UNIT 6

Individual Rights and Liberties

Visit the *Street Law* Web site at streetlaw.glencoe.com for unit-based activities.

This final unit of *Street Law* provides information on individual rights and liberties. Unit 6 focuses primarily on constitutional law and federal civil rights laws passed by the U.S. Congress.

The topics in Unit 6 are controversial ones. Reasonable people often disagree about many of these issues and, over time, courts and legislatures change the laws in these areas. Abortion, sexual harassment, discrimination, the rights of gay and lesbian people, and conflicts over religious rights are among the most difficult public policy issues in the United States. These issues can be divisive, but at the same time, the Bill of Rights and our civil rights laws are the hallmarks of the extraordinary freedom Americans have in the area of political and social rights.

After Chapter 36 introduces the study of constitutional law, Chapter 37 focuses on freedom of expression. This freedom is critical to maintain a democracy: citizens must be free to communicate, particularly with their government. This chapter also deals with the scope and limits of the government's ability to regulate expression,

STUDENT NONVIOLENT COORDINATING COMMITTEE
WE SHALL OVERCOME

Dr. Martin Luther King, Jr. championed the cause of individual rights and liberties for everyone.

and in some instances, to prevent and punish it. Similar principles are discussed in Chapter 38, Freedom of the Press. Chapter 39 looks at speech and press issues in special settings.

Chapter 40 presents freedom of religion. This area of law is particularly challenging because the right of individuals to practice their religion sometimes clashes directly with the government's obligation not to establish—or unfairly favor—any specific religion.

Chapter 41 introduces the concept of due process, or legal fairness. Due process concerns both fair procedures and protection from government interference with certain rights. The most controversial of these, the right to privacy, is the subject of Chapter 42.

Chapter 43 looks at the ways in which the U.S. Constitution prevents the government, and civil rights laws prevent companies and individuals, from discriminating unlawfully.

The final chapter in this unit, Chapter 44, provides a link between school and the world of work with its focus on rights and responsibilities in the workplace.

CHAPTER
36

Introduction to Constitutional Law

"Injustice anywhere is a threat to justice everywhere."

— Dr. Martin Luther King, Jr.

The U.S. Constitution is the framework of our government. It establishes the executive, legislative, and judicial branches. It is also the supreme law of the land, which all public officials are bound by oath to enforce. Moreover, the Constitution guarantees each American certain basic rights.

One remarkable feature of the U.S. Constitution is its endurance. It is the oldest written national constitution in the world that is still in use. Another remarkable feature of the Constitution is its ability to adapt itself to changing conditions.

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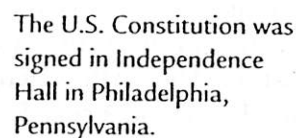


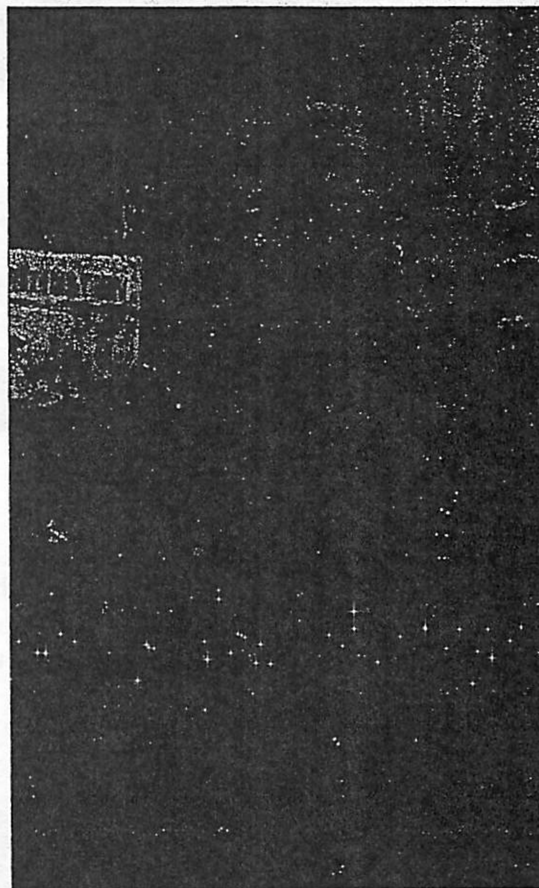
The U.S. Constitution was signed in Independence Hall in Philadelphia, Pennsylvania.

Amendments to the Constitution

The Founders of the United States knew that the Constitution might have to be changed. Therefore, they provided two methods of proposing **amendments**, or additions, to the Constitution. The first method is by a two-thirds vote of both houses of Congress; the second is by a national convention called by Congress at the request of the legislatures in two-thirds of the states. Once proposed, an amendment does not take effect unless it is ratified either by the legislatures in three-fourths of the states or by special ratifying conventions in three-fourths of the states.

The original Constitution, adopted in 1787, contained only a few provisions guaranteeing individual rights. However, citizens pressured their leaders to add a Bill of Rights. In response, the first ten amendments were adopted by Congress in 1791 and quickly ratified by the states.

These first ten amendments contain most of our basic rights. The First Amendment protects the freedoms of religion, speech, press, assembly, and petition. The Second Amendment protects the right of the people to bear arms. The Third Amendment protects against the quartering of soldiers in private homes, and the Fourth Amendment protects against unreasonable searches and seizures.



Collection of Cheekwood Museum of Art, Nashville, Tennessee

As this painting *His First Vote* (1868) by Thomas Waterman Wood shows, African American men won the right to vote when the Fifteenth Amendment became law. *How did the Fourteenth and Fifteenth Amendments expand civil rights in the nation?*

The Fifth Amendment provides a right to **due process** of law—fair procedures that are required when government action affects your rights—and gives certain rights to accused people, including protection against self-incrimination. The Sixth Amendment provides the rights to a lawyer, an impartial jury, and a speedy trial in criminal cases.

The Seventh Amendment provides for jury trials in civil cases. The Eighth Amendment bars cruel and unusual punishment and excessive bail or fines. The Ninth Amendment declares that the rights spelled out in the Constitution are not the only rights that people have. Finally, the Tenth Amendment reserves to the states and the people any powers not belonging to the federal government. (The text of the entire Constitution can be found on pages 570–599.)

The Bill of Rights was designed to protect Americans against the overuse of power by the *federal* government. Nothing in the unamended Constitution specifically requires *state* governments to abide by the Bill of Rights. But in interpreting the Fourteenth Amendment, which was passed after the Civil War, the U.S. Supreme Court has applied most protections in the Bill of Rights to the state and local levels of government, including public schools.

In addition to the Bill of Rights, later amendments provide other important rights. The Thirteenth Amendment forbids slavery and outlaws involuntary servitude, except as a punishment for crime. The Fourteenth Amendment requires equal protection of the laws for all citizens. It also provides that no state can deprive any citizen of "life, liberty, or property without due process of law."

Several amendments protect and broaden the right to vote in federal and state elections. The Fifteenth Amendment forbids denying the right to vote based on race or color. The Nineteenth Amendment gives women the right to vote. The Twenty-third Amendment gives citizens of Washington, D.C., the right to vote in presidential elections. The Twenty-fourth Amendment prohibits poll taxes. The Twenty-sixth Amendment gives all people 18 years of age or older the right to vote.

Problem 36.1

a. Do we have any important rights not listed in the Bill of Rights? If so, what are they? Make a list.

b. Over the years, a number of new constitutional amendments have been suggested or proposed. Do you think we need any new amendments to the Constitution? If so, what amendments do you propose, and why?

c. The following are some of our most basic and important rights. Based on your opinion, rank these rights in order from the most important to the least important. Explain your rankings.

- Right to privacy
- Right to a jury trial
- Right to freedom of religion
- Right to travel freely
- Right to freedom of speech
- Right to be free from self-incrimination
- Right to bear arms
- Right to freedom of the press
- Right to be free from cruel and unusual punishment
- Right to legal counsel
- Right to assemble peacefully
- Right to vote

Basic Constitutional Law Principles

To understand constitutional law, there are three basic ideas to keep in mind. First, the rights guaranteed in the Constitution are not, and cannot be, absolute. The unrestricted exercise of certain rights would, in some instances, restrict the rights of others.

For example, freedom of speech does not mean that anyone can speak about any topic at any time and place. Freedom of the press does not allow a person to intentionally publish false or harmful information about another person. And, as you know, the right to vote does not extend to everyone, regardless of their age.

The courts have designed several "tests" to determine how cases should be decided. These tests are needed because the language of the Constitution is typically brief and often written in general terms. The words are not usually self-explanatory.

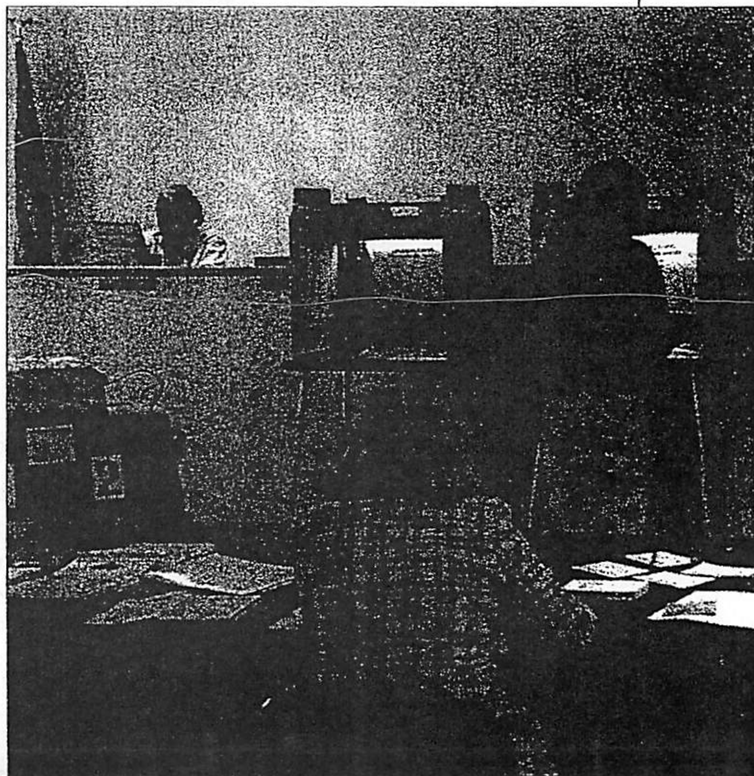
In this unit you will study many of the tests developed by the justices of the U.S. Supreme Court. These tests are not like those you have taken in school. Instead, they are rules that the Supreme Court requires courts to use in analyzing similar issues that arise in later cases.

For example, suppose someone, as a joke, yells "Fire!" in a crowded theater. The exact words protecting freedom of speech are: "Congress shall make no law . . . abridging the freedom of speech . . ." Do these words adequately explain whether the police can arrest the person for shouting "Fire!" falsely?

To analyze this particular case, the courts might use the **balancing test**. This means they would weigh the danger to the public of shouting "Fire!" falsely in a crowded theater (people might panic and be injured) against the benefit to an individual of being able to choose what to say and when and where to say it. In balancing one interest against the other, a court would probably decide that protecting the public is more important and would therefore restrict the speech of the person yelling "Fire!" We know this from analyzing the case using the balancing test, but we might not have been able to determine it simply from reading the language of the First Amendment.

The rights guaranteed in the Constitution cannot be absolute. For example, the right to vote does not extend to everyone. *What other ideas basic to understanding constitutional law must you keep in mind?*

The second idea basic to understanding constitutional law is that the Constitution protects citizens from certain actions by the *government*. Its protection usually does not extend to situations that are purely private in nature. This means that actions by private citizens, businesses, or organizations are generally not covered by the Constitution. For example, the Fourth Amendment protects against unreasonable searches and seizures by the government. It does not protect against searches and seizures by private individuals. Therefore, if a neighbor comes into your house and seizes your television, this act does *not* violate the Constitution. It may, however, constitute a tort, a crime, or both. As you will see later in this unit, many private actions, though not unconstitutional, have been made unlawful by congressional or state legislative action.



The third idea basic to understanding constitutional law is that enforcing one's rights can be time-consuming and expensive. Before trying to enforce a right, you should be aware of the time and money involved. You should then weigh these costs against the importance of protecting the right. However, remember that you can do many things to protect your rights. Therefore, if you are convinced that you are correct, do not give up.

Because of the importance of the U.S. Constitution, we sometimes assume that it contains all our rights. However, many basic rights are also protected by state constitutions, as well as by laws passed by the U.S. Congress and by state and local legislatures.

The U.S. Constitution does provide a so-called constitutional floor. This means that no government—federal, state, or local—can take away the basic rights protected by the federal Constitution. However, governments can grant citizens greater rights than those found in the U.S. Constitution. Federal courts, for example, have not interpreted the Constitution's equal protection clause to provide gay and lesbian people with the same degree of protection from government discrimination as is provided to African Americans. Some state and local governments, however, have laws and regulations forbidding discrimination based on sexual orientation. They are thus protecting more rights than those found in the U.S. Constitution.

"In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful."

—John Marshall Harlan

The individual rights discussed in this chapter can also be called human rights. The world community has adopted a Universal Declaration of Human Rights, as well as a number of other international documents whereby participating countries promise to work to protect these human rights. Most of the human rights included in the U.S. Bill of Rights can be classified as political or civil rights. However, there are other rights, classified as social and economic rights, which are not included in the U.S. Constitution. These include the right to an adequate standard of living, housing, health care, and education.

Some people criticize the United States for acting as a leader in political and civil rights while ignoring the need for social and economic rights. Others say that such rights are not enforceable and that the government should consider them goals rather than enforceable rights.

Problem 36.2

a. What is meant by the statement, "Rights are not absolute"? Give an example of a right that is not absolute, and explain why this is so.

b. How does the U.S. Supreme Court use tests? What test does the Court use when determining whether the state can use a confession obtained by police from an accused person? (Hint: Look at Unit 2 and the material on criminal law.)

c. Give an example of an important economic right. Is it provided for in the Constitution? Should it be? Give your reasons.

CHAPTER 37

Freedom of Speech

"*Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*"

— First Amendment to the U.S. Constitution

The freedom of speech clause of the First Amendment guarantees the right to express information and ideas. It protects all forms of communication: speeches, books, art, newspapers, television, radio, and other media. The First Amendment exists to protect ideas that may be unpopular or different from those of the majority. The U.S. Constitution protects not only the person *making* the communication but also the person *receiving* it. Therefore, the First Amendment includes a right to hear, see, read, and in general be exposed to different points of view. While courts are very protective of this right, freedom of speech—like other constitutional rights—is not absolute.

Our democracy requires vigilant protection of freedom of speech.

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The Importance of Freedom of Speech

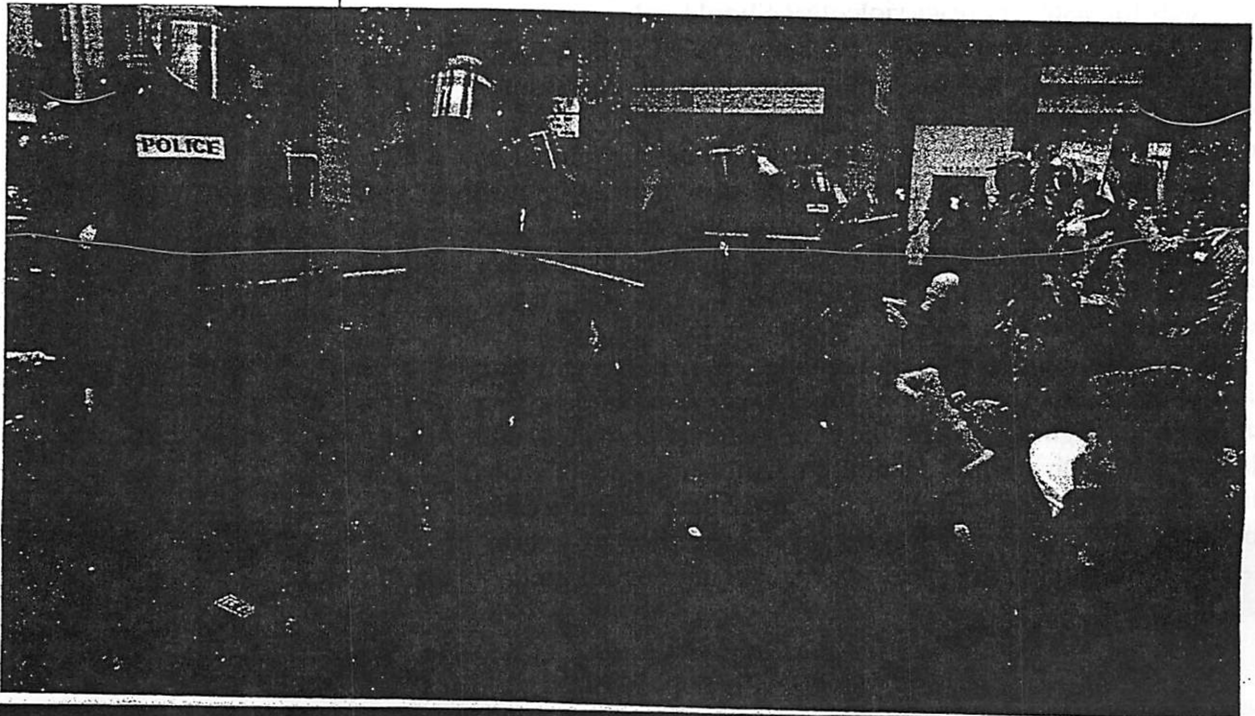
The First Amendment's protection of speech and expression is central to U.S. democracy. The essential, core political purpose of the First Amendment is self-governance: enabling people to obtain information from a diversity of sources, make decisions, and communicate these decisions to the government. In this sense, the First Amendment is the heart of an open, democratic society.

Beyond the political purpose of free speech, the First Amendment provides us with a "marketplace of ideas." Rather than having the government establish the truth, freedom of speech enables the truth to emerge from diverse opinions. The people determine the truth by seeing which ideas have the power to be accepted in the marketplace of ideas. This underscores the United States's commitment to trusting the will of the people. The concept of a dynamic marketplace of ideas also encourages a variety of artistic and other creative expression that enriches our lives.

Related to self-government and the marketplace of ideas is the notion that a free, unfettered exchange of ideas and information gives society a safety valve that helps the people deal with change in a more orderly, stable way. Through discussion, society can adapt to changing circumstances without resorting to force. Those who disagree with a decision—and such disagreements are inevitable—may be more likely to go along with the majority if they have had a chance to express themselves. Sometimes, this self-expression is like letting off steam, hence the safety valve concept.

The language of the First Amendment seems absolute: "Congress shall make no law . . . abridging the freedom of speech." Yet as the example of shouting "Fire!" in a public place showed, freedom of speech

The need for peace and public order must be balanced against the right to express individual opinion. *Why are conflicts involving freedom of expression so difficult to resolve?*



is not absolute and was not intended to be. However, the expression of an opinion or point of view is usually protected under the First Amendment, even if most people disagree with the speaker's message. Remember that the First Amendment was designed to ensure a free marketplace of ideas—even unpopular ideas. Freedom of speech protects everyone, including people who criticize the government or express unconventional views. In some instances, the First Amendment provides people with a right *not* to speak and *not* to associate with others who propose a different message.

Problem 37.1

a. A Supreme Court justice once wrote that the most important value of free expression is "not free thought for those who agree with us, but freedom for the thought we hate." What did the justice mean by this? Do you agree or disagree?

b. Can you think of any public statements or expressions of public opinion that made you angry? How did you feel about protecting the speaker's right to freedom of expression? What is the value of hearing opinions you dislike? What is the danger of suppressing unpopular thought?

c. Assume that the United States is fighting a war and you disagree with the decision to be involved in this war. If you decide to join protests against the war, some people will call you unpatriotic. Is there some way that protest—even during a time of war—can be considered patriotic? Explain.

Conflicts involving freedom of expression are among the most difficult ones that courts are asked to resolve. Free speech cases frequently involve a clash of fundamental values. For example, how should the law respond to a speaker who makes an unpopular statement to which the listeners react violently? Should police arrest the speaker or try to control the crowd? Courts must balance the need for peace and public order against the fundamental right to express one's point of view.

As already noted, freedom of speech may at times be limited by government action. Sometimes government can limit or punish speech because the content of the speech is not fully protected. This idea will be explored in the sections that follow on obscenity, defamation, commercial speech, and fighting words and incitement. Government can also regulate speech even when the content is protected. The section on time, place, and manner restrictions deals with regulation of protected speech. Sometimes expressive conduct that communicates through actions rather than words is protected, and you will learn about this in the section on symbolic speech. Finally, you will study laws passed to restrict speech that are unenforceable either because they are unclear (vague) or because they are overinclusive—that is, they prohibit expression that should be protected.

