Court found that the law was a violation of freedom of expression protected by the First and Fourteenth Amendments. In a case once again involving members of the Jehovah's Witnesses, the Court in *Wooley v. Maynard* (1977) cited *Barnette* in affirming a lower court decision in New Hampshire enjoining the state from prosecuting individuals for covering up the state motto ("Live Free Or Die") on their license plates. The Court found that the action by the state violated the freedom of the individual to refuse to affirm an ideology that he or she opposes.

Justice Jackson's freedom of thought and belief argument took its firmest hold in flag desecration cases. In *Spence v. Washington* (1974), the Court reversed a lower court decision upholding a State of Washington law forbidding the improper display of a flag. And in the two flag burning cases, *Texas v. Johnson* (1989) and *United States v. Eichman* (1990), the Court wholly adopted the argument for freedom of expression and belief, ruling that the Constitution forbids laws prohibiting burning the flag. *Barnette* figured in

these cases both because of its language on freedom of expression as well its connection to the symbolic importance of the U.S. flag.

The Flag Salute Cases and Communication

The flag desecration cases highlight one of the key relationships between these cases and principles of communication. Even when denying the claims of the Witnesses in *Gobitis,* Justice Frankfurter noted the importance of symbols in communication. Citing an earlier case, *Halter v. Nebraska* (1907), he stated that people "live by symbols" (*Gobitis,* 1940, p. 596). Though this was not a new idea (see, e.g., *Stromberg v. California,* 1931), the importance the Court placed on the function of symbols provided language and arguments for numerous cases involving freedom of expression. Symbols as well as verbal speech are understood as essential to human communication and worthy of protection. The understanding that symbols, even when accompanied by silence, convey and are intended to convey a message allowed the Court to expand its holdings in freedom of speech to realms where there was little if any "speech." Flag burning, flag desecration, black armbands in protest (*Tinker v. Des Moines School District,* 1969): All of these were understood by the Court as communication which deserved the protection of the First Amendment.

While the language and the arguments themselves are important, as communication scholars we have to be aware that invoking the power of symbols is much more than a rhetorical technique. In their influential *Metaphors We Live By,* George Lakoff and Mark Johnson make and defend the claim that metaphors and symbolic language are more than mere rhetorical flourishes; they argue that metaphors are the grounding element of how we perceive the world (1980, p. 4). Communication scholar Haig Bosmajian used this understanding of metaphoric language in his 1992 analysis of judicial decision making. He argued that legal writing and judicial opinions are most in need of the power of metaphor: "Through incorporation of tropes into legal opinions, what is abstruse and obscure becomes concrete and comprehensible" (p. 47).

This attention to the power of symbols is evident in Justice Jackson's opinion in *Barnette:*

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and na-

> tions, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical reiment [*sic*]. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn. (1943, pp. 632–633)

Given this understanding of the true power of symbols and metaphoric language, Justice Jackson's decision in *Barnette* contains more than just colorful and powerful language. Metaphors and symbols (appropriately enough, as the case is about symbolic communication to begin with) influence how the public and the courts perceive the world. The language is not mere dicta; it is a structuring element in helping shape future perceptions of religious freedom, individual freedom, and the relationship between a citizen and his or her country. When Jackson speaks of the "unanimity of the graveyard" (*Barnette,* 1962, p. 641), he uses metaphor as a specific tool to help us shape our perceptions of freedom and patriotism. When he figuratively locates the right of free expression as a "fixed star in our constitutional constellation" (p. 642), this is not simply a rhetorical flourish but a way of allowing his audience to understand better the importance of this right. And when Jackson states "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials" (p. 638), his choice of language figuratively and pragmatically creates a special physical place for individual rights. Jackson deliberately chose his language to use the power of metaphor to create and manage perception.

One other interesting relationship between the decision in *Barnette* and communication theory is entailed less in the legality and more in the humanity of the case. Justice Jackson supported his holding by championing freedom of thought. He argued throughout the need to make sure that individuals are not cowed by the many. More importantly, he acknowledged the potential for active and passive oppression in the very nature of a majority-minority relationship.

Public communication researcher Elisabeth Noelle-Neumann developed a theory that supports Justice Jackson's concerns for the minority. She ar-

gued that there exists a "spiral of silence" operating to pressure people in the minority from voicing their beliefs (1993). She further asserted that both individuals and groups have an ability to divine present and short-term future public opinion. When they realize that their position is in the minority, people are often less willing to speak up. Therefore, even in a passive mode, the majority status of a viewpoint operates to silence minority views.

In *Barnette,* the Witness position is certainly the minority position. Refusal to salute the flag, especially during a period of heightened pressure to forge national unity, is far from the mainstream. However, the Witnesses never shied away from voicing their opinions. Is Noelle-Neumann mistaken? No, nor is Justice Jackson in his concern for the status of the minority viewpoint.

The Witnesses were not just members of a minority. They belong to a small, insular, almost fanatical religious group. God was on their side, and everything they did was for the glory of God and under the authority of God. True believers do not heed the disapproval of the majority. The concept of a "spiral of silence" does not apply when those in the minority are convinced of the righteousness of their message and the protection and support of an omnipotent God. When held by an insular group, opposition to a majority viewpoint functions less to silence the group and more to support that group's principles and its members' adherence to the group. Noelle-Neumann noted that certain groups of people specifically seek to be outside the norm: "There seems to be a second type of reformer . . . for whom the provocation of the public becomes almost a purpose in itself, an intensified existence. There at least they find attention, and even public outrage is better than being ignored" (1993, p. 140). A better description of the Jehovah's Witnesses could hardly be found.

Justice Jackson was not mistaken in his understanding of what Noelle-Neumann later described as a spiral of silence. His decision was not written for the specific case of the Witnesses. He emphatically stated that religious belief was irrelevant to his decision. What mattered to him was making sure that all people who find themselves in disagreement with the majority will know they have the power of the Constitution on their side (*Barnette,* 1943, pp. 634–635).

In *Barnette,* Justice Jackson and the Court crafted a decision supporting freedom of thought for all. This decision did not reach a receptive audience during an era of war and a following period of distrust and suspicion. When times changed and the need arose, however, the language and the precedent of *Barnette* were available for the Courts of later times to use to strengthen the freedom of the individual.

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New York Times v. Sullivan

Nicholas F. Burnett

Students introduced to the history of the freedom of expression are often surprised to learn that the liberties they take for granted are in fact the result of comparatively recent legal victories. Despite the clarity and elegance of the language of the First Amendment, its implementation, its enactment, and most importantly its embrace by the government did not develop for many decades. The events surrounding the passage of the Sedition Act in 1798, Lincoln's attacks on the Copperhead press during the Civil War, the Red Scare of 1919–1920, and the McCarthyism of the 1950s suggest that throughout much of America's history, speakers who tried to voice a political opinion that differed from the views of the dominant powers risked harassment, imprisonment, or worse. The decade from 1955 to 1965 saw the First Amendment repeatedly put to the test as the civil rights movement swept the South and Jim Crow laws were met with resistance and protest.

Against this backdrop came a Supreme Court case that altered for all time the way we understand our First Amendment rights. The case has had a dramatic impact on government officials' use of libel suits to respond to criticism of how they do their jobs. It also offers a view of how the arguments and language choices of a Supreme Court decision have provided substance and meaning to the promise of the First Amendment.

The Facts of the Case

In March 1960, Martin Luther King Jr. was facing trumped-up criminal charges for tax evasion and perjury in an Alabama court.[1] In order to raise money for his defense, the Committee to Defend Martin Luther King and the Struggle for Freedom in the South drafted a full-page advertisement to run in the *New York Times* for the purpose of soliciting donations for King's defense fund. Penned by the fund's executive director, Bayard Rustin, and the

actor Harry Belafonte, the advertisement was titled "Heed Their Rising Voices." The text of the ad recounted the recent struggles of civil rights protestors throughout the South and the Reverend King's travails in particular. It was signed by scores of well-known liberal activists, entertainers, and intellectuals, including Marlon Brando, Dorothy Dandridge, Eleanor Roosevelt, Sammy Davis Jr., Jackie Robinson, John L. Lewis, Nat King Cole, and Nat Hentoff. The text of the ad also included the endorsement of four well-known African American preachers—Ralph Abernathy, S. S. Seay Sr., Joseph Lowry, and Fred Shuttlesworth—whose names appeared without their knowledge. The text of the ad read in part:

> In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear gas ringed the Alabama State College campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission. . . .
>
> Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering," and similar "offenses." And now they have charged him with "perjury"—a *felony* under which they could imprison him for *ten years*. (cited in Lewis, 1991, p. xiv)

The advertisement did not go unnoticed in the South. Though the *New York Times* had a very modest circulation in the State of Alabama, one of the local Montgomery city commissioners seized an opportunity to take a slap at an important representative of the "Northern Press." The local Montgomery newspaper stirred the tempest with bellicose editorials, denouncing the *Times* for printing defamatory and erroneous material.

L. B. Sullivan, the Montgomery city commissioner responsible for oversight of the police force, filed a $500,000 defamation suit against the *Times,* even though he had not been mentioned by name in the ad. Sullivan's suit claimed that the advertisement contained a number of false statements that were injurious to him in his role as public safety commissioner. The suit pointed out several errors in the text of the ad: King was arrested four times, not seven; the students sang the National Anthem, not "My Country, 'Tis of Thee"; the police were deployed near the campus, but they did not "ring" it; most, but not all, of the student body participated in the protest; and finally,

the dining room was never padlocked. Relying upon these seemingly trivial mistakes, Sullivan claimed that his reputation had been damaged, and he demanded compensation as well as punitive damages to prevent future errors.

Shortly after Sullivan filed his suit, the mayor of Montgomery filed a similar $500,000 action against the *Times.* Eight days after Sullivan's filing, the governor of the State of Alabama followed with a $1 million suit that proceeded despite the fact that the *Times* published a retraction after receiving a complaint from the governor. By the time Sullivan's case came to trial, the *Times* was facing $2.5 million in damages from libel suits, with more in preparation.

At the trial in Montgomery, Alabama, Sullivan called only five witnesses. All of them testified that because Sullivan was commissioner of public safety and the ad dealt with the conduct of law enforcement, they connected the ad with Sullivan. When cross-examined, the witnesses claimed they did not believe the charges represented in the ad and it had no effect on their opinion of Sullivan. Remarkably, three of the five witnesses testified they had not even seen the ad until Sullivan's lawyers showed it to them.

Lawyers for the *Times* first attempted to derail the case by claiming that the Alabama courts had no jurisdiction over the case. The *Times* attempted to have the case moved to the federal courts, where it was generally thought that a less biased trial could be conducted. The judge ruled, however, that because the *Times* had hired a part-time reporter who occasionally filed stories from Alabama, it was essentially a corporation doing business in Alabama.

Having lost on procedural grounds, the *Times* argued that one of the basic legal requirements for proving libel was missing in Sullivan's case. The *Times* reasoned that Sullivan's defamation claim was unsupportable because he was not referred to, either directly or indirectly, in the ad. Furthermore, the *Times* argued, there was no intention to defame Sullivan because the advertisement had been accepted in the course of regular business. The *Times* had simply relied on the credibility and good names of those who endorsed the ad.

The jury disagreed, however, and in a matter of hours returned a verdict granting Sullivan the full $500,000. Three months later, the mayor of Montgomery won a similar case and was also awarded $500,000 in damages. The suit filed by the governor was not far behind, and it did not take a legal genius to see what was happening. Southern officials either keen on continuing segregationist policy or simply irked by national press coverage had found a tool to punish these organizations for even the smallest misstatement of fact. The stakes were enormous. One former general counsel for the *Times,* James Goodale, suggested, "Without a reversal of these verdicts, there was a rea-

sonable question of whether the *Times,* then wracked by strikes and small profits, would survive" (Lewis, 1991, p. 35).

This defamation action had broader implications that are of interest to us as well. This case is not merely a question of "southern violators" attempting to insulate themselves from criticism and striking out at those who would question their way of life. At heart, this was a case about how far the government may go to suppress criticism of its public officials.

The Appeals

Although the *Times* moved to have the other cases continued pending the appeal of Sullivan's case, the Alabama judiciary was unsympathetic, and the other cases proceeded. The African American ministers who were included in the original suit felt the wrath of the courts almost immediately. The four ministers each had land and other personal property seized even before the appeal went forward (Kane, 1992, p. 22).

The Alabama Supreme Court dispatched the *Times*'s appeal, rejecting both its jurisdictional arguments as well as the substantive arguments related to the defamation. As interpreted by Judge Jones in the original trial, Alabama law required the *Times* to determine if the message in question was true in all its particulars. A finding of falsity in any part of the message meant that the jury was invited to presume injury to the plaintiff's reputation, even if there was no trial evidence showing injury (Kane, 1992, p. 30). The *Times* did raise a constitutional objection, but the Alabama Supreme Court dismissed it with little discussion, noting simply that "The First Amendment of the U.S. Constitution does not protect libelous publications" (Grimsley, 1995, p. 297).

At the time, the Alabama Supreme Court was on relatively solid ground in rejecting the *Times*'s constitutional claim. In *Chaplinsky v. New Hampshire* (1942), the U.S. Supreme Court had held that libel—along with obscenity and fighting words—constituted a categorical exception undeserving of First Amendment protection. These categories of speech were viewed as being of such little aid in the search for truth that they could be restricted with relatively little impact on the marketplace of ideas. In a libel action by a private citizen, that may be a reasonable assessment. However, when a public official attempts to punish a news outlet for seemingly minor and unintentional misrepresentations of fact, and when that suit is filed as part of a larger strategy to dissuade news outlets from covering public affairs of momentous importance, concerned parties might well raise constitutional issues.

Proof of the potential for constitutional concern was confirmed when the

U.S. Supreme Court granted certiorari and agreed to review the case. Oral arguments were heard on January 6, 1964, and the decision was announced just eight weeks later. Justice William Brennan was assigned to write the decision.

We know from an account provided by one of Brennan's law clerks that, while all nine justices favored a reversal of the Alabama Supreme Court's decision, most were inclined to do so on the narrow legal grounds that the libel had not been proven on the basis of clear and convincing evidence.[2] In the two months and three days between the oral arguments and the announcement of the decision, Brennan wrote eight separate drafts of the decision. On one hand, he had to contend with the liberal wing of the Court—Justices Hugo Black, Arthur Goldberg, and William O. Douglas—who argued that critics of public officials should be immune to file libel suits. On the conservative side of the aisle, Justice John Marshall Harlan was a strong believer in states' rights and the concept of federalism. In his book, *Make No Law* (1991, p. 181), Anthony Lewis recounts the lengths to which Brennan had to go to preserve the unanimous decision. Particularly troubling for Brennan was Harlan's insistence that the Court should move toward a national rule for libel that would preempt the various formulations of the individual states. Finally, on the evening before the decision was to be announced, Harlan called Brennan at home to say that he would withdraw his separate, dissenting opinion and join Brennan's opinion without qualification.

The Decision

Thanks to Justice Brennan's hard work, on March 9, 1964, the Court announced a 9–0 decision which not only overturned the decision of the Alabama Supreme Court but also effectively prevented the Alabama courts from retrying the case (*New York Times v. Sullivan,* 1964). Brennan clearly intended to craft a decision that would do more than merely reverse the Alabama Court's decision in the *Sullivan* case. It would also serve as a precedent for other courts and as a shot across the bow for southern officials planning to pursue a strategy of press intimidation through lawsuits.[3]

The opinion opened with Justice Brennan rejecting the notion that libelous speech was necessarily unprotected speech. He argued that the Court had never decided the question of constitutional limitations upon the power to award damages for libel of a public official. Moreover, he noted that "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment" (p. 269). Brennan

declared that the controversy involved more than a mere dispute about libel: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials [references omitted]. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection" (pp. 270–271).

In a memorable passage, the Court reiterated its belief that falsity did not disqualify communication from constitutional protection and that, in fact, some error was to be expected in the contest of public issues. Justice Brennan cited the case of *NAACP v. Button* (1963, p. 433) in noting that "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'" (*Sullivan,* 1964, pp. 271–272). Of course, Brennan's confidence in public discussion also echoed thinkers like John Milton and John Stuart Mill who embraced the notion of the marketplace of ideas and the belief that truth would eventually triumph over falsity. Particularly in the realm of public affairs, holding speakers to too fine a standard of truth would inevitably silence some. Quoting *Sweeney v. Patterson* (1942), concerning a congressman's attempt to sue for libel, Brennan transformed *Sullivan* from an effort to silence a private libel into a more odious attempt to resurrect the crime of seditious libel: "Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. . . . The protection of the public requires not merely discussion, but information. . . . Whatever is added to the field of libel is taken from the field of free debate" (p. 272).

Justice Brennan's references to the Sedition Act of 1798 established that the Court would not allow Alabama to punish communication that was critical of government officials. Neither would it allow Alabama to accomplish through a civil libel suit what it would be less willing to attempt using criminal law: the silencing of the press. In a particularly pointed passage, Brennan blasted the Alabama judiciary:

> The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute [for criminal libel], and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to

> civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication [footnote omitted]. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. (pp. 277–278)

Brennan was keenly aware of the mountain of judgments that the *New York Times* was facing. He understood too well that a democracy which allowed its public officials to use libel suits in order to bankrupt respectable members of the press was doomed. More importantly, he comprehended that only a federal rule could prevent the occurrence of future instances of abuse.

What was the solution to this state of affairs? Justice Brennan responded with a regulation that some critics saw as inappropriate judicial activism but that supporters cheered as a critical advance in the protection of First Amendment rights. The Court announced a federal rule prohibiting a public official from recovering damages for a "defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not" (pp. 279–280). Brennan reasoned that this requirement would afford citizens—and, of course, news outlets—a greater level of protection. He drew an analogy to the privilege granted to public officials, insulating them from libel cases for statements made within the scope of their official duties (*Barr v. Matteo,* 1959, p. 575): "Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. As [James] Madison said, 'the censorial power is in the people over the Government, and not in the Government over the people.' It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves [citations omitted]" (pp. 282–283).

Justice Brennan took a final, unusual step of foreclosing the possibility of the Alabama courts' having the final word by retrying the case using the new "actual malice" standards. Motivated by "considerations of effective judicial administration" (p. 284), Brennan extended the Court's reach by reviewing the evidence in *Sullivan*. In other words, the Court examined the facts of the case to see if actual malice could be proven. Though the Supreme Court usually restricts itself to matters of law, Brennan claimed (citing *Edwards v. South Carolina,* 1963, p. 235) that "an independent examination of the whole re-

cord" is necessary, "so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression" (p. 285).

The Court first found the case against the four ministers glaringly weak (p. 286). Although Justice Brennan did not comment on the motive for their inclusion by Sullivan in the lawsuit, it seems reasonable to conclude that the Court intended to terminate their harassment by Alabama officials.

Justice Brennan employed the remainder of the decision to dissect the evidence against the *Times* and to eviscerate the findings of the Supreme Court of Alabama. Criticizing both the Alabama Supreme Court's interpretation of the evidence and the underlying theories that led to a finding in support of Commissioner Sullivan, Brennan took special exception to the legal and logical gymnastics employed to fulfill the requirement that libelous statements were made "of or concerning" Sullivan. The Court concluded that "such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on government operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent" (p. 292).

Although Justice Brennan worked diligently to maintain his unanimous decision, two justices wrote concurring opinions. A concurring opinion suggests that the author agrees with the final outcome of the case but differs on the reasons for the decision or its scope. Concurring opinions can also be an important source for critics of a decision and can form the basis of a subsequent reexamination of the findings in the case. Justice Black was joined by Justice Douglas in one concurring opinion, while Douglas joined Justice Goldberg in a second concurring opinion. On display in Black's concurrence is the absolutist approach to the First Amendment for which he was well known. Black doubted whether Brennan's actual malice formulation could provide sufficient protection against official powers. Black claimed that the majority simply did not go far enough in protecting citizens' rights to criticize the government:

> "Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, I vote to reverse exclusively on the ground that the *Times* and the individual

> defendants had an absolute, unconditional constitutional right to publish in the *Times* advertisement their criticisms of the Montgomery agencies and officials. (p. 293)

So while Black and Douglas agreed that the case should be reversed, their decision was simpler because they were willing to give citizens absolute immunity from libel suits as long as the communication constituted comment upon the role or job of government officials.

Justice Black was all too aware of the strategy of intimidation which southern officials had adopted to try to silence the northern press. He noted that briefs filed in the case confirmed that the *Times* faced eleven lawsuits seeking $5.6 million; an additional five suits sought $1.7 million from CBS for news reports it had aired. Black feared that his brethren had underestimated the threat being faced and found the solution offered in the majority opinion—the actual malice standard—to be inadequate to provide real protection. His concluding argument for absolute protection of speech critical of the government was succinct and compelling: "This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials" (p. 297).

Assessing the Impact of *New York Times v. Sullivan*

Numerous questions arise concerning the impact of *Sullivan*. What qualifies the case for inclusion in a list of the most important free speech decisions of the twentieth century? Have the protections provided by the decision held up or was Justice Black correct in predicting that the absolute malice standard would prove to be insufficient? Fortunately, the intervening years have provided a wealth of practical experience and the observations of a number of expert commentators.

By the mid-1960s members of the press faced millions in potential judgments from suits brought by southern officials. The cases pending against the *Times* and CBS withered because plaintiffs faced the unlikely prospect of surmounting the barriers that the actual malice standard had erected. Martin Luther King Jr.'s nonviolent approach to racial justice depended heavily on exposing the oppression and brutality of the treatment of African Americans in this nation. That strategy would have been unworkable without the press providing daily reports of lunch counter sit-ins, freedom riders, and the day-to-day conduct of the civil rights movement. Twenty years later, when Eric

Embry, part of the legal team for the *New York Times* was asked what would have happened if the *Sullivan* case had gone the other way, he replied flatly that CBS, whom he also represented, "would not have gone on doing programs on the South" (Lewis, 1991, p. 245). Though in all likelihood the South would have eliminated racial discrimination eventually, the strategy of intimidation probably would have been more successful and the campaign for civil rights would have taken far longer. If not for the national press coverage the movement received, the struggle might also have been far bloodier.

We do know that few large libel suits were filed against the press in the years immediately following the *Sullivan* decision. That relief was relatively short-lived, however, as plaintiffs soon realized that the mere filing of a suit, successful or not, often had the desired effect of muzzling the media. In a comprehensive study of the period 1980–1999, the Libel Defense Resource Center reported: "The good news is that the overall number of trials is declining, and media defendants are winning a higher percentage of those trials, even those trials before juries. But of substantial concern, when plaintiffs do win at trial, the awards are, on the average, substantially higher in the 1990s than they were in the 1980s" (Libel Defense Resource Center, 2000).

Indeed, in 1997 the *Wall Street Journal* lost a libel case to a small investment office in Houston and was ordered to pay $222.7 million in actual and punitive damages, the largest libel award ever granted. Though a judge later reduced the verdict to $22.7 million by eliminating the punitive damage award, Dow Jones, the parent company of the *Wall Street Journal,* succeeded in having the entire verdict thrown out because of misconduct and misrepresentations by the plaintiff (Noack, 1999, p. 6). This case followed a familiar pattern in which libel plaintiffs often succeed with juries, only to have huge judgments reduced and cases often reversed at higher levels of appeal. Judge Pierre Leval has suggested that judges need to be more aggressive in responding to motions for summary judgment in favor of media defendants. He argued that a disciplined application of the actual malice standard should result in far more libel cases being dismissed at the very earliest stages of the trial process. This would dramatically decrease the costs of defending a libel suit and discourage plaintiffs from pursuing dubious cases (Leval, 1993).

In the fifteen years following the *Sullivan* decision, the Court decided a number of cases in which it refined the concept of "public official," expanded the actual malice rule to cover public figures as well, and offered additional guidance regarding the actual malice standard and whether different media might, in fact, have differing expectations of accuracy. Perhaps the most troubling of these for critics of the actual malice rule was the case of *Herbert v. Lando* (1978). In that case, Colonel Anthony Herbert's lawyers went all the

way to the Supreme Court to win the right to ask the defendants—producers and reporters for the CBS news show *60 Minutes*—questions about their state of mind in preparing a story about Herbert. The media defendants had balked at answering such intrusive questions, claiming a First Amendment right to what went on during the (admittedly) subjective process of editing a television program. Justice Byron White's opinion in the case suggested that the thoughts and editorial processes of a defendant must be open to inquiry if a court is to require evidence of actual malice. Under *Herbert,* reporters could be questioned at length about the decisions made in talking to witnesses, revising a story in a particular way, or choosing which shot to display on screen coupled with what line from a script. Many commentators took this pronouncement as a kind of last straw in dismantling the protection that Justice Brennan had fashioned in crafting the actual malice rule. The cost of defending a libel suit—even one that could be defeated—is likely to soar astronomically as the discovery process dissects not only a media outlet's files and tapes, but also the minds of its reporters and editors.

Proposals for shoring up the actual malice rule abound. Some commentators (e.g., Diamond, 1996; Grimsley, 1995; Hopkins, 1989) view the actual malice rule as outdated and see value in mandatory retraction policies that would limit the liability (and the potential damage awards) of media defendants. Others (e.g., Weaver & Bennett, 1993) look to the judicial systems of foreign countries to see how they have dealt with the problem.

Regardless of the efficacy of the actual malice rule, the final impact of the *Sullivan* case is more subtle, yet in many ways more profound. In banishing the crime of seditious libel and finally condemning the Sedition Act of 1798, Justice Brennan's decision had the effect of privileging a view of the freedom of expression that is often referred to as returning us to the "central meaning of the First Amendment" (Kalven, 1964, p. 191). To protect against the possibility of self-censorship, the Supreme Court fashioned a decision that provided a zone of comfort, knowing that in the rough and tumble of political debate, false statements are probably inevitable. By moving from a pastiche of common law rules and state libel laws with different requirements and varying levels of protection, the Court provided a constitutional framework for media organizations and citizens alike. A return to the Madisonian ideal of citizens speaking their minds about the conduct of government is perhaps the most enduring effect of *Sullivan*.

Two telling tributes to the impact of this decision are evident in the willingness of the press to confront the government over its conduct of the Vietnam War and to challenge a president seeking reelection about his personal conduct. Anthony Lewis wrote, "The allowance of room for honest mistakes

of fact encouraged the press, in particular, to challenge official truth on two subjects so hidden by government secrecy, Vietnam and Watergate, that no unauthorized story could ever have been 'absolutely confirmable'" (1991, p. 158). If errors are made, they will be revealed in the continuing discussion of public affairs that an active and vital press can facilitate. Through Justice Brennan, the Court argued persuasively that it is far better to tolerate the inevitable errors of an "uninhibited, robust, and wide-open" marketplace of ideas than to police those discussions with libel suits (*Sullivan,* 1964, p. 270).

Finally, there are few decisions in the history of twentieth-century free speech jurisprudence that have had a greater impact than the *Sullivan* decision on the way we talk about our First Amendment rights. Rhetorical scholars might do well to look at the influence of the oft-quoted passages and phrases in this decision that find their way into many popular discussions about the First Amendment.[4] Through the work of Lewis and other fine legal scholars we have a wealth of information regarding the legal, rhetorical, and argumentative strategies Justice Brennan employed to maintain his unanimous decision. It is possible to analyze and interpret the *Sullivan* case as a rhetorical document, crafted with very specific audiences in mind (the other justices, the larger legal community, the participants in the suit), each with its own needs and interests. This rhetorical (as opposed to strictly legal) view of understanding the language and arguments of a legal decision will doubtless bring us to a deeper and richer awareness of these important national artifacts.

Conclusion

When the Court's decision in *Sullivan* was released in 1964, Alexander Meiklejohn, the influential law professor and philosopher of free speech, declared it to be "an occasion for dancing in the streets" (cited in Lewis, 1991, p. 200). Twenty years later, Floyd Abrams, perhaps the leading First Amendment lawyer in the nation, characterized the decision as "majestic. . . . It had a command of American history that is rare in judicial opinion. It reminded us of how young we are as a country" (cited in Lewis, 1991, p. 156). But Abrams's assessment of the decision did not speak to its efficacy in protecting the press and preserving the breathing space necessary for truth to emerge. Subsequent court decisions have chipped away at those protections and the cost of defending against libel suits—even unsuccessful ones—has grown enormously. The actual malice rule crafted by Justice Brennan may well have preserved his unanimous decision, but the intervening years have proven Justice Black to be the more accurate predictor of events. As Black argued in his

concurrence at the time, actual malice has proven to be an exceedingly elusive and abstract concept—"hard to prove and hard to disprove" (*Sullivan,* 1964, p. 293). The result is that lawsuits are filed, juries often award very large settlements, and a complex and expensive appeals process is left to make amends. This could not be what Brennan had hoped for.

Richard Epstein, a constitutional law expert from the University of Chicago, declared that "in 1964, the world was a better place after *New York Times* was decided. A generation has now passed, and the dancing has stopped" (1986, p. 783). His gloomy assessment includes the possibility that the actual malice rule may have even made things worse for media defendants: It has allowed suits to continue, and it has increased the costs of defending those suits. For Epstein, however, Justice Black's proposal for immunity is not the answer, either. In the long run, Epstein argues, such a policy would have serious implications for the media's own reputation while foreclosing the possibility that defendants who suffered real injuries at the hands of the press might recover damages.

We are left with the uncomfortable conclusion that there is no best policy. And perhaps that is as it should be. For years political theorists have argued that the most outstanding feature of our Constitution has been its ability to change over time. The genius of the system is that it can change incrementally to meet the needs of a changing world. In all probability, at some point in the future the Court will decide that a different path or a re-balancing of interests needs to occur. Until that time, *New York Times v. Sullivan* remains one of the enduring First Amendment cases of the twentieth century.

Notes

1. The subsequent investigation revealed little basis for the charges. There was so little evidence that even the all-white jury acquitted King. That a vindictive motive spurred the charges is evidenced by the fact that after the acquittal, the governor was so enraged he added King's name to the list of defendants in the suit that the State of Alabama was pursuing against the *New York Times* (Branch, 1988, p. 312).

2. In his excellent analysis of the *Sullivan* case, *Make No Law,* Anthony Lewis gives credit to Stephen R. Barnett for documenting the difficult process of maintaining the unanimous decision (1991, p. 165).

3. My focus on Justice Brennan should not minimize the important contributions of Herbert Wechsler, the lead attorney for the *Times.* Wechsler's brief for the Court provided an important framework for many of the critical arguments and strategies Brennan used in the final draft of the *Sullivan* decision.

4. Michael McGee's (1980) work on ideographs may provide a particularly powerful way of capturing the ideological power of Justice Brennan's language.

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United States v. O'Brien

Donald A. Fishman

The role of symbolic speech in First Amendment jurisprudence remains controversial. The constitutional references to not abridging freedom of speech and press reasonably could be interpreted as applicable only to verbal communication. But over the past forty years, freedom of expression has come to be viewed as embracing nonverbal as well as verbal elements. During the twentieth century, courts were increasingly confronted with hybrid situations where speech and conduct became commingled in the process of expressing an idea. Such hybrid situations included controversies over flag burning, nude dancing, sleeping in a public park, wearing armbands in school, and burning draft cards.

The case that established the prevailing test for symbolic speech is *United States v. O'Brien* (1968). As Roy Moore contends, *O'Brien* "probably evoked more public controversy" during the late 1960s than any other free speech case of its era (1994, p. 132). The decision was announced on May 27, 1968, during a widely publicized student protest at Columbia University, and it stimulated a surge of commentary on the permissible limits of civil disobedience (Johnson, 1997, p. 129). The decision also dealt with conscription at a time when students' antiwar sentiments were becoming increasingly vocal. But the enduring value of *O'Brien* has been the test it set forth to protect symbolic speech, making the decision a cornerstone in deciding the legitimacy of symbolic speech as a distinct category of expression. *O'Brien* analyzed the boundaries and restrictions placed upon symbolic speech to determine whether, as Chief Justice Earl Warren wrote, "an apparently limitless variety of conduct can be labeled 'speech'" (*United States v. O'Brien,* 1968, p. 376). The *O'Brien* Court provided a test for the constitutional protection of symbolic speech that has not been "seriously challenged" or "modified" since 1968 (Fraleigh & Tuman, 1997, p. 292).

Initially, *O'Brien* was a major disappointment to advocates of expanded protection for symbolic speech. To critics, the starting point of the *O'Brien* analysis seemed inappropriate and the focus of the decision too narrow (Martin, 1968, p. 42). The Court's emphasis was on whether the government had asserted a substantial interest sufficient to justify a regulation. The nature of the government interest, not freedom of speech, was the controlling element in the decision-making process. But critics overlooked an equally important point: The open-ended language of *O'Brien* could be reinterpreted as broadly as circumstances warranted, and in the ensuing years the decision became the precedent most consistently relied upon in deciding speech issues implicating symbolic conduct.

This article is subdivided into four sections. The first reviews the facts in the *O'Brien* case. The second analyzes the contours of the symbolic speech issue and the immediate historical and legal context prior to the *O'Brien* decision. The third section examines the *O'Brien* decision and its accompanying test. And the fourth explains the enduring significance of the *O'Brien* test, especially its influence in the flag burning controversy twenty years later.

Facts of the Controversy

On the morning of March 31, 1966, David Paul O'Brien, then 19 years old, and three companions burned their Selective Service Registration certificates on the steps of the South Boston Courthouse. A large crowd had gathered to witness the well-publicized event, including several agents from the Federal Bureau of Investigation and a sizable number of representatives from the media. To many of the onlookers, the act of burning a draft card was provocative. The FBI agents rescued O'Brien and his colleagues from an attack by a hostile crowd and quickly ushered them into the courthouse. For his conduct in burning his draft card, O'Brien was tried, convicted, and sentenced in the United States District Court for the District of Massachusetts. O'Brien was found guilty under the Military Training and Service Act of 1948 (MTSA). That act, as amended by Congress in 1965, required Selective Service registrants to have their draft cards in their possession at all times, and the legislation created criminal penalties for anyone "who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate" (*O'Brien,* 1968, p. 370). At trial, O'Brien insisted that he intentionally burned his draft card to influence people to adopt his anti-Vietnam War beliefs, and he argued that his actions constituted symbolic speech protected by the First Amendment.

The Court of Appeals agreed with O'Brien, ruling that the 1965 amendment to the 1948 MTSA was unconstitutional because it singled out for special treatment individuals who were involved in protest activities. But the United States Supreme Court overturned the Court of Appeals decision and found O'Brien guilty. In the process, the Court set forth its most influential statement to date acknowledging symbolic speech as a distinct category of expression.

The Contours of Symbolic Speech

Symbolic speech is a form of expression that occurs where action and speech become commingled and the resulting hybrid becomes a vehicle designed to express an idea. *Symbolic speech,* which in recent cases also has been called *expressive conduct,* may be contrasted with *pure speech,* which is language-based expression, either oral or written. However, Franklyn Haiman argues that at a general level conduct may be viewed as expression because "certain kinds of non-linguistic behavior perform precisely the same function as do words—the communication of ideas and feelings to other people" (1981, p. 25). Michael Henderson contends that "if the intent of an act is to communicate a certain message, it follows that this act is inherently communicative and should be viewed in the same manner as written or spoken communications" (1996, p. 547).

Mark Kohler draws a distinction between *symbolic* and *non-symbolic* conduct. He defines *symbolic* as involving two characteristics: (1) intent of the speaker, and (2) communicative impact. Kohler contends that the test to determine if the conduct qualifies as symbolic speech is whether the "purported speaker intended a particularized message to be conveyed through his conduct" and whether there is "a substantial likelihood that those observing the conduct will understand that a message is being communicated by the conduct" (1990, p. 383). By implication, conduct that does not reflect these standards should not receive First Amendment protection.

Leading constitutional theorists have identified two other aspects of symbolic speech. Geoffrey Stone writes that symbolic speech is particularly effective as a medium for protest because of its "emotive power," especially in conveying the depths of one's convictions (1989, p. 114). Thomas Emerson contends that symbolic speech developed when activists perceived that they were unlikely to receive media coverage unless they dramatized their message (1970, p. 80). As a result, activists began to utilize variants of symbolic expression to convey their beliefs.

The case law, however, indicates that not all types of speech commingled

with conduct have been accorded equal protection. In fact, *the courts have treated unfavorably cases where conduct was the primary, not the secondary, element of the speech situation or where the conduct was perceived to be more important than the verbal message.* Much of the difficulty associated with the acceptance of symbolic speech has been due to the verbal orientation of First Amendment doctrine, the problem of distinguishing easily between the primary and secondary effects of a message, and the difficulty of drawing a meaningful line between speech and conduct (Stone, 1989, pp. 114–115).

In terms of historical context, the controversies concerning symbolic speech are a product of a twentieth-century perspective on the process of communication. Laurence Tribe notes that the distinction between speech and conduct originated in the labor picketing cases of the 1930s and 1940s. Tribe contends that from inception a two-tiered system for handling issues of symbolic speech developed in the case law. In *Thornhill v. Alabama* (1940) the Court upheld peaceful picketing as a constitutionally protected form of speech. But in a series of other labor cases, the Court drew a distinction between speech and *speech plus* (*speech plus* was defined as speech that includes conduct), and it allowed states to regulate the act of picketing as an example of *speech plus* (Tribe, 1978, p. 598). Although this two-tiered system for symbolic speech provided courts with optimal discretion, it left unresolved where to draw the line between speech and *speech plus.* For a brief period, both *Thornhill* and its companion approach coexisted without challenge. But political events of the early 1960s arising from the sit-in and picketing cases of the civil rights movement drew attention to the distinction. In the period immediately prior to *O'Brien,* the courts faced a series of cases protesting the evils of segregation that included conflicting interpretations of the primary and secondary elements of the speech situation.

By and large, during this period the Court continued its ambivalence toward *symbolic speech,* accepting the concept in dicta but rejecting the thesis of extending protection to all forms of *speech plus.* Moreover, the Court continued to dispose of these troublesome issues on a case-by-case basis while refusing to provide a broader doctrinal treatment of *symbolic speech* as a distinct category.

Four of these cases from the civil rights movement establish the immediate legal context of the *O'Brien* decision. In *Garner v. Louisiana* (1961), the Court reversed several breach of the peace convictions of blacks who were arrested for sit-in demonstrations at lunch counters in Louisiana. The Court resolved this case on very narrow grounds, declaring that a breach of the peace cannot occur if the behavior is orderly and peaceful. In his concurring opinion in *Garner,* Justice John Marshall Harlan insisted that a peaceful

lunch counter sit-in is "as much a part of the free trade in ideas . . . as is verbal expression . . . just as much as, if not more than, a public oration delivered from a soapbox at a street corner" (p. 157).

Five years later in *Brown v. Louisiana* (1966), the Court overturned another breach of the peace conviction arising from a sit-in demonstration. In *Brown,* the Court found no evidence of disorderly conduct apart from the rebelliousness of the protesters in refusing to leave a "whites-only" area of a public library. In his plurality opinion, Justice Abe Fortas affirmed the idea that symbolic speech served as a useful medium to exchange ideas. Even Justice Hugo Black, whose dissent berated the protesters, acknowledged their conduct as "expressing dissenting ideas" (p. 166).

The Court's varied approach to symbolic speech had surfaced a year earlier in *Cox v. Louisiana* (1965). The accept-some-elements-but-reject-other-components approach of the symbolic speech doctrine manifested itself in a fast and loose, bifurcated pattern of thinking. In *Cox,* the Court reversed a conviction for breach of the peace of students picketing a courthouse. Yet it was unwilling to extend the same protection to symbolic speech that it applied to pure speech. In *Cox,* the majority announced that "we emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as those amendments afford to those who communicate ideas by 'pure speech'" (p. 555).

During the Vietnam War, the Court continued its ambivalent approach toward symbolic speech. As opposition to the war escalated, protesters took to the streets to participate in large, dramatic demonstrations. As Haiman explains, the forms of protests generated a hostile reaction from the public "because many of these, such as the draft card burnings, were entirely new forms of expression, and others, like the marches, were unprecedented escalations of old forms" (1982, p. 371).

The Warren Court shared the general ambivalence of the American public toward the Vietnam War, and it sharply disapproved of the forms of protest used by the antiwar movement. Justices Black and Fortas were deeply disturbed by the menacing tactics of the protesters. Justice Thurgood Marshall had close ties to Lyndon Johnson, and he was reluctant to ally himself with opponents of the war. Justices Harlan and Byron White were strongly hawkish. Justices William Brennan and Potter Stewart sympathized with the objectives of the antiwar movement while not necessarily agreeing with its tactics. Justice William O. Douglas was the most libertarian "in his willingness to give wholehearted support to the activists who had taken the struggle into the streets and parks of America, and even to the doorsteps of

the Pentagon" (Belknap, 1998, pp. 87–101). Justice Warren admired President Johnson as a politician and until early 1967 he continued to defend Johnson's military policies. But Warren's disillusionment with the war efforts continued to fester. He was pleased by the president's March 31, 1968, announcement that he would not stand for reelection. Moreover, Warren was sympathetic to the use of protest demonstrations to influence public opinion. He told reporters that the protests "may prove effective in shaking the Establishment out of complacency." He gently reminded the media that "this is a country born in protest" (cited in Cray, 1997, p. 487). Nevertheless, Warren deplored the violence that sometimes accompanied the demonstrations, and he was hostile to many of the extremist tactics employed by antiwar activists. Ironically, the Warren Court, which is heralded for its judicial activism, was willing to defer to "congressional judgment" on the issue of permissible or prohibited "tactics employed by the antiwar movement" (Belknap, 1998, pp. 119–120).

Given the contradictory attitude of the Warren Court toward U.S. involvement in Vietnam, its ambivalence toward the tactics of antiwar protesters, and the massive shift in public opinion after the Tet offensive in February 1968, it is not surprising that the draft card burning case became a highly controversial issue during the spring of 1968. Justice Warren assigned the opinion to himself. Several drafts of the opinion were circulated among the members of the Court before a consensus evolved (Schwartz, 1983, pp. 683–685). None of the Court's private reservations about the case was expressed publicly in written form. Justice Harlan concurred with the Court's opinion, but he explicitly left room for creating enhanced protection for symbolic speech so that a speaker would not be prevented from reaching a desired audience. Harlan believed that O'Brien had multiple alternatives at his disposal to express his political beliefs that did not involve burning his draft card. Moreover, Harlan viewed protecting the registration card as a "substantial" governmental interest (*O'Brien,* 1968, pp. 387–388). Justice Douglas dissented, but his opinion challenged the legality of a peacetime draft because no official declaration of war had been promulgated (p. 389). No part of his opinion mentioned symbolic speech. Justice Marshall did not participate in the decision. From this set of cross-pressures and conflicting circumstances, the *O'Brien* test emerged.

Analysis of the *O'Brien* Opinion

O'Brien presents two important free speech issues. The first issue deals with the difficulty of drawing boundaries between speech and conduct. Simply

stated, could the burning of a draft card be protected as a form of symbolic speech? The second issue deals with judicial deference to legislative authority and whether, in the face of evidence that Congress wanted to stifle dissent with its 1965 amendment to the MTSA, the Court should overturn legislation enacted on the basis of bad motives.

The Symbolic Speech Issue

Justice Warren's hostility to the tactics of the antiwar protesters framed his overall perspective on the case. In *O'Brien,* Warren began his discussion of symbolic speech by rejecting the argument that all forms of expressive conduct should receive First Amendment protection. In one of the most frequently cited passages of the Court's opinion, he wrote: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea" (p. 376). But he immediately followed that statement with an inquiry entertaining the possibility that O'Brien's conduct did actually implicate First Amendment values because it involved political speech.

Reflecting on this alternative formulation, Justice Warren insisted that even a generous interpretation of the draft card burning issue does not necessarily lead to a conclusion that O'Brien's conduct should be granted First Amendment protection. This approach was at odds with Warren's initial thinking that draft card burning was a nonverbal act outside the protection of the First Amendment. Instead, the new language reflected the influence of Justice Brennan, who was dissatisfied with Warren's original draft of the opinion. Brennan lobbied Warren to include language in the Court's opinion that "only a compelling state interest" could justify limiting First Amendment rights. As Bernard Schwartz explains, "Brennan wanted Warren to recognize that the conduct involved did fall within First Amendment protection, but that the interest in regulating it was compelling" (1983, p. 684). Warren's final opinion incorporates much of the approach suggested by Brennan.

In *O'Brien,* Justice Warren sought to enunciate an overarching principle to explain the perceived relationship between verbal and nonverbal categories of communication. His inference, based upon previous decisions of the Court, was that the guiding rule for protecting hybrid acts should be anchored firmly in the existence of an important governmental interest:

> This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify in-

> cidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified [when it meets the following four criteria]. (pp. 376–377)

Warren then announced a four-part test to measure a governmental interest and determine whether that interest might survive the Court's scrutiny in not infringing upon freedom of expression. The four criteria were:

> 1. A regulation must be within the constitutional power of the government;
> 2. A regulation must further an important or substantial governmental interest;
> 3. A governmental interest should be unrelated to the suppression of free expression;
> 4. A governmental regulation must be no greater than is essential to further the desired interest. (p. 377)

Justice Warren relied on these principles to examine the registration procedures of the Selective Service System. He wrote that Congress undoubtedly has the constitutional power to raise and deploy an army, and the accompanying power to conscript citizens. Moreover, he argued that the registration of potential soldiers and the issuance of certificates were a "legitimate and substantial administrative aid in the functioning" of the Selective Service System (p. 377). Warren refuted O'Brien's arguments that the certificate itself was no more than a "piece of paper" and that it should not have to be carried at all times by an individual. Warren graciously conceded that most of the written information on a certificate served no purpose in the vital notification process that informed a soldier when to report for duty. But he vigorously dismissed the broader assertion that a draft card served no purpose at all.

In fact, Justice Warren devoted a surprising amount of space within his opinion to enumerating the reasons for carrying a draft card. A draft card (1) serves as proof that an individual has registered for the draft; (2) saves the Selective Service System time in documenting that an individual has registered and has not avoided the draft; (3) helps the efficiency of the Selective Service System and reduces potential confusion; (4) provides proof during a national crisis that an individual is fit and ready to serve in the armed forces, even if the individual is temporarily located far away from his local draft

board; (5) improves the correspondence between an individual and his draft board by providing a convenient reference number that makes it easy to transmit communication and ultimately speeds up the determination of who is eligible for service; (6) serves as a constant reminder that the person should notify his local board in case of a change of address; and (7) creates harm to the operation of an efficient record keeping system if and when a draft card is mutilated, forged, or altered. If nothing else, these arguments demonstrated to Warren that the requirement to possess a draft card was unrelated to freedom of expression, and that the requirements reflected a functional concern by Congress to raise, maintain, and keep track of members of its military system.

