CHAPTER 3

The First Amendment

CONTEMPORARY PROBLEMS

This chapter examines a wide range of different and contemporary topics affecting the freedom of expression, starting with the First Amendment rights of public school and university students. As you'll discover, students at public high schools do possess some First Amendment rights, but those rights are not the same as the rights of adults. You also will learn about topics including book banning, hate speech and freedom of expression on the Internet, among other issues. Ultimately, you will find out that each of these areas has its own set of unique issues, rules and court rulings.

THE FIRST AMENDMENT IN SCHOOLS

Censorship of school newspapers is a serious First Amendment issue in America today. For instance, in 2013 the principal at Bear Creek High School in Stockton, California, confiscated about 1,700 copies of an issue of the student newspaper, the Bruin Voice, that featured a front-page article headlined "Outdated safety plan leaves some wondering: exactly how safe is BC [Bear Creek]?" According to a story in the local newspaper, the Stockton Record, the editor-in-chief of the Bruin Voice and its journalism advisor "said the principal was embarrassed that the paper exposed loopholes in an outdated 45-page safety policy that many staff members do not read or adhere to and could leave the campus exposed." Principal Shirley McNichols denied that was the reason for the confiscation, telling the Stockton Record she thought the article might cause a panic and that she just wanted to ensure that the student newspaper was "not creating an unsafe situation by perpetuating a false impression that we don't have a policy in place and that we aren't aware of shortcomings or are not seeking improvements."

In 2012 administrators at Lenoir City High School in Tennessee refused to print an editorial written by the student newspaper's editor-in-chief regarding her atheism. School authorities claimed the editorial would pose "academic challenges" to the school district. In the censored editorial entitled "No Rights: The Life of an Atheist," Krystal Myers asserted that her "rights as an Atheist are severely limited and unjust when compared to other students who are Christians," and she contended that some teachers openly asserted their Christian viewpoints in the classroom. Myers, an honors student, gained a small measure of justice when the Knoxville News Sentinel later published her editorial, meaning that it reached a much larger audience than it would have had school authorities allowed it to run in the student newspaper, the Panther Press.

And in 2011 administrators at Northview High School in Sylvania, Ohio, censored from the online version of the student newspaper, The Student Prints, a collection of student-written columns called "A Deeper Look into Homosexuality." The five student columnists expressed a wide-range of views on the topic, and their writings were accompanied by the results of a poll that asked students whether they would be comfortable or uncomfortable if their best friend told them he or she was gay. The topic clearly was timely and important, yet school officials censored the entire spread because they feared it would make some students afraid for their safety and lead to the bullying of gay students. The student journalists, however, gained a measure of revenge on the school officials when the local newspaper, the Toledo Blade, ran an editorial blasting the censorship and placed a copy of the censored content in PDF form on its own Web site.

Not only does such censorship deprive students and others of information they should rightfully see, but when practiced in the schools, censorship can take on the aura of being good policy, the right thing for the government to do. School, after all, is where students are taught the difference between right and wrong, and where they learn about the freedoms Americans enjoy under their Constitution.

CENSORSHIP OF EXPRESSION IN PUBLIC HIGH SCHOOLS

For centuries, students were presumed to have few constitutional rights. They were regarded as second-class people and were told it was better to be seen and not heard. Parents were, and still are, given wide latitude in controlling the behavior of their offspring, and when these

young people moved into schools or other public institutions, the government had the right to exercise a kind of parental control over them: *in loco parentis,* in the place of a parent. During the social upheaval of the 1960s and 1970s, students began to assert their constitutional rights, and in several important decisions the federal courts acknowledged these claims. In 1969, in the case of *Tinker* v. *Des Moines,* the Supreme Court ruled that students in the public schools do not shed at the schoolhouse gate their constitutional rights to freedom of speech or expression.

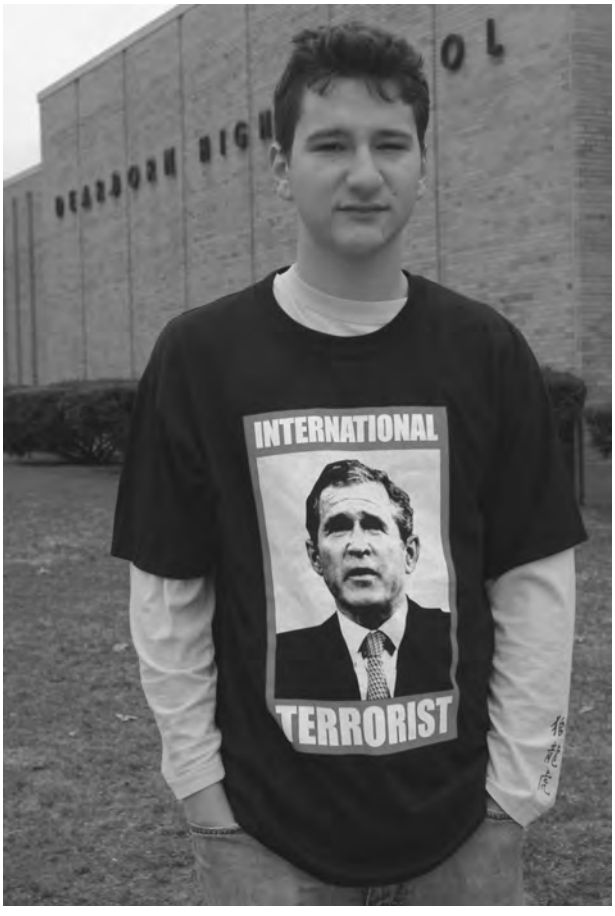
During the social upheaval of the 1960s and 1970s, students began to assert their constitutional rights, and in several important decisions the federal courts acknowledged these claims.

On December 16, 1966, Christopher Eckhardt, 16, and Mary Beth Tinker, 13, went to school wearing homemade black armbands, replete with peace signs, to protest the war in Vietnam. Mary Beth's brother John, 15, wore a similar armband the following day. All three were suspended from school after they refused requests by school officials to remove the armbands. School administrators feared that wearing the armbands might provoke violence among the students, most of whom supported the war in Vietnam. The students appealed to the courts to overturn their suspensions. Three years later, the Supreme Court held that students have a First Amendment right to express their opinions on even controversial subjects like the war in Vietnam if they do so "without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others."[1] In ruling in favor of the Tinker children and Eckhardt, the Supreme Court added that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression" in public schools. The Court concluded that, in this case, the "record does not demonstrate any facts which might reasonably have led school authorities [in Des Moines] to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred."

The *Tinker* standard applies not only to students in public high schools, but also all the way down to students in public elementary schools. As the 3rd U.S. Circuit Court of Appeals wrote in a March 2013 opinion involving a fifth-grader called *K.A.* v. *Pocono Mountain School District,* "the *Tinker* test has the requisite flexibility to accommodate the age-related developmental, educational, and disciplinary concerns of elementary school students."

The *Tinker* standard played a key role in the 2003 federal district court opinion in *Barber* v. *Dearborn Public Schools.*[2] The case arose from a dispute in Dearborn, Mich. That city boasts, the court noted, "the largest concentration of Arabs anywhere in the world outside of the Middle East" and "approximately 31.4% of Dearborn High's students are Arab." Many of these residents reportedly fled Iraq to escape the regime of the now deceased former dictator, Saddam Hussein. It was in this environment on Feb. 17, 2003—just before the launch of the U.S. military offensive in Iraq—that Bretton Barber, then a high school junior, wore a T-shirt labeling President George W. Bush an "International Terrorist" in order "to express his feelings about President Bush's foreign policies and the imminent war in Iraq." Barber went through the first three class periods of the day without having anyone mention the shirt. It was during the lunch period, however, that one student (and one student only) complained to an assistant principal about Barber's political fashion statement. That student was upset because he had a relative in the military being sent to Iraq and at least one of his family members served in each of the country's prior wars. Barber soon was asked to remove the T-shirt—he

1. *Tinker* v. *Des Moines School District,* 393 U.S. 503 (1969).
2. 286 F. Supp. 2d 847 (E.D. Mich. 2003).



Bretton Barber wears the T-shirt that landed him in trouble with administrators at Dearborn High School. A federal judge ruled that he had a First Amendment right to wear the shirt to school.

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was wearing a different shirt underneath it—or turn it inside out. Refusing to take either option, Barber called his father and went home from school that day. Shortly thereafter, he filed a federal lawsuit against the school district.

Judge Patrick J. Duggan faced the issue of whether the school violated Barber's First Amendment right to free speech and political expression when it prohibited him from wearing the anti-Bush T-shirt. He first held that Barber's case was controlled by the U.S. Supreme Court's 1969 opinion in *Tinker* v. *Des Moines Independent Community School District* that upheld the right of students to wear black armbands to school to protest the Vietnam War. Duggan thus decided that Barber's case was not guided by the high court's more recent decisions in either the sexually offensive, captive-audience expression case of *Bethel School District* v. *Fraser*[3] (see page 95) or the school-sponsored newspaper case of *Hazelwood School District* v. *Kuhlmeier*[4] (see pages 89–93). Barber's situation, in brief, was much more factually

3. 478 U.S. 675 (1986).
4. 484 U.S. 260 (1988).

similar to *Tinker* than it was to either *Bethel* or *Hazelwood,* thus allowing the judge to distinguish the latter two cases.

Applying the *Tinker* precedent, Judge Duggan reasoned that the school officials' "decision to ban Barber's shirt only can withstand constitutional scrutiny if they show that the T-shirt caused a substantial disruption of or material interference with school activities or created more than an unsubstantiated fear or apprehension of such a disruption or interference." The judge found that only one student and one teacher had expressed negative opinions about the shirt and that there was "no evidence that the T-shirt created any disturbance or disruption in Barber's morning classes, in the hallway between classes or between Barber's third hour class and his lunch period, or during the first twenty-five minutes of the lunch period."

CENSORSHIP OF NRA T-SHIRTS IN PUBLIC SCHOOLS: VIEWPOINT-BASED DISCRIMINATION AGAINST SPEECH?

In April 2013, a student was arrested by police and suspended from Logan Middle School in West Virginia for wearing a T-shirt that displayed the logo of the National Rifle Association and an image of a hunting rifle. The school alleged the student was materially disrupting the educational process (the *Tinker* standard), but the student claimed he was merely exercising his First Amendment right to engage in speech supportive of his Second Amendment rights. Importantly, schools cannot ban a student's political speech simply because they disagree with the message or find it offensive. Given the current debate about gun control, 14-year-old Jared Marcum's shirt can clearly be viewed as conveying a political statement. It was unclear, however, whether his shirt actually caused a substantial and material disruption of the educational atmosphere, as is required by *Tinker* for the censorship to be permissible. Ultimately, as the Washington Times reported, the school allowed Marcum to return to class after a one-day suspension and, more significantly, allowed him (and many fellow students who agreed with Marcum) to wear the same shirt that originally landed Marcum in trouble.

As for the school officials' argument that the continued wearing of the shirt might cause trouble in the future, given the ethnic composition of the student body and the imminence of war, Judge Duggan found that "even if the majority or a large number of Dearborn High's Arab students are Iraqi, nothing in the present record suggests that these students were or would be offended by Barber's shirt which conveys a view about President Bush. More importantly, there is nothing in the record before this Court to indicate that those students, or any students at Dearborn High, might respond to the T-shirt in a way that would disrupt or interfere with the school environment." He added that "it is improper and most likely detrimental to our society for government officials, particularly school officials, to assume that members of a particular ethnic group will have monolithic views on a subject and will be unable to control those views."

Comparing the situation in Barber's case with the Vietnam War protest scenario at issue in the *Tinker* case, Judge Duggan wrote: "[C]learly the tension between students who support and those who oppose President Bush's decision to invade Iraq is no greater than the tension

that existed during the United States' involvement in Vietnam between supporters of the war and war-protesters." The judge added that "students benefit when school officials provide an environment where they can openly express their diverging viewpoints and when they learn to tolerate the opinions of others." Judge Duggan thus ruled in favor of Bretton Barber.

In a rather remarkable T-shirt censorship case, a federal judge in 2011 upheld under the *Tinker* standard a California school's decision to prohibit the wearing by students of T-shirts bearing the American flag on May 5. May 5 is the date of a Mexican holiday known as Cinco de Mayo. The judge in *Dariano* v. *Morgan Hill Unified School District*[5] determined that wearing American flag shirts on that specific day might lead to a substantial disruption of the educational atmosphere. He cited "a context of ongoing racial tension and gang violence within the school" and noted that the ban was implemented "after a near-violent altercation had erupted during the prior Cinco de Mayo over the display of an American flag." Based upon this history of racial trouble at Live Oak High School, the judge concluded that "school officials [could] reasonably forecast that Plaintiffs' clothing could cause a substantial disruption with school activities."

The *Dariano* decision tracks a long line of cases in which courts allow schools to prohibit students from wearing confederate flag symbols if there is a recent history of racial tension and trouble within a school. In 2012, the *Dariano* students who found their American-flag adorned clothing censored appealed to the 9th U.S. Circuit Court of Appeals. They argued in their brief that "without exception, the celebration of the American flag should be protected no less than its desecration. Indeed, it is a poor lesson in American civics to ban the American flag as a polarizing racist pariah when competing symbols of nationhood are at issue." The 9th Circuit had yet to issue a ruling in the case by January 2014.

Political T-shirts, even innocuous ones simply carrying the names of political candidates, always seem to stir up controversies. In a clear case of unconstitutional censorship in light of cases like *Tinker* and *Barber*, a teacher named Lynette Gaymon at Charles Carroll High School in Pennsylvania publicly ridiculed 16-year-old Samantha Pawlucy in a geometry class for wearing a pink Mitt Romney/Paul Ryan T-shirt the month before the 2012 presidential election. Gaymon reportedly told Pawlucy to get out of the classroom, likened the shirt to a Ku Klux Klan shirt and said "this is a Democratic school." The school district moved Gaymon to another classroom. Although Gaymon claimed she was only joking and eventually wrote a letter apologizing for her actions, such instances of censorship by adult teachers targeting minor students because of their political viewpoints is truly troubling to those who support freedom of speech.

The legacy of *Tinker* has largely failed to live up to the Court's bold language in the case. Although *Tinker*'s material-and-substantial interference or disruption standard remains good law and has never been overruled, many lower courts attempt to factually distinguish *Tinker* in student-speech cases to avoid applying its precedent. It is a major problem for students' speech rights that has grown worse after the tragedy at Columbine High School in Littleton, Colo., in 1999. Judges remain extremely sensitive to the legacy of Columbine and other school shootings and, in turn, give great deference to school administrators and principals and are loathe to question their judgment about when speech might reasonably lead to a substantial and material disruption of the educational process or interference with the rights of other students.

5. 822 F. Supp. 2d 1037 (N.D. Cal. 2011).

The killing of 20 elementary school students in December 2012 in Newtown, Connecticut, spawned another crackdown on student speech referencing violence. For instance, a high school senior named Courtni Webb was suspended from her charter school in the San Francisco Unified School District shortly after the Newtown tragedy for writing a poem about it. The poem included the lines "I understand the killings in Connecticut. I know why he pulled the trigger" and "Why are we oppressed by a dysfunctional community of haters and blamers?" In an interview with a reporter from KGO-TV, Webb said the poem was "just talking about society and how I understand why things like that incident happened." She said writing poetry was therapeutic for her. California Education Code Section 48907 makes it clear that "pupils of the public schools, *including charter schools,* shall have the right to exercise freedom of speech and of the press." (emphasis added)

While *Tinker* applies today in cases involving student speech that occur on school grounds and that are neither school sponsored nor sexually lewd, vulgar or profane, a very different legal standard applies when the speech is sponsored by the school, such as a school newspaper that is part of the curriculum. The standard in this latter situation was created by the Supreme Court in 1988 in *Hazelwood School District* v. *Kuhlmeier*[6] and it is discussed next.

REMEMBERING CHRISTOPHER ECKHARDT: THE FORGOTTEN STUDENT IN *TINKER*

Christopher Eckhardt, one of the three young plaintiffs in *Tinker* who broke new ground for the First Amendment rights of public school students, died in December 2012 at 62 years of age in Clearwater, Florida. In a tribute posted on the First Amendment Center's Web site, First Amendment scholar David Hudson wrote that Eckhardt "will be remembered forever for his exploits wearing black peace armbands as a teen" and added that *Tinker* "remains the leading K-12 student-speech case in American jurisprudence. It also represents the high-water mark of student First Amendment free-speech rights." In 2013, Mary Beth Tinker launched the "Tinker Tour," in which she and First Amendment attorney Mike Hiestand began to travel to schools around the country "to promote youth voices, free speech and a free press."

The Hazelwood *Case*

In 1983 the principal at Hazelwood East High School near St. Louis censored the school newspaper by completely removing two pages that contained articles about teen pregnancy and the impact of parents' divorce on children. The articles on pregnancy included personal interviews with three Hazelwood students (whose names were not used) about how they were affected by their unwanted pregnancies. There was also information about birth control in the story. The story on divorce quoted students—again not identified—about the problems they had suffered when their mothers and fathers had split up. The censorship of the articles was defended on the grounds of privacy and editorial balance. School officials said they were concerned that the identity of the three girls who agreed to anonymously discuss their pregnancies might

6. 484 U.S. 260 (1988).

nevertheless become known. School officials said they acted to protect the privacy of students and parents in the story on divorce as well. In addition, the principal said the latter story was unbalanced, giving the views of only the students. In 1988 the Supreme Court ruled that the censorship was permissible under the First Amendment.[7]

It is important to note that this ruling involved censorship of a high school newspaper that was published as a part of the school curriculum. The court strongly suggested the ruling would not necessarily apply to a high school paper published as an extracurricular activity where any student might contribute stories. Justice Byron White, author of the court's opinion, noted specifically in a footnote that the court did not at that time have to decide whether its ruling might also be applied to school-sponsored college and university newspapers.

The Supreme Court refused to apply the *Tinker* standard by distinguishing the *Hazelwood* case from the earlier ruling. The *Tinker* ruling, Justice White said in the 5-3 decision, deals with the right of educators to silence a student's personal expression that happens to occur on school property. *Hazelwood* concerns the authority of educators over school-sponsored publications. "Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of individual speakers are not erroneously attributed to the school," he wrote. Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored publications as long as their actions are reasonably related to "legitimate pedagogical concerns." This means school officials could censor out material they found "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." Justice White stressed at one point in the ruling that the education of the nation's youth is primarily the responsibility of parents, teachers and state and local school officials, not federal judges. Only when the decision to censor has "no valid educational purpose" is the First Amendment directly and sharply involved.

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THE NO-TAT POLICY AT TIMBERLAND HIGH: NO INK FOR THE INK

The Student Press Law Center (SPLC) reported in 2010 that administrators at Timberland High School in Wentzville, Mo., imposed a ban on any mention or image of tattoos in either the award-winning student newspaper or the yearbook. The school's principal also instituted a policy under which he got to read and approve any and all stories before they could be published—a classic form of a prior restraint on speech (see pages 74–81 regarding prior restraints). The SPLC noted that the school even confiscated an issue of the newspaper that violated the zero-tolerance for tattoos policy because of a postage-stamp-sized image of a student's breast-cancer ribbon tattoo memorializing a cherished friend. In a move to show solidarity with the student journalists at Timberland High School, more than 2,000 temporary tattoos carrying the message "Tattoos are Temporary—Ignorance is Permanent" were handed out at the 2010 National High School Journalism Convention.

7. *Hazelwood School District* v. *Kuhlmeier,* 484 U.S. 260 (1988).