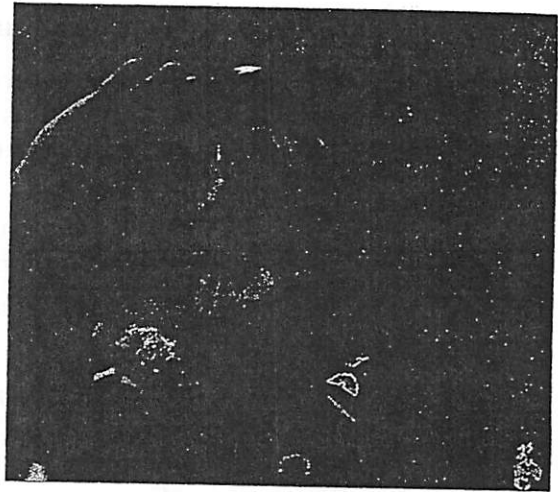
The Case of . . .

The St. Patrick's Day Parade

Every year the City of Boston authorizes a group of Irish American war veterans to organize a St. Patrick's Day Parade. In 1993, this group refused to allow a gay, lesbian, and bisexual group of Irish Americans to march in the parade under its own banner. This group sued the veterans (the parade organizers) under a state law that prohibited discrimination based on sexual orientation in places of public accommodation. The Massachusetts courts said that the parade organizers had to allow the gay, lesbian, and bisexual group to participate.

The parade organizers appealed this decision to the U.S. Supreme Court. They argued that the state court order violated their First Amendment rights. The veterans contended that the parade was an example of protected, collective expression; that the gay, lesbian, and bisexual group had a message different from theirs; and that the government could not require them to endorse that message.

The U.S. Supreme Court reversed the decision of the Massachusetts courts, holding that a private speaker (the veterans group) has a right to express a point of view and that it is beyond the power of the government to control this point of view.



An Irish American war veteran

Problem 37.2

a. Do you agree or disagree with the decision of the Massachusetts courts? Give your reasons.

b. Why did the U.S. Supreme Court reverse the decision of the Massachusetts courts? Do you agree with this reversal? Explain.

c. Assume the parade was instead sponsored by a group of veterans and that another group of veterans who objected to U.S. foreign policy wanted to march and hold up banners expressing their critical views. Should the courts require that they be allowed to participate? Explain.

Obscenity

The portrayal of sex in art, literature, films, and on the Internet is a troublesome topic in American society. Although the First Amendment guarantees freedom of expression, the government has the power to prohibit the distribution of obscene materials. In general terms, **obscenity** is anything that treats sex or nudity in an offensive or lewd manner, exceeds recognized standards of decency, and lacks serious literary, artistic, political, or scientific value.

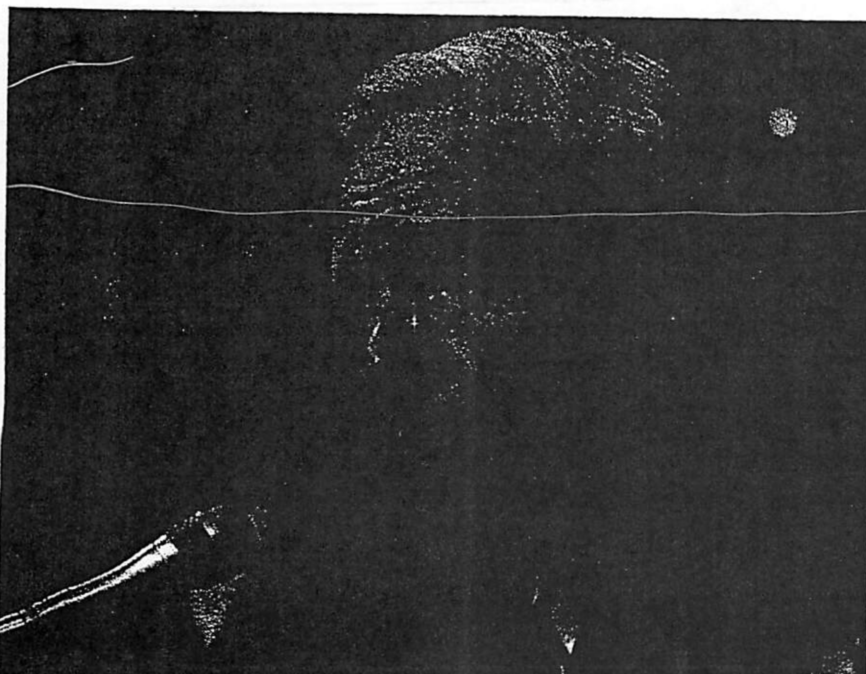
As you might expect, courts have had difficulty developing a precise legal definition of obscenity. For example, in speaking about pornography, Justice Potter Stewart once said that he could not define

it, "but I know it when I see it." In 1957, the Supreme Court ruled that obscenity is not protected by the Constitution. Later, in the 1973 case of *Miller* v. *California,* the U.S. Supreme Court set out the following three-part test as a guideline for determining whether a work is obscene:

1. Would the average person applying contemporary community standards find that the material, taken as a whole, appeals to prurient interest (that is, an immoderate, unwholesome, or unusual interest in sex)?
2. Does the work depict or describe, in a patently offensive way, sexual conduct specifically outlawed by applicable state law?
3. Does the work, taken as a whole, lack serious literary, artistic, political, or scientific value?

Applying these standards, a medical textbook on anatomy with pictures of nudity is not obscene because it has scientific value. But a sex magazine filled only with nude photos of persons committing illegal acts may be obscene, depending on the standards of the local community.

Recently, state and local governments have developed new strategies for dealing with pornography. Some communities have tried to ban all pornographic works that degrade or depict sexual violence against women. Such works, they argue, are a form of sex discrimination that may lead to actual violence or abuse against women. Other communities regulate adult bookstores and movie theaters through their zoning laws. Such laws restrict these stores and theaters to special zones or ban them from certain neighborhoods. Finally, most communities have passed laws outlawing child pornography (depictions of children involved in sexual activity) and greatly restricting minors' access to sexually oriented material. The Supreme Court has held that laws against child pornography are constitutional, even when the laws ban material that is not technically obscene.



Lawmakers such as Senator Joe Lieberman from Connecticut testify before Congress in support of laws that protect children from adult content on the Internet. *Why has the Supreme Court found some efforts to do this unconstitutional?*

A more difficult problem arises in trying to protect children from pornography on Internet sites. The Supreme Court has found some of Congress's efforts to do this to be unconstitutional because those laws have not been sufficiently clear about exactly what expression is prohibited. Another problem with efforts to protect children from harmful material on the Internet is that such efforts may result in restricting adult access to material that is legal for adults to see.

Problem 37.3

a. Should the government be allowed to censor books, movies, the Internet, or magazines? If so, under what circumstances, and why?

b. Who should decide if a book or movie is obscene? What definition should be used?

c. Do you think books and movies that depict nude women and emphasize sex encourage violence against women? Should they be banned? Explain your answer.

d. Assume that filtering software is installed on the computers in your town's public school library. The software blocks pornographic sites, but some historical and religious sites are also blocked. Is the use of this software a violation of the First Amendment? Explain.

e. Is there a problem with indecent material on the Internet? If so, what should be done about it?

Defamation

The First Amendment does not protect defamatory expression. **Defamation** is a false expression about a person that damages that person's reputation. When defamation is spoken, it is called **slander**. Written defamation is called **libel**. For example, assume a patient said that her doctor was careless and had caused the death of patients. If others heard this remark, the doctor could sue the patient for slander if the statement had been false. If the patient had written the same thing in a letter, the suit would be for libel. However, if a statement—written or spoken, no matter how damaging or embarrassing—is proven to be true, the plaintiff cannot win a defamation suit in court. The U.S. Supreme Court has special rules that make it difficult for public officials or public figures to win defamation suits.

Commercial Speech

Another form of speech that is not fully protected by the Constitution is **commercial speech**. Most advertising is considered commercial speech, as distinguished from individual speech. At one time commercial speech received no protection by the courts. It was assumed that government could regulate commercial speech in much

The Case of . . .

The Public Official's Lawsuit for Libel

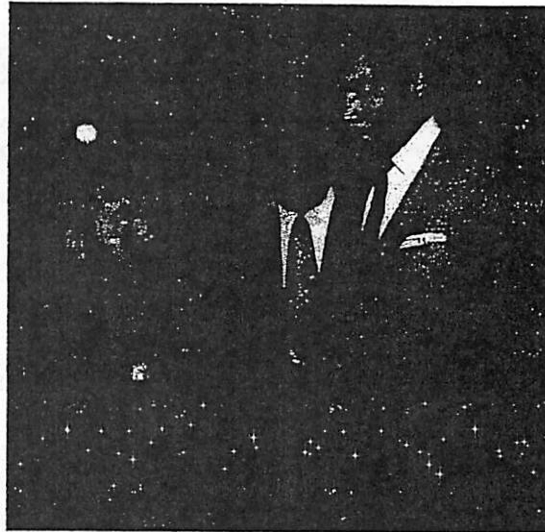
On March 29, 1960, the *New York Times* printed an advertisement placed by four African American clergymen. The ad was entitled "Heed Their Rising Voices." It called attention to the civil rights struggle in the South and appealed for funds for various causes, including a legal defense fund for Dr. Martin Luther King, Jr., who had been indicted for perjury in Montgomery, Alabama.

The ad focused on the violence with which the civil rights movement had been met in Montgomery. A portion of the advertisement contained factual errors. For example, the ad said that truckloads of armed police ringed the Alabama State College campus when, in fact, the police were deployed near the campus but did not surround it. The ad also said that Dr. King had been arrested seven times, but he had actually been arrested only four times.

L. B. Sullivan was an elected commissioner of the city of Montgomery, and he was responsible for the police department there. While the ad did not mention him by name, he contended that references to police included him. Sullivan sued the clergymen and the newspaper for libel in the Alabama courts and was awarded damages of $500,000.

On appeal, the U.S. Supreme Court reversed the decision. The Court did not analyze the ad as commercial speech, but instead viewed it as communicating information about a public issue of great concern. The Court said that debate on public issues must be "uninhibited, robust, and wide open" and that it may include "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." If critics had to guarantee the complete accuracy of every assertion, it would lead to self-censorship, not free debate.

In the case of *New York Times* v. *Sullivan,* the Court established a rule that a public official cannot recover damages for a defamatory falsehood relating to official conduct unless the official can prove the speaker either knew the statement was false or offered it recklessly. In this case, the Court said that the clergymen did not know the information in the ad was false and they did not offer it with reckless disregard for its truth. The newspaper had some information in its news files that could have resulted in catching some of the factual errors. However, the Court said that the newspaper did not act with malice.



Dr. Martin Luther King, Jr. under arrest

In a later case, the Court extended this rule to cover lawsuits brought by all public figures—not just public officials.

Problem 37.4

a. Do you agree or disagree with the Supreme Court's decision in this case? Explain.

b. Does the rule about public officials and public figures reduce the privacy rights of these people? Explain.

c. What rights and interests were balanced by the Supreme Court in deciding this case?

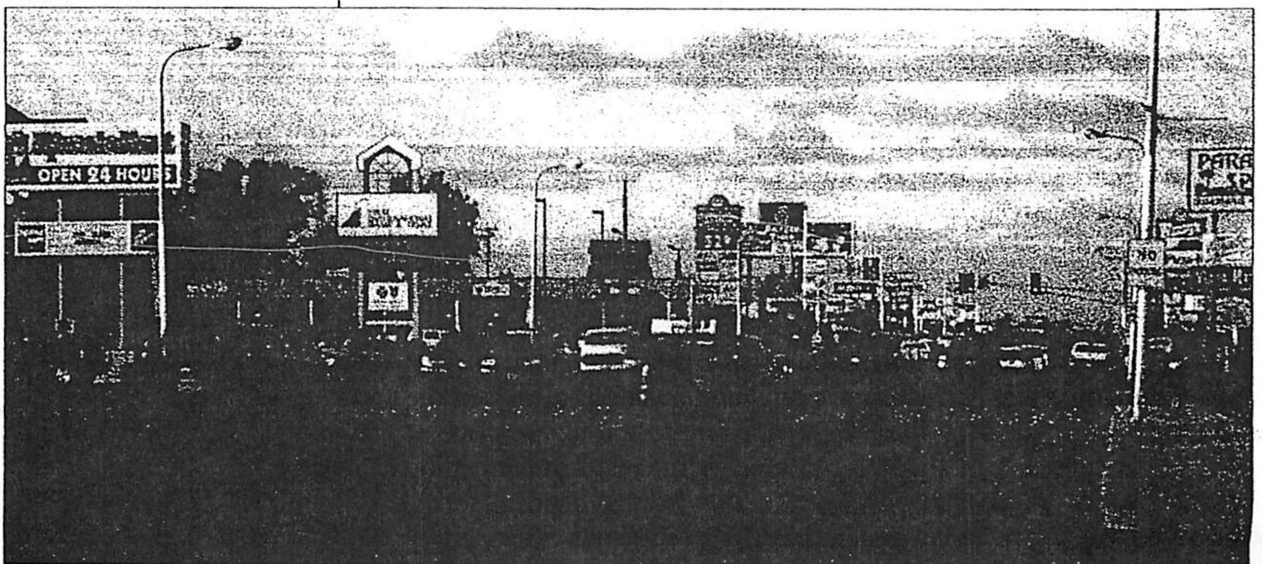
the same way that it could regulate business itself. Today, commercial speech does not receive the same high level of protection accorded to political speech, but most commercial speech receives at least some First Amendment protection.

A case in point involves a state that passed a law making it unprofessional conduct for pharmacists to advertise prescription drug prices. The state's concern was that such advertising might lead to aggressive price competition and ultimately to unprofessional, shoddy services by pharmacists. While the information in these ads was purely commercial, the Supreme Court struck down the law based on the argument that society's interest in information about products was more important than the state's interest in regulating advertising of prescription drugs. In addition, when states tried to ban all advertising by lawyers as being inherently misleading, the Court said that such a concern could not support a total ban on advertising by lawyers.

In general, courts allow the government to ban commercial speech that is false or misleading or that provides information about illegal products. If information is not false or misleading and the product or service being advertised is legal, then the government is limited in the ways it can regulate commercial speech. The courts tend to look carefully at such government regulation to see if there is a good reason for it and if the regulation itself is consistent with that good reason.

In one case the government wanted to keep manufacturers of alcoholic beverages from competing with each other in "strength wars," so they banned statements about alcoholic content on beer cans. A beer company sued, arguing that this violated the company's freedom of speech. The Supreme Court agreed with the beer company. While the government had a good reason for its concern about "strength wars," it did not make sense to ban alcohol content from beer labels but not, for example, from wine labels.

Commercial speech includes advertising. *In what ways can states regulate commercial speech?*



The Case of . . .

The Offensive Speaker

In 1948, Father Terminiello arrived to make a speech at a Chicago auditorium. Outside the auditorium about 300 people were picketing his speech. Inside, Terminiello criticized Jews and African Americans, as well as the crowd outside. By the time his speech was finished, 1,500 people had gathered outside. A police line prevented the protesters from entering the building. However, the "howling mob" outside was throwing stones and bricks at the building, and the police were unable to maintain control. The crowd was also yelling at and harassing people who came to hear Terminiello speak.

Terminiello was arrested and charged under a statute that was interpreted to prohibit conduct "which stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance." The U.S. Supreme Court held that the statute was unconstitutional on grounds of vagueness and of being overly broad. Terminiello's conviction was reversed.

Problem 37.5

a. What happened in the Terminiello case? Why was Father Terminiello arrested?

b. Should the police have controlled the crowd instead of arresting Father Terminiello? Did the police violate his First Amendment rights? Why or why not?

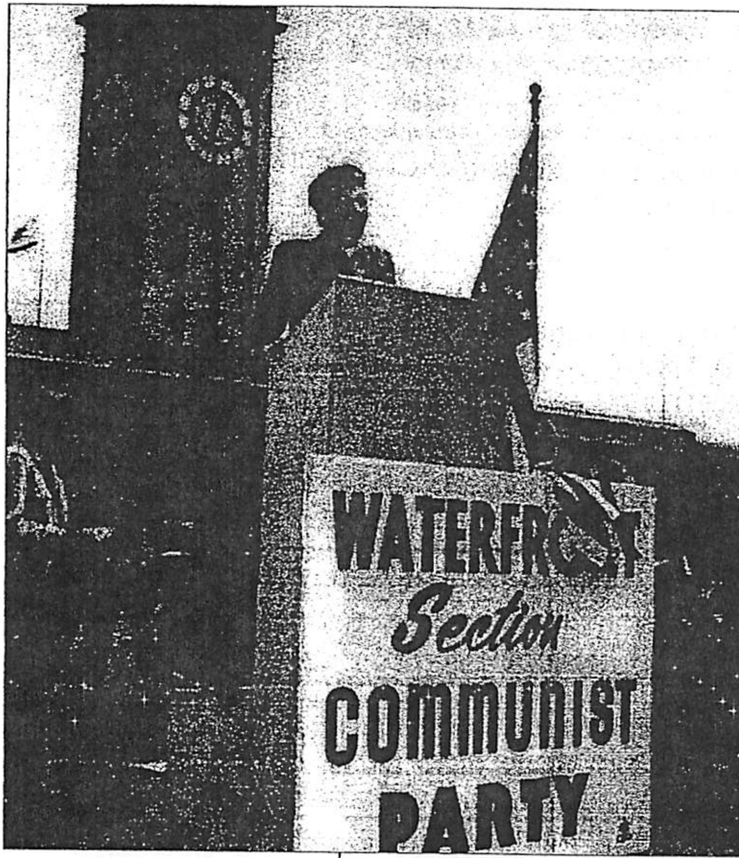
c. What did the U.S. Supreme Court decide in this case? Why?

d. Under what circumstances, if any, should people be prohibited from voicing unpopular views? Explain your answer.

Fighting Words, Offensive Speakers, and Hostile Audiences

In addition to obscenity, defamation, and commercial speech, there are a few additional situations in which the U.S. Constitution does not protect the content of a person's speech. When a person speaks publicly, two elements are interacting: the speaker and the audience. Protection of a person's speech by the First Amendment depends on how these elements interact in different situations. There are times when certain words may be protected and other times when the same words may not be protected because the surrounding situation is different.

The First Amendment does not protect you if you use words that are so abusive or threatening that they amount to what the U.S. Supreme Court calls **fighting words.** These are words spoken face-to-face that are likely to cause an imminent breach of the peace between the speaker and the listener. Fighting words are like a verbal slap in the face. They do not convey ideas or contribute to the marketplace of ideas. Their value is outweighed by society's interest in maintaining order. Still, courts very rarely use the "fighting words" doctrine today. Even offensive, provocative speech that makes its listeners very angry is generally protected and not considered to be fighting words.



In the early 1950s, some people were accused of trying to organize the Communist Party in order to overthrow the U.S. government. *What test did the Supreme Court use to decide the* Dennis *case?*

In addition to analyzing face-to-face speech, the police must also decide how to handle the responses of a large audience to speech. Police action may depend on whether the audience is friendly or hostile toward the speaker and whether there is evidence that a serious danger exists if the speech continues.

In The Case of the Offensive Speaker on page 453, the police had to deal with an audience that disagreed with the speaker's message. The police must also deal with problems caused when the audience agrees with the message. For example, the government must decide how to deal with speakers who advocate illegal activities. Prior to the 1950s, the courts used the **clear and present danger** test. This test examined the circumstances under which a speech was made and determined whether a clear and present danger of unlawful action existed. The courts generally held that the unlawful action did not have to occur immediately after the speech (for example, when a speaker encourages the audience to overthrow the U.S. government). When there was a clear and present danger of unlawful activity, the government could punish the speaker.

In the early 1950s, the Supreme Court reflected the nation's concern with the Cold War and national security. In *Dennis* v. *United States* (1951), the defendants were convicted for attempting to organize the U.S. Communist Party, whose goal was to overthrow the government. In *Dennis,* the Court used a balancing test that downplayed the probability of the act. Instead, the Court balanced the right of the speaker against the harm the speaker proposed. When the speech advocated very dangerous acts, like overthrowing the government, the Court required less proof of clear and present danger.

In the late 1960s, however, the Supreme Court began using the **incitement test** for cases in which the speaker urged the audience to take unlawful action. This test allowed the government to punish advocacy only when it was directed toward inciting, or producing immediate lawless action from, the audience and when the advocacy was likely to produce such behavior. Unlike the clear and present danger test, the incitement test required that the unlawful action be likely to occur within a short period of time. Therefore, the incitement test gives speakers greater protection.

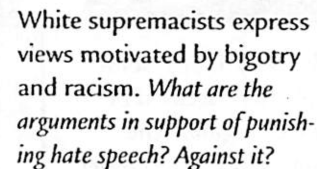
For example, if a speech causes members of an audience to talk to one another in disagreement, the speaker might not be arrested. However, if the speech urges the audience to throw objects at others and the audience begins to do this, the speaker could be arrested. In practice, the police can face a difficult dilemma in deciding whether to arrest an unpopular speaker or control a hostile audience.

Hate Speech

In recent years there has been an effort to punish those who express views—called **hate speech**—motivated by bigotry and racism. This effort has sometimes run afoul of the First Amendment.

Those who support punishment for hate speech argue that strong measures should be taken because of the emotional and psychological impact hate speech has on its victims and its victims' communities. Furthermore, supporters of punishment argue that hate speech amounts to fighting words, and thus does not qualify for First Amendment protection.