At the same time, Justice Warren reluctantly conceded that the Court was not persuaded that the lack of possession of a draft card per se would directly harm the efficiency of the Selective Service System. He contended that while nonpossession of a card would not be fatal, the act of mutilating, forging, or altering a card would trigger any or all of the seven harms he had enumerated in the opinion. Warren's conclusion was premised on a highly instrumental standard of judgment: He could not envision an alternative to draft cards if the country wanted to maintain an effective Selective Service System.

To buttress the functional argument he advocated, Justice Warren cleverly cited *Stromberg v. California* (1931), a decision that struck down a California statute punishing individuals who expressed political opposition to the government by displaying a flag, badge, or banner. That statute, wrote Warren, was aimed at communicative impact: It infringed on freedom of expression, and therefore could not be upheld (p. 382). But the draft card required by the Selective Service System represented a utilitarian interest, and the government had created an appropriate and narrow means to achieve the compelling objective of maintaining an effective and ready military service. Warren concluded that a sufficient governmental interest had been demonstrated to overcome O'Brien's claim that the burning of his draft card should be protected by the First Amendment.

Congressional Motives

Justice Warren rejected O'Brien's argument that the 1965 amendment to the MTSA was unconstitutional because it was designed to suppress freedom of speech. Warren introduced a fundamental principle of constitutional law: that the Court would not strike down a statute on the basis of "bad motives." As Tribe points out, the Court went to great lengths to avoid the "motive inquiry." It upheld a conviction for burning a draft card despite strong evidence that the intent of the 1965 congressional amendment "was precisely to

stop those who would demonstrate their opposition to the war in Vietnam by publicly burning their draft cards" (1978, p. 593).

There is persuasive evidence that Representative L. Mendel Rivers (D-South Carolina) and Senator Strom Thurmond (R-South Carolina) were alarmed by the burning of draft cards as a tactic to defy authority and feared the mass destruction of such cards. Representative James Bray (R-Indiana) was even more forceful; he envisioned that draft card burning legislation would serve as "one step in bringing some legal control over those who would destroy American freedom" (cited in Belknap, 1968, pp. 129–130). The Senate adopted the proposed amendment by a voice vote, while the House enacted the amendment by a 393–1 recorded vote (p. 130).

Justice Warren remained steadfast in his refusal to undertake de novo review of the 1965 amendment. Warren claimed O'Brien's argument about "bad motives" was based upon a serious misunderstanding. The Court previously had struck down congressional legislation, but only when a statute on its face created harmful or discriminatory consequences. The *purpose* and *language* of the statute were the key points; an analysis of congressional motives was irrelevant. Moreover, Warren was convinced that the number of people making statements like Representative Bray was small in comparison with the full body of Congress. As a result, the Court held that the statute was constitutional on its face and that it would be overreaching to dismiss congressional legislation on the basis of what a few congressmen may have said about the purpose of the law. The Court concluded that the factual basis supporting the contention of "illicit motives" would not be a legitimate ground for dismissing the case (*O'Brien,* 1968, pp. 387–388).

On the other hand, Tribe argues that the "bad motive" rationale was a factor the Court should have assessed more carefully. Among the items that Tribe contends should have been considered were "the circumstances under which the law was enacted," the timing issue (i.e., the adoption of an amendment penalizing draft card burning "only after such conduct became a notorious form of protest"), the elimination of a "dramatic vehicle" of dissent, and the absence of any actual evidence that the "administration of the draft had in any way been endangered" by the burning of draft cards (1978, p. 597). Tribe argues that these questions should have spearheaded a more demanding form of scrutiny by the Court and that the Court's approach was at odds with its own standards of review.

The Court's reluctance to look at the possibility of bad motives is puzzling. That some statutes or regulations are really pretextual—that they serve another purpose than their stated objectives—is a commonplace in administrative law. Justice Warren's seven purposes of maintaining a draft card

add up to "administrative efficiency"; the lack of compelling support for a draft card, plus the dubious history of the 1965 amendment, should have triggered stronger scrutiny. However, the Court was troubled by the tactics of the antiwar movement, unsympathetic to a novel form of protest, and hostile toward the militancy of the protesters.

The Enduring Importance of *O'Brien*

Like *Schenck v. United States* (1919), *O'Brien* is a much more conservative opinion than its reputation would suggest. Also as in *Schenk,* the test formulated in *O'Brien* was capable of being expanded or narrowed as circumstances required. But the elaborate four-part test in *O'Brien* represents the "coming of age" of nonverbal communication (Haiman, 1981, p. 373).

Willingly or inadvertently, the Court in *O'Brien* made symbolic speech a separate and distinct category of expression. *O'Brien* established a more open-ended framework than the decision reached in its holding. In fact, the flexibility of the *O'Brien* test was evident one year later in *Tinker v. Des Moines School District* (1969). In *Tinker,* the nonviolent tactics of antiwar students who wore black armbands to protest the Vietnam War pleased all the members of the Court except Justices Harlan and Black. The Court acknowledged the importance of reasonable policies granting school officials the necessary authority to prescribe and control conduct in schools. But the Court treated the wearing of armbands as more "akin to pure speech" than expressive conduct; it was deemed a passive form of protest. Thus the Court found "the wearing of armbands to be entirely divorced from actually or potentially disruptive conduct by those participating in the protest" (p. 503).

But the most conspicuous example of the influence of the *O'Brien* test on the symbolic speech debate occurred during the flag burning controversy of 1989 and 1990. This controversy vividly demonstrates the indebtedness the symbolic speech doctrine owes to the *O'Brien* test.

No one arguing the pros or cons of flag burning denies that the flag strikes a deeper emotional chord among Americans than the burning of a draft card did in 1970. In the late 1960s, a majority of the American people favored a flag burning amendment on the grounds that the flag serves as a special part of our national symbolism (Michelman, 1990, p. 1339–1343). But the Court's decision in *O'Brien* paid dividends in rejecting legislation to criminalize flag burning. In *Texas v. Johnson* (1989) the Court cited *Spence v. Washington* (1974, p. 409) in observing: "While we have rejected the view that an apparently limitless variety of conduct can be labeled 'speech,' we have acknowledged that conduct may be 'sufficiently imbued with elements of communi-

cation to fall within the scope of the [First Amendment]'" (p. 406). Brennan's majority opinion applied the *O'Brien* test as the controlling standard, and the majority claimed it was merely following precedent in reaching its findings.

The following year the Court faced an even more problematic flag burning statute in *United States v. Eichman* (1990). The Flag Protection Act of 1989, enacted after *Texas v. Johnson* (1989), prohibited impairing the physical integrity of the flag without reference to an actor's motive, message, or impact on the audience, in contrast to the earlier Texas statute that had criminalized flag desecration on the basis of the likely impact on onlookers. Nonetheless, Justice Brennan argued that both acts involved a similar governmental interest directly related to the suppression of freedom of expression. Brennan insisted that the Flag Protection Act both prescribed an orthodoxy of belief and suppressed expression out of concern for the communicative impact on its audience (pp. 2408–2409). But Brennan's sharpest words were reserved for the argument advanced by the government that there was a growing national consensus in favor of prohibiting flag burning: "Even assuming such a consensus exists, any suggestion that the government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment" (p. 2408).

The durability and strength of the *O'Brien* test are also underscored in *Eichman* (1990). In *Eichman,* John Paul Stevens's dissenting opinion proposed a new three-part test to counteract *O'Brien.* The three prongs of the proposed test are: (1) whether the prohibition is supported by a legitimate interest unrelated to "suppressing the ideas that the speaker desires to express"; (2) whether the prohibition does not interfere with the speaker's freedom to express those ideas by other means; and (3) whether the interest in allowing the speaker absolute freedom of choice is less important than society's interest in supporting the desired prohibition (p. 2410). Stevens's *Eichmann* test was designed to justify narrowing the scope of symbolic speech. However, the test presupposes that symbolic speech is presumptively protected. The underlying objective of applying the new test appeared to be to assign more weight to a governmental interest if an alternative means of protesting exists. Although Stevens's *Eichmann* test has been the most formidable challenge to the *O'Brien* test over the past thirty years, this contemporary alternative has yet to attract support from a majority of the Court.

Conclusion

The *O'Brien* test has been the controlling precedent in symbolic speech controversies for more than three decades. The test does not examine the defen-

dant's mode of expression or even the intended message. Instead, the analysis focuses upon whether the government has asserted a substantial interest to justify a regulation. Even Justice Stevens's innovative counter-test was not able to narrow the boundaries of symbolic speech. It was a legal Trojan horse that failed to capture the spotlight. *O'Brien* itself is really a very conservative decision, yet in the ensuing years, a series of commentators and other decisions have been able to expand *O'Brien's* open-ended language.

O'Brien legitimized nonverbal communication as a component of First Amendment thinking. Although there were symbolic speech cases before and after *O'Brien,* no other decision has provided such a durable test to apply to issues where speech and conduct are commingled.

There is still work to be accomplished in incorporating research in communication into legal principles. As Haiman explains, "The problem in dealing with nonverbal communication from a legal perspective is not the question of *whether* the First Amendment applies to such behavior but *when*" (1981, p. 26). The courts have examined such hybrid symbolic speech situations as the unauthorized wearing of military uniforms (*Schacht v. United States,* 1970), nude dancing (*Barnes v. Glen Theatre,* 1991), and even sleeping in a public park (*Clark v. Community for Creative Non-Violence,* 1984). But the question of where to draw the line between speech and nonverbal communication remains problematic. Research from communication studies has been difficult to translate into the bright-line principles that serve as guidelines in the legal community.

On the positive side, a series of cases to consult and multiple factors to draw upon for assistance are available when analyzing nonverbal communication. Most prominent among the factors are (1) the intent of the speaker, (2) the ability of the audience to comprehend then sender's intent, and (3) the harm done to society by the nonverbal component when weighed against the benefits disseminating the communicative message.

Haiman has been especially helpful in synthesizing the legal principles upon which to forge a more productive approach to symbolic speech. His approach begins with the assumption that a person "cannot not communicate" (1981, p. 31). This overarching premise is supported by academic research in communication and psychology, but it has not yet been translated into legal thinking. For Haiman, "all behavior is *capable of being understood* as communication" (p. 31). Unfortunately, this assumption complicates rather than simplifies an interpretation of symbolic speech. Haiman formulates three categories of behavior that include elements of symbolic speech: (1) *entirely symbolic,* such as words, pictures, and gestures; (2) *functional,* such as eating and sleeping where the activity's communicative impact is incidental; and (3) *sometimes symbolic,* such as the length of a person's hair, refusing to pay taxes,

and a parade that disrupts traffic. The "sometimes symbolic" category provides the most difficult questions for developing a First Amendment approach to symbolic speech (pp. 31–33). Haiman contends that the concept of primary or secondary effects, while still accepted in legal circles, is a distinction that does not lead to a productive line of inquiry. Instead he urges that the way to frame the threshold question should be: "Whether the non-symbolic element . . . is sufficiently harmful to place the total conduct beyond any possible First Amendment protection" (p. 35). This is a broader balancing test than *O'Brien* currently recognizes.

The future success of a new theoretical approach to symbolic speech depends on how well the author/theorist can displace, alter, or undermine the *O'Brien* standard, which remains the litmus test that must be challenged or modified. Symbolic speech has come a long way during the past three decades, but *when* and *where* to draw the line still remain problematic.

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Brandenburg v. Ohio

Richard A. Parker

Protecting speech that may incite receivers to take unlawful action has become one of the focal points for determining governmental tolerance of free expression in the United States. The Supreme Court's decision in the case of *Brandenburg v. Ohio* (1969) is singularly significant precisely because it articulated the current standard for identifying the judicial limits of tolerance for such expression.

A review of the recent literature suggests that this case is often cited but rarely analyzed.[1] Therefore this essay addresses the facts of the case, the status of the law of incitement prior to the Supreme Court's ruling, the decision of the Court in *Brandenburg,* and the influence of that decision upon subsequent free speech law.

The Facts of the Controversy

Clarence Brandenburg, a leader of the Ku Klux Klan in Ohio, spoke at a Klan rally on a farm in Hamilton County. The speaker addressed armed, hooded figures with appeals to the strength of the organization, derogatory references to African Americans and Jews, and a single, qualified appeal for action: "We're *not a revengent organization,* but *if* our President, our Congress, our Supreme Court continues to suppress the white, Caucasian race, *it's possible that* there *might* have to be *some revengeance [sic]* [italics added] taken" (p. 446).[2] Unfortunately for Brandenburg, his speech was recorded for posterity by a reporter for a Cincinnati television station; relevant portions were later broadcast on the local station and on a national television network. Because he was charged with advocating violent action to effect political change, Brandenburg became liable for criminal prosecution under provisions of the Ohio Criminal Syndicalism Act (1919). Relevant provisions of the act criminalized advocating "the duty, necessity, or propriety of crime,

sabotage, violence, or unlawful methods of terrorism as a means of accomplishing . . . political reform" and also "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism" (p. 445). Brandenburg was convicted of violating the act, fined $1,000, and sentenced to prison for one to ten years.

Neither the intermediate appellate court nor the Supreme Court of Ohio addressed the substantial constitutional questions raised by Brandenburg in his challenge to the constitutionality of the act under the First and Fourteenth Amendments (p. 445). The United States Supreme Court elected to reverse the lower courts' decisions on sweeping constitutional grounds: It not only declared the Ohio Criminal Syndicalism Act unconstitutional, it also explicitly overturned its own decision in *Whitney v. California* (1927). The Court thereby substantially revised the foundations of incitement law in the light of the Constitution's guarantees of free expression.

The Law of Incitement

The courts have recognized numerous exceptions to the absolute command of the First Amendment: "Congress shall make no law . . . abridging the freedom of speech" (U.S. Const. Amend. I).[3] Among these exceptions is the law of incitement to unlawful action: Simply put, the courts have held steadfastly that expression is unprotected when it incites receivers to commit criminal acts. Soliciting another to commit murder, for example, is a private speech-act made public when the solicitation is addressed to an audience of potential receivers.[4] The law holds that publication of the solicitation provides no refuge from prosecution, the literal commands of the First and Fourteenth Amendments notwithstanding (*Abrams v. United States,* 1919, p. 627 [Holmes, J., dissenting]).

The classic statement of the law of incitement prior to *Brandenburg* appeared in 1942, in the Court's unanimous opinion in *Chaplinsky v. New Hampshire:* "*Insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace* [italics added] . . . are no essential part of any exposition of ideas, and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" (pp. 571–572). The careful reader will notice immediately that the incitement in *Chaplinsky* is different from that in *Brandenburg.* In the former case, the concern was with speakers who provoke an audience to *breach the peace of the speaker.* In *Brandenburg,* the issue is whether or not the sender incites *the receiver to take unlawful action against others.* Nevertheless, the courts have consistently de-

tected a common thread in these disparate types of speech—they constitute categorical exceptions to the guarantee of free expression (Fraleigh & Tuman, 1997, Chap. 6). After 1942 the question became: When does incitement to unlawful action constitute a categorical exception?

Controversies involving the issue of incitement to unlawful action occupied the courts' attention throughout the twentieth century. Prior to *Brandenburg* the Supreme Court entertained three alternative approaches to deciding such cases. In the first major decision of the century involving free speech interests, Justice Oliver Wendell Holmes wrote for the Court that incitement posing a *clear and present danger* to government interests constituted an exception to the apparently absolute command of the First Amendment (*Schenck v. United States,* 1919).[5] When Holmes and his colleague Justice Louis Brandeis clarified this position in subsequent dissents, the majority of the justices eschewed this line of reasoning for an alternative standard: Speech which has a *bad tendency* may be regulated as a component of the state's exercise of its police power (*Abrams v. United States,* 1919; *Gitlow v. New York,* 1925). Eventually the Court explored an alternative approach, *balancing* in each case the gravity of the evil resulting from incitement against the improbability of its occurrence (*Dennis v. United States,* 1951). By 1969 juridical action had exposed the shortcomings of each of these approaches.

The clear and present danger test had been drastically reconfigured into a balancing test in *Dennis* (Wirenius, 2000, pp. 56–62). By the time *Brandenburg* reached the Court's docket, at least two of the justices, Hugo Black and William O. Douglas, had concluded that the language of the clear and present danger test might be construed to mean whatever those who invoke it want it to mean; therefore the test was rendered essentially meaningless. Furthermore, the clear and present danger purportedly resulting from communication need be neither imminent nor likely. Thus even the most remote possibility of unlawful action justified governmental action—i.e., prosecution of advocates. Finally, any test of free speech ought to protect incitement to nonviolent civil disobedience. However, the clear and present danger test did not distinguish between violent and nonviolent results but between lawless and lawful actions.

The bad tendency test provided even less protection for incitement. By criminalizing speech *tending* to produce unlawful action, the bad tendency test effectively reclassified any incitement as unprotected speech—a categorical exception to the First Amendment.

Balancing is a method, not a standard per se; it provides no criteria for decision making. The tasks of determining the elements to be balanced, assigning relative weights to these elements, and conducting the actual balanc-

ing of the elements against each other are left to the arbiter. Thus "speech tends to be devalued as just another social interest to be considered in the mix" (Smolla, 1992, p. 40), rather than regarded as an essential right. Yet devaluing speech is surely an unacceptable way to protect controversial communication.

One other important development in free speech law preceded and influenced the Court's decision in *Brandenburg*. In *Yates v. United States* (1957), 14 defendants accused of advocating the forcible overthrow of the government were eventually released because the Supreme Court ruled, inter alia, that prosecutions for incitement must be directed at those who advocate action, not ideas.[6] "Mere doctrinal justification of forcible overthrow . . . is too remote from concrete action" to provide evidence of incitement (p. 322). While *Yates* was decided on the basis of evidentiary requirements rather than by standards for determining when incitement is punishable, it unmasked the Court's nascent concern for protecting advocacy of unlawful but not imminent action.

Standards and the *Brandenburg* Court

As the Supreme Court confronted the exigencies inherent in *Brandenburg,* the justices implicitly recognized two concerns. The first was that the previous standards had been tried and found wanting. The second was that incitement to unlawful action constituted a unique and enduring constitutional problem.

In the 1960s, when antiwar and antigovernment sentiment was commonplace, the justices realized that a standard for distinguishing between clearly prosecutable cases of incitement and controversies involving protected expression was essential. *Brandenburg* invited the Court to articulate such a standard.

The Supreme Court's Decision

When the Supreme Court convened to discuss the *Brandenburg* case, all the justices concurred that the conviction should be reversed. The justices disagreed, however, regarding the language employed to identify instances of criminal incitement. According to Bernard Schwartz, Chief Justice Earl Warren assigned the task of composing the majority opinion to Justice Abe Fortas. Fortas's draft opinion (cited in Schwartz, 1995, p. 27) proposed a test designed to overcome the limitations of previous standards: "This Court has on many occasions reiterated the principle that 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 law violation except where such advocacy is directed to inciting or producing imminent lawless action *and is attended by present danger that such action may in fact be provoked*" [italics added].[7] Fortas's opinion strengthened the language of the clear and present danger test by requiring evidence of the incitement or production of *imminent* lawless action. Although Holmes had previously endorsed an imminence requirement,[8] the Court never embraced his amended version of the test.

The draft opinion's language aroused Justice Black. He notified Fortas "that he would not concur with the result unless all references to the clear and present danger test were removed" (Schwartz, 1995, p. 27). Fortas refused to accede to Black's request. Before *Brandenburg* was announced, however, Fortas resigned from the Court. Justice William Brennan redrafted the opinion to eliminate any references to the clear and present danger test, substituting for the offending phrase the requirement that advocacy must be "likely to incite or produce such [illegal] action" (p. 28). The change in phraseology shifted the focus of the second element of the *Brandenburg* test from an assessment of the climate in which incitement occurs to a judicial determination of the probability that criminality will result. Schwartz concluded that this revision "completely altered the nature of the *Brandenburg* opinion" because it "virtually did away with the [clear and present danger] test as the governing standard in First Amendment cases" (p. 28). Justices Black and Douglas joined the Court in issuing a unanimous per curiam opinion in the *Brandenburg* case, though they also published separate concurring opinions criticizing the clear and present danger test. The per curiam opinion announced a new test for incitement cases: "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 law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (p. 447). The Court concluded (p. 449) by declaring Ohio's Criminal Syndicalism Act unconstitutional, by extending the new standard to apply to statutes regulating the right of assembly as well as freedom of expression, and by overruling its own prior decision in *Whitney v. California* (1927) excepting criminal syndicalism laws from the constraints of the First Amendment.

Analysis and Interpretation of the Court's Decision

Incitement laws test our commitment to a basic principle: We should maximize protections for expression. In *Brandenburg v. Ohio,* the Supreme Court

held that speech which incites others to unlawful action is safeguarded up to the point where illicit response is imminent. How successful was the Court in protecting communication?

Contributions of *Brandenburg*

Writing in 1920 in the shadow of the Espionage Act convictions, Zechariah Chafee Jr. asserted that the "real issue in every free speech controversy is this: Whether the state can punish all words which have some tendency, however remote, to bring about acts in violation of the law, or only words which directly incite to acts in violation of law" (1920/1969, p. 23). Nearly a half century later, the new requirements for conviction established in *Brandenburg* strengthened First Amendment protections for communicators.

First, the Brandenburg test integrated the element of imminence into existing standards for determining the scope of protection for free speech. An examination of the Court's decisions in *Brandenburg* and subsequent cases clearly establishes that in order to prosecute incitement to unlawful action, the government must establish three elements.[9] The first element of the speech is that the speech must be *directed* toward lawless action. The second element is that the advocacy must call for *imminent* lawbreaking rather than illegal conduct at some future time. The third element is that the advocacy must be *likely* to produce such conduct (Fraleigh & Tuman, 1997, p. 115).

The first element, that communication must be directed toward lawless action, implies that the prosecution must establish not only the apparent function of the words used but also the communicator's criminal intent (*Hess v. Indiana,* 1973; *Texas v. Johnson,* 1989). The second and third elements—imminence and likelihood—combine to restrict the category of punishable incitement. Combining these elements is important because "an incitement test might lead to conviction on the basis of choice of words alone, without an independent requirement that the state show an objective likelihood of imminent lawless action as a result of the speech" (Lynd, 1975, p. 159). After *Brandenburg,* the law punishes only the most obviously intentional, highly probable, and immediate incitements to illegal action.

How does the *Brandenburg* test compare to previous tests for determining when incitement constitutes protected speech? The *Brandenburg* test is clearly superior to both the clear and present danger test and the bad tendency test, for the simple reason that it includes a specific imminence requirement. This requirement also resolves concerns that emanate from the use of balancing: Communication can neither be devalued nor regarded as just another social interest because the test protects speech unless unlawful action is imminent. Moreover, judges are no longer free to disregard these

conditions; the imminence and likelihood requirements limit their autonomy. Thus, by adding a proof requirement of imminence, the *Brandenburg* test fortifies previous standards for determining the scope of protection for free speech.

Second, the Brandenburg test has been interpreted to require judicial re-examination of the factual issues in incitement cases. The Supreme Court has established stringent procedures for deciding cases involving categorical exceptions to the First Amendment, including incitement cases: The Court is committed to a policy of conducting "an independent view of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to insure that protected expression will not be inhibited" (*Bose Corp. v. Consumers Union of United States,* 1980, p. 504). This position both preserves constitutional protection for speech-acts and demonstrates a commitment to protect as much speech as possible.

The Court confirmed its commitment to an exacting examination of the record in its opinion in the notorious flag burning case of *Texas v. Johnson* (1989). Gregory Lee Johnson torched an American flag as an element of a political protest in front of the city hall in Dallas, Texas, during the time of the Republican National Convention in that city in 1984. He was convicted of flag desecration under Texas law. The State of Texas asked the Court to rule that the state "need only demonstrate 'the potential for a breach of the peace,' . . . and that every flag burning necessarily possesses that potential." The Court declined because to do so "would eviscerate our holding in *Brandenburg*" (p. 409). The majority concluded, citing *Brandenburg* (p. 447): "We have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or induce such action'" (p. 409). *Texas v. Johnson* is an explicit commitment to a *policy* of examining the relevant circumstances in incitement cases.

Third, the Brandenburg standard has been interpreted to protect advertising that may incite receivers to unlawful action. In *Carey v. Population Services Intl.* (1977), the Court declared unconstitutional a New York State law prohibiting, among other things, the advertising of contraceptives. Citing *Brandenburg* (p. 701), the Court strongly suggested that the state would be required to demonstrate the efficacy of the advertising in producing imminent lawless action among receivers as a condition of upholding the constitutionality of the law.

Carey is important because the Court explicitly extended the imminence requirement beyond the realm of political speech (p. 701). Moreover, it specifically protected advertising, which, as a form of commercial speech, has been perceived historically as less worthy of protection than political speech (*Central Hudson Gas & Electric v. Public Service Commission,* 1980, pp. 562–563).

Fourth, the Brandenburg test has been applied in civil as well as criminal litigation. The Supreme Court has utilized *Brandenburg* standards to protect speech from civil liability. In *National Assn. for the Advancement of Colored People v. Claiborne Hardware* (1982), for example, the Court ruled that an NAACP boycott of white merchants in Mississippi could not be enjoined and lost earnings need not be compensated because speeches inciting receivers to boycott the merchants were protected by the First Amendment.

A series of cases has questioned the validity of an imminence requirement when assigning tort liability to media defendants. For example, the Supreme Court refused to overturn a Fourth Circuit Court of Appeals ruling that the publisher of a how-to manual for committing murder was liable in aiding and abetting the contract murders of three people (*Rice v. Paladin Enterprises, Inc.,* 1997), despite the fact that the criminal acts were performed more than a year after the killer acquired the materials. Because strict adherence to the imminence requirement would provide virtual blanket immunity to most media defendants, the courts appear to be moving toward broad-based judgments examining all aspects of the record in these tort liability cases, presumably to advance the social interest in compensating injured parties (Vansen, 1998, p. 606).

Fifth, the Brandenburg decision effectively abolished the crime of criminal syndicalism as a control on the exercise of freedom of expression. State criminal syndicalism laws, also known as sedition laws, were used throughout the twentieth century to convict those who advocated force or the use of violence. By the time of World War II more than two-thirds of the states had passed such laws, and after the war many states extended these laws to include subversive activities. In the 1960s a new wave of anti-syndicalism laws was initiated in many states to control "the activities of civil-rights workers, black militants, aggressive peace marchers, and the New Left generally" (Emerson, 1970, p. 155).

Brandenburg v. Ohio changed all that. The Court announced that the incitement test would govern state sedition laws and overruled its contrary holding in *Whitney v. California* (1927). Then it held the Ohio Criminal Syndicalism Act unconstitutional because it fell "within the condemnation of the First and Fourteenth Amendments" (*Brandenburg v. Ohio,* 1969, pp. 448–

449). Consequently, invocation of these state statutes has withered. At the close of the twentieth century, textbooks on free speech treat the law of criminal syndicalism as a historical anachronism.

Criticisms of *Brandenburg*

Several scholars have highlighted *Brandenburg's* apparent weaknesses. At least three of their criticisms merit consideration.

First, the Brandenburg test justifies punishing communicators of messages for acts committed by receivers of those messages. From the civil libertarian perspective, the basic objection to the *Brandenburg* test is that incitement should never be a crime because it wrongly assumes that speakers can cause audiences to commit illegal acts. William E. Bailey claims that communication theory and research provide no support for the position that speech possesses unidirectional causative powers.[10] Thus he concludes that "the Court has assumed wrongly that the speaker is *the* causative agent in the speech situation, and it is this unwarranted assumption that modern communication research most strongly rejects" (p. 10). Taken to its logical conclusion, Bailey's position would absolve the speaker from responsibility in virtually all instances of incitement.

However, immunizing inciters would contradict what courts attempt to do in incitement cases. Rather than absolving either the communicator or the respondent from culpability (Greenawalt, 1989, pp. 80–82, 111), David Crump proposes that judges seek to assign shared responsibility between sender and receiver for incitement to unlawful action when "the solicitor truly is responsible" as determined by evidence of the solicitor's "mental state and conduct" (1994, p. 65). This is functionally equivalent to the concept of shared responsibility for harms (in order to clarify the culpability of accessories to an offense) cultivated in tort law (Lynd, 1975). Presumptively absolving either party of responsibility for inciting illegal action would distort the dynamics of the communication process. Bailey admits as much when he reconfigures communication as involving a symbiotic relationship—a simultaneous cause-effect transaction (Delia & Grossberg, 1977, p. 36)—between speaker and audience.[11]

Moreover, in all probability, absolving the speaker from responsibility because the receiver is an autonomous agent would wreak havoc on criminal law. Every exposed conspiracy would degenerate into a shouting match among co-conspirators, each claiming the role of the innocent inciter while blaming others for committing the offense. The defense of "mere incitement" would become as common in conspiracy cases as the claim of infliction of emotional distress has become in tort litigation (Markin, 2000). Therefore,

as a practical matter, courts wisely diffuse responsibility for illegality among inciters and performers, despite the injunction of the First Amendment. Furthermore, when determining relative culpability in a given case, courts are expected to address such issues as the vulnerability or emotional state of the receiver, the probable effects of the message, and the relative authority or influence of the sender (*Carey v. Population Services Intl.,* 1977; *Watts v. United States,* 1969).

What, then, restrains judges who tend to blame the inciter for acts committed by receivers? Franklyn Haiman suggests a practical guideline that preserves shared responsibility while limiting judicial prerogative to impose undue hardship upon communicators: "Unless coerced, deceived, or mentally deficient," receivers "should *not* be relieved of responsibility for their own behavior" (1981, p. 278).[12] The operant assumption is that free, rational adult minds can make decisions and bear the consequences.

Second, the Brandenburg test permits punishment for incitement to the most innocuous crimes. Haiman argues that the test omits the requirement "that the lawless action contemplated must be a 'serious evil'" (1981, p. 277). This is essentially a broader restatement of the criticism of the clear and present danger test noted above—that it does not protect the advocacy of civil disobedience as the paradigm exemplar of unlawful communication that ought to be immunized from prosecution. However, Haiman's apparent intent is to include a broad category of relatively harmless crimes—e.g., so-called victimless crimes.

The courts have shown some inclination to provide de facto safeguards (*Watts v. United States,* 1969). However, the test itself is deficient precisely because it lacks a specific requirement that prosecutors establish the seriousness of the offense independently of its illegality. The Supreme Court has yet to address the vital question: Does incitement to innocuous criminal action constitute an exception to the imminence requirement?

Third, the Supreme Court itself has fashioned some notable exceptions to the Brandenburg standard in incitement cases. Specifically, the Court has deviated from this approach when the special circumstances of "institutional rules"—regulations that restrict speech in specific legal environments—come into play. The Court has identified several categorical exceptions to the *Brandenburg* standard.

One category of exceptions addresses state requirements that applicants to the bar must swear they have not previously incited others to overthrow the government. In a series of cases (*Baird v. State Bar of Arizona,* 1971; *In re Stolar,* 1971; *Law Students Civil Rights Research Council v. Wadmond,* 1971), the Court upheld the constitutionality of such oaths, ignoring the *Branden-*

burg requirement in each case. Another category of exceptions addresses institutional rules at state-supported colleges and universities. In *Healy v. James* (1972), the Court attempted to deal with a college president's refusal to recognize a local chapter of Students for a Democratic Society. Here Justice Lewis Powell, writing for the Court, acknowledged the *Brandenburg* test as the appropriate standard when the issue was the likelihood of campus disruption and illegal activity. However, he also recognized the institutional goal of preventing disruptions, including violations of reasonable campus rules, interruption of classes, or interference with students' opportunity to obtain an education. Citing *Tinker v. Des Moines School District* (1969, p. 506), Powell concluded that First Amendment guarantees "must always be applied 'in light of the special characteristics of the . . . environment' in the particular case" (*Healy v. James,* 1972, p. 180). The Court also declined to invoke the *Brandenburg* standard in cases involving military personnel. In *Parker v. Levy* (1974) and *Greer v. Spock* (1976) the Court refused to protect freedom of expression and deferred to the preeminence of military necessity in establishing rules for appropriate conduct in the armed forces and on military bases. The Court also recognized that prisons constitute an institutional environment necessitating stringent standards, specifically with regard to regulating potential and actual incitement (*Thornburgh v. Abbott,* 1989 [Stevens, J., concurring/dissenting]). Thus in at least four settings—the bar, schools, the military, and prisons—the *Brandenburg* test will be limited or nonexistent in its applications. The rationale appears to be that public institutions must maintain a threshold level of order and/or adherence to rules in order to achieve their goals (Tedford, 1997, Chap. 11).

Conclusion

The Supreme Court took fifty years to move from its original, restrictive interpretation of incitement to unlawful action as unprotected speech to today's standard requiring proof of direction toward, and a likelihood of, imminent lawless action. During the last 33 years the Court has reinforced its commitment to that standard, requiring a thorough investigation of the circumstances surrounding any claim that speech incites receivers to violate the law. Subsequently, criminal prosecutions for incitement have all but disappeared from the Court's docket, an apparent casualty of the stringent requirements for conviction and the gradual evolution of a climate of tolerance for speech that pushes the envelope of sociopolitical change. The Court has applied the standard in civil as well as criminal cases, and has specifically extended its protections beyond political to commercial speech. Nevertheless, the Court

has carved out a series of exceptions to these stringent requirements when institutional rules limit freedom of expression. However, the Supreme Court has long considered institutional rules to constitute a legitimate class of exceptions to the injunctions of the First Amendment. Overall, the Court's contemporary interpretation of the law of incitement ensures protection for many who would incite others to commit illegal acts.

Perhaps a new day will bring another round of repressive legislation, aggressive prosecution, and severe judicial testing of the law of incitement. If not, this would be a unique development in the history of free expression in this country. If so, and prosecutors once again marshal legal resources to suppress the speech of those who advocate violating the law of the land, we would be wise to recall the admonition of Justice Holmes, dissenting in *Gitlow v. New York:* "Every idea is an incitement" (1925, p. 673).

Notes

1. Recent exceptions include Schwartz (1995) and Crump (1994). An older but still valuable resource is Siegel (1987). The classic reference in the field is Haiman's Chapter 12: "Incitement to Illegal Action" (1981).

2. The italicized words illustrate the absence of malice, specificity, and appeal to immediate action in Brandenburg's incitement.

3. *Chaplinsky v. New Hampshire* (1942) identified exceptions to First Amendment doctrine.

4. Greenawalt observed that this is a commonsense distinction rather than one grounded in precedent (1995, p. 673).

5. The Court explicitly endorsed the clear and present danger standard on numerous occasions. See, e.g., *West Virginia Board of Education v. Barnette* (1943).

6. The convictions were remanded to the district court, where prosecutors could not meet the evidentiary requirements imposed by the Supreme Court.

7. The Fortas draft is in the Thurgood Marshall Papers, Library of Congress, *Brandenburg v. Ohio* file, and is reproduced in part by Schwartz (1995, p. 27).

8. "The United States constitutionally may punish speech that produces or is intended to produce a clear and *imminent* [italics added] danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent" (*Abrams v. United States,* 1919, p. 627 [Holmes, J., dissenting]).

9. A review of Supreme Court citations to *Brandenburg v. Ohio* (1969) on Lexis/Nexis Internet Site (2000) identified 37 cases; these were culled to identify those in which the *Brandenburg* standard was material to the decision rendered.

10. Benson (1991) offers a convincing argument for the claim that Bailey's (1981) perspective constitutes a communication theory. Bailey's analysis assumes that cause-

effect analysis is tenable; it is limited to conclusions derived from empirical research. However, demonstrating that the cause-effect relationship between speech and action cannot be measured does not disprove its existence. The relationship may defy measurement with the instruments available in the 1980s, or it might be amenable to rhetorical rather than empirical analysis.

11. If the law recognized "the audience as a definite and possibly determinant factor in speech efficacy" and considered "the causal factors traditionally assigned to the speaker [to be] possibilities rather than certainties," Bailey claims that courts "would not affirm incitement convictions." Rather, he asserts, the courts would "hold that too many variables enter to allow the conviction and that no audience can be compelled by word to commit acts they do not want to commit" (1981, p. 10). None of these conclusions follows empirically from Bailey's premise. Since *Brandenburg* no contemporary court claims that receivers in incitement cases are forced to do what the sender says or vice versa. Instead the courts identify senders and receivers (i.e., their personality characteristics, intents, and actions) as variables to be assessed, without prejudging the relevance of any variable or the necessity of any outcome.

12. Haiman (1981, pp. 278–283) devotes several pages to discussing the "hard cases" that this policy entails.

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Cohen v. California

Susan J. Balter-Reitz

Free speech law is premised on the importance of language—the idea that words have power. There would be no need to protect expression if language had no effect on individuals or culture. Language is central to the values that have been articulated by both the Court and legal theorists to justify the protection of expression. These values can be divided into two categories: (1) expression serves as an outlet for the speaker, and (2) expression serves some function for the audience.[1] Both speakers and audiences are affected by the words of a message; speakers are able to express themselves in the manner they choose and audiences are exposed to diverse viewpoints. Because words have power, there is always an impulse to control the words used to express ideas; to control language is to control thought. Although the power of language is at the heart of the First Amendment, few Supreme Court decisions explicitly focus on the debate that surrounds the exclusion and inclusion of particular words in the lexicon of the public sphere. *Cohen v. California* (1971) is perhaps the Court's finest articulation of the importance of protecting the ability of protesters to use the language they find most appropriate to their message. As such, it deserves to be among those nominated as the most significant free speech cases in the twentieth century.

Facts of the Controversy

On April 26, 1968, Paul Robert Cohen appeared at the Los Angeles County Courthouse to testify as a defense witness in a misdemeanor trial. He walked into the building wearing a dark jacket upon which were painted several peace symbols as well as the slogans "Stop the War" and "Fuck the Draft." As Cohen walked down the corridor toward the courtroom where he was scheduled to testify, three police officers noticed his jacket. Cohen took the jacket off as he entered the courtroom and folded it over one of his arms. The

policemen followed Cohen into the courtroom, approached the bench, and asked the presiding judge to hold Cohen in contempt of court. The judge refused their request, so the officers arrested Cohen as he left the courtroom and charged him with "disturbing the peace by engaging in tumultuous and offensive conduct" (*People v. Cohen,* 1969, p. 505).

Cohen was convicted and sentenced to 30 days in the Los Angeles County jail. He appealed his conviction to the California Court of Appeals, which ruled in the state's favor. Cohen appealed this ruling to the California Supreme Court, which rejected his appeal. In each appeal, Cohen claimed that California's application of the breach of the peace statute to his case was an infringement on his freedom of expression (*Cohen v. California,* 1971). Cohen took his case to the U.S. Supreme Court, which granted certiorari on February 22, 1971.

The Limits of Speech

At first glance, it would seem that California had no right to silence Cohen's antiwar message, a clear instance of political speech. Although the Court has never interpreted the First Amendment as providing absolute protection for all speech, political protest has been widely acknowledged as central to the protections guaranteed by the First Amendment. A state that wishes to censor political speech must overcome a strong legal presumption. Despite this presumption, a Los Angeles County judge convicted Cohen, and two higher California courts upheld his conviction. California offered three separate arguments to justify its silencing of Cohen. First, Cohen's jacket was likely to cause a breach of the peace, and thus the state was justified in censoring Cohen's jacket to protect the public good. Second, Cohen's wearing of the jacket was conduct rather than speech and, as such, did not deserve First Amendment protection. Third, Cohen had no right to use vulgarity to express his message. Each argument was intended to shift presumption away from the protection of Cohen's right to political speech by providing California with legitimate grounds to protect its interests.

Breach of the Peace

Cohen was convicted under California's breach of the peace statute, a law that values the protection of public order more highly than the protection of a speaker's right to communicate a message to an audience.[2] When a court considers a breach of the peace conviction, it is asked to weigh the likelihood that a speaker's message would incite violence in the audience against the right of the speaker to communicate ideas. Although there were no signs that

Cohen's jacket caused any turmoil in the courthouse, and no witnesses came forward to testify that they were in any way offended by Cohen's message, the California Court of Appeals found that: "The defendant's stated purpose was to force a confrontation with others as to his opinion of the draft. The expression he chose to display on his jacket is one that is not used publicly to espouse a philosophy of personal conviction. He was intent upon attracting the attention of others to his views by the sheer vulgarity of his expression. He must have been aware that his behavior would vex and annoy a substantial portion of his 'unwilling audience'" (*People v. Cohen,* 1969, p. 506). The combination of the language Cohen used and the finding that those present in the courthouse constituted a captive audience sufficed to justify California's contention that Cohen was likely to cause others to breach the peace. Although California did not argue that the captive audience in the courthouse in and of itself was sufficient justification to restrict Cohen's speech, the captivity of this audience made the possibility of a breach of the peace more likely.

Prior to *Cohen,* the Supreme Court's rulings on breach of the peace cases were inconsistent. Two cases in particular illustrate the different standards applied by the Court in determining the likelihood that a speaker's words might incite violence in an audience. In *Feiner v. New York* (1951), the Court upheld the conviction of Irving Feiner for calling the mayor of Syracuse names on a street corner. Although no actual violence resulted from Feiner's speech, the Court claimed that Feiner's conviction rested not on the content of the speech but on the reaction it actually engendered in the crowd. Twelve years later, in *Edwards v. South Carolina* (1963), the Court refused to uphold the conviction of 187 high school and college students who marched on the South Carolina State House to protest discrimination and were charged with breach of the peace. The Court held there was no evidence presented that the crowd was in any way prone to violence and concluded that the students' convictions rested entirely on their viewpoint.

Speech v. Conduct

One strategy that can be used to minimize the value of protest is to create a distinction between speech and conduct. Conduct is not clearly protected by the First Amendment. If the state could prove that wearing a jacket was conduct rather than speech, Cohen would have no standing to claim that he was within his First Amendment rights to wear the jacket. The California Court of Appeals clearly distinguished between the message printed on the back of the jacket and Cohen's wearing of the jacket. The Court argued that "In the case before us, the defendant's conduct consisted of 'speech' and 'non-speech'

elements. Here the non-speech elements of the defendant's conduct consisted of marching through a public building with the premeditated intent of attracting the attention of others to the message on his jacket" (*People v. Cohen,* 1969, p. 509). This delineation between the intent of the message and Cohen's display allowed the California Court of Appeals to claim that it was not restricting political speech.

The Right to Use Offensive Language

The most controversial finding of the California Court of Appeals was that Cohen had no right to use the word "fuck" to express his message. While the First Amendment offers no protection for obscene speech, there is no argument that Cohen's message could be classified as obscenity.[3] Thus the California court validated its restriction of Cohen's language based on a standard that did not have First Amendment standing. It argued that Cohen's choice of language was inappropriate for the public sphere; his use of the word "fuck" was inappropriate for civil discourse: "The defendant has not been subjected to prosecution for expressing his political views. His right to speak out against the draft and war is protected by the First Amendment. However, no one has the right to express his views by means of printing lewd and vulgar language that is likely to cause others to breach the peace to protect women and children from such exposure" (*People v. Cohen,* 1969, p. 509). While California's first two justifications for restricting Cohen's speech hint that the language of the protest was the primary reason for silencing Cohen, this opinion explicitly states that California has the right to ban certain words from the public vocabulary.

The Decision of the Supreme Court

Although the Court granted certiorari to Cohen's case, many of the justices were uneasy about the issue of protecting his language. There was a general squeamishness on the Court about the use of the word "fuck." When the case was discussed in conference, Chief Justice Warren Burger referred to it as the "screw the draft" case (Woodward and Armstrong, 1979, p. 150). Justice Hugo Black, a free speech absolutist, was so uncomfortable with the word that he defined Cohen's action as conduct and voted to uphold California's conviction. Bob Woodward and Scott Armstrong (1979, p. 151) note that even the liberals on the Court, who were in favor of reversing California's decision, thought that this case was not "worth giving blood on." Justice John Marshall Harlan, the author of the majority opinion, seemed to reinforce the liberals' position, beginning his decision with the admonition: "This case

may seem at first blush too inconsequential to find its way into our books" (*Cohen v. California,* 1971, p. 15). Despite his opening sentence, Justice Harlan's opinion is perhaps the most incisive critique of language norms undertaken by the Court. The opinion's systematic examination of the controversy wrought by Cohen's choice of language makes explicit the values articulated by the California Court of Appeals and those espoused by the Supreme Court.

Justice Harlan's opinion took an unusual form for a Supreme Court decision. After he provided the facts of the controversy and argued that the Court had jurisdiction over the case, he dedicated the first substantive part of the decision to defining the categories of speech that Cohen's jacket did *not* fall under: The jacket could not be considered obscene, the message did not constitute "fighting words," and the audience was not captive. This strategy allowed Justice Harlan to undermine California's justification for upholding Cohen's conviction as well as provide the basis for arguments that Cohen's jacket was political speech and, as such, deserved absolute protection under the First Amendment. Harlan directly addressed some of California's arguments and undermined others that were not as explicitly stated, most notably the state's interest in protecting a captive audience and the inference that "fuck" might be taken as obscene.

Justice Harlan began his direct argument against California's position by stating that Cohen's conviction rested entirely on the offensiveness of the message rather than on conduct. The opinion relegated California's argument that Cohen's jacket was likely to cause a breach of the peace to a minor concern. Justice Harlan created a tension between Cohen's expression and the state's wish to expunge "fuck" from the public vocabulary. The issue, he noted, "is whether California can excise, as 'offensive conduct,' one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assumption that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary" (pp. 22–23).

Harlan contended that if the state has the right to eliminate specific words from public discourse it would be tantamount to the state's proscription of a viewpoint: "We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning expression of unpopular views" (p. 26). Thus the state's regulation of public discourse is considered de facto viewpoint censorship rather than protection of the public good.

Justice Harlan supported the right of speakers to choose the language they use to create their messages. He recognized that language has both cognitive and emotive functions. His famous metonymy,[4] "one man's vulgarity is another's lyric" (p. 25), spoke to this argument. He stated: "We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function, which, practically speaking, may often be the more important element of the overall message sought to be communicated" (p. 26). Justice Harlan thus framed California's decision to cleanse the language of protest as outright censorship. His argument not only protected Cohen's ability to express himself in the manner he chose, it also made visible the power that the California court attempted to wield. By controlling the language of protest, California was controlling the content of the protest as well.

Influence of the Decision

At the heart of *Cohen* is Justice Harlan's affirmation of the power of language. Cohen's jacket was clearly political speech; his intent was to express his dissatisfaction with the government's policy of coercing young men into military service. Under traditional First Amendment principles, Cohen's message would be protected. Yet Cohen's conviction was not overturned until the Supreme Court heard it, and even there the vote was only 5–4 to overturn. The reason the conviction was upheld by the California Court of Appeals was the manner in which Cohen chose to protest the draft. It was the language of the expression, not the political opinion expressed by the message, that resulted in Cohen's harsh treatment by the state of California and his narrow victory in the Supreme Court.

