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## Closing the Barn Door after the Genie Is out of the Bag: Recognizing a "Futility Principle" in First Amendment

Eric B. Easton

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**CLOSING THE BARN DOOR AFTER THE GENIE IS  
OUT OF THE BAG: RECOGNIZING A “FUTILITY  
PRINCIPLE” IN FIRST AMENDMENT  
JURISPRUDENCE**

*Eric B. Easton\**

TABLE OF CONTENTS

INTRODUCTION .....	2
I. THE FUTILITY PRINCIPLE REVEALED .....	7
A. <i>Classic Prior Restraint Cases</i> .....	7
B. <i>Denying Access to Public Information</i> .....	13
C. <i>Liability for Invasion of Privacy</i> .....	21
D. <i>Regulation of Commercial Speech</i> .....	26
II. THE FUTILITY PRINCIPLE EXAMINED.....	34
A. <i>Defining the Futility Principle</i> .....	34
B. <i>Justifying the Futility Principle</i> .....	39
III. THE FUTILITY PRINCIPLE APPLIED .....	42
A. <i>Mayhem Manuals and the Internet</i> .....	42
B. <i>The Memphis Obscenity Convictions</i> .....	49
C. <i>Cryptography Export Controls</i> .....	56
CONCLUSION .....	63

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The Attorney General . . . submits that despite the fact that *Spycatcher* has received worldwide publication and is in fact available in this country for anyone who wants to read it, the law forbids the press, the media and indeed anyone else from publishing or commenting on any part of it . . . . If such was the law then the law would indeed be an ass, for it would seek to deny to our own citizens the right to be informed of matters which are freely available throughout the rest of the world and would in fact be seeking in vain because anyone who really wishes to read *Spycatcher* can lay his hands on a copy in this country.<sup>1</sup>

## INTRODUCTION

As a general proposition, the First Amendment does not permit the government to suppress protected speech without some legitimate purpose. Depending upon the perceived value of the speech and the means chosen to suppress it, that purpose may have to represent an important,<sup>2</sup> substantial,<sup>3</sup> overriding,<sup>4</sup> or even compelling<sup>5</sup> governmental interest.<sup>6</sup>

In most instances, the First Amendment also requires some demonstration that speech suppression will achieve or contribute to achieving that legitimate state purpose.<sup>7</sup> The required "fit" between the purpose and the means chosen may be quite precise<sup>8</sup> or merely reasonable.<sup>9</sup> The required demonstration of this means-end fit may be

1. *Attorney Gen. v. Guardian Newspapers, Ltd.*, 3 All E.R. 545 (H.L. 1988).

2. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (holding that the "symbolic speech" of tearing up a selective service certificate is not protected under the First Amendment because Congress has the authority to raise armies and selective service certificates play a "legitimate and substantial" administrative role in that function).

3. *See, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (explaining that the government must have at least a substantial interest before regulating commercial speech).

4. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) (holding that, absent an overriding contrary interest, the trial of a criminal case must be open to the public).

5. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982) (ruling that a compelling governmental interest must exist in order to prevent the press access to criminal sex-offense trials).

6. Chief Justice Warren commented on the "imprecision" of such terms in *O'Brien*. *See* 391 U.S. at 377 (noting that the terms "compelling," "substantial," "subordinating," "paramount," "cogent," and "strong" are inherently imprecise).

7. *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976) (holding that to justify a prior restraint on the press to publicize information related to a murder trial, the government must show that alternative measures will not protect the rights of the accused).

8. *See, e.g., Globe Newspaper Co.*, 457 U.S. at 607 (asserting that to deny the right of free speech, the government must demonstrate "that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest").

9. *See, e.g., Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (holding that when regulating commercial speech, the fit between the purpose and the means chosen to achieve it need only be reasonable).

either empirical<sup>10</sup> or merely logical.<sup>11</sup> But, the government may not suppress speech by any means that is wholly ineffective, that does not serve,<sup>12</sup> further,<sup>13</sup> or directly advance<sup>14</sup> the state's purpose.

Oddly, the courts have never formally held that this effectiveness test encompasses effectiveness in actually suppressing the speech in question. Although First Amendment opinions in which courts have struck down measures which suppress speech have often noted the availability of the same speech through other media or in other places,<sup>15</sup> the U.S. Supreme Court has never expressly articulated a principle that such a finding should be dispositive, or even decisive, in determining whether the measures taken are constitutional.

Consequently, the government has been permitted to take measures that suppress speech, by some, but not other, speakers,<sup>16</sup> to some, but not other, audiences.<sup>17</sup> Typically, this result has occurred where the Court has relegated the speech or the speaker to a lower degree of First Amendment protection, as in the case of commercial or broad-

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10. See, e.g., *Turner Broadcasting Sys. v. Federal Communications Comm'n*, 114 S. Ct. 2445, 2470 (1994) (finding that, when the government defends a regulation as a means to prevent anticipated harms, the government must demonstrate that those harms are real).

11. See, e.g., *Posadas de P.R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328, 341-42 (1986) (arguing that the government's restrictions on advertising would logically reduce the demand for gambling).

12. See, e.g., *Globe Newspaper Co.*, 457 U.S. at 610 (explaining that the mechanism chosen, a statute which prevented the disclosure of sensitive information in a sex-offense case, was not effective in *servicing* the governmental purpose of safeguarding the physical and psychological well-being of a minor since the press could obtain the desired information through the trial transcripts).

13. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (holding a statute that bans the destruction of selective service cards constitutional because it *further*s the government's interest in conscripting manpower for military service).

14. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (stating that in suppressing commercial speech, a court "must determine whether the regulation *directly advances* the governmental interest asserted, and whether it is no more extensive than is necessary to serve that interest") (emphasis added).

15. See *Globe Newspaper Co.*, 457 U.S. at 596 (recognizing that while the statute at issue barred the press and general public from the courtroom during the testimony of minor sex victims, the statute did not deny the press access to trial transcripts or court personnel).

16. See *infra* notes 193-211 and accompanying text (discussing *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), where the Court upheld a Federal Communications Commission regulation as applied to prohibit a North Carolina radio station from broadcasting lottery advertisements, while allowing Virginia radio stations to broadcast such advertisements into North Carolina, on the ground that the federal government had a substantial interest in supporting the anti-gambling policy of nonlottery states as well as not interfering with the policies of states which permit lotteries).

17. See *infra* notes 185-90 and accompanying text (discussing *Posadas de P.R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986), in which the Court upheld a statute banning gambling advertisements directed to Puerto Rican residents, but not to tourists, on the ground that the statute directly advanced Puerto Rico's substantial interest in reducing the demand for casino gambling by its residents, thus protecting their health, safety and welfare).

cast speech. In the mid-1980s, for example, the Court affirmed a statute that effectively precluded local newspapers from carrying commercial speech that national newspapers and other media were free to carry.<sup>18</sup> More recently, the Supreme Court allowed the Federal Communications Commission to prohibit one local radio station from carrying commercial speech that many other stations already broadcast to the very same audience.<sup>19</sup> The Court also refused to bar Congress from preventing cable television operators from carrying certain speech despite the fact that other sources provided the same speech to the same and other audiences.<sup>20</sup> Because the Court failed to protect otherwise available speech, without regard to the speaker's identity or the speech's content, these decisions have squandered judicial and governmental resources, discriminated among speakers and audiences, and engendered disrespect for the law. As objectionable as these results are today, they will become unconscionable when the convergence of print, broadcasting, cable, telephone, and computer-assisted communications erases current distinctions among media and audiences.

The highest judicial authorities of Great Britain<sup>21</sup> and Canada<sup>22</sup> recently expressed opinions that significantly curtailed the power of their lower courts to suppress speech when that suppression would be futile in preventing the speech from reaching the intended audience.<sup>23</sup> New communications technologies and media market realities re-

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18. *Posadas de P.R. Assocs.*, 478 U.S. at 344.

19. *Edge Broadcasting Co.*, 113 S. Ct. at 2707-08.

20. *Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 114 S. Ct. 2445, 2468-69 (1994).

21. *See Attorney Gen. v. Guardian Newspapers, Ltd.*, 3 All E.R. 545 (H.L. 1988) (quashing injunctions against republication in British newspapers of excerpts from the book, *Spycatcher*, which the United Kingdom banned, but was published widely abroad).

22. *See Dagenais v. Canadian Broadcasting Corp.*, 3 S.C.R. 835 (1994) (vacating a ban on the broadcast of the fictional film, *The Boys of St. Vincent*, during the trial of clergymen accused of sexual misconduct similar to that depicted in the film). In a comparable case, a United States federal district court refused to enjoin the broadcast of a television miniseries entitled *Deadly Matrimony*, rejecting plaintiff's argument that the broadcast would prejudice the pending appeal of his sentence in connection with the murder portrayed in the program. *Corbitt v. National Broadcasting Co.*, No. 92C7655, 1992 U.S. Dist. LEXIS 17894, at \*4-5 (N.D. Ill. Nov. 23, 1992). The *Corbitt* court found it significant that the press had extensively covered the trial and that a book detailing the murder and plaintiff's role in it had been published the previous year. *Id.* at \*5.

23. The *Spycatcher* Cases addressed, *inter alia*, the propriety of an injunction banning newspaper serialization of *Spycatcher*, the autobiography of Peter Wright, a former British security service officer. *Guardian Newspapers, Ltd.*, 3 All E.R. at 550. Upon learning that Mr. Wright planned to publish his autobiography in Australia, the Attorney General instituted an action in New South Wales against him and his publishers to enjoin publication pursuant to the Official Secrets Act 1911. *Id.* at 552. While that litigation was pending, the government obtained interlocutory orders against two other newspapers, the *Observer* and the *Guardian*, which had pub-

ceived some of the credit, or blame, for the outcome of these cases,<sup>24</sup> as did the pervasiveness of the American free speech and free press regime.<sup>25</sup> It would be perverse indeed if our First Amendment juris-

lished articles in June 1986 on the impending trial, including an outline of some of the author's claims in his unpublished manuscript. *Id.* at 553.

The injunctions banned disclosure or publication of any information obtained by Mr. Wright in his position as a member of the British secret service. *Id.* *The Sunday Times* purchased the serialization rights and published the first excerpt of the proposed book on July 12, 1987. *Id.* at 554-55. The Attorney General then secured an interlocutory injunction in England preventing *The Sunday Times* from publishing further portions of the book while the trial was pending. *Id.* at 555. On July 13, the book was published in the United States. *Id.* Thereafter, the book was published in several other countries and disseminated worldwide; the British government made no attempt to prevent its importation into the United Kingdom. *Id.* at 557-58. The Attorney General subsequently sought permanent injunctions against the three newspapers to restrain publication of any secret information obtained by the author, order an accounting of the profits made by *The Sunday Times* as a result of the serialization, and obtain a general injunction banning future publication of information gained by members of the secret service. *Id.* at 546, 556.

The Chancery Division trial judge discharged the interlocutory injunctions, holding that the Attorney General was not entitled to injunctions against the *Guardian* and the *Observer* because the book had been published overseas, and thus the damage the injunctions sought to prevent had already been realized. *Id.* at 555. The trial judge further ruled that *The Sunday Times* had breached its duty of confidence by publishing the first excerpt and was, therefore, accountable for the profits of the serialization. *Id.* Finally, the court denied the injunction restraining future publication. *Id.*

The Court of Appeal dismissed the Attorney General's appeal, holding that publication of *Spycatcher* in the United States and elsewhere destroyed the secrecy of the contents. *Id.* Balancing the public's right to receive information against the Crown's interest in national security, the Court of Appeal further held that, because copies of the book were readily available to anyone who wished to obtain them, continuing the injunctions was unnecessary and should be discharged. *Id.* The court decided, however, that the injunctions should remain in force pending appeal to the House of Lords. *Id.* The House of Lords dismissed the appeal. *Id.* See Philomena M. Dane, Comment, *The Spycatcher Cases*, 50 Ohio St. L.J. 405 (1989) (discussing the *Spycatcher* cases and the courts' refusals to grant the government a permanent injunction).