Others argue that so-called speech codes designed to promote tolerance for minorities, women, and gays, while well-intentioned, are vague and difficult to enforce fairly. They claim that such speech



White supremacists express views motivated by bigotry and racism. *What are the arguments in support of punishing hate speech? Against it?*

codes put the government into the censorship business—favoring certain content or viewpoints and disfavoring others—in violation of the First Amendment. Legal battles over speech codes, primarily on public college and university campuses, have usually resulted in courts striking them down as First Amendment violations. Supporters of the First Amendment argue that the preferred approach to hateful speech is more speech—speech that rebuts bigotry and racism.

The legal result has been different, however, for state laws that increase criminal punishments for bias-motivated violence and intimidation. In 1993 the U.S. Supreme Court unanimously upheld a Wisconsin law that provides enhanced sentencing when the defendant "intentionally selects the person against whom the crime (is committed) because of . . . race, religion, color, disability, sexual orientation, national origin or ancestry. . . ." Most states now have similar laws providing enhanced penalties for bias-motivated crimes.

Problem 37.6

A state university adopts the following policy: "A student or faculty member may be suspended or expelled for any behavior, verbal or physical, that stigmatizes an individual on the basis of race, ethnicity, religion, national origin, sex, sexual orientation, creed, ancestry, age, marital status, handicap, or veteran status."

a. Decide whether the following actions violate the above policy. If they do, should the student or faculty member be punished?

- After writing a limerick for an assignment, a student reads it aloud in an English class. It makes fun of the reported homosexual acts of a politician.
- A white student writes an article on race relations for the school newspaper. It states that African Americans are more likely than whites to become criminals in the United States, and says this is one reason why whites do not mix more with African Americans.
- The athletic director schedules the varsity club's awards dinner on a major Muslim holiday. Several Muslim athletes are unable to attend.
- An African American student hears that a group of Chinese students will not socialize with African Americans. She calls them "typical Chinese racists."
- Wearing white robes and hoods, a white supremacist student group stages a silent march on campus.

b. What are the arguments for and against the above policy? Do you support or oppose it? Can it be improved? If so, how? Are there ways for students to take a stand against hate speech even if there is no code? Explain.

c. Should television and radio stations be regulated by laws, or should they have their own rules similar to the above university policy? Should other private businesses have similar rules? Give your reasons.

d. Think about how racial and ethnic slurs compare with fighting words. In what ways are they the same? How do they differ?

Law in Action

International Forum on Hate Speech

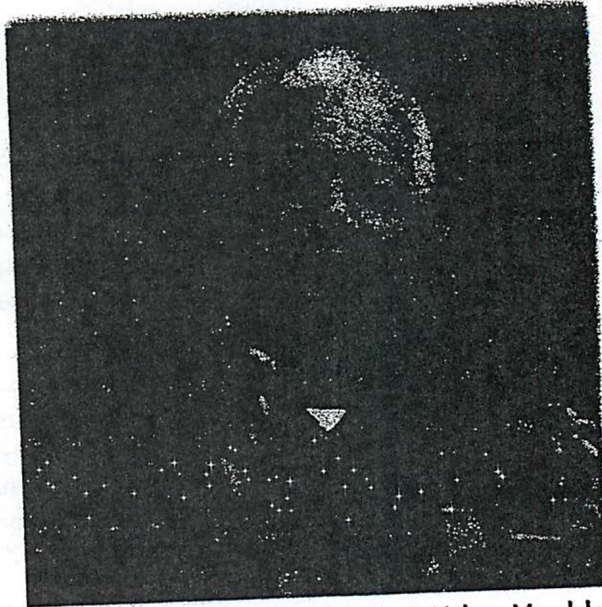
Individuals from many different countries have gathered to discuss whether all countries should enact criminal laws against hate speech. The following speakers give their views.

A German: "Because of the experience of our country under Hitler, we are very worried about how speech can be used to condemn and abuse millions of people. If there had been laws forbidding anti-Semitic speech, could the Holocaust have been prevented? Today, we see strong antiforeigner feeling in our country. We are thankful that we have laws prohibiting 'incitement to hatred' laws and believe they are needed in all countries."

An American: "Our history includes a revolution that was at least partially a reaction to government censorship. We think it is dangerous to allow government to decide what speech will be allowed. It is true that racism is a serious problem in our country and that racist speech can have a very negative impact on the victims. However, it may be overly paternalistic for the government to try to protect people from such speech. Would it not be better to let the marketplace of ideas condemn the racists?"

An Israeli: "The continual conflict between Arabs and Jews in our region led the government to pass a criminal law governing incitement to racism. However, this law has done nothing but create the illusion of progress against racism. There have been few prosecutions, and the ones that have occurred have been against Arabs. Although the law has symbolic value, it may be better not to have prosecutions, because these just give racists on both sides a platform from which to speak."

A South African: "With its history of ethnic and racial division, my country seems a likely candidate for a law against hate speech. In fact, for many years there has been such a law, which prohibited 'bringing any section of inhabitants of the country into ridicule or contempt.' This law was used principally by the white government to prosecute blacks. But many in my country think that the violence can only be stopped if people aren't allowed to promote racial hatred. My view is that while we work to undo racial injustice, it makes sense to ban racist speech."



South Africa's Nelson Mandela

Problem 37.7

a. Which of the speakers favor laws against hate speech? Why?

b. Which of the speakers oppose such laws? Why?

c. How do you think the history of each speaker's country affects the viewpoints expressed?

d. What are the pros and cons of encouraging countries to enact their own criminal laws against hate speech? What is your position? Give your reasons.

Time, Place, and Manner Restrictions

Laws may regulate expression in one of two ways. Some laws regulate expression based on its content. These laws prescribe *what* a speaker is allowed to say. Other laws regulate the time, place, and manner of expression. These laws prescribe *when, where,* and *how* speech is allowed.

As a general rule, government cannot regulate the content of expression—except in special situations, as noted in the preceding sections. However, government may make reasonable regulations governing the time, place, and manner of speech. For example, towns and cities may require citizens to obtain permits to hold a march, use sound trucks, or stage protests in parks, on streets, or on other public property. Towns and cities may also regulate the time during which loudspeakers may be used, the places where political posters may be displayed, and the manner in which demonstrations may be conducted. Such laws control when, where, and how expression is allowed.

The Case of . . .

The Nazis in Skokie

The American Nazi Party planned a demonstration in the town of Skokie, Illinois. A large number of Skokie's residents were Jewish, and many were survivors of Nazi concentration camps during World War II. Many others had lost relatives in the gas chambers. Because of this, many residents strongly opposed the Nazi demonstration in their town.

To prevent violence and property damage, the town passed a law that it hoped would keep the Nazis from demonstrating there. The law required anyone seeking a demonstration permit to obtain $300,000 in liability insurance. However, this requirement could be waived by the town. The law also banned distribution of material promoting racial or religious hatred and prohibited public demonstrations by people in military-style uniforms. The Nazis challenged the law as a violation of their First Amendment rights.

Problem 37.8

a. Why did Skokie's Jewish population feel so strongly about this demonstration?

b. Some people claimed that the purpose of the demonstration was to incite Skokie's Jews and to inflict emotional harm rather than to communicate ideas. Do you agree or disagree? Should the motive of the speaker influence whether a speech is protected by the Constitution?

c. Does the government have an obligation to protect the rights of Nazis and other unpopular groups, even if their philosophy would not permit free speech for others? Should Ku Klux Klan or Communist Party rallies have the same protection?

d. Was the law in this case neutral in its viewpoint? Explain.

e. How should this case be decided? In what ways, if any, should the town be able to regulate speech and assembly?

Courts analyze such regulations by first determining whether the site affected is a **public forum,** such as a street or park that is traditionally open to expression (or designated for this purpose), or whether the site is a nonpublic forum, such as a bus terminal or a school. If the site is a public forum, then the regulation will be overturned unless it serves an important government interest. For example, the government may prohibit loudspeakers from blaring in quiet hospital zones or keep marchers off busy main streets when commuters are driving to or from work. However, regulations for nonpublic forums are upheld if they are reasonable. For instance, a school district could choose to limit the use of school buildings (a nonpublic forum) to educational purposes.

Public forums, such as streets or parks, are places where First Amendment rights of expression are traditionally exercised. *How do the courts analyze time, place, and manner restrictions?*

Regulations for public and nonpublic forums must also be viewpoint-neutral—that is, they cannot promote or censor a particular point of view—and they must serve important government interests. The courts will also be more likely to uphold time, place, and manner restrictions if they leave open alternative ways for communicating the information in question.

Problem 37.9

Which of the following laws regulate the content of expression, and which regulate the time, place, and manner of expression? Which, if any, violate the First Amendment?

a. A city ordinance prohibits posting signs on public property such as utility poles, traffic signs, and streetlights.

b. A regulation prohibits people from sleeping in federal parks, even though the sleeping is part of a demonstration against homelessness.

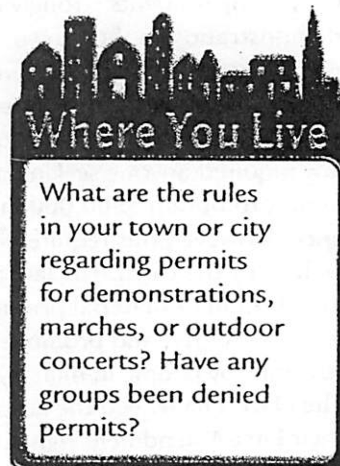
c. A federal regulation prohibits public radio stations from airing editorials.

d. A town ordinance prohibits commercial billboards anywhere within the town limits.

e. A District of Columbia ordinance prohibits the display within 500 feet of a foreign embassy of any sign that tends to bring a foreign government into "public disrepute."

f. A town ordinance prohibits picketing outside abortion clinics.

g. A city ordinance prohibits political or religious organizations from passing out leaflets or asking for donations inside the airport terminal.



What are the rules in your town or city regarding permits for demonstrations, marches, or outdoor concerts? Have any groups been denied permits?

The Case of . . .

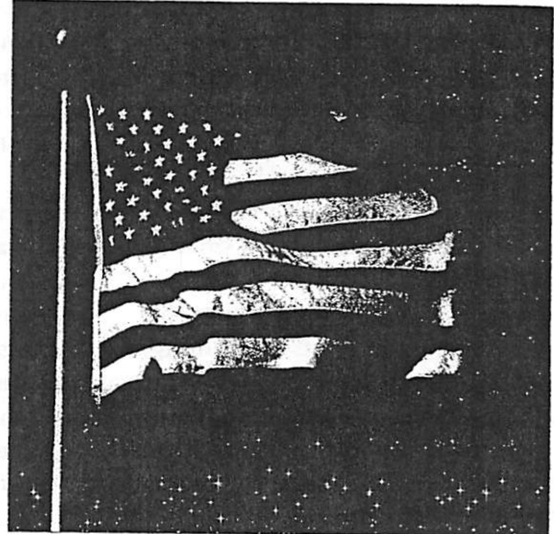
The Flag-Burning

While the Republican National Convention was taking place in Dallas in 1984, Gregory Lee Johnson participated in a political demonstration. Demonstrators marched through Dallas streets, stopping at several locations to stage "die-ins" intended to dramatize their opposition to nuclear weapons. One demonstrator took an American flag from a flagpole and gave it to Johnson.

The demonstration ended in front of the Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, protesters chanted, "America, the red, white, and blue, we spit on you." There were no injuries or threats of injury during the demonstration.

Of the hundred or so demonstrators, only Johnson was arrested. He was charged under a Texas criminal statute that prohibited desecration of a venerated object (including monuments, places of worship or burial, or a state or national flag) "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."

At Johnson's trial, several witnesses testified that they had been seriously offended by the flag-burning. He was convicted, sentenced to one year in jail, and fined $2,000. The case was appealed to the U.S. Supreme Court.



The American flag

Problem 37.10

Assume that you are a justice on the U.S. Supreme Court. Study the two opinions that follow, decide which you would vote for, and in a letter to the editor of a national newspaper, give the reasons for your decision.

Opinion A

Johnson argues that his burning of the flag should be protected as symbolic speech under the First Amendment. The First Amendment literally protects speech itself. However, this Court has long recognized that First Amendment protection does not end with the spoken or written word. While we have rejected the idea that virtually all conduct can be labeled speech and so is protected by the First Amendment, we have recognized conduct as symbolic speech when the actor intended to convey a particular message and there was a great likelihood that those viewing the conduct would understand the message.

In this case, Johnson's conduct is similar to conduct protected as symbolic speech in our earlier cases. However, the First Amendment does not provide an absolute protection for speech. This Court will analyze the Texas law, along with the facts of the case, to determine whether the state's interest is sufficient to justify punishing Johnson's action.

In earlier cases, we upheld the conviction of a protester who burned his draft card. We reached that decision because the government

had an important interest in requiring that everyone age 18 and older carry a draft card. In that case we did not punish the protester's speech, but rather his illegal act (burning his draft card). However, we have held that freedom of speech was violated when individuals were arrested for displaying a flag decorated with a peace symbol constructed of masking tape and for wearing pants with a small flag sewn into the seat.

In the *Johnson* case, the state argues that it has two important interests: preventing a breach of the peace and preserving the flag as a symbol of nationhood and national unity. The first interest is not involved in this case because there was no breach of the peace or even a threat of such a breach.

The state's other argument—the preservation of the flag as a symbol of nationhood and national unity—misses the major point of this Court's earlier First Amendment decisions: the government may not prohibit expression simply because society finds the ideas presented to be offensive or disagreeable. Johnson was prosecuted for burning the flag to express an idea—his dissatisfaction with the country's policies. His conviction must be reversed because his act deserves First Amendment protection as symbolic speech. The government has not provided sufficient justification for punishing his speech.

Opinion B

For more than 200 years the American flag has occupied a unique position as the symbol of the nation. Regardless of their own political beliefs, millions of Americans have an almost mystical reverence for the flag. Both Congress and the states have enacted many laws prohibiting the misuse and mutilation of the American flag. With the exception of Alaska and Wyoming, all the states have specific laws prohibiting the burning of the flag. We do not believe that the federal law and the laws in 48 states that prohibit burning of the flag are in conflict with the First Amendment. Although earlier cases have protected speech and even some symbolic speech related to the flag, none of our decisions has ever protected flag-burning.

The First Amendment is designed to protect the expression of ideas. Indeed, Johnson could have denounced the flag in public or even burned it in private without violating the Texas law. In fact, other methods of protest were used and permitted at the demonstration. The Texas statute did not punish him for the ideas that he conveyed but rather for the conduct he used to convey his message. Requiring that Johnson use some method other than flag-burning to convey his message places a very small burden on free expression.

We have never held that speech rights are absolute. If Johnson had chosen to spray-paint graffiti on the Washington Monument, there is no question that the government would have the power to punish him for doing so. The flag symbolizes more than national unity. It symbolizes to war veterans, for example, what they fought for and what many died for. It also symbolizes our shared values such as freedom, equal opportunity, and religious tolerance. If the great ideas behind our country are worth fighting for—and history demonstrates that they are—then the flag that uniquely symbolizes the power of those ideas is worth protecting from burning. The conviction should be affirmed.

Landmark Supreme Court Cases

Visit the Landmark Supreme Court Cases Web site at landmarkcases.org for information and activities about *Texas v. Johnson*.

Symbolic Speech

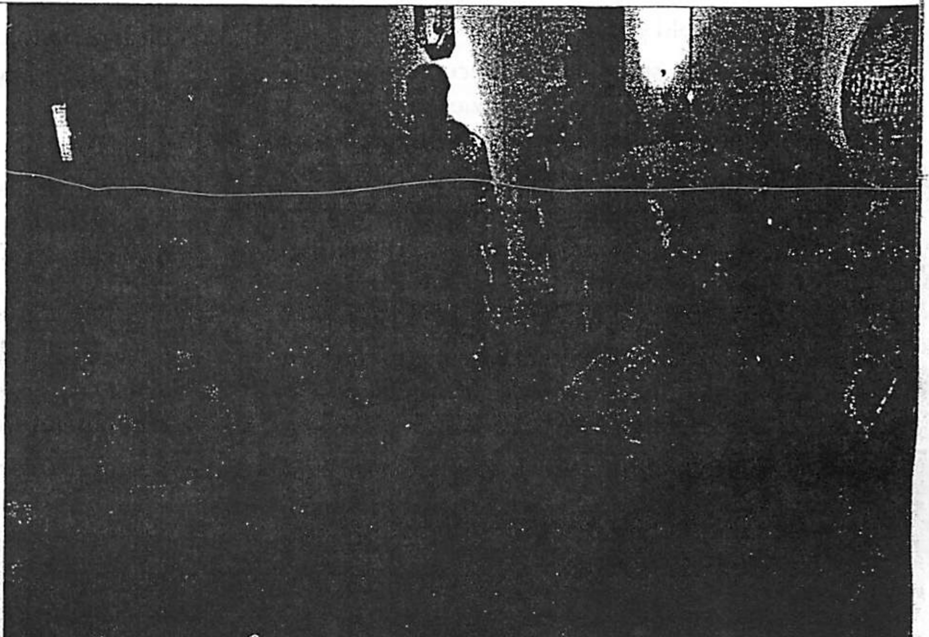
Expression may be symbolic as well as verbal. **Symbolic speech** is conduct that expresses an idea. Although speech is commonly thought of as verbal expression, we are all aware of nonverbal communication. Sit-ins, flag waving, demonstrations, and wearing armbands or protest buttons are examples of symbolic speech. While most forms of conduct could be said to express ideas in some way, only some conduct is protected as symbolic speech. In analyzing such cases, the courts ask whether the speaker intended to convey a particular message and whether it is likely that the message was understood by those who viewed it.

To convince a court that symbolic conduct should be punished and not protected as speech, the government must show it has an important reason. However, the reason cannot be merely that the government disapproves of the message conveyed by the symbolic conduct.

Vagueness and Overinclusive Laws

Courts have ruled that laws governing free speech must be clear and specific. This is so that a reasonable person can understand what expression is prohibited. Laws also need to be clear so they can be enforced in a uniform and nondiscriminatory way. Laws governing free speech that are not clear and specific can be struck down by courts on grounds of **vagueness**.

In addition, laws that regulate free speech must be narrowly drafted to prohibit only as much as is necessary to achieve the government's goals. Laws that prohibit both protected and unprotected expression are termed *overinclusive*. In specific cases, courts may strike down statutes that are overly vague or overinclusive, even if the expression in question could have been prohibited or punished under a clearer, more narrowly drafted law.



People often use sit-ins, a form of symbolic speech, to protest. *How do the courts determine whether conduct is protected as symbolic speech?*

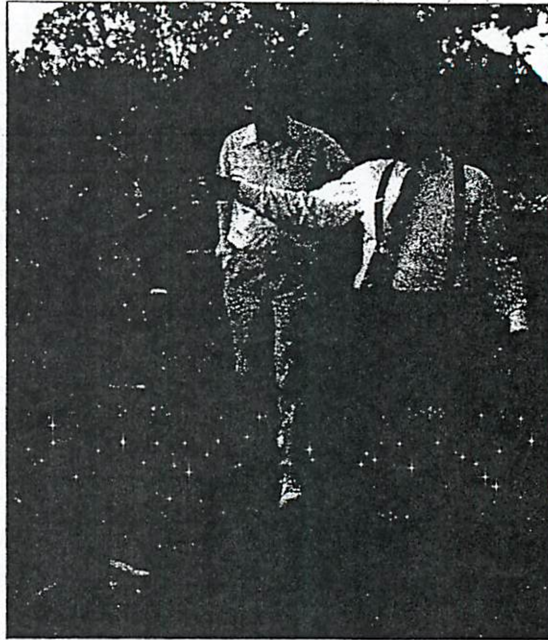
The Case of . . .

The Cross-Burning Law

In the late 1980s, many states and localities passed laws against hate crimes. These laws defined the types of acts that constituted hate crimes and provided criminal penalties for them. St. Paul, Minnesota, was one of many cities to pass such a law. This city's ordinance read as follows:

> *Whoever places on public or private property a symbol . . . or graffiti, including but not limited to a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender, commits disorderly conduct and shall be guilty of a misdemeanor.*

Russell and Laura Jones and their five children were an African American family who had just moved into a mostly white St. Paul neighborhood. Late one night they were awakened by noise outside their bedroom window. When they parted the curtains, they saw a cross burning on their front lawn. St. Paul police arrested a white 18-year-old factory worker. He was prosecuted and convicted under the local ordinance described above.



Surveying the damage

Problem 37.11

a. What happened in this case? Why was the 18-year-old prosecuted?

b. Could the state have prosecuted the defendant using some other law or ordinance? If so, which ones? Why do you think it used the hate crimes ordinance?

c. Can you identify words or phrases in the ordinance that are not clear and specific? What are they? Exactly what expression is prohibited?

d. On appeal, what legal arguments can the defendant raise? What legal arguments can the state make?

e. When interviewed by a national newspaper, the lawyer for the defendant said, "Everybody's gotten real thin-skinned lately, and I'm defending the right to express yourself in that kind of climate. . . . With an ordinance like this, you open up a doctrine that swallows the First Amendment." What did the lawyer mean by these comments? Do you agree or disagree with them? Give your reasons.

f. How should this case be decided? Give your reasons.

g. Assume that the ordinance is upheld. Could a man in St. Paul be prosecuted for wearing a sexist T-shirt, based on the language of the ordinance? Could a Native American family in St. Paul have a visitor from Washington, D.C., arrested because the visitor's car had a Washington Redskins bumper sticker? What steps can the government take to prevent hateful speech?