It is not only stories about sexual behavior or violence that can provoke school administrators to censor student publications. School officials frequently seek to block the publication of stories that will make school administrators or teachers appear to be foolish or incompetent or lacking judgment.

There are only a few rare instances in which courts have held that school administrators have gone too far and violated the rights of student-journalists under *Hazelwood*'s expansive "legitimate pedagogical concerns" standard. One such case of a First Amendment violation involved the censorship of an article in the Utica High School Arrow in Utica, Mich. The student-authored article in question reported on a lawsuit filed against the Utica Community Schools (UCS) by two local residents, Joanne and Rey Frances, who lived next door to the UCS bus depot. The Frances' lawsuit claimed injuries and illnesses allegedly caused by breathing in the diesel fumes emitted by the UCS's idling buses each school day. A local newspaper had already covered the story about the lawsuit before student Katherine "Katy" Dean researched and wrote an article about the situation for her school newspaper, the Arrow. The Arrow is an officially sponsored publication of the UCS and, as part of the high school's curriculum for which students receive credit and grades, operates under the direction of a faculty adviser. The faculty adviser, however, does not regulate the subjects covered by students, but instead merely provides advice on which stories to run. She also reviews, criticizes and checks the grammar contained in articles. The Arrow's staff of student journalists controls the content of the monthly paper, is responsible for major editorial decisions without significant administrative intervention and typically does not submit its content to school administrators for prepublication review.

The article written by Dean was balanced and accurate, and it correctly reported that school district officials declined to comment on the lawsuit. One day before the article was scheduled to go to press, however, UCS administrators ordered that it be removed from the Arrow, citing so-called journalistic defects and "inaccuracies" (for instance, the UCS administration did not like the fact that Dean's article accurately attributed scientific data to a story in USA Today—apparently it was not a credible source in the minds of the school officials—and the fact that a draft of the story used pseudonyms for the Frances' real names). The American Civil Liberties Union filed a lawsuit on behalf of Dean, claiming the censorship violated Dean's First Amendment rights under *Hazelwood*.[8]

In 2004 U.S. District Court Judge Arthur Tarnow applied the *Hazelwood* legitimate-pedagogical-concerns standard and ruled in favor of Dean and against the school. The judge called the school's censorship and suppression of the article "unconstitutional," adding that the school's "explanation that the article was deleted for legitimate educational purposes such as bias and factual inaccuracy is wholly lacking in credibility in light of the evidence in the record."[9] Judge Tarnow distinguished the Arrow article about the lawsuit from the censored content in the *Hazelwood* case that dealt with teen pregnancy and divorce. He observed that Katy Dean's article about the bus-fumes lawsuit did not raise any privacy concerns since a local paper had already addressed the lawsuit, and it did not contain any sexual "frank talk" and thus could not reasonably be perceived as being unsuitable for immature audiences. Beyond such critical distinctions, Judge Tarnow found the article to be fair and balanced, noting that Dean's story "sets forth the conflicting viewpoints on the health effects of diesel

8. *Dean* v. *Utica Community Schools,* 345 F. Supp. 2d 799 (E.D. Mich. 2004).
9. *Associated Press,* "Utica Schools."

fumes, and concludes that the link between diesel fumes and cancer is not fully established." Finally Tarnow noted that the story contained no serious grammatical errors and that "Dean's article properly and accurately attributes its quotations to their sources. The article qualifies any statement made by its sources. The article does not present the author's own conclusions on unknown facts." Judge Tarnow thus concluded that "Katy Dean had a right to publish an article concerning the Frances' side of the lawsuit so long as it accurately reported the Frances' side of the lawsuit."

In addition to holding that the school's actions against Dean violated the *Hazelwood* standard, Judge Tarnow ruled that the censorship of her article violated the more general but important First Amendment rule against **viewpoint-based discrimination.** In support of this holding, Judge Tarnow noted that the UCS attorney "conceded that Dean's article would not have been removed from the Arrow if it had explicitly taken the district's side with respect to the Frances' lawsuit against UCS." This is the essence of viewpoint-based discrimination: The government (in this case, the school district) restricts and restrains one side of a debate but not the other. For instance, in 2012 a federal judge in *ACLU* v. *Conti* held that the state of North Carolina's "offering of a Choose Life license plate in the absence of a pro-choice plate constitutes viewpoint discrimination in violation of the First Amendment." More simply put, the government should remain neutral in the marketplace of ideas (see pages 52–53 regarding the marketplace of ideas) and not favor one side of a debate over the other. By acknowledging that the school would have allowed Katy Dean to print an article that favored the UCS's position in the lawsuit filed against it by the Franceses, the UCS attorney essentially admitted the viewpoint-based discrimination that drove it to censor Dean's story.

The case of *Dean* v. *Utica Community Schools* should stand as a stark reminder to overzealous and censorious high school administrators that there are limits, even under the *Hazelwood* legitimate-pedagogical-concern standard, to censorship of the student press.

High school journalism remains vigorous in many schools. And the legislatures in a handful of states, including California, Colorado, Arkansas, Iowa, Massachusetts, Oregon and Kansas, have passed statutes granting student-journalists in those states a fuller measure of freedom of expression than was granted by the Supreme Court in *Hazelwood.* For instance, Oregon's anti-*Hazelwood* statute, enacted in 2007, provides that student-journalists "have the right to exercise freedom of speech and of the press in school-sponsored media, whether or not the media are supported financially by the school or by use of school facilities or are produced in conjunction with a high school class" and that "student journalists are responsible for determining the news, opinion and feature content of school-sponsored media," subject only to the substantial-and-material disruption limitations articulated by the U.S. Supreme Court in *Tinker* (rather than to the *Hazelwood* standard) and general rules of libel and privacy laws.[10]

California's anti-*Hazelwood* statute was used in 2008. That's when a lawsuit was filed against Fallbrook Union High School District and Principal Rod King contending, in part, that the censorship and removal from the student newspaper, the Tomahawk, of both an article regarding the contract buy-out of a former superintendent and an editorial critiquing the Bush administration's abstinence-only policy for sex education violated the statute.[11]

10. Oregon Revised Statutes § 336.477 (2009).
11. Complaint, *Ariosta* v. *Fallbrook Union High School District*, Case No. 3:2008CV02421 (Superior Ct., San Diego County, Cal. 2008).

California's anti-*Hazelwood* statute bans the prior restraint of articles in public school papers unless the content is "obscene, libelous or slanderous" or would cause "substantial disruption of the orderly operation of the school."[12] The incident at Fallbrook also was troubling because the principal canceled the journalism class, thus terminating publication of the Tomahawk as a curricular activity, and removed the newspaper's faculty adviser. Importantly, California in 2008 amended its anti-*Hazelwood* statute to prohibit retaliation, such as dismissal or reassignment, against high school newspaper advisers for protecting the statutory and First Amendment rights of student-journalists and editors. And in January 2011, the law was amended once again to protect not only newspaper advisers at public schools, but also advisers at charter schools.

The question, In what ways can a high school newspaper be censored? cannot be answered until two other questions are. First, is the newspaper published at a public or private high school? Constitutional protections have substantially less meaning at private schools. The First Amendment is not considered an impediment at private high schools or private colleges and universities. A newspaper at a private school can be censored in just about any way imaginable. There is, however, one minor exception to this general rule. In particular, California has a statute known as the "Leonard Law" that applies First Amendment standards to private, secular high schools and to secondary schools; these private schools, in other words, are forbidden from violating students' First Amendment rights.[13] Although California is the only state to have such a law extending First Amendment rights to private school students, there is nothing to prevent legislative bodies in other states from drafting and approving similar legislation in the future.

The next question to ask when focusing on public schools is, What kind of newspaper is it? Three kinds of publications are possible:

- A school-sponsored newspaper, generally defined as a paper that uses the school's name and resources, has a faculty adviser and serves as a tool to teach knowledge or skills. Typically this kind of newspaper is produced as part of a journalism class.
- An unsupervised or student-controlled newspaper produced on the school's campus as an extracurricular activity.
- A student newspaper produced and distributed off campus.

The *Hazelwood* ruling spoke only to the first kind of newspaper. This type of paper can be most heavily censored. Most authorities agree that school officials have less power to censor the second kind of publication, and no power to censor the third kind of newspaper, unless students attempt to distribute it on campus. School administrators can ban the on-campus distribution of material produced elsewhere, and this authority provides them with a kind of informal censorship power if students seek to circulate the material on school property.

12. California Education Code § 48907 (2013).

13. California Education Code § 48950 (providing in relevant part that "school districts operating one or more high schools and private secondary schools shall not make or enforce any rule subjecting any high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction by the First Amendment to the United States Constitution").

STUDENT SPEECH RIGHTS ON THE WEB: THE ISSUE THE SUPREME COURT MUST ADDRESS

When students use their home computers, outside school and on their own time, to post Internet content that ridicules their teachers, administrators or classmates, can schools punish them without violating the First Amendment right of free speech? As of early 2014, the U.S. Supreme Court had not ruled on this issue, and lower courts were split on whether schools should have jurisdiction over such off-campus-created student expression. Only one thing appears fairly clear today: If a student who creates the off-campus, Internet-posted speech later downloads it at school and shows it to other students while on campus, then the school has jurisdiction and the *Tinker* standard typically applies. But some courts have held that schools can punish student-authors even if they never download the speech in school.

The October 2012 decision by the 8th U.S. Circuit Court of Appeals in *S.J.W.* v. *Lee's Summit R-7 School District*[14] illustrates a somewhat typical off-campus speech, in-school punishment scenario. Brothers Steven and Sean Wilson were suspended from their Missouri high school, Lee's Summit North, in early 2012 after creating, while off campus, a Web site called NorthPress. The site featured a blog where students posted comments and vented about their high school. The Wilson brothers wrote posts containing "a variety of offensive and racist comments as well as sexually explicit and degrading comments about particular female classmates." The racist posts allegedly "mocked black students."

Upon learning the brothers were responsible for the posts, administrators at Lee's Summit North suspended them for 10 days—a suspension later extended to 180 days, although the brothers were allowed to attend another school (one they claimed was academically inferior). Teachers at Lee's Summit North alleged that on the day the student body learned of the postings, there was considerable disturbance and disruption on campus. In addition, "administrators testified that local media arrived on campus and that parents contacted the school with concerns about safety, bullying, and discrimination."

Should the Wilson brothers be punished for their off-campus created, Internet-based expression? Yes, according to the appellate court, which held that the U.S. Supreme Court's 1969 decision in *Tinker* (an on-campus student speech case described earlier in this chapter) supplied the correct rule and test for determining if the punishment was justified. *Tinker* applied, the 8th Circuit wrote, because the speech was "targeted at" the Wilson brothers' high school. "The parties dispute the extent to which the Wilsons' speech was 'off-campus,' but the location from which the Wilsons spoke may be less important than the . . . finding that the posts were directed at Lee's Summit North," the appellate court reasoned. It added that "the specter of cyber-bullying hangs over this case. The repercussions of cyber-bullying are serious and sometimes tragic."

The bottom line, as of early 2014, is that an increasing number of courts (although not all) are concluding that: 1) a public school *does* have jurisdiction to punish its

14. 696 F.3d 771 (8th Cir. 2012).

students for their off-campus created speech posted online *if* the speech is directed at or otherwise targets other students or school officials; and 2) *Tinker*'s substantial-and-material disruption standard supplies the correct test for determining if punishment in any given case is justified.

The Bethel *Case*

In addition to the tests created in the *Tinker* and *Hazelwood* rulings, the U.S. Supreme Court prior to 2007 had considered the speech rights of public high school students in one other case. In particular, the court held in 1986 in *Bethel School District* v. *Fraser*[15] that officials at Bethel High School in Pierce County, Wash., did not violate the free speech rights of student Matthew Fraser when they suspended him for making a sexually suggestive speech nominating a classmate for student government at an assembly packed with 600 students. Although he did not use profanity, the sexual innuendos were clear to some students in the audience who "hooted and yelled" (other students, conversely, were "bewildered and embarrassed") when Fraser said:

> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you.

In rejecting Fraser's First Amendment argument, the majority of the Supreme Court refused to apply the *Tinker* substantial-and-material-disruption standard, noting what it called a "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content" of Fraser's talk, as well as the fact that the speech in *Tinker* was "passive expression" (it was an armband) while Fraser's speech was actively spoken to a captive audience of students gathered for the assembly. Having thus distinguished *Tinker*, the court in *Fraser* held that schools can punish students who use "offensively lewd and indecent speech" that is "unrelated to any political viewpoint" because

- such expression "would undermine the school's basic educational mission";
- "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse"; and
- society has an interest "in teaching students the boundaries of socially appropriate behavior."

In addition to these rationales for allowing the school's punishment of Matthew Fraser, the majority reasoned that "by glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students."

The bottom line is that, prior to 2007, there was a trilogy of Supreme Court cases (*Tinker*, *Hazelwood* and *Bethel*), each with its own rules and guidelines, that public schools may use to squelch the speech rights of students. They are summarized in the following box.

15. 478 U.S. 675 (1986).

THREE KEY SCHOOL-SPEECH CASES PRIOR TO 2007

1. ***Tinker:*** School officials may regulate speech that they reasonably believe will materially and substantially disrupt or interfere with classwork, educational activities and/or discipline.
2. ***Hazelwood:*** Schools may regulate speech that is school sponsored and/or that is part of the school curriculum, so long as the censorship is reasonably related to legitimate pedagogical (i.e., teaching and learning) concerns.
3. ***Bethel:*** Schools may regulate sexually offensive speech that is lewd, vulgar or indecent (they also can regulate obscene speech since it is without any First Amendment protection [see Chapter 13]; *Fraser*'s language about speech that "would undermine the school's basic educational mission" also is used successfully by some schools to ban images and ads for drugs, tobacco and alcohol).

In reality, many student-speech cases do not fit squarely into any of the three Supreme Court precedents described in the box. For instance, a case may be a hybrid of political content and drug-related imagery (a T-shirt showing a pot leaf and the accompanying message, "Vote Yes on Proposition 42: Legalize Marijuana"). Lower courts in these situations are forced to try to find the precedent that comes the closest, factually speaking, to the issue at hand.

"I ♥ BOOBIES! (KEEP A BREAST)": MAKING A FEDERAL CASE OVER BRACELETS

In 2013, several federal courts considered if public schools could lawfully ban students from wearing breast cancer awareness bracelets bearing the slogan "I ♥ Boobies! (Keep A Breast)." Some schools asserted authority to ban the bracelets under the Supreme Court's precedent in *Bethel School District* v. *Fraser* (described earlier), arguing that the word "boobies" is sexually lewd and vulgar. They added that the phrase "I ♥ Boobies!" is an impermissible double entendre about sexual attraction to breasts.

Students, however, countered that the entire message is far more political, providing an effective, yet fun, way of raising awareness of breast cancer. In other words, they argued that "boobies" is not lewd or vulgar when used in conjunction with the other words on the bracelets. They thus claimed the First Amendment protected wearing the bracelets to school.

The 3rd U.S. Circuit Court of Appeals concluded in August 2013 in *B.H.* v. *Easton Area School District* that students had a First Amendment right to wear the bracelets, finding that "the bracelets here are not plainly lewd" under *Fraser* and adding that the school district "failed to show that the bracelets threatened to substantially disrupt the school under *Tinker*." Should the age of the students—middle schoolers rather than high schoolers—make a difference in how the court decides the case? What do you think about the ban on such bracelets in public schools?

The Morse *Case*

In 2007, the U.S. Supreme Court heard a student-speech case called *Morse* v. *Frederick*. In this dispute, known as the "Bong Hits 4 Jesus" case, the 9th U.S. Circuit Court of Appeals ruled in 2006 that the First Amendment protected a student's right to unfurl, while standing on a sidewalk across the street from his high school as an Olympic torch relay passed by, a banner emblazoned with that drug-related catchphrase.[16] The students at Juneau-Douglas High School in Alaska had permission to be on the sidewalk during the relay and were under teacher supervision. While student Joseph Frederick claimed the "Bong Hits 4 Jesus" language was meaningless, funny and done in order to get on television, Principal Deborah Morse did not find it amusing and considered it a pro-drug message in conflict with the school's "basic educational mission to promote a healthy, drug-free life style." Frederick's banner was taken down and he was suspended for 10 days.

In ruling for Frederick, the 9th Circuit applied the *Tinker* standard. Noting there was no substantial and material disruption of educational activities caused by Frederick's banner, the 9th Circuit focused on the fact that the school conceded the banner "was censored only because it conflicted with the school's 'mission' of discouraging drug use."

The school petitioned the U.S. Supreme Court to hear the case and to reverse the 9th Circuit's opinion. The school was represented by Ken Starr, the former independent counsel who investigated Bill Clinton's affair with Monica Lewinsky. Starr asked the nation's high court to consider the following question:

> *Whether the First Amendment allows public schools to prohibit students from displaying messages promoting the use of illegal substances at school-sponsored, faculty-supervised events.*

The Supreme Court ruled in 2007, holding that the First Amendment rights of Joseph Frederick were not violated. Writing for a five-member majority of the court, Chief Justice John Roberts explained that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it." Roberts rejected the idea that the banner constituted political speech, writing that "this is plainly not a case about political debate over the criminalization of drug use or possession."[17] The long-term impact of this decision in *Morse* remains to be seen, but the ruling itself was very narrow and limited. It is important to note that the court in *Morse* did not overrule *Tinker*, *Hazelwood* or *Bethel*; those decisions remain intact. The *Morse* opinion is limited in scope to nonpolitical speech that advocates or celebrates the use of illegal drugs.

Unfortunately for advocates of student-speech rights, some courts are stretching the Supreme Court's ruling in *Morse* far beyond its narrow facts about nonpolitical speech advocating illegal drug use. Just six months after *Morse*, the 5th U.S. Circuit Court of Appeals interpreted *Morse* to stand for a broad, pro-censorship principle—that "speech advocating a harm that is demonstrably grave and that derives that gravity from the 'special danger' to the physical safety

16. *Frederick* v. *Morse*, 439 F. 3d 1114 (9th Cir. 2006).
17. *Morse* v. *Frederick*, 551 U.S. 393 (2007).

of students arising from the school environment is unprotected."[18] The 5th Circuit held in *Ponce* v. *Socorro Independent School District* that a "*Morse* analysis is appropriate"—rather than the traditional and more rigorous substantial-and-material disruption standard from the high court's ruling in *Tinker*—when the student speech at issue "threatens a Columbine-style attack on a school." As the 5th Circuit wrote in holding that *Morse* can be used to squelch and punish not just speech that advocates illegal drug use, but also student speech that threatens mass violence:

> If school administrators are permitted to prohibit student speech that advocates illegal drug use because "illegal drug use presents a grave and in many ways unique threat to the physical safety of students" . . . then it defies logical extrapolation to hold school administrators to a stricter standard with respect to speech that gravely and uniquely threatens violence, including massive deaths, to the school population as a whole.