24. In *Dagenais*, for example, Chief Justice Lamer noted that

recent technological advances have brought with them considerable difficulties for those who seek to enforce [publication] bans. The efficacy of bans has been reduced by the growth of interprovincial and international television and radio broadcasts available through cable television, satellite dishes, and short-wave radios. It has also been reduced by the advent of information exchanges available through computer networks. In this global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult. Therefore, the actual effect of bans on jury impartiality is substantially diminishing.

3 S.C.R. at 886.

25. In the Court of Appeal's *Spycatcher* opinions, Lord Justice Bingham argued that the intercourse between England and the United States is

so close and so constant that . . . it can[not] be [legally] necessary to restrain here the publication of information which relates to this country and is circulating freely in the United States. As Sir Nicholas Browne-Wilkinson V-C put it: "The truth of the matter is that in the contemporary world of electronics and jumbo jets news anywhere is news everywhere."

*Guardian Newspapers, Ltd.*, 3 All E.R. at 637 (citations omitted).

Also of interest is Sir Robert Armstrong's testimony for the government in the *Spycatcher* trial to the effect that the First Amendment precludes the United States' Central Intelligence Agency

prudence failed to keep pace with the enlightened approach of our common law brethren.<sup>26</sup>

This Article argues for a simple proposition: the First Amendment imposes a presumption against the suppression of speech when suppression would be futile. Suppression is futile when the speech is available to the same audience through some other medium or at some other place. The government can overcome this presumption of futility only when it asserts an important interest that is unrelated to the content of the speech in question, only when the suppression directly advances that interest.

In Part I, this Article explores the role that this unarticulated "futility principle" has played in Supreme Court and other decisions concerning the suppression of core political speech by prior restraint, denial of access, and subsequent punishment. In addition, Part I demonstrates how that principle has often, though not always, been disregarded by the Court in cases involving the regulatory suppression of

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from imposing an absolute bar on publication by ex-CIA officers and that therefore the government has resorted to requiring the author to submit his manuscript to the CIA for vetting before publishing it. *Id.* at 579.

Sir Robert was asked why a similar practice should not be adopted in this country. His answer was that the vetted work, as published in the United States, would nevertheless be likely to contain information about the CIA that the CIA would prefer was not made public. But the CIA had to put up with the First Amendment as (although not as Sir Robert put it) a necessary evil.

*Id.*

26. Particularly apt is the statement of Lord Oliver of Aylmerton the first time the Spycatcher case reached the House of Lords:

We do not have a First Amendment but, as Blackstone observed, the liberty of the press is essential to the nature of a free state. The price that we pay is that liberty may be and sometimes is harnessed to the carriage of liars or charlatans, but that cannot be avoided if the liberty is to be preserved. No one contends that the liberty is absolute and there are occasions when it must yield to national emergency, to considerations of national security, and, on occasion, to private law rights of confidentiality where they are not overborne by some countervailing public interest. I do not for a moment dispute that there are occasions when the strength of the public interest in the preservation of confidentiality outweighs even the importance of the free exercise of the essential privileges which lie at the roots of our society. But if those privileges are to be overborne, then they must be overborne to some purpose . . . .

Once information has travelled into the public domain by whatever means and is the subject matter of public discussion in the press and other public media abroad . . . I find it unacceptable that publication and discussion in the press in this country should be further restrained . . . .

Ideas, however unpopular or unpalatable, once released and however released into open air of free discussion and circulation, cannot forever be effectively proscribed as if they were a virulent disease. "*Facilis descensus Averno*": and to attempt, even temporarily, to create a sort of judicial cordon sanitaire against the infection from abroad of public comment and discussion is not only, as I believe, certain to be ineffective but involves taking the first steps upon a very perilous path.

Attorney Gen. v. Guardian Newspapers Ltd., 1 W.L.R. 1248, 1320-21 (H.L. 1987).

commercial speech. In Part II, this Article more fully articulates the rule developed by the case law and justifies its wider application by reference to the values it supports. Finally, in Part III, this Article applies the rule to actual situations involving computer-assisted communications technology, an integral part of the convergent communications environment that will soon be upon us.

## I. THE FUTILITY PRINCIPLE REVEALED

### A. *Classic Prior Restraint Cases*

The ancient maxim that neither law nor equity will act in vain<sup>27</sup> has often found expression in First Amendment jurisprudence when parties seek injunctions to prohibit publication of publicly available speech. The futility of enjoining publication of the history of U.S. involvement in Vietnam, details of a grisly rape and mass murder, and instructions for making a hydrogen bomb played a certain if unquantifiable role in *New York Times v. United States*,<sup>28</sup> *Nebraska Press Ass'n v. Stuart*,<sup>29</sup> and *United States v. Progressive, Inc.*,<sup>30</sup> respectively.

In *New York Times*, the Supreme Court concluded in a brief opinion that the federal government failed to overcome the "heavy presumption" against the constitutional validity of suppressing speech.<sup>31</sup> The *New York Times* Court refused to enjoin continued publication of a classified history of the United States' involvement in the Vietnam War that came to be known as the "Pentagon Papers."<sup>32</sup> A government contractor had taken the classified materials without authorization and given them to the *New York Times*, *The Washington Post*, and *The Boston Globe*.<sup>33</sup> The government learned of the theft only after the *Times* published extensive excerpts, and it immediately sought to block any further publication.<sup>34</sup>

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27. See HERBERT BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED & ILLUSTRATED 174 (10th ed. 1939) ("The law will not itself attempt to do an act which would be vain, . . . nor to enforce one which would be frivolous."); G. KEETON, AN INTRODUCTION TO EQUITY 183, 243 (1965) (discussing that, because a disgruntled partner could simply terminate the partnership, courts generally deny such partner's request for specific performance of partnership matters in a partnership-at-will based on this maxim).

28. 403 U.S. 713 (1971) (per curiam).

29. 427 U.S. 539 (1976).

30. 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

31. 403 U.S. at 714.

32. *Id.*

33. *Id.*

34. *Id.* For a detailed description of the facts of *New York Times v. United States* see SANFORD UNGAR, THE PAPERS AND THE PAPERS (1973).



Of the nine separate opinions written in the case, three specifically addressed the futility question.<sup>35</sup> Justice Douglas's concurring opinion, which otherwise focused on the impropriety of the government's imposition of a prior restraint in the absence of authorizing legislation, alluded to the futility of an injunction in minimizing the damaging impact of disclosure:

There are numerous sets of this material in existence and they apparently are not under any controlled custody. Moreover, the President has sent a set to the Congress. We start then with a case where there already is rather wide distribution of the material that is destined for publicity, not secrecy.<sup>36</sup>

Justice White similarly recognized the futility of injunctive relief in this case, although he would have opened the door widely for criminal sanctions in the same circumstances:

Normally, publication will occur and the damage be done before the Government has either opportunity or grounds for suppression. So here, publication has already begun and a substantial part of the threatened damage has already occurred. The fact of a massive breakdown in security is known, access to the documents by many unauthorized people is undeniable, and the efficacy of equitable relief against these or other newspapers to avert anticipated damage is doubtful at best.<sup>37</sup>

Even in dissent, Justice Harlan considered the futility of an injunction one of the open factual issues to be addressed before the Court could rule on the merits:

[w]hether the threatened harm to the national security or the Government's possessory interest in the documents justifies the issuance of an injunction against publication in light of . . . [t]he extent to which the materials at issue have apparently already been otherwise disseminated.<sup>38</sup>

Therefore, in a case where no more than three justices subscribed to any one of the nine separate opinions, seven agreed that the public availability of the material might influence the case's outcome.<sup>39</sup>

The Court more fully developed this futility principle in *Nebraska Press Association v. Stuart*, where it considered effectiveness as one of three dispositive factors in deciding whether to enjoin publication. In

35. The three opinions that addressed the futility question were written by Justice Douglas, Justice White, and Justice Harlan. *Id.*

36. *Id.* at 722 n.3 (Douglas and Black, J.J., concurring).

37. *Id.* at 733 (White and Stewart, J.J., concurring).

38. *Id.* at 754-55 (Harlan, Blackmun, J.J., and Burger, C.J., dissenting).

39. The seven Justices who considered the public availability of the Pentagon Papers in deciding whether to grant injunctive relief in *New York Times* included Chief Justice Burger and Justices Douglas, Black, White, Stewart, Harlan, and Blackmun.

*Nebraska Press*, the Court reviewed the constitutionality of a gag order that restricted the press's ability to report information related to a multiple murder prosecution.<sup>40</sup> The gag order incorporated certain provisions of otherwise voluntary bar-press guidelines for crime reporting.<sup>41</sup> Writing for the Court, Chief Justice Burger adopted Judge Learned Hand's classic formula from *United States v. Dennis*:<sup>42</sup> whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."<sup>43</sup> To determine whether the gag order met this test, Justice Burger found it necessary to evaluate (a) the nature and extent of pre-trial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pre-trial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger.<sup>44</sup>

Justice Brennan's lengthy concurrence, which argued that gag orders affecting the press are always unconstitutional, also discussed the order's futility:

[m]uch of the information that the Nebraska courts enjoined petitioners from publishing was already in the public domain, having been revealed in open court proceedings or through public documents. Our prior cases have foreclosed any serious contention that further disclosure of such information can be suppressed before publication or even punished after publication.<sup>45</sup>

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40. 427 U.S. 539, 542-43 (1976).

41. *Id.* at 613-617.

42. 183 F.2d 201 (1st Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

43. *Nebraska Press Ass'n*, 427 U.S. at 562 (citing *United States v. Dennis*, 183 F.2d at 212).

For a critique of the Court's use of Judge Hand's formula in this context see James L. Oakes, *The Doctrine of Prior Restraint Since the Pentagon Papers*, 15 U. MICH. J.L. REF. 497, 510-511 (1982) (arguing that it is inappropriate to apply Judge Hand's formula in freedom of speech cases where the suppressed information is freely available from other sources).

44. *Nebraska Press Ass'n*, 427 U.S. at 562. With respect to the third factor, Justice Burger wrote:

Finally, we note that the events disclosed by the record took place in a community of 850 people. It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it.

*Id.* at 567.

45. *Id.* at 595-96 (Brennan, Stewart and Marshall, J.J., concurring). Since *Nebraska Press*, lower courts have consistently refused to enjoin publication of information which was revealed, even inadvertently, in open court. See, e.g., *In re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990) (vacating a district judge's injunction against publishing the name of an attorney targeted in a grand jury investigation, which was accidentally disclosed by the district judge in open court), cited with approval in *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994) (authorizing publi-

Both Justices Burger and Brennan noted that the gag order only applied to the local press; therefore the national media remained free to publish the same information.<sup>46</sup> Justice Brennan remarked that Judge Stuart's proposed restraints applied only to the local press groups involved the case, who subjected themselves to the court's jurisdiction, while other local media organizations remained free to disseminate the information.<sup>47</sup> Finally, Justice Brennan argued that even if the government could bring every press association into the case through collateral restraint proceedings, such efforts "would often be ineffective, since disclosure of incriminating material may transpire before an effective restraint could be imposed."<sup>48</sup>

As Justice Brennan predicted, this very issue arose *United States v. Progressive, Inc.*<sup>49</sup> In *Progressive, Inc.*, the federal government asked a federal district court to enjoin *The Progressive* magazine from publishing an article which purported to explain how to make a hydrogen bomb.<sup>50</sup> Announcing the article in advance, *The Progressive* claimed that the author had only used information already in the public domain.<sup>51</sup> In response, the government argued that much of the information was in fact not publicly available.<sup>52</sup> Moreover, the government asserted, the compilation was classified under the Atomic Energy Act of 1954.<sup>53</sup> The trial judge granted a temporary restraining

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cation of the investigative report of a federal independent counsel where the information, although held to be governed by grand jury secrecy requirements, was already widely known).

46. Justice Burger maintained that the Court must not

ignore the reality of the problems of managing and enforcing pre-trial restraining orders. The territorial jurisdiction of the issuing court is limited by concepts of sovereignty. The need for *in personam* jurisdiction also presents an obstacle to a restraining order that applies to publication at large as distinguished from restraining publication within a given jurisdiction.