Law in Action

Advising Your City Council

Citizens have come to their representative on the city council and asked for her help in solving the following problem. They are concerned about people on their downtown streets who are approaching local citizens and tourists and asking for money. These people hold out a cup and say, "Help the homeless," to passersby. Some people report that they have had their path blocked and have felt harassed.

The council member is sympathetic to the concerns voiced by her constituents, but she also realizes that this issue might involve the First Amendment and the right to freedom of speech.

Problem 37.12

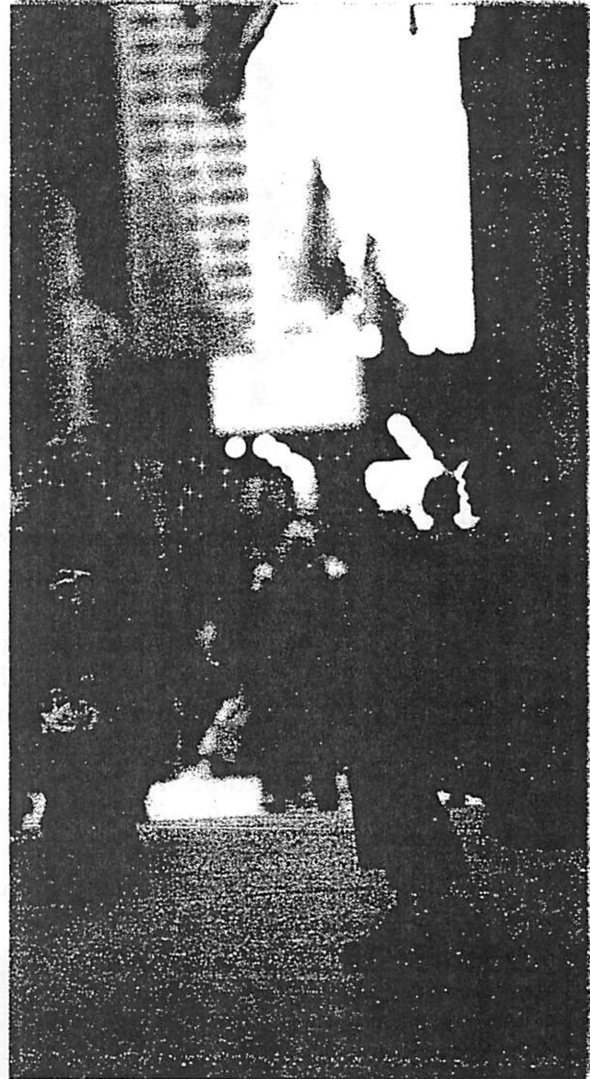
Assume that you work for this council member. Draft a paper advising her about possible approaches the council might take. Consider these points:

a. Should a new criminal law be drafted to address this problem? Can an existing criminal law be used? Remember that a criminal law that violates the First Amendment would be unconstitutional.

b. Are the words "Help the homeless" protected speech under the First Amendment? If so, would they be considered political speech? Commercial speech? Some other type of speech? If these words would not be protected, why not?

c. Even if the words are protected, is there some way to regulate this activity according to time, place, and manner that will improve the situation?

d. Draft a proposed law to regulate asking for money on downtown streets. Analyze the law to be sure that it is not vague or overinclusive and that it is not designed to prohibit one particular point of view.



A homeless man

e. Would citizens support passing such a law? Would police support enforcement? Might the law be challenged in court? Explain your answers.

CHAPTER
38

Freedom of the Press

The First Amendment to the U.S. Constitution guarantees freedom of the press. It protects us from government **censorship** of newspapers, magazines, books, radio, television, and film. Censorship occurs when the government examines publications and productions and prohibits the use of material it finds offensive. Traditionally, courts have protected the press from government censorship. For example, in 1966 the U.S. Supreme Court said that "justice cannot survive behind walls of silence." It said this to emphasize our system's distrust of secret trials. In addition to providing information about news events, the press subjects all of our political and legal institutions to public scrutiny and criticism.

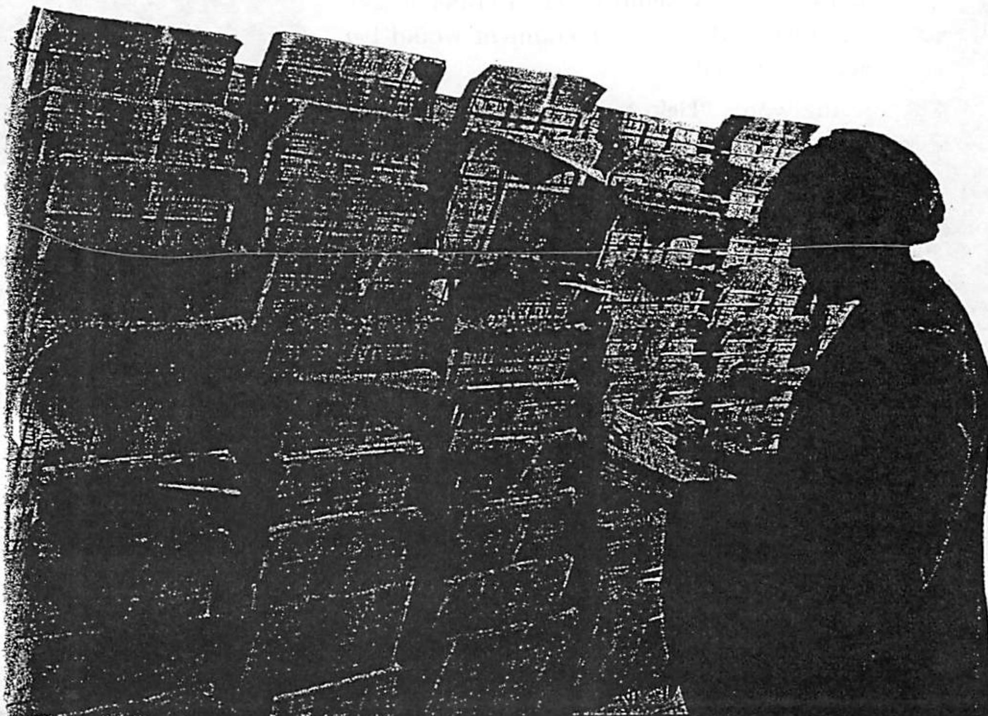
The Framers of the Constitution provided the press with broad freedom. This freedom was considered necessary to the establishment of a strong, independent press sometimes called "the fourth branch" of government. An independent press can provide citizens with a variety of information and opinions on matters of public importance.

"If it were left to me to decide whether we should have a government without a free press or a free press without a government, I would prefer the latter."

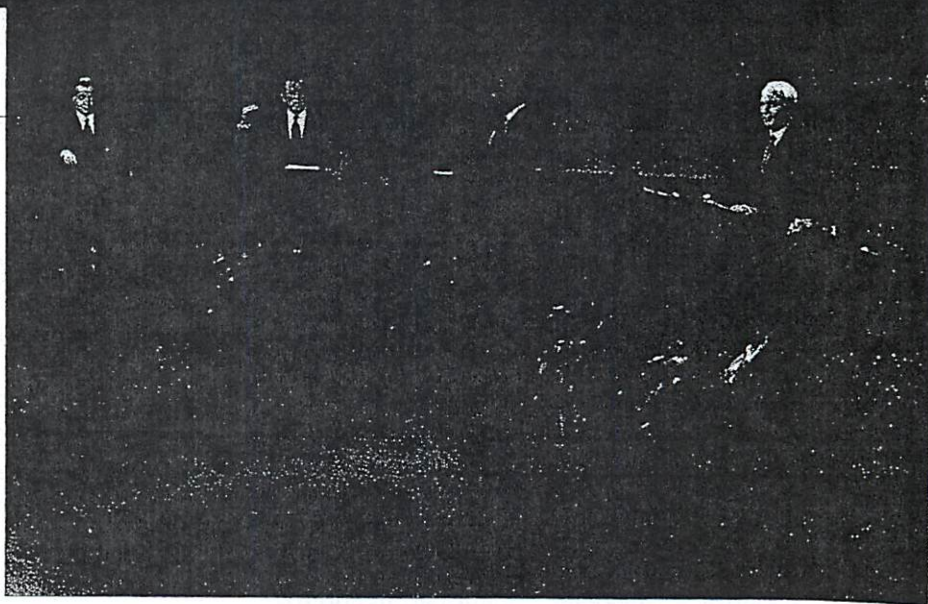
— Thomas Jefferson

Street Law online

Visit the *Street Law* Web site at streetlaw.glencoe.com for chapter-based information and resources.



The right of the press to gather and publish information may conflict with other important rights.



Political debates are often televised so voters can find out where the candidates stand on issues that affect their lives and the nation's well-being. *Should all candidates be included in televised debates?*

However, freedom of the press sometimes clashes with other rights, such as a defendant's right to a fair trial or a citizen's right to privacy. In recent years there has been increasing concern about extremely aggressive journalism, including stories about people's sex lives and photographs of people when they believed they were in a private setting.

Among the difficult questions that government and the press have confronted are these: When can the government prevent the press from publishing information? When can the government keep the press from obtaining information? When can the government force the press to disclose information? Is freedom of the press limited in

The Case of . . .

The Gag Order

Six people were brutally murdered in their home in a small Nebraska town. The murders and the later arrest of a suspect received widespread news coverage. At a pretrial hearing that was open to the public, the prosecutor introduced a confession and other evidence against the accused. Both the trial judge and the lawyers believed that publication of the information would make it impossible for the suspect to have a fair trial before an unbiased jury. As a result, the trial judge issued a gag order, which prohibited the news media from reporting the confession or any other evidence against the accused. Members of the news media sued to have the gag order declared unconstitutional and removed.

Problem 38.1

a. What happened in this case? Why did the judge issue a gag order?

b. Should judges be able to close criminal trials to the press? If so, when and why?

c. Which is more important: the right to a fair trial or the right to freedom of the press? Explain your answer.

d. As a practical matter, how could the court protect the rights of the accused in this case without infringing on the rights of the press?

The Case of . . .

The Candidates' Televised Debate

The Arkansas Educational Television Commission, a state-owned public broadcaster, sponsored debates between the major political party candidates for the 1992 congressional election in Arkansas's Third Congressional District. Ralph Forbes, a ballot-qualified independent, sought permission to participate in the debate. The television station's staff determined that Forbes had not generated enough enthusiasm for his campaign from voters and did not include him in the debate. Forbes sued, contending that his exclusion violated his First Amendment rights.

The television station argued that its decision was a viewpoint-neutral exercise of journalistic discretion. The station staff did not invite Forbes because he lacked serious voter support, not because of his views.

Forbes argued that since the station is owned by the state, the government would actually be deciding who is and who is not a viable candidate. This, Forbes contends, is a decision that must be left to the voters. In addition, in an earlier campaign in which he ran as a Republican Party candidate for lieutenant governor, Forbes won a majority of the counties in the Third Congressional District.

Problem 38.2

a. What arguments can the television station make for keeping Forbes out of the debate?

b. What arguments can Forbes make that would enable him to participate in the debate?

c. How should this case be decided?

d. How important are televised debates between candidates?

e. Could a third-party candidate with only a modest level of support make a difference in the outcome of an election? Explain.

f. Should our political system do more to encourage participation from candidates who are not members of one of the two major parties? Why or why not?

g. Should a government-owned television station provide an automatic right of access for debates to all candidates who qualify to appear on the ballot? Give your reasons.

places such as schools or prisons? Are there special limits on the press during wartime? What happens when the government is also the press, as in the case of publicly owned radio and television stations?

Prohibiting Publication

In The Case of the Gag Order on page 466, the judge was concerned about the defendant's Sixth Amendment right to a fair trial. The reporters were concerned about their First Amendment right to freedom of the press. This case presented a conflict between two important constitutional rights: free press and fair trial.

In 1976, the U.S. Supreme Court decided that the gag order was unconstitutional in this case. The Court held that the trial judge should have taken less drastic steps to lessen the effects of the pretrial publicity. The Court suggested postponing the trial until a later date,

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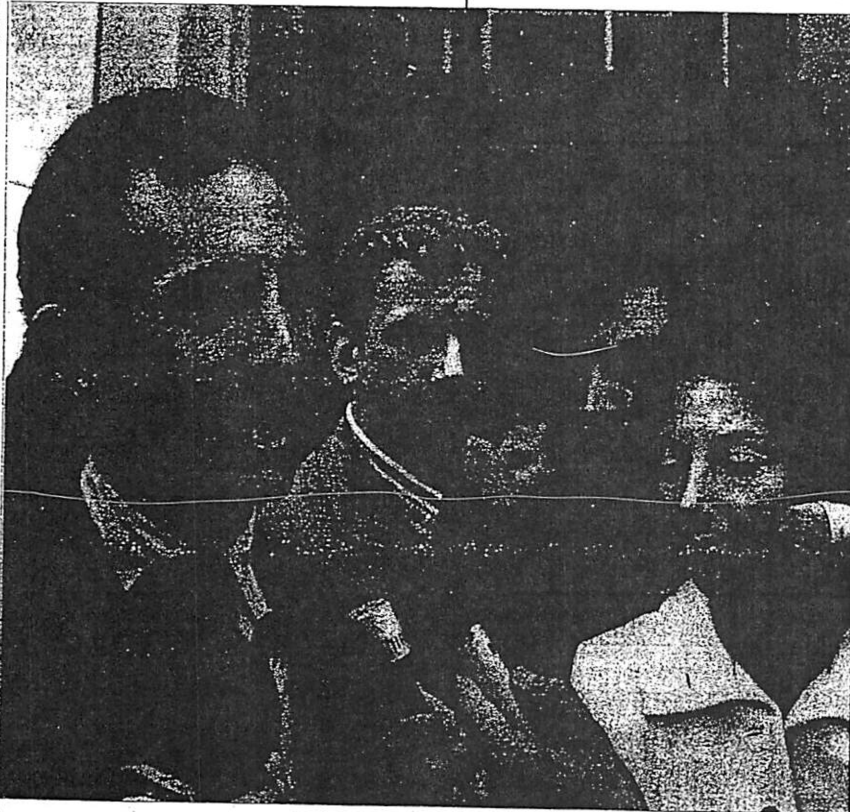
moving the trial to another county, questioning potential jurors to screen out those with fixed opinions, and carefully instructing the jury to decide the case based only on the evidence introduced at the trial.

If the gag order had been upheld, it would have amounted to a **prior restraint**—prohibition against any publication—on the press. Attempts to censor publications before they go to press are presumed unconstitutional by the courts. Prior restraint is only allowed if (1) publication would cause a certain, serious, and irreparable harm; (2) no lesser means would prevent the harm; and (3) the prior restraint would be effective in avoiding the harm.

A few years after the gag order case, the U.S. Supreme Court ruled that the public and the press usually have a right to attend criminal (and probably civil) trials. Trials can only be closed if there are vital government interests at stake and no less-restrictive way to protect those interests.

Another example of a government attempt to impose censorship before publication took place in 1971, when a government employee gave top-secret documents about origins of the Vietnam War to several newspapers. The documents outlined the past conduct of the United States regarding the Vietnam conflict. The government sued to block publication of the so-called Pentagon Papers, but the Supreme Court refused to stop publication. It said that the documents, although perhaps embarrassing to the government, would not cause "direct, immediate, and irreparable harm." However, if the documents had, for example, contained a secret plan of attack during a time of war, the Court might have blocked publication.

After completing an analysis of the Vietnam War, Defense Department official Daniel Ellsberg released portions of the study to the *New York Times*. The government tried to block its publication, claiming that national security would be threatened. *Give an example of a government document whose release should be stopped by the courts.*



Problem 38.3

A state law made it a crime to publish the name of any youth charged as a juvenile offender. A newspaper later published an article containing the name of a juvenile charged with the murder of another youth. The newspaper learned the name of the arrested youth by listening to the police radio and by talking to several witnesses to the crime.

a. What is the state's interest in having and enforcing this law?

b. What is the newspaper's interest in publishing the juvenile's name?

c. How should the conflict be resolved?

Denying the Press Access to Information

Another way in which the government sometimes tries to control the press is by denying the public access to certain information. Some people argue that denying access to information does not violate the rights of the press. Others contend that freedom of the press implies a right to obtain information.

To protect the public's access to government information, Congress passed the *Freedom of Information Act (FOIA)* in 1966. This law requires federal agencies to release information in their files to the public. The law allows citizens to obtain government information and records unless the material falls into the category of a special exception. Exceptions include information affecting national defense or foreign policy, personnel and medical files, trade secrets, investigatory records, and other confidential information. The *FOIA* applies only to federal agencies and does not create a right of access to records held by Congress, the courts, or by local or state government agencies.

The purpose of the *FOIA* is to allow citizens to learn about the business of government. Federal agencies must respond to requests for information within 20 days. Agencies that refuse to release unprivileged information can be sued in federal court. If you want to request information under the *Freedom of Information Act,* send a letter to the head of the agency or to the agency's *FOIA* officer. You can find the contact information you need online at www.usdoj.gov/foia or by calling 202-514-FOIA.

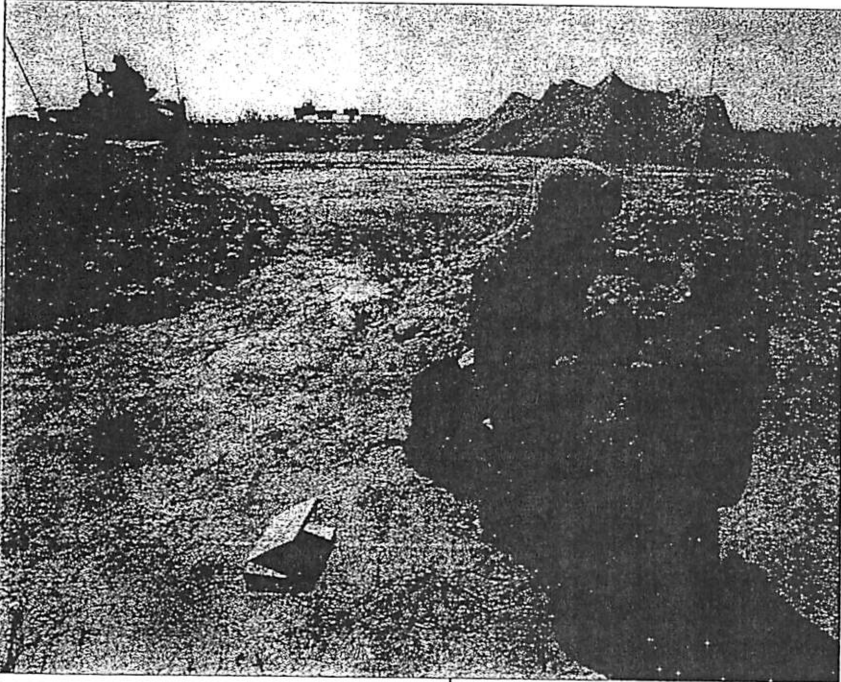
Problem 38.4

The Defense Department has a policy restricting access to a U.S. Air Force base that serves as the main military mortuary for soldiers killed abroad. A group of veterans and photographers argued that this policy restricted needed public access to information. The federal court, as well as the court of appeals, however, agreed with the military's argument that the privacy of grieving families was of greater importance and should be protected. The policy did not interfere with protected First Amendment rights of the public or the press.

a. Why do you think the veterans and photographers wanted public access to a military base serving as a mortuary?

b. Do you agree with the decision of the court of appeals in this case? Give your reasons.

When you write to request information, identify the records you want as accurately as possible. Although you are not required to specify a document by its official name, your request must reasonably describe the information sought. The more specific and limited the request, the greater the likelihood that it will be processed without delay. You are not required to demonstrate a need or even a reason for



An embedded reporter during the 2003 Iraq war uses a laptop computer to write a story. *What were the advantages of allowing reporters to travel with the military troops in Iraq?*

wanting to see the information. However, you are more likely to receive the documents if you explain why you want them. Some states have laws similar to the *FOIA*. These laws provide citizens with access to state agency files.

During times of war, there may be special issues related to press access to information. For example, the Pentagon allowed hundreds of embedded reporters to accompany troops during the Iraq war in 2003. This strategy provided the public with a great deal of information, virtually in real time, about the war and its aftermath. However, the courts have not been particularly protective of the rights of the press in terms of access to information. In a leading case, the Supreme Court said: "It is one thing to say that the government cannot restrain the publication of news emanating from certain sources. It is quite another to suggest that the Constitution imposes upon the government the affirmative duty to make available to journalists sources of information not available to members of the public generally."

Problem 38.5

Rumors about a federal prison had circulated for years. Former prisoners claimed that rape, suicide, murder, and mistreatment were all common occurrences. The warden denied the allegations but refused to provide any information about prison conditions.

A newspaper asked permission to inspect the prison and interview the prisoners, but the warden denied the request. The newspaper then asked the federal government for information about the prison. The newspaper asked for a list of inmates and for information about anyone who had died or been injured while in custody. The government refused to provide any information.