CENSORSHIP OF COLLEGE NEWSPAPERS

The Supreme Court in *Hazelwood* did not decide whether its "reasonably related to legitimate pedagogical concerns" test applied to college newspapers. In fact, it wrote, "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." Since then, two federal appellate court decisions have addressed censorship by university officials of student-run publications:

- *Kincaid* v. *Gibson*[19]
- *Hosty* v. *Carter*[20]

The first case suggests that the federal courts are reluctant to expand the censorial powers of college administrators via *Hazelwood*. In 2001 the 6th U.S. Court of Appeals ruled that when administrators at Kentucky State University refused to permit the distribution of the school's yearbook because they didn't approve of its content and the color of its cover, they violated the First Amendment rights of the students at the school. But the 10-3 ruling was based largely on the fact that the creation of the yearbook was not a classroom activity in which students are assigned a grade. The yearbook was a designated public forum (see pages 116–117) created by the university to exist in an atmosphere of free and responsible discussion and intellectual exploration, the court said. What the school officials did was clearly censorship. "There is little if any difference between hiding from public view the words and pictures students use to portray their college experience, and forcing students to publish a state-sponsored script. In either case, the government alters student expression by obliterating it," Judge R. Guy Cole wrote. But in reality, the court had merely distinguished the production of the yearbook from the classroom-generated newspaper in *Hazelwood*.

A more disturbing, disappointing and important federal appellate court decision affecting the college press was handed down in 2005 in *Hosty* v. *Carter*. The *Hosty* case centered on

18. *Ponce* v. *Socorro Independent School District*, 508 F. 3d 765, 770 (5th Cir. 2007).
19. 236 F. 3d 342 (6th Cir. 2001).
20. 412 F. 3d 731 (7th Cir. 2005), cert. den., 126 S. Ct. 1330 (2006).

demands by university administrators in 2000 for prior review and approval—a classic prior restraint on speech, in other words—of the Innovator, the student-run newspaper at Governors State University, located south of Chicago, Ill. The Innovator had previously published articles under the byline of student Margaret Hosty that were critical of a school official, sparking the confrontation.

A major issue in the resulting lawsuit was whether the legitimate-pedagogical-concerns standard articulated by the U.S. Supreme Court in the *Hazelwood* case for controlling the censorship of school-sponsored, high school newspapers that are part of the curriculum is also applicable to college newspapers.

In *Hosty,* the student-journalist plaintiffs argued that *Hazelwood*'s legitimate-pedagogical-concerns standard was never made applicable to the college press, and they contended that university administrators cannot ever insist that student newspapers be submitted for review and approval. But by a 7-4 vote, the U.S. 7th Circuit Court of Appeals rejected these contentions and rebuffed the idea that there is a bright-line difference between high school and college newspapers. The 7th Circuit wrote that the Supreme Court's footnote in *Hazelwood* "does not even hint at the possibility of an on/off switch: high school papers reviewable, college papers not reviewable." It added that "whether *some* review is possible depends on the answer to the public-forum question, which does not (automatically) vary with the speakers' age." The key in *Hosty,* then, was whether the student newspaper constituted a public forum. Whether a particular physical venue or location constitutes a public forum for purposes of First Amendment speech protection is discussed later in this chapter (see pages 116–120). Writing for the seven-judge majority in *Hosty,* Judge Frank Easterbrook articulated a rule that "speech at a non-public forum, and underwritten at public expense, may be open to reasonable regulation even at the college level."

Thus, for the majority of the 7th Circuit, "*Hazelwood*'s first question therefore remains our principal question as well: was the reporter a speaker in a public forum (no censorship allowed?) or did the University either create a non-public forum or publish the paper itself (a closed forum where content may be supervised)?" This meant that the appellate court had to examine the status of the particular student newspaper at issue in *Hosty,* namely the Innovator, to determine whether or not it was a public forum. The court noted that if the Innovator "operated in a public forum, the University could not vet its contents." The appellate court, unfortunately, held that it was not possible on the record in front of it to determine what kind of forum Governors State University had established with the Innovator. The court did, however, provide some guidance on this for the future, noting among other things that

- while "being part of the curriculum may be a *sufficient* condition of a non-public forum, it is not a *necessary* condition. Extracurricular activities may be outside any public forum . . . without also falling outside all university governance [emphasis added]." In other words, just because a college newspaper is an extracurricular activity and not part of the curriculum does not mean that it necessarily escapes all university control or regulation; and
- "a school may declare the pages of the student newspaper open for expression and thus disable itself from engaging in viewpoint or content discrimination while the terms on which the forum operates remain unaltered."

Another important factor in the public forum determination of a university newspaper is whether the university underwrote and subsidized the newspaper without any strings attached

or, conversely, whether it "hedge[d] the funding with controls that left the University itself as the newspaper's publisher."

What does all of this mean for college newspapers? First, it's important to remember that the decision is binding in only the three states that comprise the 7th Circuit Court of Appeals—Illinois, Indiana and Wisconsin (see page 26 for a map of the federal appellate court circuits). Second, many college newspapers, such as the Alligator at the University of Florida, are independent of the universities that their student-journalists attend and are not directly funded by the university. In an official press release on the *Hosty* decision, Mark Goodman, former executive director of the Student Press Law Center that had filed a friend-of-the-court brief in the case, stated:

> As a practical matter, most college student newspapers are going to be considered designated public forums and entitled to the strongest First Amendment protection because that's the way they've been operating for decades. But this decision gives college administrators ammunition to argue that many traditionally independent student activities are subject to school censorship.

In 2006, California became the first state to pass so-called anti-*Hosty* legislation after the U.S. Supreme Court refused earlier that year to hear the *Hosty* case. California's new law prohibits state public university officials from making and enforcing rules "subjecting any student to disciplinary sanction solely on the basis of conduct that is speech or other communication that, when engaged in outside a campus of those institutions, is protected from governmental restriction by the First Amendment."[21] In brief, the law prohibits prior restraints and censorship by university administrators (officials, for instance, in the University of California and California State University systems) of public college and university newspapers. This, in turn, means that the *Hazelwood* rule cannot apply to the public collegiate press in California; instead, college newspapers in the Golden State must be treated like real-world professional newspapers such as the Los Angeles Times and the San Francisco Chronicle.

Some courts, unfortunately, still apply *Hazelwood*'s "reasonably related to legitimate pedagogical concerns" standard in university settings. For instance, in 2012 the 6th U.S. Circuit Court of Appeals in *Ward* v. *Polite*[22] considered whether Eastern Michigan University had violated the First Amendment rights of graduate student Julea Ward. Ward claimed she was expelled from the university's counseling program because some professors objected to her expression of her religious viewpoints and beliefs. In holding that *Hazelwood* supplied the proper standard to determine if Ward's free speech rights were violated, the 6th Circuit acknowledged that *Hazelwood* stemmed from a high school case, but it then added that *Hazelwood* "works for students who have graduated from high school. The key word is student. *Hazelwood* respects the latitude educational institutions—at any level—must have to further legitimate curricular objectives. All educators must be able 'to assure that participants learn whatever lessons the activity is designed to teach.'" The appellate court added that "[nothing in *Hazelwood* suggests a stop-go distinction between student speech at the high

21. California Education Code § 66301. Illinois adopted similar law in 2007.
22. 667 F.3d 727 (6th Cir. 2012).

school and university levels, and we decline to create one." The *Ward* decision is binding only in the 6th Circuit, which includes the states of Kentucky, Michigan, Ohio and Tennessee.

Problems for College Journalists

What kinds of censorship problems affect the college press? Getting access to information is one problem. Student-journalists often have difficulty gaining access to reports on faculty performance, student government meetings and school disciplinary hearings. It is not uncommon for a college to reject the criminal prosecution of a student apprehended for a minor crime, and instead punish the student through a disciplinary proceeding. The criminal trial would be open to the public and the press; disciplinary hearings are routinely closed. Hence, no bad publicity for the school. Campus administrators have even attempted to bar all reporters from access to university police reports, citing the Family Educational Rights and Privacy Act (FERPA; see Chapter 9), which limits the public access to most student records. School officials have argued—unsuccessfully—that crime reports that name students as victims, perpetrators or even witnesses are educational records and hence inaccessible under this law. If the press can't see the official police reports, stories about the incident generally won't be written. The courts have rejected this interpretation of the law.[23]

For instance, in 2008 the attorney general of North Dakota issued an opinion rebuking the University of North Dakota for failing to provide a newspaper with student disciplinary records related to alleged incidents of anti-Semitic behavior on campus.[24] The opinion made it clear that FERPA does not prohibit the release of student disciplinary records that redact (black out) the names of the students involved and other personally identifiable information about them. In this case, the university failed to consider whether personally identifiable information could be removed and redacted from the requested records; instead, it simply refused to turn over the documents. The attorney general concluded that

> FERPA does not prohibit the release of disciplinary proceeding records if an educational institution can adequately remove all personally identifiable information from those records. The University of North Dakota violated the [North Dakota] open records law when it incorrectly responded that FERPA prevented the release of all disciplinary proceeding records and because it failed to consider whether the requested records could be released after removing all personally identifiable information.

In 2008, staff members of the Progress, the student newspaper at Eastern Kentucky University, obtained a letter from the Kentucky attorney general's office agreeing with the newspaper that the university's police department was unnecessarily and excessively redacting some information from police incident reports. The university's police department had justified its redacting under the guise of protecting privacy. The state attorney's general office, however, found the police were misusing a privacy exemption under the Kentucky Open Records Act.

23. See *Student Press Law Center* v. *Alexander,* 778 F. Supp. 1227 (1991); and *Ohio ex rel The Miami Student* v. *Miami University,* 79 Ohio St. 3d 168 (1997).
24. Open Records And Meetings Opinion, No. 2008-O-27 (N.D. Attorney General Dec. 1, 2008), available online at http://www.ag.nd.gov/documents/2008-O-27.pdf.

A FAILURE TO TIMELY WARN OF DANGER: THE VIRGINIA TECH MASSACRE OF 2007

Seung-Hui Cho, a student at Virginia Tech University in Blacksburg, Va., shot and killed two students in a dormitory at 7:15 in the morning on April 16, 2007. Campus police quickly discovered the shooting at 7:24 a.m. Cho, however, remained on the loose, and he continued his on-campus rampage, ultimately killing 32 students before taking his own life. Virginia Tech officials took more than two hours before they finally sent an e-mail at 9:26 a.m. warning students, faculty and staff about the shootings.

More than three years later, the U.S. Department of Education concluded that Virginia Tech failed to adequately warn students that day and violated the Clery Act. The report, released in December 2010, found that "the warnings that were issued by the University were not prepared or disseminated in a manner to give clear and timely notice of the threat to the health and safety of campus community members" and, to make matters even worse, that "Virginia Tech did not follow its own policy for the issuance of timely warnings as published in its annual campus security reports."

In August 2012, U.S. Secretary of Education Arne Duncan concluded that the 9:26 a.m. e-mail did not constitute a timely warning to Virginia Tech students, staff and faculty. Secretary Duncan determined that this violation of the Clery Act merited a $27,500 fine against Virginia Tech. He further found that Virginia Tech was guilty of having "inconsistent and undisclosed timely warning policies" at the time of the shooting, but he did not impose a monetary fine for this violation. Instead, Duncan remanded this aspect of the dispute to an administrative law judge to calculate an appropriate monetary fine.

Under a federal law called the Clery Act (named for a Lehigh University student raped and killed in her dorm in 1986), all colleges and universities that participate in federal student-aid programs are required to give timely warnings of campus crimes that represent a threat to the safety of students and/or employees and to make public their campus security policies. The law also mandates that colleges and universities collect data and statistics on a number of specific crimes and then report that information to the campus community on an annual basis. These data obviously can help student-journalists in reporting on problems on their campuses. One major problem with the law is that it does not define what constitutes a timely warning. In light of shooting tragedies in recent years at Virginia Tech and Northern Illinois University, such warnings are of obvious importance. Due in part to these terrible events, the Clery Act was amended in 2008 to require campus authorities "to immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on the campus."

In 2013, the Department of Education fined Yale University $165,000 under the Clery Act for, among other things, failing to report four forcible sex offenses, dating back to 2001 and 2002, in its annual campus crime statistics. An April 2013 letter to Yale President Richard Levin from the DOE stated that although Yale corrected its reports in 2004 after being notified of the problem, "the correction of violations does not diminish the seriousness of not correctly

reporting these incidents at the time they occurred." While Yale is a private institution, it nonetheless participates in federal student-aid programs and thus is subject to the Clery Act.

In 2011, the U.S. Department of Education opened a massive investigation into Penn State's compliance or possible lack thereof with the Clery Act in light of the sexual abuse scandal at Pennsylvania State University focusing on accusations against former assistant football coach and convicted child molester Jerry Sandusky. The Department of Education sent a team of investigators to the university, with Education Secretary Arne Duncan stating that "if it turns out that some people at the school knew of the abuse and did nothing or covered it up, that makes it even worse. Schools and school officials have a legal and moral responsibility to protect children and young people from violence and abuse."

In June 2012, Education Secretary Duncan ordered Tarleton State University, a public institution of higher education in Texas, to pay $110,000 for failing to report three forcible sex offenses and a robbery. Each of the four violations individually cost the university $27,500. Duncan furthermore asked an administrative law judge to determine the amount of a possible additional fine for 70 non-violent crimes that also went unreported. Ultimately, Tarleton State University agreed to pay a total fine of $123,500 in July 2012 to settle the matter with the Department of Education.

In October 2012, the Department of Education increased the maximum fine for a single instance of a violation of the Clery Act to $35,000 (up from the $27,500 established in 2002) to adjust for inflation.

HOW MUCH CRIME OCCURS ON YOUR CAMPUS?

Student journalists (as well anyone else) can locate data about crime on their campus by visiting a Web site hosted by the Office of Postsecondary Education of the U.S. Department of Education. The Web site, known as the Campus Security Data Analysis Cutting Tool, is a clearinghouse for data collected under the Clery Act. You can find it at http://ope.ed.gov/security.

The theft of all the issues of a single edition of a newspaper by those who disagree with the material published in the paper is a problem on some campuses. Campus police usually claim they are powerless to pursue the thieves, since, because the student newspapers are free, no law has been broken.

And therein lies the problem of quite literally stealing "free" speech: How can one steal something if it is free? In fact, only three states—California, Colorado and Maryland—have statutes specifically aimed to penalize the theft of free newspapers. California's law provides that a person can be fined $250 on a first offense for taking more than 25 copies of a free or complimentary newspaper if done so with the intent to "deprive others of the opportunity to read or enjoy the newspaper."[25]

Because only three states have statutes targeting the theft of free newspapers, incidents of newspaper theft on college campuses are rampant today. The SPLC tracks and describes the

25. California Penal Code § 490.7 (2009).

incidents from a link on its Web site at http://www.splc.org/knowyourrights/newspapertheft.asp and provides a helpful "Newspaper Theft Checklist" of strategies and advice for college newspaper journalists at http://www.splc.org/theftchecklist.asp.

For instance, nearly 2,000 copies of the February 28, 2013, edition of the Tulane Hullabaloo were taken by two Tulane University students who, according to the SPLC, admitted their actions. Why did the students take the papers? Both, according to the SPLC, were pledges of the Kappa Sigma fraternity, and the edition of the Hullaballoo they took featured a front-page story about a drug raid at the Tulane Kappa Sigma house. The two students who took the papers were charged $1,896 for their misdeeds. That amount was determined because the Hullabaloo's policy allows each Tulane student two free copies each edition, but charges $1 for every edition beyond that.

One year earlier and shortly before student government elections were to be held at the University of Florida, more than 250 copies of a February 2012 edition of the Independent Florida Alligator were found shoved in a trashcan. The student newspaper wrote in the next day's edition that it believed the copies were dumped by a UF student volunteering on behalf of one student-government party. Why did the student throw them away? The paper's editors suggested he was unhappy with a front-page story about head football coach Will Muschamp endorsing an opposing rival candidate. The student ultimately admitted dumping the newspapers and wrote a front-page column in the Alligator the next month apologizing for his actions. Also in 2012, the SPLC reported that nearly 200 copies of an edition of the Flor-Ala, the student newspaper of the University of North Alabama, were stolen from various buildings and locations on campus. The particular edition of the stolen papers featured a front-page article critical of the Greek system's Derby Days event.

Such incidents are not rare, and theft of college newspapers seems to be a rising problem across the nation. In fact, a total of 27 different incidents of college-newspaper theft were reported to the SPLC in 2012. By comparison, there were only nine reported theft incidents in 2011 and just six in 2010. In 2012, copies of student newspapers disappeared from racks or were otherwise stolen or trashed at universities and colleges both large and small, public and private, including: Butler University; Central Connecticut State University; Christopher Newport University; Georgia Perimeter College; Georgia State University; Oklahoma City Community College; Oregon State University; San Antonio College; University of Dayton; University of Florida; University of North Alabama; University of South Dakota; University of Southern Indiana; University of Vermont; West Virginia University; and Western Illinois University.

Finally, attempts to censor college newspapers indirectly, by reducing or even ending their funding, have generally failed. In 1983 the 8th U.S. Court of Appeals handed down an important ruling that still represents the state of the law,[26] more than 30 years later. The case began in the late 1970s when the University of Minnesota Daily published a year-end edition containing content that, according to one university faculty member, offended Third World students, blacks, Jews, feminists, gays, lesbians and Christians.[27] In the wake of complaints from students and off-campus readers, the university regents embarked on a plan to cut the funding for the newspaper. The plan was to allow students to decide whether or not to

26. *Stanley* v. *McGrath,* 719 F. 2d 279 (1983).
27. Gillmor, "The Fragile First."

contribute $2 each semester to fund the newspaper. The $2 fee had automatically gone to the newspaper in the past. Two university review committees advised the regents the plan was a bad idea, but it was adopted nevertheless. Before the vote many of the regents publicly stated they favored the plan because students should not be forced to support a newspaper that was "sacrilegious and vulgar."

A lawsuit followed the decision, and the appellate court ruled the move by the regents violated the First Amendment. A reduction in or even the elimination of fees is certainly permissible, the court said, so long as it is not done for the wrong reasons. But there was ample evidence in this case, the court said, that the reduction was enacted to punish the newspaper. As such it was an attempt at censorship. The court cited the negative comments about the newspaper by the regents during consideration of the plan, as well as the fact that the change was not made at other University of Minnesota campuses (which are governed by the same board of regents), only the Twin Cities campus, home of the offending newspaper, as evidence of the punitive nature of the new policy. "Reducing the revenues available to the newspaper is therefore forbidden by the First Amendment," the court concluded.[28]

In 2012, a committee of students and administrators at the University of Memphis—a public university subject to the First Amendment—voted to slash the funding appropriation from student activity fees to the student newspaper, The Daily Helmsman, by a whopping 33 percent from $75,000 to $50,000. Why did the Student Fee Allocation Fund Committee take such drastic action? According to the Student Press Law Center, it allegedly was purely a content-based decision—the committee simply was displeased with the nature of the newspaper's stories. In particular, the paper had published content critical of the university's police department in the handling of an alleged sexual assault, and there were several incidents involving conflicts between members of the staff of the Helmsman (including its editor-in-chief, Chelsea Boozer) and police services. As Frank LoMonte, head of the SPLC, wrote in a blog posting in early August 2012, "Every public statement from a person involved in the budget process has directly connected the newspaper's level of funding with the editors' discretionary choice of stories." If the funding cuts were indeed made in retaliation for published content, then the move would violate the First Amendment.

Perhaps in response to such concerns and after an internal review, University of Memphis President Shirley Raines agreed to restore the money for fiscal year 2012–2013. In a press release, Raines explained that "[s]ince content may have been a factor, we will restore the $25,000 in funding to The Daily Helmsman. . . . We recognize that all university funding decisions related to the student newspaper should be made regardless of the content of the newspaper, whether these decisions are made by students, faculty or staff."