Justice Harlan's opinion was instrumental in broadening the protection of speech by refining two different First Amendment concepts: defining the constraints of the captive audience doctrine and providing protection for speakers who use language that some members of an audience might find offensive. While the courts have yet to develop consistent doctrine in either of these two areas (Strauss, 1991), *Cohen* has been responsible for increasing the protection offered to speech under the First Amendment.

Captive Audience

Prior to *Cohen,* states were able to justify restricting speech by arguing that they were protecting a captive audience—an audience that was unable to escape the message of the speaker and was therefore "trapped." Previously, the Court viewed these unwitting audience members as helpless in the face of the

onslaught of speech. While *Cohen* did not entirely eradicate the Court's use of the captive audience doctrine, it did significantly reshape its contours, especially in regard to individuals who are confronted with messages outside their homes.

Cohen established two principles to guide the Court in determining whether an audience should be protected from unwanted messages. The first of these relates to the place where the message is encountered. While Justice Harlan reaffirmed a listener's right to be free from unwanted messages in the home, his opinion reinforced the openness of public places. When individuals leave the sanctity of their homes they must be prepared to protect themselves from unwanted messages rather than relying on intervention from government agents. Harlan reaffirmed the holding in *Rowan v. Post Office Dept.* (1970, p. 738) that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." Harlan concluded that no substantial privacy interests can be claimed outside the home (*Cohen,* 1971, p. 21). Thus the public must avoid unwanted messages for themselves; it is their responsibility to avoid communication they might find offensive.

The second principle advanced by *Cohen* requires the Court to consider the difficulty the listener would have in avoiding an objectionable message. Justice Harlan argued, "Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes" (p. 21). This simple statement was revolutionary: If the government wants to silence objectionable messages, it must show that the unwilling audience had to go to great lengths to avoid the speaker's message.

A number of cases have cited and expanded on *Cohen's* standards of a captive audience. In *Spence v. Washington* (1974), *Erznoznik v. City of Jacksonville* (1975), and *Consolidated Edison v. Public Service Commission of New York* (1980) the Court protected the rights of speakers on the basis of the argument that unwilling auditors could easily avoid the messages by simply turning their heads (*Spence* and *Erznoznik*) or by throwing away an offensive flier (*Consolidated Edison*). While the Court still recognizes some situations where individuals may be considered captives, more often than not public communication is protected as a result of *Cohen*.[5]

The Power of Language

Cohen introduced a new level of protection into the marketplace of ideas. If the First Amendment protects anything, it protects the ability of citizens to criticize the government. Prior to *Cohen,* however, the Court envisioned the form that protest could take in narrow terms. Mark Rutzick noted: "It viewed the process by which ideas were formed and conveyed in a very restricted

framework. Its paradigm was a debating society, a sedate assembly of speakers who calmly discussed the issues of the day and became ultimately persuaded by the logic of one of the competing positions. Emotion never entered the debate, for emotion had nothing to do with truth" (1974, p. 18). Cohen's message, centered on the emotive power of the word "fuck," challenged this paradigm. His language signaled intensity of feeling as well as a political message. Justice Harlan's opinion embraced the emotionalism of the protest as well as its content. By protecting emotive as well as cognitive content, Harlan reinforced the dual values of the First Amendment. Speakers should be able to express themselves using the language they find most appropriate to convey their sentiments.

Several subsequent Supreme Court cases cite *Cohen* as controlling precedent for the claim that a speaker cannot be silenced because an audience finds the message offensive. In both *Hess v. Indiana* (1973) and *Baines v. Birmingham* (1971) the Court ruled that a speaker's use of profane language was insufficient grounds for restricting protest. The Court also applied this reasoning to flag desecration cases in *Spence v. Washington* (1974) and *United States v. Eichman* (1990). In *Carey v. Population Services International* (1977), the Court used *Cohen* to protect the advertising of birth-control methods in a college newspaper, even though some students were offended by the ads. Each of these instances of speech provoked emotional responses from audiences, yet the Court protected the speaker's right to use the language he or she deemed most appropriate. Harlan refused to grant states the power to proscribe the form of protest, and his opinion allows the debate over language use to be conducted without a juridical mandate.

Viewing *Cohen* as a Study in Verbal Hygiene

Justice Harlan's opinion is essentially a critique of California's prescriptive approach to language. As noted earlier, California intended to ban the word "fuck" because it was likely to antagonize an audience. However, the California Court of Appeals decision did not evaluate the debate over the word or specify the values it relied on to justify excluding this word from the public sphere. Conversely, Harlan's opinion illustrated a reflexivity of language use that constitutes a compelling argument against California's standards for language usage. Both courts were engaging in a practice that Deborah Cameron labels "verbal hygiene."

According to Cameron, verbal hygiene is the attempt to change language usage to conform to a set of standards that may or may not be accepted by members of a language community. There is no single practice of verbal hy-

giene; it "comes into being whenever people reflect on language in a critical way" (1995, p. 9). At any time people may engage in verbal hygiene on any number of issues they have with the way language, grammar, or style is used. While the most common forms of verbal hygiene are practiced by language communities that debate the usage of words, its practice is not limited only to discussions of usage. Essentially, verbal hygiene occurs whenever disputes about language use occur, whether they are concerned with usage, practices, or who makes the rules about what can be said. Cameron argues that examination of verbal hygiene practices is crucial, for learning about these practices "has the potential to cast light on the relations between language, society and identity" (p. 17). Harlan's opinion exemplifies the debate over language practices; his argument makes clear the values and assumptions at work in this particular controversy and provides insight into the role the Court ought to take when engaged in verbal hygiene controversies.

Cameron argues that controversies over language involve issues of authority, identity, and agency (pp. 12–23). That is, language use, especially use that is considered "proper," creates and maintains power structures: Those who can play the language game have their messages taken more seriously by other members of the political, social, and educational elite. Cameron notes that "rules of language use often contribute to a circle of exclusion and intimidation as those who have mastered a particular practice use it in turn to intimidate others" (p. 12). Those who do not know or abide by the rules are often frustrated by institutional systems. California's attempt to keep "fuck" out of the vocabulary of protest would have the effect of limiting the actors who engage in protest. Individuals who would be most likely to express their dissatisfaction with the Vietnam War by using "fuck" would not be admitted into discourse about the war. Franklyn Haiman (1972) made a similar argument when he argued that the Court's protection of Cohen's expression was important because it protected the language of the streets.

Justice Harlan's opinion also rejected the power of the state to interfere in the communication process. *Cohen* argued that the state has no right to determine what words should be available for use by a speaker. Harlan consistently reinforced the rights of the speaker to use the full spectrum of language to construct a message: Cohen and his audience are the interpreters of his expression; thus the government should not interfere in the communication process to protect only some of those in the audience who may be offended by Cohen's choice of words.

Harlan concluded his opinion on this point with perhaps the most recognizable quote from this opinion: "For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre,

it is nevertheless often true that one man's vulgarity is another's lyric" (*Cohen,* 1971, p. 25). The determination of whether a word should be judged as vulgarity or lyric belongs to the participants in a communication situation, not to the state. The Court does not set standards for direct language practices: It does not disallow particular words, but it does create principles for the application of standards. Harlan's verbal hygiene created a meta-rule that should be applied to the debate over language practices: Language serves different users in different ways. Cameron argues: "We cannot avoid arguments about the merits of particular norms. Since the one thing that really is inevitable about our linguistic practices is their normativity, quarrels about language should concern (and in fact, once one has cut through the ideological undergrowth, do concern) not whether there ought to be norms but which norms they ought to be" (pp. 163–164). Harlan's argument creates a higher order principle of language use than does the California court. It speaks to who should have the power to control public discourse rather than what should not be said in public.

Disputes over verbal hygiene do not only bring power issues into focus; they also shed light on the construction of identity that occurs through the use of language. Individuals are defined by the language they use, but they also define themselves by their use of language. Perhaps the most recognizable theme that runs through the *Cohen* opinion is confirmation of the emotive function of language. Justice Harlan protected not only Cohen's right to condemn the draft but also his right to express his message in a manner that conveyed his vehemence. Haiman has noted that "it can hardly be maintained that phrases like, 'Repeal the Draft,' 'Resist the Draft,' or 'The Draft Must Go' convey essentially the same message as 'Fuck the Draft.' Clearly something is lost in the translation" (1972, p. 189). The use of the word "fuck" gives the message its potency. Charles Ogden and I. A. Richards wrote that words are an exercise of "power over the external world" (1930, p. 47). If the Court is to proscribe the words the public has available to frame its protests, in effect it is limiting the power of individuals to make sense of their environments and their place in those environments.

Justice Harlan proposed a theory of language that would be very familiar to scholars of communication, but it was revolutionary for the Supreme Court. He noted that "most linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact words are often chosen as much for their emotive as cognitive force" (*Cohen,* 1971, p. 26). Cohen certainly could have chosen many different words to represent his displeasure with the draft, but none would have conveyed the same mean-

ing as the expression he chose and none would have said as much about how he viewed himself as a language-user. Harlan's opinion critiques California's banning of the word "fuck" merely on the grounds that some people might be offended. His opinion rejects the imposition of the power of the state into the language debate on the basis of unarticulated value positions. By exposing California's unspoken justifications, Harlan was able to argue successfully that language choices should be made by those who use the language rather than by a judicial or legislative authority.

Perhaps more than any other Supreme Court case, *Cohen* reaffirms the Court's protection of our rights to express our frustrations with the government in the manner we choose. Justice Harlan's refusal to demonize the particular form of expression that Cohen selected is a grand statement about the power of language to express not only content but also emotion. The state does not have the power to control the language of civil discourse, even if it offends some in the audience. Harlan's opinion clearly specifies the right of individuals to decide how they want to speak. *Cohen v. California* stands as one of the Court's most fervent protections of language. Harlan's opinion protects not only dissent but also the manner in which a person may engage in dissent. This decision set the stage for *Texas v. Johnson* (1989) and other cases that reinforced the right to political protest no matter how offensive some may find the means. This alone warrants its inclusion as one of the landmark free speech cases of the twentieth century.

Notes

1. Classical justifications for protecting speech are aimed at the audience. John Milton, for example, argued that freedom of expression is necessary in the search for truth (Sabine, 1951). John Stuart Mill advanced Milton's argument by adding that people will become better critical thinkers if a diversity of viewpoints is available for their consideration (Spitz, 1975).

2. The law reads, in part, "Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, . . . or who . . . use[s] any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor" (*Cohen v. California,* 1969, p. 505).

3. Cohen's message would have been subject to the *Roth* test of obscenity. California would have had to show that "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest" (*Roth v. United States,* 1957, p. 489).

4. For a complete discussion of metonymy see Bosmajian (1992, pp. 141–166).

5. Perhaps the most notable exception to the shrinking of the captive audience was the Court's decision in *FCC v. Pacifica* (1978). Wilfred Tremblay discusses the arguments the majority opinion used to restrict the definition of captivity in his chapter on *Pacifica* in this volume.

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Kleindienst v. Mandel

Mary Elizabeth Bezanson

Citizens of the United States define themselves politically and culturally by the First Amendment's protection for freedom of speech. Few realize that protection would be meaningless without the coextensive protection of the right to receive.[1] One reason for this lack of recognition may be that the freedom of speech and the right to receive often are so entangled that they are difficult to distinguish. In only a handful of cases is the right to receive the issue fully before the courts. The 1972 Supreme Court decision of *Kleindienst v. Mandel* is one of those cases and so remains one of the landmark free speech decisions in the twentieth century. *Kleindienst* turns in large part on the Court's conception of communication; thus the majority and dissenting opinions make important comments on the Court's perception of the process of communication. The contribution of *Kleindienst* is conceptual rather than legal. This essay considers the facts of the case, the strength of the precedent line supporting the right to receive, the Court's treatment of the issues in *Kleindienst,* the conception of communication developed in the decision, and the importance of the decision in subsequent communication law.

Facts of the Case

Ernest E. Mandel, a Belgian citizen, was the editor of *La Gauche,* the Belgian Left Socialist weekly, and the author of the two-volume work, *Marxist Economic Theory* (1969). While asserting that he was not a member of the Communist Party, he advocated "the economic, governmental, and international doctrines of world communism" (*Kleindienst,* 1972, p. 756).

Mandel was granted visas to enter the United States in 1962, as a working journalist, and in 1968, as a speaker at various universities and colleges. In both cases, without his knowledge, his admittance was granted at the attor-

ney general's discretion, since he was ineligible for admittance under the Immigration and Nationality Act of 1952, which allowed for the exclusion of any alien advocating the doctrine of world communism (pp. 754–755).[2] In September 1969, Mandel again applied for a nonimmigrant visa for a six-day period to allow him to participate in a conference at Stanford University. He was invited to respond to an address given by John Kenneth Galbraith. When others learned of his visit, he was also invited by the faculties of Princeton, Amherst, Columbia, and Vassar to speak, and invited to Cambridge, Massachusetts, and New York City by members of other groups. Given his longer itinerary, Mandel filed a visa application allowing for a more extended stay (p. 757). His visa requests were denied. The Immigration and Naturalization Service, acting for the attorney general in a letter to Mandel's New York counsel, argued that while in the country in 1968 his activities "went far beyond the stated purpose of the trip, on the basis of which his admission had been authorized and represented a flagrant abuse of the opportunities afforded him to express his views in this country" (p. 759).

In the majority opinion of *Kleindienst,* Justice Harry Blackmun asserted that after his visa applications were denied, Mandel addressed a meeting in New York on transatlantic telephone (p. 759). However, in the appendix to *Mitchell v. Mandel,* later renamed *Kleindienst v. Mandel* following the change in attorneys general, Exhibit O suggested that Mandel's address to the Bertrand Russell Peace Foundation in New York City was heard by the 1,200-member audience on a tape recording; the planned transatlantic hookup failed (p. 51). The asserted differences in mode of access and the failure of the technology became significant because they denied Mandel's receivers the opportunity to interact with him.

In March 1970, Mandel joined David Mermelstein, Wassily Leontief, Norman Birnbaum, Robert L. Heilbroner, Robert Paul Wolff, Louis Menashe, Noam Chomsky, and Richard A. Falk in filing a lawsuit (Motion to Affirm, p. 1). All those joining Mandel were United States citizens and university professors desiring direct communication with Mandel (*Kleindienst v. Mandel,* 1972, p. 759). Of course, as U.S. citizens only Mandel's receivers had standing to sue.

A three-judge District Court rendered a sharply divided opinion in *Mandel v. Mitchell* (1971). Judge John F. Dooling Jr., joined by Circuit Judge Wilfred Feinberg, found the statutes in question reached beyond subversive activities to "belief and preachment" (p. 625). He found that the government had unconstitutionally infringed on the First Amendment rights of Mandel's receivers. District Judge John R. Bartles wrote in sharp dissent, concluding that

"the determination of which classes of aliens may enter and remain in the United States is wholly within the sphere of the political branches of the government" (p. 638). The government appealed directly to the Supreme Court.

Precedent Line for the Right to Receive

The Court has provided specific protection for the right to receive in four quite different channels of communication: personal distribution of literature, public speaking, mass media, and mail. Each will be considered in turn.

The Court's first explicit recognition of the right to receive occurred in *Martin v. City of Struthers* (1943). Justice Hugo Black, writing for himself and four others, found that the city ordinance prohibiting those distributing literature from summoning residents to the door constituted an unconstitutional intrusion on the rights of speakers and receivers. He contended, "This freedom [of speech and press] embraces the right to distribute literature and necessarily protects the right to receive it" (p. 143). In recognizing the rights of the participants in *Martin,* Black argued, "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulation of time and manner of distribution, it must be fully preserved" (pp. 146–147).

The four justices writing in dissent found other interests more compelling. Justice Felix Frankfurter argued that the right to privacy was more essential (pp. 153–154). Justice Stanley Reed, joined by Justices Owen Roberts and Robert Jackson, argued that no censorship occurred because the ordinance restricted only the action of summoning residents to the door, not the communication of distributing literature (p. 156).

Three years after the decision in *Martin,* Justice Black wrote the majority opinion in *Marsh v. Alabama* (1946), involving the distribution of literature in a company-owned town. Again, Jackson, joined by four others, found the right to receive fundamental to the decision of the case. He argued, with regard to citizens of a company-owned town, "To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored" (p. 508). Thus, for Jackson, the private property rights of the corporation owning Chickasaw could not overcome the rights of her citizens to receive information. Justice Reed, joined by Chief Justice Harlan Stone and Justice Burton, found the private property rights of the owners of Chickasaw dispositive. For the dissenters in this case, the right to receive could not overcome private property interests.

The Court has also recognized the importance of the right to receive

through the public speaking channel of communication. *Thomas v. Collins* (1944) involved a union organizer, R. J. Thomas, speaking in defiance of an order to restrain his speech until he received an organizer's card required by Texas statute. Justice Wiley Rutledge, delivering the opinion of the Court, determined that "the right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly" (p. 532). Justice Jackson supported Rutledge's position in his concurring opinion: "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us" (p. 545). Justice Rutledge and those supporting his position recognized the importance of First Amendment protection for the rights of labor organizers and workers wishing to hear him. Justice Roberts, joined by Chief Justice Stone and Justices Reed and Frankfurter, wrote in dissent. They argued that the statute in question required only the registration of those working as paid solicitors, in essence providing protection for the interests of receivers (pp. 549, 556).

Although *Garrison v. Louisiana* (1964) is not commonly interpreted as a case decided upon the right to receive, Justice William Brennan, writing for the Court in that case, based his decision in part on that right. *Garrison* involved the conception of slander when a public figure, a district attorney, criticized the conduct of another group of public figures, judges in his area (p. 64–65). Justice Brennan wrote: "The *New York Times* rule is not rendered inapplicable merely because an official's private reputation,[3] as well as his public reputation is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants" (p. 77). Here the rights of receivers appeared more essential than the interests of speakers.

The Court recognized early the importance of the right to receive through the mass media channels of communication. In *Grosjean v. American Press Company* (1936), involving a Louisiana statute requiring a license tax on all newspapers with a circulation of over 20,000 copies per week, Justice George Sutherland recognized that the question raised "goes to the heart of the natural right of the members of an organized society, united for their common good, to impart, and acquire information about their common interests" (p. 243). While Justice Sutherland did not use the language of the "right to receive," his conception of the case nevertheless turned on that notion.

Almost 20 years later, in *Butler v. Michigan* (1957), the Court considered

the constitutional acceptability of a Michigan statute classifying as a misdemeanor the distribution of materials, including books, pamphlets, magazines, newspapers, and ballads that had the potential to corrupt the morals of minors (p. 381). In writing for the full Court, with Justice Black concurring in the result, Justice Frankfurter wrote: "The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig" (p. 383). Frankfurter recognized that the effect of the Michigan statute was to "reduce the adult population of Michigan to reading only what is fit for children" (p. 383). The Court realized that adult members of a society had the right to receive material deemed unacceptable for youth.

Two cases decided only three years before *Kleindienst* provided further support for the right to receive through the mass media. In a landmark case, *Red Lion Broadcasting Company v. FCC* (1969), concerning the acceptability of the fairness doctrine, Justice Byron White found: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee [citations omitted]" (p. 390). Justice White concluded, "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. That right may not constitutionally be abridged either by Congress or by the FCC" (p. 390). In *Red Lion,* the full Court (absent Justice William O. Douglas, who did not participate) again realized that the rights of receivers were more fundamental than the rights of speakers.

In the year of the *Red Lion* decision, the Court also heard *Stanley v. Georgia* (1969), involving a Georgia statute which punished private possession of obscene material. The Court unanimously determined that Stanley's constitutional rights had been violated, but for two quite different reasons than in *Red Lion*. Delivering the opinion of the Court, Justice Thurgood Marshall wrote, "It is now well established that the Constitution protects the right to receive information and ideas" (p. 564). He contended: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds" (p. 565). Five justices joined Marshall in his assessment of the case. Justice Potter Stewart, joined by Justices Brennan and Byron White, concurred in the decision of the Court but

concluded that Georgia had obtained the material in question through illegal search and seizure (p. 569). These cases demonstrate the Court's recognition and support for the right to receive through the mass media.

The only important precedent involving the mail channel of communication was *Lamont v. Postmaster General* (1965). Justice Douglas, writing for seven members of the Court, concluded that the federal statute requiring the Postmaster General to hold overseas "communist political propaganda" until requested by the addressee was unconstitutional because it imposed an affirmative obligation on the addressee. Douglas wrote: "This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as "communist political propaganda" (p. 307). Douglas appeared to base his decision, albeit implicitly, on the right to receive.

In his concurring opinion, Justice Brennan, joined by Justices Arthur Goldberg and John Harlan, made explicit the importance of the rights of receivers. Determining that the right of access to publications was essentially a penumbral right, Brennan wrote, "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers" (308). For Brennan, and those joining him, the right to receive functioned as the primary constitutional interest in the free flow of information.

The Supreme Court's Decision

The Court's treatment of *Kleindienst v. Mandel* put into sharp relief two competing interests: a citizen's right to receive and the government's sovereignty. The six-member majority found that the government's interest in sovereignty outweighed the citizen's right to receive. The dissenting opinions balanced those interests in critically different ways. This section examines those differences.

Justice Harry Blackmun, joined by Chief Justice Warren Burger and Justices Potter Stewart, Byron White, Lewis Powell, and William Rehnquist, delivered the opinion of the Court. Justice Blackmun began by establishing the Court's acceptance for the right to receive citing *Stanley v. Georgia*'s (1969) citation of *Martin v. City of Struthers* (1943), *Thomas v. Collins* (1944),

Red Lion Broadcasting Co. v. FCC (1969), and *Lamont v. Postmaster General* (1965). These were the significant cases establishing the line of precedent in the four channels of communication considered previously. Blackmun asserted further that the right to receive was "'nowhere more vital' than in our schools and universities," citing *Shelton v. Tucker* (1960, p. 487), *Sweezy v. New Hampshire* (1957, p. 250, plurality opinion), and *Keyishian v. Board of Regents* (1967, p. 603). From the precedent line supporting the right to receive and that right's essential role in academics, Justice Blackmun dismissed two of the government's arguments: that this case involved only action and that alternate access to Mandel's ideas existed. The balance of Justice Blackmun's opinion asserted that the government's legitimate sovereign interest in determining immigration policy exceeded the rights of receivers. Blackmun argued: "Appellees' First Amendment argument would prove too much. In almost every instance [of] an alien excludable under § 212 (a)(28), there are probably those who would wish to meet and speak with him. The ideas of most such aliens might not be so influential as those of Mandel, nor his American audience so numerous, nor the planned discussion forums so impressive. But the First Amendment does not protect only the articulate, the well known, and the popular" (p. 768). The majority appeared to believe that by opening the door to Mandel, the attorney general's ability to exclude those who could be excludable would be destroyed. Blackmun concluded: "We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant" (p. 770). For the majority, if the government provided any justification for exclusion, no First Amendment or other challenge would be allowed against a decision flowing from governmental sovereignty.

Justice Douglas wrote in dissent. Accepting that "The First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know" (p. 771), Douglas wondered if the attorney general could forbid the entry of those who believed the earth to be round or who accepted the theory of evolution (pp. 771–772). Douglas argued that in *Kleindienst,* "The Attorney General stands astride our international terminals that bring people here to bar those whose ideas are not acceptable to him" (p. 772). Douglas rejected the view that the attorney general was entrusted with such power by Congress and would have admitted Mandel (p. 774).

Justice Marshall, joined by Justice Brennan, also wrote in dissent, providing an extensive rebuttal to the majority decision. Justice Marshall began by fully accepting the majority view that the First Amendment protects the

right to receive. In addition to citing Court precedent, Marshall provided a conception of communication that would support his position (p. 775). He then moved to a thorough analysis of the majority's justification for abridging the free speech rights of receivers. He rebutted the majority position on a number of grounds.

Justice Marshall questioned the majority's "unprecedented deference to the Executive" (p. 777) in accepting the attorney general's assertion of a "legitimate" rather than a compelling interest and in refusing to "look behind" that assertion. Marshall found the attorney general's reason for Mandel's exclusion a "sham" (p. 778). He argued that the real question the majority failed to face was whether Mandel could be excluded merely for promoting world communism. Because the Court had ruled in *Noto v. United States* (1961, pp. 297–298) and *Brandenberg v. Ohio* (1969, pp. 447–449) that the government cannot constitutionally prohibit the "mere advocacy of communist doctrine, divorced from incitement to imminent lawless action" (p. 780), Marshall reasoned that there could be no "compelling" reason for Mandel's exclusion. Marshall believed that the correct reading of *Lamont v. Postmaster General* should be determinate in this case because "the burden imposed on the right to receive information in our case is far greater than in *Lamont* (1965), with far less justification" (p. 781). Finally, Marshall rejected the majority opinion that the government's position was beyond review because the admittance of aliens was involved. For Marshall, the long line of "ancient" precedent cited by the majority could be distinguished from *Kleindienst* because in all the previous cases only the interests of aliens were before the Court (pp. 781–782). Marshall concluded, "Without any claim that Mandel 'live' is an actual threat to this country, there is no difference between excluding Mandel because of his ideas and keeping his books out because of their ideas. Neither is permitted" (p. 784).

Analysis and Interpretation: The Court's Conception of Communication

The legal precedent relied on in *Kleindienst* provided minimal justification for the right to receive due to the limited nature of those holdings, limited support of the Court, and limited theoretical justification. *Kleindienst*'s ultimate contribution was not legal but conceptual. Not only did the full Court support the right to receive, that support was based on both the limited legal precedent and the developed theoretical conception of the process of communication.

Despite the fact that members of the *Kleindienst* majority determined that

the government's interest in sovereign control over immigration outweighed the rights of receivers, those rights were still supported. The majority rejected the government's claim that because Mandel's receivers had alternate access to his ideas, no First Amendment rights were implicated (p. 765). In rejecting the government's claim the majority also rejected the conception of communication implicit within that claim. A rhetorical, rather than legal, analysis reveals the significance of this move.

In *Metaphors We Live By* (1980), George Lakoff and Mark Johnson quoted Michael Reddy as suggesting that the "conduit" metaphor structures "our language about language" (p. 10).[4] Lakoff and Johnson suggested the following as examples of this metaphor in everyday talk:

> It's hard to *get* that idea *across* to him.
> I *gave* you that idea.
> It's difficult to *put* my ideas *into* words.
> Try to *pack* more thought *into* fewer words. (p. 11)

Reddy asserted that the "conduit" metaphor was structured around three notions:

> Ideas (or meanings) are objects.
> Linguistic expressions are containers.
> Communication is sending. (p. 10)

These ideas are echoed in the government's position that alternate access to Mandel's work was sufficient. If ideas or meanings are objects, then those objects are not changed by the channel of communication in which they are sent. There is no rhetorical difference between reading an idea in a book and speaking to an individual. If linguistic expressions are containers, then books are the same as speeches, tape recordings, or telephone hookups. If communication is sending, then receivers are irrelevant.

The majority believed that "this argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning" (*Kleindienst,* 1972, p. 765), thus rejecting the "conduit" metaphor. These justices realized that the quality of the communication changes when individuals meet face to face. But they did not suggest why.

Justice Marshall in his dissent explained why face-to-face interaction influences the quality of communication. He argued, "The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin"

(p. 775). Marshall's "coin" metaphor suggests quite a different reading from the conduit metaphor. The coin metaphor would suggest:

> Ideas (or meanings) are negotiated.
> Linguistic expressions gain meaning from people.
> Communication is the interplay between sending and receiving.[5]

Marshall explicitly commented on the importance of this novel metaphoric structure when he asserted: "But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the 'means indispensable to the discovery and spread of political truth'" (*Kleindienst v. Mandel,* 1972, p. 775, citing *Terminiello v. Chicago,* 1949, p. 4). Through his powerful metaphor, Justice Marshall captured the vibrancy of the way communication works in human culture. Marshall realized that the guarantees of the First Amendment are fully developed only when both speakers and receivers are granted protection. He concluded: "There can be no doubt that by denying the American appellees access to Dr. Mandel, the government has directly prevented the free interchange of ideas guaranteed by the First Amendment. It has, of course, interfered with appellees' personal rights both to hear Mandel's views and to *develop and articulate their own views through interaction with Mandel* [italics added]" (p. 776). Marshall understood, as the majority did not, the full First Amendment implications of denying Mandel's entry.

Contribution to Case Law

Given the full Court's support for the right to receive based on both legal precedent and theoretical conception, and the rather extraordinary interest in opposition to that right, one might suppose that protection for the right to receive would now hold great influence with the Court. This has proved not to be the case. Relatively few significant First Amendment cases cite *Kleindienst.*[6] In only three cases did the opinion of the Court employ the *Kleindienst* precedent to support the right to receive. In seven cases, dissenters called on that support but failed to convince their colleagues; in two cases, concurring opinions used that support to establish an alternate justification for a decision. In one case, the majority accepted the notion of the right to receive and rejected its application to the facts before it.

Kleindienst was cited as part of the precedent line in seven dissenting opinions. In each instance, the dissenting justice was attempting to demon-

strate that the right to receive outweighed a competing governmental interest: Justice Douglas's dissent in *Gravel v. United States* (1972) involving the extension of the speech and debate clause to a congressional aide; Justice Powell's dissent in *Saxbe v. Washington Post* (1974), involving the news media's access to individual prisoners at minimum and maximum security prisons; Justice John Paul Stevens's dissent in *Smith v. United States* (1977), involving the appropriate definition of "community standards" in obscenity cases; Justice Stevens's dissent in *Houchins v. KQED* (1978), involving media access to a county jail; Justice Marshall's dissent in *United States Postal Service v. Greenburgh Civic Associations* (1981), involving placing "unstamped" messages in private mailboxes; Justice White's dissent in *Renne v. Geary* (1991), involving the endorsement by political parties in nonpartisan races such as city offices; and Justice Rehnquist's dissenting and concurring opinion in *Allentown Mack Sales v. NLRB* (1998), involving the establishment of union representation.

Kleindienst was cited in only two concurring opinions: Justice Powell's opinion in *Young v. American Mini Theatres* (1976), involving zoning for adult movie theaters; and Justice Stewart's opinion in *Richmond Newspapers, Inc. v. Virginia* (1980), involving press coverage of a trial.

In *Pell v. Procunier* (1974), the majority accepted the right to receive and rejected its application. Justice Stewart argued that while the First and Fourteenth Amendments protect the right to publish and "correlatively" the right to receive generally, the press could be refused special access to prison inmates (p. 832).

In only three cases did a majority of the Court find that the right to receive outweighed the competing governmental interest. In each of these cases, the rights of the speakers involved were not as easily identifiable as the rights of the receivers.

In *Procunier v. Martinez* (1974), the Court unanimously held that censorship of prisoners' mail went too far. Justice Powell, writing for himself and seven others, determined that the free speech rights of prisoners were not the only rights implicated by a prison censorship scheme: "Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily impinges on the interests of each" (p. 408). In effect, Justice Powell argued that the free speech rights of the outsider determined the level of constitutional protection afforded to prisoners' mail.

A nearly unanimous Court supported the right to receive in *Virginia State*

Board of Pharmacy v. Virginia Citizens Consumer Council (1976), involving the rights of receivers to have access to prescription drug prices. Writing for himself and six others, Justice Blackmun argued that "freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and its recipients both. This is clear from the decided cases" (p. 756). Those decided cases included *Lamont* (1965), *Kleindienst* (1972), and *Martinez* (1974), as well as a list of other right-to-receive cases. Justice Blackmun concluded, "If there is a right to advertise, there is a reciprocal right to receive the advertising" (p. 757). Blackmun and the majority joining him found that the right to receive outweighed the state's interest in preserving the professional reputation of pharmacists.

In a spirited dissent, Justice Rehnquist disputed the claims of the majority. He argued that the majority extended standing beyond previous decisions and granted First Amendment protection to "purely commercial endeavors" (p. 781). For Rehnquist the rights of receivers were not implicated in this case because the information they desired could be acquired either by calling a pharmacy or by having the information published. Rehnquist reasoned, "Appellees who have felt so strongly about their right to receive information as to litigate the issue in this lawsuit must also have enough residual interest in the matter to call their pharmacy and inquire" (p. 782). The commercial dimensions of the message were telling for Rehnquist: "It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment" (p. 787). Rehnquist categorically denied First Amendment protection to the rights of receivers when the message of the communication was commercial. Six years later, in *Board of Education v. Pico* (1982)—a case involving student rights of access to materials in a school library—he denied receivers that same protection when "inappropriate" messages flowed through the library. Justice Brennan, writing for the barest plurality of the Court, again relied on *Kleindienst* to support the rights of receivers. In protecting the rights of students to have access to materials in school, Justice Brennan argued that: "First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them. . . . More importantly, the right to receive ideas is a necessary predicate to the *recipient's* [italics added] meaningful exercise of his own rights of speech, press, and political freedom" (p. 867). Justice Rehnquist dissented sharply. He argued, "It is the very existence of a right to receive information, in the junior high school and high school setting, which I find wholly unsupported

by our past decisions" (p. 910). He went so far as to suggest that Brennan had fashioned this new doctrine out of "whole cloth" (p. 910). He conceded that "the Court has recognized a *limited version* [italics added] of this right in other settings" (p. 910), but not in schools. Not only would Rehnquist *deny* extension of the right to receive to the school library, he suggested that protection for that right in other channels was *limited*.

Conclusion

Kleindienst v. Mandel (1972) may never be recognized as a First Amendment landmark decision. After all, the rights of Mandel's receivers were denied. Yet the contribution of the majority and dissenting opinions was inestimable. For the first, and perhaps only, time the rights of receivers were recognized and supported by all the members of the Supreme Court. Further, that support sprung not only from a tenuous line of legal precedent but also from a novel conception of communication.

Members of the Court rejected the "conduit" metaphor of communication that infuses all language about language. Rather, the majority sensed but could not name something more. Justice Marshall named it. As he said, "The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin" (*Kleindienst,* 1972, p. 775). Here was the essence of communication, in language that has never again been cited by the Court. Scholars in speech communication are in a unique position to understand Justice Marshall's perceptive metaphor. They are likewise capable of explaining why both the sending and receiving of communication are equally worthy of First Amendment protection.

Notes

1. There is a subtle yet significant difference between the right to receive and the right to know. The right to receive involves the reception of messages speakers wish to send. The right to know involves requiring a speaker to disseminate a message. For example, the right to receive means that once a book is selected to be placed in a library's collection, it could not be removed because of its political content. The right to know would require a library to place all books on its shelves.

2. The statutory language can be found at 66 Stat. 182, 8 U.S.C. § 1182 (a)(D) and (G)(v) and § 1182 (d)(3)(A). The relevant parts of the statute are included in the *Kleindienst* opinion (1972, p. 755).

3. The *New York Times* rule "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the

statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not (*New York Times v. Sullivan,* 1964, pp. 279–280).

4. For other works examining the use of metaphor in Supreme Court opinions please see Bosmajian (1984), (1986), and (1992).

5. A fuller discussion of these issues than is possible here is provided in Bezanson (1987).

6. Representative works that focus on the issue of immigration and academic freedom include: Burr (1985), Scanlan (1988), and Sherman (1988). *Kleindienst* establishes important legal precedent in cases involving immigration and academic freedom.

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Miller v. California

Joseph Tuman

While much effort has been exerted to prevent the spread of obscenity in this country, offering some precision in its definition, much less divining any tests to regulate it, have proven far more elusive. What exactly is obscenity? How does the person who creates a message know when the message is obscene? Is obscenity concerned with nudity? Sex? Deviant behavior? Vulgarity? Offensiveness? Why has our society concerned itself with obscenity in the first place? Do the effects of obscenity justify its regulation?

> There are two groups of people who are professionally interested in . . . identification [of obscenity]: the lawyers and the moral philosophers; the administrators of justice the more because eternal problems can wait for solutions (the most important ones have already been waiting thousands of years), but criminals cannot. They die away before a reliable law has been passed according to which they will receive the punishment they deserve. And so public prosecutors avowedly brought charges with a bad conscience. But better laws that nobody believes in than none at all. Paulus said: "In the absence of law, sin goes unrecorded." For the sake of recording it, obscenity laws have been reformulated—and at the same time it has been admitted that nobody knows the meaning of obscene. (Marcuse, 1965, p. 13)

> I could never succeed in [defining obscenity] intelligibly. . . . But I know it when I see it. (*Jacobellis v. Ohio,* 1964, p. 197 [Stewart, J., concurring])

> The problem is . . . that one cannot say with certainty that material is obscene until five members of this Court, applying inevitably obscure standards, have pronounced it so. (*Paris Adult Theatre I v. Slaton,* 1973, p. 92 [Brennan, W., dissenting])

In this chapter I examine the Supreme Court's opinion in *Miller v. California* (1973), a landmark decision which provided the definition of, and test for, obscenity. This particular case is one of the seminal decisions of the last century, but not because it offered any unique or groundbreaking perspective on obscenity and freedom of expression. In fact, it provided little in the way of new insights into the subject. The *Miller* ruling was constructed from an amalgamation of earlier tests and definitions, the sum of which allowed the Court to fashion a threadbare majority holding and finally dispose of the issue. With exceptions for minor clarifications, the *Miller* test for obscenity continues to be the standard used today. To understand the significance of the justices' achievement in developing this test, one must begin by placing the *Miller* case in the context of obscenity historically, and in the range of Supreme Court decisions that tried and ultimately failed to garner the support of five justices on the Court. I will explore *Miller* in this context, and then consider the precise holding in this case, before considering what effects it has had on other obscenity cases and our legal system. In that last section I will focus upon the Court's rhetorical choice of emphasis upon "community standards" and assess what impact this has had upon an enduring communication-based theory: free expression in the marketplace of ideas.

Contextualizing Obscenity

The authors of the *Miller* majority opinion were very clear that their discussion of obscenity was confined to pornography, and "hard core" pornography at that. This focus raised a question that still goes begging today: Why is obscenity limited this way? To understand what the Court was seeking in *Miller,* one must first understand the concept of obscenity in a larger cultural and historical context. What does "obscenity" mean? Where did the word, or the concept behind it, originate?

In the United States, early courts were markedly influenced by developments in British common law but occasionally traced concepts back to early Roman law. This may explain the early context for obscenity. In this country, the Supreme Court has acknowledged that the origin of the word may have come from the Latin *obscaenus,* combining *ob,* meaning "to" and the word *caenum,* meaning "dirt," "filth," "mire" and "excrement" *(Miller,* 1973, p. 18). *Caenum* was also used to denote penis and, in the plural, genitals or posterior. The word *obscenum* was employed in Roman literature to express aesthetic aversion (ugly), moral aversion (immoral) and material aversion (disgusting). Writers such as Cicero, Ovid, and Livy often used it to suggest a

general sense of vulgarity or nastiness. Were these pieces the origins of the concept as employed in this country?

Another possibility suggests the word *scena* or stage. Some have argued that obscene derives from this word *scena,* as in "off the stage," meaning things which should not appear on stage and never in public display.[1]

Dirt, filth, genitals, aversion, and public display may explain part of this but not all; in this country (as in some others), obscenity has always been about sex, and the aforementioned terms do not always apply in that context. The early history of the Catholic Church may provide some other explanations. The church first provided a catalogue of banned books in the year 496, but this list (and those which came after it) focused mostly on the writings of heretics, and only rarely on what might be considered indecent or obscene. A rare example might include some writings of Pope Pius II, who, under the name Aeneas Silvius de Piccolomini, wrote erotica in his youth—which he banned after he became head of the church. By 1900, however, the *Index of Proscribed Books* as dictated by Leo XIII expressly prohibited "books which treat, relate or teach dirty or immoral things" (p. 14), most definitely pointed at the sexual. The basis for the church's objection to this form of expression was a Catholic sense of morality, reinforced by interpretation of an early passage in the Old Testament: the account of the fall. In the book of Genesis, Adam and Eve are forced from the Garden of Eden by an angry Creator. But is the Creator's wrath directed at their consumption of the apple (which had been expressly forbidden) or the self-awareness it induced, creating a sense of shame of their own nakedness? In the fourth century, Augustine read this passage as suggesting that "the sexual desire of our disobedient members arose in those first human beings as a result of the sin of disobedience . . . and because a shameless movement resisted the rule of their will, they covered their shameful members" (cited in Pagel, 1988, p. 111). Augustine's position, eventually adopted by the church, suggested that sexual relations were "inherently sinful and would only, and barely, be tolerated for procreation purposes in the context of marriage" (cited in Nahmod, 1992, p. 385). Awareness of the self, therefore, was connected to awareness of sexuality; this promoted intercourse, which was sinful unless done for procreation in marriage.

This view of obscenity was pervasive and influential throughout other countries and cultures where Christianity flourished. In seventeenth-century England, Christian Puritanism influenced a strong rejection of any portrayal of sexual pleasure in literature (Tribe, 1988, p. 905). Bawdy and sexually related vulgar behaviors were similarly treated.

The 1663 case of Sir Charles Sydles is generally regarded as the first ob-

scenity case in Great Britain. Sydles was a confidant of the crown, and well known for his bad behavior. After one episode of a drinking binge, he reportedly climbed to the balcony of a tavern, stripped for the audience that gathered below, and proceeded to yell religious insults while showering the audience with his urine. The audience became an angry crowd and then a mob, damaging the tavern. Although Sydles was convicted for using force to cause a breach of the peace, his case was recognized as precedent for the notion that obscenity (in this case, his nudity) may cause a breach of the peace (*Dominus Rex v. Curl,* 1727, p. 788).

There was little else in the way of common-law development of obscenity in Great Britain until 1868,[2] when Lord Chief Justice Cockburn authored a test for obscenity in the case of *Regina v. Hicklin.* This case involved an antireligious pamphlet that detailed the sexual nature of questions asked by Catholic priests and included references to sexual intercourse. In banning these pamphlets, Cockburn's opinion offered a test which provided that the question was "whether the tendency of the matter charged . . . is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall" (*Regina v. Hicklin,* 1868, p. 368). This test sought to determine the obscene nature of expression on the basis of its effects upon those most susceptible to its influence.

American courts widely adopted the *Hicklin* test (see, e.g., *United States v. Kennerly,* 1913), although eventually some judges were willing to make exceptions in an ad hoc fashion if the expression in question was classic literature (e.g., the works of Rabelais or Ovid). Nevertheless, reliance on the *Hicklin* standard exacted a "heavy toll on contemporary literature" (Tribe, 1988, p. 906). Works by authors such as Theodore Dreiser and D. H. Lawrence were declared obscene in 1930.[3] By 1933, however, the tide had begun to shift against the use of the *Hicklin* test. Judges abandoned the standard in favor of one which examined the effect on the average reader or viewer of the dominant theme of the allegedly obscene work, taken as a whole.[4]

To this point it was generally assumed that restrictions against obscenity were within the limitations of the Constitution. Indeed, until 1948 the Supreme Court never directly considered whether rules against obscenity might violate the Constitution generally, and the First Amendment specifically. Prior to that time, the Court's decision to uphold restrictions against obscenity (on other grounds) inferred a view that the restrictions were constitutional (see, e.g., *Rosen v. United States,* 1896). Likewise, dicta in cases like *Near v. Minnesota* (1931) and *Chaplinsky v. New Hampshire* (1942) strongly suggested a willingness to allow anti-obscenity regulations as constitutional. For example, in *Chaplinsky,* the Court held that "lewd and obscene . . . utter-

ances are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" (1942, pp. 571–572). This passage was strongly influential and encouraged the development of a First Amendment conception often referred to as the doctrine of categorization: the idea that certain classes of valueless speech merit no First Amendment protection (Tuman, 1992, p. 114). One of these classes of valueless speech was obscenity.

In 1948 the Supreme Court had an opportunity to address the constitutionality of obscenity laws. In reviewing a New York lower court's conviction of Doubleday and Company for publishing Edmund Wilson's *Memoirs of Hecate County,* a divided Court considered the First Amendment implications for the first time. The Court ultimately affirmed the conviction in a per curiam decision without issuing any opinion (*Doubleday v. New York,* 1948, p. 848). The *Doubleday* case was significant, however, in that it first showcased how divisive the obscenity question would ultimately come to be within the Supreme Court.

Nine years later the Supreme Court again considered the constitutionality of obscenity regulations, dividing once more in *Roth v. United States* (1957). In *Roth,* Justice Brennan's majority opinion vigorously asserted that obscenity was not within the protection of the First Amendment (p. 485) and branded this form of expression "as utterly without redeeming social importance" (p. 484). Brennan was nevertheless careful to affirm that sex and obscenity were not necessarily the same thing, suggesting instead that "obscene material is material which deals with sex in a manner appealing to prurient interest" (p. 487). The *Roth* opinion then rejected *Hicklin* and seized upon Judge Learned Hand's suggestion that the test for obscenity would now be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests" (p. 489). *Roth* produced a separate concurring opinion (and analysis) from Chief Justice Earl Warren and a concurring/dissenting opinion from Justice John Marshall Harlan, as well as an outright dissent by Justices William O. Douglas and Hugo Black. That kind of divided thinking regarding obscenity would continue for the next 16 years.

While some later decisions refined and focused the *Roth* standard,[5] nine years passed before the Court more formally addressed this obscenity test. In *Memoirs v. Massachusetts,* a bare three-justice plurality opinion veered away from the previous standard, arguing that, for obscenity, "three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is pat-

ently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value" (1966, p. 418).

The last element of this test was significant. In *Roth,* the language "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance" (p. 484) operated as a justification for restricting obscenity. In *Memoirs,* the Court's plurality opinion transformed the *Roth* language into part of the test for determining whether something was obscene. By making it part of the test, prosecutors and law enforcement officials were compelled to prove that any challenged obscene material was utterly without socially redeeming importance or value. However, this was only a plurality opinion of three justices, and suggested no consensus on what constituted obscenity. The result for the next seven years was that no majority opinion with five justices could be constructed or agreed upon; instead, some 31 obscenity cases were decided by the Court, with five justices in a majority holding (all with separate opinions) applying five different tests for obscenity (see, e.g., *Redrup v. New York,* 1967).

To return to the question with which this section opened: In the time leading to the *Miller* opinion, what was obscenity? Plainly it was limited to sex and sexual matters, not mere nudity. More specifically, it dealt with depictions of sex that appealed to prurient interests and had no worth or value.

Curiously, however, the 31 aforementioned cases with diverse reasoning from the Supreme Court produced summary reversals of convictions for obscenity, because the justices could not agree among themselves. Meanwhile, public tolerance and tastes were changing in the late 1960s and early 1970s. That same public constituted the community whose standards would apply in those cases.