*Nebraska Press Ass'n*, 427 U.S. at 565-566 (citations omitted).

47. *Id.* at 609 n.36.

48. *Id.* at 609.

49. 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

50. *Id.* at 991.

51. *Id.* at 993. Much of the information in the article came from Dr. Edward Teller's Encyclopedia Americana article on the hydrogen bomb. Edward Teller, *Hydrogen Bomb*, in 14 ENCYCLOPEDIA AMERICANA 654 (1978), noted in James L. Oakes, *The Doctrine of Prior Restraint Since the Pentagon Papers*, 15 U. MICH. J.L. REF. 497, 510-511 (1982). See also Erwin Knoll, *The H-Bomb and the First Amendment*, 3 WM. & MARY BILL OF RTS. J. 705, 706 (1994) (explaining that while information concerning the H-Bomb was publicly available, only a major world power would possess enough money and other resources to actually create one).

52. *United States v. Progressive Inc.*, 467 F. Supp. at 993.

53. *Id.* The government argued that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2274(b) & 2280 (1988), "authorize[s] injunctive relief against one who would disclose restricted data 'with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation.'" *Progressive, Inc.*, 467 F. Supp. at 993 (quoting 42 U.S.C. § 2274(b) (1988)).

order against *The Progressive*, partially because he believed the article contained “concepts” vital to the operation of the hydrogen bomb that were not accessible in the “public realm.”<sup>54</sup> The judge also admitted that the basis for his decision to infringe on the magazine’s “cherished First Amendment rights” included his fear that a mistake in ruling against the government could pave the way for thermonuclear annihilation: “In that event, our right to life is extinguished and the right to publish becomes moot.”<sup>55</sup>

In the end, it was the government’s claim that became moot, and not the magazine’s right to publish, as the government voluntarily withdrew its case when two other newspapers published the technical essence of *The Progressive* article while the case was pending appeal.<sup>56</sup> If the details of the *The Progressive*’s article had ever been secret, as the government claimed, they were certainly in the public domain after the newspaper’s actions. Thus, the government ultimately accepted the futility of continuing the litigation.

These three classic prior restraint cases show that the notion of futility already plays some role in First Amendment jurisprudence. A majority of the *New York Times* justices recognized the futility of suppressing publicly available information. The *Nebraska Press* Court incorporated the doctrine into its three-part test for reviewing the constitutionality of injunctive relief. Finally, the futility principle dictated the outcome of *The Progressive* case although government prosecutors, rather than a court, gave it effect.

The lower federal courts have also employed the futility concept to resolve First Amendment issues. The First Circuit Court of Appeals, for example, implicitly applied the futility principle in *In re Providence Journal*<sup>57</sup> to find a temporary restraining order “transparently invalid.”<sup>58</sup> In that case, the district court had temporarily restrained the *Journal* from publishing logs of the FBI’s electronic surveillance of the late mob leader Raymond Patriarca.<sup>59</sup> The court reasoned that the FBI had improperly released the logs in response to the *Journal*’s re-

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54. *Id.*

55. *Id.* at 996.

56. RALPH L. HOLSINGER, *MEDIA LAW* 48-50 (1994). The two newspapers that published the information were the *Madison Press Connection*, which printed a letter that contained most of the technical information contained in the *The Progressive*’s article, and *The Wall Street Journal*, which ran an article on “nuclear matters.” *Id.*

57. 820 F.2d 1342 (1st Cir. 1986), *modified on reh’g en banc*, 820 F.2d 1354 (1st Cir. 1987), *cert. dismissed*, United States v. Providence Journal Co., 485 U.S. 693 (1988).

58. *Id.* at 1352-53.

59. *Id.* at 1345.

quest under the Freedom of Information Act.<sup>60</sup> The *Journal*, however, violated the order the next day by publishing an article based on the logs and calling the order “a prior restraint in violation of the Constitution.”<sup>61</sup> As a result, the paper and its Executive Editor were convicted of criminal contempt.<sup>62</sup> In holding that the collateral bar rule<sup>63</sup> did not apply where a court order was “transparently” unconstitutional, the First Circuit indicated that the availability of the information to other media significantly contributed to its holding.<sup>64</sup>

Other cases also illustrate how the lower federal courts have applied the futility principle to deny injunctive relief for invasion of privacy, defamation, and intentional infliction of emotional distress. For example, in *Jones v. Turner*,<sup>65</sup> a federal district court declined to enjoin distribution of an issue of *Penthouse* magazine containing semi-nude photographs of a woman who claimed that she had been sexually harassed by then-Governor Bill Clinton.<sup>66</sup> Beyond the fact that it found Ms. Jones unlikely to prevail on the merits of an invasion of privacy suit under New York law,<sup>67</sup> the court determined that injunctive relief would likely prove ineffective because the magazine had already been widely disseminated to distributors and subscribers.<sup>68</sup>

60. 5 U.S.C. § 552 (1994); *In re Providence Journal*, 820 F.2d at 1344-45.

61. *In re Providence Journal*, 820 F.2d at 1344-45.

62. *Id.*

63. The collateral bar rule provides that a party may not violate a court order and then raise the issue of its unconstitutionality as a defense in any resulting criminal contempt proceeding. *Id.* at 1346. See Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 94 (1984) (comparing collateral bar rule violations with certain statutory violations). See generally Richard E. Labunski, *A First Amendment Exception to the “Collateral Bar” Rule: Protecting Freedom of Expression and the Legitimacy of Courts*, 22 PEPP. L. REV. 405 (1995) (discussing the collateral bar rule and analyzing its impact on First Amendment rights).

64. *In re Providence Journal*, 820 F.2d at 1344-45. The court stated that:

[a] party seeking a prior restraint against the press must show . . . that the prior restraint will be effective . . . [H]ad the court considered the likely efficacy of the order it would have concluded that the order would not necessarily protect Patriarca’s rights. Other media . . . had the same information that the government had disclosed to the *Journal*. Moreover, Patriarca’s complaint specifically alleged that portions of the information disclosed by the FBI had already been “disseminated” by the media. It is therefore hard to imagine a finding that the prior restraint would accomplish its purpose.

*Id.* at 1351.

65. No. 94 Civ. 8603, 1995 WL 106111 (S.D.N.Y. Feb. 3, 1995).

66. *Id.* at \*1.

67. *Id.* at \*20-21.

68. The court explained that:

*Penthouse* has already shipped hundreds of thousands of copies of the article in its magazines to its subscribers and distributors. Moreover, there also already has been a great deal of news coverage of the photographs and article, and several of the pictures have been displayed both on television and in the print media.

*Id.* at \*21.

In other cases, courts have denied injunctive relief because the public character of the underlying acts precluded the plaintiff from establishing an element of the tort.<sup>69</sup> Before further discussing the impact of the futility principle on civil tort actions, this Article first examines the role of the futility principle in a line of cases that challenged media access to judicial records and proceedings.<sup>70</sup>

### B. Denying Access to Public Information

This discussion focuses primarily on the courts' authority to deny the electronic media access to aural and visual evidence offered in open court and thus readily available to both the print media and members of the general public who are in the courtroom. Although the Supreme Court has not found a constitutional requirement that such information be made available,<sup>71</sup> it has recognized a common law right to inspect and copy public documents, including examination of judicial records.<sup>72</sup> This Section also examines two cases in which the futility principle was instrumental in giving the press access to the courtroom and to confidential police materials, respectively: *Richmond Newspapers v. Virginia*<sup>73</sup> and *Globe Newspapers v. Police Commissioner of Boston*.<sup>74</sup>

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According to defense counsel, *Penthouse* had already mailed all subscription copies of the magazine and shipped most of the newsstand copies to wholesalers and retailers. *Id.* at \*4. Plaintiff's counsel argued in vain that injunctive relief was appropriate if any of the potential damage could be prevented:

Now, if in fact two million or so copies have been distributed, that's not to say they cannot be returned. That's not to say they can't be brought back into Penthouse's control. As far as we are aware, they have not hit the newsstands. With respect to the issue of would the relief be effective, if a defendant has the opportunity to inflict harm to a plaintiff on a given number of times, and those are already out in the open, in this case two million times, two million plus times, but they have the ability to inflict even greater harm on the plaintiff, there is no reason why they should be entitled to inflict additional harm in whatever number of additional copies that may be to be distributed in the future.

*Id.* at \*3.

69. See, e.g., *Doe v. Roe*, 638 So. 2d 826, 827 (Ala. 1994) (refusing to enjoin distribution of a novel based on an actual murder). The *Doe* court reasoned that the murder was a "matter . . . of legitimate public concern." *Id.* Consequently, the plaintiff could not establish an essential element of invasion of privacy: that the defendant "wrongfully intrud[ed] into private activities in a manner that would outrage, or cause mental suffering, shame, or humiliation to, a person of reasonable sensibilities." *Id.* at 827-28.

70. This Article revisits the relationship between the futility principle and civil tort actions when it examines the constitutional privacy cases in part I.C, *infra*.

71. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978); *Estes v. Texas*, 381 U.S. 532, 589 (1965).

72. *Nixon*, 435 U.S. at 597.

73. 448 U.S. 555 (1980).

74. 648 N.E.2d 419 (Mass. 1985).

The problems created by the presence of audio-visual technology in the courtroom should not surprise anyone who has viewed films of the Lindbergh baby kidnapping trial,<sup>75</sup> read the Supreme Court's opinions in *Estes v. Texas*<sup>76</sup> or *Sheppard v. Maxwell*,<sup>77</sup> or watched any of the O.J. Simpson trial on television.<sup>78</sup> In addition, the U.S. Judicial Conference recently decided to terminate a three-year experiment which allowed the media to broadcast civil proceedings in some federal courts, despite the paucity of judicial complaints.<sup>79</sup> In the cases that follow, however, few of the courts' traditional concerns (e.g., prejudicial effect on the jury, disruption of the trial process, grandstanding by parties and witnesses) were present. These cases did not present the question of whether denying broadcast journalists covering the trial the use of their electronic equipment violated the First Amendment; the tapes at issue had been submitted as evidence in open court and thus were public records. Instead, the issue typically involved the defendant's privacy interest in minimizing the dissemination of embarrassing information versus the broadcast media's interest in "actuality" (i.e., the "live" aural and visual information that print media cannot convey to their audience).

In *Nixon v. Warner Communications, Inc.*,<sup>80</sup> the Supreme Court considered whether the First Amendment entitled broadcasters and the general public to hear White House conversations that had been secretly recorded by President Nixon.<sup>81</sup> The government had introduced the tapes as evidence in the trial of former Attorney General John Mitchell and other Watergate figures.<sup>82</sup> Jurors, reporters, and

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75. See generally L. KENNEDY, *THE AIRMAN AND THE CARPENTER: THE LINDBERGH KIDNAPPING AND THE FRAMING OF RICHARD HAUPTMANN* (1985) (describing the kidnapping of the Lindbergh baby and the resulting trial of Richard Hauptmann); A. SCADUTO, *SCAPEGOAT: THE LONESOME DEATH OF BRUNO RICHARD HAUPTMANN* (1976) (examining the facts surrounding the Hauptmann trial under the premise that Hauptmann was innocent); GEORGE WALLER, *KIDNAP: THE STORY OF THE LINDBERGH CASE* (1961) (providing a narrative of the Hauptmann trial); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *STAN. L. REV.* 21, 124-25 (1987) (describing the Hauptmann trial as "an atmosphere of near-hysteria"); Robert R. Bryan, *The Execution of the Innocent: The Tragedy of the Hauptmann-Lindbergh and Bigelow Cases*, 18 *N.Y.U. REV. L. & SOC. CHANGE* 831 (1990-91) (discussing the mass hysteria surrounding the trial of Hauptmann and Bigelow).

76. 381 U.S. 532 (1965).

77. 384 U.S. 333 (1966).

78. *People v. Simpson*, No. BA097211 (L.A. Cnty. Sup. Ct. 1995).