The newspaper then did two things. It filed a suit seeking admission to the prison, and it filed a *Freedom of Information Act* request for information about the prison.

a. How would you decide this lawsuit? Explain.

b. What are the newspaper's rights under the *Freedom of Information Act?* How would you decide its request for information?

c. What rights or interests does the prison administration have in this case?

d. Give two examples of information held by the federal government that you could access using the *Freedom of Information Act.*

Where You Live

Does your state have a version of the *Freedom of Information Act?* If not, should it? If so, what information is covered by the act? How can a citizen get information under the act?

Requiring the Press to Disclose Information

The government and the press also sometimes disagree over the extent to which the First Amendment protects a reporter's sources of information. These conflicts arise because people may give reporters confidential information that is important to a news story. If the people thought they would be identified, they might be less likely to give journalists this information. In one case, a reporter was summoned before a grand jury and asked questions about a crime. The journalist knew this information based on a confidential conversation. The journalist requested a qualified privilege that would have allowed him not to reveal the identity of the source of the confidential information. The U.S. Supreme Court refused to extend any special First Amendment right to the journalist in this situation. The Court did say that states could pass "shield" laws that would give journalists such a privilege. More than half the states have done this, but even the shield laws can come into direct conflict with other very important constitutional rights.

The Reporters' Committee for Freedom of the Press was created in 1970 at a time when the U.S. news media faced a wave of government subpoenas asking reporters to name confidential sources. This organization, with its steering committee comprised of many of the nation's leading journalists, continues to provide free legal services to more than 2,000 journalists each year. The Reporters' Committee for Freedom of the Press also provides access to an updated collection of news stories on freedom of the press issues online at www.rcfp.org. Student journalists work with an affiliated group, the Student Press Law Center. Information about their work is available online at www.splc.org.

The Case of . . .

The Shield Law

In 1976, the *New York Times* published a story suggesting that a doctor had murdered several patients. As a result, New Jersey authorities investigated the case and charged the doctor with murder.

Defense attorneys asked the *New York Times* to turn over the names of all persons who had been interviewed during the investigation, as well as any other information it had. The defense contended that it could not properly prepare its case without this information. The *New York Times* and the reporter who conducted the investigation refused to turn over any information. They argued that the First Amendment and a New Jersey law that protected a reporter's sources of information allowed them to withhold any unpublished material in their possession.

Problem 38.6

a. What rights are in conflict in this case?

b. Should the judge allow the reporter to withhold the information sought by the defense attorney? Why or why not?

CHAPTER

39

Expression in Special Places

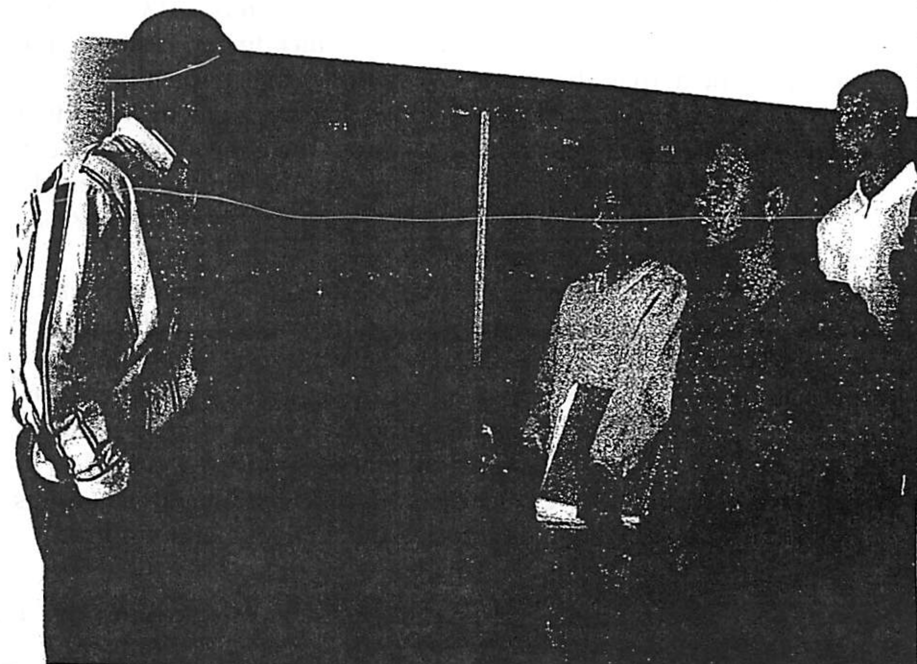
Schools, military bases, and prisons present special First Amendment problems. The rights of students, military personnel, or inmates often conflict with the rights of others or interfere with the need to preserve order. When this conflict occurs, courts must balance the competing interests in each case.

As a general rule, courts allow greater freedom of speech and assembly in public parks and on street corners than in schools, military bases, and prisons. Courts sometimes speak of places such as public parks and street corners, where First Amendment rights are traditionally exercised, as **public forums.** For the most part, however, courts have found that schools, military bases, and prisons (and their publications) provide only a limited forum for the exercise of First Amendment freedoms. In these places, you can usually exercise your rights, but only as long as the expression does not interfere with the purpose of the facility.

"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. . . ."

— *Tinker v. Des Moines* **(1969), majority opinion**

Visit the *Street Law* Web site at streetlaw.glencoe.com for chapter-based information and resources.



Schools provide only a limited forum for the exercise of First Amendment rights.

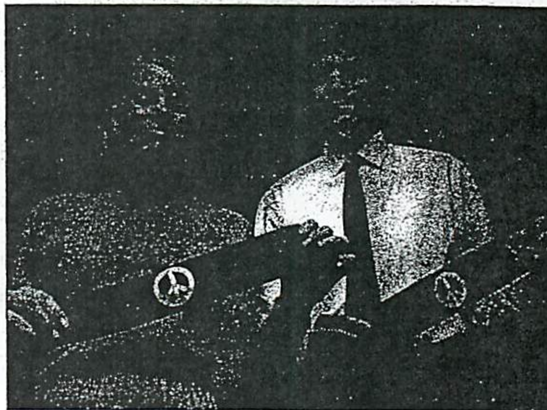
The Case of . . .

The Student Armbands

Mary Beth Tinker and her brother John were opposed to the Vietnam War. They decided to wear black armbands to school as symbols of their objection. When school administrators learned of this, they adopted a policy of asking anyone wearing armbands to remove them. Students who refused would be suspended until they returned to school without the armbands.

The Tinkers and three other students wore black armbands to school. Although some students argued the Vietnam issue in the halls, no violence occurred. The five protesting students were suspended from school until they came back without their armbands.

Should wearing armbands be considered a form of free expression protected by the Constitution?



Mary Beth and John Tinker

Landmark Supreme Court Cases

Visit the Landmark Supreme Court Cases Web site at landmarkcases.org for information and activities about *Tinker* v. *Des Moines.*

The First Amendment in Public Schools

In *Tinker* v. *Des Moines School District* (1969), the U.S. Supreme Court decided that the right to freedom of expression "does not end at the schoolhouse gate." The Court held that wearing armbands was a form of "symbolic speech" protected by the First Amendment. However, the Court also held that the students' right to free speech could be restricted when the school could show that the students' conduct would "materially and substantially disrupt" the educational process. Such a disruption did not occur in reaction to the Tinkers' armbands, nor could it reasonably have been predicted, so their suspensions were declared unconstitutional.

The *Tinker* case provides a standard that the courts use to determine whether punishment of student speech by public school officials violates the First Amendment. Although the *Tinker* case clearly involved expression not endorsed or sponsored by the school, in other cases the courts have been asked to determine the extent to which student speech can be controlled as part of school-sponsored activities. In these cases the courts have balanced students' First Amendment rights against the schools' duty to determine the educational program.

In *Hazelwood* v. *Kuhlmeier* (1988)—the school newspaper censorship case—the U.S. Supreme Court ruled that school officials could have editorial control over a school-sponsored newspaper produced in a journalism class. The justices found that such a publication should not be treated as a public forum for young journalists or students in general. The reasons given for allowing this control were that (1) schools should not have to permit student speech that is inconsistent with their basic educational mission (for example, schools could refuse to sponsor student speeches advocating drug or alcohol use), and (2) schools should be allowed to control expression that students, parents, and others in the community might reasonably believe the school has endorsed (for example, students could be stopped from printing vulgar or lewd material in the school newspaper).

This decision gives educators editorial control over the style and substance of school-sponsored student speech if they can show their actions are reasonably related to legitimate educational concerns.

The Case of . . .

Censorship of the School Newspaper

A high school principal deleted two pages from the year's final issue of the school newspaper because these pages contained one story on student experiences with pregnancy and another about the impact of divorce on students. The principal believed that the stories had been written in such a way that the privacy rights of some students might be violated. He also believed the topics might offend or be inappropriate for some of the younger students at the school.

The newspaper was written as part of the school's advanced journalism class. Following the school's regular practice, the journalism teacher had submitted the page proofs to the principal just before publication. The principal deleted the two pages on which the articles in question appeared. Those pages also contained several stories he did not object to. His reason for deleting the pages was that the school year was almost over, and he did not believe there would be enough time to rewrite the offensive stories.

The existing school board policy said, "School-sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism."

The student editors of the paper sued the principal and the school district, arguing that their First Amendment rights had been violated.

Problem 39.1

a. What arguments can the students make?

b. What arguments can the principal make?

c. How is this case similar to *Tinker*? Different?

d. How should the court decide this case?

e. Did the principal violate the school's policy? Give your reasons.

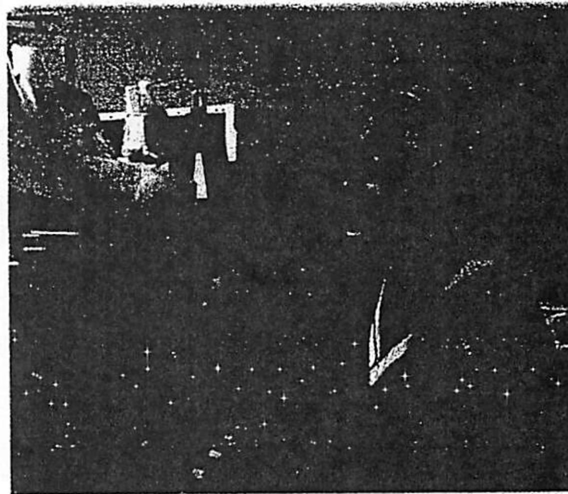
f. Is a new policy needed for student publications at this school? If so, draft one.

Landmark Supreme Court Cases

Visit the Landmark Supreme Court Cases Web site at landmarkcases.org for information and activities about *Hazelwood* v. *Kuhlmeier.*

Student Expression and the First Amendment

Based on the Supreme Court decisions in *Tinker* and *Hazelwood,* analyze each of the following cases. Give arguments both for permitting the expression and for supporting the school's need to regulate the expression. How should each case be decided?



A high school radio station

a. At an assembly before student council elections, a student makes a campaign speech for a friend. While not legally obscene, the speech has many sexual references and makes some students uncomfortable. Others applaud, jeer, and shout additional sexual references. The principal meets with the speaker after the assembly, and then suspends him for several days. The student sues the school for violating his right to free speech.

b. Students publish, with their own money and equipment, an "underground newspaper" off school premises that contains the results of best/worst teacher and best/worst class surveys. The principal does not allow distribution of the newspaper at school. The students sue the school for violating freedom of the press.

c. A major project of a high school drama class is the production of a spring musical. Tickets are sold at the school and at several locations in the community. The students and their drama teacher select the musical *Hair,* which has several scenes with partially clothed actors and actresses. The drama class begins rehearsals, prints tickets, and starts to publicize the performances. When the school board learns which musical has been selected, it cancels the production. The students sue, alleging violation of their freedom of expression.

d. A few parents complain to the high school librarian that several of the school's library books contain negative stereotypes about women and certain racial and ethnic groups. The parents ask that the books be removed from the library. The principal agrees and removes the books, even though they are available in the community library. Other students and their parents sue the school for violating the rights of students who want access to those books.

e. Lakeside High School students operate a radio station each morning before school begins, playing music, reporting sports scores, and making other announcements from the student lounge. The faculty member responsible for supervising the student lounge believes that the lyrics of a popular song frequently played on the station are sexually suggestive. He complains to the principal, who removes the CD from the radio station and tells the student disc jockeys that they must submit an upcoming music playlist monthly for her approval. The student disc jockeys sue, claiming a violation of their rights.

What are your school's policies on student speech and press rights? Are they consistent with the decisions in *Tinker* and *Hazelwood?*

Therefore, even with the greater editorial control allowed by the *Hazelwood* decision, a principal who personally opposes (or supports) gun control, for example, cannot censor a student publication that fairly presents all points of view on that subject.

In addition to cases dealing directly with student speech and press rights, courts have had to consider whether student appearance—dress and grooming—is protected expression. In recent years students have worn shirts with messages promoting violence, gang membership, drug use, drinking, and sexism. Alarmed educators argue that these clothes transmit a message inconsistent with school and community values and that these messages can lead to school disruption, including violence. Parents also worry that their children may become targets for violence when wearing such clothing. Some principals have refused to allow students inside their schools wearing such clothing. Some students argue that their choice of clothing and personal grooming is a form of expression that should be protected by the First Amendment.

The First Amendment in Prisons and the Military

Compared with prisons and the military, schools are relatively open institutions. Schools are supposed to prepare students for life in our constitutional democracy, with its emphasis on individual freedom. By contrast, both prisons and the military closely regulate almost all aspects of life. Prisons, in particular, physically separate their members from society. In a 2001 case, the U.S. Supreme Court affirmed its existing rule that a prison regulation that interferes with an inmate's constitutional rights will be upheld as long as it is reasonably related to legitimate **penological** (corrections) objectives. In that case an inmate claimed a First Amendment right to provide legal assistance to a fellow inmate who had been charged with assaulting a correctional officer. The inmate offering the assistance was punished for violating prison rules. The Court explained that this inmate did not have a right to provide legal assistance and again emphasized the need to defer to prison authorities in the administration of the correctional system.

In 1976 the Court upheld a regulation on a large military base that prohibited all political speeches and the distribution of campaign literature. These cases show that individual rights are often very limited when balanced against the special needs of the military and prisons for order and discipline.

Individual rights and freedom of expression are limited on military bases. *Why is this so?*

CHAPTER

40

Freedom of Religion

"*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .* "

— **First Amendment to the U.S. Constitution**

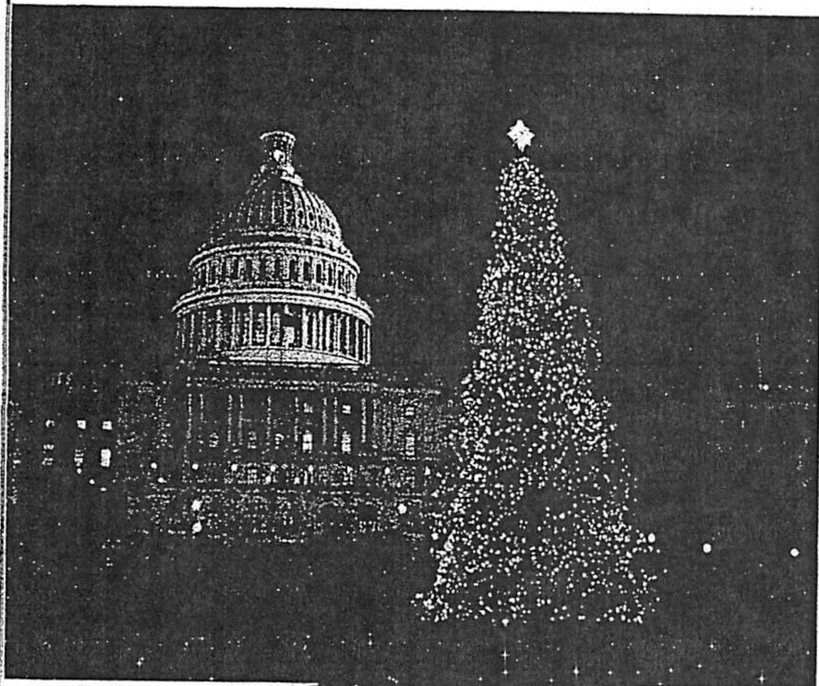
Street Law online

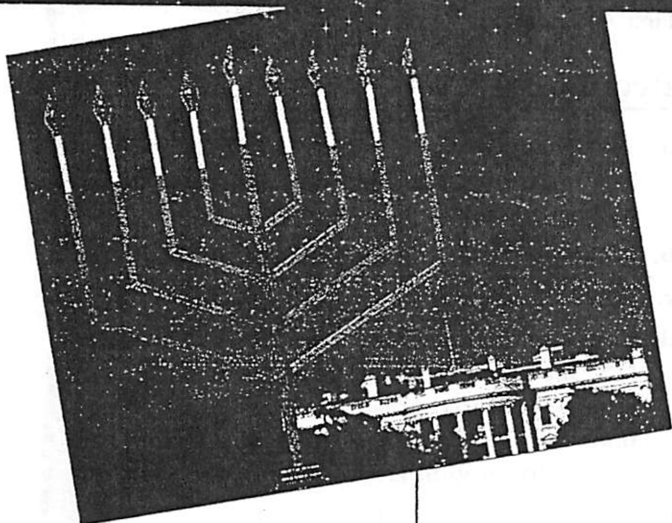
Visit the *Street Law* Web site at streetlaw.glencoe.com for chapter-based information and resources.

The first 16 words of the First Amendment to the U.S. Constitution deal with freedom of religion. These words reflect the deep concern that the Founders of the United States had about the relationship between church and state, and about the right of individuals to practice their religion freely. In addition, Article VI of the Constitution prohibits the government from requiring any religious test for public office.

Religious freedom is protected by two clauses in the First Amendment: the establishment clause and the free exercise clause. The **establishment clause** forbids the government from setting up a state religion. It also prohibits the government from endorsing or supporting religion and from preferring one religion over another. The **free exercise clause** protects the right of individuals to worship or believe as they choose. Government cannot prohibit or unduly burden religious practice.

People practice their religion in many different ways.





A Christmas tree and a Hanukkah menorah are displayed on government property. *Do either or both of these displays violate the First Amendment?*

Taken together, the establishment and free exercise clauses prohibit the government from either endorsing religion or punishing religious belief or practice. Some people believe that the two clauses require the government to be neutral toward religion. This means that the government should not favor one religion over another or favor religion over nonreligion in its actions or its laws. Others believe that the First Amendment requires the government to accommodate religious belief and practice, as long as it does not establish or promote a state or national religion.

Between 1791 and 1940, the U.S. Supreme Court heard only five cases dealing with church-state relations. Since then, the Court has heard more than a hundred such cases, half of them since 1980.

Based on data about church membership and attendance, the United States is a religious country, and many Americans are religious people. Many national traditions have religious overtones. For example, U.S. money includes the words "In God We Trust." The Pledge of Allegiance contains references to God. And many state legislatures, Congress, and the Supreme Court begin their sessions with a brief prayer. Although these traditions are criticized by some people as violating the First Amendment, they have so far been upheld by the courts.

The Establishment Clause

The establishment clause in the First Amendment forbids state and federal governments from setting up churches, from passing laws aiding one or all religions, or from favoring one religion over another. In addition, the establishment clause forbids the government from passing laws barring or requiring citizen attendance at any church or belief in any religious idea.

Thomas Jefferson once referred to the establishment clause as a "wall of separation between church and state." In the United States, there is a wall of separation, but it is not complete. Churches are indirectly aided by government in many ways. For example, churches do not have to pay real estate taxes, even though they receive government services such as police and fire protection.

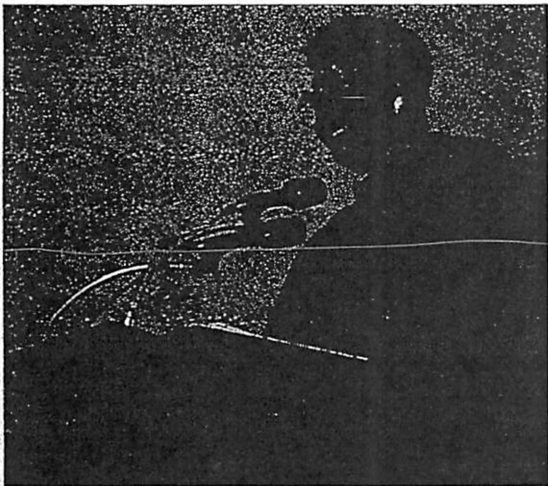
The Case of . . .

The Rabbi's Invocation

For many years the Providence, Rhode Island school committee and superintendent have permitted, but not directed, school principals to include invocations and benedictions in the graduation ceremonies of the city's public middle schools. As a result, some public middle schools in Providence have included invocations and benedictions in their graduation ceremonies.

The invocations and benedictions are not written or delivered by public school employees, but by members of the clergy invited to participate in these ceremonies for that purpose. The schools provide the clergy with guidelines prepared by the National Conference of Christians and Jews. These guidelines stress inclusiveness and sensitivity in preparing nonreligious prayer for public, civic ceremonies. The clergy who have delivered these prayers in recent years at the graduations have included ministers of various Christian denominations, as well as rabbis.

Attendance at graduation ceremonies is voluntary, and parents and friends of the students are invited to attend. Middle school ceremonies are held at the schools.