It was against this backdrop that the *Miller* case, an otherwise ordinary and quite unremarkable obscenity case (at least on the facts), took center stage.

The *Miller* Decision

In June 1973 the Court handed down its ruling in *Miller.* The case dealt with the application of a California state criminal obscenity statute to one Marvin Miller, charged and convicted for knowingly distributing obscene material. Miller had sent five unsolicited advertising brochures through the mail in an envelope addressed to a restaurant in Newport Beach, California. There the envelope was opened by the restaurant manager and his mother. Neither had requested the brochures, which advertised four books titled *Intercourse,*

Man-Woman, Sex Orgies Illustrated, and *An Illustrated History of Pornography,* and a film titled *Marital Intercourse.* The brochures were a combination of printed text, photographs, and drawings, displaying groups of people engaged in sexual acts with genitals plainly exposed. The recipients of this material complained to the police, who brought charges against Miller for violation of Section 311.2 (a) of the California Penal Code.[6]

As with the cases before *Miller,* the Court began by acknowledging the legitimacy of the state's interest in regulating material that was obscene, but suggested that the issue before the Court was to decide once and for all by what standards obscenity might be identified for the purposes of such regulation (*Miller,* 1973, p. 20). The five-member majority opinion was authored by Chief Justice Warren Burger and joined by Justices Byron White, Lewis Powell, Harry Blackmun, and William Rehnquist. Justices William O. Douglas, William J. Brennan, Potter Stewart, and Thurgood Marshall dissented. Burger's majority opinion opened with an acknowledgment of the "tortured history of the Court's obscenity decisions" (p. 20). It stressed the prior conflict within the Court, and noted that no approach had been found with which at least five members of the Court could agree (p. 21).

Burger limited his discussion to works which depicted or described sexual conduct. He announced a new test for any court to use in determining obscenity: (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appealed to the prurient interest (in sex); (b) whether the work depicted or described, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacked serious literary, artistic, political, or scientific value (p. 25).

Burger's opinion rejected the "utterly without redeeming social value" standard (p. 25) from *Memoirs,* suggesting it had never been supported by more than three justices at one time. With a nod to Justice Brennan, the author of the *Memoirs* opinion and now one of the four dissenters in *Miller,* Burger noted that even Brennan had "abandoned" the *Memoirs* standard as unworkable (p. 27).

The majority emphasized that it was not the place of the Court to dictate to the states how their obscenity laws should be worded. Yet in the same breath, the Court offered examples of what might qualify as obscene under the majority holding. These included: "(a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; or (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals" (p. 25). In essence, this analysis applied the Court's ruling to both words and pictures.

The majority opinion then warned that prurient, patently offensive representations or descriptions might still merit First Amendment protection if they were found to have serious literary, artistic, scientific, or political value. For example, the majority suggested, a medical textbook with graphic illustrations of human anatomy would merit protection (p. 26).

The majority opinion was also at pains to distinguish and dismiss the complaints lodged in dissents by Justices Douglas and Brennan—especially the latter. Justice Burger's opinion claimed that Brennan now suggested that no test for obscenity could distinguish between protected and unprotected speech; therefore, attempting a new test would be pointless (p. 27). If there is a single strong theme woven into the majority opinion, however, it is that five justices on the Court concluded that a distinction between protected and unprotected speech was both possible and necessary.

This becomes more obvious when the opinion recounts some facts of the case and leaves out others. Why did Burger's opinion describe the titles of the material advertised in the unsolicited brochures? Cases which reach the Supreme Court are based upon appeals dealing with questions or interpretations of law or procedure from lower courts. The Supreme Court does not sit in judgment of facts already presented and judged at trial level or act as a second judge or jury. In this instance, Burger's opinion recounts the details of these brochures to punctuate the majority's distaste for the material contained therein. He repeatedly reminds the reader that the brochures were unsolicited and that the unwilling recipients were a grown man *and his mother!* Although the majority opinion does not (and probably could not) rely upon captive-audience theory to justify California's use of its obscenity law, Burger clearly inferred that, as in a captive-audience situation, this offensive material was foisted upon people without their volition.

Effects of the *Miller* Holding

The *Miller* opinion is in many respects most unoriginal in its approach to obscenity. The three-pronged test owed much to earlier opinions. Part (a) of the *Miller* test, dealing with "contemporary community standards" (p. 24), is a condensed version of the original *Roth* (1957) formulation, together with parts (a) and (b) of the *Memoirs* (1966) formulation. Part (b) of *Miller* borrows from *Memoirs* (1966) in the sense that it recycles language concerning expression that is "patently offensive" but which is limited to that defined "by applicable state law" (p. 24). Part (c) of *Miller,* the closest thing to something new and innovative in the opinion, dismisses the vague language about expression which is "utterly without redeeming social value" in part (c) of

the *Memoirs* (1966) formulation, replacing it with protection for any expression which has "serious literary, artistic, political, or scientific value" (p. 24).

It is thus reasonable to ask: If there was little in the way of innovation and novelty in the *Miller* opinion, why does it rate as a highly significant decision of the Supreme Court in the last century? There are three responses to this.

First, the *Miller* opinion is significant because it represented a departure from the fractured opinions that preceded it. A majority of five members of the Court at last agreed to a standard for obscenity. Conceivably this had as much to do with the politics of selecting justices for the high Court as it did with the changing philosophy about the issue. *Miller* was handed down in the first years of Warren Burger's tenure as chief justice, while most of the previous opinions had been written during Earl Warren's tenure as chief justice.[7] The majority voting bloc in *Miller* was not atypical of other majority holdings concerning obscenity and/or the First Amendment in that era. The politics of the Court notwithstanding, to find language acceptable to enough justices to produce a voting majority was no small accomplishment. In that sense, *Miller* is noteworthy less for the language agreed to in the final test than for the fact that any consensus occurred at all.

Second, the *Miller* case is significant and influential because, after more than a quarter of a century, it remains the standard for obscenity today. Opinions issued in the years after *Miller* have refined our understanding of the three-prong test, but no decision has come even close to repudiating or overturning it. In 1974, the Court affirmed the *Miller* test in *Hamling v. United States* (p. 104), clarifying that contemporary community standards were local, not national standards. The Court in *Hamling* also asserted that a juror would be entitled to draw upon his or her own knowledge of the views of the average person in the community in determining what is obscene (p. 104). By contrast, three years later, in *Smith v. United States* (1977), the Court ruled that the third part of the *Miller* test could be judged by a national standard rather than by local standards; jurors could consider evidence outside their own local community in determining what constituted something of serious literary, artistic, scientific, or political value. Conversely, reliance upon local community standards was limited to the first two parts of the *Miller* test. In 1987 the Court further explained as to this third part of the *Miller* test that the national standard in use would be a reasonable-person standard: Inquiry into whether expression had serious value required a fact finder to determine whether "a reasonable person would find such value in the material taken as a whole" (*Pope v. Illinois,* 1987, pp. 500–501).

Third and finally, the *Miller* decision may be seen as significant for a potentially more political reason. By mandating the use of contemporary com-

munity standards for at least two parts of the test for obscenity (determining what appealed to a prurient interest in sex or sexual matters), the Court supported the notion that states and localities are better able to determine these issues than any federal court or national law. The diversity of approaches by states and localities could also accommodate the range of views concerning obscenity across the country. The chief justice's opinion warned readers: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City. . . . People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity" (p. 33). The *Miller* Court's affirmation is also a rejection of federal intervention in these matters —provided (as always) that state and local remedies adhere to constitutional guidelines. This kind of thinking ultimately helped foster what would become the centerpiece of new politically conservative thinking seven years later, in the core of Ronald Reagan's appeal to voters as he defeated an incumbent Democrat and swept into the presidency by advocating a diminished role for the federal government.

The *Miller* Court was speaking metaphorically, however. The *community* in "community standards" suggests a literal meaning, but the Court has never been clear about what constitutes a community. While a community may be made up of those who share beliefs and values, it is really a collection of individuals who happen to live in proximity to one another. When the *Miller* Court mandated community standards, it was using *community* as a metaphor, conjuring images of local living areas, populated by people living near one another and sharing the beliefs of that area. But this metaphor is, at best, a romanticized ideal.[8] In theory, judges and juries should be able to divine the tastes and standards of a community when confronted with expression that borders on the obscene. But in practice, the evidence of community standards (if any is offered at all) has often been left to the testimony of an expert witness—frequently a vice specialist for the police department—who offers his or her *opinion* about what the standards of the community may be. As members of the community, jurors are then asked to compare this evidence with their own experience and knowledge. There is little reason to believe, however, that this judgment represents any kind of consensus about what a community believes.

Community Standards and the Marketplace of Ideas

The marketplace of ideas is itself a metaphor for an environment in which government regulation of expression is limited at best. This communication-

based metaphor for free expression was developed by Justices Oliver Wendell Holmes and Louis Brandeis in a series of legal opinions at the beginning of the twentieth century. Holmes first suggested the marketplace metaphor in 1919 in *Abrams v. United States,* arguing that "the ultimate good desired is better reached by free trade in ideas, and . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market" (p. 630). Notice that Holmes's original language regarding the marketplace referenced free trade of ideas or expression in the context of "truth." This context reflected the influence of earlier thinkers about the value of free expression. Aristotle once wrote that "the true and the just are by nature stronger than their opposites," and that true and better facts "are by nature always more productive of good syllogisms and, in a word, more persuasive" (1991, pp. 34–35). Holmes was influenced by Aristotle, and also by English poet John Milton, who in the *Areopagitica* (1644) expressed similar sentiments about truth and free expression. Milton argued in opposition to Parliament's Licensing Order of 1643, which gave that body the power to control what was printed in England. Asserting the power of truth to emerge from free expression, Milton wrote: "And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the wors, in a free and open encounter" (cited in Patrick, 1968, p. 327). For Holmes, like Aristotle and Milton before him, truth would emerge only from a free and openly competitive exchange of all possible ideas in discourse; therefore, the contribution of free expression to a free society was its ability to promote truthful discovery through open discourse.

Of necessity, this metaphor of the marketplace had several postulates. One of these involved the commodification of ideas and expression. Free speech was seen as a commodity to be consumed or rejected. In such a marketplace, there would be no need for external regulation of the competition between ideas; the marketplace would regulate itself.

That a marketplace would allow for ideas and expression that many consumers might find objectionable was a second postulate. Holmes wrote in *United States v. Schwimmer* that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate" (1927, pp. 654–655).

A third postulate required understanding the role of competition in the marketplace. External regulation by the government is not required; the marketplace is self-regulating. The metaphor proposed that the best remedy for offensive ideas or expression is not censorship but competition with other

ideas and expression. Justice Brandeis noted in *Whitney v. California* that "the fitting remedy for evil counsels is good ones" (1927, p. 375) and "the remedy to be applied is more speech, not enforced silence" (p. 377).[9]

While not everyone endorses the use of the marketplace metaphor, there is no denying its enduring force even to this day, whether in helping to understand the role of free expression in dissent regarding American foreign policy or the limited role of government in regulating the Internet.[10] The Court's decision in *Miller*—and, most importantly, its endorsement of contemporary community standards—affords another opportunity to employ this metaphor, dealing as it does with an objectionable commodity: obscenity. *Miller* allows for the possibility of this commodity, obscene speech, in competition with other expression, and defers to consumer preference about the worth or value of obscenity. But the *Miller* test's use of the aforementioned community standards also suggests a reassessment of an unspoken and poorly understood component of the marketplace metaphor.

When the *Miller* test mandated the use of contemporary community standards, it in effect assigned control over the self-regulation of this objectionable speech to local communities. This was a conscious effort on the part of the majority to resist endorsing a national standard for obscenity. A national standard was not seen as "constitutionally sound" (*Miller,* 1973, p. 33). Said the Court: "Our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation" (p. 30).

In terms of the viability of the marketplace metaphor, the shift in the Court's language was subtle but unmistakable. By suggesting there was to be no national standard or "single formulation," the Court was in effect saying that while a marketplace metaphor could be used here, it did not apply to competition in *the* marketplace but to competition in *numerous* marketplaces.

What would this mean for the original metaphor, as envisioned by Holmes and Brandeis? Its underlying postulates would remain unchanged. Expression —here as obscenity—was still seen as a commodity. Obscenity might still be allowed, even though it was objectionable speech, but that speech would compete with other speech, and only in limited circumstances would it be removed from the marketplace. That rule would, of course, assume that the marketplace was only a local marketplace, operating independently of all other such marketplaces which might reach similar or different conclusions about obscenity. Holmes and Brandeis had carefully constructed their metaphor around the relationship between free expression and the promotion of some ultimate, singular truth—*the* truth. However, by suggesting that there

are marketplaces in the plural sense, the *Miller* decision recognized that truth was at best a relative concept.

Conclusion

Obscenity remains a highly volatile issue in this country, originating as it does from mixed lineage and tied to religion, questions of morality, and matters of what is publicly acceptable. It continues to be rooted in a discussion of sex and, in this country, a perverse or extreme interest in sex. While some have tried more recently to tie obscenity and pornography to violence and crime,[11] that effort has met with mixed and incomplete results, because various studies have found claims of a causal relationship inconclusive. The controversy over obscenity continues.

Given the current state of broadcast television programming, and the much more open sexual content of many feature films, it would appear that the American public is more receptive to a higher threshold for obscenity than when the *Miller* case was decided.[12] The advent of the Internet and the World Wide Web has also greatly transformed the debate over this controversy. The combination of computer-mediated communication and interactive technology has made obscene pornographic material far more available than before, raising a new generation of concerns over minors' ability to access this material.

Despite these changes, the legal standard for determining whether expression is obscene and beyond the protection of the First Amendment remains the same. *Miller v. California* is still the standard today. Whether that makes sense as we go forward into the twenty-first century remains an open question. The high Court may well have to wade back into this issue once more. But, as Justice Brennan warned us 27 years ago, getting at least five justices to agree on a new standard for obscenity may prove more difficult than it seems.

Notes

1. Havelock Ellis provided this translation for Marcuse's *Obscenity: The History of an Indignation* (1965, p. 12).

2. *Rex v. Wilkes* (1727) would be the only other case. *Rex* involved the prosecution of Wilkes, a foe of the Whig party, for publication of a poem, "Essay on Woman." While the poem was deemed obscene, Wilkes's prosecution was plainly political. Only 13 copies of the poem existed, and they were distributed to members of a private club to which Wilkes belonged. The case is noteworthy in some respects today

less for legal precedent that publication of obscenity may be punished, than, more ominously, that obscenity charges could and would be used politically to silence opposition.

3. Dreiser's novel *An American Tragedy* was declared obscene in *Commonwealth v. Friede* (1930). Lawrence's masterwork *Lady Chatterly's Lover* was declared obscene in *Commonwealth v. Delacey* (1930).

4. See, e.g., *United States v. One Book Called "Ulysses"* (1933/1934), in which both the trial and appellate judges strongly argued against the *Hicklin* standard. This followed a suggestion initially made (but not widely endorsed for some two decades) by Judge Learned Hand in *United States v. Kennerly* (1913) that community standards were a better way to judge the obscenity of expression.

5. See, e.g., *Smith v. California* (1959), wherein the Court mandated a scienter requirement under the *Roth* standard before a bookseller could be held liable for distributing obscenity; see also the opinion in *Kingsley International Pictures Corp. v. Regents of NYU,* suggesting that a book could not be held obscene merely because it attractively portrays an idea (in this case, adultery) "which is contrary to the moral standards, the religious precepts, and the legal code of the community" (1959, p. 688).

6. Section 311.2(a) provides that "every person who knowingly: sends, or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer, any obscene matter is guilty of a misdemeanor."

7. Both Courts were concerned with expanding government control over personal rights, although each approached this in different ways. The Warren Court recognized the primacy of personal, as opposed to property, rights in the individual. By contrast, the Burger Court recognized the significance of personal rights but said they should not be differentiated from property rights. The Burger Court was generally more accepting of the notion that commercial speech could be protected by the First Amendment, yet seemingly less tolerant if that commercial speech happened to be pornography. For a full discussion, see Schwartz (1993, p. 327).

8. Sometimes metaphors become ineffective because they lose their potency (Osborn, 1977, pp. 347–363) or are mismanaged in ways that suggest a disconnect between the rhetor's words and actions (Stelzner, 1977, pp. 284–297). In the present instance, the metaphor has lost its potency precisely because people do not see a connection between the Court's allusion to standards shared by all (or most) and the attempt to regulate allegedly obscene expression.

9. For a lengthier discussion of the marketplace metaphor, see Fraleigh and Tuman (1997).

10. See, e.g., *Reno v. ACLU* (1997, p. 885), in which the Court referred to the Internet as a powerful "new marketplace of ideas."

11. For example, Professors Catherine MacKinnon and Andrea Dworkin helped develop an antipornography law for the city of Minneapolis in 1983, and MacKinnon a later one for Indianapolis in 1987. Although both laws were ultimately found unworkable (one for political reasons, the other because it was deemed unconstitutional for its overbreadth), both aimed to frame pornography as "sex discrimination" and a "violation of women's civil rights" (Indianapolis-Marion County City Council General Ordinance No. 24, section 16-3(q) April 23, 1984). Both also described pornography in terms of graphic and often violent subordination of women. At different times, some authors (e.g., Russell and Trocki, 1993, p. 194) have suggested a link between pornography and violence, while others (e.g., Pally, 1994, p. 25) have claimed the link is not so obvious.

12. After all, programmers and producers could scarcely sell television programming or movies if a significant portion of the population had no interest in watching.

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Buckley v. Valeo

Craig R. Smith

Recent scholarship on the rhetoric of law suggests that the contexts of legal rulings are crucial to proper readings of decisions because the context often determines the arguments and evidence available to jurists. In 1985 James Boyd White called for an examination of the rhetoric of the law, claiming that conversations, testimony, and pleas create contexts for cases and embed cases in contexts. Five years later he advanced this theory by "suggesting a way of reading a text as rhetorically constitutive: as an act of expression that reconstitutes its own resources of language and in doing so constitutes a community, directly with its reader and indirectly with those others in the world about whom it speaks" (1990, p. 101). Eventually, White argued that the persuasion of judges is heavily reliant on imagining contexts either to project them as a rationalization for their decisions or to incorporate them to ground their decisions (White, 1994). Because of the rhetorical use of context, White places law under the study of rhetoric (1985, p. 684).

Subsequently, Marouf Hasian Jr., Celeste Condit, and John Lucaites developed ways of discovering a rhetorical context in the rhetoric of legal cases using the "separate but equal issue" as their case study. They examined this context for "the range of linguistic usages available to those who would address a historically particular audience as a public" (1996, p. 326). Legal advocates will make varying choices from the legitimate linguistic possibilities embedded in the context. Context played a large role in *Buckley v. Valeo* (1976). The case falls into the context of the Watergate scandal, which in the minds of some justices marginalizes other contexts such as original intent, strict construction, and the traditional First Amendment context that no speech is more valued in American democracy than political speech.[1]

In 1971 Congress passed the Federal Election Campaign Act (FECA), which placed restrictions on campaign fund-raising and spending. Senator James L. Buckley, a member of the Conservative Party of New York, and

Eugene J. McCarthy, a liberal Democrat and former senator from Minnesota, challenged FECA in 1975, arguing that it infringed on freedom of expression and association. That set in motion a battle of contexts that framed the arguments of the case.

Relevant Facts of the Case: The Federal Election Campaign Act

Along with requiring full disclosure of contributions to a federal campaign, the new FECA rules limited individual contributions to $1,000 per election, prohibited corporate contributions, and established that employees of a company could contribute to a campaign only by forming political action committees (PACs) within the company that could make maximum contributions of $5,000 per candidate per election. No individual would be allowed to give more than $5,000 to a PAC or $25,000 overall to federal candidates during a single year. The new law also carefully monitored and limited what a political party could contribute to its candidates and what corporations or unions could "contribute in kind"—equipment, services, transportation, and the like. Political parties were forced to allocate their contributions on the basis of population formulas, but they could provide money to and in states for the purpose of "party building activities." Further, the law provided for public financing of presidential nominating conventions and for matching funds to help pay for presidential primary and general election campaigns. In return for accepting matching funds, presidential candidates were limited in how much they could spend. However, if one believes that monetary support is tantamount to endorsement of a candidate, curtailing of funds might be tantamount to a curtailment of the speech of that candidate.

Lesser issues loomed larger in some campaigns. The law did not include an inflation index for contributions, and the limits of $1,000 and $5,000 in federal campaigns became outdated. Moreover, they severely restricted a campaign's ability to meet current costs for campaign advertising, staff, and travel (Smith, 1996). Furthermore, the cost of advertising varies enormously between various market locations and sizes. The disclosure requirements entailed meticulous record keeping of campaign receipts and expenditures. The law required all who contributed more than $10 to a campaign to provide their names and addresses; these are sent to the FEC in quarterly reports and are now available on-line, revealing various associations that formerly were kept private.

Within the provisions of the law, "major" parties eligible for full matching funds were those whose candidates received at least 25% of the vote in the

previous presidential election. "Minor" parties were those that received at least 2% of the vote but less than 25%; they would be funded at a much lower rate. This practice severely restricted the ability of third parties to emerge.

Moreover, the law was filled with loopholes. For example, the "party building" provision allowed for what is called "soft money":[2] contributions given to the party for grassroots and party building activities.[3] These activities are not subject to the limitations of the Federal Election Campaign Act or the regulations of the Federal Election Commission. Nor are certain activities of corporations and unions, including corporate communication to stockholders, union communications to members or their families, nonpartisan voter registration drives and get-out-the-vote activities, and creation of political action committees. The law also allows issue advocacy by for-profit, nonprofit, and labor organizations as long as they are not coordinated with a candidate. Thus the Christian Coalition or the Sierra Club is allowed to campaign against candidates who hold positions with which the group disagrees so long as it does not "coordinate" its activities with candidates who favor its positions. If candidates refuse matching funds, as did John Connolly, Ross Perot, George W. Bush, and Steve Forbes, they may spend their own resources without restrictions, perhaps overwhelming their opponents.

Constitutional Issues: The Challenge and the Ruling

Buckley and McCarthy challenged FECA on traditional constitutional grounds to bolster their position and give it rhetorical consistency. The appellants argued that the law restricted freedom of speech, freedom of association, due process and equal protection. They lost at the appellate level when the court found "a clear and compelling interest" (*Buckley v. Valeo,* 1975, p. 841) in preserving the integrity of the electoral process. This opinion was important because a plurality of the Supreme Court justices subsequently concluded that this interest overrode First Amendment concerns. The Court of Appeals for the District of Columbia also accepted the appellees' claim that that the law restricted conduct, not speech, and was therefore constitutional given congressional power to regulate federal elections.

In a curious decision with no single justice signing, the Supreme Court ruled in *Buckley v. Valeo* (1976) that the restrictions on contributions were constitutional but that spending limitations were unconstitutional. The contribution limits, said the Court (using the 1972 election as an example), were appropriate ways of controlling the appearance of undue influence (p. 26); the spending limits, however, restricted freedom of expression (pp. 39, 44, 56–

58). Despite Chief Justice Warren Burger's argument that "contributions and expenditures are two sides of the same First Amendment coin" (p. 241), the majority believed that contributors have alternative avenues of expression not available to candidates. Furthermore, despite an argument that the disclosure provision violated the rights of free association and privacy, the Court held that the government had a compelling interest in preventing a "corrupting" influence (p. 55) that overrode freedom of association. Finally, the Court held that the provisions regarding minor parties' matching funds and ballot access did not violate the due process clause of the Fifth Amendment (p. 74).

The *Buckley* decision is long and complex, with justices joining and dissenting on various parts of various opinions. Justices William Brennan, Potter Stewart and Lewis Powell concurred in all parts of the majority decision; they were joined by Justice Thurgood Marshall in all parts but I.C.2, which strikes down spending limits. Thus Marshall became the strongest proponent of FECA as written, and, not surprisingly, his opinion is the one most governed by the Watergate context.

Justice Harry Blackmun joined in all parts except section I.B, which upholds limits on fund-raising. Opposing the public funding provisions, Justice William Rehnquist joined in all parts except III. B.1, in which the majority found no merit to claims that public financing of presidential candidates was a free speech or due process violation. Chief Justice Warren Burger dissented on contribution limits but joined in Part I.C, which overturned expenditure limits, and Part IV, which ruled that Congress had the right to establish an FEC. Thus Burger, a Nixon appointee, was the strongest opponent of FECA and the least governed by the corruption context. Justice Byron White joined only in Part III because he believed that expenditure limits were constitutional.

An analysis of the decision reveals that shifting contexts created a barrier to consensus, though the majority was able to cobble together a compromise. They acknowledged that "the First Amendment protects political association as well as political expression" unless a compelling government interest can be advanced by a narrowly constructed regulation (*Buckley v. Valeo,* 1976, p. 15). For some, Watergate verified the government's argument that it had a compelling interest. For others, the First Amendment context was more compelling.

The government argued that illegal campaign expenditures were analogous to burning a draft card. These expenditures constituted conduct and therefore fell under the relatively lax *O'Brien* rule, which allowed for restrictions (*United States v. O'Brien,* 1968). *O'Brien* made a distinction between conduct, which could be regulated, and expression, which could not. The

Court in *Buckley* disagreed with the government's position; it did not "share the view that the present Act's contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien*. The expenditure of money simply cannot be equated with such conduct as destruction of a draft card" (p. 16). Moreover, the Court ruled, "Even if the categorization of the expenditure of money as conduct were accepted, the limitations challenged here would not meet the *O'Brien* test because the governmental interests advanced in support of the Act involve 'suppressing communication.' The interests served by the Act include restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns" (p. 17). Thus, in the early pages of this decision, the majority equated money and speech, accepting the argument that money is symbolic speech. With this move, the majority assured that the law, if it were to be upheld, would have to meet strict scrutiny because it sought to restrict expressive conduct.

When the Court examined FECA's restrictions on campaign spending in the light of strict scrutiny, it found the law wanting. The majority discounted "time, place and manner restrictions" as a rationale for the law. The Court established those criteria in a number of cases which argued that content neutral restrictions on time, place, and manner of speech were permissible if the state had a compelling interest to advance (see, e.g., *Heffron v. International Society for Krishna Consciousness,* 1981). In *Buckley,* the Court ruled: "The critical difference between this case and [time, place, and manner rulings] is that the present Act's contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner regulations otherwise imposed" (p. 18).

The heart of the case for striking down the spending limitations came next: "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. . . . The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech" (p. 19). In response Justice Blackmun wrote that the Court could not make a distinction between contributions and expenditures on the basis of which was more vital to freedom of expression (p. 290). The majority disagreed: "The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech" (p. 39). Furthermore, Congress had been too vague on spending restrictions:

"There is no definition clarifying what expenditures are 'relative to' a candidate," complained the majority (p. 41). The Court turned "to the basic First Amendment question" and found that the law "impermissively burdens the constitutional right of free expression" (p. 44).

However, the Supreme Court did not find campaign contributions to hold the same stature. Given that in many cases (e.g., *Tinker v. Des Moines School District,* 1969; *Texas v. Johnson,* 1989) the Supreme Court has extended First Amendment protection to symbolic speech, one might expect the Court to follow suit when it comes to campaign fund-raising. However, because the plurality accepted the Watergate context instead of the traditional First Amendment context, it ruled that the compelling government interest of preventing the "appearance" of corruption trumped First Amendment concerns:[4] "The governmental interest in preventing . . . the appearance of corruption is inadequate to justify [the] ceiling on independent expenditures" (p. 45). It further ruled that contributions were not as analogous to speech as were campaign expenditures: A "limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication" (p. 20).

The majority held that a contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support (pp. 20–21). Furthermore, given that the government has a compelling interest in preventing corruption or its appearance, restricting large contributions goes to the heart of the problem, while restricting expenditures does not. The majority claimed that these restrictions would force campaigns to seek wider support, thereby involving more people in campaigns. Finally, the majority noted that contributors may engage in direct participation in the political process rather than contributing to candidates who speak for them (p. 21). The law does not prevent voters from organizing with "like-minded" persons to support a candidate; in fact it encourages this, reinforcing the important element of freedom of association (p. 22).[5] The Court concluded that "although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions" (p. 23).

The final major issue in the case is with respect to the right to associate with whom one pleases. The First Amendment guarantees "the right of the people peaceably to assemble" in order to "petition the government" (*United States v. Cruikshank,* 1876). Like other First Amendment rights, it can be

limited only if the law advances a compelling government interest (*Cox v. Louisiana,* 1965). It is difficult to see how the Court could rationalize curtailing a citizen's desire to support his or her association through a confidential contribution. Yet it did so by accepting appellees' arguments that the government had a compelling interest to advance the "prevention of corruption and the appearance of corruption spawned by the real *or imagined* [italics added] coercive influence of large financial contributions on candidates' positions and on their actions if elected to office" (*Buckley,* 1976, p. 25). Restrictions and incentives are set in place to encourage broader participation (more candidates rather than one, the formation of political action committees, direct involvement rather than monetary support) and to reduce influence and associational strength (less money per candidate). Evidently, giving all of one's money to one candidate is not a specific enough symbolic message to warrant protection, and such a contribution gives an appearance of corruption which justifies restricting freedom of assembly (p. 30).

Limitations of space allow for a brief recounting of issues of lesser importance in this case. The appellants argued that the law favors incumbents because with established name identification they can raise funds more easily than challengers. The majority dismissed this claim, arguing that "challengers can and often do defeat incumbents in federal elections. . . . Since the danger . . . and the appearance of corruption apply with equal force to challengers and incumbents, Congress had ample justification for imposing the same fund raising constraints upon both" (pp. 32–33). To support this claim, the majority relied (in footnote 34) on the very atypical election results from 1974 in which many Republican incumbents were thrown out of office because of Watergate.

Appellants argued that minor parties and their candidates were disadvantaged under this law because of their smaller base of support. While the Court found this argument "troubling" (p. 33), the majority did not accept it. Since all candidates are treated equally, the law is fair: The "attempt to exclude minor parties and independents en masse from the Act's contribution limitations overlooks the fact that minor-party candidates may win elective office or have a substantial impact on the outcome of an election" (pp. 34–35).

The majority did rule that limitations on candidates' spending of personal resources violate their free speech rights. Note that on this point, the Court shifted contexts by favoring equal treatment over providing incentives to reduce the influence of money in the campaign. On this basis the majority also precluded regulation of independent expenditures unless the speech involved expressly advocates the victory or defeat of a candidate.

The Court was likewise concerned about the disclosure requirements of

FECA. The majority even admitted: "We are not unmindful that the damage done by disclosure to the associational interest of the minor parties and their members and to supporters of independents could be significant. These movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances fears of reprisal may deter contributions to the point where the movement cannot survive" (p. 71). However, in part because the appellants had provided insufficient evidence to document their fears (p. 72), the Court concluded that the requirements were constitutional and denied the request for a blanket exemption for minor parties—again coming down on the side of equal treatment for all parties. Furthermore, the Court argued that disclosure would overcome "routing of financial support of candidates through avenues not explicitly covered by the general provisions of the Act" (p. 76). In his dissent, Justice Burger contended that the right of association guaranteed a secrecy that outweighed other considerations: "Rank-and-file union members or rising junior executives may now think twice before making even modest contributions to a candidate who is in disfavor by the union or the management hierarchy" (p. 237).

The majority also overruled the argument that a $1,000 limit on individual contributions and a $5,000 limit on PAC contributions was ridiculously below a threshold that would appear to influence candidates or elections improperly. Instead, the Court upheld the law because "the line is necessarily a judgmental decision" (p. 83).

The Court went on to affirm the use of a Presidential Election Campaign Fund for primary campaigns, party nominating conventions, and general election campaigns. It rejected the First and Fifth Amendment claims of the appellants on the ground that the law "furthers, not abridges, pertinent First Amendment values" (p. 93).

The Dissenters

Five justices dissented at various points but never coalesced into a majority on any one issue. Justice Burger's dissent is the most extensive. While he agreed that "the need for disclosure outweighs individual constitutional claims" (p. 236), he objected to the disclosure of small contributions, the limitation on contributions, and public financing of presidential elections. Burger believed that small anonymous contributions could not corrupt the system; however, if the donor's identity were revealed, he or she could be punished or harassed. Burger strongly opposed limits on contributions because they effectively limit expenditures, which the majority claimed was un-

constitutional. He argued that the majority simply could not have it both ways; all political campaign "money translates into communication" or none of it does (p. 243).

Justice Burger also opposed public financing of presidential elections on the grounds that it undercuts representative democracy. Like Justice Rehnquist, Burger believed FECA allows the government to favor certain parties over others and, with its matching provisions, gives a preference to candidates who are talented at raising money. Furthermore, a "candidate with substantial personal resources is now given by the Court a clear advantage over his less affluent opponents, who are constrained by the law in fund-raising, because the Court holds that the 'First Amendment cannot tolerate' [p. 59] any restrictions on spending" (p. 253). These problems have been caused by the Court's piecemeal approach to the act: "By dissecting the Act bit by bit, and casting off vital parts, the Court fails to recognize that the whole of this Act is greater than the sum of its parts" (p. 235).

Justice White dissented, also in the name of consistency, because both contributions and expenditures should be limited. He argued that unless spending limits were in place the law would not function properly; the rich would have an advantage.[6] He also argued that the Watergate context justified "curative steps" (p. 259).

Justice Rehnquist dissented in part because he believed the act was unfair to independent candidates and minor parties. The most interesting part of his dissent is his redefinition of the Court's prior ruling in *Gitlow v. New York* (1925): "I am of the opinion that not all of the strictures which the First Amendment imposes upon Congress are carried over against the States by the Fourteenth Amendment, but rather that it is only the 'general principle' of free speech . . . that is incorporated" (*Gitlow,* p. 672 [Holmes, J., dissenting], cited in *Buckley,* p. 291).[7] In this instance, Rehnquist introduced the context of original intent and strict construction, one to which he would often return in later cases.

The Impact of *Buckley v. Valeo*

The Republican Party was the first to adapt to the ruling by honing its rhetorical effectiveness at direct-mail solicitations of small donors and soft money solicitations from corporations. For years it has held a huge lead over other parties in terms of fund-raising. At the same time it could brag that the average donation to the party and its candidates was far below that of the Democrats. In the first 18 months of the 1986 election cycle, for example, the

National Republican Senatorial Campaign Committee raised $59.6 million, compared to $6.8 million raised by its Democratic counterpart (Wilcox & Joe, 1998, p. 15).

Meanwhile, the courts began to react to the *Buckley* decision. In *FEC v. Massachusetts Citizens for Life* (1986), one of the most important rulings concerned issue advocacy. The Supreme Court ruled that federal regulations could limit donations for "communications that in express terms advocate the election or defeat of clearly identified candidate[s] for federal office," but not for more general "issue advocacy" (p. 263). Here the Court also affirmed that "individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction" (p. 261). The FEC soon clarified its rules with regard to advertising covered by the act: Such advertising had to be close to the election date, advocate voting for or against a candidate, and suggest only one meaning.

As the Watergate scandal receded into the past and the Court acquired more conservative jurists, the traditional free speech context began to govern the Court's ruling on campaign speech. In 1996 the Court expanded freedom of expression for parties on a 7-to-2 vote when it rejected the Federal Election Commission's penalizing of the Colorado Republican Party for funding radio advertisements that criticized the record of the Democratic candidate for U.S. Senate, Timothy Worth. The Republican Campaign Committee was free to advocate the defeat of the Democratic candidate as long as it did so independently of the Republican candidate's campaign. The same rule applies to independent PACs. "The independent expression of a political party's view is 'core' First Amendment activity," wrote Justice Stephen Breyer, a Clinton appointee (*FEC v. Colorado Republican Federal Campaign Committee,* 1996, p. 610). The ruling affirmed the standard practice of a major party collecting soft money from unions, corporations, and private individuals and passing that money to state parties, which used the funds to attack their candidates' opponents (Cantor, 1996). It also allows for the conflation of expenditures and contributions given the possibility for earmarking contributions to the national party (Briffault, 1997, pp. 102–103). Although some justices sought to strike down the prohibition on coordination with the party's own candidate, more disagreed, leaving this restriction in place. When the case returned to the Supreme Court in June 2001, the Republican Party argued that this restriction on coordination was a violation of the free speech rights of the parties, but the majority did not buy the argument. Justice Souter wrote for a 5-to-4 majority in *FEC v. Colorado Republican Federal Campaign Committee* (2001) that reaffirmed the prohibition on coordination

between the party's campaign and the candidates'. The *Los Angeles Times,* among others, commented on the influence of the context on the decision, claiming that it reflected "the fundraising scandals and excesses that have beset Washington since 1996" (Savage, 2001, p. A1).

In its most recent rulings, the Court has moved back to the corruption context, reflecting the influence of the scandals of the 1996 campaign (see below). By far the most significant ruling was *Nixon v. Shrink Missouri Government PAC* (2000). This PAC intentionally gave state auditor candidate Zev Fredman a contribution that was over the state-imposed limits. The PAC and Fredman argued that the state law violated their First and Fourteenth Amendment rights. The 8th Circuit Court of Appeals agreed, arguing that *Buckley* required courts to apply strict scrutiny to state laws. Therefore Missouri was required to demonstrate that the law advanced a compelling interest and that the statutes were narrowly drawn (*Shrink Missouri Government PAC v. Adams,* 1998).

The Supreme Court overruled (*Nixon,* 2000), arguing that *Buckley* is the authority for comparable state limits on contributions and those limits need not be pegged to the precise dollar amounts approved in *Buckley.* Justice David Souter, writing for the majority, claimed that the possibility of the appearance of corruption was a sufficient compelling interest for the state to restrict contributions in this case.

Circumventing the Intent of *Buckley*

One of the strongest criticisms of the *Buckley* decision focuses on how easy it is to circumvent the intent of Congress (see, e.g., Adamany & Agree, 1975; Sabato, 1989). The "soft money" loophole means that rich donors can give a great deal of money directly to political parties, and, with a wink and a nudge, it will be spent on behalf of the donors' preferred candidates (Sabato, 1989). From 1993 to 1997, campaign contributions by the 544 largest public and private companies in America jumped 75% to $129 million. Soft money is the fastest growing component of this sum, constituting over $50 million from corporations.[8] From January 1, 1995, to November 25, 1996, the Republican national committees reported raising $141 million in soft money, an increase of 183% over the previous cycle. The Democratic national committees raised $122 million, an increase of 237% ("Donors: Survey Sheds Light on Firms," 1997, p. A22). In the 2000 election cycle, the Democratic party raised $270 million in soft money while the Republicans raised $447 million (Savage, 2001, p. A16).

In the 1996 presidential campaign yet another problem with soft money

arose. While foreigners are prohibited from contributing to federal campaigns, green card holders are not (FECA, 2 U.S.C. §441e), so foreign groups attempted to circumvent the law by passing money through American citizens or American subsidiaries. Both tactics are illegal if the money is spent directly on candidates; however, if the money is given to parties as soft money, it may not be covered under the statutes. In 1995 John Huang—former head of U.S. operations for the Indonesian-based Lippo Group and subsequently a mid-level official at the Commerce Department—was hired by the Democratic National Committee. In 1996 he raised over $3 million for the Democratic Party, primarily from Asian Americans, some of whom were used as conduits for foreign funds (Stone, 1996). Many of the agents involved in these transfers, including John Huang, have pled guilty to violating the law.[9]

Another problem is that because election campaigns have become so expensive, fewer people are able to run for office. The average cost of winning a House seat in 2000 was $847,000, up from $87,000 in 1976; the cost of winning a Senate seat was $7.2 million, up from $609,000 in 1976; House and Senate candidates spent over one billion dollars in 2000, up from $115 million in 1976 (Cantor, 2002, p. 5). In 1996 over $400 million was spent on broadcast advertising by federal, state, and local candidates in primary and general campaigns, up from $10 million in 1960, or $53 million in adjusted 1996 dollars (Cantor, 1996, pp. 3–4).

Congress attempted to solve some of these problems with campaign reform legislation signed into law (Bipartisan Campaign Reform Act) by the president on March 27, 2002. Provisions of the law which prohibit special interest groups from running advertisements against federal candidates 60 days before a general election and 30 days before a primary were immediately challenged in court, as were provisions ending soft money contributions to the national parties. Undoubtedly the case will go to the Supreme Court, providing yet another opportunity for the Court to modify and/or clarify its ruling in *Buckley*.

Conclusion

A quarter-century ago, in the wake of the Watergate scandal, Congress attempted to write a law that would limit the amount of money one could accept and spend on a federal campaign. The legislature's goals were to reduce both the influence of corporations and the cost of campaigns, and to provide funding for presidential campaigns. However, *Buckley* struck down the limits on campaign spending. That decision also allowed candidates to use their

own fortunes to fund their campaigns at any level; it allowed corporate political action committees to bundle contributions for more impact; it allowed issue advertising directed at opposition candidates as long as no coordination with the favored candidate could be proven; it spawned hugely successful direct-mail campaigns, which collected millions of dollars from small givers. And, of course, the law itself never addressed the issue of soft money from individuals, unions, and corporations going into the parties' war chests, which could then be redirected into federal campaigns in the name of "party building" and "issue advocacy." Thus, in the name of equal treatment and by reworking congressional legislation, the Court has created a system that favors the independently wealthy, the major parties, and incumbents. If it wished to dispel the appearance of corruption, it certainly failed, because large donors could simply redirect their giving directly to the national parties. In this way, *Buckley* has severely inhibited efforts at campaign reform—though if the ruling in *Nixon* (2000) is any indication, the Court would again strike down attempts by Congress to limit expenditures by candidates.

Buckley also ruled that money in the form of contributions is not akin to symbolic speech; rather, it is more like conduct. Therefore, the First Amendment does not protect contributions as speech. Most reformers welcomed this section of the decision, but some First Amendment advocates believed it to be not only contradictory to the ruling on spending limits but also a violation of contributors' First Amendment rights. Rhetorical analysis reveals that competing contexts for the *Buckley* decision prevented consensus and resulted in a contradictory ruling. Justices accepting the corruption contexts of either the 1970s or 1990s were more likely to treat campaign fund-raising as conduct, or at least as speech that could be restricted to advance a compelling government interest. Justices who accepted the traditional free speech context for the political arena were more likely to accept campaign spending and fund-raising as symbolic speech. For these reasons, very few people, including only three justices of the Supreme Court, embraced *Buckley* in its entirety.

Notes

1. For example, the Supreme Court has held that speech endorsing candidates "is at the core of our electoral process and of the First Amendment freedoms" (*Williams v. Rhodes,* 1968, p. 32). See also *Garrison v. Louisiana* (1964).

2. In 1943, Congress banned unions and corporations from participating in political campaigns. Unions then developed the concept of "soft money" by forming

the first political action committees, contributing to state and local campaigns, and creating party-building activities such as voter registration drives (Heard, 1960, pp. 177–178.)

3. This provision was added to the law in 1979.

4. The argument seems to contradict the traditional position that the burden of proof is heavier than mere appearances. See, e.g., *Ibanez v. Florida Department of Business and Professional Regulation* (1994).

5. This section can be read as a nod to the losing side's very strong arguments on how the law impacts freedom of association.

6. Ross Perot used $60 million of his money in the 1992 campaign, which Dorf (1999) argues changed history. In *Buckley* the majority ruled that a person has the right to "vigorously and tirelessly . . . advocate his own election" (1976, p. 52).

7. When they joined the Court, Antonin Scalia and Clarence Thomas embraced this rather stunning interpretation.

8. PAC contributions constitute about the same amount, but they grow more slowly.

9. James Riady pled guilty to violating campaign laws and was fined $8.59 million in April of 2001.

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FCC v. Pacifica Foundation

R. Wilfred Tremblay

FCC v. Pacifica Foundation (1978) is a major twentieth-century First Amendment ruling because of its direct and immediate impact on what citizens could see and hear on American broadcast media. Equally important is that the argument advanced by the Supreme Court to support its position directly equates certain kinds of speech with physical action, suggesting a new legal construct: a "speech-act." By employing simple metaphors to amplify Judeo-Christian mythology, the Court implied that its ruling was a legitimate prophylactic action against what Franklyn Haiman called "symbolic battery" (1981, pp. 131–156): speech that others perceive as harmful to them.

In short, the majority in *Pacifica* used rhetorical sleight of hand to reverse a twentieth-century trend in First Amendment jurisprudence. Previously, the Court had seemingly marched inexorably toward what R. C. Post calls "ingrained individualism" (1988, p. 335): legal analysis that ignores the values and perspectives of groups in favor of the claims of individuals (p. 299). In *Pacifica,* the Court favored the interest of groups seeking to enforce a particular conception of morality at the expense of the right of free expression. In so doing, it created a homo-centric picture of the United States that justified the federal government's direct involvement in monitoring language to preserve the moral status quo of society's dominant culture.

Facts of the Case

At approximately 2:00 P.M. on October 30, 1973, noncommercial radio station WBAI-FM in New York, licensed to the Pacifica Foundation, aired a 12-minute comedy monologue called "Filthy Words" from the George Carlin recording "George Carlin: Occupation Foole" as part of a larger discussion about language. Listeners were notified before the broadcast that some

language on the track might be offensive (Bittner, 1982, p. 125; Samoriski, Huffman, & Trauth, 1995).

Carlin's satiric routine was recorded in front of a live audience, which often responded with laughter as the comedian identified certain words and a variety of colloquialisms that "you couldn't say on the public airwaves . . . the ones you definitely wouldn't say, ever. The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and maybe, even bring us, God help us, peace without honor . . . and a bourbon" (*Pacifica,* 1978, p. 751).

In a letter of complaint to the Federal Communication Commission (FCC) enforcement bureau dated November 28, 1973, John H. Douglas, a planning board member of Morality in Media, expressed concern that his 15-year-old son heard parts of the Carlin routine as they traveled together in a car (Glasser & Jassem, 1980, p. 297, note 6). Douglas acknowledged that Carlin's monologue had some social value and that he understood selling the record for private use; however, the complaint alleged the WBAI broadcast was inappropriate for the middle of the day, when children might hear it.

In response to the initial FCC query that resulted from this complaint, the Pacifica Foundation defended the broadcast, calling Carlin a "significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl" (Glasser & Jassem, 1980, pp. 286–287). The licensee added that Carlin was "merely using words to satirize as harmless and essentially silly our attitudes towards those words" (Samoriski et al., 1995, p. 53). The FCC agreed that the monologue was not obscene because it had literary value and lacked prurient appeal; therefore, it passed the test for obscenity previously constructed by the Supreme Court in *Miller v. California* (1973). Nevertheless, in its memorandum opinion the commission determined that the monologue was "indecent" because it depicted "sexual and excretory functions in a patently offensive manner" (*In re Pacifica Foundation,* 1975, p. 99). The commission also used the occasion to notify broadcasters that it intended to clarify the standards to be utilized when considering an increasing number of complaints about indecent broadcasts.