Alcohol Advertisements and the College Press

In 1996, Pennsylvania adopted a law known as Act 199. The law prohibited the paid dissemination of alcoholic beverage advertising in college newspapers.[29] After Act 199 became

28. *Stanley* v. *McGrath,* 719 F. 2d 279 (1983).
29. 47 Pennsylvania Statutes Annotated § 4-498 (2004).

law, the Pennsylvania Liquor Control Board issued an advisory notice clarifying how the law applied to universities and the collegiate press. The notice stated:

> Advertisements which indicate the availability and/or price of alcoholic beverages may not be contained in publications published by, for and in behalf of any educational institutions. Universities are considered educational institutions under this section. Thus, an advertisement in a college newspaper or a college football program announcing beverages would not be permissible.

What does this statement mean? Under this law, an advertisement paid for by a local bar in State College, Pa., and placed in the student newspaper at the Pennsylvania State University, the Daily Collegian, that described the availability and/or price of beer at the bar during happy hours would not be permissible. The student newspaper at the University of Pittsburgh, the Pitt News, decided to challenge the law on First Amendment grounds because the Pitt News, like the Daily Collegian, had received a substantial portion of its advertising revenue from alcoholic beverage ads prior to the enactment of Act 199. But in 1998 alone, the Pitt News lost $17,000 in advertising revenue because of the law.

Pennsylvania, in contrast, argued that the law was necessary to curb both underage drinking (although many college students and all faculty are of at least the legal drinking age of 21) and binge drinking/alcohol abuse. The theory on the latter interest apparently was that if students didn't know where the cheap beer was being served because they couldn't find advertisements for it in college newspapers, then they wouldn't drink as much.

In 2004, however, the U.S. Court of Appeals for the 3rd Circuit held in a *Pitt News* v. *Pappert* that Act 199 violated the First Amendment rights of the Pitt News and, by implication, other college newspapers in Pennsylvania.[30] The appellate court ruled that the law was "an impermissible restriction on commercial speech" (see Chapter 15 and the Central Hudson test for commercial speech) and that it was presumptively unconstitutional because it targeted a too narrow segment of the media—newspapers affiliated with colleges and universities—and thus conflicted with U.S. Supreme Court precedent on taxation of the press. The appellate court observed that Pennsylvania "has not pointed to any evidence that eliminating ads in this narrow sector [of the media] will do any good. Even if Pitt students do not see alcoholic beverage ads in the Pitt News, they will still be exposed to a torrent of beer ads on television and the radio, and they will still see alcoholic beverage ads in other publications, including the other free weekly Pittsburgh papers that are displayed on campus together with the Pitt News." The appellate court added that "in contending that underage and abusive drinking will fall if alcoholic beverage ads are eliminated from just those media affiliated with educational institutions, the Commonwealth relies on nothing more than 'speculation' and 'conjecture.' " The court suggested that rather than restricting the First Amendment speech and press rights of college newspapers, the "most direct way to combat underage and abusive drinking by college students is the enforcement of the alcoholic beverage control laws on college campuses."

The same issue later arose when the ACLU sued in federal court in Richmond, Va., on behalf of Collegiate Times and the Cavalier Daily, the student-run papers at Virginia

30. *Pitt News* v. *Pappert*, 379 F. 3d 96 (3d Cir. 2004).

Tech and the University of Virginia, respectively, challenging Virginia Alcohol Beverage Control regulations prohibiting all advertisements for beer, wine and mixed beverages in "college student publications" unless made in reference to a dining establishment.[31] The Virginia statute, like the Pennsylvania one at issue in *Pitt News* v. *Pappert*, initially was declared unconstitutional on First Amendment grounds. In 2008, a federal court issued a permanent injunction prohibiting Virginia from enforcing it.[32] Although the court agreed with Virginia that there was a substantial interest in reducing underage and excessive drinking in college, it found, as did the appellate court in *Pitt News*, "that any suggestion that the regulation materially advanced the governmental interest was speculative." But in 2010, the 4th U.S. Circuit Court of Appeals, in a split 2-1 ruling, reversed the district court's decision and concluded instead that the Virginia Alcoholic Beverage Control Board's "ban on alcoholic advertisements in college student publications passes muster under *Central Hudson*. The district court, therefore, erred in finding otherwise."[33] In contrast to the district court, the 4th Circuit majority found the link between the ban on such alcohol ads in college newspapers and "decreasing demand for alcohol by college students to be amply supported by the record." In a hugely deferential decision to the Alcoholic Beverage Control Board, the majority reasoned that the law is "supported by the fact that alcohol vendors *want* to advertise in college student publications. It is counterintuitive for alcohol vendors to spend their money on advertisements in newspapers with relatively limited circulation, directed primarily at college students, if they believed that these ads would not increase demand by college students. The college newspapers fail to provide evidence to *specifically* contradict this link" (emphasis in original). One judge dissented, writing that he was "persuaded by an opinion from the Third Circuit dealing with similar facts," namely *Pitt News* v. *Pappert*.

The bottom line is that there was a disagreement (a "split of authority" in legal parlance) between the 3rd and 4th Circuits on the constitutionality of laws targeting alcohol advertisements in the college newspapers. The issue seemed ripe for review by the U.S. Supreme Court, but in 2010 it denied a petition for a writ of certiorari in the Virginia case. After the Supreme Court declined to hear the Virginia case, the dispute was remanded (sent back) to the district court in Richmond. In September 2012, U.S. Magistrate Judge Hannah Lauck ruled in favor of Virginia and upheld the ban on advertisements for alcohol in college papers. In reaching this conclusion, she applied the *Central Hudson* test—the same test applied earlier in the case by the 4th Circuit when it upheld the law (see Chapter 15 for more on the *Central Hudson* test). The case then went back up to the 4th Circuit, and it reversed Judge Lauck's ruling in September 2013. The 4th Circuit held that Virginia's ban on alcohol ads was not narrowly tailored under *Central Hudson* and thus was unconstitutional. Why? Because a majority of college newspaper readers are age 21 years or older and the law thus would "keep would-be drinkers in the dark."

31. Complaint, *Educational Media Co. at Va. Tech* v. *Swecker* (E.D. Va. filed June 8, 2006).
32. Order, *Educational Media Co*. v. *Swecker*, Case No. 3:06CV396 (E.D. Va. June 19, 2008). The same judge earlier in 2008 had granted summary judgment in favor of the student newspapers. *Educational Media Co*. v. *Swecker*, 2008 U.S. Dist. LEXIS 45590 (E.D. Va. Mar. 31, 2008).
33. *Educ. Media Co. Va. Tech., Inc.* v. *Swecker*, 602 F. 3d 583 (4th Cir. 2010), cert. den., 131 S. Ct. 646 (2010).

BOOK BANNING

In 2013, the Thomas Jefferson Center for the Protection of Free Expression gave a "Muzzle Award" for censorship to the Annville-Cleona School Board in Pennsylvania. Why? Because the board, as the Jefferson Center explained, removed an award-winning children's picture storybook called "The Dirty Cowboy" from its elementary school library after one student's parents complained. The parents apparently objected to colorful illustrations depicting a cowboy's efforts to reclaim his clothes after they were taken away by a dog as the cowboy bathed in a river. Although the cowboy is depicted without his clothes, the book shows no nudity, as the illustrations cleverly obscure his genitalia with items such as a boot and a flock of birds.

In 2012, the best-selling book trilogy "Fifty Shades of Grey" became the subject of censorship efforts in several states, including Florida. Some public libraries either refused to purchase the book or had it removed from their shelves. The book's erotic theme and its classification as so-called mommy porn sparked the backlash, although others simply said the series was poorly written and thus not deserving of taxpayer expenditures. Also in 2012, a coming-of-age work of fiction called "Looking for Alaska" was banned from assigned classroom reading lists in several schools because of a brief oral-sex passage.

In November 2012, the mother of two students in the Davis School District in Utah filed a federal lawsuit alleging that the removal of the book "In Our Mothers' House" from the shelves of its elementary school libraries violated the First Amendment rights of her children. The book, written by award-winning author Patricia Polacco, depicts a family with same-sex parents. Apparently acting in response to complaints about the book from some parents, the school district placed the book behind a counter where students now must first obtain written parental permission to read it. The complaint in *A.W.* v. *Davis School District* alleged that "by restricting access to 'In Our Mothers' House' based on the fact that the book depicts a family with same-sex parents, the District has placed a discriminatory burden on students' ability to access fully protected speech. Even worse, restricting access to 'In Our Mothers' House' and segregating it from the rest of the library collection places an unconstitutional stigma on the ideas contained in the book and the students who wish to read it." The case had yet to be resolved when this textbook went to print.

The American Library Association (ALA) keeps tabs on what it calls the "most challenged" books in the United States. The ALA defines a challenged book as one against which a formal, written complaint has been filed with a library or school requesting it be removed due to content or appropriateness. Among the 10 most challenged books in the United States in 2012 were modern titles such as "Fifty Shades of Grey," "The Absolutely True Diary of a Part-Time Indian," "And Tango Makes Three" and "The Kite Runner." Overall, the ALA's Office for Intellectual Freedom received more than 450 reports of attempts to remove or restrict materials from school curricula and library bookshelves, an increase from 2011's total of 326 attempts.

When it comes to removing books from public school libraries, the only U.S. Supreme Court opinion on point is an aging 1982 case called *Board of Education* v. *Pico*.[34] Unfortunately, there was no majority opinion in *Pico* (there were seven separate opinions) as the Court addressed the issue of whether a school board could constitutionally remove from a public

34. 457 U.S. 853 (1982).

school library books by the likes of Kurt Vonnegut and Langston Hughes that it characterized as "Anti-American, Anti-Christian, Anti-Sem[i]tic, and just plain filthy." There was, however, a plurality opinion (see page 23) holding that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.' " The plurality opinion noted that school boards

> rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. . . . Our Constitution does not permit the official suppression of ideas. Thus whether [the school board's] removal of books from their school libraries denied [students'] their First Amendment rights depends upon the motivation behind [the school board's] actions.

In contrast to unconstitutional justifications for removing books from school libraries based upon dislike of the ideas and political viewpoints in them, the plurality wrote that it would be okay to remove books if done so "based solely upon the 'educational suitability' of the books in question" or if the books were "pervasively vulgar." The court thus suggested that motivation of a school board in removing a book is key in determining whether its removal violates the First Amendment rights of minors to access the ideas in the book.

The guidelines from *Pico* were applied in 2006 by a federal court in Florida in *ACLU of Florida* v. *Miami-Dade County School Board*.[35] The dispute centered not on pervasive vulgarity, but on the removal from school libraries of particular books, targeting children from 4 to 8 years old, about Cuba and life in that island nation. The school removed the books after a parent complained they were "untruthful" and portrayed "a life in Cuba that does not exist." As U.S. District Court Judge Alan S. Gold wrote, the "heart of the argument is that the Cuba books omit the harsh truth about totalitarian life in Communist Cuba."

In ruling against the school board and in ordering it to immediately replace the Cuba books, the judge wrote that "[s]ignificant weight must be given to the board's failure to consider, much less adopt, the recommendations of the two previous committees, and that of the school superintendent, to leave the Cuba books on the library shelves because they were educationally suitable." Recall that in *Pico* the Supreme Court wrote that school boards could legitimately remove books from libraries if they did so based upon concerns about "educational suitability." This case, however, was different, as Judge Gold reasoned:

> The majority of the Miami-Dade County School Board members intended by their removal of the books to deny schoolchildren access to ideas or points-of-view with which the school officials disagreed, and that this intent was the decisive factor in their removal decision. In so acting, the School Board abused its discretion in a manner that violated the transcendent imperatives of the First Amendment.

35. 439 F. Supp. 2d 1242 (S.D. Fla. 2006).

In 2009, however, the 11th U.S. Circuit Court of Appeals reversed Judge Gold's opinion with a split 2-1 decision and, in so doing, it allowed the school board to remove the contested book, "Vamos a Cuba," from its libraries.[36] The two-judge majority initially noted there was no majority opinion in the Supreme Court's *Pico* ruling and thus it observed that "the question of what standard applies to school library book removal decisions is unresolved" and "we have no need to resolve it here." But in ruling in favor of the school board, the 11th Circuit majority adopted the school board's position that its motive for removing the book was not based on any improper political reasons or the book's political viewpoint, but rather was due to legitimate pedagogical concerns (akin to *Hazelwood*, page 89) about factual inaccuracies and critical omissions. The majority wrote that "whatever else it prohibits, the First Amendment does not forbid a school board from removing a book because it contains factual inaccuracies, whether they be of commission or omission. There is no constitutional right to have books containing misstatements of objective facts shelved in a school library." This was the situation with "Vamos a Cuba." The majority found:

> The book did not tell the truth. It made life in Cuba under Castro appear more favorable than every expert who testified for either side at the hearing knows it to be, more favorable than the State Department knows it to be, more favorable than the district court knows it to be, and more favorable than we know it to be. Once you find, as we have, that the book presents a false picture of life in Cuba, one that misleadingly fails to mention the deprivations and hardships the people there endure, the argument that the [school] board acted for ideological reasons collapses on itself.

There was a strenuous dissent by Judge Charles R. Wilson, who wrote that "the school board's claim that 'Vamos a Cuba' is grossly inaccurate is simply a pretense for viewpoint suppression, rather than the genuine reason for its removal. The record supports the district court's determination that the book was not removed for a legitimate pedagogical reason." The Supreme Court declined to hear the case, thus leaving the 11th Circuit's pro-censorship opinion intact.

SUMMARY

Four U.S. Supreme Court decisions—*Tinker, Hazelwood, Bethel* and *Morse*—provide the legal tests for determining the free speech rights of students in public schools. Each of the four cases features its own rule and applies to a particular situation. School officials have abused *Hazelwood*'s "reasonably related to legitimate pedagogical concerns" standard when it comes to censoring student newspapers produced as part of the school curriculum. A new problem not addressed in these four cases is school censorship of speech created by students off campus, on their own computers and posted on the World Wide Web. The impact of the court's 2007 ruling in *Morse* remains to be seen, but the scope of the *Morse* ruling is very narrow.

Two federal appellate court cases—*Kincaid* and *Hosty*—address censorship of college newspapers. Another problem college papers face today is theft by disgruntled students. Alcohol ads pose an additional issue for some college newspapers, as some states have attempted to regulate them.

Book banning and removal from public school libraries is a problem today.

36. *ACLU of Florida* v. *Miami-Dade County School Board*, 557 F. 3d 1177 (11th Cir. 2009), cert. den., 130 S. Ct. 659 (2009).

TIME, PLACE AND MANNER RESTRICTIONS

Most attempts by the government to use prior censorship are based on the content of the material it seeks to censor. But the government can also base its attempts at prior censorship on other factors—specifically, the time, the place or the manner of the communication. There would certainly be few content-based objections to an individual presenting a speech on how to grow mushrooms. But the government (as well as citizens) would surely object if the speaker wanted to give the speech while standing in the middle of Main Street, or on a sidewalk at 2 a.m. in a residential neighborhood. These are called **time, place and manner restrictions or rules.**

But the government can also base its attempts at prior censorship on other factors—specifically, the time, the place or the manner of the communication.

FUNERAL PROTESTS AND TIME, PLACE & MANNER REGULATIONS: TARGETING THE WESTBORO BAPTIST CHURCH?

The topic of time, place and manner regulations is of particular importance today in measuring the constitutionality of the increasing number of funeral protest laws adopted across the country at the federal, state and local levels. For instance, President Obama in August 2012 signed a bill amending two federal statutes (18 U.S.C. § 1388 and 38 U.S.C. § 2413) to now prohibit protests and demonstrations within 300 feet of any funeral, memorial service or ceremony held for a member or former member of the Armed Forces. The prohibition begins two hours before such a funeral or service and concludes two hours afterward. In other words, the law restricts both the time (a two-hour buffer zone) and place (a 300-foot buffer zone) of speech near funerals.

In October 2012, a federal appellate court in *Phelps-Roper* v. *City of Manchester* upheld as constitutional a Missouri municipality's law limiting picketing and other protest activities within 300 feet of a funeral or burial service while it is occurring and for one hour before and after. The court declared the law was a content-neutral statute because it regulated disrupting or attempting to disrupt a funeral with *any speech,* regardless of the topic, subject matter or viewpoint of that speech. The court thus applied the intermediate scrutiny standard of review described in this section of the book. The court held the law served a substantial interest in protecting the privacy of funeral attendees and that it did "not limit speakers or picketers in any manner apart from a short time and narrow space buffer zone around a funeral or burial service."

Measures such as this often are adopted because of the tactics of the members of the Westboro Baptist Church, who protest near funerals of U.S. soldiers killed in Iraq in order to convey their belief that the soldiers' deaths represent God's punishment for American tolerance of homosexuality. That said, however, it is possible to craft the language in such a funeral protest ordinance in a content-neutral way that applies to all picketing and protesting, regardless of the messages being conveyed.

Such rules generate no serious First Amendment problems so long as they meet a set of criteria the courts have developed. This set of criteria is sometimes referred to as the **intermediate scrutiny** standard of judicial review.

1. **The rule must be neutral as to content, or what the courts call content neutral, both on its face and in the manner in which it is applied.** A rule that is content

neutral is applied the same way to all communications, regardless of what is said or printed. In other words, a law cannot permit the distribution of flyers promoting the construction of a new stadium, but restrict persons from handing out material in favor of tearing down a viaduct. A viable time, place and manner rule must be content neutral. In 2000 the Supreme Court ruled that a Colorado law that made it unlawful for any person within 100 feet of the entrance to a health care facility to approach within 8 feet of another person to pass out a handbill or a leaflet, display a sign or engage in "oral protest, education or counseling" was content neutral. The statute prohibited unwanted approaches to all medical facilities in the state, *regardless* of the message the speaker was attempting to communicate, the court said.[37]

The 9th U.S. Court of Appeals ruled that a Las Vegas ordinance that banned the distribution of commercial leaflets along Las Vegas Boulevard, commonly known as Las Vegas Strip, was not content neutral because it didn't apply to persons handing out other kinds of leaflets as well.[38] An ordinance like this that is not content neutral is considered a content-based law and is subject to the much more rigorous **strict scrutiny** standard of judicial review that requires the government to prove a compelling interest—not simply a substantial interest—and that the statute restricts no more speech than is absolutely necessary to serve the allegedly compelling interest (see page 70).

Sometimes a law will appear to be content neutral but is not because it gives far too much discretion to the officials who are assigned to administer it. For instance, in 2008 the 9th U.S. Circuit Court of Appeals held that a Seattle parade-permit law that allowed the police chief there to decide whether marchers had to use sidewalks instead of streets for their parades was unconstitutional.[39] In this case, a group of marchers (the plaintiff) wanted to use the streets, but were ordered by the police to use the sidewalks because there allegedly were too few marchers, even though Seattle did not include a minimum numbers requirement in all—or even most—parade permits as a condition of allowing marchers to utilize the streets. The appellate court reasoned that "the ordinance by its terms gives the chief of police unbridled discretion to force marchers off the streets and onto the sidewalks, unchecked by any requirement to explain the reasons for doing so or to provide some forum for appealing the chief's decision. We therefore hold that the parade ordinance is facially unconstitutional." It added that the "danger of abuse is acutely presented in this case, where the speech the [plaintiff] seeks to engage in—protesting police brutality—is directly critical of the governmental body that administers Seattle's permit scheme."