A graduation ceremony

Daniel Weisman's daughter, Deborah, graduated from Nathan Bishop Middle School, a public school in Providence. Rabbi Leslie Gutterman, from a local synagogue in Providence, delivered the invocation and benediction at the ceremony. Both prayers were consistent with the guidelines that had been sent to him by the school principal.

The Weismans filed a case in federal court contending that inviting religious leaders to provide the invocation and benediction at public school graduations violated the separation of church and state required by the First Amendment.

Problem 40.1

a. What happened in this case? Why did the Weismans object to the rabbi's invocation and benediction?

b. What arguments can the Weismans make?

c. What arguments can the school make?

d. Compare this case to the decisions of the U.S. Supreme Court that have found public school-sponsored prayer to be unconstitutional. How is this case like the school prayer cases? How is it different?

e. How should this case be decided?

f. Assume that after the Weismans' complaint the school abandoned its policy of selecting different religious leaders each year and instead sponsored an election to select a student to deliver the prayers at graduation exercises. Would such a policy violate the First Amendment? Explain.

g. Could the school post information on its bulletin board about a community-based baccalaureate service sponsored by local churches for graduating seniors? Would it make a difference if the sign said "This is not a school sponsored or endorsed activity"?

How is the issue of religious holiday displays handled in your community? At your school?

Cases involving the establishment clause have been among the most controversial to reach the U.S. Supreme Court. In these cases, the justices tend to look closely at a very wide range of facts before rendering their decision, rather than being driven by one or two facts or rigid standards. In recent years they have relied on several tests. One of these, the *endorsement test,* asks whether the challenged law or government action has either the purpose or the effect of endorsing religion in the eyes of members of the community. When using this test, the Court analyzes whether the government has sent a message to nonbelievers that they are outsiders and not full members of the political community. As The Case of the Rabbi's Invocation illustrates, the test is not always easy to apply.

In addition to the endorsement test, the Supreme Court also uses the following three-part test from a case decided in 1971 to determine whether a government law or action meets the requirements of the establishment clause:

- The challenged law or government action must have a secular, or nonreligious, purpose.
- The primary effect of the law or action must be to neither advance nor inhibit (hold back) religion.
- The operation of the law or action must not foster excessive entanglement of government with religion.

Establishment clause cases are particularly controversial when they involve aid to parochial schools or prayer in public schools. Over the years, the Court has approved some forms of aid to parochial school students and their parents. For example, it has allowed states to provide bus transportation, computers, and loans of certain textbooks to parochial school students. In 2002 the Court approved a program from Ohio that provided vouchers to low-income parents to help pay tuition at a variety of nonpublic schools, including religiously affiliated schools. However, state or federal laws that provide financial aid directly to a religious institution or its instructors are less likely to be approved.

Although the topic continues to be very controversial, the Court has held that public school-sponsored prayer violates the establishment clause. Even *voluntary* school-sponsored prayer (or school-sponsored daily Bible readings or recitation of the Lord's Prayer) has been found to be unconstitutional.

The Free Exercise Clause

The free exercise clause in the First Amendment protects the right of individuals to worship as they choose. However, when an individual's right to free exercise of religion conflicts with other important interests, the First Amendment claim does not always win. As a rule, religious *belief* is protected. However, *actions* based on those beliefs may be restricted if they violate an important secular government interest. As long ago as 1878, the U.S. Supreme Court upheld the

conviction of a Mormon man who had violated the criminal law against polygamy (having multiple spouses), even though his religion at that time encouraged this practice.

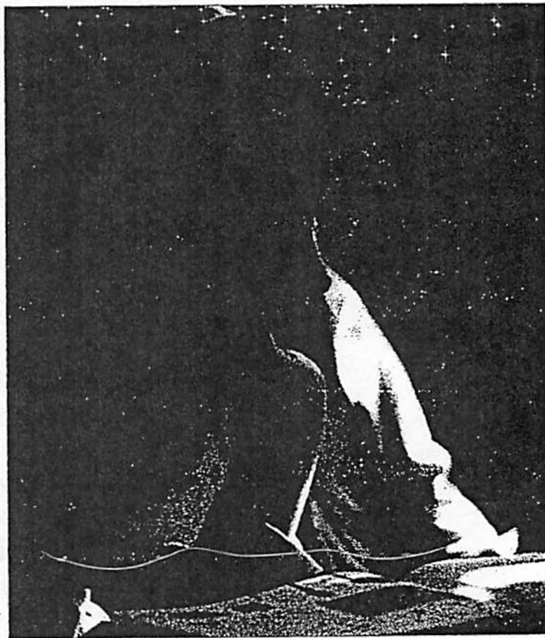
If the government intentionally acts to interfere with religious practice, the courts will almost always protect the religious practice. For example, a city in Florida passed an ordinance that banned religious animal sacrifice, a practice of followers of the Santeria religion. An analysis of the public debate behind this law showed that most local citizens disliked this religious practice. The Supreme Court unanimously agreed that the ordinance was passed in order to interfere with religious practice and therefore violated the free exercise clause of the First Amendment.

The Case of . . .

The Amish Children

Wisconsin had a law requiring all children to attend school until age 16. However, the Amish believe that children between the ages of 14 and 16 should devote that time to Bible study and to training at home in farmwork. The Amish believe that high school is "too worldly for their children." State officials prosecuted several Amish parents for not sending their children to school. The parents defended their actions as an exercise of their religion.

Wisconsin v. Yoder reached the U.S. Supreme Court in 1972. The Court weighed the rights of the Amish to practice their religion against the state's interest in requiring school attendance. The Court held that the Amish people's right to free exercise of religion was more important than the two additional years of required schooling. Among the factors the Court considered was the tendency for Amish children to become employed, law-abiding citizens after completing their religious education.



An Amish student

Problem 40.2

a. Do you agree with this decision? Give your reasons.

b. What arguments might the dissenters have put forward in their opinion?

c. This case began in Wisconsin as a prosecution of the parents for not sending their children to school. Their defense at trial, and their arguments in the appeals courts, focused primarily on the rights of the parents. Did the students have rights that might have been considered? What rights and interests might have been asserted on behalf of the students?

The more difficult problem arises when the government is not trying to harm religion, yet passes a law that happens to punish religious practice or forces someone to act in a way that violates his or her religious beliefs. In 1990, for example, the Court upheld the drug conviction of a Native American man even though his religion specifically required the sacramental use of peyote, an illegal drug. The Supreme Court's rule is that a valid, neutral law (that is, a law that does not specifically target a religious belief or practice)—in this case, the state's drug laws—will be upheld even if it interferes with religious practice.

The establishment and free exercise clauses are closely related. However, they often come into conflict with each other. Ensuring that a law does not establish a religion can interfere with free exercise of religion and sometimes with freedom of speech.

Consider the case of an evangelical Christian student group at a state university which applied for funding for its student publication. The university granted money to other student groups through this funding process. In order to avoid what it feared would be an establishment of religion (by funding the religious publication), the university refused the funding request. In 1995, the U.S. Supreme Court said that the university had to treat religious and nonreligious activities equally for funding purposes. The Court held that failure to treat the religious publication equally was a violation of freedom of speech (i.e., content-based discrimination).

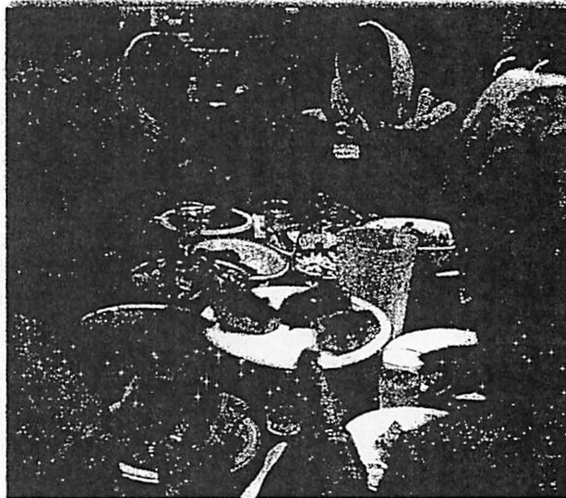
That same year, the Court also allowed the Ku Klux Klan to display a cross on the lawn of a state-owned park across from the Ohio Statehouse. The state had treated the cross as a religious symbol rather than a political symbol and had denied the Klan permission to display it, even though the park had been made available to a wide range of expressive conduct in the past. In its decision, the Court reasoned that the expression should be viewed as private expression (the Klan's) in a public place and that a reasonable observer would not see the state as endorsing religion.

Although the free exercise clause protects people's right to worship as they choose, the government may pass laws that happen to punish certain religious practices. *How has the Supreme Court handled such cases?*

You Be The Judge

Religion and Public Education

The following situations involve religion and public education. For each, determine whether the establishment clause, the free exercise clause, or both are involved. Then decide whether the government's action violates the First Amendment.



A Muslim holiday celebration

a. A high school student who has been deaf since birth asks his school district to pay for a sign language interpreter to accompany him to classes at a local religious school. A federal law requires school districts to provide for the education of all children with disabilities. The school district (which had provided the student with an interpreter while he attended the public school) refuses to pay.

b. A state law authorizes a one-minute period of silence in all public schools "for meditation or voluntary prayer."

c. A state law requires that the Ten Commandments be posted in each public school classroom.

d. A group of high school students requests permission from the school principal to form a prayer club. The group agrees to follow the rules required of all student clubs, which meet twice a week at the beginning of the school day during an activity period. A faculty member volunteers to supervise the group. The principal refuses the group's request.

e. A public high school coach gathers his players together before a game and leads them in a brief prayer. One of the players tells the coach he is uncomfortable with the prayer. The coach tells him that it is fine for him to either say nothing or leave the room while the prayer is being said.

f. Eid al-Fitr is an important religious holiday that Muslims celebrate in the days following Ramadan. Muslim students stay home from school during the holiday. Unaware of the holiday, a public school system schedules standardized testing during that time.

g. In a science class, the instructor teaches about the theory of evolution. A student is concerned that evolution is different than the Biblical story she has learned in church and from her family. Her mother asks that the science teacher also provide a lesson on creationism in order to provide balance.

h. In December a school sets up a Christmas tree in the hallway outside the main office. The tree and ornaments are purchased using donations from students and their families, as opposed to the school's budget. Most students in the school celebrate Christmas.

i. A school district has a "no hats in school" rule to help keep outsiders out of the schools. A Jewish student wants to wear a yarmulke and a Muslim student wants to wear a headscarf as part of their religious practices.

CHAPTER

41

Due Process

"No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

— **Fifth Amendment to the U.S. Constitution**

The phrase **due process** embodies society's basic notions of legal fairness. A first reading of the due process clauses in the Fifth and Fourteenth Amendments to the U.S. Constitution suggests a limitation that only relates to procedures. In fact, many due process cases do involve the question of fair procedures, or **procedural due process.** However, courts have also interpreted the language of these amendments as a limitation on the substantive powers of legislatures to pass laws affecting various aspects of life. When applying what is called **substantive due process**, courts look at whether a law or government action unreasonably infringes on a fundamental liberty.

In a case from 1833, the U.S. Supreme Court decided that the Fifth Amendment restricted only federal government actions and was not directly binding on state governments. As a result of that case, neither the Supreme Court nor the federal courts in general exercised much control over the substance of state laws or over the processes by which states administered their laws during the country's early years. This situation changed dramatically with the passage of the Civil War amendments (Thirteenth, Fourteenth, and Fifteenth Amendments), which were designed to prevent discrimination by states against blacks freed from slavery as a result of that war.

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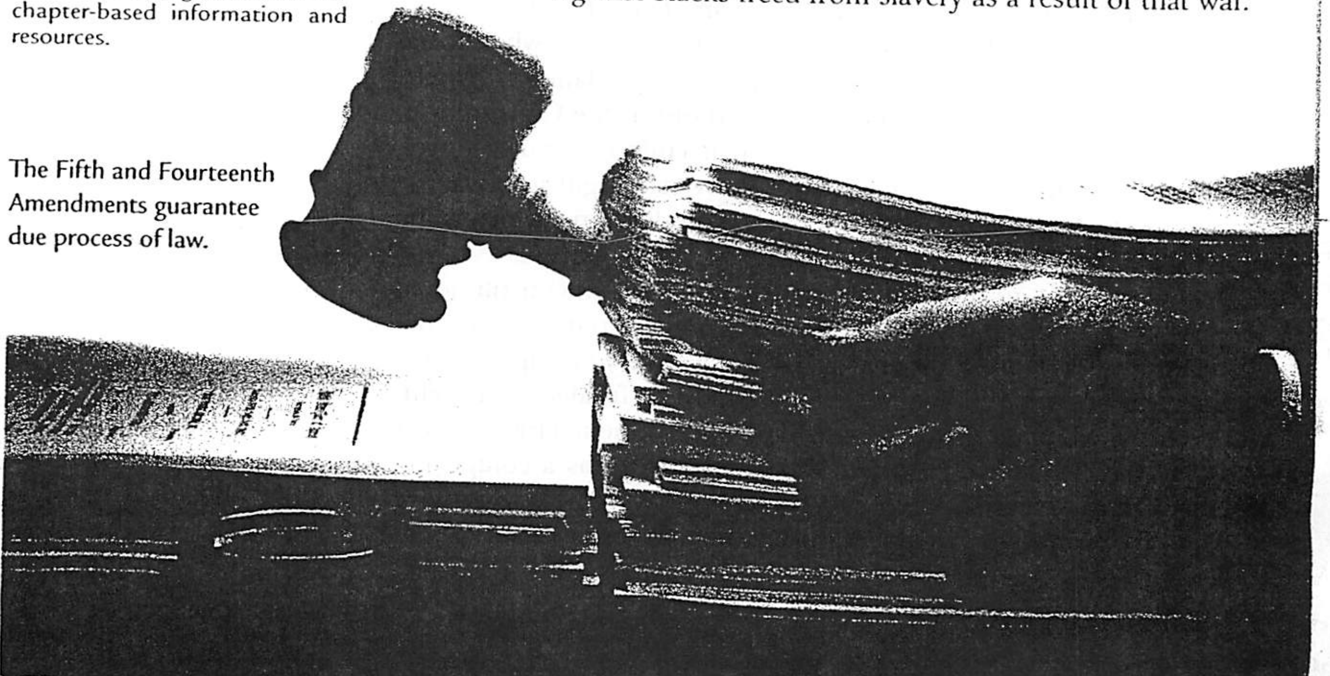
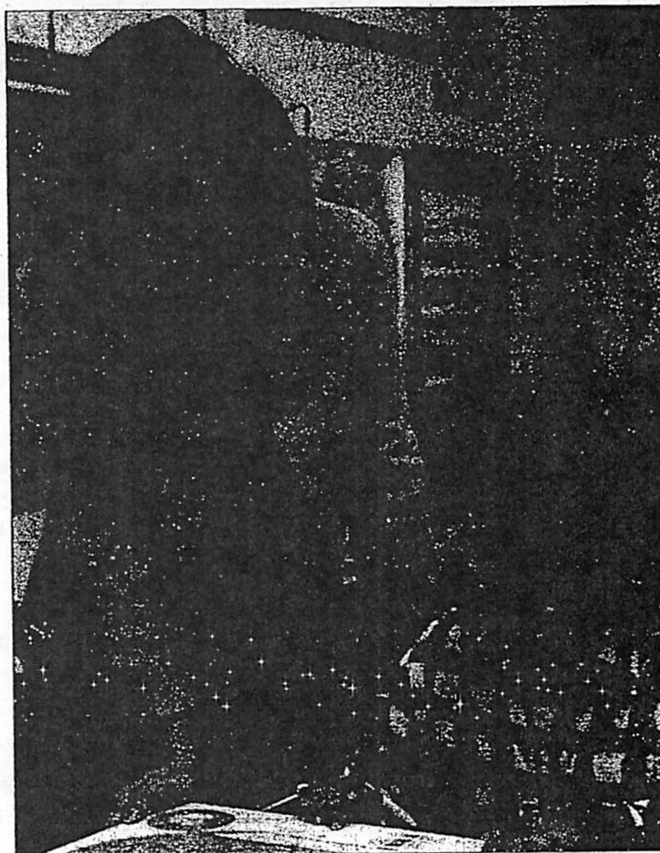


The Fifth and Fourteenth Amendments guarantee due process of law.

The Fourteenth Amendment's due process clause is almost identical to the Fifth Amendment's clause. However, the Fourteenth Amendment specifically limits the actions of the state governments. Courts have interpreted these two clauses identically: the Fifth Amendment now limits the power of the federal government and the Fourteenth Amendment limits the power of state and local governments.



Parents and children are guaranteed a choice between public and private schools because of substantive due process.
How is substantive due process different from procedural due process?

Substantive Due Process

During the first third of the twentieth century, the U.S. Supreme Court used the due process clause to strike down certain social and economic legislation, such as child labor and minimum wage laws. In those cases, the Court believed that legislators were treating the property rights of businesses unfairly. Since the late 1930s, however, the courts have deferred much more to the legislative judgments of elected officials. It is common in current court opinions upholding economic regulations for judges to write that "we will not substitute our wisdom for that of the legislators." In reviewing social and economic welfare laws, the Court now simply requires that the law be rational in order to be constitutional. Only a law with no rational relationship to a legitimate legislative purpose will be declared unconstitutional. This is a fairly easy test to meet, hence the notion of deferring to the wisdom of state and federal lawmakers.

During the 1960s, the Court began to use a stricter test when social and economic welfare laws had an impact on fundamental rights. These fundamental rights, while not spelled out in the Constitution, include the right to marry, to bear and rear children, and to travel. Fundamental rights also include the controversial right to privacy—including a wide range of rights related to reproduction—which is the topic of the next chapter.

A law will not necessarily be struck down as unconstitutional because it affects a fundamental right. In some circumstances, the government may be able to show that it has a very strong, or compelling, interest when taking action that affects a fundamental right. For example, as noted above, parents have a fundamental right to bear and rear their children. However, the government has a compelling interest in protecting children and therefore may be able to remove children from abusive parents and place them in foster care.

The Case of . . .

The Right to Die

In 1983, Nancy Cruzan was severely injured in an automobile accident. As a result of the accident, she suffered permanent brain damage. She remained unconscious in a state hospital and almost totally unresponsive to the world around her for seven years. She was kept alive by a feeding tube that provided water and nutrition. Her parents asked the hospital to remove the tube, but the hospital refused to do so without a court order. All parties agreed that Nancy would soon die without the feeding tube.

State law required "clear and convincing" proof that Nancy would not want to continue her life in this persistent vegetative state. Both the trial court and the state supreme court found her parents unable to produce this evidence based on some conversations Nancy had had with friends before her accident. In a 5-to-4 decision in 1990, the U.S. Supreme Court affirmed the decision of the state supreme court. However, in holding that a state has a strong interest in preserving life, the Court also said that a competent adult has a liberty interest in not being forced to undergo unwanted medical procedures, such as artificial life-sustaining measures. In this case, Nancy Cruzan was found not competent to make this decision. Comments she had made to others before her accident were not considered by any of the reviewing courts as meeting the state's clear and convincing standard of proof.

Seven years later, a related case came to the U.S. Supreme Court. The State of Washington had passed a law that made promoting a suicide attempt a felony. The law provided: "A person is guilty of the crime when he knowingly causes or aids another person to attempt suicide." This law could be applied to a doctor who assisted a patient with a suicide attempt.

In January 1994, several doctors practicing in Washington, along with three gravely ill patients and a nonprofit organization called Compassion in Dying, filed suit in federal court asking that their state's assisted suicide law be declared unconstitutional. They argued that the ban on physician-assisted suicide violates a liberty interest protected by the Fourteenth Amendment's due process clause, "which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide." The state argued that its interest in preserving life outweighs an individual's interest in physician-assisted suicide.

Supporters of the right to die

Problem 41.1

a. How are the *Cruzan* and assisted suicide cases similar? How are they different?

b. What other arguments can you make in favor of allowing physician-assisted suicide?

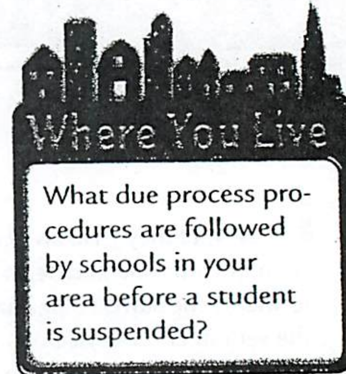
c. What other arguments can you make against it?

d. How should the Court decide the physician-assisted suicide case?

e. Do you believe there should be a right to physician-assisted suicide? Give your reasons.

Procedural Due Process

Many modern due process cases deal with what is called procedural due process (fair administration of the law). Due process procedures do not guarantee that the *result* of government action will always be to a citizen's liking. However, fair procedures do help prevent arbitrary, unreasonable decisions. Due process requirements vary depending on the situation. At a minimum, due process means that citizens who will be affected by a government decision must be given notice of what the government plans to do and have a *chance to comment* on the action before it occurs.



What due process procedures are followed by schools in your area before a student is suspended?

Government takes many actions that may deprive people of life, liberty, or property. In each case, some form of due process is required. For example, a state might fire someone from a government job, revoke a prisoner's parole, or cut off someone's Social Security payments. Due process does not prohibit these actions, but it does require that certain procedures be followed before any action is taken.