The indecency standard in force at that time prohibited communication that "describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience" (*In re Pacifica Foundation,* 1975, p. 98). The commission suggested that licensees channel such indecent programming

to a time period when children would not be in the audience, although it failed to identify a specific time period. Importantly, this definition gave short shrift to the context of the speech, a significant departure from the obscenity standard derived from *Miller*.

The FCC's legal standing to regulate such indecent content derives from Title 18 of the United States Code (Broadcasting Obscene Language, 1976), which prohibits "any obscene, indecent, or profane language by means of radio communication" and authorizes fines of not more than $10,000 or imprisonment for not more than two years, or both. Nevertheless, the commission did not impose formal punishment on Pacifica Foundation for the broadcast; it did, however, warn that a notice would be placed in the organization's file that might be considered during subsequent license renewal (*In re Pacifica Foundation,* 1975).

The Pacifica Foundation, which had a history of previous disputes with the commission in the 1960s, appealed the action to the U.S. Court of Appeals for the District of Columbia Circuit. The Court of Appeals reversed the FCC order on a 2–1 vote, with each judge writing a separate opinion. The appeals court ruled that the commission's action violated the section 326 "no censorship" provision of the Communications Act of 1934 and that section 1464 of the U.S. Code must relate narrowly to language that is "obscene" and not merely indecent. The opinion concluded that the "ruling is overbroad and carries the FCC beyond protection in the public interest into the forbidden realm of censorship" and that "as used, the words do not appeal to the prurient interest. They are merely crude statements and are not used to titillate" (*Pacifica v. FCC,* 1977, pp. 10, 16). The FCC appealed the Circuit Court ruling on certiorari to the United States Supreme Court.

Pre-*Pacifica* Indecency Actions

A historical overview of the FCC's involvement with regulating broadcast indecency will facilitate analysis of the Supreme Court's decision in *Pacifica*. The commission's varying regulatory postures are evident in three different eras.[1]

Era One: A Period Of Little Enforcement (1920s–1950s)

The FCC and its precursor, the Federal Radio Commission (FRC), were empowered to enforce certain program restrictions. The Circuit Court of Appeals for the District of Columbia ruled that the FRC's actions regarding undesirable program content typically were minor, such as warning about the

advertising of certain "offensive" contraceptives (*KFKB v. FRC,* 1931). Accordingly, the courts in this period also upheld the FRC's refusal to renew the license of a station that broadcast frequent references to "pimps" and "prostitutes" and attacks on the Roman Catholic Church, holding that the FRC could regulate broadcasts that "offend the religious susceptibilities of thousands . . . or offend youth and innocence by the free use of words suggestive of sexual immorality" (*Trinity Methodist Church, South v. FRC,* 1932, p. 853; *Pacifica,* p. 736, note 10).

In *Duncan v. United States* (1931), the FRC revoked a station license in Oregon after a disc jockey was convicted of a felony—under the prevailing *Hicklin* definition of obscenity (*Regina v. Hicklin,* 1868)—for broadcasting material that created the "tendency to excite libidinous thoughts on the part of the hearers . . . and . . . [was] calculated to arouse . . . sexual passions and desires" (cited in Bittner, 1982, p. 123). Still, the FRC's license revocation in *Duncan* had more to do with the criminal conviction of the licensee's employee than with the content of the broadcast itself (Rivera-Sanchez, 1994).

Clearly, broadcast content regulation from the 1920s to the 1950s was highly paternalistic. The FCC had not caught up to the Supreme Court's evolving conception of ingrained individualism, which began with Oliver Wendell Holmes's dissent in *Abrams v. United States* (1919).

Era Two: Alternative Regulatory Rationales (1950s and 1960s)

This second period evinces a move away from paternalism. During this era, the FCC purposely avoided contentious definitions of indecency and obscenity, expressing a greater concern for fraudulent actions than with content matters. The commission recognized that "indecent broadcasts were not problematic per se, but were symptomatic of inadequate supervision and lack of candor with the Commission" (Levi, 1992, p. 61). The FCC's refusal to prosecute stations for indecent language allowed greater experimentation on broadcast channels. For example, in 1964 the commission renewed the licenses of two other Pacifica stations (*In re Pacifica Foundation,* hereafter referred to as *Pacifica I*), despite complaints of offensive programming. These complaints arose from the broadcasting of unexpurgated language on three occasions: a reading of Edward Albee's *The Zoo Story,* a poetry reading by Lawrence Ferlinghetti, and a talk show featuring frank discussion of homosexuality (Barton, 1976). In refusing to take action in *Pacifica I,* the commission admitted that "such provocative programming . . . may offend some listeners. But . . . [this] does not mean that those offended have the right, through the Commission's licensing power, to rule such programming off

the airwaves. Were this the case, only the wholly inoffensive, the bland, could gain access to the radio microphone or TV camera" (cited in Kahn, 1968, p. 284). Subsequently, in the most significant action during this period, the commission refused to renew a South Carolina radio station's license because of misrepresentation to the commission, not for obscene program content—although the commission acknowledged the conviction of that station's deejay for vulgar, indecent, and filthy broadcasts (*In Re Palmetto Broadcasting,* 1961; *Robinson v. Federal Communications Commission,* 1964).

Era Three: A Period of Increased Indecency Enforcement (Early to Mid-1970s)

In sharp distinction to the previous two decades, the 1970s saw an upsurge of FCC involvement in the area of broadcast indecency as it became sensitive to evolving regulatory standards for obscenity developed by the Supreme Court (*Ginsberg v. State of New York,* 1968; *Ginzburg v. United States,* 1968; *Memoirs v. Massachusetts,* 1966; *Roth v. United States,* 1957). Under this gestating standard, the commission fined student radio station WHUY-FM a nominal $100 for airing an unexpurgated interview by the Grateful Dead's Jerry Garcia, who repeatedly said the words "shit" and "fuck" throughout a taped broadcast. Claiming that the expletives were "gratuitous" and did not advance the public interest, the commission also developed a distinction between broadcasting and other media, saying that broadcasting comes into the general public's homes without advance warning (*In re WHUY-FM Eastern Educational Radio,* 1970).

The commission's major indecency action immediately prior to *Pacifica* (1978) was *Sonderling Broadcasting Corporation (WGLD-FM) v. FCC* (1975). Here the commission fined an Illinois station $2,000 for engaging in what was popularly called "topless radio": shows that encouraged women to call in to the station and discuss their sexual practices during a live broadcast. Despite an invitation by the FCC to seek judicial review, the station paid the fine, refusing to challenge the order. A coalition of interest groups did appeal, but the ruling was upheld by the District of Columbia Court of Appeals because of the pandering nature of the broadcast.

While there was increased regulatory action in the 1970s, the commission's reliance on "settled" obscenity law as identified above meant that its rulings focused on discrete issues such as "pandering" and "gratuitous disregard of the public interest" rather than on some broader, ill-defined interpretation of socially appropriate content as it did from the 1920s to 1950. This specificity was dramatically altered in *Pacifica* when the Court over-

looked its historic constitutional protection for individualism by defaulting to standards of majoritarian morality in deciding broadcast content cases.

The *Pacifica* Opinion

In a 5–4 decision the Supreme Court reversed the Circuit Court and found the FCC's action constitutional. Justice John Paul Stevens wrote for the Court and was joined by Chief Justice Warren Burger and Justices Harry Blackmun, Lewis Powell, and William Rehnquist. Justice Powell wrote a separate concurring opinion that was joined by Justice Blackmun.

Opinion of the Court

The Court rejected the Pacifica Foundation's two-pronged argument that indecency and obscenity were essentially the same and that the commission lacked standing to develop a separate indecency standard because the Carlin monologue contained no prurient appeal. Instead, Justice Stevens's argument centered on the statutory language of the code: "The words 'obscene, indecent, or profane' are written in the disjunctive, implying that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality" (*Pacifica,* 1978, pp. 739–740). The Court never identified how the FCC was to determine "accepted standards of morality," leaving the commission to make that determination on an ad hoc basis.

Justice Stevens developed the Court's argument around three main themes: (1) broadcasting is a uniquely pervasive presence; (2) the government has a legitimate interest in protecting children from exposure to indecent language; and (3) indecent speech is a nuisance. These two latter themes became the initial bases for developing the "speech act" concept so critical to *Pacifica*.

Unique Pervasiveness

This argument centers on the physical fact that radio waves permeate the natural environment without invitation, therefore violating the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying the remedy for an assault is to run away after the first blow (Pacifica, 1978,

pp. 748–749). The Court's implicit rationalization was that non-broadcast media, by their distinctive natures, are always *invited* into one's private area.

Accessibility to Children

The second theme evolves around the claim that broadcasting is uniquely accessible to children. The Court used *Ginsberg* (1968, pp. 639–640) as a precedent, justifying "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household'" (*Pacifica,* p. 749).

Nuisance

The Court made no attempt to create a broader constitutional test, as it did in the area of obscenity law. Citing *Chaplinsky v. New Hampshire* (1942, p. 572), Justice Stevens wrote: "These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: 'Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality'" (*Pacifica,* 1978, p. 746).

This interpretation places the definitional emphasis on individual words themselves rather than on contextual meaning, a curious standard because the Court attempted to build its own argument around the importance of context. The Court even employed Justice Oliver Wendell Holmes's famous metaphor from *Schenck v. United States* (1919, p. 52) about falsely shouting fire in a theater and causing a panic—which is the "classic exposition of the proposition that both the content and context of speech are critical elements of First Amendment analysis" (Huffman & Trauth, 1991, p. 22). In *Pacifica,* context appears to be defined only by *place* and not by *connotation,* as suggested in perhaps the most memorable metaphor in *Pacifica's* majority opinion: "A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard" (Justice George Sutherland in *Euclid v. Ambler Realty Co.,* 1926, p. 388, cited in *Pacifica,* 1978, p. 750).

Concurring Opinion

Justice Powell's concurrence centered on a view that justices are not free to decide the relative value of each speech type. He suggested that the Court should look only at unique characteristics of broadcast media and at society's interest in protecting children and unwilling adults.

Justice Brennan's Dissent

Justice William Brennan, joined by Justice Thurgood Marshall, wrote an extensive dissent. Focusing on the privacy rights of individuals, Brennan argued that the majority opinion overlooked the right of an adult to receive information. He directly challenged Justice Stevens's claim of intrusion, suggesting that "whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the 'off' button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection" (*Pacifica,* 1978, pp. 765–766). Justice Brennan clearly employed the classic libertarian free speech metaphor of John Milton and John Stuart Mill, where a free marketplace of ideas is the best control for "bad" speech: The remedy for offending speech is more speech.

Justice Brennan's most pungent attack, however, was reserved for what he insinuated was the majority's cavalier attitude toward Court precedent in the area of parental rights, especially toward the stream of law evolving from *Pierce v. Society of Sisters* (1925) and *Wisconsin v. Yoder* (1972). The decision in *Yoder* held that

> parents, *not* the government, have the right to make certain decisions regarding the upbringing of their children. As surprising as it may be . . . some parents may actually find Mr. Carlin's unabashed attitude towards the seven "dirty words" healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or its existence. (1972, p. 770)

Justice Brennan also addressed the emotional meaning of words, which he claimed was conspicuously absent in the Court's opinion. He quoted Justice John Marshall Harlan in *Cohen v. California* (1971): "We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for the emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated" (*Pacifica,* 1978, p. 774). This notion of the emotive function of words played a significant role in later opinions on free expression, especially *Texas v. Johnson* (1989).

Justice Brennan's final swipe at the Court's opinion focused on cultural mores, particularly the potential of society's majority to dominate minority populations:

> Today's decision will thus have its greatest impact on broadcasters desiring to reach, and listening audiences composed of, persons who do not share the Court's view as to which words or expressions are acceptable and who, for a variety of reasons, including a conscious desire to flout majoritarian conventions, express themselves using words that may be regarded as offensive by those from different socio-economic backgrounds. In this context, the Court's decision may be seen for what, in the broader perspective, it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking. (pp. 776–777)

Clearly, Brennan recognized the potential impact of *Pacifica*'s rhetorical drift toward a "tyranny of the majority."

Justice Stewart's Dissent

Justice Potter Stewart wrote a separate dissent joined by Justices Brennan, Marshall, and Byron White. Stewart wrote that Congress did not intend a disjunctive reading of the word *indecent* because sections 1461 and 1464 were enacted separately, even though both statutes were codified together in the Criminal Code of 1948 as part of a chapter titled "Obscenity." Stewart's concern, while not expressed as broadly as Brennan's, was that indecency should be evaluated using the same standards as for obscenity.

Post-*Pacifica* Miasma

Immediately after the *Pacifica* ruling the area of broadcast indecency seemed relatively clear. Broadcasters simply issued orders to avoid the seven words mentioned in the Carlin monologue. At the same time, the FCC retreated from enforcement; in fact, there were no indecency actions following *Pacifica* until 1987 (Samoriski et al., 1995). However, this relative calm dissipated in the closing days of the Reagan administration, when the commission revisited the issue, enacting the definition of indecency supported by the Court in *Pacifica:* "Language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs" (*New Indecency En-*

forcement Standards, 1987, p. 2726). Dramatic and unprecedented indecency enforcement under the FCC chairmanship of Alfred Sikes began in January 1988.

Under Sikes's leadership, the commission ordered all indecent material to be channeled between 12:00 A.M. and 6:00 A.M.—the "safe harbor" when supposedly there are fewer children in the audience. It attacked "indecent" content with a renewed passion, as evidenced by its muscle-flexing in four cases.

In the first case the commission urged the Justice Department to prosecute another Pacifica Foundation station, KPFK-FM in Berkeley, California, for airing "The Jerker"—a radio drama featuring the frank language of two male AIDS patients engaging in phone sex—which the commission felt was obscene. In the second case, the FCC issued a warning against KCSB-FM at the University of California-Santa Barbara for playing *Makin' Bacon,* a sexually laden song by the Pork Dukes. The Justice Department refused to take action against KPFK, and no formal penalty was enforced against KCSB (Samoriski et al., 1995). The commission also imposed forfeitures against Infinity Broadcasting of Pennsylvania for airing parts of the *Howard Stern Show,* which they claim "pandered" to the audience and was broadcast in a time period when children were likely to be in the audience (*In re Infinity Broadcasting Corp. of PA,* 1987). It also fined a Kansas City television station the maximum $2,000 for airing in "a pandering and titillating fashion" a movie called *Private Lessons,* about a 15-year old boy's seduction by an adult housekeeper (*In re Media Central [KZKX-TV],* 1988).

The FCC's new "get tough" policy was tested in court by a coalition of media organizations in *Action for Children's Television v. FCC* (ACT I) (1988). The United States Court of Appeals for the District of Columbia upheld the FCC's jurisdiction to protect children by enforcing indecency rules, even though it struck down the commission's 12:00 A.M. to 6:00 A.M. safe harbor as "too restrictive," ruling that indecent expression deserved some First Amendment protection. While the FCC studied how to comply with the court's ruling, in 1990 Congress attached a rider to an appropriations bill requiring a 24-hour ban on all indecent broadcasting. The commission subsequently supported this policy in its own indecency report, which modified the upper limit definition of "children" from 17 to 12 years old (*Enforcement of Prohibitions Against Broadcast Indecency,* 1990).

This 24-hour ban was rejected by the D.C. Circuit as an unconstitutional violation of the First Amendment in *Action for Children's Television v. FCC* (ACT II) (1991). Congress entered the fray once again, this time mandating a 6:00 A.M. to midnight safe harbor. However, a three-judge D.C. Circuit

Court panel in *Action for Children's Television v. FCC* (ACT III) (1993) overturned this mandate because it violated the rights of adult listeners to access information. Nevertheless, the ACT III ruling was later reversed by the D.C. Circuit's 7–4 en banc decision upholding the indecency ban because of a "compelling" need to protect children (*Action for Children's Television v. FCC,* 1995a). This same ruling declared that indecency enforcement must be applied evenly. Because the *Public Telecommunications Act of 1992* allowed public broadcasters to air indecent material beginning at 10:00 P.M., the Court ruled that commercial stations must be afforded the same opportunity. And in *Action for Children's Television v. FCC* (ACT IV) (1995b), a three-judge panel upheld the FCC's procedures for violations and forfeitures. Therefore, after years of litigation, the new safe harbor rule went into effect in August 1995: "No station shall broadcast in any day between 6 A.M. and 10 P.M. any material which is indecent" (*In re Prohibitions against Indecency in 18 U.S.C. sec. 1464,* 1995). The commission had finally found a comfortable niche. It continued to fine licensees essentially for two types of offenses: shock radio and erotic artistic expression.

Discussion of the *Pacifica* Opinion

The confusion experienced by the lower courts, the FCC, and Congress in interpreting and applying *Pacifica* suggests that the Supreme Court decision suffers from at least four serious flaws.

First, the definition of indecency approved by the Court is more restrictive than the contemporary definition of obscenity. In *Pacifica,* the Court addressed only the facts of this specific case, not the constitutionality of the FCC's language defining indecency (Schrier, 1988). The inconsistency between the FCC's Court-approved definition of indecency and the more rigorous three-part obscenity test derived from *Miller* (1973) is obvious. As Samoriski et al. point out (1995, p. 52), *Pacifica* allows indecency to be defined by a nebulous national standard while *Miller,* purportedly dealing with far more offensive "obscene" material, intentionally rejects a singular national standard in favor of local standards. Moreover, *Miller* also requires the presence of prurient interest in "works taken as a whole"; *Pacifica*'s indecency standard requires neither a single standard nor prurient intent. This is really closer to the restrictive nineteenth century *Hicklin* rule (*Regina v. Hicklin,* 1868), which has often been rejected by American courts for determining obscenity.

Second, *Pacifica* makes a significant assumption about the need to protect children from indecency, an assumption that takes the form of a myth, a

"pre-existing and value laden set of ideas derived from the culture and transmitted by communication" (McQuail, 1994, p. 247). *Pacifica* never addresses the issue of at what age a person is no longer a "child," accepting without comment the commission's use of 17. Indeed, the commission subsequently recognized this difficulty when it reclassified "children" as persons 12 years old or younger (*Enforcement of Prohibitions Against Broadcast Indecency,* 1990).

The Court also failed to provide evidence supporting its claim that children must be protected from indecent language; instead, it implicitly accepted the FCC's earlier rationale that "obnoxious gutter language describing these matters [sexual and excretory activities and organs] has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe such words are indecent within the meaning of the statute and have no place on radio when children are in the audience" (*In re Pacifica Foundation,* 1975, p. 98). There is an assumption here—a myth—that indecency dehumanizes society and that children do not have the requisite cognitive skills to understand the context of natural bodily functions. However, this assumption is unsupported in the relevant literature and appears to be formulated more on Judeo-Christian morality than evidence from contemporary social science (Donnerstein, Wilson, & Ling, 1992).

Third, the commission's indecency policy is enforced by ad hoc rather than a priori standards, creating a chilling environment for broadcasters who lack clear programming guidelines. Because courts recognize any form of prior review as a violation of Section 326 of the Communications Act of 1934, the commission's indecency restrictions can occur only on a case-by-case basis; The Court supported this approach by quoting the application of the fairness doctrine developed in *Red Lion Broadcasting Co. v. FCC* (1969): "We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, . . . but will deal with those problems if and when they arise" (p. 734, cited in *Pacifica,* 1978, p. 743). Theodore Glasser and Harvey Jassem suggest the lack of clear guidelines "roughly corresponds to Justice Potter Stewart's 'But I know it when I see it' test for obscenity" (1980, p. 292).

This "rule as you go" method was evident in the commission's confusing response to the decision by National Public Radio (NPR) to air an interview with crime boss John Gotti in which he regularly used "fuck" and its various permutations. The commission refused to take action against the broadcasters because its ad hoc analysis of the interview determined that even though the broadcast occurred within the safe harbor, the offending words

were in a news setting, which deserves more consideration (*In re complaint of Peter Branton,* 1991). While the commission made its decision for the public interest, it overlooked the very real fact that there is a blurred line between news and entertainment in contemporary broadcasting and that simply categorizing content as "news" may not make it inherently more in the public interest than material labeled "entertainment."

Fourth, the Supreme Court's steadfast refusal to apply any restrictions to print media while restricting broadcasting seems to suggest that it has adopted Lee Bollinger's (1976) position that a print-broadcast duality offers society the best of both worlds: a more accessible broadcast media protected by a very free print press. Implicit in this position is recognition that "a press half free and half tethered provides us with both the uninhibited reaching and the balance necessary to serve First Amendment goals" (Powe, 1987, p. 248). To support this stance the Court has gone through extraordinary rhetorical contortions to construct narrow differences between broadcasting and print, as exemplified in *Pacifica* (1978), *Red Lion* (1979), *National Broadcasting Co. v. United States* (1943), *Cohen v. California* (1971), and *Miami Herald Publishing Co. v. Tornillo* (1974). Subsequent court rulings failed to apply *Pacifica* directly to other media, including the mail (*Bolger v. Youngs Drug Products Corporation,* 1983), cable television (*Cruz v. Ferre,* 1985), telephone (*Sable Communications v. FCC,* 1989), or the Internet (*Reno v. ACLU,* 1997). Yet the restrictions are still in place for broadcasters. One should note, however, that this might be simply a product of generational or ideological bias; a Supreme Court consisting of justices from a different era might rule differently on the issue today.

Conclusion

Pacifica is important to twentieth-century jurisprudence even though it appears to be an anomaly, diverging from previous and subsequent free speech rulings that typically have enhanced freedom of expression. In its ruling, the Court showed it was capable of constructing an argument built upon an intricate myth about the impact of certain kinds of communication: sexually explicit messages. In so doing, it supported an indecency policy based on an unsubstantiated assumption that sexual content automatically will produce a negative effect on persons under a certain age. Thus it transformed pure speech (Carlin's seven words) into an act (a pig entering a parlor).

By making such an argument devoid of context, the Court supported the creation of a secondary category—*speech acts*—to "be treated differently from 'pure' speech . . . [and] subjected to the same scrutiny and possible

regulation by society as other kinds of regulable action, behavior, or conduct" (Haiman, 1993, p. 2). As a result, there is the potential for increased "intermingling of morality and the law that can be the undoing of a free society" (Haiman, 1993, p. 86). Indeed, by extrapolating the Court's *Pacifica* argument to its logical end, one could envision the Court rethinking other settled areas of communication law that may pose similar nuisances to majoritarian conventions, such as flag burning and racist speech.

This rhetorical retreat from ingrained individualism, the foundational bedrock of twentieth-century jurisprudence, results in what Post calls an "assimilist" interpretation of the First Amendment.[2] One might argue that when speech regulation is constructed on majoritarian desires, concerns about vaguely defined public interest may force courts to defer to the dominant norms and mores of the culture, regardless of constitutional—or even rhetorical—merit.

The cultural norm reflected in *Pacifica* is the controversial issue of sex. Indeed, this is the irony presented by the *Pacifica* decision: In framing the argument necessary to transform simple speech into action in order to better protect children from indecent language, the Court mirrored society's confusing and contradictory mythology in matters concerning sexual communication—the point, after all, of Carlin's monologue.

Notes

1. Derived from Levi's (1993) four eras of FCC indecency regulation.

2. Post (1988) presents three categories: assimilist, individualist, and pluralist. A pluralist interpretation assigns rights by group characteristics.

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Central Hudson Gas & Electric v. Public Service Commission

Joseph J. Hemmer Jr.

Commercial speech has not enjoyed the First Amendment protection awarded to other types of expression, a principle established in *Valentine v. Chrestensen* (1942). Following this ruling, the Court occasionally expressed doubts about the validity of the *Chrestensen* standard. Throughout the second half of the twentieth century, the federal judiciary came to recognize that just as the freedom to distribute political information is vital to the effective operation of democratic government, the liberty to disseminate commercial messages is essential to the efficient operation of the capitalistic marketplace. The Court's decision in *Central Hudson Gas & Electric v. Public Service Commission* (1980) is significant toward this end because it set forth a test which has become the standard for evaluating commercial speech.

A literature review reveals that legal scholars recognize the importance of *Central Hudson*. This decision has been described as "one of the most familiar names in the First Amendment commercial speech lexicon" (Bachrach, 1990, p. 224), "the centerpiece of commercial speech analysis" (Heffley, 1994, p. 688), "a guideline to cases involving the commercial speech doctrine" (Kalm, 1994, p. 1597), "the universally accepted standard for reviewing the constitutionality of restrictions upon commercial speech" (Lavery, 1994, p. 550), the "most significant commercial speech decision" (Van Riper, 1987, p. 281), the "landmark case" (Waters, 1997, p. 1627), and the "standard for examining commercial speech regulations" (Hemmer, 1996, p. 112). Accordingly, this essay considers the evolution of commercial speech law, the facts of the Central Hudson case, application of the four-prong test in subsequent commercial speech cases, efforts to clarify and redefine the test, and relevance to communication theory.

Evolution of Commercial Speech Doctrine

Toward the end of the nineteenth century, the United States experienced a shift in public attitude toward business transactions. The view that society

benefits the most in an environment that encourages free competition without restriction was replaced by an attitude that favored governmental regulation of deceptive business activities. Until that time, advertising had been "regulated" by the doctrine of caveat emptor: "Let the buyer beware." A more restrictive policy was introduced with the passage of the Pure Food and Drug Act in 1906 and the creation of the Federal Trade Commission in 1914.

During the initial regulatory period, the Supreme Court reinforced the FTC's determination to protect business competitors against deceptive advertisements. In *Federal Trade Commission v. Winsted Hosiery* (1922), the Court determined that deceptive labeling constituted unfair competition. Labels which exaggerated the amount of wool in underwear were literally false and calculated to deceive the purchasing public. The practice was unfair to manufacturers who labeled their products truthfully. A later case, *Maybelline v. Noxell Corporation* (1986), involved advertising of mascara. After reviewing laboratory research, the court determined that claims of "nontransferability" and the assertion that the products were "waterproof" were deceptive. The defendant was ordered to discontinue all deceptive ads. In *Maybelline,* as in *Winsted Hosiery,* the court acted to assure fair business competition.

The Supreme Court has also shielded consumers from deceptive practices. The classic case, *Federal Trade Commission v. Colgate Palmolive* (1964), involved deceptive demonstration of shaving cream on television. In its decision, the Court claimed that the misrepresentation of any fact that constituted a material factor in a purchaser's decision to buy was unprotected commercial speech. Chief Justice Earl Warren concluded: "If the inherent limitations of a method [simulated demonstration] do not permit its use in the way a seller desires, the seller cannot by material misrepresentation compensate for those limitations (p. 391).

The cases summarized above illustrate the Court's commitment to safeguard business competitors as well as public consumers from deceptive advertising. Over the years, the Court has also established doctrines applicable to commercial messages that are factual and nondeceptive.

Commercial Speech

The commercial speech doctrine was stated definitively in *Valentine v. Chrestensen,* a case that granted greater protection to editorial than to commercial forms of advertising. Writing for the Court, Justice Owen Roberts declared: "This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that . . . the states and municipalities may not unduly burden or

proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising" (1942, p. 54).

The Court reaffirmed this position in later cases. In *Ohralik v. Ohio State Bar Association* (1978), Justice Lewis Powell argued that commercial speech is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression" (p. 456). In *Board of Trustees of the State University of New York v. Fox* (1989), Justice Antonin Scalia claimed: "Our jurisprudence has emphasized that commercial speech [enjoys] a limited measure of protection commensurate with its subordinate position in the scale of First Amendment values" (p. 477). As recently as 1995, Justice Sandra Day O'Connor noted: "There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer. . . . This case, however, concerns pure commercial advertising, for which we have always reserved a lesser degree of protection under the First Amendment" (pp. 634–635, *Florida Bar v. Went For It*).

Commercial Information

During the mid-1970s, the Supreme Court began to retreat from the commercial speech doctrine. In *Bigelow v. Virginia* (1975), the Court extended protection to messages that did more than simply propose a commercial transaction. Portions of the message, especially reports regarding the legal status of abortion laws, conveyed information of potential interest to a diverse public—not only to readers in need of abortions but also to those with an interest in the abortion controversy. In *Bigelow,* Justice Harry Blackmun claimed that "the relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas" (p. 826).

One year later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976), the Court further eroded the commercial speech doctrine. A consumer group argued that the First Amendment entitled citizens to receive information concerning prescription drug prices. According to the Court: "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions . . . be intelligent and well informed. To this end, the free flow of commercial information is indispensable" (p. 765).

Linmark Associates v. Township of Willingboro (1977) concerned an ordinance that limited the use of for-sale signs in real estate advertising. The law, which attempted to stop "panic selling" by whites who feared their commu-

nity was becoming all black, thereby reducing property values, was overturned because it affected one of the most important decisions citizens have a right to make: where to live and raise their families.

Carey v. Population Services International (1977) involved a statute that sought "to suppress completely any information about the availability and price of contraceptives." Justice William Brennan observed that the law banned "the free flow of commercial information" that reflected "substantial individual and societal interests" (p. 700). He argued that "the fact that protected speech may be offensive to some did not justify its suppression" (p. 701).

Bates v. State Bar of Arizona (1977) involved advertising of lawyers' fees and services. Justice Blackmun stated: "The Constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellant's truthful advertisement concerning the availability and terms of routine services. We rule simply that the flow of such information may not be restrained" (p. 384).

In several cases decided in the latter half of the 1970s—*Bigelow, Virginia State Board of Pharmacy, Linmark, Carey, Bates*—the Supreme Court enunciated the commercial information doctrine, which coexisted with the commercial speech doctrine. Commercial speech which promoted the sale of goods and services was subject to less protection than other forms of expression. Commercial speech which provided valuable information was granted more constitutional protection. The stage was set for the Court to introduce a test that would measure the protection afforded to commercial messages.

Facts and Decision in the *Central Hudson* Case

In 1973, the Public Service Commission of New York ordered public utilities to halt all advertising that promoted the use of electricity. The order was based on the commission's determination that fuel stocks were insufficient to satisfy customer demands. The commission eventually issued a policy statement which divided advertising into two categories: promotional (intended to stimulate the purchase of services) and informational (not intended to promote sales). The statement banned promotional advertising, noting that such activity runs contrary to the national policy of preserving energy. It permitted informational advertising designed to encourage "shifts of consumption" because such advertising did not seek to increase total consumption, but rather to encourage a leveling of demand. The Central Hudson Gas and Electric Corporation initiated court action, arguing that the commission had restrained commercial speech in violation of the First Amendment.

The *Central Hudson* case reached the Supreme Court in 1980, when Justice Powell, in an 8–1 decision, spelled out a "four-prong" test that has become the standard for evaluating commercial speech cases. First, the communication must be neither misleading nor related to unlawful activity in order to be afforded First Amendment protection. Second, the government must assert a substantial interest to be achieved by restricting commercial speech. Third, the restriction must directly advance governmental interest. Fourth, the restriction must not be excessive: Governmental interest may not be served as well by a more limited restriction (p. 566).

In applying the test, Justice Powell decided that the proposed public utility advertisements satisfied the first prong: The ads were neither misleading nor related to unlawful activity. In applying prong two, Powell acknowledged that the government had offered two substantial interests—fair rates and energy conservation. The commission contended that promotional advertising would "aggravate inequities" in "utilities' rates" and "extra costs would be borne by all consumers." The state's concern about fair rates represented "a clear and substantial governmental interest." The commission also argued that the state's interest in conserving energy was "sufficient to support suppression of advertising designed to increase consumption of electricity" (pp. 568–569). Turning to the third prong, Powell examined whether a restriction on promotional advertising furthered governmental interests. Regarding the first interest—equitable rate structure—the Court found that the link was "most tenuous" and "highly speculative," thus failing to pass the test. The second interest—energy conservation—passed prong three because there is an "immediate connection between advertising and demand for electricity." However, the regulation failed to satisfy prong four because the commission's ban suppressed "information about electric devices or services that would cause no net increase in total energy use." In addition, no showing had been made that a more limited restriction would not serve the governmental concern (p. 569). The *Central Hudson* Court concluded that the restriction was overly broad, suppressing speech that in no way impaired the governmental interest in energy conservation.

Justice Powell was joined in the majority opinion by Chief Justice Warren Burger and Justices Potter Stewart, Byron White, and Thurgood Marshall. Concurring opinions were offered by Justices William Brennan, Harry Blackmun, and John Stevens. The gist of their reasoning described commercial speech as entitled to greater protection. These justices concluded: "No differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information" (p. 578). Justice William

Rehnquist filed a dissenting opinion which stressed that commercial speech was entitled to less protection. He concluded that "the Court's decision today fails to give due deference to this subordinate position of commercial speech" (p. 589). The majority opinion, however, focused on a point between the concurring and dissenting views: It formulated the test that would become the standard for evaluating commercial speech.

Application of the *Central Hudson* Test

The Supreme Court has applied the *Central Hudson* test in deciding 16 cases, in some instances to protect commercial speech and in others to uphold governmental interest in regulating advertising.

In *Metromedia v. City of San Diego* (1981), the justices analyzed a restriction on outdoor advertising displays, a measure designed to promote the goals of traffic safety and the appearance of the city. The Court overturned the ordinance even though it passed the *Central Hudson* test. The regulation was unconstitutional because it valued commercial ads over noncommercial messages (p. 514). This law violated the longstanding principle that commercial speech enjoys less protection than other types of communication.

In Re R.M.J. (1982) involved a regulation that limited advertising by lawyers to 10 categories of information. In applying prong two of the *Central Hudson* test, the Court noted the absence of any "substantial interest promoted by the restriction" (p. 205) and overturned the regulation.

In *Bolger v. Youngs Drug Products Corporation* (1983), the Court rejected a federal law that prohibited the mailing of unsolicited advertisements for contraceptives. The Court decided that the governmental interests claimed to be served by banning the mailings—shielding recipients from potentially offensive materials and helping parents control the manner in which their children learn about birth control—did not justify the ban. The Court noted that simply because "protected speech may be offensive to some does not justify its suppression" (p. 71).

In *Zauderer v. Office of Disciplinary Counsel* (1985), the Court examined rules that prohibited the use of illustrations in advertising by lawyers. The Court found that the state's interest in preserving the dignity of the legal profession constituted insufficient reason to justify such rules. The state's arguments lacked "evidence or authority of any kind" to support its contention that these practices were harmful (p. 648).

In *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico* (1986), the Court applied the *Central Hudson* test to a law that authorized casino gambling in order to promote tourism but prohibited gambling par-

lors from advertising to people living in Puerto Rico. In upholding the law, the Court claimed that reducing the demand for gambling by residents and thus protecting their health, safety, and welfare constituted a "substantial governmental interest." Furthermore, the restrictions "will not affect advertising of casino gambling aimed at tourists but will apply only to such advertising when aimed at the residents" (p. 343).

In *Shapero v. Kentucky Bar Association* (1988), the Court overturned a policy that did not serve a substantial governmental interest. According to the Court, the banned "written solicitation conveys information about legal services by means that are more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney" (p. 476). The Court did not find this type of expression to be misleading.

Board of Trustees of the State University of New York v. Fox (1989) involved a regulation that banned commercial enterprises from operating on a public university campus. The Court approved this policy as it applied to a "Tupperware" party. The Court held that the regulation satisfied *Central Hudson* because it effectively furthered the substantial interests of promoting campus safety and preventing commercial exploitation of students.

City of Cincinnati v. Discovery Network (1993) involved a restriction against placing selected news racks on public property for the purpose of distributing free magazines which consisted primarily of advertisements. The city expressed concern for the safety and aesthetics of city streets. The Court found that the action neglected to meet prong three of *Central Hudson* because removing only a "minute" and "paltry" number of news racks had only a minimal effect on safety and appearance (p. 418).

In *Edenfield v. Fane* (1993), a certified public accountant successfully challenged a ban on the use of "direct, in-person, uninvited solicitation" to obtain new clients. The Court acknowledged that the government cited substantial interests: to prevent fraud, protect privacy, and maintain CPA independence. With regard to prong three, however, the law failed to pass the test, for the government neglected to show that the regulation directly advanced these interests "to a material degree" (pp. 770–771).

In *United States v. Edge Broadcasting Company* (1993), the Court upheld legislation designed to control gambling. The law prevented a broadcasting company from airing lottery advertisements from its location near the border of two states, one which had a legal lottery while the other did not. The Court acknowledged that the government had a substantial interest in supporting the policy of non-lottery states.

Ibanez v. Florida Department of Business and Professional Regulation (1994) involved a CPA who was reprimanded for using the word "certified" on

her business cards and in yellow pages listings. The Board of Accountancy claimed that any use of the word "certified" that was not directly connected with the board "inherently mislead[s] the public into believing that state approval and recognition exists" (Final Order of the Board of Accountancy [May 12, 1992], pp. 193–194, cited in *Ibavez,* p. 142). The Court disagreed, noting that the board had not demonstrated the public would be misled or that harm would result from allowing such communication to reach the public eye.

In *Rubin v. Coors Brewing Company* (1995), the brewer filed suit against a ban on the use of labels that describe the alcohol content of beer. The government had identified a substantial interest in curbing "strength wars" by brewers who might compete for customers on the basis of alcohol content, and it had an interest in protecting the health of its citizens. However, the Court recognized the "overall irrationality of the Government regulatory scheme." The ban failed to advance the interest because existing state statutes "directly undermine and counteract its effects" (p. 488).

In *Florida Bar v. Went For It* (1995), the Court upheld a restriction on direct-mail solicitation by attorneys. The messages were factual and not misleading. The Court concluded that the Florida Bar had a substantial interest in protecting personal injury victims and their loved ones against invasive contact by lawyers. The ban's scope was narrowly tailored to the stated objective.

In *44 Liquormart v. Rhode Island* (1996), liquor retailers successfully challenged statutes that prohibited the advertising of liquor prices, except at the place of sale. The Court acknowledged a substantial governmental interest in promoting the reduction of alcohol consumption; since there was no supporting evidence, the Court could not accept the "assertion" that the ban significantly advanced the interest (p. 505).

The most recent case in which the Court applied the *Central Hudson* test, *Greater New Orleans Broadcasting Association v. United States* (1999), involved a challenge to federal law that prohibited broadcasters from carrying ads for privately operated casino gambling, even if gambling was legal in the station's locale. Although the government interest in reducing social costs associated with gambling was found to be substantial, the law failed to advance the interest because it was "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it" (p. 190).

The cases cited in this section exemplify the Supreme Court's use of the *Central Hudson* test to evaluate commercial expression. In some instances—*Central Hudson, Youngs Drug Products, Zauderer, Shapero, Discovery Network, Fane, Ibanez, Coors Brewing Company, 44 Liquormart,* and *Greater*

New Orleans Broadcasting—the test operated to protect commercial speech. In others—*Posadas, Fox, Edge,* and *Went For It*—the test served to uphold governmental interests. In *Metromedia,* the test did not play a principal role in the decision.

In applying the test, the Court has utilized the four prongs in an uneven manner. Prong one has never served as the determining criterion because all 16 cases involved truthful messages related to lawful activity. Prong two functioned as the key factor in five decisions—*R.M.J., Youngs Drug Products, Zauderer, Shapero,* and *Ibanez.* In those cases, the government failed to demonstrate that a substantial interest would be served. The determining criterion in the remaining cases centered around prong three—the level of scrutiny required to prove a "fit" between the government's substantial interest and the extent to which that interest is furthered by the regulation.

Clarification and Redefinition of the *Central Hudson* Test

There have been two principal efforts to clarify and redefine the test. The first, affecting prong two, focused on the amount and quality of evidence required to establish a substantial governmental interest. The second, concerning prong three, redefined the nature of the "fit" that a regulation must meet to demonstrate that it furthered governmental interest. Resolution of these issues helped determine the level of scrutiny required to satisfy the test.

Evidentiary Requirement

In *Metromedia,* Justices White, Brennan, and Rehnquist offered conflicting views regarding the evidence requirement that would satisfy the *Central Hudson* test. Justice White's plurality opinion set the stage for the debate when he "simply accepted as substantial the city's asserted interest in promoting traffic safety and preserving the aesthetic appearance of the city, without requiring a showing of why those interests were substantial" (Van Riper, 1987, p. 253). Justice Brennan called for stricter scrutiny when he argued that San Diego had failed to provide sufficient evidence demonstrating that the interests were substantial (*Metromedia,* 1981, p. 531). Justice Rehnquist took issue with Justice Brennan: "Nothing in my experience on the bench has led me to believe that a judge is in any better position than a city or county commission to make decisions in an area such as aesthetics. Therefore, little can be gained in the area of constitutional law, and much lost in the process of democratic decision making, by allowing individual judges in

city after city to second-guess such legislative or administrative determinations" (p. 570).

A few years later in *Posadas,* the Court employed the lesser requirement in accepting a "legislature's belief" regarding the harms of gambling (1986, p. 341). Legal scholars criticized the evidentiary standard that permeated Justice Rehnquist's opinion in that case. Albert Mauro observed: "The Court determined both whether the state interest was substantial and whether the restrictions advanced the interest almost solely on the basis of the state legislature's judgment" (1992, p. 1945). Ellen Van Riper noted: "The Court essentially deferred to the government on every point[,] unquestionably accepting its claims as true and compelling despite the fact that there was . . . ample room for dispute" (1987, p. 271). According to Steve Younger, "the Court might as well have stated that the legislature may decide whether a ban on commercial speech is constitutional" (1987, p. 1171). In *Posadas,* "precedent has been set to allow a 'substantial' governmental interest to be found in commercial speech cases in the most tenuous of circumstances. . . . No evidence is necessary to prove the government's assertions" (Athan, 1987, p. 751).

Despite Justice Rehnquist's efforts, the *Central Hudson* test generally has been implemented with a strict evidentiary requirement. The burden of proof has been substantial and has rested with the governmental agency. In *Zauderer,* Justice White observed the absence of "any evidence or authority of any kind" and noted that a restrictive policy could not be sustained on "unsupported assertions" (1985, p. 648). In *Fane,* Justice Anthony Kennedy cited an absence of "studies," "anecdotal evidence," or "empirical data" supporting the governmental interest as justification for rejecting the regulatory ban (1993, p. 771). In *Ibanez,* Justice Ruth Bader Ginsberg reiterated that "the State's burden is not slight; . . . mere speculation or conjecture will not suffice" (1994, p. 143). In *Coors Brewing Company,* Justice Clarence Thomas required that a governmental body "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree" (1995, p. 487). In *44 Liquormart,* Justice Stevens emphatically declared that "*Posadas* clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy" (1996, p. 509).

"Fit" Requirement

In the *R.M.J.* decision, Justice Powell altered the wording of prong three as set forth in *Central Hudson.* He referred to whether the restriction was "no more extensive than *reasonably* [italics added] necessary to further substantial interests," rather than whether the restriction in question was "no more ex-

tensive than is necessary to serve that interest" (1982, p. 207). This modification was cited briefly in *Zauderer* and *Shapero,* thereby imprinting on the record a watered-down requirement for satisfying prong three: a "reasonably necessary" rather than "least restrictive means" standard.

The "reasonable fit" terminology was used by Justice Rehnquist in the *Posadas* decision. In measuring the "fit" between the legislature's ends (reducing casino gambling by residents) and the means chosen to accomplish those ends, Rehnquist decided that the "fit" was "reasonable" because the challenged restrictions "directly advance" the government's asserted interest (1986, p. 341).

In *Fox,* Justice Scalia applied the "reasonable fit" standard in defining how government may satisfy prongs three and four: "What our decisions require is a 'fit' between the legislatures's ends and the means chosen to accomplish those ends . . . , a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served'" (1989, p. 480). Justice Scalia's terminology in *Fox* "effectively removed a large amount of the limited First Amendment protection commercial speech had in the past" (Fawal, 1990, p. 481). While *Central Hudson* established a rigid method for balancing advertisers' free speech interests against the government's concern with regulating business, the *Fox* decision balanced the equation in favor of government: "If courts defer to the judgment of local lawmakers without scrutinizing the justifications for a particular regulation, the state may satisfy the test any time it claims a substantial interest" (Rownd, 1990, pp. 284–285).

Following *Fox,* the Court utilized the "reasonable fit" standard but coupled it with a strict evidentiary requirement. In *Discovery Network,* Justice Stevens claimed that the government failed to establish a "reasonable fit": There was an absence of evidence indicating that the means of regulation would "directly advance" the substantial interest in aesthetics (1993, p. 418). In *Discovery Network,* by refusing to allow legislators to further their interest through an under-inclusive regulation, the Court returned the *Central Hudson* test near its pre-*Fox* position: Any review of bans on commercial speech "must include a fact-specific evaluation of the relationship between a selective regulation of commercial speech and the asserted governmental interests" (McAndrew, 1994, p. 1287). This decision "put teeth back into the *Central Hudson* test" (Servilla, 1993, p. 1116). The *Fane* decision also imposed a strict standard, requiring "the state to meet a heightened burden of proof in showing that its regulation directly advances its stated interest" (Levy, 1994, p. 296).

Nevertheless, in *Edge,* the Court reverted to a lenient standard in approving

a restriction designed to reduce gambling in non-lottery states. The Court did not demand that the "fit" must be "in proportion to the interest served" (*Discovery Network,* 1993, p. 417), and that the government must demonstrate "that the harms it recited are real and that its restriction will alleviate them to a material degree" (*Fane,* 1993, p. 771). Tara Lavery contends that "it can hardly be argued that a categorical ban on truthful advertising regarding an activity in another state, which is perfectly legal, is in proportion to effectuating the government's asserted interest in protecting the policies of nonlottery states" (1994, p. 580).

Court decisions since 1993 have required a "sufficient" or "reasonable" fit. In *Coors Brewing Company,* the Court determined that a label ban failed to directly advance the interest in suppressing beer-strength wars; the government did not provide a "sufficient" fit (1995, p. 490). In *Went For It,* Justice O'Connor upheld a restriction on personal injury lawyers sending direct-mail solicitations to victims. She claimed that the ban was narrowly tailored to the stated objective: The fit was "reasonable" (1995, p. 632). In *44 Liquormart,* the Court rejected a statute that prohibited the advertising of liquor prices, except at the place of sale. Justice Stevens noted that the state had failed to establish a "reasonable fit" between its abridgement of speech and its temperance goal (1996, p. 507). In *Greater New Orleans Broadcasting Association,* Stevens wrote the opinion that rejected the government's attempt to limit advertising of privately owned gambling casinos; the plan lacked a "reasonable" fit (1999, p. 188).

The Court has accepted the "reasonable fit" terminology, which demands a less strict standard of scrutiny for prong three of the *Central Hudson* test. Nonetheless, in a preponderance of recent cases, the justices have required a strict evidentiary standard for proving an interest is "substantial" and for demonstrating that the regulation advances that interest to a "reasonable" degree. Thus, the *Central Hudson* test has been implemented with at least an intermediate level of scrutiny.