Just because a statute restricts the noise or sound level of speech does not necessarily mean that it is content neutral. It is only a content-neutral statute if *all* noises—all messages, all sounds, regardless of topic or subject matter—are

37. *Hill* v. *Colorado,* 530 U.S. 703 (2000).
38. *S.O.C.* v. *Clark County, Nevada,* 152 F. 3d 1136 (1998).
39. *Seattle Affiliate of Oct. 22nd Coalition to Stop Police Brutality, Repression & Criminalization of a Generation* v. *City of Seattle*, 2008 WL 5192062 (9th Cir. Dec. 12, 2008).

treated equally. For instance, in 2012 the Supreme Court of Florida held in *Florida* v. *Catalano*[40] that a state statute that prohibited playing car stereos at a sound level "plainly audible at a distance of 25 feet or more" away was a content-based law. Why? Because the Florida statute carved out an exemption from this rule for "motor vehicles used for business or political purposes, which in the normal course of conducting such business use soundmaking devices." As the Supreme Court of Florida wrote in explaining how this exemption made the law content based rather than content neutral, "business and political vehicles may amplify commercial or political speech at any volume, whereas an individual traversing the highways for pleasure would be issued a citation for listening to any type of sound, whether it is religious advocacy or music, too loudly. Thus, this statute is content based because it does not apply equally to music, political speech and advertising." As a content-based law, the Florida statute was subject to the much more rigorous **strict scrutiny** standard of review (see page 70 regarding strict scrutiny) and ultimately was declared unconstitutional.

2. **The law must not constitute a complete ban on a kind of communication.** There must be ample alternative means of accomplishing this communication. In the 1980s several states sought to ban the polling of voters outside voting booths. The polling was conducted by the news media for several reasons, including an attempt to find out what kinds of people (age, political affiliation, occupation, etc.) voted for which candidates. Many of these statutes were struck down at least in part, the courts ruled, because the press could not ask these questions at any other place or in any other manner and expect to get the same data. The ban on exit polling, then, constituted a complete ban on the kinds of questions reporters sought to ask.

GUIDELINES FOR TIME, PLACE AND MANNER RESTRICTIONS

1. Rules must be content neutral.
2. Rules must not constitute a complete ban on communication.
3. Rules must be justified by a substantial state interest.
4. Rules must be narrowly tailored.

3. **The state must articulate a substantial interest to justify this restraint on speech.** A ban against using loudspeakers to communicate a political message after 10 p.m. could surely be justified on the grounds that most people are trying to sleep at that time. A ban against passing out literature and soliciting money in the passageways between an airport terminal and the boarding ramps could also be justified by the state, which wants to keep these busy areas clear for passengers

40. 104 So. 3d 1069 (Fla. 2012).

hurrying to board airplanes.[41] But attempts by the government to ban distribution of handbills on city streets because many people throw them away and cause a litter problem are typically rejected.[42] The state interest in keeping the streets clean can be accomplished by an anti-litter law. At times communities have attempted to raise aesthetic reasons to justify limiting or banning newspaper boxes. Some courts refuse to allow these concerns alone to justify limits on First Amendment freedoms, usually noting that many other common objects on the streets (telephone poles, trash cans, fire hydrants, street signs) are also eyesores.[43] Other courts have ruled that aesthetic considerations can be included in a community's justification for limits.[44] If the community can demonstrate a strong rationale for its aesthetic concerns, even a total ban on the placement of racks in a specific area might be acceptable. In 1996 the 1st U.S. Court of Appeals permitted the city of Boston to completely ban news racks from the public streets of a historic district of the city, where the architectural commission was trying to restore the area to what it looked like hundreds of years earlier.[45]

In addition to asserting a substantial interest, the state is required to bring evidence to court to prove its case. Southwest Texas State University in San Marcos attempted to restrict the distribution of a small community newspaper on its campus. It told the 5th U.S. Circuit Court of Appeals that it sought such restrictions in order to preserve the academic environment and the security of the campus, protect privacy on campus, control traffic, preserve the appearance of the campus, prevent fraud and deception and eliminate unnecessary expenses. These were all laudable goals, but the court said the university presented no evidence to support the notion that restricting the sale of these newspapers to a few vending machines or direct delivery to subscribers on campus would accomplish these goals. "[T]he burden is on the defendants [university] to show affirmatively that their restriction is narrowly tailored to protect the identified interests. Defendants failed to carry this burden," the court ruled.[46]

4. **The law must be narrowly tailored so that it furthers the state interest that justifies it, but does not restrain more expression than is actually required to further this interest.** "A regulation is narrowly tailored when it does not burden substantially more speech than is necessary to further the government's legitimate interests."[47] Officials in the city of Sylvania, Ga., believed they had a litter problem. The Penny-Saver, a weekly free newspaper, was thrown on the lawn or driveway of each residence in the city. Often residents just left the paper where it fell. These

41. See, for example, *International Society for Krishna Consciousness* v. *Wolke,* 453 F. Supp. 869 (1978).
42. *Schneider* v. *New Jersey,* 308 U.S. 147 (1939); and *Miller* v. *Laramie,* 880 P. 2d 594 (1994).
43. See *Providence Journal* v. *Newport,* 665 F. Supp. 107 (1987); and *Multimedia Publishing Co. of South Carolina, Inc.* v. *Greenville-Spartanburg Airport District,* 991 F. 2d 154 (1993).
44. See *Gold Coast Publications, Inc.* v. *Corrigan,* 42 F. 3d 1336 (1995); and *Honolulu Weekly Inc.* v. *Harris,* 298 F. 3d 1037 (2002).
45. *Globe Newspaper Company* v. *Beacon Hill Architectural Commission,* 100 F. 3d 175 (1996).
46. *Hays County Guardian* v. *Supple,* 969 F. 2d 111 (1992).
47. *Ward* v. *Rock Against Racism,* 491 U.S. 781 (1989).

> unclaimed papers were unsightly and sometimes wound up on the street or in the gutter. The city adopted an ordinance that made it illegal to distribute free, printed material in yards, on driveways or on porches. The publisher of the Penny-Saver sued, claiming the new law was a violation of the First Amendment. The Georgia Supreme Court agreed, rejecting the city's argument that this was a proper time, place and manner rule. The ordinance was certainly content neutral, but it was not narrowly tailored. The law blocked the distribution of the Penny-Saver but also barred political candidates from leaving literature on doorsteps, stopped many religious solicitors who hand out material and blocked scores of others from passing out pamphlets door-to-door. In addition, the court ruled, the problem could be solved in other ways that do not offend the First Amendment. The city could require either the Penny-Saver publisher or the city residents to retrieve the unclaimed papers or could punish the publisher for papers that end up in the ditch or on the street.[48]

The 2012 appellate court decision in *Bays* v. *City of Fairborn*[49] provides an example of a content-neutral statute that was not narrowly tailored. Each summer, the City of Fairborn, Ohio, hosts a "Sweet Corn Festival" at a 200-acre public park. The festival involves a corn eating competition, live music and various booths selling arts and crafts. The festival, however, has a policy that forbids the soliciting of any and all causes outside of the booth space. The policy applies to all forms of solicitation, whether by sign display, leaflets or face-to-face discussions.

The no-solicitation policy was challenged by Tracy Bays and Kerrigan Skelly, two Christians who sought to distribute religious literature and speak to festival goers while wandering through the grounds. Bays also wanted to carry a sign that read "Jesus is the Way, the Truth and the Life. John 14:6" on the front and "Are you born again of the Holy Spirit?" on the back. They were told they could not do so, however, because of the ban against soliciting causes outside of booths.

The 6th U.S. Circuit Court of Appeals initially found the no-solicitation policy was content neutral. Why? Because it applied evenhandedly to any individual or group wishing to solicit causes, regardless of whether those causes were commercial, charitable or religious. Next, the court assumed the policy served significant interests in both crowd control and the smooth flow of foot traffic in the park during the festival. The problem, the court said, was that the policy was not narrowly tailored to serve those interests. The court suggested that while it might be permissible to prohibit the display of signs, Fairborn's ordinance went too far by also prohibiting all face-to-face discussions. It is one thing, the court suggested, to prohibit "public speaking designed to gather crowds." Such a prohibition likely would be okay because the gathered crowds would interfere with the significant interest in the flow of foot traffic. It is another thing, however, to ban solicitors who merely mingle with others individually and seek to hand out leaflets. In other words, Fairborn's policy would have been more narrowly tailored if it had permitted solicitations via one-on-one conversations and prohibited solicitations by stationary preaching intended to gather an audience.

48. *Statesboro Publishing Company* v. *City of Sylvania,* 516 S.E. 2d 296 (1999); see also *Houston Chronicle* v. *Houston,* 630 S.W. 2d 444 (1982); and *Denver Publishing Co.* v. *Aurora,* 896 P. 2d 306 (1995).
49. 668 F.3d 814 (6th Cir. 2012).

A law can be declared invalid if it fails to pass any of these four criteria. The manner in which courts apply the intermediate scrutiny test—how rigorously they employ it, how much deference they grant to asserted legislative interests and even whether they choose to use a different test—often depends on the nature of the specific location where the law in question applies.

FORUM ANALYSIS

Courts have identified four kinds of forums:

Traditional Public Forum: Traditional public forums are public places that have by long tradition been devoted to assembly and speeches, places like street corners, public parks, public sidewalks or a plaza in front of city hall. The highest level of First Amendment protection is given to expression occurring in traditional public forums.

Designated Public Forum: Designated public forums are places created by the government to be used for expressive activities, among other things. A city-owned auditorium, a fairgrounds, a community meeting hall and even a student newspaper intended to be open for use by all students are examples of designated public forums. It is clear today that "the government must have an affirmative intent to create a public forum in order for a designated public forum to arise."[50] Intent may be determined by three factors:

1. Explicit expressions of intent
2. Actual policy and history of practice in using the property
3. Natural compatibility of the property with the expressive activity

For instance, in 2006 a federal appellate court in *Bowman* v. *White*[51] held that three specific areas on the University of Arkansas at Fayetteville campus were designated public forums: the Union Mall (an outdoor area in the center of campus near the library composed of grassy mounds surrounded by sidewalks and walkways, benches and potted trees and plants); the Peace Fountain (a metallic tower structure, also located in the center of the campus, with a fountain at the base); and an area outside a major campus dining hall. In concluding these areas were designated public forums, the court reasoned that

> [the] tradition of free expression within specific parts of universities, the University's practice of permitting speech at these locations, and the University's past practice of permitting both University Entities and Non-University Entities to speak at these locations on campus demonstrate that the University deliberately fosters an environment that permits speech.

Although a government entity is not required either to create or to maintain indefinitely a designated public forum (i.e., a designated public forum can be closed if the government wishes to do so), once it creates a designated public forum and chooses to keep it open, it "is bound by the same rules that govern traditional forums."[52] This means that a time, place and manner regulation in both a traditional public forum and a designated public forum must

50. *Ridley* v. *Massachusetts Bay Transportation Authority*, 390 F. 3d 65 (1st Cir. 2004).
51. 444 F. 3d 967 (8th Cir. 2006). See also *Hays County Guardian* v. *Supple*, 969 F. 2d 111, 117 (5th Cir. 1992), which found certain outdoor areas at Southwest Texas State University to be a designated public forum, designated for the speech of students.
52. Weaver and Lively, *Understanding the First Amendment*, 118.

survive and pass the four-part intermediate scrutiny standard just described,[53] whereas a content-based restriction must pass the more stringent strict scrutiny standard of review (see page 70) and thus is more likely to be held invalid and unconstitutional.

Public Property That Is Not a Public Forum: Some kinds of public property not considered to be public forums are obvious—prisons and military bases, for example. The Supreme Court has stated that a nonpublic forum consists of "[p]ublic property which is not by tradition or designation a forum for public communication."[54] Law professors Russell Weaver and Donald Lively observe that courts have identified a number of places as nonpublic forums including:

- Postal service mailboxes
- Utility poles
- Airport terminals
- Political candidate debates on public television[55]

In addition to these examples, a court in 2010 held that Hawaii's unencumbered beaches (beaches not set aside for any specific purpose and not otherwise leased or permitted) are nonpublic forums for purposes of the First Amendment. The court wrote that "nothing in the record demonstrates or indicates that all Hawaii unencumbered State beaches have traditionally been places for the free exchange of ideas generally."[56]

In (and on) such places and venues, the government has much greater power to regulate and restrict speech, and thus "regulation of speech in a nonpublic forum is subject to less demanding judicial scrutiny."[57] Regulations on speech activities in nonpublic forums will be upheld and allowed as long as they are reasonable and viewpoint neutral (see page 92 discussing viewpoint-based discrimination and page 42 discussing viewpoint neutrality). The latter requirement entails "not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper exclusion of viewpoints."[58]

Unconstitutional viewpoint-based discrimination in a nonpublic forum is illustrated by a 2010 case called *Nieto* v. *Flatau*[59] in which officials at Camp Lejeune Marine Corps Base prohibited Jesse Nieto from displaying a bumper sticker with the message "ISLAM = TERRORISM" on his car that he drove to work on the base. Nieto's youngest son had been killed when the USS Cole was bombed by Islamic terrorists. Camp Lejeune had a policy prohibiting the display of "extremist, indecent, sexist or racist" messages on motor vehicles on the base. Observing that military bases are not public forums for First Amendment purposes and that the government is entitled to great deference in restricting speech on them, U.S.

53. See *Wells* v. *City and County of Denver*, 257 F. 3d 1132, 1147 (10th Cir. 2001), which wrote that "a content-neutral restriction in a traditional or designated public forum is subject to review as a regulation on the time, place, and manner of speech."
54. *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37, 46 (1983).
55. Weaver and Lively, *Understanding the First Amendment*, 120.
56. *Kaahumanu* v. *Hawaii*, 685 F. Supp. 2d 1140 (D. Haw. 2010).
57. *Faith Center Church Evangelistic Ministries* v. *Glover*, 462 F. 3d 1194, 1203 (9th Cir. 2006).
58. *Child Evangelism Fellowship of Maryland* v. *Montgomery County Public Schools*, 457 F. 3d 376, 384 (4th Cir. 2006).
59. 715 F. Supp. 2d 650 (E.D. N.C. 2010).

District Judge Malcolm Howard restated the rule that the government may enact restrictions on speech in nonpublic forums, provided those restrictions are reasonable and not viewpoint-based. The problem for Camp Lejeune was that it freely allowed the display of bumper stickers with pro-Islam messages including "Islam is Love" and "Islam is Peace" but it prohibited Nieto's anti-Islam message of "ISLAM = TERRORISM" on his car. That is viewpoint-based discrimination because the military discriminated against Nieto's speech based upon his particular viewpoint on Islam. The judge also noted that the mere fact that some people may be highly offended by Nieto's bumper sticker is not a sufficient reason for banning it.

In 2010 a federal appellate court in *News & Observer Publishing Co.* v. *Raleigh-Durham Airport Authority*[60] held that a public airport's total ban on newspaper racks inside its terminals was unconstitutional because it was not a reasonable restriction of speech. Initially observing that airport terminals are nonpublic forums, the appellate court reiterated the long-standing rule that if a regulation on speech in a nonpublic forum is both reasonable and not an effort to suppress expression because public officials oppose a speaker's viewpoint, then the regulation is permissible under the First Amendment. In this case, although there were several shops at the airport that sold newspapers, the 4th U.S. Circuit Court of Appeals nonetheless found that the complete ban on newspaper racks inside the terminals "significantly restricted the [newspaper] publishers' protected expression." The appellate court determined that the facts in the case reflected "that travelers had trouble buying newspapers from the shops," as "there were instances of unavailability during the early morning" and "newspapers were unavailable once the shops closed each day around 9:00 p.m. This means that passengers aboard the 37 flights scheduled to arrive after that time or aboard flights delayed past that point could never purchase a newspaper upon landing." Thus, although the ban on newspaper racks did not discriminate against any newspaper's viewpoint, it was simply not a reasonable measure. It restricted far too much speech to serve the airport's admittedly legitimate interests in aesthetics, preserving revenue in the shops selling newspapers, preventing congestion in the terminals, and ensuring airport security. The appellate court reasoned that "a limited number of carefully placed news racks would create only trivial congestion" and that "carefully placing an appropriate number of news racks inside the terminals would be incompatible with the airport's intended purposes of facilitating air travel and raising revenue."

Private Property: Owners of private property, which includes everything from a backyard patio to a giant shopping mall, are free to regulate who uses their property for expressive activity. There are no First Amendment guarantees of freedom of expression on private property.

The problem of dealing with distribution of materials at privately owned shopping centers has been a troubling one. In 1968, in *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza,*[61] the Supreme Court ruled that the shopping center was the functional equivalent of a town's business district and permitted informational picketing by persons who had a grievance against one of the stores in the shopping center. Four years later in *Lloyd Corp.* v. *Tanner,*[62] the court ruled that a shopping center can prohibit the distribution of handbills on its property when the action is unrelated to the shopping center operation. Protesters against

60. 597 F. 3d 570 (4th Cir. 2010).
61. 391 U.S. 308 (1968).
62. 407 U.S. 551 (1972).

nuclear power, for example, could not use the shopping center as a forum. People protesting against the policies of one of the stores in the center, however, could use the center to distribute materials.

In 1976 the Supreme Court recognized the distinctions it had drawn between the rules in the *Logan Valley* case and the rules in the *Lloyd Corp.* case for what they were—restrictions based on content. The distribution of messages of one kind was permitted, while the distribution of messages about something else was banned. In *Hudgens* v. *NLRB,*[63] the high court ruled that if, in fact, the shopping center is the functional equivalent of a municipal street, then restrictions based on content cannot stand. But rather than open the shopping center to the distribution of all kinds of material, *Logan Valley* was overruled, and the court announced that "only when . . . property has taken all the attributes of a town" can property be treated as public. Distribution of materials at private shopping centers can be prohibited.

Just because the First Amendment does not include within its protection of freedom of expression the right to circulate material at a privately owned shopping center does not mean that such distribution might not be protected by legislation or by a state constitution. That is exactly what happened in California. In 1974 in the city of Campbell, Calif., a group of high school students took a card table, some leaflets and unsigned petition forms to the popular Pruneyard Shopping Center. The students were angered by a recent anti-Israel U.N. resolution and sought to hand out literature and collect signatures for a petition to send to the president and Congress. The shopping center did not allow anyone to hand out literature, speak or gather petition signatures, and the students were quickly chased off the property by a security guard. The students filed suit in court, and in 1979 the California Supreme Court ruled that the rights of freedom of speech and petitioning are protected under the California Constitution, even in private shopping centers, as long as they are "reasonably exercised."[64] The shopping center owners appealed the ruling to the U.S. Supreme Court, arguing that the high court's ruling in *Lloyd Corp.* v. *Tanner* prohibited the states from going further in the protection of personal liberties than the federal government. But six of the nine justices disagreed, ruling that a state is free to adopt in its own constitution individual liberties more expansive than those conferred by the federal Constitution.[65]

A state is free to adopt in its own constitution individual liberties more expansive than those conferred by the federal Constitution.

Although the California Supreme Court held in the Pruneyard Shopping Center dispute that the speech clause of the California Constitution protected expression in a privately owned shopping center (subject to the owner's reasonable time, place and manner restrictions), subsequent decisions by lower-level appellate courts in California have distinguished between large, Pruneyard-type shopping centers (Pruneyard itself consisted of 21 acres, with 65 shops, 10 restaurants and a cinema) and large, individual retail stores, even though those stores are located within a larger retail development. These cases have held that the entrance areas and aprons of such large retail stores are not public forums. For instance, a California appellate court ruled in 2010 that the entrance to Foods Co., a large warehouse grocery store located in Sacramento in a retail development, was not a public forum.[66] The store has only one customer entrance, consisting of a sidewalk or apron extending out about 15 feet to a driving

63. 424 U.S. 507 (1976).
64. *Robins* v. *Pruneyard Shopping Center,* 592 P. 2d 341 (Cal. 1979).
65. *Pruneyard Shopping Center* v. *Robins,* 447 U.S. 74 (1980).
66. *Ralphs Grocery Co.* v. *United Food & Commercial Workers Union Local 8*, 186 Cal. App. 4th 1078 (2010).

lane that separates the apron from the parking lot. The entrance area is about 31 feet wide. The appellate court added that the entrance way neither was designed to be nor was presented to the public as a public meeting place. It noted that because the area was a private forum, its owner could "selectively permit speech or prohibit speech."