79. See Henry J. Reske, *No More Cameras in Federal Courts: Judicial Conference Ends Experiment Despite Few Complaints from Judges*, A.B.A. J., Nov. 1994, at 28 (reporting the majority's view that "even if a few participants were affected by broadcast proceedings, a fair trial could be threatened").

80. 435 U.S. 589 (1965).

81. *Id.* at 591.

82. *Id.* at 594.

members of the public who sat in the courtroom had already heard the tapes<sup>83</sup> and transcripts had been widely distributed.<sup>84</sup> District Judge Gerhard Gesell initially heard the motion and found the media's First Amendment claim to the tapes "wholly without merit."<sup>85</sup> Judge Gesell based his decision on the Supreme Court's oft-repeated maxim that the First Amendment guarantees the press no greater right of access than that afforded the general public.<sup>86</sup> Judge Gesell did find, however, that the public enjoys a privilege, based on common law and tradition, to "inspect and obtain copies of such judicial records."<sup>87</sup> Judge Gesell concluded that the White House tapes constituted just such records, notwithstanding President Nixon's objections to their release.<sup>88</sup> Before Judge Gesell could find an acceptable mechanism for releasing the tapes, however, the Mitchell trial concluded and the matter was returned to trial judge John Sirica.<sup>89</sup> Concerned about the possibility that the tapes might prejudice the appeals of the four men convicted in that trial, Judge Sirica denied the media's

83. *Id.*

84. *Id.*

85. *United States v. Mitchell*, 386 F. Supp. 639, 640 (D. D.C. 1974).

86. *Id.* (citing *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post*, 417 U.S. 843 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Estes v. Texas*, 381 U.S. 532 (1965)). Judge Gesell also quoted a well-known paragraph from Justice Stewart's 1974 address at Yale Law School, entitled "Or of the Press":

"So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can. But this autonomy cuts both ways. The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information or to require openness from the bureaucracy . . . . The Constitution, in other words, establishes the contest, not its resolution."

*Mitchell*, 386 F. Supp. at 641 (quoting Supreme Court Justice Stewart, Address at the Yale Law School Sequincentennial Convocation (Nov. 2, 1974)).

87. *Id.* (citing *Ex parte Drawbaugh*, 2 App. D.C. 404 (1894)). The *Drawbaugh* court asserted that "any attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access and to its records, according to long-established usage and practice." *Id.* (quoting *Drawbaugh*, 2 App. D.C. at 407).

88. Judge Gessel explained that

[a]lthough former President Nixon has been pardoned, . . . he has no right to prevent normal access to these public documents which have already been released in full text . . . . *His words cannot be retrieved; they are public property* . . . . [T]he fact the evidence is in aural form is of no special consequence. *The tape exhibits are in evidence and have therefore come into the public domain and the public should have the opportunity to hear them.* Whether any individual affected has a right under the law of privacy or related doctrines against anyone who thereafter republishes is not to be determined here.

*Id.* at 642 (emphasis added) (citations omitted).

89. *United States v. Mitchell*, 551 F.2d 1252 (D.C. Cir. 1976).



petitions for immediate release of the tapes,<sup>90</sup> only to be reversed by the Court of Appeals.<sup>91</sup> Although the Court of Appeals, like Judge Gesell, ruled on common law grounds, its language more closely resembled constitutional, as opposed to common law, jurisprudence.<sup>92</sup> Writing for the court, Chief Judge David Bazelon insisted that the court had "no need, and therefore . . . no occasion, to decide the novel constitutional question" raised by a ban on inspecting or copying the tapes.<sup>93</sup>

In reversing Chief Judge Bazelon's decision to release the tapes, the Supreme Court acknowledged the common law right of access to judicial proceeding described by the trial and appellate courts.<sup>94</sup> But, the Court found no reason to "delineate precisely the contours" of that right because it assumed, *arguendo*, that the common law right of access applied to the tapes.<sup>95</sup> The Court also assigned an unspecified amount of weight to the fact that the public already had access to the taped conversations through the trial and release of printed tran-

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90. *United States v. Mitchell*, 397 F. Supp. 186 (1975).

91. *Mitchell*, 551 F.2d at 1264-65.

92. *Id.* The Court of Appeals stated that

[t]his common law right is not some arcane relic of ancient English law. To the contrary, the right is *fundamental* to a democratic state. As James Madison warned, "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both . . . . A people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Like the First Amendment, then, the right of inspection serves to produce "an informed and enlightened public opinion." Like the public trial guarantee of the Sixth Amendment, the right serves to "safeguard against any attempt to employ our courts as instruments of persecution," to promote the search for truth, and to assure "confidence in . . . judicial remedies." And in the instant case, like the Fifth and Fourteenth Amendments, the right of inspection serves to promote equality by providing those who were and those who were not able to gain entry to Judge Sirica's cramped courtroom the same opportunity to hear the White House tapes.

*Id.* at 1258 (emphasis added) (footnotes omitted). See also Donna R. Moliere, Comment, *The Common Law Right of Public Access When Audio and Video Tape Evidence in a Court Record is Sought for Purposes of Copying and Dissemination to the Public*, 28 LOY. L. REV. 163, 204 (1982) (stating that "[t]he press' freedom to report accurately on judicial proceedings is also a highly valued first amendment right. This freedom is of critical importance in a democratic government in which the proper functioning of the judiciary is an important public concern") (footnotes omitted).

93. See *Mitchell*, 551 F.2d at 1259 ("We refer to these constitutional provisions simply to underscore the importance of the values that the common law right seeks to protect, and to make clear our duty to tread carefully in this important area."). Later in the opinion, Chief Judge Bazelon reiterated that the interests served by the common law right of access to judicial proceedings "are closely related to" First Amendment interests. *Id.* at 1261 n.39.

94. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

95. *Id.* at 599.

scripts.<sup>96</sup> The Court predicated its reversal on statutory grounds, namely the Presidential Recordings and Materials Preservation Act,<sup>97</sup> which the Court found controlling.<sup>98</sup> Although the Court declined to consider how it would have decided the case absent that statute,<sup>99</sup> it expressly rejected constitutional arguments based on the First and Sixth Amendments.<sup>100</sup> Still, the Court acknowledged that any member of the public present in Judge Sirica's courtroom could hear the tapes, and offered no principled explanation for limiting that right to members of the public with the right courthouse connections or the time to wait in line for a seat.<sup>101</sup>

In a more recent controversy involving recorded material, three courts of appeal granted the public access to videotapes of the so-called ABSCAM sting operations in the early 1980s, viewing the press merely as a conduit through which the public could exercise its acknowledged right to the information.<sup>102</sup> In each of these cases, video tapes of members of Congress and others apparently accepting bribes from wealthy Middle Eastern businessmen were introduced into evidence in open court by federal prosecutors.<sup>103</sup> Court officials distributed transcripts to the jury and the media and permitted artists to create sketches from the videotapes.<sup>104</sup> In *Myers*, District Judge George Pratt granted the application of the three major television networks to copy and televise the videotapes, and the Second Circuit affirmed his decision. The Second Circuit reasoned that:

[o]nce the evidence has become known to the members of the public, including representatives of the press, through their attendance at a public session of court, it would take the most extraordinary

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96. See *id.* at 599 n.11 ("We need not decide whether such facts ever could be decisive. In view of our disposition of this case, the fact that substantial access already has been accorded the press and the public is simply one factor to be weighed.")

97. 44 U.S.C. § 2101 (1988 & Supp. V 1993).

98. *Nixon*, 435 U.S. at 603. The Presidential Recordings and Materials Preservation Act directs the Administrator of General Services to take custody of presidential tapes, which government archivists then screen for portions of historical value to be preserved for use in judicial proceedings and eventual public release. 44 U.S.C. § 2107 (1988 & Supp. V 1993).

99. *Nixon*, 435 U.S. at 603.

100. *Id.* at 609-610.

101. *Id.* at 609. See Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 942-43 (1992) (distinguishing the right of access accorded to the press from that enjoyed by the general public).

102. *National Broadcasting Co. v. Jenrette*, 653 F.2d 609 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981); *United States v. Myers*, 635 F.2d 945 (2d Cir. 1980). *Contra* *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981) (holding that a defendant's right to a fair trial outweighed the media's common law right of access to incriminating tapes introduced at an earlier trial of three co-defendants, who were acquitted).

103. *Myers*, 635 F.2d at 948; *Criden*, 648 F.2d at 816; *Jenrette*, 638 F.2d at 611.

104. *Myers*, 635 F.2d at 948; *Criden*, 648 F.2d at 816; *Jenrette*, 653 F.2d at 611.

circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction.<sup>105</sup>

In *Criden*, the Third Circuit Court of Appeals reversed the district court's denial of the media's application for permission to copy the ABSCAM tapes implicating Philadelphia attorney Howard Criden. The court explained that:

[w]hatever the validity of the original ruling [on admissibility at trial], the tapes were in fact admitted into evidence, their contents publicized, and the transcripts of the tapes released to the press. Thus, whatever privacy right defendants may have claimed in such tapes is irretrievably lost, and if any remedy remains, it must perforce be confined to appellate action with regard to the underlying conviction. It would unduly narrow the right of access were it to be confined to evidence properly admitted, since the right is based on the public's interest in seeing and knowing the events which actually transpired.<sup>106</sup>

In *Jenrette*, the D.C. Circuit only had to look back to Judge Bazelon's opinion in *Mitchell* to reverse the district court's denial of media access to tapes of Representative John Jenrette's moment of weakness. "[T]he tapes had been seen and heard by those members of the press and public who attended the trial. Our cases have recognized that such previous access is a factor which lends support to subsequent access."<sup>107</sup>

The Supreme Court itself added significance to the prior availability of information in *Globe Newspaper Co. v. Superior Court*,<sup>108</sup> when it struck down a Massachusetts statute that denied the public access to the courtroom during the testimony of minor sexual assault victims,<sup>109</sup> notwithstanding that the court had released transcripts of the minor's

105. 635 F.2d at 952.

106. 648 F.2d at 828.

107. *Jenrette*, 653 F.2d at 614. Even the Fifth Circuit, which ruled against media access in a similar but distinguishable case, *Belo Broadcasting Corp. v. Clark*, conceded that prior availability is a factor which must be considered in such cases:

While the provision to media representatives of verbatim transcripts of the recordings and preferential seating at the trial, as afforded in the court below, certainly does not conclude the matter against a right to further access, it has been recognized by the Supreme Court as a factor properly to be considered in the grant or denial of physical access.

654 F.2d 423, 432 (5th Cir. 1981). See Laurie Romanowich, Recent Case Analysis, *Belo Broadcasting Corp. v. Clark: No Access to Taped Evidence*, 32 AM. U. L. REV. 257, 275-76 (1982) (arguing that the *Belo Broadcasting* court gave "inadequate weight to the presumption in favor of access").

108. 457 U.S. 596 (1982).

109. MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981).

testimony to the media.<sup>110</sup> Although the Court had previously held in *Richmond Newspapers v. Virginia* that the public had a First Amendment right to attend criminal trials,<sup>111</sup> it did not rely solely on that decision in *Globe Newspaper Co.*<sup>112</sup> Instead, it called upon the unarticulated futility principle to find that Massachusetts had not asserted a compelling interest sufficient to overcome the public's First Amendment right to attend criminal trials guaranteed by *Richmond Newspapers*.<sup>113</sup>

The futility principle also seems to have been decisive in *Globe Newspaper Co. v. Police Commissioner of Boston*.<sup>114</sup> In that case, reporters sought access to materials collected by the Boston Police Department in its investigation of police misconduct in a highly publicized and racially volatile murder.<sup>115</sup> A U.S. Department of Justice report and a lengthy response by the Boston police had previously disclosed much of the substantive information contained in the confi-

110. *Globe Newspaper Co.*, 457 U.S. at 610-11.

111. 448 U.S. 555, 581 (1980).