If a person has a right to due process, the next issue is this: What process is due? Due process is a flexible concept. The procedures required in specific situations depend on several factors: (1) the seriousness of the harm that might be done to the citizen; (2) the risk of making an error without the procedures; and (3) the cost to the government, in time and money, of carrying out the procedures.

According to past decisions of the U.S. Supreme Court, the primary reason for establishing procedural safeguards—when a life, liberty, or property interest is affected by government action—is to prevent inaccurate or unjustified decisions. In a case decided by the Supreme Court in 2003, a sex offender released from prison complained that personal information about him was made available through a state-sponsored Internet site. The site provided information to residents about convicted sex offenders as part of their state's Megan's Law—a law passed in every state and the District of Columbia in memory of a New Jersey girl raped and killed in 1994 by a neighbor who, unbeknownst to the girl's parents, was a convicted sex offender. The former inmate in the 2003 case contended that listing his name and personal information without a court hearing to determine whether or not he was *currently* dangerous harmed his reputation—his interest in liberty—and therefore violated his procedural due process rights. The Court found that the operation of Megan's Law was valid because it simply provided residents with truthful information about convicted sex offenders without maintaining that they were currently dangerous. There was no need for individual hearings because there was no substantial risk of error.

In addition to providing notice and a chance to be heard, due process must follow certain procedures. These may include a hearing before an impartial person, representation by an attorney, calling witnesses on one's behalf, cross-examination of witnesses, a written decision with reasons based on the evidence introduced, a transcript of the proceeding, and an opportunity to appeal the decision.

If you believe that the government has not followed fair procedures when taking some action that affected your life, liberty, or property interest, you may want to consult an attorney. With the attorney's advice and assistance, you can file a complaint directly with the government agency. You may also be able to go to court and seek an order that the government follow due process in dealing with you.

Remember that when the U.S. Supreme Court decides a constitutionality issue, it sets out the minimum protection required. No government can offer less. For example, a state could not decide to do away with the notice requirement in the *Goss* decision. However, government agencies can, and sometimes do, offer greater due process protection than the Supreme Court requires.

The Case of . . .

The Deportation of Permanent Residents

Hyung Joon Kim came to the United States with his parents in 1984 when he was six. Two years later he got a "green card," which identifies legal aliens as permanent residents. He was convicted of burglary in 1996 and of petty theft the next year. After serving two years he was paroled. But soon he was arrested by immigration authorities and jailed as the federal government began deportation proceedings against him. Under the 1996 *Immigration and Naturalization Act,* immigrants—including legal permanent residents—who have already been convicted of certain crimes can be detained without a hearing while the government decides whether to deport them.

From jail, Kim asked a federal judge to release him and to provide him with a due process hearing before further detaining him. Kim wanted the government to have to show that he was unlikely to show up for his deportation hearing. Both the trial judge and the federal court of appeals sided with Kim. The government appealed the decision to the U.S. Supreme Court, which found the federal law to be constitutional, and not a violation of Kim's right to due process. Writing for the majority in this 5-to-4 decision, Chief Justice Rehnquist said: "This Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." In dissent, Justice Souter wrote that the Court was forgetting more than one hundred years of case precedents that protected the basic liberty interests of permanent residents by locking Kim up for no reason.

Congress had passed the 1996 law out of a concern that many immigrants, once released from jail, would continue to commit crimes and would be hard for authorities to locate. This decision affirms the wide-ranging power the federal government has over immigrants.

Problem 41.2

a. Do you agree with the Court's decision? Explain.

b. Should lawful permanent residents (green-card holders) have the exact same rights as citizens? Should immigrants in the country illegally have fewer rights than lawful permanent residents?

The Case of . . .

Goss v. *Lopez*

Ohio law provides for a free education for all children between the ages of 6 and 21. In 1971, widespread student unrest took place in the public schools of Columbus, Ohio. Students who either participated in, or were present at, demonstrations held on school grounds were suspended. Many suspensions were for a period of ten days. Students were not given a hearing before suspension, although at a later date some students and their parents were given informal conferences with the school principal. A number of students, through their parents, sued the board of education, claiming that their right to due process had been violated when they were suspended without a hearing.

In *Goss* v. *Lopez,* the U.S. Supreme Court decided that students who are suspended for ten days or less are entitled to certain rights before their suspension. These rights include (1) oral or written notice of the charges, (2) an explanation (if students deny the charges) of the evidence against them, and (3) an opportunity for students to present their side of the story.

The Court stated that in an emergency, students could be sent home immediately and a hearing could be held at a later date. The Court did not give students a right to a lawyer, a right to call or cross-examine witnesses, or a right to a hearing before an impartial person.

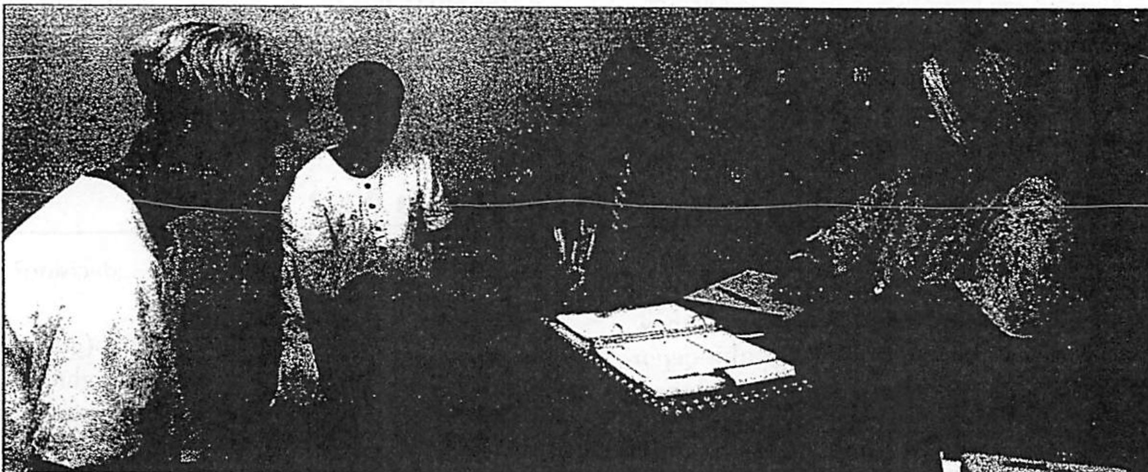
In *Goss,* the Court considered the due process interests of harm, cost, and risk. The Court ruled that reputations were harmed and educational opportunities were lost during the suspension; that an informal hearing would not be overly costly for the schools; and that while most disciplinary decisions were probably correct, an informal hearing would help reduce the risk of error.

Problem 41.3

a. What happened in the *Goss* case? What rights did the Supreme Court say the students should be given prior to a brief suspension?

b. What rights might the students want that they did not receive in this case? What are the arguments for and against providing these additional rights?

c. Do you think this case was decided correctly? Give your reasons.



Meeting with the principal

CHAPTER

42

The Right to Privacy

"The makers of our Constitution . . . conferred, against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

— *Olmstead* v. *United States* (1928), dissenting opinion

Today, Justice Louis D. Brandeis's words from the *Olmstead* case continue to have meaning in our daily lives. Although the words *right to privacy* or *right to be let alone* do not appear anywhere in the U.S. Constitution, many people agree that privacy is a basic right that should be protected.

Development of the Right to Privacy

Since the mid-1960s, the U.S. Supreme Court has recognized a constitutional right to privacy. This right is protected when people seek to be let alone, such as in search and seizure cases. It is also protected when people want to make certain kinds of important decisions, such as marriage and family planning, free of undue government interference.

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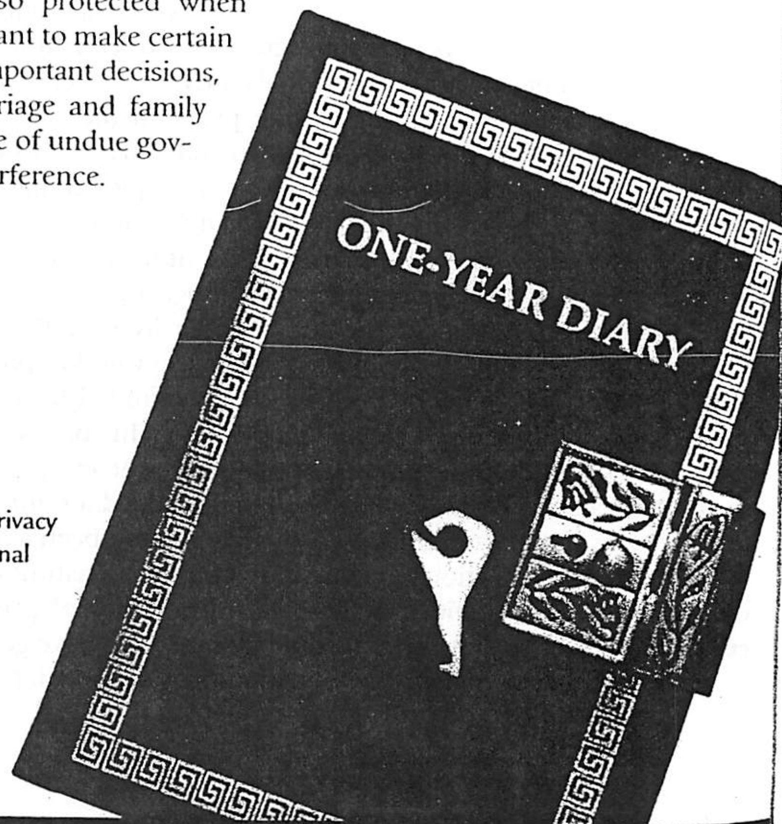


People expect privacy with their personal belongings.

Courts have determined that protection of the public, as well as the public's right to know, often overrides a criminal's right to keep his or her criminal record private. *Do you agree with these court decisions?*

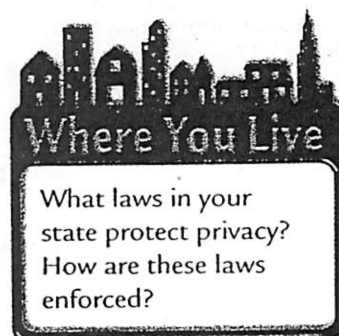
The Supreme Court has said that the Constitution creates "zones of privacy." The zones are derived from the freedoms of speech and association (First Amendment), the freedom from unreasonable search and seizure (Fourth Amendment), the right to remain silent (Fifth Amendment), the right to have one's home free of soldiers during peacetime (Third Amendment), and the unspecified rights kept by the people (Ninth Amendment). In addition, because privacy has been found to be a fundamental right, the Court sometimes justifies privacy protection in terms of substantive due process. The right to privacy generally protects citizens from unreasonable interference by the government.

The right to privacy sometimes conflicts with important government interests. For example, the government may need information about individuals to solve a crime or to determine eligibility for government programs. In such cases, the government can regulate certain acts or activities, even though an individual's interest in privacy is affected. Deciding whether a constitutional right to privacy exists involves a careful weighing of competing private and government interests.

Several recent cases show how the courts weigh and balance these interests in privacy cases. In one case, the U.S. Supreme Court held in 1997 that a Georgia law requiring candidates for certain public offices to submit to drug tests before an election was unconstitutional. The Supreme Court balanced the individuals' privacy expectations against the state's interest in the drug testing program (i.e., ensuring that elected officials were not drug users). In that case the Court found that testing candidates in the absence of any suspicion that they were drug users could not be justified by the state's interest.

In another decision, the Supreme Court upheld a New Jersey law requiring that notice be given to local youth groups, day care centers, and neighbors that a convicted sex offender lived in the area. The Court determined that the public's right to know and to protect children overrode an offender's right to keep a criminal history private. Giving such notice did not violate the privacy rights of a sex offender.

Surveys regularly show popular support for protecting privacy, and some states have passed new privacy laws or added a right to privacy to their state constitutions. However, there has also been a movement to limit privacy protections that are based on the Constitution. Those who favor such limitations believe that the "zones of privacy" discussed above are the creation of some justices who have gone too far in reading privacy rights into the Constitution. Others point to popular



What laws in your state protect privacy? How are these laws enforced?

support for privacy, extensive state laws in this area, and the many U.S. Supreme Court decisions supporting privacy rights. They argue that privacy rights are settled law on which people have come to rely, and that these precedents should not be overruled.

In this chapter you will learn about privacy in a number of contexts: at home and at school, in gathering information, and in the areas of birth control and abortion. There is also information dealing with privacy on the job in Chapter 44.

Problem 42.1

For each of the following situations, decide what privacy rights or interests are in conflict and what arguments can be made for each side. Indicate whether you agree or disagree with the law or policy.

a. A public school requires students to obey a dress code and restricts the hair length of boys.

b. The government requires taxpayers to reveal the source of their income, even if it is from illegal activities.

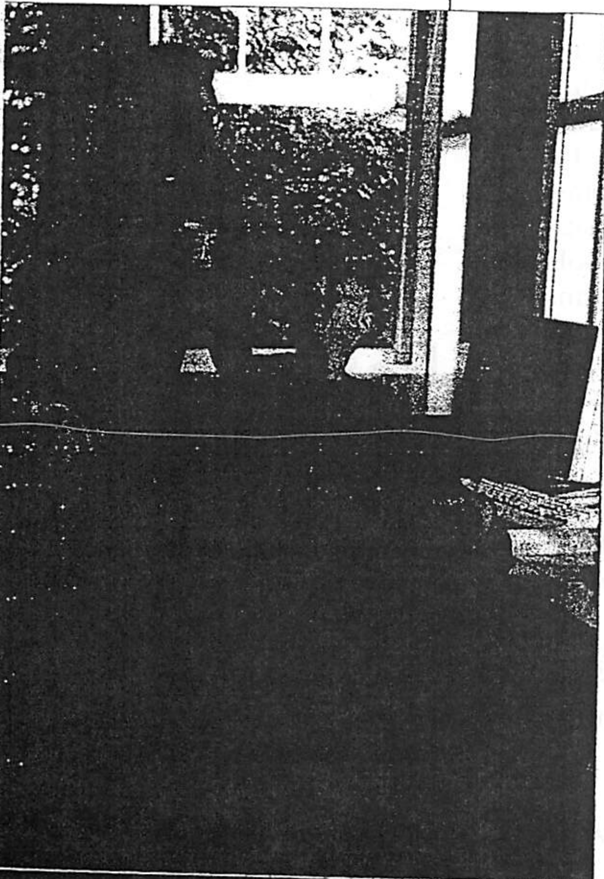
c. A law forbids nude sunbathing anywhere at a community's beaches.

d. In a prison that has had several stabbings, inmates are strip-searched every day.

e. A state law requires motorcyclists to wear helmets.

f. The police place a small device in a phone that enables them to record all numbers dialed on that phone.

Privacy at home is protected by law. *What do police need in order to search a person's home?*



Privacy in the Home and at School

There is a saying that a person's home is his or her castle. Historically, the law has recognized that people may reasonably expect considerable privacy in their homes. For example, police usually need a valid search warrant in order to search a person's home.

In a 1986 case, the U.S. Supreme Court considered whether a state had the authority to prosecute consenting adult males for engaging in a sexual act in a bedroom of their own home. In a 5-to-4 decision, the Court held that there was no constitutionally protected right to engage in homosexual conduct—even in the privacy of one's home. The Court found that outlawing homosexual conduct was deeply rooted in the nation's history and traditions. The dissenters, basing their reasoning on the Georgia case that follows, believed that the sexual practices of consenting adults in their own bedrooms should be fully protected under previous

The Case of . . .

Possessing Obscene Materials at Home

Georgia had a law prohibiting the possession of obscene or pornographic films. A man was arrested in his own home for violating this law. He said—and the state prosecutor did not challenge him—that he had the films for his own use and did not offer them for sale.

In this case, the U.S. Supreme Court recognized the right to possess obscene materials in one's own home for private use. The Court indicated that individuals generally have the right to think, observe, and read whatever they please, especially in their own homes. However, the Court has held that states may prohibit the possession and viewing of child pornography, as long as the law is reasonably designed to protect the physical and psychological well-being of minors.

Problem 42.2

a. Do you agree or disagree with the Supreme Court's opinion? Give reasons for your answer.

b. Would you decide the case differently if the man had shown the obscene films to people outside his home?

c. Would your decision be different if people had to pay to see the films? Why?

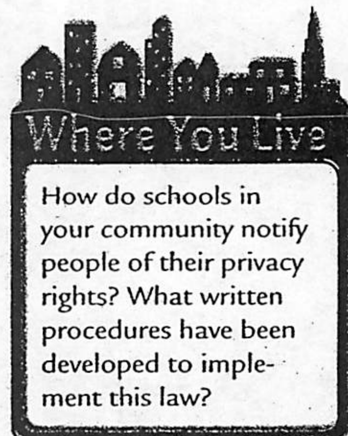
d. Assume a person is arrested for possessing a small amount of marijuana in her home. Could she successfully argue, based on the Georgia case, that the law violates her right to privacy?

e. How is the case of possessing obscene materials similar to the case described in question **d.**? How are the two cases different? Be sure to provide supporting details to explain your answer.

privacy decisions and the fundamental "right to be let alone" by the government. However, in 2003, the Court changed course, overruling the 1986 decision. For more information on this topic, see The Case of *Lawrence* v. *Texas* on page 528. This decision is an example of how the reasoning in the dissent in an earlier case (the 1986 case) can sometimes become the reasoning for the majority decision in a later case.

Government generally limits students' right to privacy in schools. For example, most courts have upheld searches of students' desks and lockers. The courts reason that lockers belong to the school and that students cannot reasonably expect privacy on school property. Likewise, the Supreme Court has upheld searches of students' belongings without a warrant and without probable cause, as long as school officials have some reasonable suspicion of wrongdoing. See the section on search and seizure in schools on pages 146 and 148.

There is, however, a federal law that protects students' right to some privacy. Known as the *Family Educational Rights and Privacy Act of 1974 (FERPA)*, this law gives parents the right to inspect their children's school records. If parents find any inaccurate, misleading, or inappropriate information, they may insist on a written correction. The law also prohibits the release of school records to other parties without a parent's permission.



Students who reach age 18 or attend college have a right to see their own records. Requests to see school records must be honored within 45 days. Schools have a duty to inform parents and students of their rights under this law.

Information Gathering and Privacy

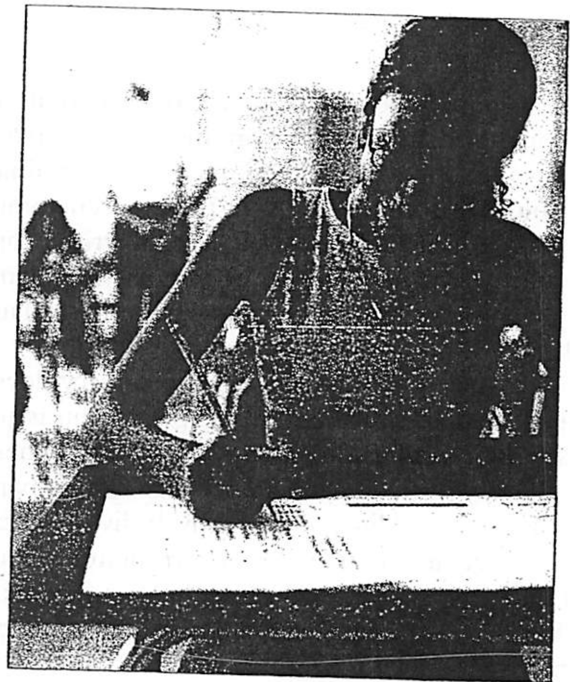
Computers have changed the way we live, work, and play. Computers allow businesses and organizations to collect, store, and examine detailed information about individuals. Some organizations sell the information collected to businesses or other organizations. Individuals are often unaware of this practice.

The Case of . . .

Peer Grading

The Owasso School District in Oklahoma does not have a formal policy telling teachers how student work is to be graded. Some teachers grade all assignments themselves, while others have students grade some of their own papers after the answers are provided. Still others use peer grading from time to time. This means that students exchange papers and grade each other's work from answers provided.

Mrs. Falvo has four children in the school system. She believes that peer grading humiliates her children and is a violation of their right to privacy under the federal *Family Educational Rights and Privacy Act of 1974 (FERPA)*. The school system believes that peer grading provides immediate feedback to students and avoids the problem of students cheating when they grade their own papers. The school system also contends that peer grading is done for the individual teacher and not for the school system, which does not maintain these educational records (i.e., grades for specific assignments during a semester). Mrs. Falvo wins her case in the lower courts, and the U.S. Supreme Court agrees to review the case in order to decide how *FERPA* applies to peer grading.



Grading a classmate's work

Problem 42.3

a. Must the Court decide that a grade on an assignment is part of a student's school record in order for the *Falvo* case to be upheld?

b. How should this case be decided? Explain.

The Case of . . .

The Candidate's Indiscretion

A married male state senator running for governor had a reputation for dating women in the state's capital city. The candidate's wife and two children lived in their hometown about 200 miles from the state capital. The members of the press who traveled with the senator on campaign trips noticed that his wife seldom came along and that he often dined late at night with one particular woman. The press decided to investigate further and discovered this woman leaving the candidate's hotel room one morning.