Relevance to Communication Theory

First Amendment scholars have approached freedom of communication issues from a variety of philosophical bases. The theory which seems most relevant to the *Central Hudson* test is the "self government" notion of Alexander Meiklejohn. He recognized two types of expression: public and private. Public expression, he argued, enhances self-government and is entitled to absolute protection. He identified four categories of public expression: education, philosophy and science, literature and the arts, and public discussion of

public issues (Meiklejohn, 1961, pp. 256–257). Private expression, which includes advertising of products and services, may be regulated, he asserted. Meiklejohn noted that "the constitutional status of a merchant advertising his wares, of a paid lobbyist fighting for the advantage of a client, is utterly different from that of a citizen who is planning for the general welfare" (p. 39).

It seems clear that Meiklejohn's theory perceives the importance of communication to be related to its *function*—that is, because expression contributing to self-government is most important, it deserves the most protection. The "freedom of public discussion" is beyond the reach of legislative limitation." On the other hand, the "private right of speech . . . may on occasion be denied or limited" (Meiklejohn, 1948, p. 39). This unique perspective upon communication—that its function determines its worth—is at the core of the theory.

The earlier section of this essay outlining the evolution of the commercial speech doctrine illustrates the difficulty in applying Meiklejohn's functional theory to commercial speech issues. The Supreme Court has realized that private speech often exhibits characteristics which are similar to public speech. In those cases, the distinction was blurred and the dividing line became unclear. In some instances, the Court protected commercial speech while in others it imposed bans on commercial advertising.

The *Central Hudson* opinion affirms Meiklejohn's view by explicating conditions for controlling private expression. Justice Powell acknowledged that the "Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression" (1980, p. 564). He noted that the government may ban "forms of communication more likely to deceive the public than to inform it" (p. 564) and "commercial speech related to illegal activity" (p. 565). He claimed that when "the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech" (p. 564).

Justice Powell also identified aspects of *Central Hudson* which protect against abuse of free speech, noting that the regulatory scheme must be designed to accomplish the state's goal: "Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive" (p. 564).

Conclusion

The *Central Hudson* test has become the standard for evaluating commercial expression. It has been used as an analytical tool in 16 Supreme Court cases. In most of these decisions, the Court has endorsed First Amendment protections and opposed the governmental interest. As crafted by Justice Powell, the test is narrowly tailored, defining its procedures clearly in four stages. It is linear, moving in a direct path from focus on possible deception to questions of illegality, substantial interests, advancement of those interests, and finally, overbreadth.

The test has undergone clarification and redefinition, becoming weaker in the process. It seems clear that Justice Powell's original "least restrictive means" wording incorporates a demanding level of scrutiny. The "reasonable fit" standard fails to establish guidelines; each case requires a separate determination of what is "reasonable." This standard is inherently subjective, in many ways representing the absence of a standard. Justices have a wider range upon which to roam in search of a "fit."

During the 20-year period in which the Court has applied the *Central Hudson* test, the Court has left standing the preferential treatment enjoyed by other forms of expression over commercial speech. Having decided that the level of First Amendment protection offered to commercial speech is not absolute, the Court has failed to shape a solid framework for addressing commercial speech situations. As a result, it has had to face the difficult task of judging not only the truthfulness of commercial expression but its value as well.

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Hazelwood School District v. Kuhlmeier

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On January 13, 1988, the Supreme Court of the United States decided that public high school students who produce a newspaper as part of a journalism class do not have First Amendment protection from state censorship. As a legal artifact, *Hazelwood School District v. Kuhlmeier* (1988) presents no striking or significant leap of juridical epistemology. Indeed, the opinion presents a rather straightforward application of public forum analysis.[1] However, the case is noteworthy in an altogether different context as intersected with the social structure in which it was formed. From this methodological vantage the *Hazelwood* case constitutes a cultural artifact from which arguments can be made about the society from which it stems, in much the same manner as a Sinagua Indian potsherd permits the archaeologist's narrative.[2] The primary goal of the following analysis is to illustrate how *Hazelwood* reconceptualizes the status and location of individual rights for American public high school students. As critical instance, then, the project examines what the *Hazelwood* case indicates about our understanding of communication and, more importantly, our understanding of American social and cultural logics.

What Happened and Where We Stand

The case began in the spring of 1983 at Hazelwood East High School in St. Louis County, Missouri. On May 10 the page proofs of the May 13 edition of the school newspaper, *Spectrum,* as generated by the Journalism II class of Hazelwood East, were submitted to the school principal for review prior to publication. This submission followed standard procedure. The principal of Hazelwood East, Mr. Robert E. Reynolds, reviewed the proofs on May 11 and determined that two articles—one on teen pregnancy, the other on divorce—warranted removal. In order to remove the two offending sto-

ries and meet a press deadline, Reynolds decided to cut two pages from the six-page proof, in effect excising a total of seven articles. Subsequently, the May 13 edition of *Spectrum* was published as a four-page, state-edited text.

Cathy Kuhlmeier, Leslie Smart, and Leanne Tippett, three students involved in the production of *Spectrum,* brought suit in the United States District Court for the Eastern District of Missouri, Eastern Division, in January 1984. Not surprisingly, the complaint centered on the alleged violation of the students' First and Fourteenth Amendment rights as exercised within the preparation of the May 13, 1983, edition of *Spectrum.*[3] In May 1985 the District Court, in the first major consideration of the complaint, judged that the students' constitutional rights had not been violated (*Kuhlmeier v. Hazelwood School District,* 1985). The U.S. Court of Appeals for the Eighth Circuit reversed in January 1986 (*Kuhlmeier v. Hazelwood School District,* 1986). The Supreme Court granted certiorari in January 1987 and reversed the Eighth Circuit in January 1988 (*Hazelwood School District v. Kuhlmeier,* 1988). The students lost.

As rearticulated by a majority of the Supreme Court in the *Hazelwood* opinion, the free speech and press rights of public school students are not "automatically coextensive with the rights of adults in other settings" (*Bethel School District No. 403 v. Fraser,* 1986, p. 682). However, the Court has also decreed that public school students do not leave constitutional protections and freedoms behind upon entering school grounds (*Tinker v. Des Moines School District,* 1969, p. 506). The current overall framework is simple. As representatives of the state, public school administrators may censor, restrain, and punish student expression in any communicative form which (1) materially and substantially interferes with the requirements of appropriate school discipline, (2) interferes with the rights of students, (3) fails to meet standards of academic propriety, (4) generates health and welfare concerns, or (5) is deemed obscene, indecent, or vulgar.[4] Student expression which may be considered school-sponsored is most susceptible to regulation. Theatrical productions, public speeches in an assembly environment, and publications produced as part of a curricular activity are examples of student expression which may bear the "imprimatur of the school" (*Hazelwood,* 1988, p. 271). A few loopholes exist; for example, student expression that might be characterized as personal or non-school-sponsored is heavily protected. Yet even within this category, expression found to interfere with school discipline or the rights of others may be restrained. Off-campus and extracurricular newspapers and publications as well as student dress are examples of personal or non-school-sponsored speech that may or may not come under the control of

school officials. On the other hand, in the aftermath of the *Hazelwood* ruling, some state legislatures have passed statutory protections for student expression which exceed federal boundaries (Abrams & Goodman, 1988).

Commentators Comment

Scholarly and legal commentary on the *Hazelwood* ruling abounds (Abrams & Goodman, 1988; Bryks, 1989; Forehand, 1988; Hafen, 1988; Hafen & Hafen, 1995; Hawthorne, 1989; James, 1989; Salomone, 1992). Two camps of argument have formed: pro-*Hazelwood* positions and a party of commentators opposed to *Hazelwood*. The pro-*Hazelwood* position is perhaps best argued by Bruce C. Hafen and Jonathan O. Hafen. In a nutshell, the Hafens' symposium argues that the autonomy of a child is best developed during a temporary surrender of freedom to state authority during the period of compulsory state education. A child's ability to exercise freedom in the long run is thought to be thereby expanded and more meaningful. During this temporary surrender, a student is inculcated and indoctrinated with the values of the community in which she resides; following this surrender, American youth will finally "have something worth saying, together with the maturity, insight, and skill needed to say it intelligibly" (1995, p. 385). Hafen and Hafen argue that premature recognition of the legal autonomy of a child erodes the development of actual autonomy (p. 385). The authors conclude that the line between what state agencies tolerate and what they promote as related to expressive activity illustrates constitutional reasoning centered on the differences between social and individual interests.

Bobby Hawthorne (1989) advances another pro-*Hazelwood* position. Simply put, members of the commercial media applauded the *Hazlewood* decision because, they said, it mirrors the real world of the modern journalist. If the analyst makes the utilitarian assumption that the result of a high school journalism class is to accurately reproduce the professional world of journalism, a strong editorial process (prior restraint) merely reflects the conditions of current news practices. Professional journalists are not guaranteed publication; rather, they face the prospect of editorial rejection, for numerous pragmatic reasons. *Hazelwood* helps mirror reality for would-be journalists. Ironically, the idea that the central function of *Hazelwood* is to prepare or teach student journalists about the real world is the basis for commentary opposed to *Hazelwood*.

The starting point for the opposition is the *Hazelwood* dissent. Justices William Brennan, Thurgood Marshall, and Harry Blackmun argued: "When the young men and women of Hazelwood East High School registered for

Journalism II, they expected a civics lesson. *Spectrum,* the newspaper they were to publish, was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a . . . forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment" (1988, p. 277). For the *Hazelwood* opposition, the frustration seems to center not on the observation that *Hazelwood* is an instructional instrument but on the object of that pedagogy. The opposition argues that *Hazelwood* teaches students a reality of state power—an "Orwellian guardianship of the public mind" (p. 286)—inconsistent with the spirit of the Constitution. In support of the dissent, Abrams and Goodman go farther, essentially arguing that students will be encouraged to pursue expressive activity outside of school, sacrificing academic credit and educational input. "The likely effect of such a message is student cynicism. Students who might have eagerly awaited a chance to participate in our system as adults may instead pursue more parochial concerns" (1988, p. 723). Unwittingly, Abrams and Goodman identified and stepped over the cultural implications of *Hazelwood* to which I now turn: the notion that freedom, for high school journalists at least, and for all American youth enrolled in the public school system at worst, is essentially defined outside of traditional or mainstream social structures.[5]

The Statements of Argument

The significance of the *Hazelwood* decision is an inadvertent identification and illustration of a greater cultural, social, and political contradiction. The case intersects with numerous domains: education theory, child development, the public forum problem, parental rights, and the meaning of constitutional protections. The philosophy of the decision pits individual rights against the determinative rights of community and society. The majority opinion in *Hazelwood* implies a contradictory notion of American identity. *Hazelwood* draws a boundary delineating two spaces: the sphere of practice as contrasted with the sphere of the ideal.

The purpose of this essay is to position the reader to consider *Hazelwood* from a critical cultural position. I argue that the *Hazelwood* decision as cultural artifact (1) defines constitutional freedom outside the bounds of the legal and problematizes American identity in the process; (2) illustrates the ideological conflicts inherent between an everyday life of practice and an identity-laden perception of a constitutional ideal; (3) allows the state to deny the semiotic process and to actively define and produce what is acceptable; and (4) points out a uniquely late-twentieth-century tension between indi-

vidual and social rights that may define a future theoretical direction in free speech theory and practice.

Implications for Communication Criticism

Malcolm Sillars articulates the relevance of the analysis that follows to the practice of rhetorical/communication criticism and theory. He delineates two broad approaches of communication/rhetorical analysis: the traditional or "objectivist" perspective (traced to classical Greek origins), and the "deconstructive" (which emerged more recently). Traditional modes of rhetorical analysis utilize criticism from an objectivist standpoint; they tend to treat communication texts or artifacts from a perspective of "judicial criticism" or as "messages that can be assessed against reality-based standards" from a "common sense" point of view. "Therefore, common sense critics evaluate the accuracy of factual statements, the beauty of linguistic expressions, or the rhetorical skills of orators against ideal standards, each of which has its own complexity" (Sillars, 1991, p. 10). Readings from the objectivist perspective are thematic of the tradition of the field.[6] Examples of objectivist critical approaches to the law include an excellent work from the communication discipline by Craig Smith (1998), who presents a rather straightforward rhetorical analysis of the Supreme Court's decision in *44 Liquormart v. Rhode Island* (1996). Other examples include an Aristotelean rhetorical analysis by Grant Cos and Robert Schatz (1998). Historical analysis is the approach of Elizabeth Koehler (1998) and Richard Parker (1997).

This essay centers upon the second approach to criticism as identified by Sillars: deconstruction (see Derrida in Richter, 1989). The deconstructive perspective is one of the most significant contributions to communication theory in the last 25 years; however, few communication scholars use the approach within the domain of legal analysis.[7] A work of criticism from the deconstructive viewpoint focuses on one major idea that characterizes the critical task: Communicative meaning is to be found and best understood in "the relationship of the text to the society from which it comes" (Sillars, 1991, p. 18). From this perspective, the object is not to determine the meaning of a legal text as related to author intention, effect on reader, rhetorical form, or the conventions of language. Rather, it is to treat a legal document as a communicative artifact, using the broader approach of cultural studies. The meaning of a legal text is, if you will, co-constructed between self and other (Anderson and Meyer, 1988). The task of the deconstructive critic, then, is to argue what a legal text "says" about the culture or society which

generated it. This approach represents a new locus of legal criticism centered within the communication discipline (Hundley, 1997).

The analysis which follows also turns on the domain of "Critical Legal Studies" (CLS).[8] Neither a distinct method nor a theory, the CLS project is driven by the expectation of certain outcomes. Of the many goals of CLS, perhaps the most predominant ones center on the illustration of how a given category of texts (i.e., legal ones) perpetuates or corrects for social inequality through the maintenance (or change) of social, political, and cultural structures. CLS tries to uncover the logics or reasoning of the law, the *why* of the law rather than the *what*. The arguments which follow here stem from textual analysis embedded within an ideological framework. Ideological criticism is an approach that "digs out the politics" of a text; within it, "all other approaches to criticism can be explained" (Sillars, 1991, p. 195). The critic looks for patterns of belief or interpretive schemes revealed in a text which explain the logics of a society or culture. If the critic can uncover these patterns, the ideology of the group becomes apparent. The ideology underlying the text allows for the critic to better understand how the text was generated, what it signifies, and (most importantly) the nature of power relationships between contenders in an argument. From this point of view, analysis reveals why some commentators feel *Hazelwood* was a good decision and others do not.

The examination of a state text requires the reader to view the function of the state beyond traditional molds. From this perspective, the state is neither merely an enemy of freedom nor an agent passing out megaphones (Fiss, 1996). To the contrary, one must examine the state functioning as producer. Judith Butler problematizes state-speech sanctioning in this manner, using hate speech as an example:

> That formulation is this: the state produces hate speech, and by this I do not mean that the state is accountable for the various slurs, epithets, and forms of invective that currently circulate throughout the population. I mean only that the category cannot exist without the state's ratification, and this power of the state's judicial language to establish and maintain the domain of what will be publicly speakable suggests that the state plays much more than a limiting function in such decisions; in fact, the state actively produces the domain of publicly acceptable speech, demarcating the line between the domains of the speakable and the unspeakable, and retaining the power to make and sustain that consequential line of demarcation. (1997, p. 77)

From Butler's perspective, in *Hazelwood* the state is not involved in the production of speech but rather in the production of the practice of freedom. By defining freedom outside traditional social structures and locations (for our purposes, the American public school system), the *Hazelwood* decision contradicts traditional American ideological identity.

My first argument is that *Hazelwood* defines constitutional freedom outside the bounds of the legal and problematizes American identity in the process. Abrams and Goodman are concerned that *Hazelwood* will lead public high school students to "cynicism" and "more parochial concerns" (1988, p. 723). However, the capacity of *Hazelwood* to define freedom outside the law is a significant contradiction within the case. The majority opinion seems to indicate that the "normal" exercise of First Amendment freedoms for public high school students is an illegal exercise, one where American identity itself is beyond the law. The Court delineates three speech places (from most to least free): personal or published speech off state property, personal speech on state property, and published speech on state property. Within state structures, the rights of the students are curtailed. Outside state parameters, freedom reigns. The opinion argues that the closer the speaker is to the state, the less free the speaker becomes. The effect of limiting freedom as expression becomes more closely associated with the state undermines what might be termed a primary constitutional or American ideal: As speech becomes more closely associated with the state, the freer it should become.

The second half of my first argument states that *Hazelwood* problematizes students' identity. This is the identity of the soon-to-be-adult (Hafen and Hafen, 1995). What sort of American identity does *Hazelwood* reinforce? Hafen and Hafen argue that from the state's perspective, suspension of freedom is integral to the development of a responsible citizen and therefore produces a positive outcome. Abrams and Goodman (1988) argue that *Hazelwood* may lead high school students to pursue freedom outside established social structure: a negative outcome. However, the domain of identity under scrutiny here is not so specific. American identity centers on the notion of myth—a historical belief in who or what we think we are based on the social citation of stories, narratives, and repetition of patterns of signification. While there is no one myth that captures the idea of being an American, one example will help illustrate how this national or cultural identity works.

The cowboy icon readily exemplifies the myth of rugged individualism. To be American within this narrative is to be self-sufficient, solving one's own problems without the assistance of anyone, especially not the state. Typically, problems within a given community are essentialized between the differences of two men: iconically right and wrong, white hat and black hat.

Resolution is violent; the state judicial system is relegated to a secondary or nonexistent role. In fact, the victor must disassociate from the community after the gunfight. The community needs the cowboy/gunfighter but cannot accommodate his individualism, so off he rides. American identity is rife with these individualistic icons: the cowboy, the mountain man, the biker, the military hero, the fighter pilot, the cop, and so on.[9] Within the law, constitutional rights reside at the site of the individual, not the community. A semiotic *I,* not *we,* exercises constitutional rights. In *Hazelwood,* the state is established as the enemy of those rights. To be American is to seek the exercise of individual rights outside the structures of community, state, and the public high school. American identity is defined outside state structures; for the *Hazelwood* youth, to be American is to seek freedom outside the law.

The second argument regarding *Hazelwood* extends the problem of identity. *Hazelwood* is a significant case precisely at the point where it identifies the tensions between practice and ideals. The dissent is perhaps most illustrative of this. The justices in dissent lament the civics teachings of *Hazelwood:* a lesson of state regulation and power. The frustration of the *Hazelwood* dissent is that public high school freedoms bear little relation to the ideals of American identity. Furthermore, if we bring to the fore the perspective that *Hazelwood* merely teaches would-be journalists the current conditions of commercial press practice, we deepen the contradiction between ideal and actual practices. The Constitution demands a free press, and our identity myths celebrate it. Yet *Hazelwood* shows us that the differences between what we do and what we desire to be—or what our myths tell us—are substantial. Two domains of thought are created from this perspective: a sphere of the ideal, which is tied to American identity myths, and the sphere of practice. One way to describe the latter is to examine how precedent operates. The idea of a standing decision allows the judiciary to move slowly and cautiously, because the speaker knows safe ground. However, for the courts to cite the ideal sphere is nearly a violation of precedent since they are in essence creating new safe grounds for speech that do not exist in everyday life.

Citation of the ideal sphere is a point at which we may identify some of our American myths and come to understand the aforementioned tension with the sphere of practice. In *Tinker,* the oft-cited phrase "It can be hardly argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (1969, p. 506) is a citation of the ideal sphere—an indication of what the law should be or what we desire it to be. The phrase is an indication that our constitutional rights do not simply vanish when we associate with the authoritarian role of the state.

Historically, citations of the ideal sphere are numerous. Exemplary citations from case law include the definition of the public forum: places for expression which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions" (*Hague v. CIO,* 1939, p. 515). Justice Brennan's statement from *New York Times v. Sullivan* in which the First Amendment fosters a public debate which is "uninhibited, robust, and wide open" (1964, p. 250) is another example of the ideal sphere. The marketplace of ideas metaphor, the town meeting myth, the narrative story told to children that anyone can be president, and just about any passage from the Bill of Rights or the Declaration of Independence are all citations to this ideal sphere. The majority opinion in *Hazelwood* contains none of these, and the dissent offers only one: the civics lesson. *Hazelwood* is a case squarely in the realm of adjudicating a practice which conflicts radically with the ideals of possibility offered in *Tinker.* The actual practice of freedom, the real freedom for the Hazelwood kids, resides in a reality of prior restraint.

My third argument concerning the significance of the *Hazelwood* decision centers on the idea or notion that the state is active in the production of acceptable speech. The corollary to this is an effect on communication as a process: the denial of the semiotic slip, the ability for a sign to mean otherwise (see Derrida in Richter, 1989). For public high school students, at least, *Hazelwood* defines and concretizes the meaning of particular expressions for history. Consider the specific expressions which were censored in *Hazelwood:* one article on teen pregnancy, another on divorce. Recall that the articles were removed from *Spectrum* by Principal Reynolds for general health and welfare concerns and issues of academic propriety. While the justification for removing the two articles had the effect of modifying precedent, the semiotic effect of the removal is quite different. The state has locked in the meaning of these two topics as an expressive negative. The ability of these two topics to mean differently has been curtailed. Any high school administrator, then, can merely cite *Hazelwood* when dealing with these two topics, without carefully considering the reasoning behind Principal Reynolds's decision or the issues themselves. In effect, the *Hazelwood* court determined the meaning of teen pregnancy and divorce, and moved the power of the state behind the definition.

If one considers Butler's (1997) argument concerning hate speech quoted above, one finds the applicability to *Hazelwood* a match. In *Hazelwood* the state actively produced the public domain of the speakable for minors; the topics of teen pregnancy and divorce do not belong in this domain, no matter

how our culture changes over time. The force of the meanings of these two topics cannot be redirected. Consider the meaning of hate speech or pornography. If the state chooses to ban a certain word or type of sexual depiction, the state in effect defines that word or depiction, effectively denying the ability of that word, that depiction, or (in the case of *Hazelwood*) that topic to mean differently or for the force of that utterance to be redirected. To ban the topic of teen pregnancy for high school students is to give the topic a state-enforced negative meaning—a taboo, if you will—that denies the ability of language to deal with the topic safely or legally. Additionally, the stakeholders in a given utterance cannot participate in the redirection of the power of that utterance. Catherine MacKinnon's *Only Words* (1993) alludes to the effect of state power on stakeholders. MacKinnon argues that pornography should be censored by the state precisely because it is a violation of the Fourteenth Amendment rights of women. Butler responds that a complete ban on pornography gives those depictions a state-authorized definition. However, for women to redirect the power of pornography, the images of pornography must remain free in order to critique them. For example, Madonna uses the trappings of pornography to critique the objectification of women, and the irreverent African American comic redirects the meaning and power of the pejorative term "nigger" to create community.

High school students must be given the opportunity to redirect the citational power of historically negative topics. The alternative is to stigmatize forever certain topics of importance to American youth. Divorce, teen pregnancy, and drug use will not vanish if we merely forbid expression that concerns them. In fact, the semiotic process requires the freedom of the sign to slip—to mean otherwise. The alternative is to allow *Hazelwood*-armed administrators to ban forever the discussion of true teen concerns, thus perpetuating negative associations with topics, words, and ideas. An analysis of *Hazelwood* must ask whether teen pregnancies will increase or decrease, and whether the impact of divorce will be lessened, by not talking or writing about either topic. In effect, the *Hazelwood* majority stigmatized two topics—locked in their meanings—denying high school students the ability to use the good offices of the state to help solve or address these issues. Additionally, the *Hazelwood* decision effectively disenfranchised high school students from defining these topics for themselves as a community. In fact, the Court seemed to deny the role of the state in resolving significant social problems, leaving American youth to fend for themselves.

To better understand my fourth and final argument, consider the observations of Owen Fiss, who asserts that juridical thinking is strangled by mythical notions of individualism. Historically, he observes, individual rights

were privileged over the rights of community, and even the rights of sub-communities specifically protected under the auspices of the Fourteenth Amendment were less privileged. Fiss argues for a state that allocates expressive resources affirmatively to help foster a healthy national forum, "to pass out the megaphones" to groups who might not otherwise be heard (1996, p. 4).

In relation to *Hazelwood,* Fiss's idea dovetails with the observation that the State fosters a theory of individualism. American high school students, as a community, arguably are not heard. *Spectrum* was an outlet for that community voice, a state-fostered forum for what may be classified as a Fiss sub-community. But rather than promoting the notion of community in a state-sponsored setting, *Hazelwood* encourages individualism. The individual expressive rights of each student were protected, yet a community right was denied. If high school students are a distinct sub-community, what is the effect of *Hazelwood* on the social status of that group?

To censor a social group or disempower its membership through judicial restraint is to stigmatize that group in relation to other speaking groups. Indeed, the speaking status of a particular group serves to reinforce the social status of that group. The *Hazelwood* decision fosters the social and cultural marginalization of high school students. Like Hafen and Hafen, it says to the reader that high school students do not have anything worth saying as a community or as individual members of that group. Non-associative individual communicative rights are held paramount, yet the social status of the group to which one belongs undermines the expressive power of so-called individual speech among members of that group. In *Hazelwood,* the state is the negating force behind the student utterance: The state enforces the marginal status of the student community voice while protecting the rights of the individual, effectively disempowering both. Fiss contends that an individualistic theory of rights "is unable to explain why the interests of speakers should take priority over the interests of those individuals who are discussed in the speech, or who must listen to the speech, when those two sets of interests conflict" (1996, p. 3). Fiss's observation is refocused in *Hazlewood.* Libertarian theories of speech which protect the individual student voice are unable to explain why the interests of the state take priority over the interests of the group or community of that individual.

From this viewpoint, the *Hazelwood* decision clearly delineates the distinction between a libertarian perspective and a democratic one. *Tinker* (1969) protects the individual voice; this remains firm. However, both the *Fraser* (1986) and *Hazelwood* (1988) decisions deny protection to a class or distinct group of speakers made up of those *Tinker* individuals. *Hazlewood* pays hom-

age to the libertarian perspective, instructing the American public high school student that constitutional power resides with self. The voice of the group is less powerful, less important, and less free. The ramifications of this observation extend to voting, the potential for social change, cultural and political progress, and perceptions of power. *Hazelwood* certainly teaches American youth a civics lesson: Only the individual voice counts, the community voice is null, and true freedom resides outside state structures. It thereby provides support for Fiss's contention that the state is historically positioned as an enemy of freedom rather than its social and cultural source.

Notes

1. *Hazelwood* is significant precisely because it articulates the current standards governing student speech in a public high school. The Eighth Circuit Court of Appeals found the newspaper to be a limited-purpose public forum, and therefore any limitation on speech must meet strict scrutiny. By contrast, the Supreme Court found that no forum had been created, and therefore any limitation on speech must merely be "reasonable." For more in-depth coverage of the public forum issue, see Post (1987).

2. The analysis of a social or cultural artifact in order to better understand a society or culture encompasses the traditional fields of archaeology and anthropology. The examination of artifacts of legal communication, like the *Hazelwood* cases, falls to the field of "Critical Legal Studies," a subarea of cultural studies.

3. Specifically, the students alleged that the actions of the principal "amounted to an illegal, content-based prior restraint" (*Kuhlmeier v. Hazelwood School District,* 1984, p. 1289). According to the policy in place at the time, the principal could censor libelous, obscene, or private material and articles that could cause material and substantial disruption to the work and discipline of Hazelwood East High School.

4. The current framework is an amalgam of three cases. Criteria 1 and 2 stem from *Tinker* (1969); criteria 3 and 4 stem from *Hazelwood* (1988); and criterion 5 stems from *Fraser* (1986). If read chronologically, the reasons for which student expression may be curtailed progress into broader categories.

5. Essentially, First Amendment freedoms are greater in scope when disassociated from state public schools. Although school and state do not always share identical physical boundaries, the public school is arguably the closest link to state regulation for American youth.

6. The foundations of objectivist criticism include authors from the neoclassical perspective (e.g., Aristotle, 1932; Toulmin, 1958), formal approaches (e.g., Burke, 1954), and the traditions of accurate interpretation (e.g., Hirsch, 1960).

7. However, see Heather Hundley (1997) for an exemplary deconstructive rhetorical analysis of *Texas v. Johnson*. See also Per Fjelstad (1994), Marouf Hasian (1994), and William Lewis (1994).

8. For background on the CLS movement, see Jerry D. Leonard (1995).

9. Iconic representations of the rugged individual are all male. The discussion of the semiotic "I" which follows is also probably masculine in the eyes of the law. Yet it is intriguing that the plaintiffs in *Hazelwood* are all female.

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Hustler Magazine, Inc. v. Falwell

Edward C. Brewer

"Taste is not your strong point, Larry," talk-show host Larry King commented to Larry Flynt during an interview with Flynt and Jerry Falwell on *Larry King Live* (1997). The interview took place on the first day the controversial film *The People v. Larry Flynt* was released. The interview centered primarily on the Supreme Court case *Hustler Magazine, Inc. v. Falwell* (1988). Sometimes protecting the First Amendment means protecting speech that is arguably distasteful or of questionable value. But whether or not one likes another person's speech, the First Amendment guarantees the right to voice an opinion without fear of governmental reprisal. Had the Supreme Court found in Falwell's favor, the ramifications for journalists would have placed the free marketplace of ideas in serious jeopardy.

The Facts of the Controversy

Both Larry C. Flynt and Jerry Falwell were prominent public figures. Flynt was publisher of *Hustler Magazine,* a sexually explicit national publication that in its lewdness challenged traditional moral values. Falwell was a prominent televangelist and founder of Liberty University and the Moral Majority. They were two figures with completely opposing viewpoints joined together forever through a constitutional battle over the First Amendment.

The inside cover of the November 1983 issue of *Hustler Magazine* featured a parody of a Campari liqueur advertisement. The Campari ads generally included interviews with celebrities talking about their "first time." The innuendoes suggested they were describing their first sexual encounter, but at the end of the ad it became clear that they were talking about the first time they drank Campari. The parody in question featured Jerry Falwell describing his "first time" taking place in an outhouse with his mother, and he had to kick the goat out first. Crude and outrageous? Yes. Believable? Hardly,

Jerry Falwell talks about his first time.*

FALWELL: My first time was in an outhouse outside Lynchburg, Virginia.

INTERVIEWER: Wasn't it a little cramped?

FALWELL: Not after I kicked the goat out.

INTERVIEWER: I see. You must tell me all about it.

FALWELL: I never really expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, "What the hell!"

INTERVIEWER: But your mom? Isn't that a bit odd?

FALWELL: I don't think so. Looks don't mean that much to me in a woman.

INTERVIEWER: Go on.

FALWELL: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda—that's called a Fire and Brimstone—at the time. And Mom looked better than a Baptist whore with a $100 donation.

INTERVIEWER: Campari in the crapper with Mom . . . how interesting. Well, how was it?

FALWELL: The Campari was great, but Mom passed out before I could come.

INTERVIEWER: Did you ever try it again?

FALWELL: Sure . . .

lots of times. But not in the outhouse. Between Mom and the shit, the flies were too much to bear.

INTERVIEWER: We meant the Campari.

FALWELL: Oh, yeah. I always get sloshed before I go out to the pulpit. You don't think I could lay down all that bullshit sober, do you?

Campari, like all liquor, was made to mix you up. It's a light, 48-proof, refreshing spirit, just mild enough to make you drink too much before you know you're schnockered. For your first time, mix it with orange juice. Or maybe some white wine. Then you won't remember anything the next morning. **Campari. *The mixable that smarts.***

CAMPARI® **You'll never forget your first time.**

*AD PARODY—NOT TO BE TAKEN SERIOUSLY

especially considering the source. But just in case there was any doubt in the reader's mind, the ad included, in small print at the bottom, the words: "Ad parody. Not to be taken seriously."

Reverend Falwell, though, took the ad very seriously and brought suit against *Hustler Magazine* and its publisher, Larry Flynt. He sought to recover damages for invasion of privacy, libel, and intentional infliction of emotional distress. A federal district trial judge directed a verdict for *Hustler*/Flynt on the invasion of privacy charge, and a jury found in favor of *Hustler*/Flynt on the defamation charge. But the jury found in favor of Falwell on the charge of intentional infliction of emotional distress (*Falwell v. Flynt,* 1985),[1] and the 4th Circuit Court of Appeals affirmed that decision (*Falwell v. Flynt,* 1986a). The Supreme Court reviewed the case in March 1987, heard oral arguments in December 1987, and announced its decision to reverse the judgment of the Court of Appeals in February 1988 (*Falwell*).

The Journalistic Concern

Although closely related to the privacy torts, the tort of infliction of emotional distress is distinguishable from both defamation and privacy. Throughout the twentieth century the concept spread and became generally recognized. In most states the tort focuses "on extreme and outrageous behavior by the defendant that produces serious emotional consequences on the plaintiff" (Franklin, Anderson, & Cate, 2000, p. 477). *Falwell* has become the leading case on "conduct that has no purpose other than to inflict emotional distress, or conduct that has another purpose but goes beyond the pale of tolerable conduct" (p. 477).

The fact that a U.S. Court of Appeals upheld the initial damage award was of grave concern to journalists. That court noted that all Falwell (a public figure) needed to prove was that the item was published intentionally and that it was sufficiently outrageous to cause emotional distress (*Falwell v. Flynt,* 1986a). While most journalists were not particularly enamored with Larry Flynt and did not necessarily condone the parody, many viewed the decision as a serious threat to their freedom of expression. Journalists were concerned because the emotional distress tort was being used in this case to "circumvent the libel requirement that [the plaintiffs] had to offer clear and convincing proof of actual malice" (Pember, 2000, p. 228). On a *Larry King Live* broadcast, Reverend Falwell stated that if his mother hadn't been in the parody, he would have just chuckled and moved on. During that same broadcast, Flynt stated that "if it would have been a statement of fact, Jerry would have had all the basis for his lawsuit and would have won and would have

collected damages." Flynt perhaps stated it best when he said that if a parody could inflict emotional distress, political cartoonists and the media as a whole would be in peril (*Larry King Live,* January 10, 1997).

Falwell suggested that pornography was the scourge of society and thus he shouldn't have lost this case (*Larry King Live,* 1997). But this case wasn't about pornography; rather, it concerned the requirements for proving intentional infliction of emotional distress upon a "public figure." Flynt is not concerned whether people think he has a sick sense of humor. He aims his magazine at a specific market, a "loyal readership." Flynt even went as far as to state that "pornography is the most purest [*sic*] form of art" (*Larry King Live,* 1997). One certainly does not have to agree with him, though, to be concerned about the ramifications for the findings of the Court of Appeals for journalists and with regard to the ability of the general public to receive information. If journalists are more concerned about self-censoring to avoid a lawsuit than informing the public, the free marketplace of ideas is affected and the general public is the loser.

New York Times v. Sullivan (1964) established the actual malice standard: Public figures who sue for libel must prove that the communicator either knew that the statement of fact was false or acted with reckless disregard of whether the statement was false or not. Flynt most assuredly acted with malice: That he considered Falwell a hypocrite and relished the idea of exposing him as such was no secret. However, the advertisement parody in question was just that—a parody. The actual malice standard applies to statements of fact. No one could reasonably characterize this parody as a statement of fact. It also seemed highly unlikely that Falwell's parishioners would see the ad parody in Flynt's publication, as it is not generally the type of publication they would be likely to purchase.

Falwell's counsel took Flynt's deposition in June 1984 and recorded it on videotape. Flynt identified himself as Christopher Columbus Cornwallis I.P.Q. Harvey H. Apache Pugh and testified that rock stars Yoko Ono and Billy Idol wrote the parody. Flynt expressed what Falwell claimed to be a demonstration of Flynt's apparent intention to inflict emotional distress when he admitted in his deposition that his motive was to "assassinate" Falwell's character (*Falwell v. Flynt,* 1986a, p. 1273). Falwell claimed that he had never been as angry as he was when he first saw the ad parody and that his anger continued until that moment. He also indicated that while he is not an emotional man, he felt like weeping.

The battle really began at this point. The disputed issues focused upon outrageousness, intent, and fact versus opinion. The jury decided that Falwell indeed suffered severe emotional distress as a direct result of Flynt's par-

ody and that Flynt's action was both outrageous and intolerable as per applicable Virginia law (*Womack v. Eldridge,* 1974). The tort of emotional distress as decided in the Virginia Supreme Court in the *Womack* case would allow even a political figure to be awarded damages for a statement that was perfectly true. In his dissent from the denial of rehearing en banc (*Falwell v. Flynt,* 1986b, p. 488),[2] Judge James Harvie Wilkinson III explained the implications of the *Womack* standard:

> The tort of emotional distress is more than just unnecessary to regulate political discourse; it will prove a profound and ominous inhibitor of speech. To recover under the tort, a political figure need show only the defendant's intention to publish something he should have known would cause emotional distress, conduct that offends the generally accepted standards of decency and morality ("outrageous" conduct), severe emotional distress, and a causal connection between the defendant's act and the emotional distress (*Womack v. Eldridge,* 1974). These elements encompass an absolutely staggering array of political statements, and there is no limiting principle in the panel opinion.

Journalists were concerned about the implications of the *Falwell* (1986a) decision, which was based in part on *Womack*. Indeed, they "viewed the decision as a serious threat to freedom of expression" (Pember, 2000, p. 229).

The Appeal Process

As one would expect, Flynt appealed and Falwell cross-appealed (*Falwell v. Flynt,* 1986a). The previous decisions were affirmed (*Falwell v. Flynt,* 1986b). Flynt made two primary constitutional arguments in his appeal. He first asserted that because Falwell was admittedly a public figure, he should be held to the actual malice standard of *New York Times v. Sullivan* (1964) in order to recover for emotional distress. Second, Flynt contended that because the jury found the parody not to be reasonably believable, statements in it should be construed as opinion as opposed to fact; therefore, these statements should be completely shielded by the First Amendment.

The Court of Appeals for the Fourth Circuit rejected both arguments. It rebuffed the first argument on the grounds that an action for intentional infliction of emotional distress concerns itself not with statements but with "intentional or reckless *conduct* [italics added] which is outrageous and proximately causes severe emotional distress" (*Falwell v. Flynt,* 1986a, p. 1276). The second argument was rejected on similar grounds. The court stated that

the effect of *Sullivan* (1964) and subsequent cases "is to increase the level of fault necessary for a public figure to prevail in an action for defamation. . . . It gives the press protection from honest mistakes, but it is not a license to lie" (p. 1275). Of significant note was the argument for upholding the lower court's conclusion that Flynt intentionally inflicted emotional distress.

In his deposition, Flynt testified that he intended to cause Falwell emotional distress. If the jury found his testimony on this point to be credible, it could have found that Falwell satisfied the first element. Evidence of the second element, outrageousness, is obvious from the language in the parody and in the fact that Flynt republished the parody after this lawsuit was filed. The final elements require the plaintiff to prove that the defendant's conduct proximately caused severe emotional distress (p. 1276).

Dr. Rod Godwin, a colleague of Falwell's, testified that Falwell's enthusiasm and optimism visibly suffered as a result of the parody. He noted that Falwell's ability to concentrate on the myriad details of running his extensive ministry was diminished (p. 1277). This evidence seemed to be sufficient for the jury to find that Falwell's distress was both severe and directly related to the ad parody. The appeals court upheld that decision.

Journalists continued to be concerned with the implications of such a ruling. The door seemed to be opening for a plethora of similar lawsuits. Donald Gillmor, Jerome Barron, and Todd Simon (1998, p. 320) identified cases involving erroneous obituaries (*Decker v. Princeton Packet,* 1988), *Rubenstein v. New York Post,* 1985) or telephone listings (*Tatta v. News Group Publications,* 1986); one plaintiff even attempted to recover damages by charging that an inadequate retraction constituted affliction (*Beasley v. Hearst Corp.,* 1985). Although decisions in all these cases were in favor of the defendants, journalists were apprehensive that *Falwell* might change the outcomes of such suits.

A petition for rehearing with suggestion for rehearing en banc was denied by a vote of 6–5 (*Falwell v. Flynt,* 1986b). The dissent from the denial of rehearing en banc indicated that at least a portion of the court was also mindful of some of the same issues that were making journalists nervous. While the dissenting judges acknowledged the repugnant nature of Flynt's communication, they stated that *Hustler Magazine* "is a singularly unappealing beneficiary of First Amendment values and serves only to remind us of the costs a democracy must pay for its most precious privilege of open political debate" (p. 484). The dissenters pointed out that those who participate in public life are not powerless to respond to attacks upon their reputations; unlike private citizens, they have the ability to respond to such attacks. The dissenting judges indicated that although Falwell did not hold public office, he never-

theless was as much a political figure as those who did. The dissent continued with some examples of the tradition of satiric comment, recognizing that much of that comment was excessively offensive at the time, it contributed to public debate. The type of speech practiced by Flynt, the judges indicated, serves only to discredit the speaker. Sometimes it even attracts sympathy and support for the target of the attack (p. 488). Thus, in the dissenting judges' opinion, Falwell did not suffer any loss of reputation.

In an article published before the Supreme Court decision, Susan Kirkpatrick pointed out:

> The test developed in *Falwell v. Flynt* . . . offers inadequate constitutional protection to speech challenged by a claim for intentional infliction of emotional distress. Since it gives no consideration to society's interest in unfettered speech, it assigns liability indiscriminately to any type of speech that meets a factfinder's personal definition of "outrageous" conduct. . . . The *Falwell* standard thus would allow liability not only for defamatory falsehoods or speech that invaded the plaintiff's privacy, but also for heretofore-protected expressions of opinion on matters of public concern and even true reports. (1987, p. 1017)[3]

The idea of "outrageousness" as a foundation upon which to base regulation of free speech had journalists worried about their freedom to express ideas, especially unpopular ones. Kirkpatrick pointed out that "in *Cohen v. California* (1971) . . . the Supreme Court ruled that the government could not ban the use of profane speech because its ability to censor certain words might be used as a guise to censor the expression of unpopular views" (1987, p. 1018).

The Supreme Court Decision

Most would agree that Flynt's parody was foolish and disgusting. Nevertheless, it was a parody, not a statement of fact. Years ago Justice Frank Murphy stated that "one of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation" (*Baumgartner v. United States,* 1943, pp. 673–674). That sentiment is certainly at the heart of Flynt's argument.[4]

The case finally reached the Supreme Court of the United States on writ of certiorari. The Supreme Court unanimously reversed the decision of the lower courts on the issue of intentional emotional distress (*Falwell,* 1988).[5] Chief Justice William Rehnquist delivered the opinion in which Justices Wil-

liam Brennan, Thurgood Marshall, Harry Blackmun, John Paul Stevens, Sandra Day O'Connor, and Antonin Scalia joined. Justice Byron White filed an opinion concurring in the judgment. Justice Anthony Kennedy did not take part in the consideration or decision of the case.

The Court recognized that, for the purposes of the First Amendment, Falwell was (and remains) a public figure. In addition to being a television evangelist, he was head of the Moral Majority at the time of this case. He had purposely thrust himself into the political arena. The central tenet here is the free flow of ideas. The Supreme Court indicated that even if speech is offensive, it cannot override the First Amendment when the speech can reasonably be understood to contain no factual claims regarding the public figure involved.

Analysis and Interpretation of the Court's Decision

Rodney Smolla declared the Supreme Court's decision to be "a triumphant celebration of freedom of speech" (1988, p. 303).[6] He went on to state that "far from signaling the disintegration of America's moral gyroscope, the opinion reaffirms the most powerful magnetic force in our constitutional compass: that essential optimism of the American spirit, an optimism unafraid of wild-eyed, pluralistic, free-wheeling debate" (p. 303). However, freedom of speech comes with a cost. In the name of protecting the First Amendment, one must be willing to tolerate speech that is offensive so long as it does not misrepresent actual facts. In delivering the opinion of the Court, Justice Rehnquist cited *Bose Corp. v. Consumers Union of United States, Inc.* (1984, pp. 503–504) when he asserted that "the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole" (*Hustler Magazine, Inc. v. Falwell,* 1988, p. 51). And, citing *Gertz v. Robert Welch, Inc.* (1974), Rehnquist stated, "The First Amendment recognizes no such thing as a 'false' idea" (p. 51).

Does this decision indicate a change in American society? Should there be a distinction between good speech and bad speech? Bruce Fein suggested that the Court's opinion in *Falwell* "contains the earmarks of a decadent society reluctant to draw distinctions between virtue and vice, between the ennobling and the degrading. The opinion of Chief Justice Rehnquist lamented an inability to demarcate a principled First Amendment line between the political cartoons of Nast and debased, repugnant parodies exemplified by the Falwell portrayal" (1989, p. 913).

Should such a line be drawn? The difficulty lies again in the idea of "out-

rageousness" and the value struggle surrounding that concept. What is outrageous to one may not be to another. Such a standard would be impossible to impose consistently. Justice Rehnquist cited Chief Justice Earl Warren, concurring in *Curtis Publishing Co. v. Butts* (1967), when he proclaimed that "the sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large'" (p. 51).

Falwell would suggest that the intention to inflict emotional distress should override the speech itself and that it does not matter whether the speech is true or not. Falwell was suggesting that words can hurt, and the power of words should be a consideration legally. If the words (outrageous or not) could be considered hurtful, they should be of less value. In this scenario, words of little or no value—words that are intentionally harmful—would be unprotected. However, Rehnquist wrote that "while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures." He went on to assert, "were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject" (p. 53). From the beginning of the jury trial through the Supreme Court proceedings, there was never any doubt that Falwell was a public figure. Moreover, Justice White, concurring in the judgment, opined that the Court's prior ruling in *New York Times v. Sullivan* (1964) "has little to do with this case, for here the jury found that the ad contained no assertion of fact." But he also agreed with the other justices that "the judgment . . . [awarded in the lower court], which penalized the publication of the parody, cannot be squared with the First Amendment" (p. 57).

Contributions of Falwell

As the *Falwell* case went to the Supreme Court, "the possibility that public figure libel plaintiffs, frustrated by their inability to win libel suits under *New York Times,* would sue in great numbers for infliction of emotional distress was a serious concern for the media" (Carter, Franklin, & Wright, 1999, p. 815). The Supreme Court's unanimous ruling in deciding *Falwell* has served as a hindrance to scurrilous lawsuits for intentional infliction of emotional harm and "a strong reaffirmation of the Court's support for the actual malice standard when public figures sue the media" (Zelezny, 2001, p. 189).

While it may not be the answer to all emotional distress situations, *Falwell* has "curtailed the advancement of this tort to some extent" (Zelezny, 2001, p. 187).