112. See *Globe Newspaper Co.*, 457 U.S. at 596 (striking down a Massachusetts statute which denied the press access to the courtroom during minor sexual assault victims' testimony). See generally Sally M. Keenan, Comment, *Globe Newspaper Co. v. Superior Court*, 11 HOFSTRA L. REV. 1353 (1983) (analyzing the *Globe Newspaper* case, focusing on its impact on First Amendment issues and the public's common law right of access).

113. The Court's reasoning clearly embodied the futility concept:

Although § 16A bars the press and general public from the courtroom during the testimony of minor sex victims, *the press is not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony*. Thus § 16A cannot prevent the press from publicizing the substance of a minor victim's testimony, as well as his or her identity. If the Commonwealth's interest in encouraging minor victims to come forward depends on keeping such matters secret, § 16A hardly advances that interest in an effective manner.

*Globe Newspaper Co.*, 457 U.S. at 610 (emphasis added). See also *In re The Charlotte Observer*, 882 F.2d 850, 854-55 (4th Cir. 1989) (reversing the closure of a hearing on defendant's motion for change of venue where "all of the publicity whose exposure in this hearing is the subject of concern is already in the public domain"); *In re Herald Co.*, 734 F.2d 93, 101 (2d Cir. 1984) (remanding an order to close a pretrial suppression hearing to determine whether "the information sought to be kept confidential has already been given sufficient public exposure to preclude a closure order on this account").

In two other access cases, however, judges all but ignored the futility principle by allowing the public to attend evidentiary hearings while denying access to the news media or conditioning media access on a nonbinding promise to comply with state bench-bar-press guidelines. For example, in *Sacramento Bee v. United States Dist. Court*, 656 F.2d 477 (9th Cir. 1981), the Ninth Circuit grudgingly conceded that allowing access to the public but not the press was error, but found it insufficient to justify issuing a writ of mandamus. *Id.* at 483. Similarly, in *Federated Publications, Inc. v. Swedberg*, 633 P.2d 74 (Wash. 1981), cert. denied, 486 U.S. 984 (1982), the Washington Supreme Court justified its exclusion of the press as a reasonable "experiment" falling within the trial court's power to exclude press and public alike. *Id.* at 78.

114. 648 N.E.2d 419 (Mass. 1985).

115. *Id.* at 423.

dential police records sought by the *Globe*.<sup>116</sup> When the police commissioner declined to release the actual materials compiled during the police investigation, the *Globe* filed suit.<sup>117</sup>

In ordering the release of most of the police records, the trial judge "indicated that the considerable amount of previous publicity given to much of the information in the [Justice Department] report and the [Boston police] response had influenced his decision to order disclosure of materials that might otherwise be protected" under exemptions to state public disclosure laws.<sup>118</sup> The Massachusetts Supreme Judicial Court affirmed the trial court's order, pointing out that the extensive publicity had compromised any privacy interests that might be affected by renewed disclosure, and even warranted release of secret grand jury testimony.<sup>119</sup> The court, quoting the trial judge with approval, emphasized that "it is impossible to erase from public knowledge information already released."<sup>120</sup>

The access cases establish that the futility principle, although unacknowledged, plays an important role in discouraging the suppression of speech by supplementing and reinforcing the more traditional First Amendment principle that a "trial is a public event and what transpires in the courtroom is public property."<sup>121</sup> Moreover, the futility principle apparently prompted one court to release documents that would otherwise have been protected from public access by statutory exemptions to state disclosure laws.<sup>122</sup>

116. *Id.*

117. *Id.* at 423-24.

118. *Id.* at 424.

119. *Id.* at 426, 428-29. In deciding to release the police reports, the court quoted *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994), explaining that "[t]here must come a time . . . when information is sufficiently widely known that it has lost its character as [protected grand jury] material. The purpose in [protecting grand jury material] is to preserve secrecy. Information widely known is not secret." *Id.* at 429.

120. *Id.* at 426 (quoting *Globe Newspaper Co. v. Police Comm'r of Boston*, 648 N.E.2d 419, 426 (Mass. 1985)). See also *Commercial Broadcasting Sys., Inc. v. United States Dist. Court*, 765 F.2d 823, 825-26 (9th Cir. 1985) (unsealing documents filed in a post-conviction criminal proceeding where "most of the information the government [sought] to keep confidential concern[ed] matters that might easily be surmised from what [wa]s already in the public record), cited with approval in *The Wash. Post v. Robinson*, 935 F.2d 282, 291-292 (D.C. Cir. 1991) (unsealing plea agreement with potential witness in ongoing criminal investigation where the fact and terms of the agreement had already been published in the newspaper).

121. *National Broadcasting Co., Inc. v. Jenrette*, 653 F.2d 609, 614 (1981) (quoting *United States v. Mitchell*, 551 F.2d 1252, 1261 (D.C. Cir. 1976)).

122. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610, n.26 (1982) (noting that the state's interest in barring public and press access to criminal sex offense trials during the testimony of minor victims does not justify a mandatory closure rule absent a showing that closure would improve the quality of testimony of all child victims).

*C. Liability for Invasion of Privacy*

Having considered cases involving prior restraints and denial of access, this Article now examines a line of subsequent punishment cases. Depending on the nature of the underlying claim, courts generally evaluate the constitutionality of measures imposing civil or criminal penalties on speech by balancing the free speech interests of the speaker (and sometimes the audience) against either the private interests of the person whom the speech has injured or society's interest in order, morality, or other values.<sup>123</sup> These public and private interests converged in the constitutional privacy cases, where the Supreme Court struck down state statutes that provided both civil and criminal remedies for disclosure of otherwise public information.

In *Cox Broadcasting Corp. v. Cohn*,<sup>124</sup> the Supreme Court held that "States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."<sup>125</sup> *Cox Broadcasting* began as a civil lawsuit for damages under a Georgia statute that made it a misdemeanor to publish or broadcast the name or identity of a rape victim.<sup>126</sup> The father of 17-year-old Cynthia Cohn had sued Cox Broadcasting Co., which had identified her by name in a broadcast about the trial of the six youths charged with her rape and murder.<sup>127</sup> In granting Cohn's motion for summary judgment, the trial court rejected Cox Broadcasting's constitutional arguments and held that the statute gave a civil remedy to those injured by its violation.<sup>128</sup> Although the Georgia Supreme Court found that Cohn should have based his cause of action on the common law tort of public disclosure and not the statute, the court upheld the statute's constitutionality as a expression of the public policy of Georgia that disclosure of a rape victim's name was not protected expression under the First Amendment.<sup>129</sup>

The United States Supreme Court declined to address Cox Broadcasting's argument that the press may not be held civilly or criminally liable for publishing truthful statements, however damaging they might be.<sup>130</sup> Instead, the Court focused on the narrower question of

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123. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (stating that States must weigh the interest in privacy against the interests of the public to know and of the press to publish).

124. 420 U.S. 469 (1975).

125. *Id.* at 495.

126. GA. CODE ANN. § 26-9901 (1972).

127. *Cox Broadcasting Corp.*, 420 U.S. at 474 n.5.

128. *Id.* at 474.

129. *Id.* at 474-75.

130. *Id.* at 490-91.

the press's liability for broadcasting such truthful statements which are found in public court records.<sup>131</sup> The Court found support for its decision in the then-proposed version of the *Restatement (Second) of Torts*, which embodied the futility principle.<sup>132</sup> Applying that principle, the Court found that the First Amendment interest in a vigorous press outweighs the "fading" interest in privacy when the information already appears on the public record.<sup>133</sup>

The Court followed *Cox Broadcasting in Oklahoma Publishing Co. v. Oklahoma County District Court*<sup>134</sup> and *Smith v. Daily Mail Publishing Co.*,<sup>135</sup> in which the Court further defined the rights of the media to publish public information. First, in *Oklahoma Publishing*, the Court struck down a pretrial order enjoining reporters who attended a juvenile proceeding from publishing the name or photograph of a young boy involved in that proceeding.<sup>136</sup> Although the mode of suppression constituted a prior restraint, subject to punishment by contempt, the Supreme Court relied on both *Nebraska Press* and *Cox Broadcasting*, holding that "the First and Fourteenth Amendments will not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public."<sup>137</sup>

Similarly, in *Daily Mail Publishing*, the Court struck down a West Virginia statute which imposed a fine and imprisonment on any newspaper publishing the name of any youth charged as a juvenile offender without the prior approval of the juvenile court.<sup>138</sup> Reporters had obtained the name of a 14-year-old charged with killing a classmate by interviewing eyewitnesses, police, and an assistant prosecuting attorney.<sup>139</sup> A local newspaper, *The Charleston Gazette*, then published the child's name, and at least three different radio stations broadcast the information.<sup>140</sup> When the *Daily Mail* published the juvenile's

131. *Id.*

132. *See id.* at 493-494 ("There is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public. Thus there is no liability for giving publicity to facts about the plaintiff's life which are matters of public record.") (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (Tentative Draft No. 13, 1967)).

133. *See id.* at 495-96 ("If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information.").

134. 430 U.S. 308 (1977) (per curiam).

135. 443 U.S. 97 (1979).

136. *Oklahoma Publishing Co.*, 430 U.S. at 311-12.

137. *Id.* at 310.

138. *Daily Mail Publishing Co.*, 443 U.S. at 98 (quoting W. VA. CODE § 49-7-3 (1976)).

139. *Id.* at 99.

140. *Id.*

name, however, a Kanawha County grand jury indicted the newspaper.<sup>141</sup> The state supreme court quashed the indictment on the ground that the statute operated as a prior restraint on speech and that the state's interest in protecting the identity of the juvenile offender did not overcome the heavy presumption against its constitutionality.<sup>142</sup>

In affirming the state supreme court's decision, the United States Supreme Court brushed aside the state court's doctrinal arguments in favor of a futility analysis.<sup>143</sup> The Court found that only the "highest form of state interest" will sustain the validity of sanctions for publishing truthful information lawfully obtained about a matter of public interest, whether the information was provided by the government or not.<sup>144</sup> Applying this standard, the Court concluded that the state's interest in preserving the anonymity of juvenile offenders was not of the "highest order."<sup>145</sup> Moreover, the Court stated, even if the state's asserted interest had passed constitutional muster, the statute chosen to serve that interest did not effectively accomplish its stated purpose.<sup>146</sup>

Concurring in the judgment, Justice Rehnquist embraced the futility argument, even though he rejected the Court's holding that protecting the anonymity of a juvenile offender could never constitute an interest of the highest order:

It is difficult to take very seriously West Virginia's asserted need to preserve the anonymity of its youthful offenders when it permits other, equally, if not more, effective means of mass communication to distribute this information without fear of punishment.<sup>147</sup>

Justice Rehnquist added in a footnote that "an obvious failure of a state statute to achieve its purpose is entitled to considerable weight in the balancing process that is employed in deciding issues arising under the First and Fourteenth Amendment protections accorded freedom

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141. *Id.* at 100.

142. *Id.*

143. *Id.* at 103-105.

144. *Id.* at 103-104.

145. *Id.* at 104.

146. *Id.* The Court concluded that the statute did not effectively protect juvenile offenders' identities because

[t]he statute does not restrict the electronic media or any form of publication, except "newspapers," from printing the names of youths charged in a juvenile proceeding. In this very case, three radio stations announced the alleged assailant's name before the Daily Mail decided to publish it.

*Id.* at 104-05.

147. *Id.* at 110 (Rehnquist, J., concurring).



of expression."<sup>148</sup> It would take a decade and a fourth major privacy case, *Florida Star v. B.J.F.*,<sup>149</sup> for the Court to synthesize the holdings of *Cox Broadcasting*, *Oklahoma Publishing* and *Daily Mail Publishing* and begin to enunciate a true futility principle.