Problem 42.4

a. Is it reasonable for the candidate to expect the reporters not to disclose this personal information? Give arguments on both sides of this issue.

b. Suppose a reporter also had information that the candidate used cocaine at a social gathering. Would you analyze his privacy rights differently in this situation? Explain your reasons.

c. Some states have laws requiring that a political candidate reveal the source and amount of all campaign contributions. Do these laws violate the privacy rights of the contributors?

The federal government's computers contain enormous amounts of information. Today, there are more than 5,000 federal data banks. For example, the federal government requires financial institutions to microfilm large checks passing through customer accounts. In fact, most banks keep copies of all checks written or deposited by their customers. This information can be useful when authorities investigate white-collar crime, but it may be unfairly damaging if it falls into the hands of other investigators.

Courts have held that the right to privacy does not protect checks or deposit slips. However, limited protection is provided by a federal law that requires customers to receive notice whenever a federal agent seeks a copy of their financial records from a bank, savings and loan association, or credit card company. Individuals can then ask a federal court to decide whether the government's request should be honored. However, the law does not protect against requests from state and local governments, private investigators, or credit bureaus to see a person's financial records.

Although laws such as the *Freedom of Information Act* encourage the government to release information to the public, another law restricts access to federal records. The *Privacy Act of 1974* prevents the government from releasing most information about an individual without that person's written consent. It protects medical, financial, criminal, and employment records from unauthorized disclosure. The law also entitles individuals (with some exceptions) to see information about themselves and to correct any mistakes. If your rights are violated under this law, you may sue for damages in federal court.

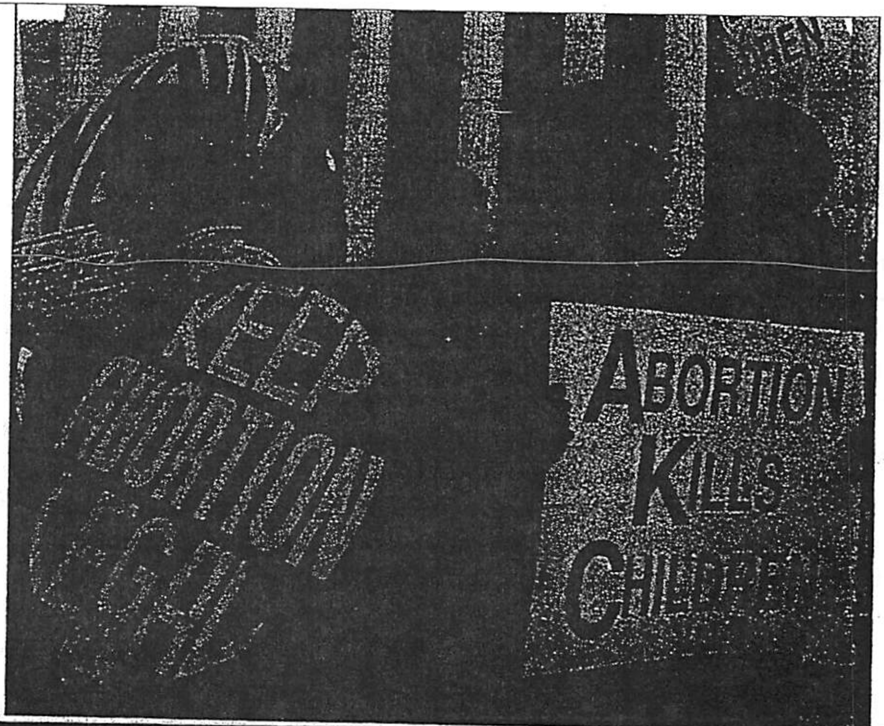
After September 11, 2001, the federal government increased its methods of information gathering. Under the *USA Patriot Act,* if a federal law enforcement official alleges that requested records might be relevant to a terrorism investigation, the usual requirement of finding probable cause is waived (not needed). Under the act, warrants may be issued for library and bookstore records, as well as to search computer hard drives and discs. The *USA Patriot Act* is discussed in more detail in Chapter 17.

Reproductive Rights and Privacy

In 1965, the Supreme Court struck down a state law that prohibited the possession of contraceptives by married couples. In 1972, the Court declared that a law prohibiting the sale of birth control devices to unmarried people was also unconstitutional. In both cases, the Court found that these laws had interfered with the fundamental right to bear or not bear children and had violated the right to privacy.

Abortion laws have changed over time. In the early 1800s, abortion was legal in the United States prior to "quickening" (when the mother can first feel the fetus moving, usually about 16 weeks). However, by the late 1870s, attitudes changed, and almost every state had laws restricting abortions. As a result, abortion activity went underground. In the mid-1960s, some people became vocal about the need for legalized abortion. People proposed many arguments on both sides, giving medical, moral, religious, financial, political, and constitutional reasons.

Some people argue that abortion is wrong in all situations. These individuals believe that life begins at conception and must be protected from that moment on. This is often referred to as the "right to life," and supporters are said to be pro-life. Others argue that abortion is a constitutional right and a private matter to be decided by a



Women on both sides of the abortion issue show their support. *Why is abortion such a controversial issue?*

woman. These individuals believe that a woman must be allowed to control her own body and not have it regulated by laws that work against her personal choices. This is often referred to as the "right to choose," and supporters are said to be pro-choice.

The U.S. Supreme Court and many state courts have struggled with these issues. In 1973, a landmark Supreme Court decision in *Roe* v. *Wade* made abortion legal in certain circumstances. Based on a woman's constitutional right to privacy, *Roe* held that a woman had a fundamental, though not absolute, right to an abortion. This right was defined on a trimester basis. During the first trimester of pregnancy (the first three months), a woman could have an abortion on demand without interference from the state. During the second trimester of pregnancy (four through six months), the state could regulate abortions for safety but could not prohibit them entirely. During the third trimester of pregnancy (seven through nine months), the state could regulate or forbid all abortions except to save the life of the mother.

Problem 42.5

a. Why do you think abortion is so controversial?

b. Should abortion be allowed on demand? Totally banned? Regulated in some way? Would you allow late-term abortions under any circumstances? Explain.

c. What are the advantages and disadvantages of state laws that require minors to obtain consent from a parent before receiving an abortion?

d. Assume that a private organization wants to distribute condoms at a high school and that the school board passes a rule prohibiting condom distribution. Would such a rule violate the privacy rights of high school students? What are the arguments for and against such a rule?

The 1973 *Roe* decision did not end the debate over abortion. In some ways, the decision intensified the debate. Since 1973, the Supreme Court has held that states could not give a husband veto power over his wife's decision to have an abortion. Parents of minor-age, unwed girls also could not have absolute veto power over abortion decisions. However, the Supreme Court has said that states may require that pregnant unmarried minors obtain parental consent as long as the minor also has the option to avoid this by going before the court to obtain permission from a judge. While never actually overturning *Roe* v. *Wade,* the Supreme Court has allowed states additional authority to limit the right to an abortion. In 2000, however, the Supreme Court found a state law that criminalized the performance of partial-birth abortions (also called late-term abortions) to be unconstitutional because it did not contain an exception that would allow the procedure for the preservation of the health of the mother. This issue continues to be a very controversial topic.

support for privacy, extensive state laws in this area, and the many U.S. Supreme Court decisions supporting privacy rights. They argue that privacy rights are settled law on which people have come to rely, and that these precedents should not be overruled.

In this chapter you will learn about privacy in a number of contexts: at home and at school, in gathering information, and in the areas of birth control and abortion. There is also information dealing with privacy on the job in Chapter 44.

Problem 42.1

For each of the following situations, decide what privacy rights or interests are in conflict and what arguments can be made for each side. Indicate whether you agree or disagree with the law or policy.

a. A public school requires students to obey a dress code and restricts the hair length of boys.

b. The government requires taxpayers to reveal the source of their income, even if it is from illegal activities.

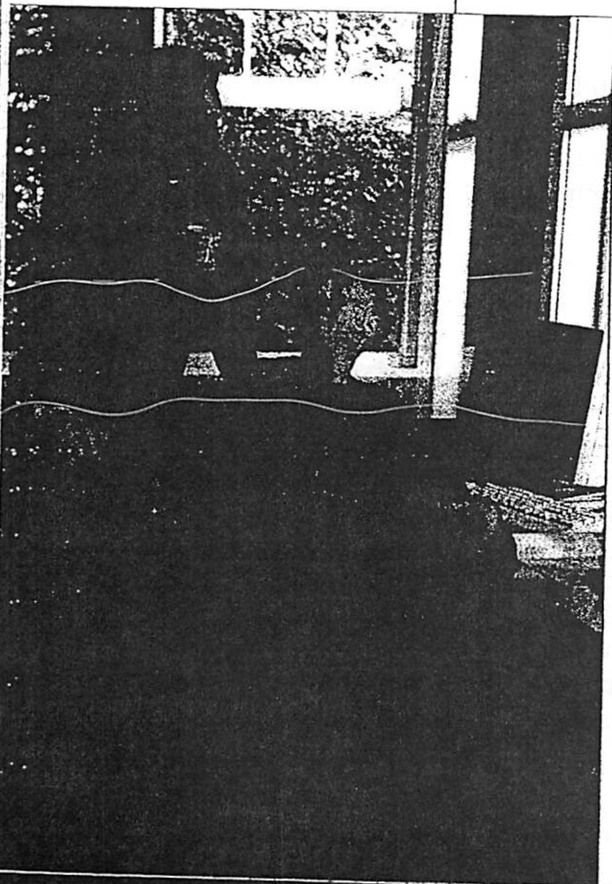
c. A law forbids nude sunbathing anywhere at a community's beaches.

d. In a prison that has had several stabbings, inmates are strip-searched every day.

e. A state law requires motorcyclists to wear helmets.

f. The police place a small device in a phone that enables them to record all numbers dialed on that phone.

Privacy at home is protected by law. *What do police need in order to search a person's home?*



Privacy in the Home and at School

There is a saying that a person's home is his or her castle. Historically, the law has recognized that people may reasonably expect considerable privacy in their homes. For example, police usually need a valid search warrant in order to search a person's home.

In a 1986 case, the U.S. Supreme Court considered whether a state had the authority to prosecute consenting adult males for engaging in a sexual act in a bedroom of their own home. In a 5-to-4 decision, the Court held that there was no constitutionally protected right to engage in homosexual conduct—even in the privacy of one's home. The Court found that outlawing homosexual conduct was deeply rooted in the nation's history and traditions. The dissenters, basing their reasoning on the Georgia case that follows, believed that the sexual practices of consenting adults in their own bedrooms should be fully protected under previous

The Case of . . .

Possessing Obscene Materials at Home

Georgia had a law prohibiting the possession of obscene or pornographic films. A man was arrested in his own home for violating this law. He said—and the state prosecutor did not challenge him—that he had the films for his own use and did not offer them for sale.

In this case, the U.S. Supreme Court recognized the right to possess obscene materials in one's own home for private use. The Court indicated that individuals generally have the right to think, observe, and read whatever they please, especially in their own homes. However, the Court has held that states may prohibit the possession and viewing of child pornography, as long as the law is reasonably designed to protect the physical and psychological well-being of minors.

Problem 42.2

a. Do you agree or disagree with the Supreme Court's opinion? Give reasons for your answer.

b. Would you decide the case differently if the man had shown the obscene films to people outside his home?

c. Would your decision be different if people had to pay to see the films? Why?

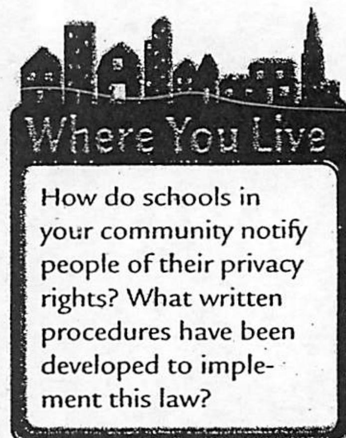
d. Assume a person is arrested for possessing a small amount of marijuana in her home. Could she successfully argue, based on the Georgia case, that the law violates her right to privacy?

e. How is the case of possessing obscene materials similar to the case described in question **d.**? How are the two cases different? Be sure to provide supporting details to explain your answer.

privacy decisions and the fundamental "right to be let alone" by the government. However, in 2003, the Court changed course, overruling the 1986 decision. For more information on this topic, see The Case of *Lawrence* v. *Texas* on page 528. This decision is an example of how the reasoning in the dissent in an earlier case (the 1986 case) can sometimes become the reasoning for the majority decision in a later case.

Government generally limits students' right to privacy in schools. For example, most courts have upheld searches of students' desks and lockers. The courts reason that lockers belong to the school and that students cannot reasonably expect privacy on school property. Likewise, the Supreme Court has upheld searches of students' belongings without a warrant and without probable cause, as long as school officials have some reasonable suspicion of wrongdoing. See the section on search and seizure in schools on pages 146 and 148.

There is, however, a federal law that protects students' right to some privacy. Known as the *Family Educational Rights and Privacy Act of 1974 (FERPA)*, this law gives parents the right to inspect their children's school records. If parents find any inaccurate, misleading, or inappropriate information, they may insist on a written correction. The law also prohibits the release of school records to other parties without a parent's permission.



How do schools in your community notify people of their privacy rights? What written procedures have been developed to implement this law?

Students who reach age 18 or attend college have a right to see their own records. Requests to see school records must be honored within 45 days. Schools have a duty to inform parents and students of their rights under this law.

Information Gathering and Privacy

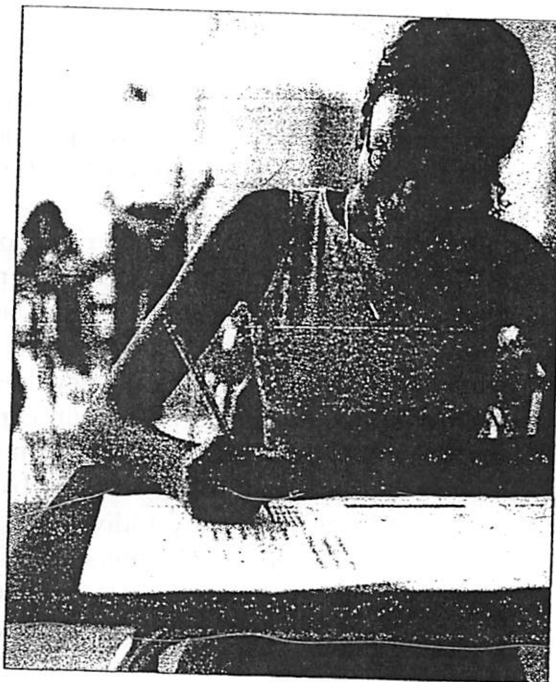
Computers have changed the way we live, work, and play. Computers allow businesses and organizations to collect, store, and examine detailed information about individuals. Some organizations sell the information collected to businesses or other organizations. Individuals are often unaware of this practice.

The Case of . . .

Peer Grading

The Owasso School District in Oklahoma does not have a formal policy telling teachers how student work is to be graded. Some teachers grade all assignments themselves, while others have students grade some of their own papers after the answers are provided. Still others use peer grading from time to time. This means that students exchange papers and grade each other's work from answers provided.

Mrs. Falvo has four children in the school system. She believes that peer grading humiliates her children and is a violation of their right to privacy under the federal *Family Educational Rights and Privacy Act of 1974 (FERPA)*. The school system believes that peer grading provides immediate feedback to students and avoids the problem of students cheating when they grade their own papers. The school system also contends that peer grading is done for the individual teacher and not for the school system, which does not maintain these educational records (i.e., grades for specific assignments during a semester). Mrs. Falvo wins her case in the lower courts, and the U.S. Supreme Court agrees to review the case in order to decide how *FERPA* applies to peer grading.



Grading a classmate's work

Problem 42.3

a. Must the Court decide that a grade on an assignment is part of a student's school record in order for the *Falvo* case to be upheld?

b. How should this case be decided? Explain.

The Case of . . .

The Candidate's Indiscretion

A married male state senator running for governor had a reputation for dating women in the state's capital city. The candidate's wife and two children lived in their hometown about 200 miles from the state capital. The members of the press who traveled with the senator on campaign trips noticed that his wife seldom came along and that he often dined late at night with one particular woman. The press decided to investigate further and discovered this woman leaving the candidate's hotel room one morning.

Problem 42.4

a. Is it reasonable for the candidate to expect the reporters not to disclose this personal information? Give arguments on both sides of this issue.

b. Suppose a reporter also had information that the candidate used cocaine at a social gathering. Would you analyze his privacy rights differently in this situation? Explain your reasons.

c. Some states have laws requiring that a political candidate reveal the source and amount of all campaign contributions. Do these laws violate the privacy rights of the contributors?

The federal government's computers contain enormous amounts of information. Today, there are more than 5,000 federal data banks. For example, the federal government requires financial institutions to microfilm large checks passing through customer accounts. In fact, most banks keep copies of all checks written or deposited by their customers. This information can be useful when authorities investigate white-collar crime, but it may be unfairly damaging if it falls into the hands of other investigators.

Courts have held that the right to privacy does not protect checks or deposit slips. However, limited protection is provided by a federal law that requires customers to receive notice whenever a federal agent seeks a copy of their financial records from a bank, savings and loan association, or credit card company. Individuals can then ask a federal court to decide whether the government's request should be honored. However, the law does not protect against requests from state and local governments, private investigators, or credit bureaus to see a person's financial records.

Although laws such as the *Freedom of Information Act* encourage the government to release information to the public, another law restricts access to federal records. The *Privacy Act of 1974* prevents the government from releasing most information about an individual without that person's written consent. It protects medical, financial, criminal, and employment records from unauthorized disclosure. The law also entitles individuals (with some exceptions) to see information about themselves and to correct any mistakes. If your rights are violated under this law, you may sue for damages in federal court.

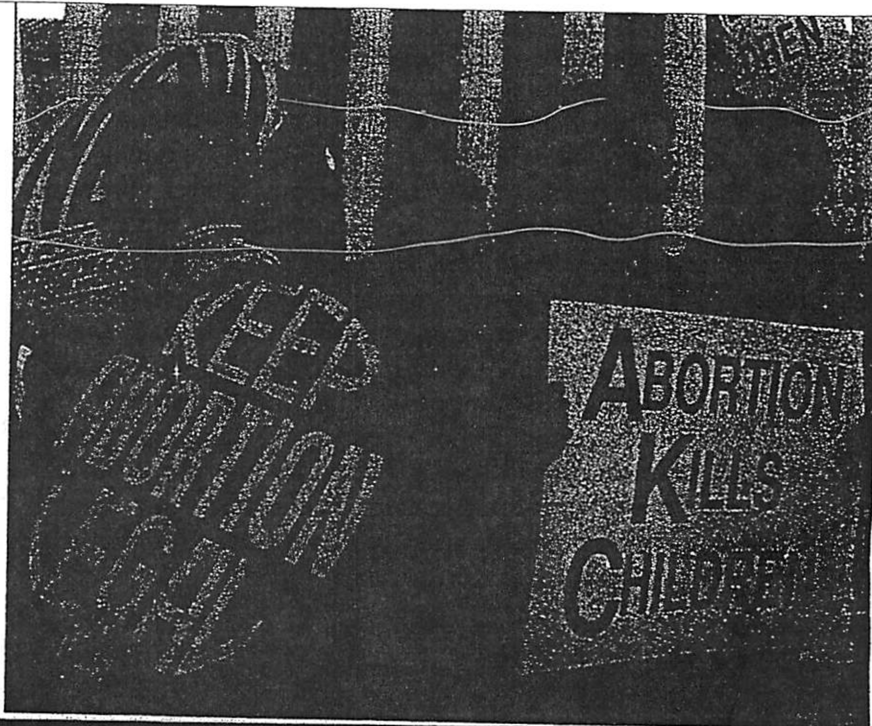
After September 11, 2001, the federal government increased its methods of information gathering. Under the *USA Patriot Act,* if a federal law enforcement official alleges that requested records might be relevant to a terrorism investigation, the usual requirement of finding probable cause is waived (not needed). Under the act, warrants may be issued for library and bookstore records, as well as to search computer hard drives and discs. The *USA Patriot Act* is discussed in more detail in Chapter 17.

Reproductive Rights and Privacy

In 1965, the Supreme Court struck down a state law that prohibited the possession of contraceptives by married couples. In 1972, the Court declared that a law prohibiting the sale of birth control devices to unmarried people was also unconstitutional. In both cases, the Court found that these laws had interfered with the fundamental right to bear or not bear children and had violated the right to privacy.

Abortion laws have changed over time. In the early 1800s, abortion was legal in the United States prior to "quickening" (when the mother can first feel the fetus moving, usually about 16 weeks). However, by the late 1870s, attitudes changed, and almost every state had laws restricting abortions. As a result, abortion activity went underground. In the mid-1960s, some people became vocal about the need for legalized abortion. People proposed many arguments on both sides, giving medical, moral, religious, financial, political, and constitutional reasons.

Some people argue that abortion is wrong in all situations. These individuals believe that life begins at conception and must be protected from that moment on. This is often referred to as the "right to life," and supporters are said to be pro-life. Others argue that abortion is a constitutional right and a private matter to be decided by a



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