Falwell has been used, at least in part, to help decide several Supreme Court cases in recent years. In *Shapero v. Bar Assn.* (1988), Judge Blackmun's dissent in *Cohen v. Cowles Media Co.* (1991), and *Simon & Schuster v. Crime Victims Board* (1993), *Falwell* was cited in arguments for protection of political speech or political opinion. *Riley v. National Federation of the Blind of N.C., Inc.* (1988) cited *Falwell* and included in Justice Scalia's concurrence the statement: "the dissemination of ideas cannot be regulated to prevent it from being unfair or unreasonable" (p. 803). *Owens v. Okure* (1989) cited *Falwell* in distinguishing constitutional malice (a.k.a. actual malice) from common-law malice in First Amendment jurisprudence. *Thornburgh v. Abbott* (1989) cited *Falwell* in a discussion of uninhibited public debate. *Texas v. Johnson (1989)* cited *Falwell* when claiming speech should invite dispute and that the government cannot prohibit speech because society finds the idea itself offensive or disagreeable. *Harte-Hanks Communications v. Connaughton* (1989) cited *Falwell* as support for the ruling that a public figure may not recover for the tort of intentional infliction of emotional distress without showing false statement. *United States v. Eichman* (1990, p. 319) cited *Falwell* in a discussion of "scurrilous caricatures" and the free flow of ideas. *Milkovich v. Lorain Journal* (1990) also emphasized the free flow of ideas and referenced *Falwell* in determining what a reasonable reader would understand. *United States v. Kokinda* (1990) cited *Falwell* (pp. 49, 57) in stating that speech is not subject to regulation simply because it might embarrass others. *Burson v. Freeman* (1992) cited *Falwell* in support of the reasoning that although society may find speech offensive, offensiveness alone is not sufficient reason for suppressing free expression.

There has not been an overabundance of emotional distress suits against the media, but by the 1980s "some legal scholars were speculating whether the tort would evolve to supplant claims for defamation and invasion of privacy" (Zelezny, 2001, p. 187). The Supreme Court decision in *Falwell* reinforced the appropriateness of the actual malice standard. According to Justice Brennan (cited in Zelezny, 2001, p. 189), "the *Falwell* ruling . . . anchored actual malice as a solid doctrine for the foreseeable future."

The Supreme Court has modified slightly one element of its decision in *Falwell.* In *Milkovich v. Lorain Journal,* the Court reconsidered its dicta, first expressed in *Gertz* (1974, pp. 339–340) and subsequently affirmed in *Falwell* (1988, p. 51), that the First Amendment protects false opinions. The Court

refused "to create a wholesale exemption for anything that might be labeled 'opinion'" (*Milkovich,* 1990, p. 18). However, the Court also guaranteed the fullest protection for opinions expressed in public debate, unless these imply "false and defamatory facts regarding public figures or officials" (p. 20) and are made with actual malice. *Milkovich* withdraws First Amendment protection for defamatory opinions expressed regarding nonpublic figures or matters not of public concern.

Communication Implications

Communication is difficult to define. John Cragan and Donald Shields define communication variously as "information, argument, chaining fantasies, question-asking and disclosing, storytelling, and the talk of diffusing novel ideas" (1998, p. 5). All these definitions contain issues of value. Communication is used to influence others. Emotion is often an element of the communication strategy. Political speeches, pleas from children to parents, and public service announcements all involve emotional appeal. Do some involve intentional hurt? Maybe. But that, again, is a value judgment. The difficulty here is not so much the outrageousness of the emotion but the value of the emotion.

The theory of emotional distress and tort liability relies upon the assumption that one human being can inflict emotional damage upon another through the use of words. Thus the recipient of those words should not be held solely responsible for his or her emotional responses. From a legal standpoint, this is an issue of great concern for journalists because it becomes an issue of value. The subjective nature of value makes it difficult to develop consistent standards in the eyes of the law. Aristotle suggested that the function of rhetoric is not "to persuade . . . but to discover the available means of persuasion in a given case" (cited in Cooper, 1960, p. 6). Appealing to the emotions of an audience certainly is one of those means. Indeed, as Kenneth Burke proposed, "terminologies that situate the driving force of human action in human passion treat emotion as motive" (1969, p. 32). Most assuredly, Falwell and Flynt are passionate about their causes. Emotion encompasses both motive and reality for them. One of the difficulties from a communication perspective is the issue of ethics. Is something entitled to First Amendment protection just because it is communicated? This is obviously not the case, for there are limits on "fighting words," obscenity, and so on. (*Chaplinsky v. New Hampshire,* 1942). However, the *Hustler* Campari advertisement concerned a question of value, and perhaps ethics.

Celeste Condit suggests that all texts are polysemic, that audience mem-

bers (whether viewing or reading) construct their own meanings from the texts (1989, p. 104). Thus individual audience members evaluate the same text differently. It is impossible to have one societal standard that addresses the interests of all, or to merge Falwell's interests with Flynt's interests, because these are at opposite ends of the spectrum. Since there was no middle ground in this legal battle, however, there was a need to decide for one side or the other. Neither side of the issue was especially appealing to most people; but if Falwell had won, the implication was that free speech would have been limited too severely. At the very least, the door would have been open for scurrilous lawsuits focused on the value of speech and intentional infliction of emotional harm. While parodies had long been protected, Falwell's lawsuit concerning the infliction of emotional distress was opening a new avenue of concern.

Christina Howard, Keith Tuffin, and Christine Stephens suggest that "The importance of language in the social constructionist perspective cannot be overstated. Language both constructs realities and constrains social practice: It provides the boundaries for how we perceive the world and how we can act in it" (2000, para. 5). It is clear that Larry Flynt was seeking to construct a reality and Jerry Falwell was seeking to reconstruct that reality. The realities constructed by Falwell and Flynt are not only different, they are at opposite poles of the political spectrum. In the public arena, free expression of ideas is vital. Thus, if Falwell can win damages against Flynt for "emotional distress" caused by Flynt's opinion, shouldn't Flynt be able to win the same from Falwell when he calls Flynt's business "sleaze and garbage" (*Larry King Live,* 1997)? Where would it stop?

Certainly emotion is elicited in much (if not all) of our daily speech. Perhaps an individual who is not in the public sphere may have an argument for winning a suit for damages related to emotional distress; but when one has entered the public sphere, such action becomes a dangerous threat to the First Amendment. Because language is arbitrary and value-laden, those in the public arena must develop thick skins regarding statements of opinion that differ from their own, even if "feelings get hurt." This tolerance is necessary to keep the free flow of information and ideas from becoming clogged, or even stopped altogether. Emotion as a framework is also limited because not all speech is emotional.

Gordon Shneider (1990) proposed that different categories of speech have different value and are, therefore, not equal. The idea of truth and falsity has been such a category as related to facts, but the Court in *Falwell* seemingly established that there was no such thing as a false idea. The *Milkovich* deci-

sion challenged this notion even as it protected speech regarding issues of public concern. Should the Court attempt to extend its analysis into the realm of public debate? Should ideas be separated categorically from opinions?

A few years after the *Falwell* decision, Gordon Shneider, writing in response to *Milkovich,* stated: "The broad generalization drawn from the *Gertz* (1974) dictum, that all opinions are subject to an absolute constitutional privilege and that their communication cannot constitutionally be subject to the award of damages irrespective of harm done, seems insupportable. If the Constitution protects ideas, objective use of language does not indicate that opinions can be automatically substituted for ideas. In addition, there is no historical basis to indicate that the Constitution was ever intended to protect opinions without reference to their social importance" (1990, pp. 68–69). But how does one determine "social importance?" If, as Shneider suggested, opinions are neither true nor false and have some intrinsic value, what theoretical framework can equitably and consistently be applied in the development of Supreme Court decisions? Shneider proffered, "It becomes more acceptable to use subject matter to measure the levels of protection for deductive communications which can convey or which do provide a basis for ideas, but which also have the potential for harming reputations" (p. 119). He provided at least three levels of subject matter: subjects of primary public importance, secondary public importance, and tertiary public importance. These categories, however, seem problematic in that they appear too broad and overlapping.

So is the Supreme Court developing a communication theory in the legal sense? If so it is likely to be confusing and contradictory. Thomas Benson suggested "it may be that there are such things as facts in the external world, but in making a statement about an alleged fact we are, fundamentally, only expressing an opinion" (1991, p. 386). If this is true, there can be no distinction between fact and opinion. But in *Falwell* the court did make a distinction—only to alter that distinction later in *Milkovich.* Benson remarked, "Rhetorical theory tells us that the meaning of any symbolic utterance depends partly on its context" (1991, p. 387). Surely this wasn't the Supreme Court's standard in *Falwell,* for the context of the ad parody in question was repugnant to most people. Is it truly desirable to abandon the distinction between fact and opinion or to more narrowly define facts? The Supreme Court has seemed uncertain on this matter over the years. The events of September 11, 2001, when terrorists flew two planes into the World Trade Center and one into the Pentagon, will likely further confuse this issue to some extent as national security becomes more of a factor and opinion on some subjects may

be taken more seriously. Perhaps a further distinction between opinion and ideas will develop. Only time will tell.

Conclusion

Thomas Nilsen stated that "persuasion, the inducement in others of belief or action, is an essential part of any society, for ultimately government, whether democratic or totalitarian, rests upon some form of support in public opinion" (1987, p. 231). Both Flynt and Falwell have made an effort to be persuasive in the public realm and to have an effect on policy making. Falwell has spent much of his ministry seeking to rid society of what he sees as moral decadence, including obscenity. Flynt, on the other hand, has tried to establish the notion that pornography is an art form. Each has sought the support of the public, or at least a portion of the public, from a national standpoint. Falwell considers Flynt's publications to be sleaze. Flynt considers Falwell a hypocrite. Each is entitled to his respective opinion and should be free to debate those ideas in a free marketplace of ideas.

In the preface to his book *Errors, Lies, and Libel,* Peter Kane stated:

> For those of us interested in the problems of freedom of expression, the most compelling issues usually involve conflicts between competing interests. Such conflicts involve more than understanding a philosophy or the established rules in particular cases. They confront us with legitimate demands based upon real values. Some or all of those demands and their underlying values must be compromised in order to resolve the conflict. Several questions arise. Which interests are to be compromised? How are they to be compromised? What is the rationale for this compromise? (1992, p. xv)

To a large degree, *Falwell* was a debate about values.[7] What do we value more? As in *Chaplinsky,* this case involved low-value speech—or at least a charge by Falwell that Flynt's speech is of low value because it was hurtful and offensive. From Falwell's perspective, we are living in a society of moral decline. From Flynt's perspective it is a society trying to move forward. Is there, then, good and bad speech? Is there a point at which we can draw the line of acceptability when it comes to opinion? The fact that the public may find speech offensive is not a sufficient ground to suppress it. We do not have to agree with Larry Flynt's opinions to accept his right to hold them, just as we have a right to our own opinions.

The Supreme Court ruling in *Falwell* means that in order for public figures to win damages for intentional infliction of emotional distress, they must prove three things:

> 1. That the parody or satire amounted to statement of fact, not an opinion.
> 2. That it was a false statement of fact.
> 3. That the person who drew the cartoon or wrote the article knew it was false, or exhibited reckless disregard for the truth or falsity of the material. In other words, proof of actual malice is necessary. (Pember, 2000, p. 230)

Flynt suggests that the "ruling means we can parody almost anything as long as [the parody is] not a statement of fact" (*Larry King Live,* 1997). The line between fact and opinion has been blurred recently. One may be offended by Larry Flynt's ideas and some of his publications. However, it would be more offensive to have speech limited to the extent that it would have been, had the Supreme Court ruled against *Hustler Magazine* in this particular instance. Sometimes it is necessary to protect the freedoms of those whose ideas may be offensive to us in order to save our own freedom to offer opposing viewpoints.

Notes

1. The jury assessed $100,000.00 compensatory damages against Hustler Magazine, Inc. and Larry Flynt, $50,000.00 punitive damages against Flynt, and $50,000.00 punitive damages against Hustler Magazine, Inc.

2. In a hearing en banc, all the judges of the appellate court decide the case instead of just a panel of judges.

3. For further criticism of the Fourth Circuit's decision to reject Flynt's appeal, see Jonathan Entin (1987) and Michael Kelley (1987).

4. For a discussion of the actual malice standard and intentional infliction of emotional distress as applied to the *Falwell* decision, see Boyd Farnam (1998).

5. For an analysis of the theory behind the protection of outrageous speech using the themes in the *Falwell* decision, see Robert Post (1990).

6. For a review of Smolla's book and a criticism of the Supreme Court decision, see Bruce Fein (1989).

7. See Dale Herbeck (1999) for an article related to this case dealing with the First Amendment and popular culture.

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Texas v. Johnson

David J. Vergobbi

Texas v. Johnson (1989) offers one of the most compelling and continuing tests of our country's "bedrock principle" that government cannot censor expression simply because society finds it offensive or disagreeable (p. 414). However, the Court's decision was only the starting place of an enduring and significant controversy. Its legacy lies in congressional attempts to override that bedrock principle by categorizing flag burning as nonspeech or worthless speech. Taking its cue from the State of Texas, the flag protection movement seeks to create an exception to the First Amendment based in the "legitimate and substantial interest" of a national unity maintained by the physical integrity of the flag (*Johnson v. Texas,* 1986, p. 124). This movement interprets the symbolic behavior of flag burning as a solely physical act that violates the tenets of moral patriotism and therefore constitutes immoral conduct against the state that lawfully can be prohibited. In debate on the Senate floor, Senator Max Cleland (D-Georgia) asserted: "The flag unites Americans as no symbol can. The flag is sacred. Those who desecrate the flag would desecrate America and the freedoms that we hold inviolate" (*Congressional Record,* March 17, 1999, p. S2866).

Johnson captures the classic confrontation between government to protect the individual versus government to create a better society, and the very different free expression parameters the victor would enact. To delineate those parameters and define their significance, this essay discusses the facts of the case, the lower court decisions, the Supreme Court decision and dissents, and the societal/political controversy it spawned. To demonstrate the potential for communication research provided by the flag burning controversy, the essay analyzes U.S. Senate debate over the proposed Flag Protection Amendment to reveal how political opponents legally and morally define "speech" based on the *Johnson* case. These politically driven definitions are socially significant. Agreed to or not, they can dictate by law what communicates and what

does not communicate, and thus what is or is not protected or allowed expression in our society.

The Facts of the Case

The Republican National Convention brought Gregory Lee Johnson to Dallas, Texas, in August 1984. The party was about to renominate Ronald Reagan as president of the United States, and the convention attracted not only thousands of delegates but hundreds of protestors. Johnson was a participant in the "Republican War Chest Tour" demonstration, which protested the policies of the Reagan administration and of certain corporations based in Dallas.

Marching through the Dallas streets, an estimated 100 War Chest demonstrators denounced political candidates, the military, and corporate America by distributing protest literature and chanting slogans. The group also staged "die-ins" intended to dramatize the effects of nuclear war.

In the excitement, one of the protesters stole an American flag from outside one of the targeted downtown corporate office buildings and gave it to Johnson. He carried it with him to the group's final destination, Dallas City Hall. In a final act of protest, Johnson unfurled the flag, soaked it in kerosene obtained from some unknown source, and ignited it. As the flag burned to charred remnants, the group chanted: "America, the red, white, and blue, we spit on you, you stand for plunder, you will go under" (*Texas v. Johnson,* 1989, p. 431).

Fire draws a crowd, and many of the observers later testified they were deeply offended by the flag burning, although no one was physically injured or threatened with injury during the protest march. After the demonstrators left, one of the witnesses, Daniel Walker, collected the flag's remains, took them home, and respectfully buried them in his backyard according to codified procedure.

Of the approximately 100 demonstrators involved, the police charged only Gregory Johnson with a crime, "Desecration of [a] Venerated Object," which stated that a "person commits an offense if he intentionally or knowingly desecrates . . . a state or national flag." Under this Texas statute, "'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action" (Texas Penal Code Ann. § 42.09 [a] [3] [1989]).

Trials in the Lower Courts

When Gregory Johnson went to trial, Daniel Walker told the jury the flag burning offended his feelings, thus evidencing the statute. The prosecutor

also claimed Johnson breached the peace and posed a danger to Texas "by what he does and the way he thinks" (cited in Irons, 1997, p. 218). The jury agreed, convicting Johnson and sentencing him to one year in prison and a $2,000 fine. The Court of Appeals for the Fifth District of Texas, while acknowledging that Johnson engaged in symbolic speech, affirmed his conviction. The Court stated that the desecration statute was a legitimate and constitutional means of protecting the public peace and protecting the flag as a symbol of national unity (*Johnson v. Texas,* 1986).

Johnson then appealed to the highest court in Texas, the Court of Criminal Appeals, which reiterated that flag burning was indeed a form of symbolic speech but said the lower court did not meet the required level of scrutiny. After effecting such scrutiny, the court decided the desecration statute, as applied, violated Johnson's First Amendment rights (*Johnson v. Texas,* 1988). The State of Texas disagreed and appealed to the United States Supreme Court. In a 5–4 decision that mirrored the Court of Criminal Appeals' reasoning, the Supreme Court affirmed the reversal.

The Supreme Court Decision

Texas conceded that Johnson's conduct was expressive, but argued for the two substantial state interests that arguably would override that expression. Conceding the point was not enough for majority opinion writer Justice William Brennan, who saw "expressive conduct" as the key constitutional element. The speech-versus-conduct test assumes that verbal expression is "pure speech" entitled to full First Amendment protection, whereas conduct can be regulated. But sometimes conduct carries an expressive element that is nonverbal in nature. If an activity is essentially communicative, a court could view it as symbolic speech (*Spence v. Washington,* 1974, pp. 409–411). As such, expressive conduct "is entitled to full First Amendment protection just as if it were as communicative in substance as it is in form" (Gillmor, Barron, & Simon, 1998, p. 81). Brennan's first task, then, was to clarify just how the symbolic speech standard applied to Johnson's particular circumstances. Only then could he properly gauge Texas's compelling interests.

For Brennan, the focal question in this case was "the context in which it occurred" (*Johnson,* 1989, p. 405). The case did not concern all expressive physical conduct regarding the flag, only the burning of a flag as a form of symbolic *political* expression. Citing *Spence* (1974, p. 409), Brennan concluded that the "expressive, overtly political nature of [Johnson's] conduct was both intentional and overwhelmingly apparent" and "'sufficiently imbued with elements of communication' to implicate the First Amendment" (*Johnson,* 1989, p. 406). The importance of such clarification lies in Brennan's

argument that because Johnson did engage in expression, the Texas statute was directed against a message; it was not content neutral. So the "less stringent standard" developed in *United States v. O'Brien* (1968) did not apply (*Johnson,* 1989, pp. 403–407). Flag burning must be subjected to the exacting standards of strict scrutiny tests that require the government to justify its regulation with compelling interests and utilize the least restrictive means of achieving those interests.

Brennan then addressed the substantial state interests that Texas used to justify its conviction: (1) preventing breaches of the peace and (2) preserving the flag as a symbol of nationhood and national unity. Brennan agreed with the Texas high court and held that the first interest was not implicated but that the second was related to the suppression of expression.

Justice Brennan considered the breach of peace interest from two perspectives, one of causation and the other of reactive harms. He acknowledged that government can more easily restrict *expressive conduct* than *pure speech,* but clarified his acknowledgment by declaring that suppressing *either* form of communication "must be justified by the substantial showing of the need that the First Amendment requires" (p. 406).

The State of Texas, wrote Brennan, provided no such supporting evidence but relied solely on presumption of potential dangers. Because no disturbance of the peace actually occurred or threatened to occur because of the flag burning, the state's evidence amounted to people claiming they were seriously offended, and an emotional reaction is not enough to prohibit speech. Rather, Brennan declared, quoting Justice William O. Douglas (*Terminiello v. Chicago,* 1949, p. 4), political speech "'invites dispute'" for it "'may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger'" (*Johnson,* 1989, pp. 408–409). In essence, Texas wanted to resurrect the Court's clear and probable danger test from *Dennis v. United States* (1951) that permitted the government to stop speech before it had a chance to create a real danger. This was the bad tendency test that Chief Justice Rehnquist himself applied in his *Johnson* dissent (discussed below).[1] Brennan would have none of it, stating that such a decision would "eviscerate" the *Brandenburg v. Ohio* (1969) incitement standard (*Johnson,* 1989, p. 409).

Brennan similarly dismissed any application of the fighting words doctrine (*Chaplinsky v. New Hampshire,* 1942), stating that Johnson's generalized expression could not be construed as a direct personal insult. Brennan concluded that Texas had a separate breach of peace statute to maintain order, so it need not impinge on the First Amendment to keep the peace.

Justice Brennan then addressed the state's second compelling interest:

"According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited" (*Johnson,* 1989, p. 413). Brennan reeled off 13 Supreme Court cases to evidence his classic statement that if "there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" (p. 414). He followed by clarifying that not even the flag has been exempted from this principle and that the principle is not dependent on the particular *mode* of expression selected.

Brennan further clarified that the Court had never before held—and would not hold with *Johnson*—that the government could prescribe orthodoxy or characterize a symbol as expressing only one view (pp. 415, 417). Finally, Brennan refused to create a First Amendment exception for the flag because punishing its desecration does not make it sacred, but does dilute the freedoms it represents. "We can imagine no more appropriate response to burning a flag," he wrote, "than waving one's own" (p. 420).

In affirming the previous decision of the Texas Court of Criminal Appeals, the majority's position was clear: Laws banning the desecration of venerated objects will always be content-based. The mere desire of government to promote national unity is never enough, on its own, to justify abridgement of speech.

The Supreme Court Dissenters

Chief Justice William Rehnquist and Justice John Paul Stevens saw the American flag as an exception to the command of the First Amendment. These dissents are significant because in building on the State of Texas's argument, they provide and legitimize the legal, moral, and patriotic foundations for the ensuing political flag protection movement.

Chief Justice Rehnquist, joined by Justices Byron White and Sandra Day O'Connor, believed the Texas statute was constitutional under the First Amendment, as applied in this case, for two reasons. First, Rehnquist argued that the flag has become "a visible symbol embodying our Nation. . . . It is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas" (*Johnson,* 1989, p. 429). Using eight pages of text, Rehnquist provided a history lesson of our country's laws, jurisprudence, myths, hymns, facts, and values that imbued the flag with a unique status among symbols. According to Rehnquist, the flag captures our patriotism, our na-

tionalism, and is thus held in "mystical reverence" by "millions and millions of Americans" (p. 429). How can it not be protected? he wondered.

Second, Justice Rehnquist believed the public burning of the American flag in this case "was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace" (p. 430). He argued that flag burning "is the equivalent of an inarticulate grunt or roar that . . . is most likely to be indulged in not to express any particular idea, but to antagonize others" (p. 432). Rehnquist further argued that the statute thus deprived Johnson of only one rather inarticulate symbolic form of protest "and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy" (p. 432). Thus, wrote Rehnquist, Texas was not punishing Johnson for his message but for his use of this particular symbol.

In an accompanying dissent, Justice Stevens made three major points. First, sanctioning flag desecration will tarnish the value of the flag as a national symbol, a tarnish that "is not justified by the trivial burden on free expression occasioned by requiring" that alternative modes of expression be employed (p. 437). Second, the Texas statute does not prescribe orthodox views or "compel any conduct or expression of respect for any idea or symbol" (p. 437). Third, the Texas statute *is* content neutral: "The concept of 'desecration' does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense" (p. 438). Stevens said Texas did not prosecute Johnson for his criticism of government policies—for his content—but for the manner he chose to express his views. As with protecting the Lincoln Memorial from defacement, Texas's legitimate interest in preserving the quality of an important national asset supports a prohibition of Johnson's flag burning method.

Rehnquist and Stevens thus avoided considering any strict scrutiny test in *Johnson*. In essence, they sought to create a new category of unprotected speech akin to obscenity.

Creating a National Debate

In concluding his dissent, Chief Justice Rehnquist said that "surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning" (*Johnson,* 1989, p. 435). These words, echoed by Justice Stevens, inspired Congress and a large portion of the U.S. populace to rally for the flag, producing *Johnson*'s legacy: a continuing political, legal, moral, and societal debate over the parameters

of symbolic expression. This debate greatly enriches *Johnson* for communication researchers.

While citizen organizations across the country have engaged the debate, its focal point remains in the United States Congress. Heated reaction to the *Johnson* decision swept Congress. The very next day House members promised to introduce a constitutional amendment to give Congress and the states the power to prohibit the physical desecration of the U.S. flag. Just one month later, the Senate considered both a constitutional amendment and the Flag Protection Act of 1989, which proposed amending the federal flag desecration statute.

In the fall of 1989 both the House and the Senate approved the act. Under this statute whoever "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground or tramples upon any flag of the United States shall be fined under this Title or imprisoned for not more than one year, or both" (Flag Protection Act of 1989). An exception permitted disposal of a worn or soiled flag. But in October 1989, the proposed constitutional amendment failed to obtain the necessary two-thirds vote of the Senate.

Eight months later in *United States v. Eichman* (1990), the Supreme Court relied upon *Johnson* to strike down the 1989 federal statute. *Eichman* consolidated two flag burning cases in one appeal. The first involved persons—including Gregory Lee Johnson—who burned several U.S. flags on the steps of the U.S. Capitol while protesting American foreign policy. The second concerned individuals who burned a U.S. flag in Seattle while protesting passage of the 1989 Flag Protection Act.

Once the Supreme Court ruled for a second time that flag burning was expressive speech protected by the First Amendment, opponents of flag burning realized that no statute could adequately protect the U.S. flag from desecration; only a constitutional amendment could overturn *Johnson* and *Eichman*.[2] In 1990, 1995, 1997, 1998, 1999, and 2000 both House and Senate debated such an amendment. The House continually passed it and the Senate narrowly defeated it. Flag Protection Amendment cosponsor Senator Orrin Hatch (R-Utah) again reintroduced the bill in March 2001.

The Flag Debate's Value to Communication Studies

The congressional debate clarifies two analytical focuses concerning *Johnson:* the case itself and the ensuing political and societal debate. While numerous law journal articles analyzed the legal principles established by the Court (which this essay does not pursue), a few communication scholars provided new ways to view the majority and dissents in *Johnson*. Heather Hundley

used a semiotic analysis to reveal that the justices were disagreeing because they were decoding the "flag" differently: some as symbolic, others as iconic (1997). The advocates of such disparate representations could not find core values to build consensus. Meanwhile, Stuart Kaplan first used *Johnson* to describe the evolution of the symbolic speech concept, then examined the implicit theories of visual communication that seem to explain "why judges have ruled the way they have in this area of jurisprudence" (1999, p. 3).

This essay proposes a new arena for communication investigation, one rich in possibilities: the debate spawned by *Johnson*. Throughout the legislative process involving the flag protection statute and amendment, testimony from members of Congress, legal scholars, and average citizens clearly defined this continuing national controversy. The arguments from that debate can be used as data for communication studies ranging from value analysis and semiotics to various historical, interpersonal, or rhetorical approaches.

But this controversy also provides one argument that engages the most basic level of communication: a debate over message creation, transmission, and reception. Flag protection proponents argue that the act of burning a flag carries no message, while opponents state it is indeed communicative. The essay thus focuses on three premises flag amendment supporters use that clarify how they deny the presence of communication: (1) the U.S. flag's unique status places it above the need to consider communicative value; (2) flag burning is conduct—a physical, noncommunicative act subject to regulation; and (3) only written or spoken words engage the communication process.

Franklyn S. Haiman's nonverbal symbolic communication theory, which he used to denounce "speech act" legal thinking, drives the analysis. Haiman focused on the ideas and meanings communicated between people and claimed that, whether it is called an *act* or not, "it is still essentially a *symbolic,* not a *physical,* transaction" (1993, p. 5). Haiman continued

> Though it is true that symbols can, and commonly do, arouse physiological as well as mental responses in their audience, the mental response comes first and mediates what follows. Without a response of the mind, nothing follows, for nothing has been comprehended. . . .
>
> Thus . . . a fundamental difference obtains between symbolic and nonsymbolic interactions and . . . the First Amendment is *always* implicated in the former and only occasionally in the latter. (p. 5)

In conjunction with Haiman's theory, this essay subscribes to Frank Dance and Carl Larson's postulate of communication, established through a content

analysis of several decades of such presuppositions: "A communicative act carries with it the implicit assumption that the symbolic content one produces will be consumed by another according to the same code that governed its generation" (1976, p. 36).

The selected quotations represent broadly held concepts that reverberate at all levels of discussion over the 13-year history of the flag burning controversy.[3] Space considerations narrow the focus to Senate debate, which reveals not only how political opponents legally and morally define "speech" based on the *Johnson* case, but how they use these definitions to further their political ends. Such definitions and uses are important to comprehend because this is not just another academic debate; it is a statutory debate in our country's highest legislative body. The congressional decision can dictate *by law* what is, and what is not, a communicative message, and thus what is allowable speech in our society.

Unique Status

In defining their position, proponents of flag protection reflected Chief Justice Rehnquist's dissent in *Johnson* by emphasizing the emotional and moral attachment of Americans to the flag and the perceived need to protect this attachment from physical assault. Amendment supporters based their position in what Alasdair MacIntyre (1984) called the "morality of patriotism," a deeply felt, shared cultural perspective that develops a person as a moral agent. It is defined by a proprietary love of one's country, a pride in its distinctive merits, a gratitude for benefits enjoyed, and, at some point, an uncritical acceptance of national goals and mores.

Senate amendment cosponsor Orrin Hatch clarified emotional and cultural elements of moral patriotism in March 2000. Hatch spoke on the Senate floor of how Mike Christian, one of Senator John McCain's (R-Arizona) cell mates at the "Hanoi Hilton" during the Vietnam War, painstakingly made U.S. flags out of bits of cloth to inspire other American prisoners, only to suffer life-threatening beatings for his efforts: "If a makeshift flag can stir such emotions, it is illogical for the Senate to ignore the feelings of the overwhelming number of Americans who support flag protection. The flag is not just a piece of cloth or a symbol. It is the embodiment of our heritage, our liberties, and indeed our sovereignty as a nation. The American flag unites Americans because it embodies shared values and history" (March 29, 2000, pp. S1833–1834).

Hatch's cosponsor, Vietnam War hero Senator Max Cleland, pursued the morality of patriotism, emphasizing its particular worldview, shared cultural perspective, and proprietary love of country: "The flag is not a mere symbol.

It is not just a symbol of America. It *is* America. It is what we stand for. It is what we believe in. It is sacred" (February 4, 1998, p. S396).

Moral patriotic values became a significant aspect of the flag protection argument. Moral patriots regard those outside their community as having lost hold of genuine standards of judgment, as Senator Bob Smith (R-New Hampshire) explained: "The desecration of the flag . . . is about us as a people. . . . We have moral decay in this country. We are falling apart at the seams because . . . there is no personal accountability. Desecrate graves, stomp the flag, disrespect veterans. It is OK. Spit on the flag. That is OK, it is free speech. . . . It is wrong to desecrate the flag. . . . The flag is the essence of America" (March 27, 2000, pp. S1719–1720).

These quotations elucidate two familiar premises of amendment backers: the unique status of the flag and its unifying nature. Such status and nature, the argument states, should elevate the American flag above First Amendment implications of speech. As Justice Rehnquist said, the flag "is not simply another idea . . . competing in the marketplace of ideas" (*Johnson,* 1989, p. 429). This argument sidesteps the need to discuss symbolic expression as a communicative act. Even if someone could ascertain a message from witnessing a flag burning, the opportunity to send the message would be outlawed and suppressed by fear of punishment.

Yet the above quotations also indicate that flag protection supporters *do* suggest that the U.S. flag carries symbolic expression and communicates a distinct message to the world. Justice Stevens's dissent is an often-used refrain: "[The American flag] is a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations. The symbol carries its message to dissidents both at home and abroad who may have no interest at all in our national unity or survival. The value of the flag as a symbol cannot be measured. . . . Sanctioning the public desecration of the flag will tarnish its value" (*Johnson,* p. 437).

When reintroducing the bill to Congress in 2001, Senator Cleland clarified the hierarchy of flag symbolism and its implications: "The societal interest in preserving the symbolic value of the flag outweighs the interest of an individual who chooses to physically desecrate the flag. The flag unites Americans as no symbol can. If the American flag is not sacred, what in the world is?" (cited in Kapos, 2001, p. A1).

Protection proponents thus claim that, *of itself,* the flag does communicate, does carry with it the implicit assumption that the symbolic content will be decoded by a receiver. But when someone does something to or with the flag—such as burn it—they claim the physical act of igniting the flag and the

physical act of fire destroying it, is equivalent to "an inarticulate grunt or roar" that is *not* communicative (*Johnson,* 1989, p. 432).

Noncommunicative Conduct

Those who opposed amending the U.S. Constitution to protect the flag focused on the perceived threats to free speech; in other words, they objected to interrupting the communication process. They defined the issue as strictly legal, as outlined by Justice Brennan and in testimony from constitutional scholars such as Cass Sunstein of the University of Chicago School of Law and Dean Gene Nichol of the University of Colorado Law School. Opponents of protection said that if the flag debate rested upon any symbol, it was the international perception of America as the symbol of freedom. Prohibiting the transmission and reception of expression such as flag burning would deeply harm that perception.

Testifying before a Senate hearing, Assistant Attorney General Walter Dellinger said that everyone agreed the flag "symbolizes our nation, its history, its values. We love the flag because it symbolizes the United States; but we must love the Constitution even more, because the Constitution is not a symbol. It is the thing itself" ("Proposing a Constitutional Amendment," 1995, p. 17). To Dellinger, "the thing itself" was the democratic process, the give-and-take of political discussion based in the freedom to transmit and receive information and ideas that impact the public—whatever their content, whatever their mode of transmission. Dellinger invoked John Stuart Mill's approach to open government based in "freedom of opinion, and freedom of the expression of opinion" (1859/1936, p. 63). Senator Edward Kennedy (D-Massachusetts) captured the legal tradition of this marketplace of ideas concept when he said: "If freedom means anything, it means that we must tolerate not just the views we approve, but views we oppose as well. That fundamental principle is what gives America its true strength and permits our flag to fly high" ("Proposing a Constitutional Amendment," 1995, p. 3).

Senate Judiciary Committee Chair Orrin Hatch answered his opponents by clarifying the legal premises of flag protection supporters, based on Justice Stevens's dissent and testimony from First Amendment scholars such as Stephen B. Presser of Northwestern and Harvard's Richard Parker. Said Hatch: "I believe the Court's majority [in *Johnson*] had it wrong. Burning the flag is conduct—conduct for which there exists [*sic*] numerous peaceful alternatives—and may be prohibited" (February 4, 1998, p. S395). Two years later Senator Hatch became more emphatic: "The Supreme Court, in its infinite wisdom, has indicated that flag burning, defecating on the flag, or uri-

nating on the flag is a form of speech. I don't see how anybody in his right mind can conclude that. There is no question that is offensive conduct and it ought to be stamped out" (March 28, 2000, p. S1769).

Senator Hatch established two additional legal points. First, "while traditional First Amendment jurisprudence would protect Johnson's ability to speak and write about the flag, it did not protect his ability to physically destroy the flag" (March 17, 1999, p. S2865). "The flag amendment is not about flag burners," wrote Hatch. "Its purpose is to correct the mistaken view that flag burning is speech." He continued by asserting that it "is time for us to make unequivocally clear that certain behavior in this country is and should be recognized as wrong and punishable by law" (cited in Kapos, 2001, p. A1). Second, the "First Amendment's guarantee of freedom of speech has never been deemed absolute" ("Proposing a Constitutional Amendment," 1995, p. 5). Senator Hatch compared flag burning to acknowledged, if unprotected and immoral, speech such as obscenity and libel: It is "outside the protection of the First Amendment and beyond the pale of acceptability even in a free society" (Hatch, 1995).

Senator John Ashcroft (R-Missouri) also invoked the Stevens and Rehnquist dissents, adding that the "act of desecrating the flag does not have any content in and of itself. The act takes meaning and expresses conduct only in the context of the true speech which accompanies the act. And that speech remains unregulated" (March 28, 2000, p. S1766).

Drawing directly on Justice Rehnquist's exhortation "to legislate against conduct that is regarded as evil" (*Johnson,* 1989, p. 435), flag amendment proponents have continuously stressed that the American people made clear, via opinion polls and 49 state legislative resolutions supporting the amendment, that such immoral *conduct* should be prohibited. Communicative content was not an issue when William Detweiler, Commander of the American Legion, clarified this legislative and moral duty. He testified that desecration of the flag "is an evil act. Yet, as a wise man once observed, the only thing necessary for the triumph of evil is for good men to do nothing" ("Proposing a Constitutional Amendment," 1995, pp. 36–37).

In response to the conduct-not-speech argument, amendment opponent Senator Russell Feingold (D-Wisconsin) spoke directly to Justice Brennan's concern with content neutrality: "This amendment departs from that noble and time-honored standard. It seeks instead to prohibit expression solely because of its content. Proponents of this amendment have made plain that they direct their effort at expression that they deem 'disrespectful.' Even more troubling is that this amendment leaves the determination of what is disrespectful to the government" (p. S1834).

Dellinger, Kennedy, and Feingold focused upon the communicative ability of symbols. By claiming that flag burning carried "content," they assumed that such symbolic content would be consumed by another person who could decode the message as political speech. In other words, they believed communication occurred—that the flag burner transmitted information, ideas, or emotions by the use of symbols. However, for Hatch, Ashcroft, Rehnquist, and Detweiler, if nonverbal symbols were *evil acts* they simply did not communicate; no message was transmitted in the purely physical act of igniting a flag. For proponents of flag protection, Justice Brennan's concept of *expressive conduct* did not exist; expression and conduct were mutually exclusive.

Words Alone

But if communication did not occur, flag amendment opponents asked, what, in fact, offended those witnesses to Gregory Johnson's flag burning? Essentially, opponents believed Johnson's act transmitted stimuli that evoked a particular response: offense. In other words, the witnesses decoded *something;* they just did not care for the message. Senator Ashcroft provided the pro-amendment answer when he said the act of desecrating a venerated object carries no content in and of itself—that the "act takes meaning and expresses conduct only in the context of the true speech which accompanies the act" (March 28, 2000, p. S1766). For flag amendment proponents, "true speech" uses words, whether spoken or written. Senator Hatch reified this position after he reintroduced the Flag Protection Amendment to the Senate in April 2001. Building on Justice Stevens's suggestion that "an available, alternative mode of expression—including uttering words critical of the flag—be employed" (*Johnson,* 1989, p. 437), Hatch said: "The proposed amendment would not affect anyone's ability to express any opinion whatsoever about the flag, the country, or the government's actions. People can express their views in public, in private, in newspapers, on the Internet, and through broadcast media. Lighting fire to the flag adds nothing whatsoever to any debate about our nation's policies, priorities or direction" (2001). In an earlier editorial, Senator Hatch provided a list of channels that exemplified communication only through the use of language. He concluded that "prohibiting burning and similar physical desecration of one unique symbol, our flag, will not prevent a single idea or thought from being expressed" (1995).

By defining "true speech" as solely spoken or written, Ashcroft and Hatch ignored the nature of words as symbolic artifacts selected to convey certain meanings, perhaps with political intent. For words are only part of the communicative message: Nonverbal codes, including artifacts like flags and their use, may convey even more meaning to an audience (Burgoon, 1985, pp. 349–

350). Acknowledging nonverbal codes such as flag burning would admit to the existence of message creation, transmission, and reception, which would engage Justice Brennan's concern with content neutrality. Therefore, flag amendment proponents cannot allow the presence of communication.

Conclusion

Johnson established, by the debatable 5–4 margin, that burning an American flag is indeed a communicative act and thus protected *expressive conduct*. But within the flag burning controversy, the communication process itself has become a political tool. Flag protection proponents argue that such conduct does not create or transmit a message to a receiver. They define flag burning—if in any way symbolic—as symbolic *behavior* that is immoral, an "evil act," which promotes the idea that such conduct should be subject to social control through the law. Kent Greenawalt, who adapted linguistic speech act theory to legal theory, supported this argument when he defined categories of speech that do not qualify for First Amendment protection because they "are ways of doing things, not of asserting things" and thus "subject to regulation on the same bases as most noncommunicative behavior . . . outside the scope of a principle of free speech" (1989, p. 58).

Yet this position provides the rather confusing possibility of a person believing she understood and received a particular message, only to be told by the government that no message existed. And since no message existed, her believed communication could not be protected speech under the First Amendment. Such a scenario demonstrates both the vital role the communication process plays in the law-making process and the ensuing societal implications. For what proponents "*would* restrict are the symbolic elements themselves—the ideas and meanings contained in the words, pictures, or representations in question—for it is these elements, or more accurately their consequences, that create the problems they seek to address" (Haiman, 1993, p. 4).

Flag protection proponents want to address what they see as the decay of moral patriotism in the United States. They seek to combat that decay by suppressing ideas they deem unacceptable, by denying that communication occurs. If passed, the Flag Protection Amendment would alter the parameters of free speech in our country. This is as it should be, said flag protection advocate Senator Strom Thurmond (R-South Carolina): "Why should society let even one person wrap themselves [*sic*] around some absolute interpretation of the First Amendment to protect indefensible speech? Have we

focused so much on the rights of the individual that we have forgotten the rights of the people?" (February 4, 1998, p. S400).

The proposed constitutional amendment can thus remove not only First Amendment protection for symbolic expression but also the individual citizen's legal ability to discern for him/herself whether communication even occurred. In other words, by altering our legal definition of communication to favor the community over the individual, the Flag Protection Amendment would alter our democracy's balance between citizen autonomy and social order.

Notes

1. Tedford provides a clear analysis of the Supreme Court's "bad tendency" test for speech prior to 1957 (1985, pp. 53–68).

2. While a constitutional amendment is the primary focus in Congress, in 1999 and 2000 several senators promoted federal statutes: e.g., Amendment No. 2889, 146 *Congressional Record* S1706 (2000).

3. See Robert Goldstein (1996) for a summary of congressional debate and hearings through 1995. Through 2002, the debate has not changed.

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Reno v. ACLU

Douglas Fraleigh

One of the final Supreme Court decisions on freedom of expression in the twentieth century set an important precedent for free expression rights in the new century. In *Reno v. ACLU* (1997), the Court held that restrictions on the content of Internet communication would be subjected to strict scrutiny rather than the less stringent standard of review that has been applied to the broadcast media. The *Reno* opinion is highly significant because it established ground rules for protecting expression through new communication channels that account for a rapidly increasing proportion of human interaction.

This essay begins by considering the facts of the *Reno* case and then analyzing the legal context of medium-specific limitations on communication prior to *Reno.* Next the Supreme Court's *Reno* opinion is summarized, followed by consideration of *Reno*'s influence on subsequent freedom of expression cases. Finally, some links between the *Reno* analysis and communication theory are noted.

The Context of *Reno v. ACLU*

The Facts of the Case

The exponential growth of on-line communication was one of the most significant trends in the 1990s. The Internet was relatively unknown at the beginning of the decade, but by 1994 there were 10 million users (Markoff, 1994). When the *Reno* litigation commenced in 1996, there were an estimated 40 million users (*Reno,* 1997, p. 884), and by the year 2000 that number had grown to 155 million English speakers and 147 million non-English speakers (Global Reach, 2000)—evidence that the metaphor of a World Wide Web is not merely figurative.

The Internet grew to contain an amazing diversity of information and came to serve many functions, from library to shopping mall to neighborhood bar to town hall forum. One category of Internet expression, sexually explicit words and images, was the catalyst for the *Reno* case. In 1995, *Time* magazine ran a cover story decrying the growth of "cyberpornography," based in part on a Carnegie-Mellon study that found over 900,000 sexually explicit photographs, stories, and films in cyberspace (Elmer-DeWitt, 1995, p. 38). Advocacy groups demanded action. For example, the Christian Coalition argued that "pornography on the computer superhighway has become so prevalent and accessible to children that it necessitates congressional action" (*Congressional Record,* 1995, p. S8337). On the Senate floor, Sen. James Exon (D-Nebraska) brandished a "Blue Book" with a bright red "Caution" label listing erotic sites that could be accessed for free on the Internet (Andrews, 1995, p. A1). There were apprehensions about children inadvertently coming across obscene material when using search terms such as "women" and fears of computer savvy minors intentionally accessing indecent material (Keiser, 1998).

In response to these concerns, Senator Exon initiated the Communications Decency Act (CDA) of 1996.[1] The CDA banned on-line transmission of indecent communications to minors and imposed *criminal* penalties on violators.[2] The CDA passed both houses of Congress by wide margins, with only 21 members voting "no" (Lewis, 1996); it was signed into law by President Bill Clinton on February 8, 1996. Though the statute did not define the term "indecent," judicial opinions define indecency more broadly than obscenity. *Miller v. California* (1973) and subsequent court decisions made it clear that obscene material must depict patently offensive hard-core sexual conduct (*Jenkins v. Georgia,* 1974) and lack serious literary, artistic, political, or scientific value. Indecent works can include any material that does not conform with accepted standards of morality (*FCC v. Pacifica Foundation,* 1978, p. 740). Communication that does not describe hard-core sexual conduct may nevertheless be indecent because it contains offensive words dealing with sex or excretion (p. 745). Thus indecency can include profanity that uses sexual terms (e.g., "Fuck the Draft") and descriptions of sexual activity that do not appeal to the prurient interest (e.g., candid advice regarding safe sex).

Whether America's politicians were making a serious attempt to address a social ill or just pandering to the voters is questionable. No congressional hearings were held on the CDA ("Free Speech and the Internet," 1997). The Justice Department's Office of Legislative Affairs argued that the CDA would criminalize communications protected by the First Amendment

(Markus, 1995). The Justice Department also indicated that the CDA was not necessary because it was already prosecuting on-line obscenity, child pornography, and child solicitation under existing laws, and would continue to do so (*ACLU v. Reno,* 1996, p. 857). Nevertheless, many politicians from both parties took advantage of the opportunity to posture for the cameras and to provide sound bites about protecting children (Dooling, 1996). Few wanted to take the risk of being labeled pornography supporters. Senator Orrin Hatch (R-Utah), one of few congressional conservatives to speak out against the measure, called the effort a political game "to see who can be the most against pornography and obscenity" (cited in Andrews, 1995, p. A1).

The congressional vote for the CDA was not supported by the virtual community of Internet users. Led by the advocacy group Voters Telecommunications Watch, many users darkened their Web pages in a 48-hour protest, then placed blue ribbons on pages to note their ongoing protest (Schneider, 1996, p. 70). Senator Patrick Leahy (D-Vermont) brought a foot-high stack of petitions to the Senate debate. They contained the signatures of 35,000 Internet users who believed that the CDA threatened freedom of speech (Andrews, 1995).