In *Florida Star*, the Court struck down a state statute that made it a misdemeanor to print, publish or broadcast, in an instrument of mass communication, the name of a victim of a sexual offense.<sup>150</sup> A *Florida Star* reporter-trainee had copied the full name of a sexual assault victim from a police report placed in the department's pressroom.<sup>151</sup> This information formed the basis for a one-paragraph article which appeared in the newspaper.<sup>152</sup> The victim filed a civil suit against the *Florida Star*, alleging negligent violation of the statute, and the jury awarded her \$100,000 in damages.<sup>153</sup> At trial, the judge had rejected the newspaper's First Amendment arguments and directed a verdict for B.J.F.<sup>154</sup> The First District Court of Appeal affirmed the trial court's decision and the Florida Supreme Court denied discretionary review.<sup>155</sup>

The United States Supreme Court granted *certiorari* and analyzed the case under *Daily Mail*, identifying the futility principle as "undergirding" that decision.<sup>156</sup> Turning to the statute at issue, the Court found three independent reasons why Florida could not impose liability to protect the anonymity of rape victims: 1) the information reported was available in the police pressroom, 2) the negligence per se standard employed by the statute was too broad, and 3) the statute was facially underinclusive.<sup>157</sup> All three of the court's reasons implicate the futility principle.

Initially, if the futility principle has any meaning at all, it surely encompasses situations in which the information at issue has been pub-

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148. *Id.* at 105 n.3 (Rehnquist, J., concurring).

149. 491 U.S. 524 (1989).

150. *Id.* at 526 (citing FLA. STAT. § 794.03).

151. *Id.* at 527.

152. *Id.*

153. *Id.* at 528-29.

154. *Id.*

155. *Id.* at 529.

156. The Court summarized the development of the futility principle:

The *Daily Mail* formulation reflects the fact that it is a limited set of cases indeed where, despite the accessibility of the public to certain information, a meaningful public interest is served by restricting its further release by other entities, like the press. As *Daily Mail* observed in its summary of *Oklahoma Publishing*, "once the truthful information was 'publicly revealed' or 'in the public domain' the court could not constitutionally restrain its dissemination."

*Id.* at 535 (citations omitted).

157. *Id.* at 538-541.

lished as a press release.<sup>158</sup> Second, addressing the statute's negligence per se standard, the Court said that the statute could not be saved absent a requirement of case-by-case determinations of for example, "whether the identity of the victim is already known throughout the community."<sup>159</sup> If this examination is material to the constitutionality of the statute, then so too is the futility principle. Finally, just as it had rejected West Virginia's practice of limiting the application of its statute to newspapers in *Smith v. Daily Mail Publishing Co.*, in *Florida Star* the Court disapproved Florida's limiting the application of its statute to an "instrument of mass communication."<sup>160</sup> Noting Florida's admission that the statute would not apply to the "backyard gossip who tells 50 people," the Court concluded that a "ban on disclosures effected by 'instrument[s] of mass communication' simply cannot be defended on the ground that partial prohibitions may effect partial relief."<sup>161</sup>

So important is this third iteration of the futility principle that Justice Scalia said it formed the entire basis for his vote to strike down the Florida statute.<sup>162</sup> By its failure to prevent the dissemination of the victim's identity among her friends and acquaintances, Justice Scalia asserted that the statute "ha[d] every appearance of a prohibition that society is prepared to impose on the press but not upon itself."<sup>163</sup>

In conclusion, the privacy cases, like the access and prior restraint cases, put considerable flesh on the bare assertion that core speech which has already been made public may not be suppressed. The Court, however, has imposed limits on the futility principle. In particular, the Court has failed to consistently apply the futility principle in cases where the speech is relegated to some reduced First Amendment status, thus subjecting it to less vigorously controlled content regulation.

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158. *See id.* at 538-39 ("The government's issuance of such a release, without qualification, can only convey to recipients that the government considered dissemination lawful, and indeed expected the recipients to disseminate the information further.").

159. *Id.* at 539.

160. *Id.* at 540 (quoting FLA. STAT. § 794.03).

161. *Id.* (quoting FLA. STAT. § 794.03).

162. *Id.* at 541 (Scalia, J., concurring).

163. *Id.* at 542 (Scalia, J., concurring). In 1994, the Florida Supreme Court adopted similar reasoning when it struck down the criminal provisions of the same statute, declining to save it from fatal underinclusiveness through extensive rewriting. *See State v. Globe Communications Corp.*, 648 So. 2d 110, 113 (Fla. 1994) ("[T]he 'broad sweep' and 'underinclusiveness of [the statute] are even more troublesome when the statute is used to mandate criminal sanctions.'").

### D. Regulation of Commercial Speech

In 1942, the United States Supreme Court declared that the First Amendment does not protect "commercial speech."<sup>164</sup> Justice Roberts offered no authority for that assertion; indeed, there was none to offer.<sup>165</sup> Today, over one half century later, the Court is still trying to explain its commercial speech doctrine.<sup>166</sup> One of the first in a series of cases that ultimately restored some measure of protection to commercial speech, *Bigelow v. Virginia*<sup>167</sup> demonstrates the futility of suppressing the publication of information in one state that is readily available in other states.<sup>168</sup>

In *Bigelow*, the Court struck down a Virginia statute that made it a misdemeanor to encourage abortion by "publication, lecture, advertisement . . . or in any other manner."<sup>169</sup> Bigelow was convicted of running an advertisement promoting abortion services in New York City (where abortions were legal) in the newspaper that he edited in Virginia (where abortions were illegal).<sup>170</sup> Although the Court did not hand down its final decision in *Bigelow* until after it decided *Roe v. Wade*,<sup>171</sup> which constitutionalized abortion rights on the basis of the Fourteenth Amendment right of privacy, it decided *Bigelow* on First Amendment grounds.<sup>172</sup> Justice Blackmun wrote for the Court:

Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience — not only to

164. See *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (asserting that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising").

165. As noted by Justice Blackmun in a footnote in *Bigelow v. Virginia*:

Mr. Justice Douglas, who was a Member of the Court when *Chrestensen* was decided and who joined that opinion, has observed: "The ruling was casual, almost offhand. And it has not survived reflection." Mr. Justice Brennan, joined by Justices Stewart, Marshall, and Powell, has observed: "There is some doubt concerning whether the 'commercial speech' distinction announced in *Valentine v. Chrestensen* . . . retains continuing validity."

421 U.S. 820, 820 n.6. (1975) (citations omitted).

166. See generally Robert T. Cahill, Jr., *City of Cincinnati v. Discovery Network, Inc.: Towards Heightened Scrutiny for Truthful Commercial Speech*, 28 U. RICH. L. REV. 225 (1994) (discussing the Supreme Court's wavering approach to commercial speech and the impact of the case *Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), on the commercial speech doctrine).

167. 421 U.S. 809 (1975).

168. *New York Times v. Sullivan* was arguably the first case to seriously weaken the commercial speech doctrine articulated in *Valentine v. Chrestensen* by holding that First Amendment protected core political speech even if it appeared in the guise of a paid advertisement. 376 U.S. 254, 266 (1964).

169. *Bigelow*, 421 U.S. at 812-13 (quoting VA. CODE ANN. § 18.1-63 (1960)).

170. *Id.* at 811-13.

171. 410 U.S. 113 (1973).

172. *Bigelow*, 421 U.S. at 829.

readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia.<sup>173</sup>

The Court noted that Virginia could neither regulate the advertisement of abortions in New York nor prevent Virginians from traveling to New York to obtain an abortion.<sup>174</sup> Nor could Virginia bar another state's citizen from disseminating information about an activity that is legal in that state.<sup>175</sup>

Justice Blackmun did not, however, expressly prohibit Virginia from suppressing the publication of information that is readily available to its citizens through sources beyond Virginia's police powers. It better suited Justice Blackmun's doctrinal purpose to make the point in reverse, positing the unthinkable spectacle of Virginia trying to keep *The New York Times* and *Time* magazine from crossing its borders.<sup>176</sup>

Although *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>177</sup> decided the following year, gave even broader constitutional protection to commercial speech, the notion that commercial speech protected in one state must be protected in all states never advanced beyond *Bigelow's* facts.<sup>178</sup> This limitation resulted partly from Blackmun's own judicial caution in refusing to extend the *Bigelow* principles to electronic media.<sup>179</sup> In addition, a strong dissenting opinion by Justices Rehnquist and White, who would become the foremost antagonists of employing any sort of futility principle analysis in commercial speech and electronic media contexts,

173. *Id.* at 822.

174. *Id.* at 822-23.

175. *Id.* at 824-25. Justice Blackmun stated that the statute was unconstitutional under the First Amendment because

Virginia is really asserting an interest in regulating what Virginians may *hear or read* about the New York services. It is, in effect, advancing an interest in shielding its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach. This asserted interest, even if understandable, was entitled to little, if any, weight under the circumstances.

*Id.* at 827-28.

176. Justice Blackmun argued that

[i]f application of this statute were upheld under these circumstances, Virginia might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one that appeared in *Bigelow's* newspaper or containing articles on the general subject matter to which the advertisement referred. Other States might do the same. The burdens thereby imposed on publications would impair, perhaps severely, their proper functioning.

*Id.* at 828-29 (footnote omitted).

177. 425 U.S. 748 (1976).

178. *Id.* at 760-61, 764.

179. *Bigelow v. Virginia*, 421 U.S. 809, 825 n.10 (1975).

also limited Bigelow's scope.<sup>180</sup> Justice Rehnquist also dissented from the majority's opinion in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,<sup>181</sup> a case that ultimately halted the expansion of commercial speech protection by enunciating a specific test by which lower courts could assess the constitutionality of any advertising regulation.<sup>182</sup> But Justice Rehnquist used the *Central Hudson* test, cynically perhaps, to uphold a Puerto Rico law which restricted gambling advertising in the next important commercial speech regulation case to come before the Court, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.<sup>183</sup> In so doing, he explicitly rejected the futility principle as applied to commercial speech.<sup>184</sup>

In *Posadas*, the Court upheld legislation prohibiting gambling casinos from advertising their services to the Puerto Rican public, even though gambling was legal for both tourists and Puerto Ricans.<sup>185</sup> The Commonwealth Supreme Court had narrowly interpreted the law, allowing gambling establishments to advertise within Puerto Rico, provided the advertisements were directed at tourists and not Puerto Rican residents.<sup>186</sup> Justice Rehnquist found that the legislation met

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180. *Id.* at 829 (Rehnquist and White, J.J., dissenting).

181. 447 U.S. 557, 571 (1980) (Rehnquist, J., dissenting).

182. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court struck down certain Public Service Commission regulations which prohibited utilities in that state from promoting the use of electricity. *Id.* at 563-64. The Court held that the First Amendment protected commercial speech if it was neither false nor misleading. *Id.* The Court further held, however, that States could regulate commercial speech by measures that directly advanced a substantial governmental interest and were no more extensive than necessary to promote the asserted interest. *Id.* The above holding became known as the "*Central Hudson* test." Subsequently, in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), the Court interpreted the second prong of the test as requiring only a "reasonable fit" between the asserted interest and the regulation. *Id.* at 480.

Justice Blackmun, concurring in the judgment, found that the *Central Hudson* test was inconsistent with the Court's prior cases and provided inadequate protection for commercial speech. *Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring). Conversely, Justice Rehnquist asserted that the test would unduly impair state legislatures' ability to promote important state interests. *Id.* at 584 (Rehnquist, J., dissenting).

183. 478 U.S. 328 (1986).

184. *See id.* at 340-44 (analyzing the commercial speech at issue under the *Central Hudson* four-part test without addressing the possible futility of the restraint).

185. *Id.* at 332.

186. *Id.* at 335. The Court's interpretation of the law

allow[ed], within the jurisdiction of Puerto Rico, advertising by the casinos addressed to tourists, provided they do not invite the residents of Puerto Rico to visit the casino, even though said announcements may incidentally reach the hands of a resident. Within the ads of casinos allowed by this regulation figure, for illustrative purposes only, . . . the ads of casinos in magazines for distribution primarily in Puerto Rico to the tourist . . . even though said magazines may be available to the residents and in movies, television, radio, newspapers and trade magazines which may be published, taped, or filmed in

the *Central Hudson* test,<sup>187</sup> and rejected any notion that the regulation's underinclusiveness would deprive it of its constitutional validity.<sup>188</sup> Further, Justice Rehnquist rejected Justice Stevens' dissenting argument that the statute impermissibly discriminated among different publications and audiences.<sup>189</sup> Indeed, Justice Rehnquist dismissed all counterarguments by insisting that Puerto Rico's "greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."<sup>190</sup>

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*the exterior for tourism promotion in the exterior even though they may be exposed or incidentally circulated in Puerto Rico. For example: an advertisement in the New York Times, an advertisement in CBS which reaches us through Cable TV, whose main objective is to reach the potential tourist.*

*Id.* (emphasis added) (quoting the Superior Court of Puerto Rico, San Juan Section, App. to Juris. Statement at 38b-40b).