Courts in many states (Washington, Colorado, New Jersey, Oregon, New York and others) have interpreted their state constitutions as providing broader free speech and press rights than those provided by the First Amendment to the U.S. Constitution. This trend becomes particularly noticeable when the federal courts narrow the meaning of the First Amendment.

SUMMARY

The prior restraint of expression is permissible under what are known as time, place and manner regulations. That is, the government can impose reasonable regulations about when, where and how individuals or groups may communicate with other people. In order to be constitutional, time, place and manner restraints must meet certain criteria:

1. The regulation must be content neutral; that is, application of the rule should not depend on the content of the communication.
2. The regulation must serve a substantial governmental interest, and the government must justify the rule by explicitly demonstrating this interest.
3. There cannot be total prohibition of the communication. The speakers or publishers must have reasonable alternative means of presenting their ideas or information to the public.
4. The rules cannot be broader than they need to be to serve the governmental interest. For example, the government cannot stop the distribution of literature on all public streets if it only seeks to stop the problem of congestion on public streets that carry heavy traffic.

OTHER PRIOR RESTRAINTS

Major issues regarding prior restraint have been outlined in the previous pages. Yet each year other instances of prior restraint are challenged in the courts, and frequently the Supreme Court is called on to resolve the issue. Here is a brief outline of some of these issues.

SON OF SAM LAWS

Americans have always been interested in crime and criminals. But in recent decades our desire to know more about this sordid side of contemporary life has spawned books and television programs about killers, rapists, robbers, hijackers and their victims. Indeed, it is often jokingly said of those accused of high-profile crimes that when they are captured they are more eager to contact an agent than a defense attorney. Efforts have been made by government to stop felons from receiving money that might be earned by selling stories about their crimes. Many civil libertarians say this is a prior censorship. The laws in question, which have

been adopted in one form or another by about 40 states and the federal government, are called "Son of Sam" laws after a serial killer in New York who was dubbed that name by the press. Before the Son of Sam (David Berkowitz) was caught, reports circulated that the press was offering to pay for the rights to his story. The New York legislature responded to those reports by passing a law that permits the state to seize and hold for five years all the money earned by an individual from the sale of his or her story of crime. The money is supposed to be used to compensate the victims of the crimes caused by the felon. The criminal/author collects what is left in the fund after five years.

Two separate challenges to the New York law were mounted in the late 1980s and early 1990s. Simon & Schuster contested the law when it was applied against the best-selling book "Wiseguys" (the basis for the film "GoodFellas"). Career mobster Henry Hill was paid for cooperating with the book's author, Nicholas Pileggi. Macmillan Publishing Co. also challenged the validity of the law when New York sought to seize the proceeds of Jean Harris's autobiography, "Stranger in Two Worlds," because some of the material in the work was based on her trial for the murder of her lover, diet doctor Herman Tarnower.

The statute was upheld in both federal and state courts. The 2nd U.S. Circuit Court of Appeals ruled in *Simon & Schuster* v. *Fischetti*[67] that the purpose of the law was not to suppress speech but to ensure that a criminal did not profit from the exploitation of his or her crime, and that the victims of the crime are compensated for their suffering. A compelling state interest is served, and the fact that this imposes an incidental burden on the press is not sufficient to rule the law a violation of freedom of expression.

But in late 1991 the U.S. Supreme Court disagreed and in an 8-0 decision ruled that the Son of Sam law was a content-based regulation that violated the First Amendment.[68] "The statute plainly imposes a financial disincentive only on a particular form of content," wrote Justice Sandra Day O'Connor. In order for such a law to pass constitutional muster, the state must show that it is necessary to serve a compelling state interest and that the law is narrowly constructed to achieve that end. The members of the high court agreed that the state has a compelling interest in ensuring that criminals do not profit from their crimes, but this law goes far beyond that goal; it is not narrowly drawn. The statute applies to works on any subject provided they express the author's thoughts or recollections about his or her crime, however tangentially or incidentally, Justice O'Connor noted. The statute could just as easily be applied to "The Autobiography of Malcolm X" or Thoreau's "Civil Disobedience" or the "Confessions of St. Augustine," she added. While Justice O'Connor specifically noted that this ruling was not necessarily aimed at similar laws in other states because they might be different, the decision has forced substantial changes in most of the existing laws. In Massachusetts, however, the Supreme Judicial Court of that commonwealth approved a probationary scheme that had clear earmarks of a Son of Sam law. Katherine Power, a 1970s radical who participated in a bank robbery in which a police officer was killed, pleaded guilty to her crimes and a trial court ordered the defendant to serve 20 years' probation. Attached to the probation sentence was a provision that Power could not in any way profit from the sale of

67. 916 F. 2d 777 (1990).
68. *Simon & Schuster, Inc.* v. *New York Crime Victims Board,* 502 U.S. 105 (1991); see also *Bouchard* v. *Price,* 694 A. 2d 670 (1998) and *Keenan* v. *Superior Court,* 40 P. 3d 718 (2002) in which courts in Rhode Island and California struck down similar laws.

her story to the news media during those 20 years. Power appealed the provision, citing the First Amendment and the Supreme Court ruling in *Simon & Schuster.* The Massachusetts high court rejected this appeal, arguing that a specific condition of probation (which frequently restricts a probationer's fundamental rights) is not the same as a Son of Sam law, which is a statute of general applicability.[69] So, are Son of Sam laws constitutional? They certainly can be, but most of the current laws are not narrowly tailored in such a way as to pass muster. Because the laws are content-based statutes, the state has to first demonstrate that a compelling state interest is at stake and then prove that the law does not bar more speech than is necessary to further that interest.

Although courts are likely to find that two different compelling interests justify these laws (compensating victims of crimes and preventing criminal profiteering), they also are likely to declare the laws not narrowly tailored because most Son of Sam laws regulate more speech than is necessary to serve these twin interests. For instance, in 2004, the Supreme Court of Nevada in *Seres* v. *Lerner* struck down that state's law that allowed felony victims to recover from the felon any monetary proceeds the felon might generate from published materials substantially related to the offense.[70] The high court of Nevada held the law unconstitutional because it "allows recovery of proceeds from works that include expression both related and unrelated to the crime, imposing a disincentive to engage in public discourse and non-exploitative discussion of it." A nonexploitative discussion might include such things as the writer (the felon) warning about the consequences of crime, describing life behind bars and urging others not to commit the same acts.

PRIOR RESTRAINT AND PROTESTS

Two 1994 decisions by the Supreme Court focus on the prior restraint of those seeking to demonstrate or protest. In June the Supreme Court unanimously ruled that cities may not bar residents from posting signs on their own property. Margaret Gilleo had challenged the Ladue, Mo., ordinance by posting an 8-by-11-inch sign in a window of her house protesting the Persian Gulf War. The lower courts ruled that the ban on residential signs was flawed because the city did not ban signs on commercial property; the law favored one kind of speech over another. But the Supreme Court struck down the ordinance in a broader fashion, ruling that the posting of signs on residential property is "a venerable means of communication that is both unique and important. A special respect for individual liberty in the home has long been part of our culture and law," wrote Justice John Paul Stevens. "Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8-by-11-inch sign expressing their political views," he added.[71]

Yard signs carrying political messages still cause trouble today. For instance, in November 2010 the town of Valley Center, Kan., was ordered by a judge to pay $8,000 to Jarrod West. Why? The town had stopped him from posting a sign in his yard complaining about drainage problems in his neighborhood. The sign said, "Dear Valley Center, I did not buy Lake Front Property! Fix this problem. This is what I pay taxes for." Valley Center

69. *Massachusetts* v. *Power,* 420 Mass. 410 (1995).
70. 102 P. 3d 91 (Nev. 2004).
71. *City of Ladue* v. *Gilleo,* 512 U.S. 43 (1994).

responded by charging West with criminal defamation, and it took the intervention of a local American Civil Liberties Union on West's behalf for him to prevail. It was a classic case of government censorship of a political message with which it disagreed.

In another ruling involving the right to protest, the high court upheld a Florida state court injunction that established a 36-foot buffer zone between an abortion clinic in Melbourne, Fla., and anti-abortion protesters.[72] The buffer zone, or ban on picketing, was designed to keep protesters away from the entrance to the clinic, the parking lot, and the public right-of-way. Chief Justice Rehnquist, who wrote the 6-3 ruling, said the ban "burdens no more speech than is necessary to accomplish the governmental interest at stake." The court did strike down, however, a 300-foot buffer zone within which protesters could not make uninvited approaches to patients and employees, as well as a buffer zone the same size around the houses of clinic doctors and staff members. The chief justice said a smaller zone or restriction on the size and duration of demonstrations would be constitutional.*

In 1995 the Supreme Court struck down an Ohio law (and for all intents and purposes laws in almost every other state in the nation) that prohibited the distribution of anonymous election campaign literature. Margaret McIntyre had circulated leaflets opposing an upcoming school levy, but failed to include her name and address on the campaign literature as required by law. She was fined $100. The state argued the statute was needed to identify those responsible for fraud, false advertising and libel, but seven members of the high court said the law was an unconstitutional limitation on political expression. "Under our constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent," wrote Justice John Paul Stevens for the majority. "Anonymity is a shield from the tyranny of the majority." Stevens said anonymity might in fact shield fraudulent conduct, but our society "accords greater weight to the value of free speech than to the dangers of its misuse."[73]

SUMMARY

A wide variety of legal issues relate to prior restraint. In recent years the Supreme Court of the United States has voided a statute aimed at denying criminals the right to earn profits from books or films about their crimes and voided a city ordinance that barred residents from putting signs on their front lawns or in their windows. At the same time, the high court has permitted limited restrictions aimed at those seeking to protest abortion at a clinic in Florida.

* In 2003 the Supreme Court refused to permit two abortion clinics and the National Organization for Women to use the federal Racketeer Influenced and Corrupt Organizations Act (RICO; see Chapter 13 for a discussion of this law) when they sued anti-abortion activists who disrupted and blockaded abortion clinics in Chicago in the 1990s. The high court said the protests did not constitute extortion, a crime that might make the RICO law applicable. *Scheidler* v. *National Organization for Women,* 537 U.S. 393 (2003). The court implied that it was inappropriate to use the federal racketeering law as a weapon against political protests.

72. *Madsen* v. *Women's Health Center,* 512 U.S. 753 (1994).

73. *McIntyre* v. *Ohio Elections Commission,* 514 U.S. 334 (1995).

HATE SPEECH/FIGHTING WORDS

Hate speech—words written or spoken that attack individuals or groups because of their race, ethnic background, religion, gender or sexual orientation—is a controversial but not altogether uncommon aspect of contemporary American life. Few people openly acknowledge a value in such speech, but there is a considerable debate over what to do about it. How do you balance the need to protect the sensibilities of members of the community with the right to speak and publish freely, a right guaranteed by the First Amendment?

The Supreme Court endeavored to balance these issues 70 years ago when it ruled that those who print such invective in newspapers or broadcast them on the radio or paint them on walls or fences are generally protected by the Constitution, but those who utter the same words in a face-to-face confrontation do not enjoy similar protection. The case involved a man named Chaplinsky, who was a member of the Jehovah's Witness religious sect. Face-to-face proselytization or confrontation is a part of the religious practice of the members of this sect. Chaplinsky attracted a hostile crowd as he attempted to distribute religious pamphlets in Rochester, N.H. When a city marshal intervened, Chaplinsky called the officer a "God-damned racketeer" and a "damned fascist." The Jehovah's Witness was tried and convicted of violating a state law that forbids offensive or derisive speech or name-calling in public. The Supreme Court affirmed the conviction by a 9-0 vote. In his opinion for the court Justice Frank Murphy outlined what has become known as the **fighting words doctrine:**

"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 problems."

> 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 problems. These include . . . 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 the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[74]

Fighting words may be prohibited, then, so long as the statutes are carefully drawn and do not permit the application of the law to protected speech. Also, the fighting words must be used in a personal, face-to-face encounter—a true verbal assault. The Supreme Court emphasized this latter point in 1972 when it ruled that laws prohibiting fighting words be limited to words "that have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[75] It is important to note that the high court has given states permission to restrict so-called fighting words because their utterance could result in a breach of the peace, a fight, a riot; not because they insult or offend or harm the person at whom they are aimed. Finally, there is not an official list of words that are always classified by courts as "fighting words." Whether any given word amounts to a "fighting word" depends on the context of how it is used and to whom it is addressed.

74. *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942).
75. *Gooding* v. *Wilson,* 405 U.S. 518 (1972).

PROTECTING THE SPEECH OF THE WESTBORO BAPTIST CHURCH: THE SUPREME COURT'S 2011 RULING

In 2011, the U.S. Supreme Court issued a ruling in *Snyder* v. *Phelps*[76] that protected what many people would consider hate speech. Members of the Westboro Baptist Church (WBC) believe that God hates the United States for its tolerance of homosexuality and, in turn, punishes the country by killing American soldiers. WBC members expressed these views near the funeral for Marine Lance Corporal Matthew Snyder, who was killed in Iraq in the line of duty, by carrying signs with anti-gay and anti-military messages such as "Thank God for Dead Soldiers," "Semper Fi Fags," and "God Hates Fags." The WBC protestors stood on public property about 1,000 feet away from the funeral where they had been told to stand by local police.

Albert Snyder, the father of Matthew Snyder, sued the members of the church for intentional infliction of emotional distress (see Chapter 5) and intrusion into seclusion (see Chapter 7). The WBC, however, argued that the First Amendment protected its right to engage in such speech. An eight-justice majority of the U.S. Supreme Court agreed with the WBC, basing its decision on several grounds.

First, the Court held that the speech in question, although offensive, dealt with matters of public concern, including "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy." Second, the Court reasoned that "the church members had the right to be where they were," as "the picketing was conducted under police supervision some 1,000 feet from the church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence." Finally, the Court concluded by observing that "speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even speech on public issues to ensure that we do not stifle public debate."

The lone dissenter was Justice Samuel Alito. He wrote that "our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case. . . . Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace."

See page 111 for another controversy involving the WBC.

Does swearing at members of a government committee to express frustration with their actions (or lack thereof) constitute fighting words? The 10th U.S. Circuit Court of Appeals addressed this question in 2011 in *Klen* v. *City of Loveland*.[77] Plaintiffs Edward and Stephen Klen were building contractors upset at what they perceived to be unreasonable, deliberate

76. 131 S. Ct. 1207 (2011).
77. 661 F.3d 498 (10th Cir. 2011).

delays over the issuing of permits by officials in the city of Loveland, Colo. On multiple occasions, the Klens used profane language and insults out of frustration when discussing the permit delays with city officials. They said such things as "when the hell are you going to get your shit together in this department?"; "[w]here is our damn permit?"; and "what kind of idiot are you, if you can't even run your own goddamned department?"

In concluding that this language did not constitute fighting words, the 10th Circuit reasoned that "although the Klens used less-than-polite epithets in delivering their message, and occasionally even employed insulting terms to describe city officials, there is no indication that their words were accompanied by provocative gestures or threats. Nor did their use of vulgar or offensive language necessarily make their outbursts fighting words." The appellate court added that the Klens were not trying to provoke a fight but where trying to "express ideas—chiefly that City building department officials were incompetent and were taking too long in processing plaintiffs' application for a building permit." The decision illustrates the key point that offensive speech is not necessarily the same thing as fighting words.

On the other hand, a 2012 decision by an appellate court in *Kansas* v. *Meadors*[78] illustrates that swearing sometimes can amount to fighting words, particularly when an unfriendly tension already exists between the individuals involved. In *Meadors,* those individuals were a divorced couple who shared custody of their children. While the woman was dropping off the kids at her ex-husband's house, the ex-husband "began to berate her by yelling, 'I hate you, you F'ing cunt. I hate you bitch. I'm going to get you.' He was approaching the vehicle, yelling, pointing and displaying his middle finger." The woman "testified it was very traumatic for her and the children," and she called the police. Her ex-husband continued to yell profanities after the officer arrived and told him not to do so. The ex-husband was arrested on disorderly conduct charges but claimed his speech was protected by the First Amendment. Under these circumstances, however, the court ruled his language constituted unprotected fighting words. Importantly, the court noted that a threat of violence is *not* required for speech to constitute fighting words. Instead, "a threat is merely another factor to be considered by the courts when determining whether the words spoken were fighting words."

Very few types of speech . . . fall completely outside the scope of First Amendment protection.

Another key point here is that legislators must be very precise when they try to carve out statutory exceptions for categories of speech they believe should not be protected by the First Amendment. Very few types of speech, in fact, fall completely outside the scope of First Amendment protection, according to the U.S. Supreme Court; unprotected categories include (1) child pornography involving real minors, as well as obscenity (see Chapter 13); (2) fighting words under *Chaplinsky*, described here; (3) incitement to violence under *Brandenburg* v. *Ohio* (see Chapter 2); (4) certain types of libelous statements (see Chapters 4, 5 and 6); and (5) advertising that is false, misleading or about an unlawful product or service (see Chapter 15).

78. 268 P.3d 12 (Kan. 2012).

INTERNET-POSTED THREATS AGAINST THE PRESIDENT: A COLLEGE STUDENT LEARNS THE HARD WAY

"If anyone going to UM [University of Miami] to see Obama today, get ur phones out and record. Cause at any moment im gonna put a bullet through his head and u don't wanna miss that? Youtube!"

That was the message Joaquin Serrapio, a student at Miami-Dade College, posted on his Facebook page in 2012. It proved highly problematic when the Secret Service discovered it. Serrapio was sentenced later that year to four months of home confinement, three years of probation and ordered to perform 250 hours of community service for posting both it and another message threatening President Barack Obama. A federal statute (18 U.S.C. § 871) makes it a crime to communicate "any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States." During sentencing, U.S. District Judge Marcia Cooke offered this simple yet sage piece of advice: "I want to make clear that people have the right to criticize our government, but the critique should not threaten peoples' lives."

Hate speech is one thing, but what about symbolic acts that attempt to communicate the same kinds of messages, burning a cross on someone's lawn, for example? The Supreme Court faced this question in 1992 when it struck down a St. Paul, Minn., ordinance that forbade the display of a burning cross or a Nazi swastika or any writing or picture that "arouses the anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." Minnesota courts had approved the law, saying the phrase "arouses anger, alarm or resentment in others" was another way of saying "fighting words." But the statute violated the First Amendment, the high court said, because it was content based—that is, it only applied to fighting words that insult or provoke violence on the basis of race, color, creed or gender. What about fighting words used to express hostility toward someone because of their political affiliation, or their membership in a union or the place where they were born? Justice Antonin Scalia asked. The city has chosen to punish the use of certain kinds of fighting words, but not others, he said. The majority of the court agreed that cross burning was a reprehensible act, but contended there were other laws that could be used to stop such terroristic threats that did not implicate the First Amendment, such as trespass or criminal damage to property. Eleven years later the high court revisited the issue in a case involving Virginia's law against cross burning and ruled that a state could proscribe cross burning without infringing on First Amendment freedoms, so long as the state made it a crime to burn a cross *with the purpose to intimidate the victim.* The intimidation factor is the key, Justice Sandra Day O'Connor wrote. The state would have to prove that the cross burner intended to intimidate the victim; the threat could not be inferred simply because a cross was burned on the victim's lawn.[79]

79. *Virginia* v. *Black,* 538 U.S. 343 (2003); see also Greenhouse, "Justices Allow Bans."