Shortly after the president signed the law, 20 plaintiffs, including the ACLU, filed a lawsuit against Attorney General Janet Reno and the Department of Justice. The plaintiffs argued that no technology was available to allow most persons communicating on the Internet to screen for age. Thus millions of people who communicate by e-mail, send messages to news groups, or participate in chat rooms would need to reduce their speech to a level suitable for minors (ACLU Brief, 1996) or be subjected to criminal penalties. Expression that could be sanctioned for indecency included: the text of the Tony Award-winning Broadway play *Angels in America,* which portrayed homosexuality and AIDS in graphic language; news articles and chat room discussions regarding the practice of female genital mutilation; and photographs appearing in *National Geographic* or a travel magazine of sculptures in India depicting couples copulating in various positions (*ACLU v. Reno,* 1996, pp. 852–853). Political expression on the Internet containing indecent words would also be criminalized (ACLU Brief, 1997).

A federal district court entered a preliminary injunction against enforcement of the statute (*ACLU v. Reno,* 1996, p. 883), and the government appealed that decision to the Supreme Court. Although this case would be the Court's first decision regarding free expression on the Internet, the Court had considered medium-specific regulations of indecency in a variety of other contexts. These decisions formed the legal background for *Reno v. ACLU* (1997).

Constitutional Issues in *Reno v. ACLU*

The appropriate standard of review. When courts review legislation affecting First Amendment rights, several different tests may be used. The most stringent test, strict scrutiny, applies to content-based restrictions on traditional modes of communication, such as newspapers, pamphlets, and public speeches. When strict scrutiny is employed, a reviewing Court analyzes whether the regulation promotes a compelling state interest and whether it constitutes the least restrictive means to further that interest. Few regulations on the content of speech will meet this standard (*United States v. Playboy Entertainment Group,* 2000, p. 7). At the other end of the spectrum is the rational basis test, which holds that a government restriction is constitutional if there is any rational basis for the restriction. When analyzing First Amendment rights for new communication technologies as they developed in the twentieth century, the Court treated each new medium as a law unto itself (Greenhouse, 1997) and applied various standards of review. The choice of a standard for reviewing Internet restrictions would greatly affect the likelihood that the CDA and all future regulations would be constitutionally permissible.

Medium-specific standards of review. When deciding on the standard of review to be applied to content-based restrictions on new technology, the Court often asked which existing technology was most analogous to the new one. When *Reno* was argued before the Supreme Court, a major subtext was which analogy to Internet communication was most appropriate (Greenhouse, 1997). The primary candidates were cable television, broadcasting, and telephone services.

The Court had experienced difficulty in selecting the appropriate level of review for cable television restrictions. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* (1996), a plurality of the Court coined an intermediate standard for review in evaluating a cable television law giving station operators the power to prohibit the broadcasting of certain indecent programs. The plurality asked whether the restriction "properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech" (p. 902). A *New York Times* editorial called the decision not to apply strict scrutiny "timid," and expressed concern that four of the justices "leaned toward a dangerous approach that grants more leeway to control the message when a given technology reaches large numbers of people" ("Free Speech and the Internet," 1997, p. A14).

In 1978 the Court upheld a government restriction of broadcast indecency

in *FCC v. Pacifica Foundation.* Not surprisingly, this case was central to the government's argument that the CDA's restrictions on Internet indecency were constitutional. In *Pacifica,* the Supreme Court upheld an FCC sanction imposed on Pacifica because one of its radio stations aired George Carlin's "Filthy Words" monologue at two o'clock in the afternoon. That monologue was a satire about the words that could not be said on the public airwaves. Carlin opined that there was a "list" of seven forbidden words,[3] and he repeated these words often during the monologue. The Court ruled in favor of the FCC's power to regulate "obscene, indecent, or profane language by means of radio communications," holding that broadcasting may be given less First Amendment protection than other forms of communication because the broadcast media have "a uniquely pervasive presence in the lives of all Americans" (p. 748). The bases of this pervasiveness were that indecency confronts the individual in the privacy of the home and that broadcasting is uniquely accessible to children. The "government's interest in 'the well being of its youth' and in supporting parents' claim to authority in their own household" justified a regulation against indecent broadcasting, at least during times when children are likely to be awake (*Ginsberg v. New York,* 1968, pp. 639–640, cited in *Pacifica,* 1978, p. 749).

A federal ban on indecent telephone messages received different treatment than the FCC broadcast indecency restriction at issue in *Pacifica.* In *Sable Communications of California, Inc. v. FCC* (1989), the majority refused to apply the pervasiveness rationale to telephone "dial-a-porn" services. The Court reasoned that the telephone service was not analogous to a radio broadcast because a listener had to take several affirmative steps before receiving an indecent communication. Therefore the Court applied strict scrutiny to evaluate the telephone message restriction. Because the restriction was "not narrowly tailored to serve the compelling interest of minors being exposed to indecent telephone messages," the statute was held unconstitutional (p. 131).

Adults-only limits on explicit materials. Another government line of argument was that explicit material can be kept from minors, even if adults have a right to read or view it. On its face, the CDA only banned indecent communications to minors; hence this argumentation had relevance in *Reno.*

The leading case supporting the government was *Ginsberg v. New York* (1968). In that case, the Supreme Court upheld the constitutionality of a New York statute making it unlawful to sell any magazine to minors under 17 if it contained pictures depicting nudity and if, when taken as a whole, it was harmful to minors. The defendant sold such a magazine to a 16-year-old boy. The magazine was not obscene for adults.

The *Ginsberg* Court ruled that the New York law did not deny minors'

freedom of expression. Two state interests were held to justify the regulations. One was that parental authority to direct the rearing of their children was basic to our society and that the legislature could conclude that parents are entitled to laws that aid in the discharge of their responsibility (p. 639). Parents who did not find such magazines objectionable could still purchase them for their children. The second government interest was safeguarding children from abuses which might prevent their growth into well-developed citizens. The New York legislature had made a finding that the magazines regulated by the law impaired the ethical and moral development of youth. This finding was not based on scientific fact, but the Court applied the rational basis test and concluded that it was not irrational for the legislature to find that exposure to such materials was harmful to minors (p. 641).

The Free Expression Consequences of *Reno v. ACLU*

The outcome of *Reno v. ACLU* would have a major impact on freedom of speech. Not only was the CDA itself a threat to free expression, the case also had the potential to create a precedent that could be used to justify future government limits on cyberspace communication. If the Court decided that the Internet was analogous to the broadcast media, the government would have a lighter burden of justification for additional restrictions. If the Court found that the CDA was analogous to the New York law in *Ginsberg,* the possibility of harm to children would be sufficient to justify the restriction.

A decision against free expression on-line would give the government power to control an ever growing percentage of communication. The Internet has been called "the most participatory form of mass speech yet developed" (*ACLU v. Reno,* 1996, p. 883). An increasing number of people use the Internet for a wide variety of communicative purposes that were formerly accomplished through other channels. The Court had already carved out a lower level of protection for broadcasting and refused to extend full protection to cable television. If cyberspace communication was added to the "less protected channels list," the government's power to control speech would be expanding at the outset of the twenty-first century.

The Supreme Court's Decision in *Reno v. ACLU*

No Reduced Level of Scrutiny for Internet Restrictions

By a 7–2 majority,[4] the Supreme Court ruled that the challenged provisions of the CDA were unconstitutional. The key passage in Justice John Paul Stevens's majority opinion declined to reduce the level of constitutional protection offered to Internet communication. In his words, "our cases provide

no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium" (*Reno v. ACLU,* 1997, p. 897).

Declining to apply *Pacifica* (1968) as a precedent, the majority held that the Internet is less invasive than radio or television. This conclusion was based on the district court's findings that communications do not appear on a computer screen "unbidden" and that users seldom encounter content by accident. The CDA was deemed more analogous to the unconstitutional ban on indecent, sexually oriented telephone messages that was the basis of *Sable* (1989) rather than to the radio broadcast in *Pacifica.* Furthermore, whereas the FCC was an agency that had regulated broadcast stations for decades, application of the CDA would not be determined by an agency that was "familiar with the unique characteristics of the Internet" (*Reno,* 1997, p. 894).

The CDA Fails to Survive Strict Scrutiny

When the Court subjected the CDA to strict scrutiny, the justices agreed that the government had an interest in protecting children from harmful materials. However, the Court concluded that the CDA was not tailored to achieve that objective.

The scope of the CDA is wide. The Court concluded that the CDA was not narrowly tailored "if that requirement has any meaning at all" (*Reno,* 1997, p. 902). Far from having a limited scope, the breadth of the act's coverage was "wholly unprecedented" (p. 901). Sexual expression which is indecent but not obscene is protected by the First Amendment (p. 899). Existing precedents made clear that the government cannot limit adult expression to that which is fit for children or, to put it more colorfully, "the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox" (*Bolger v. Youngs Drug Products,* 1983, pp. 74–75). The majority also noted that the indecent expression includes *non*-pornographic material with educational or other value. Examples of this include discussions about safe sex or prison rape, artistic images that include nude subjects, and any of the seven dirty words used in the George Carlin monologue at issue in *Pacifica* (1978, p. 901).

The vague terms of the CDA, along with its criminal sanctions, created a chilling effect that would magnify the act's reach into the realm of protected expression. Justice Stevens noted that terms such as "indecent" and "patently offensive sexual activities or organs" were not defined. Thus a communicator could not confidently assume that a serious discussion about homosexuality or birth-control techniques would be permitted under the CDA.[5] The severe criminal sanction of up to two years in prison magnified the chilling effect on protected speech. The Court feared that speakers would remain silent

rather than communicate even arguably unlawful words (*Reno,* 1997, pp. 897–898).

The CDA is not the least restrictive alternative. The government failed to show that the CDA was the least restrictive alternative available to achieve the state interest of protecting minors (p. 899). Restrictions on the *source* of indecent messages would necessarily burden adults' rights to send and receive information. The majority noted the district court's finding that there was no effective method for a message source to prevent minors from obtaining access to communications on the Internet because it is difficult to determine the age of a user who accesses material through e-mail, news groups, or chat rooms. Thus the sources of many indecent messages on the Internet would be committing a crime under the terms of the CDA. This criminalization would burden communication among adults (pp. 900–901). Conversely, *receivers* could limit sexually explicit material in their own home without burdening the rights of other adults to send or access sexually explicit material. Once again citing a district court finding, Justice Stevens noted that parents could install software that would be reasonably effective in preventing their children from accessing sexually explicit material or other information that they deemed inappropriate for their children (p. 901). The fact that Congress passed the law without holding hearings or making any detailed findings rendered the government's claim that the statute was a necessary remedy particularly unpersuasive to the Court (p. 902).

Judicial Internet Experience and the *Reno* Decision

An interesting aspect of *Reno* is the possibility that the hands-on Internet experience the judges acquired as the case progressed may have facilitated a positive judicial response. When Internet cases first came up for review, it was reasonable to question whether a "technological generation gap" would have an impact on judicial decisions about this new medium. One of the plaintiffs in *Reno* expressed the fear that judges who do not understand the Internet would pick the wrong analogy for this new media and issue a landmark decision restricting free speech in the new century. Thus one of the plaintiffs' rhetorical strategies was to explain how Internet technologies are more like publishing (a highly protected medium) than broadcasting (Lewis, 1996).

Instead of shunning the Internet, the federal judges embraced it. At the time *Reno* was being litigated in the federal district court in Philadelphia, the judges in the case were also visiting Web sites on computer terminals set up for the hearings. The hearings were referred to as "a crash course on the Internet" ("Free Speech and the Internet," 1997). The judges' direct experi-

ence with the issues being litigated could not help but have an impact on the case.

The district court judges were said to be dazzled by this display (Kende, 1997), and their findings of fact in the case provided an impressive primer of their knowledge of cyberspace, complete with a discussion of its history, methods of access, methods of communication, means of restricting unwanted material, means of accessing sexually explicit material, and the feasibility of Internet users determining the age of other users (*ACLU v. Reno,* 1996, pp. 830–849). These findings were important to the outcome of the Supreme Court's decision: The majority opinion consistently cited the district court's findings.

Similar positive sentiments may have had an impact on Supreme Court justices when they reviewed the case (Kende, 1997). Justice Stevens, author of the *Reno* majority opinion, previously opined that sexually explicit motion pictures were not entitled to the highest level of First Amendment protection. Yet his opinion concluded that the government interest in encouraging freedom of expression outweighed any "theoretical but unproven benefits" of censoring indecent materials (*Reno,* 1997, p. 906). The majority's enthusiasm for protecting the Internet also offers one plausible explanation why the Court employed strict scrutiny rather than deciding the case on narrower grounds, such as vagueness (Kende, 1997).

The Legacy of *Reno v. ACLU*

The Internet Receives the Highest Level of Protection

The *Reno* majority placed Internet expression squarely in the category of protected speech. Rather than simply ruling that the CDA was unconstitutionally vague or issuing some other limited holding that did not clarify the First Amendment status of cyberspace communication, the Court issued a landmark ruling providing a high degree of protection for on-line expression. By holding that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied *to this medium* [italics added]" (1997, p. 897), the majority ensured that future content-based limits on Internet communication will be subjected to the highest level of judicial scrutiny. The impact of *Reno* transcends the indecency issue. Further restrictions on new communication media are likely to be attempted in the future, such as limits on extremist speakers and regulation of "inaccurate" news and information (Volokh, 1995, pp. 1848–1849). If such regulations attempt to regulate the content of cyberspace expression, they are likely to be subject to strict scrutiny.

Support for the *Reno* decision

The *Reno* decision received high praise from civil libertarians, legal commentators, journalists, and writers. For example, ACLU Executive Director Ira Glasser (1997) called the ruling "an unprecedented breakthrough in the fight to determine the future of free speech into the next century." Vanderbilt Professor Donna Hoffman called the ruling "a deeply satisfying victory because it reaffirms the rights and responsibilities of all individuals to be active and in-control participants in the most revolutionary communication medium since the development of the printing press" (1997). Author and *Reno* plaintiff Jonathan Wallace noted that the "Court is prepared to treat the Internet like print media;" these media have "always been considered sacred in First Amendment law" (1997).

Reno Used as a Precedent

The precedential value of *Reno* has already been evident in subsequent cyberspace litigation. In 1998 New Mexico passed a statute which criminalized the dissemination by computer of material that is harmful to minors. In *ACLU v. Johnson* (1999), the Tenth Circuit Court of Appeals affirmed a district court grant of a preliminary injunction against enforcement of that statute. The appellate court noted that "the Court made clear in *Reno v. ACLU* [citation omitted] that content-based regulation of Internet speech is subject to . . . strict scrutiny" (p. 5). The court concluded that the New Mexico statute, "like the CDA, unconstitutionally burdens otherwise protected speech" (p. 8).

In the aftermath of the *Reno* decision, Congress passed the Child Online Protection Act (COPA). This law banned communication for commercial purposes on the World Wide Web that is available to minors and that includes any material harmful to minors. In *ACLU v. Reno II* (1999), the federal district court for Eastern Pennsylvania granted a preliminary injunction against enforcement of this statute. The district court also reiterated that "as a content-based regulation of [nonobscene sexual] expression, COPA is presumptively invalid and is subject to strict scrutiny by this court" (p. 18). As in *Reno,* the court concluded that the plaintiffs would be likely to prove that COPA imposes a burden on speech that is protected for adults (p. 21) and that the less restrictive means of filtering technology may be at least as successful in restricting minors' access to harmful materials on-line (p. 22). The court added that it would not protect the majoritarian will at the expense of stifling constitutional rights. Although the importance of protecting children was noted, the court warned there might be more harm to the nation if "First

Amendment protections, which [children] will with age inherit fully, are chipped away in the name of their protection" (p. 24).

Reno was also cited when the Supreme Court extended greater free speech protection to cable television. In *United States v. Playboy Entertainment Group* (2000), the Supreme Court held that Congress could not require cable operators to fully scramble or otherwise block channels dedicated to sexually oriented programming or limit their transmission to the 10 P.M. to 6 A.M. time frame (hours when children were deemed to be unlikely to be viewing). Citing *Reno* and *Sable,* the Court reiterated that such a content-based restriction of speech can stand only if it satisfies strict scrutiny (p. 5). The Court noted that another federal law—one requiring cable operators to block undesired channels at individual households' request, —was an available, less restrictive alternative (p. 6). The majority added that the government failed to meet its heavy burden to prove that this solution would be less effective (pp. 6–12).

As in *Reno II,* the Court took the opportunity to elaborate on the philosophy underlying its decision. Recognizing the vital role that communication plays in developing who we are, Justice Anthony Kennedy's majority opinion stated: "It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control" (*Playboy Entertainment,* 2000, p. 7). Again, the theme that the Court did not want to stifle the growth of new communication technology was evident. Justice Kennedy wrote that "technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us" (p. 7).

Reno v. ACLU and Communication Theory

Construction of Meaning

Construction of shared meaning is an important concept in communication theory. John Stewart wrote that one of the most important features of communication is that "humans live in worlds of meaning, and communication is the process of collaboratively constructing these meanings" (1999, p. 17). If the government has the power to influence a communication transaction by criminalizing certain messages, such as those it deems indecent, then participants lose the ability to reach an understanding on their terms. In essence, the government becomes an uninvited participant in the efforts of its citizens to create shared meaning.

When humans construct meaning, both the connotative and denotative

meanings of words are important (Littlejohn, 1999, p. 331). Justice John Marshall Harlan showed judicial understanding of this concept in *Cohen v. California* (1971, p. 26) when he wrote that "words are often chosen as much for their emotive as their cognitive force" and that the emotive content of a message "may often be the more important element of the overall message sought to be communicated." The indecency of a message may be central to the message's connotation. For example, a Web site informing teens about safe sex practices might contain blunt, indecent street jargon rather than clinical terminology. The author of the message may be concerned that teens would interpret clinical language as an adult talking down to them. A connotative meaning of the street jargon might be "I am trying to talk to you as a peer, not an authority figure."

Development of New Communication Channels

Media historians and critics offer other insights that are relevant to the *Reno* opinion. Recall that a major question prior to the Court's decision was whether the Internet should be deemed analogous to existing technologies that receive a lower level of First Amendment protection, such as broadcasting or cable television.

The attempt to relate the Internet to older forms of communication is just the latest instance of a centuries-old tradition. Mitchell Stephens noted that "when they are young, stumbling and struggling through their first stages, all media imitate, slavishly" (1998, p. 47). The earliest printed books looked much like handwritten manuscripts, early photographers tried to make their pictures look like paintings, and television borrowed many programming ideas from radio. However, these metaphors or models "end up imposing limitations upon a developing form of communication" (p. 48). Furthermore, while societies struggle to determine how to best use a new medium, that medium is "most vulnerable to attack" (p. 44).

It is questionable whether new communication technology can ever be analogized to the old. Neil Postman wrote that "each technology has an agenda of its own. It is . . . a metaphor waiting to unfold" (1985, p. 84). The Court recognized that it would be difficult to make an analogy between the Internet and older technologies, and thus it gave this new communication channel the breathing room it needed to grow and develop.

Conclusion

During the 1990s, the Internet experienced amazing growth as a worldwide communication phenomenon. Previous Supreme Court decisions regarding new technologies created a fear that Internet expression would receive a

lower level of constitutional protection. When the Supreme Court ruled on the Communications Decency Act in *Reno,* it held that regulations on the content of on-line expression would be subjected to strict scrutiny. Because the CDA reached a wide variety of constitutionally protected adult expression and there was no proof that parental control technology would be less effective in protecting minors, the Court held that the CDA failed to pass this scrutiny.

Reno has already played an important role in precluding future government efforts to impose content-based restrictions on Internet expression and other modern communication technologies. Because the government bears a heavy burden of proving that less restrictive alternatives will be less effective, "it is rare that a regulation restricting speech because of its content will ever be permissible" (*Playboy Entertainment,* 2000, p. 7). Post-*Reno* decisions have also reiterated principles that are fundamental to a vibrant First Amendment, such as the relationship of freedom of speech to effective human communication and the importance of protecting unpopular speech from the will of the majority. The courts have taken the steps needed to ensure that the never-ending world conversation that is the Internet (*ACLU v. Reno,* 1996, p. 883) cannot be controlled easily by the government.

Notes

1. The Communications Decency Act was an amendment to broader legislation, the Telecommunications Act of 1996. The Telecommunications Act primarily focused on non-Internet technology, such as local telephone service and broadcasting (*Reno,* 1997, pp. 888–889).

2. USC, Section 223(a) prohibited the knowing transmission, by means of a telecommunications device, of "obscene or indecent" communications to any recipient under 18 years of age. 47 USC, Section 223(d) banned the knowing use of an interactive computer service to send to a specific person or persons under 18 years of age, or to display in a manner available to a person under 18 years of age, communications that, in context, depict or describe, in terms "patently offensive" as measured by contemporary community standards, sexual or excretory activities or organs. Penalties included a fine and up to two years of imprisonment (*Reno,* 1997, pp. 889–890).

3. The seven words were "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits" (*Pacifica,* 1978, p. 751).

4. Justice Sandra Day O'Connor, joined by Chief Justice William Rehnquist, wrote an opinion concurring in part and dissenting in part. These two justices agreed with the majority that provisions of the CDA limiting adults' ability to obtain indecent material was unconstitutional (*Reno,* 1997, p. 908). However, they believed that the provisions of the act that banned indecent speech in communications be-

tween a single adult and one or more minors should have been upheld (p. 913). The O'Connor opinion viewed the CDA as analogous to a zoning law and argued that Congress could create "adult zones" on the Internet so long as such zones did not infringe on adults' or minors' rights to access information they were constitutionally allowed to receive (p. 908). The majority disagreed, arguing that the CDA was a blanket restriction on indecency throughout cyberspace. Therefore, it could not be analyzed as a "time, place, and manner regulation" like a zoning ordinance (p. 895).

5. During district court proceedings, the Justice Department attorney did not define indecency with specificity. For example, he did not respond to questions from the court about whether depictions of Indian statues portraying copulation or the transcript of a scene from a contemporary play about AIDS would be considered indecent (*Reno,* 1997, p. 864).

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Conclusion

Ann M. Gill

The First Amendment was created in the eighteenth century, but the parameters of its protection for speech were defined largely in the latter part of the twentieth century. Just as it took failure to ratify two proposed amendments to the Constitution for freedom of speech to attain its preeminent status as the first of the amendments, it took the Supreme Court decisions discussed in this book, among others, to make that promise a reality.

The Supreme Court did not hear many free speech cases prior to the twentieth century. The cases decided by the Court in the first third of the century were driven and decided by fears concerning the power of anti-government speech as well as assumptions about the value of particular forms of speech. The Court placed under the umbrella of First Amendment protection only those forms of speech deemed valuable and not dangerous. This book is a celebration of free speech because the twentieth century ended with judicial focus shifting from protection of government and its activities to protection of individual communication. Although the Court continued to place forms of speech either within or outside the protective umbrella of the First Amendment, the area covered was significantly greater; furthermore, as Edward Brewer concludes in his essay, offensiveness no longer served as an express criterion for exclusion. From this new perspective, freedom of speech in the United States truly became a fundamental right and the hallmark of individual liberty.

Free Speech at the End of the Millenium

Arguments for limiting speech frequently are accompanied by a citation of *Chaplinsky v. New Hampshire* (1942). The dramatic expansion of free speech rights by the Court later in the century is illustrated by what happened to forms of speech on the *Chaplinky* list of unprotected expressions: "the lewd

and obscene, the profane, the libelous, and the insulting or 'fighting' words" (pp. 571–572). As Dale Herbeck details in his essay, libel has acquired significant constitutional protection (*New York Times v. Sullivan,* 1964); offensive and vulgar language appears to be clearly protected (*Cohen v. California,* 1971; *Gooding v. Wilson,* 1972); and although fighting words remain unprotected, fighting words statutes have not fared well with the Court (*R.A.V. v. City of St. Paul,* 1992; *Gooding*). With respect to "the lewd and obscene," Joseph Tuman details how the Court developed a definition of obscenity that obligates juries to consider the work in question as a whole and exempts from the category of unprotected obscenity anything that has "serious literary, artistic, political, or scientific value" (*Miller v. California,* 1973, p. 24). As John Gossett and Juliet Dee note in their essay, the Court also made clear that a free press must be immune from prior governmental restraint on publication, with only limited exceptions (*Near v. Minnesota,* 1931).

The expansion of First Amendment protection to some components of the *Chaplinsky* list is only part of the broadening of free speech rights by century's end. Seditious libel, a staple of Anglo-American law for centuries, became speech protected under the First Amendment. Although the Court upheld convictions of antigovernment speech from the period surrounding World War I (*Schenck v. United States,* 1919; *Abrams v. United States,* 1919; *Gitlow v. New York,* 1925), by the time of the Vietnam War criticism of governmental actions was protected. This may have been the most crucial achievement of the Supreme Court in drawing the boundaries of protection. As one scholar suggests, the "true pragmatic test" of free speech is the "absence of seditious libel as a crime" (Kalven, 1965, p. 16). Although the Court never addressed the issue directly, the cases it decided during the twentieth century made clear that blasphemous libel similarly was consigned to the status of historical relic (*Burstyn v. Wilson,* 1952). In his essay, Joseph Hemmer details the evolution of commercial speech. Once deemed outside First Amendment protection (*Valentine v. Chrestensen,* 1942), it came under the umbrella of protection to the extent it contained no false claims of fact and was "of potential interest and value" (*Bigelow v. Virginia,* 1975, p. 822). A four-part test for protection of commercial speech soon emerged (*Central Hudson Gas & Electric v. Public Service Commission,* 1980). As new communication media developed, the Court determined that expression by means of film, radio, and television merits some protection under the First Amendment (*Burstyn; United States v. Paramount Pictures, Inc.,* 1948; *Red Lion Broadcasting Co. v. FCC,* 1969), although according to the Court, "differences in the characteristics of news media" justify "differences in the First Amendment standards applied to them" (*Red Lion,* p. 386). As Douglas Fraleigh points

out in his essay, the Internet was given the highest level of protection (*Reno v. ACLU,* 1997).

When not protecting expression, the Court found a way to uphold government prohibitions or punishments that ostensibly were directed at something other than expression. This included action the government had a right to prohibit (*United States v. O'Brien,* 1968). It also included regulations that were content neutral and narrowly drawn; that concerned the time, place, or manner of communication; and that left open alternate channels of expression (*Ward v. Rock against Racism,* 1989). The Court also allowed regulation of speech in nonpublic forums, provided the regulations were viewpoint neutral (*Perry Education Association v. Perry Local Educators Association,* 1983).

Although the Court gave constitutional protection to most types of speech, it indicated that political discourse is the paradigm instance of free speech: "One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation" (*Baumgartner v. United States,* 1944, pp. 673–674). Three decades later, citing *Roth v. United States* (1957, p. 484), the Court noted: "The First Amendment affords the broadest protection to such political expression in order 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'" (*Buckley v. Valeo,* 1976, p. 14).

The language used by the Court implies that political messages have higher value than other messages. In *Spence v. Washington* (1974), the Court noted that a peace sign superimposed on an American flag unambiguously communicated a political message as opposed to being "an act of mindless nihilism" (p. 410). In *Miller* the Court said that to equate the exchange of ideas and political debate with "commercial exploitation of obscene materials" is demeaning to the First Amendment (1973, p. 34). In some cases, however, the Court has broadened this core value of free speech, finding at "the heart of the First Amendment" the "fundamental importance of the free flow of ideas and opinions on matters of public interest and concern" (*Hustler Magazine, Inc. v. Falwell,* 1988, p. 50). In another instance it admitted: "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government" (*Time, Inc. v. Hill,* 1967, p. 388). Nevertheless, the Court has frequently returned to political debate as the core value of free speech.

In order to protect political debate and speech about public affairs, over the course of the century the Court widened its tolerance for the form of such discourse: "Debate on public issues should be uninhibited, robust, and wide-open" and may include "vehement, caustic, and sometimes unpleasant sharp

attacks on government and public officials" (*Sullivan,* 1964, p. 708). The language of political debate, the Court noted in *Watts v. United States* (1969), "is often vituperative, abusive, and inexact" (p. 708). To a degree, this attitude helped remove the sensibilities of justices from free speech analysis. No case made that more apparent than *Cohen.* Vulgarities such as the one embroidered on Cohen's jacket are "side effects of the broader enduring values which the process of open debate permits us to achieve" (1971, p. 25). Further, the Court asserted in *Gertz v. Welch* (1974) that the First Amendment tolerates "some falsehood in order to protect *speech that matters* [italics added]" (p. 340).

From seditious libel to political opinion couched in vulgar and offensive language, the twentieth-century expansion of protection for communication is noteworthy, as all the essays in this text demonstrate. Also remarkable, as Franklyn Haiman suggests in his introduction, is the rarity of judicial notice of rhetorical principles, despite their obvious relevance to free speech cases. The essays contained herein not only explain the legal significance of important twentieth-century free speech cases, some of them begin to bridge this chasm between the legal and the rhetorical. The Court's twentieth-century decisions, while expanding individual rights of expression in a fashion worthy of celebration, sometimes confuse the nature and function of communication.

Rhetorical Perspective on Free Speech Cases

Although the Court has focused more on the message, it has occasionally dealt with the speaker: protecting the right to speak anonymously (*Talley v. California,* 1960) as well as the right not to be forced to convey a message (*West Virginia State Board of Education v. Barnette,* 1943). It also determined, as Andrew Utterback discusses in his essay, that public school children do not have the same free speech rights as adults outside the school setting (*Hazelwood School District v. Kuhlmeier,* 1988).

Additionally, the Court has given some attention to audience. It has not allowed the privacy interests of the audience to be violated in the name of free speech. For example, advertisers do not have a constitutional right to send advertisements or other material to the home of unwilling recipients (*Rowan v. United States Post Office,* 1970). Yet similar privacy rights do not extend to audiences once they leave their homes. In public situations, individuals open themselves to becoming audiences for a variety of messages, including radio signals rebroadcast over a city transit system (*Public Utilities Commission v. Pollak,* 1952) or a profane message embroidered on a young man's jacket: "The ability of government, consonant with the Constitution, to shut off dis-

course solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections" (*Cohen,* 1971, p. 21). Audience response to communication has, at times, affected its protected status. One example comes in a First Amendment oddity discussed by Dale Herbeck: fighting words. In setting such speech outside First Amendment protection, the Court in *Chaplinsky* made audience response the issue, focusing on words with the "characteristic of plainly tending to excite the addressee to a breach of the peace" (1942, p. 573). The early seditious libel cases and more recently the 1969 *Brandenburg v. Ohio* incitement test focus on the effects of speech on an audience. In her essay Mary Elizabeth Bezanson details the Court's development of the audience's rights under the free speech clause, specifically in the form of the right to receive information.

Other than implicitly acknowledging communication's sender/message/receiver components, the Court's free speech cases do not indicate a sophisticated conception of human communication. Several of the authors in this collection discuss the Court's "symbolic speech" and/or "speech plus" analysis. The Court has always construed the free speech clause to include spoken and written verbal expression. However, by the end of the twentieth century, it also included various forms of nonverbal expression under the umbrella of the First Amendment. As John Gossett and Donald Fishman point out in their essays, not only has the Court failed to identify criteria for when nonverbal expression is protected under the free speech clause, it also has not displayed an understanding of the symbolic function of all communication.

Early in the century, the Court spoke of symbols not as communicative but as representative: that is, symbols are important because of what they stand for. In cases involving the American flag, majority opinions stated that the flag emphasizes "our national unity" (*Minersville School District v. Gobitis,* 1940, p. 605) and "the nation's power" (*Halter v. Nebraska,* 1907, p. 43). This perspective allows the Court to reason that, to protect the nation, it must protect its symbol, the flag, from abuse and disrespect. Despite a different result in another case, the Court in 1989 still spoke of the importance of a flag as representation: "The very purpose of a national flag is to serve as a symbol of our country" (*Texas v. Johnson,* p. 405). David Vergobbi's essay describes the national debate following the Court's decision in *Texas v. Johnson,* a discussion that focused on the issue of whether to protect the flag because it is a symbol or protect the underlying freedom it represents, including the freedom to burn or deface it.

In a case analyzed by Warren Sandmann in this volume, the Court implied that words and symbols are distinct entities: "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short cut from mind to mind" (*Barnette,* 1943, p. 632). In cases in which the Court identified various "symbols" as "speech," the attitude toward the capacity of nonverbal symbols to create meaning became more generous. The flag with a superimposed peace symbol, for example, was deemed effective communication, as it "would have been difficult for the great majority of citizens to miss the drift of appellant's point" (*Spence,* 1974, p. 410). The Court also acknowledged the "inherent expressiveness of marching" to make a "collective point" to bystanders (*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 1995, p. 568) and indicated that nonverbal objects or actions "sufficiently imbued with elements of communication" will receive protection under the free speech clause (*Spence,* 1974, p. 409).

Although the Court has subdivided expression into "oral or written or symbolized by conduct" (*Clark v. Community for Creative Non-Violence,* 1984, p. 293), it has never given full consideration to the symbolic potential of nearly any object. The Court has said it will look at "intent to convey a particularized message" and whether "the likelihood was great that the message would be understood" to determine whether nonverbal expression should be protected under the free speech clause (*Tinker v. Des Moines School District,* 1969, p. 505). Apparently that test is not conclusive. The Court has indicated unwillingness to expand the list of nonverbal symbols operating as speech to the range of actions and conduct such a test would cover. "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea" (*O'Brien,* 1968, p. 376). Further evidence that the Court does not routinely apply the test is found in the apparently inconsistent results in "symbolic speech" cases. The Court has held the expenditure of money in a political campaign to be expression protected by the free speech clause (*Buckley,* 1976) but not the burning of a draft card to protest the Vietnam War (*O'Brien,* 1968). The Court not only determined that the expenditure of money for political campaigns is protected, the majority (citing *Williams v. Rhodes,* 1968, p. 32) proclaimed it to be "at the core of . . . First Amendment freedoms" (*Buckley,* 1976, p. 39).

In addition to being nonuniform regarding the role of communicator intent in the area of "symbolic speech," the Court's inconsistency with regard to intent carries over to other free speech categories. If the speaker intends to communicate hate by particular expression, that does not affect First

Amendment analysis (*Garrison v. Louisiana,* 1964; *R.A.V.,* 1992). However, if the intent of discourse is to inflict emotional distress, that fact may be relevant. According to the Court, the law does not regard intent to inflict emotional distress "as one which should receive much solicitude," unless in the context of debate about public affairs (*Falwell,* 1988, p. 53). Certainly the intentional use of a false statement has relevance in defamation cases (*Sullivan,* 1964) and in commercial speech cases (*Bigelow,* 1975).

Throughout history, the persuasive power of speech has motivated governments and institutions to attempt to suppress or control speech critical of the government. The Supreme Court frankly acknowledged this motive in free speech cases in the early part of the twentieth century, expressing a fear that particular discourse could be the "single revolutionary spark" that would ignite the entire country (*Gitlow,* 1925, p. 669). Majority opinions in these early cases generally view such speech, particularly during wartime, as an abuse of freedom that could make the free speech clause "the scourge of the Republic" (*Gitlow,* p. 667). As late as 1951, the Court stated that the free speech clause is not a "semantic straitjacket" that prevents the government from responding to a threat (*Dennis v. United States,* 1951, p. 508). The move from punishing speech because it has the potential to persuade audiences to do something deemed harmful, to protecting such speech unless the government can prove it is likely to incite imminent lawless action was, as Richard Parker notes, the great contribution of *Brandenburg.* Also in 1969, the Court purported to be no longer persuaded by appeals to fear: "In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression" (*Tinker,* p. 508).

Despite significant progress in this area, the Court has elected to ignore other laws punishing speech for its persuasive powers, apparently in the vein of the *Chaplinsky* "classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" (1942, pp. 571–572). Review of the United States Code indicates many prohibitions of speech, including solicitation and conspiracy to commit crimes, threats, and harassment. These forms of speech are not without First Amendment protection, but the Court has not appropriately articulated reasons for the exclusion.

Nor has it clearly drawn a line where protection of speech stops in this area. In *Watts,* the Court reversed a conviction for threatening the life of the president based on a statement made during a rally in Washington, D.C.: "If they ever make me carry a rifle, the first man I want in my sights is L.B.J." In a per curiam opinion, the Court ruled this statement was not truly a threat. The opinion acknowledged that punishment of threats demands

some First Amendment analysis: "A statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech" (1969, p. 707). However, the Court did not justify the exemption of threats, an admitted "form of pure speech," from First Amendment protection. The only instance in which the Court addressed this issue was a parenthetical statement in *R.A.V.,* which is dictum. Discussing its holding in *Watts,* the *R.A.V.* majority suggested reasons why threats of violence are outside the First Amendment: "Protecting individuals from fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur" constitute important functions of government (1982, p. 388).

Neither has the Court clearly explained when speech constitutes a threat and therefore loses its protected status. In *NAACP v. Claiborne Hardware* (1982), the Court noted: "Speech does not lose its protected character . . . simply because it may embarrass others *or coerce them* [italics added] into action" (p. 910). In conjunction with *Claiborne Hardware* and other cases, the dictum in *R.A.V.* indicates the line of protection must fall somewhere between coercion and threats of violence. The Court's failure to deal adequately with this area of exclusion from First Amendment protection is related to the fact that a majority of the Court never has seemed to grasp the import of Justice Oliver Wendell Holmes's insight in *Gitlow* that "every idea is an incitement" which audiences may believe and act upon (1925, p. 673).

The Court's analysis is confusing in another area of rhetorical concern: the role of context in communication. Certainly context affects speakers' choices, audiences' understandings, and other aspects of communication. However, when legal distinctions turn on context, the door has seemed to open for judicial sensibilities or other inappropriate factors to affect decisions about the reach of the First Amendment. In his essay, Wilfred Tremblay indicates concern that judicial sensibilities may account for the results in particular cases. The significance of this well-founded concern is illustrated by the contrast between that possibility and the Court's proclamation that offensiveness is not an appropriate criterion for First Amendment analysis (*Texas v. Johnson,* 1989, p. 414).

In any event, the Court made context the apparent key to its decisions in a number of cases. The *Near* majority indicated that when the country is at war, the Court will allow a prior restraint with regard to particular material that might endanger the war effort or the lives of troops (1931, p. 716). Similarly, the clear and present danger cases are based on context. For example, Justice Holmes stated in his majority opinion in *Schenck* that "the

character of every act depends upon the circumstances in which it is done"; in different circumstances, the defendants would have been "within their constitutional rights" to express the sentiments in the leaflet (1919, p. 52). Another application of the clear and present danger test similarly is based on context: "The question in every case is whether the words used are used *in such circumstances* [italics added] 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" (p. 52). Citing this language in *Schenck,* the Court in *FCC v. Pacifica Foundation* (1978) held that protection of non-obscene but indecent words under the First Amendment "need not be the same in every context." Justice John Paul Stevens wrote: "It is a characteristic of speech such as this that both its capacity to offend and its 'social value' . . . vary with the circumstances" (p. 747). A footnote in the majority opinion distinguished similar speech found protected in *Cohen* on the basis of different contexts; no one in the courthouse had objected to Cohen's jacket embroidered with a profanity (1971, p. 74). The *Pacifica* majority analyzed radio not so much as a medium of transmission but as a context that changes the nature of protection for particular content. The per curiam decision in *Watts* used context to categorize Watts's statement as political opposition rather than a threat (1969, p. 708). If the State of Texas had not conceded that burning the flag was expressive activity, the Court in *Texas v. Johnson* indicated that it would have used context to determine whether action involving a flag was expression and therefore was protected under the First Amendment (1989, p. 405).

The Court apparently sees context not only playing a role in determining whether nonverbal symbols are expressive but also as the portal to their meaning: "The context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol" (*Spence,* 1974, p. 410). However, the Court's discussions of meaning in free speech cases frequently lack clarity; indeed, they sometimes reveal a lack of understanding regarding how meaning functions in human communication. Franklyn Haiman, Susan Balter-Reitz, and Douglas Fraleigh quote from one of the most insightful passages in the Court's free speech cases, sentences that bear another repetition:

> Much linguistic expression serves a dual communicative function: It conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the

> cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. (*Cohen,* 1971, p. 26)

This is not only the Court's most insightful statement about meaning but also its most eloquent. However, in all subsequent Court citations of *Cohen,* this statement has been ignored, as has been the *Cohen* majority's further insight on meaning: "We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process" (p. 26). Sadly, these elegant statements about meaning stand alone. In nearly all other instances, the Court's analysis of meaning ranges from inadequate to inept.

The most glaring example of this appears in discussion and a particular footnote in *Buckley.* As Craig Smith points out in his essay, the Federal Election Campaign Act of 1971 regulated contributions and spending for political campaigns and mandated disclosure about campaign finances. In ruling on the constitutionality of the act, the *Buckley* majority made a distinction between advocacy for the election or defeat of candidates (express advocacy), which is subject to regulation, and advocacy regarding issues (issue advocacy), which is exempt. In footnote 52 of the ruling, express advocacy is further delimited as "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'" (*Buckley,* 1976, p. 44). This narrow approach to determining whether communication advocates the election or defeat of a candidate apparently came from the Court's concern that meaning is difficult to determine, too difficult to use for constitutional distinctions. Citing *Thomas v. Collins* (1945), the Court stated that relying on something other than a narrow reading of the words used to determine meaning "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning" (p. 535; cited in *Buckley,* 1976, p. 43).

The results of the Court's attempt to avoid any ambiguity with regard to meaning demonstrate the absurdity of this approach. The Court's failure to acknowledge that messages can advocate the election or defeat of a candidate specifically and persuasively through less direct language or even nonverbally, combined with the "soft money" issue, created an enormous loophole in campaign finance law. It allowed groups that support candidates to circumvent campaign finance limitations with advertisements such as this one, which ran on the eve of the 1996 congressional election:

> Who is Bill Yellowtail? He preaches family values, but he took a swing at his wife. Yellowtail's explanation? He "only slapped her," but her nose was broken. He talks law and order, but is himself a convicted criminal. And though he talks about protecting children, Yellowtail failed to make his own child support payments, then voted against child support enforcement. Call Bill Yellowtail and tell him we don't approve of his wrongful behavior. Call [phone number]. (Briffault, 1999, p. 1751)

It does not take a communication scholar to understand either the intended meaning of this ad or how it was likely to be construed by the audience; however, because of the *Buckley* language, it avoided campaign finance law requirements as issue rather than express advocacy. The *Buckley* case left the Court, and all who follow its precedents, in the very awkward position of being able to determine the meaning of a shape sewn on a flag but not the import of words in a political advertisement.

Justice Holmes made an important observation about the rhetorical realities of law in his dissenting opinion in *Hyde v. United States* (1911): "It is one of those misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis" (p. 391). In free speech cases, however, the Court's analysis frequently suggests not so much "encysting" as a pretense of stability with regard to principle/precedent that is not always borne out in decisions. Many reasons for these apparent inconsistencies are possible, including the changing membership of the Court and the effort to attain a majority decision in a particular case. Another likely explanation is that instead of precedents leading the Court to conclusions, in some instances conclusions precipitate a search for justification. This order of analysis explains some of the inconsistent positions taken by the Court concerning communication as well as other oddities in twentieth-century free speech cases. These range from the *Buckley* muddle about meaning, to the importation of a metaphor used in nuisance law—"A pig in the parlor instead of the barnyard" (*Euclid v. Ambler Realty Co.,* 1926, p. 388)—into a free speech case (*Pacifica,* 1978, p. 74), to the differential treatment of two media of expression in *Red Lion* (1969) and *Miami Herald Publishing Co. v. Tornillo* (1974), which created disparate freedoms for broadcasters and newspaper publishers.

The essays in this book illustrate the many ways in which the law and communication studies interface, and the illumination and enrichment each can bring to the other. The connection between law and rhetoric has roots as deep as Aristotle, and (as noted by authors in this volume) contemporary

scholars in both fields have participated in a renewal of that relationship, ranging from critical studies to rhetorical analyses of legal texts. However, these authors also argue that current efforts do not begin to exhaust the potential for mutual and responsive efforts between the two disciplines; in First Amendment jurisprudence in particular, the potential for interaction is notable. The taxonomy and concepts of communication theory could certainly clarify and perhaps even guide legal analysis of the First Amendment. Analysis of such basic concepts as *symbolic* communication and *nonverbal* communication, for example, would aid the Court's analysis in so-called "symbolic speech" cases. Research in media effects would be useful to the Court in its decisions regarding both indecency and the level of protection given various media of expression under the First Amendment. Scholars of jurisprudence would find useful the metaphoric and semiotic tools of analyses employed in communication studies, such as Haig Bosmajian's study (1992) of the Court's reasoning by metaphor in its free speech decisions. Also useful are analytic distinctions between speaker and audience, public and private spheres, and denotative and connotative aspects of communication as well as the concepts of *agency, identity, motive,* and *persuasion.* These and other communication concepts discussed in this text, having proven fruitful for those who study communication, seemingly have much to offer those who analyze and determine the law of free speech.

A Celebration

The essayists in this collection call attention to a variety of issues and concerns that arise in these important First Amendment cases, including the Court's failure to give commercial speech the same level of protection as other speech, the anomalous result in *Pacifica,* the Court's overly conservative approach in *O'Brien,* and Stephen Smith's concern that the Court's menu of tests permits justices to pick and choose among them in order to rationalize an outcome they personally favor. Despite these and other concerns, the contributors to this volume are united in three opinions. First, they praise the expansion of free speech rights by the Court during the twentieth century. Second, they support as an antidote for troublesome or "dangerous" speech Justice Louis Brandeis's solution, set forth in his concurring opinion in *Whitney v. California* (1927) and discussed in Juliet Dee's essay: "The remedy to be applied is more speech, not enforced silence" (p. 377). Third, the contributors believe that concepts and methods from the field of communication studies have much to offer those who seek to identify the parameters of free speech.

Through the cases discussed in this text and their progeny, the Court has created a landscape of free speech during the twentieth century that is unparalleled in Anglo-American history. It is a landscape that, as Nicholas Burnett suggests in his essay, is not static but dynamic, and therein lies its value. Although most essayists here wish that protection for speech were even more expansive, they unanimously recognize and applaud the significant progress the Court has made. This book is a celebration of free speech. It commemorates the dynamic landscape of protected expression the Court has created from a single phrase: "Congress shall make no law . . . abridging the freedom of speech."

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Case Index

Subject Index

FREE SPEECH ON TRIAL

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At the intersection of communication and First Amendment law reside two significant questions: What is the speech we ought to protect, and why should we protect it? The 20 scholars of legal communication whose essays are gathered in this volume propose various answers to these questions, but their essays share an abiding concern with a constitutional guarantee of free speech and its symbiotic relationship with communication practices.

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