187. *Id.* at 341-44. Under the *Central Hudson* test, courts must analyze commercial speech regulations using the following four factors: 1) whether the restricted speech is misleading or fraudulent; 2) the strength of the governmental interest in restricting the speech; 3) whether the restriction advances the government's intended interest; and 4) whether a reasonable "fit" exists between the government's ends and the means chosen to accomplish those ends. 447 U.S. 557, 566 (1980).

188. *Posadas*, 478 U.S. at 342.

189. *Id.* at 345 n.9. Justice Stevens argued that

[u]nless the Court is prepared to uphold an Illinois regulation of speech that subjects the New York Times to one standard and the Chicago Tribune to another, I do not understand why it is willing to uphold a Puerto Rico regulation that applies one standard to the New York Times and another to the San Juan Star.

*Id.* at 360 (Stevens, J., dissenting) (quoting the Superior Court of Puerto Rico, San Juan Section, App. to Juris. Statement at 38b-39b).

Justice Stevens' equal protection analysis, like Justice Blackmun's argument in *Bigelow*, avoids any express reference to the futility principle:

With respect to the audience, the newly construed regulations plainly discriminate in terms of the intended listener or reader. Casino advertising must be "addressed to tourists . . ." It must not "invite the residents of Puerto Rico to visit the casino . . ." The regulation thus poses what might be viewed as a reverse privileges and immunities problem: Puerto Rico's residents are singled out for disfavored treatment in comparison to all other Americans. But nothing so fancy is required to recognize the obvious First Amendment problem in this kind of audience discrimination. I cannot imagine that this Court would uphold an Illinois regulation that forbade advertising "addressed" to Illinois residents while allowing the same advertiser to communicate his message to visitors and commuters; we should be no more willing to uphold a Puerto Rico regulation that forbids advertising "addressed" to Puerto Rico residents.

*Id.* at 360 (Stevens, J., dissenting) (quoting App. to Juris. Statement at 38b-39b).

190. *Id.* at 345-46. Commentators have seriously challenged the validity of the *Posadas* decision. See Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 488 (1992) ("[T]he [*Posadas*] Court failed to fulfill its constitutional function to determine independently the free speech value of the expression in question . . . Instead, the Court blindly deferred to social regulation."); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 649 n.74 (1990) ("[I]t is not clear that the power to regulate a specific economic activity necessarily comprises the power to regulate speech about that activity. After all, the Constitution does not forbid legislation abridging the freedom of gambling; it does forbid legislation abridging the freedom of speech."); Philip B. Kurland,

If the *Posadas* court could disregard the futility principle with respect to printed commercial speech, it should have come as no surprise that the Court would again reject it when analyzing broadcast commercial speech. In *Capital Broadcasting Co. v. Kleindienst*,<sup>191</sup> for example, the Court summarily affirmed a Federal Communications Commission (FCC) ban on airing tobacco advertisements.<sup>192</sup> Subsequently, in *United States v. Edge Broadcasting Co.*,<sup>193</sup> Justice White put the last nail in the coffin by upholding an FCC regulation that restricted radio lottery advertisements.

*Edge Broadcasting Co.* involved a radio station which was licensed to serve a North Carolina community near that state's border with Virginia.<sup>194</sup> More than 90 percent of its listeners resided in Virginia, and the station derived 95 percent of its advertising revenue from Virginia sources.<sup>195</sup> The regulation prevented Edge's WMYK-FM, or "Power 94," unlike Virginia-based competitors addressing a virtually identical market, from sharing in the revenues of Virginia's aggressively advertised state lottery.<sup>196</sup> This restriction resulted from the fact that North Carolina sponsored no state lottery and prohibited res-

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*Posadas de Puerto Rico v. Tourism Company*: " 'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful", 1986 SUP. CT. REV. 1, 6 ("When Oliver Wendell Holmes told us that: 'The life of the law has not been logic; it has been experience,' he was not suggesting the abandonment of reason."); Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Meaning*, 72 MINN. L. REV. 289, 290-91 (1987) ("[T]he Court retreated to a deferential standard of review reminiscent of thinking associated with its abandoned view that commercial expression is unprotected. Reversion to such analysis mocks the constitutional status of commercial speech."); Mary B. Nutt, *Trends in First Amendment Protection of Commercial Speech*, 41 VAND. L. REV. 173, 204-05 (1988) ("The Court's decision in *Posadas* appears to retreat to the position in *Valentine v. Chrestensen* that commercial advertising is wholly unworthy of constitutional protection. In fact, Justice Rehnquist, who authored the opinion in *Posadas*, previously had expressed a desire to return to *Chrestensen* in his dissenting opinions."); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CINN. L. REV. 1181, 1182 (1988) ("[T]he simple irreconcilability of *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico* with both *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* and the four-part test of *Central Hudson Gas and Electric Corp. v. Public Service Commission* produces a situation in which almost all of the foundational questions about first amendment protection for commercial speech remain on the table for consideration and reconsideration."); *The Supreme Court — Leading Cases*, 100 HARV. L. REV. 100, 178 (1986) ("Had Justice Rehnquist applied the *Central Hudson* test with vigor, he would have struck down Puerto Rico's law on the ground that it was enacted in pursuit of too insubstantial a purpose to justify the interference with individual choice.").

191. 405 U.S. 1000 (1972).

192. *Id.* For the facts of *Capital Broadcasting Co.*, see 333 F. Supp. 582 (D. D.C. 1971).

193. 113 S. Ct. 2696 (1993).

194. *Id.* at 2701-02. See generally Tara L. Lavery, Note, *Commercial Speech Suffers a First Amendment Blow: United States v. Edge Broadcasting Co.*, 14 N. ILL. U.L. REV. 549 (1994) (discussing the reduced protection afforded commercial speech).

195. *Edge Broadcasting*, 113 S. Ct. at 2702.

196. *Id.*

idents from participating in or advertising out-of-state lotteries.<sup>197</sup> Congress supported that prohibition by only allowing stations licensed to a community within a lottery state to broadcast information concerning state-run lotteries.<sup>198</sup> Edge Broadcasting sought a declaratory judgment from the U.S. District Court for the Eastern District of Virginia stating that the federal statute and corresponding FCC regulations were unconstitutional as applied to WMYK-FM.<sup>199</sup>

Finding the “legality of advertising about the Virginia lottery . . . undisputed,” the district court analyzed the case under the remaining three elements of the *Central Hudson* test.<sup>200</sup> Although it determined that the federal government had a substantial interest in supporting North Carolina’s effort to discourage participation in lotteries, the court found that the federal statute provided an “ineffectual means” of reducing lottery participation by North Carolina residents.<sup>201</sup> The court reasoned that since a majority of the North Carolina residents in the station’s signal area received their information from Virginia-based media, the number of listeners who might receive significantly less lottery advertising because of the statute’s restrictions on Edge Broadcasting would be too small to “directly advance” the government’s interest.<sup>202</sup> According to the district court, the law would not affect the volume of Virginia lottery advertising reaching North Carolina residents; because the amount of money earmarked for broadcasting Virginia lottery commercials in the area was largely determined without regard to how many different broadcasters would share it, once a budget was fixed, the money would simply be allocated among the broadcasters who were available to take it.<sup>203</sup> Therefore, if Power 94 did not receive any of this designated revenue, other broadcasters would take up the slack.<sup>204</sup> The Court of Appeals for the Fourth Circuit agreed with the district court’s analysis and found that

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197. *Id.* (citing N.C. GEN. STAT. §§ 14-289 & 14-291 (1993)).

198. *Id.* at 2701 (citing 18 U.S.C. §§ 1304 & 1307 (1988 & Supp. III 1991)).

199. *Id.* at 2702.

200. *Edge Broadcasting Co. v. United States*, 732 F. Supp. 633, 638 (E.D. Va. 1990).

201. *Id.* at 639.

202. *Id.*

203. *Id.* at 640-41.

204. *Id.* at 641.

Thus, those statutory provisions fail materially to protect North Carolina residents from the harms which may result from lottery advertising. Given that degree of ineffectiveness, those provisions do not meaningfully address the concerns of North Carolina or federalism’s concerns for those state interests, and do not pass muster under the third prong of the *Central Hudson* test.



the prohibition did not effectively shield North Carolina residents from lottery information.<sup>205</sup>

The Supreme Court refocused the third prong of the *Central Hudson* test on the regulatory scheme as a whole, rather than as applied to Edge in this case.<sup>206</sup> Thus, Justice White found that the statutes directly advanced the government's objective, which he characterized as "balancing the interests of lottery and nonlottery [s]tates."<sup>207</sup> Consequently, Justice White easily found a "reasonable fit" sufficient to satisfy the fourth prong.<sup>208</sup> In a part of the opinion joined by Chief Justice Rehnquist and Justices Thomas, Kennedy and Souter, Justice White specifically addressed the futility argument advanced by the district and appellate courts.<sup>209</sup> Justice White found those courts "wrong in holding that, as applied to Edge itself, the restriction at issue was ineffective and gave only remote support to the Government's interest."<sup>210</sup> Justice White argued that the government's interest was sufficiently served by the supposition that 11 percent of the radio listening time of 127,000 North Carolina residents would be free from lottery advertising.<sup>211</sup> It is not clear whether Justice White disbelieved or merely failed to understand the district court's observation that Virginia allocated a fixed pre-budgeted volume of its advertising budget to North Carolina residents regardless of Edge Broadcasting's participation in that market. In any case, White did not address it. It was enough for Justice White was that the government advanced its

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205. See *Edge Broadcasting Co. v. United States*, 5 F.3d 59, 62 (4th Cir. 1992) ("This ineffective or remote measure to support North Carolina's desire to discourage gambling cannot justify infringement upon commercial free speech."). Writing in dissent, Judge Widener sounded one of the same themes that Justice White adopted when *Edge Broadcasting* reached the Supreme Court:

I think it a mistake to hold, as we do, that those statutes as applied are invalid because less than 2% of North Carolina's total population are exposed to the broadcast of WMYK-FM. And the fact that such 2% may be exposed to the broadcasts from Virginia does not alter the fact that Congress has the undoubted right to enact the legislation which it did. The fact that the legislation does not uniformly succeed in all instances is no reason to hold it unconstitutional.

Another objection to this decision is that as a practical matter the electromagnetic waves of immense numbers of radio and television broadcasts, probably a majority of them, cross state lines, so if our decision is carried to its logical conclusion, as it will be, it will serve to completely invalidate the statutes involved.

*Id.* at 63 (Widener, J., dissenting).

206. *Edge Broadcasting Co.*, 113 S. Ct. 2696, at 2699, 2704 (1993).

207. *Id.* at 2704.

208. *Id.* at 2705.

209. *Id.* at 2706-08.

210. *Id.* at 2706.