The opinion in this second cross-burning case highlights another category of speech (a category distinct from both fighting words in *Chaplinsky* and incitement to violence in *Brandenburg*) that is not protected by the First Amendment—**true threats** of violence. As defined by Justice O'Connor in the Virginia cross burning case, true threats are "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." She added that "intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." On the other hand, "political hyperbole" is not a true threat.

TEXT MESSAGES AND TRUE THREATS: THINK TWICE ABOUT SENDING THAT MESSAGE

In May 2010, a middle-school student in Washington state identified by the initials M.W. sent the following text message to another minor whom he was interested in dating:

> I deserve you and your friends shouldn't judge me, and say I'm weird. I thought you hated people who judge or do you just hate me? They're worse than me. Probably a bunch of smokers and Mariah needs to shut the fuck up, and stop saying I'm your stalker, and you agree with her. Thanks. I shouldn't even try. I should just walk into the school with an M16, and end everyone just give up just be like, fuck you all, I'm tired of you being stupid.

The text eventually came to the attention of school officials, who expelled M.W. A juvenile court also found M.W. guilty of threatening to cause great bodily harm to the school principal, who testified that he took M.W.'s messages seriously because of previous incidents in which M.W. drew pictures of people shooting people and of people stabbing people. The principal also testified about an incident in which M.W. hid a pair of scissors up his sleeve and said he planned to stab another student.

In November 2011, an appellate court in *Washington* v. *M.W.* upheld the conviction and concluded that M.W.'s speech constituted a true threat against the principal and thus was not protected by the First Amendment. The court initially defined a true threat as "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression to inflict bodily harm or to take a life." It then applied this rule to the facts of the case and found the speech was a true threat because the principal took seriously M.W.'s threat to "end everyone" at the school with an M-16 and that the principal included himself among those at risk because "everyone" includes students and school officials. The court also noted that the principal was allowed to consider M.W.'s past problematic behaviors in reaching this determination.

Sometimes there is a right way to market one's book and sometimes there is a wrong way. This is a case involving the latter. To drum up publicity for his self-published book "Anthrax: Shock and Awe Terror," Marc McMain Keyser mailed about 120 envelopes to news outlets, elected officials and businesses like Starbucks and McDonalds. The envelopes included materials touting the book. So far so good. What was the problem?

Keyser also included in each envelope a white sugar packet "with the sugar markings covered by a label stating 'Anthrax' in large letters, 'Sample' in smaller letters and an orange and black biohazard symbol." Keyser was convicted on two counts of mailing threatening communications and three "hoax" counts for communicating false or misleading information regarding the presence of a biological weapon. Keyser, however, argued that the First Amendment protected his speech.

In December 2012, the 9th U.S. Circuit Court of Appeals rejected Keyser's free-speech argument in *United States* v. *Keyser*. As for the threats counts, the appellate court observed that "a reasonable person would understand that a recipient would perceive a packet of powder with the word 'Anthrax' and a biohazard symbol printed on it as a threat. A reasonable person would also understand that the word 'sample' would not alleviate that concern—if read and processed at all, the word would likely indicate a small amount of the actual substance." As for the hoax counts, the court held the First Amendment did not protect Keyser because "false and misleading information indicating an act of terrorism is not a simple lie. Instead, it tends to incite a tangible negative response. Here, law enforcement and emergency workers responded to the mailings as potential acts of terror, arriving with hazardous materials units, evacuating buildings, sending the samples off to a laboratory for tests and devoting resources to investigating the source of the mailings."

In 2011, states were attempting to adopt anti-cyberbullying statutes, using language from the true threats doctrine to sweep up this growing problem. Whether such laws are constitutional will be sorted out by courts throughout the rest of this decade. But the reality is that adoption of such laws is not likely to deter a teenager from bullying another teenager in cyberspace.

WHITE SUPREMACY AND THE INTERNET-BASED SOLICITATION OF THE MURDER OF A JUDGE: IS IT FIRST AMENDMENT-PROTECTED SPEECH?

A federal appellate court ruled in October 2012 that white supremacist William White was guilty of criminal solicitation of violence (speech not protected by the First Amendment and prohibited by a federal statute, 18 U.S.C. § 373) based on statements he posted on a Web site called Overthrow.com that he created to advance white supremacy. Specifically, White was upset that another white supremacist, Matthew Hale, had earlier been convicted by a jury of soliciting the murder of a federal judge. In response to Hale's conviction, White wrote on his Web site that "[e]veryone associated with the Matt Hale trial has deserved assassination for a long time." White also disclosed on the site both the home address and the mobile, home and work telephone numbers of the foreperson (Juror A) on the Hale jury. White, however, did not make an explicit request for the foreperson to be harmed.

Significantly and problematically for William White, his posting described Juror A as both a Jew and a homosexual with a black lover—statements that, in the appellate court's estimation, would make Juror A "loathed by readers of White's neo-Nazi Web site." The 7th U.S. Circuit Court of Appeals thus concluded in *United States* v. *White*[80] that "a rational jury could have found beyond a reasonable doubt that, based on the contents of the website, its readership, and other contextual factors, White intentionally solicited a violent crime against Juror A by posting Juror A's personal information on his website." The phrase "beyond a reasonable doubt" refers to the standard of evidence by which the prosecution must prove a criminal case. The appellate court added that "White rightfully emphasizes that the First Amendment protects even speech that is loathsome. But criminal solicitations are simply not protected by the First Amendment."

The efforts to control hate speech in the past three decades have focused particularly on public schools and universities. More than 300 colleges promulgated speech codes in the 1980s and early 1990s, but after several court rulings against such policies, most school policies were either abandoned or simply unenforced.[81] The courts tended to follow the principles from *Chaplinsky* and *Gooding* that limit prosecution of such hate speech to face-to-face encounters that could result in physical injury or provoke violent acts.

A policy drafted by the school board in State College, Pa., was declared unconstitutional by a federal appeals court because it was vague and overbroad and would punish students for "simple acts of teasing and name calling." A lawsuit against the policy was filed on behalf of two students who said they feared they would be punished if they expressed their religious belief that homosexuality is a sin. The district defined harassment as verbal or physical conduct based on race, sex, national origin, sexual orientation or other personal characteristics that has the effect of creating an intimidating or hostile environment. Examples of such harassment included jokes, name-calling, graffiti and innuendo as well as making fun of a student's clothing, social skills or surname. The appeals court agreed that preventing actual discrimination in school was a legitimate, even compelling, government interest. But the school district's policy was simply overbroad, prohibiting a substantial amount of speech that would not constitute actionable harassment under either federal or state law.[82] The government cannot prohibit invectives or epithets that simply injure someone's feelings or are merely rude or discourteous. The Pennsylvania ruling mirrors other similar decisions throughout the nation that pose a real dilemma for school administrators and legislators who are seeking to reduce the verbal aggressiveness common on many school yards.

The government cannot prohibit invectives or epithets that simply injure someone's feelings or are merely rude or discourteous.

At the college level, the difference between unprotected harassment and protected expression that merely offends was clarified by the Office of Civil Rights (OCR) of the U.S.

80. 2012 U.S. App. LEXIS 22229 (7th Cir. Oct. 26, 2012).

81. See, for example, *John Doe* v. *University of Michigan,* 721 F. Supp. 852 (1989); and *UWM Post* v. *Board of Regents of the University of Wisconsin,* 774 F. Supp. 1163 (1991).

82. *Saxe* v. *State College Area School District*, 240 F. 3d 200 (2001).

Department of Education in a July 28, 2003, memorandum. That memorandum provides that harassment

> must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program. Thus, OCR's standards require the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances, including the alleged victim's age.

This statement is important because many public universities today have policies that, although they are no longer called or referred to as speech codes, nonetheless restrict students' expressive rights. A Philadelphia-based organization called the Foundation for Individual Rights in Education (FIRE) aggressively challenges such policies while it simultaneously defends college students' rights of free speech. FIRE keeps tabs on these policies online at http://www.speechcodes.org and encourages students to come forward with instances of campus censorship.

University speech codes are still litigated today and, almost inevitably, are declared unconstitutional. For example, in 2007 a federal magistrate issued an injunction stopping California State University campuses from enforcing a policy that required all students to be "civil to one another."[83] The policy was challenged by members of the College Republicans at San Francisco State University who faced disciplinary charges for acts of incivility after they stepped on makeshift Hezbollah and Hamas flags at an anti-terrorism rally. Magistrate Wayne Brazil, finding that the civility rule was unconstitutionally vague (see page 12 regarding the void for vagueness doctrine), remarked during oral argument: "It might be fine for the university to say, 'Hey, we hope you folks are civil to one another,' but it's not fine for the university to say, 'If you're not civil, whatever that means, we're going to punish you.'" He added that "the First Amendment permits disrespectful and totally emotional discourse or communication." In March 2008, California State University settled the case when it agreed to amend the civility policy, as well as another rule that had too broadly defined sexual harassment as any "unwelcome conduct which emphasizes another person's sexuality," and to pay more than $41,000 in legal fees incurred by the College Republicans.[84]

In 2008, the 3rd U.S. Circuit Court of Appeals held that Temple University's sexual harassment policy (notice it was not called a speech code) was unconstitutionally overbroad in the scope of the speech it restricted (see page 12 regarding the overbreadth doctrine).[85] In ruling against Temple, the appellate court in *DeJohn* v. *Temple University* observed that "overbroad harassment policies can suppress or even chill core protected speech, and are susceptible to selective application amounting to content-based or viewpoint discrimination." In language incredibly favorable to the First Amendment freedom of speech, the court wrote that "discussion by adult students in a college classroom should not be restricted." Importantly, the court distinguished between high schools and colleges when it comes to restricting speech, writing "that Temple's administrators are granted *less leeway* in regulating student speech than are public elementary or high school administrators." Temple's policy was flawed, in part, because it punished individuals for the intent of their speech, even if the speech caused no harm.

83. Egelko, "CSU's Civility Rule Violates First Amendment."
84. Egelko, "Settlement Ends Rules on Civility for CSU Students."
85. *DeJohn* v. *Temple University*, 537 F. 3d 301 (3d Cir. 2008).

In 2010 FIRE identified another disturbing trend on college campuses: charging student groups that bring controversial speakers to campus exorbitant "security fees" for police protection. For instance, Temple University that year withdrew an unconstitutional, after-the-fact $800 security fee levied on a student group for hosting a presentation by Dutch politician Geert Wilders, who was on trial in the Court of Amsterdam for his controversial remarks about terrorism and Islam. Temple dropped its demand for an extra security fee under pressure from FIRE. By making costs high, universities can chill controversial speech on campus.

SUMMARY Hate speech is not a new problem in America, but courts now are being called on to determine just how far the state may go in limiting what people say and write about other people when their language is abusive or includes racial, ethnic or religious invective. In the early 1940s the Supreme Court ruled that so-called fighting words could be prohibited, but these words have come to mean face-to-face invective or insults that are likely to result in a violent response on the part of the victim. The high court voided a St. Paul, Minn., ordinance that punished such abusive speech because, the court said, the law did not ban all fighting words, merely some kinds of fighting words (i.e., racial or religious invective) that the community believed were improper. The decision in this case has sharply limited attempts by state universities and colleges and public schools to use speech codes to discourage hate speech or other politically incorrect comments or publications.

THE FIRST AMENDMENT AND ELECTION CAMPAIGNS

The First Amendment is clearly implicated in any election campaign. Candidates give speeches, publish advertising, hand out leaflets, and undertake a variety of other activities that clearly fall within the ambit of constitutional protection. But since the mid-1970s the First Amendment and political campaigns have intersected in another way as well. Attempts by Congress and other legislative bodies to regulate the flow of money in political campaigns have been consistently challenged as infringing on the right of freedom of expression.

Campaign reform laws tend to fall into one of two categories: those that limit how much candidates and their supporters can spend on the election, and those that limit how much money people can contribute to candidates and political parties. The courts have tended to find more serious First Amendment problems with the laws that limit spending than the laws that limit contributions, although this is not always the case.

A Supreme Court opinion on point is a 2006 decision, *Randall* v. *Sorrell*.[86] At issue was a Vermont campaign-finance statute limiting both the amounts that candidates for state office could spend on their campaigns (expenditure limitations) and the amounts that individuals, organizations and political parties could contribute to those campaigns (contribution limitations). For instance, a candidate for governor could spend no more than $300,000 during a

86. 548 U.S. 230 (2006).

two-year general election cycle, while a candidate for lieutenant governor could spend an even lower maximum of $100,000 (under the statute, the figures could be adjusted upward slightly for inflation). Vermont also had the most strict campaign contribution limits in the nation, including a $400 cap that any single individual could contribute to the campaign of a candidate for statewide office (governor, lieutenant governor, etc.) during a two-year general election cycle and a $200 cap for contributions to state legislators.

In 2006, the nation's high court declared both the expenditure and contribution limits in Vermont "inconsistent with the First Amendment." It noted that "well-established precedent makes clear that the expenditure limits violate the First Amendment." The precedent referred to was the 1976 decision in *Buckley* v. *Valeo*[87] in which the court first adopted, in the context of the Federal Election Campaign Act of 1971, the dichotomy between expenditure limits and contribution limits. In *Buckley*, the court upheld a $1,000 per election limit on individual contributions and reasoned that contribution limits are permissible in order to prevent "corruption and the appearance of corruption."[88] The court in *Buckley*, however, held that this same interest was not sufficient to justify limits on expenditures by candidates and, instead, reasoned that expenditure caps are not permissible because they "necessarily reduce the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."

As for Vermont's contribution limits, a majority of the justices found they were "well below the limits this court upheld in *Buckley*," noting that "in terms of real dollars (i.e., adjusting for inflation), [Vermont's limit] on individual contributions to a campaign for governor is slightly more than one-twentieth of the limit on contributions to campaigns for federal office before the Court in *Buckley*." The court concluded in *Randall* that Vermont's contribution limits were simply "too restrictive," threatened "to inhibit effective advocacy by those who seek election, particularly challengers," and imposed burdens on the First Amendment right of expression that were "disproportionately severe" to advancing the goals of preventing actual corruption and the appearance of corruption. The court, however, did not identify a precise dollar amount limitation that would be permissible on contributions.

The bottom line from Supreme Court decisions stretching from *Buckley* through *Randall* is that expenditure limits imposed on candidates violate free expression rights of candidates for public office, while contribution limits imposed on donors are permissible unless, as was the case in *Randall*, they become so restrictive and limiting that they prevent more expression than is needed to serve the interests of preventing corruption and its appearance. The decision in *Randall* was seen by some as "a defeat for liberal reformers who wanted to lessen the impact of money in politics."[89] Both cases, however, involved splintered decisions among the justices, suggesting that the still-valid dichotomy between expenditure limits (not permissible) and contributions (permissible if not too low) is tenuous and may change if the court's composition shifts significantly. In fact, only three justices in *Randall* firmly endorsed the continued use of the *Buckley* dichotomy.

87. 424 U.S. 1 (1976).
88. Subsequent to *Buckley*, the court also upheld a $1,075 limit on contributions to candidates for Missouri state auditor in *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377 (2000).
89. Savage, "Kennedy Moves Front and Center."

Other recent issues affecting the intersection of money, speech and politics involve challenges to the Bipartisan Campaign Reform Act (BCRA) of 2002 that, among other things, makes it a federal crime for any corporation to broadcast, shortly before an election, any ads that name a federal candidate for elected office and that target the electorate.

In 2008, the Supreme Court in *Davis* v. *Federal Election Commission* struck down as unconstitutional a portion of the BCRA called the Millionaire's Amendment.[90] The provision stated that if a candidate for the U.S. House of Representatives spent more than $350,000 of his or her own personal funds running for office, then that candidate's opponent was exempt from the normal, strict limits on contributions that can be received from individual donors (the 2008 contribution cap on a donor to a candidate for Congress was $2,300 during a two-year election cycle) and could instead receive three times the normal amount. The self-financing candidate (the one spending more than $350,000), however, was still subject to the normal limits on donor contributions. In brief, if a wealthy candidate spent too much of his or her own money (more than $350,000), then his or her opponent was cut a break from the normal contribution limits while the wealthy candidate was not. In declaring that the Millionaire's Amendment impermissibly burdened the First Amendment right of a wealthy, self-financing candidate "to spend his own money for campaign speech" by imposing asymmetrical contribution limits, Samuel Alito wrote for the five-justice majority that "we have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." The majority rejected the idea that leveling the playing field for candidates of different wealth justified the provision.

In 2010, the Supreme Court declared unconstitutional in *Citizens United* v. *Federal Elections Commission*[91] a federal law that prohibited corporations (both for-profit and nonprofit advocacy corporations) and unions from using their general treasury funds to pay for ads expressly advocating for the election or defeat of a candidate or for similar electioneering communications made within 30 days of a primary or 60 days of a general election. In reaching the conclusion that this statute violated the free speech rights of corporations, a five-justice majority concluded that the First Amendment "generally prohibits the suppression of political speech based on the speaker's identity." The decision, which centered on a documentary that was sponsored by a nonprofit corporation and that was highly critical of Hillary Clinton, reinforced the twin principles that: (1) corporations have First Amendment speech rights; and (2) political speech—even that paid for by corporations—is at the core of the First Amendment. Writing for the majority, Justice Anthony Kennedy reasoned that "speech restrictions based on the identity of the speaker are all too often simply a means to control content." The Court left in place, however, rules imposed upon corporations that spend such money that require them to disclose and report it. The decision in *Citizens United* overruled the precedent from the 1990 ruling in *Austin* v. *Michigan State Chamber of Commerce*[92] that had held that political speech may be banned based on the speaker's corporate identity (see pages 3–4 regarding stare decisis and overruling precedent).

90. 554 U.S. 724 (2008).
91. 558 U.S. 310 (2010). The documentary, "Hillary: The Movie," was released during the 2008 Democratic presidential primaries in which Hillary Clinton was competing against Barack Obama and John Edwards.
92. 494 U.S. 652 (1990).

The aftermath of *Citizens United* saw a rise in so-called Super PACs (political action committees), such as the conservative-leaning Restore Our Future and the liberal-slanting Priorities USA Action, raising and spending vast sums of money on advertisements during the 2012 election-year cycle. Priorities USA Action, for instance, stated on its website in June 2012, "We are committed to the reelection of President Obama and setting the record straight when there are misleading attacks against him and other progressive leaders," while Restore Our Future called Mitt Romney "the Republican candidate that can put our country back on the right path and the only one who can defeat Barack Obama."

The Supreme Court, however, narrowly rejected an opportunity in 2012 to reconsider its controversial *Citizens United* opinion when it issued a **per curiam opinion** in *American Tradition Partnership, Inc.* v. *Bullock*.[93] The case involved a century-old Montana statute prohibiting corporations from spending money "in connection with a candidate or a political committee that supports or opposes a candidate or a political party." The Supreme Court of Montana had upheld the law in 2011—one year after *Citizens United* was decided—because it concluded that independent expenditures by corporations had, in fact, caused actual corruption or given the appearance of corruption in the Big Sky state. The five conservative-leaning justices on the U.S. Supreme Court, however, found that *Citizens United* involved "a similar federal law" and that Montana, in an effort to defend its law, had failed to meaningfully distinguish it from that in *Citizens United*. In doing so, the majority overruled the Supreme Court of Montana and struck down the state law for violating the ruling in *Citizens United*. The four liberal-leaning justices at the time—Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan—dissented. Justice Breyer wrote for the dissenters that "Montana's experience, like considerable experience elsewhere since the Court's decision in *Citizens United,* casts grave doubt on the Court's supposition that independent expenditures do not corrupt or appear to do so."

SUMMARY

Efforts to reform the expensive American electoral process seem to be gaining momentum in the early part of the 21st century, but under the Constitution there is only so much that the law can do. The Supreme Court has ruled that while it is permissible to place a limit on how much money one person or business can donate to a campaign, it may be a violation of the First Amendment to place a limit on how much a candidate may spend. Because the presentation of campaign messages via the mass media is so much a part of the current electoral process and because sending such messages costs money, campaign spending is tied closely to freedom of speech and press and is protected by the First Amendment, the court has ruled.

THE FIRST AMENDMENT AND THE INFORMATION SUPERHIGHWAY

The First Amendment was drafted and approved in the late 18th century, a time when newspapers, magazines, books and handbills comprised the press that was intended to be protected by the constitutional provision. As each new mass medium has emerged—radio, motion pictures, over-the-air television, cable television and so forth—the courts have

93. 132 S. Ct. 2490 (2012).

had to define the scope of First Amendment protection appropriate to that medium. And so it is with the Internet, computer-mediated communication. The next 13 chapters of this text contain references to laws regarding libel, invasion of privacy, access to information, obscenity, copyright and advertising, and they contain references to how these laws are being applied to computer-mediated communication. These emerging rules have in no small part been dictated by decisions by the federal courts that speak to the general question of the application of the First Amendment to the Internet. The next few pages focus on this general question.

How the government regulates a message communicated by any medium is generally determined by the content of that particular message. A plea to burn down city hall and kill the mayor is sedition; a call to vote the mayor out of office is not. Calling Mary Smith a thief is libelous; calling Mary Smith a good student is not. The law is applied, then, based on what the message says. But in some instances the regulation of a message is based on more than the content of the message; it is also influenced by the kind of medium through which the message is transmitted. As some have stated, there is a medium-specific First Amendment jurisprudence in the United States, meaning that the scope and amount of protection that speech receives will be influenced by the nature of the medium on which it is conveyed.

At least four categories of traditional communications media were in common use when the Internet first burst onto the scene, and even today each is regulated somewhat differently by the law. The printed press—newspapers, magazines, books and pamphlets—enjoys the greatest freedom of all mass media from government regulation. The over-the-air broadcast media—television and radio—enjoy the least amount of freedom from government censorship. Cable television is somewhere between these two, enjoying more freedom than broadcasting but somewhat less than the print. Few limits are placed on the messages transmitted via the telephone, and those that are must be very narrowly drawn.[94] There are some ifs, ands or buts in this simple outline, but it is an accurate summary of the hierarchy of mass media when measured by First Amendment freedom.

Why is the printed press allotted the most protection by the First Amendment? There are no physical limits on the number of newspapers and magazines or handbills that can be published. (Economic limits are another matter, but one not considered by the courts in this context.) Since the founding of the Republic in 1789, the printed press has traditionally been free. The receiver must generally take an active role in purchasing a book or a magazine or newspaper. Young people must have the economic wherewithal to buy a newspaper or magazine, and then have the literacy skills to read it.

It is just as obvious why broadcast media have fared the poorest in First Amendment protection. There is an actual physical limit on the number of radio and television channels that exist. All but a very few are in use. Since not everyone who wants such a channel can have one, it is up to the government to select who gets these scarce broadcast frequencies and to make certain those who use the frequencies serve the interests of all listeners and viewers. Because of spectrum scarcity and other reasons, broadcasting has been regulated nearly since its inception. It has no tradition of freedom. All the receiver must do to listen to the radio or watch television is to flick a switch. Even children who don't know how to read can do this; radio and television are easily accessible to children.

94. *Sable Communications* v. *FCC,* 492 U.S. 115 (1989).

Cable television and telephones fit somewhere in between. There is potentially an unlimited capacity for messages to be transmitted by each medium. Both have been historically regulated, but not to the extent that broadcasting has been regulated. Although a receiver can watch a cable television channel as easily as he or she can watch an over-the-air channel, the receiver must take a far more active role by subscribing to a cable system. Although this action may seem like a trivial distinction, the courts have made much of it. Judges have presumed that the people who subscribe to cable television should know what they will receive. Federal law mandates that cable television companies provide safeguards (called cable locks) for parents who want to shield their children from violent or erotic programming.* Such screening technology is only now coming into use for over-the-air television. The use of a telephone also requires a more active role by the receiver than simply switching on a radio or television set.

GOOGLE AND CENSORSHIP REQUESTS ACROSS THE GLOBE

Google made headlines in 2010 when it went head-to-head with the Chinese government over the censorship of its search engine in that country. It was a brave display of a corporation sticking up for free expression. That same year, Google launched a Web site devoted to documenting the number of requests it received from government entities across the globe for the removal of content or the disclosure of user data. Removal requests seek the removal of content from Google search results or from another Google product, including YouTube, while data requests seek information about Google user accounts or products. The Web site is located at http://www.google.com/governmentrequests.

Where do computer-mediated communication systems fit into this hierarchy? In 1997 the Supreme Court ruled that communication via the Internet deserves the highest level of First Amendment protection, protection comparable to that given to print newspapers, magazines and books.[95] The high court made this decision as it ruled that the central provisions of the 1996 Communications Decency Act that restricted the transmission of indecent material over the Internet violated the U.S. Constitution. Recognizing that each medium of communication may present its own constitutional problems, Justice John Paul Stevens wrote that the members of the high court could find no basis in past decisions for "qualifying the level of First Amendment scrutiny that should be applied to this medium [the Internet]."

The court rejected the notion prevalent among those in Congress who voted for the Communications Decency Act that communication via the Internet should be treated in the same manner as communication via over-the-air radio and television. The court said that the scarcity of frequencies that had long justified the regulation of broadcasting did not apply in the case of the Internet, which, it said, can hardly be considered a "scarce" expressive commodity.

* But in *U.S.* v. *Playboy Entertainment Group, Inc.,* 529 U.S. 803 (2000), the Supreme Court suggested that cable television enjoys the full protection of the First Amendment. This notion has yet to be fleshed out by the court.

95. *Reno* v. *American Civil Liberties Union,* 521 U.S. 844 (1997).

The importance of this ruling cannot be overestimated. Not only did the court strike down a restrictive federal law that was certain to retard the growth of computer-mediated communication, it ruled that any other governmental agency that seeks to regulate communication via the information superhighway must treat this medium in the same manner it would treat a print newspaper or book.

NET NEUTRALITY

The potential of the Internet as "vast democratic fora" and a "new marketplace of ideas"—terms used by Justice Stevens to describe it back in 1997 in *Reno* v. *ACLU*—is seriously jeopardized by the possibility that the companies controlling broadband access to the Internet will block, degrade and otherwise discriminate against some types of Internet content, services and applications. Put differently, the danger exists today that those who provide on-ramps to the Internet will harm the open and nondiscriminatory nature of the medium. Interest groups such as Public Knowledge[96] thus advocate the concept of *net neutrality*, a relatively abstract term suggesting that Internet service providers should treat all traffic and content similarly and that they should not charge more money for or block access to faster services. More simply put, as the San Francisco Chronicle described it, net neutrality is "the idea that traffic on the Internet should flow as democratically as possible."[97]

Net neutrality raises important First Amendment issues for all Internet users, including the right to receive speech (including a diversity of ideas) and the right to access information. The statutes and regulations adopted by Congress and the Federal Communications Commission today will largely determine whether net neutrality becomes a reality or whether the Internet will someday be treated more like cable, where the cable system provider charges different rates for different content and services. As media merge (possibly changing the nature of the medium-specific First Amendment jurisprudence adopted by the Supreme Court) and as cable operators and phone companies compete for control over the on-ramps to the Internet, the First Amendment rights of all citizens are placed in the balance.

The issue of network neutrality heated up in 2008 when the FCC held hearings to investigate allegations that Comcast, a major opponent of government action mandating network neutrality, was restricting and interfering with Internet access to the flow of content, such as video clips, songs and software files, on a file-sharing service called BitTorrent.[98] Such a discriminatory practice by a service provider like Comcast, which provides broadband Internet access over cable lines, that targets the use of a particular peer-to-peer application is precisely what advocates of network neutrality fear.

In 2008, the FCC ruled that Comcast had unduly interfered with Internet users' right to access lawful Internet content and to use the applications of their choice.[99] The FCC ordered

96. The organization describes itself as a Washington, D.C.–based "advocacy group working to defend your rights in the emerging digital culture." See http://www.publicknowledge.org.
97. Abate and Kopytoff, "Are Internet Toll Roads Ahead?"
98. Kang, "FCC Head Says Action Possible on Web Limits"; *Associated Press*, "FCC Poised to Punish Comcast for Traffic Blocking."
99. *In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, File No. EB-08-IH-1518 (Aug. 20, 2008).

Comcast to disclose details about its discriminatory network management practices and to submit a plan showing how it would stop such practices by the end of 2008. The order, a huge victory for network neutrality advocates, signaled the FCC's willingness to police Internet disputes regarding discriminatory network management practices and consumer access to lawful content. In particular, the FCC made it clear that it was going to enforce as law four policy principles it adopted in 2005. Those principles provide that Internet consumers are entitled to

1. access the lawful Internet content of their choice;
2. run applications and use services of their choice, subject to the needs of law enforcement;
3. connect their choice of legal devices that do not harm the network; and
4. compete among network providers, application and service providers and content providers.

Comcast, however, announced shortly after the FCC's ruling that it would cap the amount of download volume of its heaviest consumers who, perhaps not so coincidentally, are those who use peer-to-peer, file-sharing services. Comcast appealed the FCC's precedent-setting order, taking its case to the U.S. Circuit Court of Appeals for the District of Columbia.

In early 2010, the D.C. Circuit dealt the FCC a huge blow on the net neutrality front when it held in *Comcast Corp.* v. *FCC*[100] that the FCC simply lacked authority to regulate Comcast's network management practices. The FCC asserted that although it lacked express authority over such practices, it nonetheless possessed ancillary authority to bar Comcast from interfering with its customers' use of peer-to-peer networking applications. In particular, 47 U.S.C. § 154 (i) authorizes the FCC to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions." Under this provision, the FCC may exercise "ancillary" authority only if it demonstrates that its actions are reasonably ancillary to the effective performance of its statutorily mandated responsibilities. The appellate court held that the FCC simply had failed to make such a showing. What does this mean? It means that unless the decision is overruled by the U.S. Supreme Court, the FCC will need to ask Congress to give it express statutory authority to regulate the network management practices of broadband providers.

The appellate court's decision was lauded by Republican FCC Commissioner Meredith Baker, who stated that it "emphasizes the limits of the Commission's authority to regulate the Internet. The D.C. Circuit's strong words . . . remind us that as an independent agency, we must always be constrained by the statute. We stray from it at our peril." Conversely, all three Democratic commissioners lamented the decision, but they vowed to plow ahead with the National Broadband Plan (see Chapter 16).

In December 2010, however, by a three-to-two vote that split along party lines (the three Democratic commissioners voted for the measure, the two Republican commissioners voted against it), the FCC approved an order that: (1) requires all broadband providers to publicly disclose network management practices (goal = *increased transparency to help consumers*); (2) restricts broadband providers from blocking lawful Internet content, lawful Web sites and lawful applications (goal = *no blocking*); and (3) bars fixed broadband providers from engaging in unreasonable discrimination in transmitting lawful network traffic (goal = *no unreasonable*

100. 600 F. 3d 642 (D.C. Cir. 2010).

discrimination by ISPs). In brief, the goals are increased transparency to help consumers, no blocking of lawful content and applications and no unreasonable discrimination.

FCC Chairman Julius Genachowski, a Democrat appointed by President Obama, lauded the order, stating that "consumers and innovators have a right to send and receive lawful traffic—to go where they want, say what they want, experiment with ideas—commercial and social, and use the devices of their choice. The rules thus prohibit the blocking of lawful content, apps, services, and the connection of devices to the network." He claimed the new "rules will increase certainty in the marketplace; spur investment both at the edge and in the core of our broadband networks, and contribute to a 21st century job-creation engine in the United States."

In stark contrast, Commissioner Robert McDowell, a Republican, saw the move as an unlawful power grab by the FCC beyond the authority vested in it by Congress (per the *Comcast Corp.* decision noted earlier) and stated that under the new rules, "politically favored companies will be able to pressure three political appointees to regulate their rivals to gain competitive advantages. Litigation will supplant innovation. Instead of investing in tomorrow's technologies, precious capital will be diverted to pay lawyers' fees. The era of Internet regulatory arbitrage has dawned."

In 2011, Verizon filed a lawsuit challenging the FCC's new rules. In a statement announcing the lawsuit in *Verizon* v. *FCC*, a Verizon attorney stated, "We are deeply concerned by the FCC's assertion of broad authority for sweeping new regulation of broadband networks and the Internet itself. We believe this assertion of authority goes well beyond any authority provided by Congress, and creates uncertainty for the communications industry, innovators, investors and consumers." In April 2011, Verizon's lawsuit suffered a brief setback, on technical grounds related to timing, when it was dismissed. Why? Because the FCC's net neutrality order had not yet been officially published in the official Federal Register, where such FCC rules are set forth. In brief, it simply was too early for Verizon to file the lawsuit; once published in the Federal Register, however, then the lawsuit could be properly filed, and Verizon vowed to do precisely that. In 2013, Verizon's challenge was still pending before the U.S. Court of Appeals for the District of Columbia, with oral argument taking place in September 2013.

BIBLIOGRAPHY

Abate, Tom, and Verne Kopytoff. "Are Internet Toll Roads Ahead?" *San Francisco Chronicle*, 7 February 2006, C1.

Associated Press. "FCC Poised to Punish Comcast for Traffic Blocking." 26 July 2008.

———. "Shippensburg Agrees to Drop Speech Code Rules." 25 February 2004.

———. "UNC Students Sue Over Newspaper Funding Cuts." 15 July 2004.

———. "U.S. Judge Says Utica Schools Illegally Censored Prep Paper." 13 October 2004.

Bruni, Frank. "Dueling Perspectives: Two Views of Reality Vying on the Airwaves." *The New York Times,* 18 April 1999, A11.

Burnett, John. "Embedded/Unembedded II." *Columbia Journalism Review,* May/June 2003, 43.

Cranberg, Gilbert. "The Gulf of Credibility." *Columbia Journalism Review,* March/April 1988, 19.

DeFalco, Beth. "Body Piercing Photo Causes Friction Between Administration, Student Press." *Associated Press,* 20 November 2004.

Delgado, Richard. "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling." *Harvard Civil Rights—Civil Liberties Law Review* 17 (1982): 133.
Denniston, Lyle. "Son of Sam Law vs. First Amendment." *Washington Journalism Review*, May 1991, 56.
Edmonson, George. "Suit Seeks Military Coffin Photos." *Atlanta Journal-Constitution,* 5 October 2004, 7A.
Egelko, Bob. "CSU's Civility Rule Violates First Amendment." *San Francisco Chronicle*, 8 November 2007, B3.
———. "Settlement Ends Rules on Civility for CSU Students." *San Francisco Chronicle*, 8 March 2008, B1.
Estrada, Naldy, and Julio Robles. "All the News That's Fit to Print and Won't Upset the Faculty." *Los Angeles Times,* 7 July 2003, California Metro 11.
Galloway, Angela. "Political Spending Unchecked." *Seattle Post-Intelligencer,* 28 July 2000, A1.
Garofoli, Joe. "Flag-Draped Coffin Photos Released." *San Francisco Chronicle,* 29 April 2005, A10.
Greenhouse, Linda. "Court Strikes Down Curb on Visits by Jehovah's Witnesses." *The New York Times,* 18 June 2003, A12.
———. "Justices Allow Bans on Cross Burnings Intended as Threats." *The New York Times,* 8 April 2003, A1.
———. "Justices, in a 5-to-4 Decision, Back Campaign Finance Law That Curbs Contributions." *The New York Times,* 11 December 2003, A1.
Hentoff, Nat. *Free Speech for Me—But Not for Thee: How the American Left and Right Relentlessly Censor Each Other.* New York: HarperCollins, 1992.
Jacobs, Matthew J. "Assessing the Constitutionality of Press Restrictions in the Persian Gulf War." *Stanford Law Review* 44 (1992): 674.
Kang, Cecilia. "FCC Head Says Action Possible on Web Limits." *Washington Post*, 26 February 2008, D1.
Lewis, Neil A., and Richard A. Oppel Jr. "U.S. Court Issues Discordant Ruling on Campaign Law." *The New York Times,* 3 May 2003, A1.
Lewis, Richard. "College Newspapers Stolen Over Reparations Ad." *The Seattle Times,* 18 March 2001, A5.
Lively, Donald. "The Information Superhighway: A First Amendment Roadmap." *Boston College Law Review* 35 (1994): 1066.
MacArthur, John R. *Second Front: Censorship and Propaganda in the Gulf War.* New York: Hill and Wang, 1992.
MacCormack, Zeke. "No Snow: Texas School Bans Book." *Seattle Post-Intelligencer,* 10 September 1999, A1.
"The Message Is the Medium: The First Amendment on the Information Superhighway." *Harvard Law Review* 107 (1994): 1062.
Paulk, Crystal. "Campus Crime Real Despite What You Read." *Quill,* September 1997, 48.
Preston, Julia. "Judge Says U.S. Must Release Prison Photos." *The New York Times,* 27 May 2005, A10.
Riskin, Cynthia. "Communications Students Support Some Speech, Press Censorship." *The Washington Newspaper,* January/February 1994.

Salamon, Julie. “New Tools for Reporters Make Images Instant, but Coverage No Simpler.” *The New York Times,* 6 April 2003, B13.
Savage, David G. “Kennedy Moves Front and Center on Court.” *Los Angeles Times*, 2 July 2006.
“School Censorship on Rise, Civil Liberties Group Says.” *Seattle Post-Intelligencer,* 29 August 1991.
Sharkey, Jacqueline. “The Shallow End of the Pool.” *American Journalism Review,* December 1994, 43.
Sterngold, James. “For Artistic Freedom, It’s Not the Worst of Times.” *The New York Times,* 20 September 1998, B1.
Tenhoff, Greg C. “Censoring the Public University Student Press.” *Southern California Law Review* 64 (1991): 511.
Thompson, Mark. “The Brief Ineffective Life of the Pentagon’s Media Pool.” *Columbia Journalism Review,* March/April 2002, 66.
Vaina, David. “The Vanishing Embedded Reporter in Iraq.” *Project for Excellence in Journalism*, 26 October 2006, http://www.journalism.org/node/2596.
Weaver, Russell L., and Donald E. Lively. *Understanding the First Amendment*. Newark, N.J.: LexisNexis.
White, Josh. “Government Authenticates Photos From Abu Ghraib.” *Washington Post*, 11 April 2006, A16.
Wilgoren, Jodi. “Don’t Give Us Little Wizards, The Anti-Potter Parents Cry.” *The New York Times,* 1 November 1999, A1.
Zeller, Tom. “Unfit: Harry Potter and Potty Humor.” *The New York Times,* 15 June 2003, B2.
Zernike, Kate. “Free-Speech Ruling Voids School District’s Harassment Policy.” *The New York Times,* 16 February 2001, A11.