211. See *id.* ("If Edge is allowed to advertise the Virginia lottery, the percentage of listening time carrying such material would increase from 38% to 49%. We do not think that *Central Hudson* compels us to consider this consequence to be without significance.").

purpose “by substantially reducing lottery advertising, even where it [was] not wholly eradicated.”<sup>212</sup>

Justices Scalia and O’Conner declined to join in that part of Justice White’s opinion, but did not write separately.<sup>213</sup> Justices Stevens and Blackmun dissented, with Justice Stevens looking back to *Bigelow* for support.<sup>214</sup> Justice Stevens rejected the characterization of *Bigelow* as turning on the constitutionally protected right to an abortion as implied by Justice White in *Edge Broadcasting*<sup>215</sup> and asserted by Justice Rehnquist in *Posadas*.<sup>216</sup> Justice Stevens argued that “*Bigelow* is not about a woman’s constitutionally protected right to terminate a pregnancy. It is about paternalism, and informational protectionism. It is about one State’s interference with its citizens’ fundamental constitutional right to travel in a state of enlightenment, not government-induced ignorance.”<sup>217</sup> Although Justice Stevens limited the rest of his dissent to disputing the substantiality of the government’s interest, he had further occasion to discuss his interpretation of *Bigelow* in a concurring opinion in *Rubin v. Coors Brewing Co.*<sup>218</sup>

In *Coors Brewing*, the futility of the government’s ban on printing the alcohol content of beer and malt liquor on container labels was so clear that even Chief Justice Rehnquist joined in rejecting the ban.<sup>219</sup> Writing for the majority, Justice Thomas concluded that such a restriction could not “directly and materially advance” the government’s asserted interest in preventing strength wars “because of the overall irrationality of the Government’s regulatory scheme.”<sup>220</sup> In particular, Justice Thomas pointed out that the regulations in question prohibited brewers from printing the alcohol content on beer bottle labels, except where state law required disclosure of such informa-

212. *Id.* at 2707.

213. *Id.* at 2700.

214. *Id.* at 2709 (Stevens and Blackmun, J.J., dissenting).

215. *See id.* at 2703 (“[T]he activity underlying the relevant advertising — gambling — implicates no constitutionally protected right; rather, it falls into a category of ‘vice’ activity that could be, and frequently has been, banned altogether.”).

216. *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 345-46 (1986) (“In *Carey* [v. *Population Servs. Int’l*, 431 U.S. 678 (1977)], and *Bigelow* [v. *Virginia*, 421 U.S. 809 (1975)], the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State . . . . In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling, and *Carey* and *Bigelow* are hence inapposite.”).

217. *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2710 (1993) (Stevens and Blackmun, J.J., dissenting).

218. 115 S. Ct. 1585, 1594-97 (1995) (Stevens, J., concurring).

219. *Id.* at 1578.

220. *Id.* at 1550.

tion,<sup>221</sup> while other federal regulations prohibited advertisers from disclosing the beer's alcohol content only where state law also barred disclosure.<sup>222</sup> After *Coors Brewing*, therefore, it seems that — despite *Posadas* and *Edge Broadcasting* — the public availability of information by other means can sometimes defeat governmental efforts to suppress it, even in the commercial speech context.<sup>223</sup> The remaining parts of this Article will further develop and refine this futility principle and apply it to new First Amendment challenges.

## II. THE FUTILITY PRINCIPLE EXAMINED

### A. *Defining the Futility Principle*

The core speech cases discussed above demonstrate that either the First Amendment or a common law rule of near-constitutional weight imposes a presumption against the validity of government efforts to suppress speech—whether the suppression is by prior restraint, denial of access, or subsequent punishment — where suppression would be futile because that speech is available to the same audience through some other medium or at some other place. Far from refuting this presumption of invalidity, the commercial speech cases show only that the presumption is more easily overcome where the speech in question is accorded reduced First Amendment protection. Because the courts do not acknowledge this presumption, the cases offer only oblique guidance as to its contours. In this Part, the Article describes the presumption of invalidity raised by the futility principle and examines

221. *Id.*

222. *Id.*

As only 18 States at best prohibit disclosure of content in advertisements . . . brewers remain free to disclose alcohol content in advertisements, but not on labels, in much of the country. The failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the government's true aim is to suppress strength wars.

*Id.*

223. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (striking down Oklahoma's prohibition against cable operators' carrying out-of-state liquor commercials on federal pre-emption grounds). Justice Brennan minimized the state's interest in discouraging liquor consumption by noting that, "Oklahoma has chosen not to press its campaign against alcoholic beverage advertising on all fronts." He pointed out that state law

permit[ed] both print and broadcast commercials for beer, as well as advertisements for all alcoholic beverages contained in newspapers, magazines, and other publications printed outside the State. The ban at issue in this case [wa]s directed only at wine commercials that occasionally appear[ed] on out-of-state signals carried by cable operators.

*Id.* at 715.

how it can be overcome in a specific case. In so doing, the Article relies as much as possible on settled case law.<sup>224</sup>

Fundamentally, the futility principle says that government action to suppress speech must be effective to be valid. At this level, the “effectiveness” required is more mechanical than substantive. For example, it is not the futility principle that requires a valid gag order to effectively protect the defendant’s right to a fair trial by an impartial jury. Higher constitutional principles serve that function. The futility principle merely recognizes that a gag order, to be effective, must stifle the targeted information. If it fails to do even that much, the futility principle renders the order invalid. Thus, no need exists to reach the more difficult questions regarding the susceptibility of jurors to prejudicial publicity or the efficacy of judicial admonitions.

The simplicity of this formulation tends to mask the true complexities of the issue. To better understand the futility principle, imagine a delicately balanced scale with the speech interest on one side and the suppression interest (e.g., privacy or national security) on the other. Certain factors operate to tip the scale one way or the other. When the government suppresses speech through the use of a prior restraint, for instance, the scale tips toward the speech interest, prior restraints being historically disfavored. By contrast, if the regulation suppresses commercial speech, the scale tips toward the suppression interest, commercial speech having less First Amendment value.

Under this analysis, the futility principle invariably causes the scale to tip toward the speech interest. Moreover, where the futility principle enters the balance opposite a prior restraint, the combination weighs so heavily in favor of the speech interest that the presumption against suppression appears all but irrebuttable. To illustrate, in *United States v. Progressive, Inc.*, once the media published the essence of the Progressive’s pending H-bomb article, the government recognized that, despite the possibility of nuclear annihilation, it would be futile to suppress Progressive’s further publication of the information. Similarly, lesser harms, like those relating to Paula Jones’s privacy and reputational interests in *Jones v. Turner*, should never support injunctive relief once the information is publicly available, even if the court may be able to contain plaintiff’s injury somewhat by restricting the information’s dissemination; the remedy more appropriately lies in criminal sanctions or money damages if the cause of action is proven.

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224. The author does not attempt, however, to disguise his position as an advocate of the proposition that public speech is free speech which should be free to any speaker, to any audience, and in any place.

In the access context, where the speech and suppression interests are more evenly balanced, the futility principle also works to diminish the state's interest in suppression and thus tip the scale in favor of access. The futility principle does not guarantee journalists the right to attend criminal trials or report on the proceedings; again, higher constitutional principles perform that function. But the futility principle does grant journalists access to embarrassing videotaped evidence, confidential police records, and secret grand jury testimony that has already become public knowledge.<sup>225</sup> One must ask: "How important can the government's asserted interest in suppression be if it allows access to some arbitrarily chosen members of the public or to the entire world via some other medium?"

The same logic seems to be at work in the subsequent punishment cases, although its formulation may be somewhat different. For example, the futility principle may operate on a subconstitutional level, depriving a plaintiff of an element of the invasion of privacy tort.<sup>226</sup> At a constitutional level, it may expose an underinclusiveness that will be fatal to a criminal statute. In either case, the futility principle almost irretrievably diminishes the state's interest in suppression.

The futility principle also functions to diminish the government's suppression interest in the regulatory context. Here, however, the resulting underinclusiveness is not necessarily fatal. Constitutional doctrine allows the state to regulate speech of lesser value, such as commercial speech, and it allows that regulation to be incremental.<sup>227</sup> Not only is the speech interest diminished in the commercial context, but the fact that the speech in question may be otherwise available does not always diminish the suppression interest enough to defeat the regulation. Thus, the presumption of invalidity is apparently rebuttable, at least in the regulatory context.

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225. The author also submits that the futility principle will ultimately unlock courtrooms everywhere to video coverage (the Judicial Conference and the O.J. Simpson trial notwithstanding).

226. Indeed, the privacy tort itself is premised on the thought that "to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn." Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 215 (1890).

227. See *supra* notes 165-223 and accompanying text (discussing the regulation of commercial speech). Note, however, Justice Brennan's dictum in *Capital Cities Cable, Inc. v. Crisp*, where he argued that

[a]lthough a state regulatory scheme obviously need not amount to a comprehensive attack on the problems of alcohol consumption in order to constitute a valid exercise of state power under the Twenty-first Amendment, the selective approach Oklahoma has taken toward liquor advertising suggests limits on the substantiality of the interests it asserts here.

467 U.S. 691, 715 (1984).

A closer examination of the commercial speech cases reveals, however, that — except for *Posadas*, which by common consensus was wrongly decided<sup>228</sup> — the more closely the asserted suppression interest lies to the content of the speech in question, the more likely the balance will weigh in favor of the speech interest.<sup>229</sup> To illustrate, the futility principle allowed the Court to sustain the regulation at issue in *Edge Broadcasting* because the federal government's interest in maintaining a neutral posture vis-a-vis state lottery advertising is remote from the content of those commercials and unaffected by the availability of the information.<sup>230</sup> By contrast, the suppression interest in *Coors Brewing* — preventing strength wars — directly related to the content of the labelling; therefore, the Court justifiably struck down the regulation at issue on the ground that suppression is futile when the alcohol content is advertised elsewhere.<sup>231</sup>

The significance of the relationship between the content of the speech and the suppression interest leads directly to the question of how the government can overcome the presumption of invalidity raised by the futility principle in a specific case. This Article submits that the government can defeat the presumption only where it asserts an important interest that is only marginally related to the content of the speech and where the regulation will directly advance that interest notwithstanding the public availability of the speech in question. Such a rule provides the only reasonable explanation for the outcome of *Edge Broadcasting*, but must be tested to see if it holds up in other contexts.

For example, in the constitutional privacy cases, the U.S. Supreme Court has consistently refused to foreclose the possibility that the press might be sanctioned for publishing information obtained unlawfully, where the same information lawfully obtained could be published without liability.<sup>232</sup> Perhaps the Court awaits an appropriate case to determine whether a governmental interest in deterring unlawful newsgathering, which is distinguishable from the content of the

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228. See *supra* note 190 (detailing several articles written in response to the *Posadas* decision in which commentators have contended that the Court erroneously reverted to a former time when commercial speech was afforded insufficient protection).

229. See *supra* notes 185-92 and accompanying text (summarizing the Court's decision in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986)).

230. See *supra* notes 194-212 and accompanying text (discussing *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993)).

231. See *supra* notes 219-22 and accompanying text (discussing *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995)).

232. See, e.g., *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103-104 (1979) (furnishing heightened First Amendment protection for publishing lawfully obtained information).

speech, could overcome the presumption raised by the futility principle.<sup>233</sup>

At a common law level it appears the Court agrees that a governmental interest in minimizing injury to a plaintiff's reputation is sufficient to justify imposing liability on the republisher of a libel, even though that interest directly relates to the speech's content.<sup>234</sup> In the absence of a recognized futility principle to protect republishers, this potential liability perhaps explains and justifies the invention of such defenses as neutral reportage<sup>235</sup> and reasonable reliance on a wire service.<sup>236</sup>

Of all the cases examined in Part I of this Article, the access cases offer the clearest support for proposition that important governmental interests unrelated to content can overcome the futility presumption. Consider the Supreme Court's refusal to find any constitutional right to televise trials, while otherwise making trials among the most accessible of all governmental functions.<sup>237</sup> This Article has already discussed the origins of the Court's animosity toward cameras and noted some common justifications: prejudicial effect on the jury, disruption of the trial process, and grandstanding by parties and witnesses. Applying the futility principle, these common justifications can be characterized as governmental interests unrelated to content which the government can assert to overcome the presumption of accessibility. After the O.J. Simpson experience, we might add the justification of preserving respect for the judicial system.<sup>238</sup>

233. It should not surprise the reader that the author does not believe such a rule should prevail; the fact that it might is sufficient to make the point here.

234. See *Hutchinson v. Poxmire*, 443 U.S. 111, 130 (1979) (citing *Doe v. McMillan*, 412 U.S. 306, 314-15 (1973), which held that a Congress member's republication of libelous material subjects him to liability).

235. The neutral reportage doctrine supplies First Amendment protection to accurate and unbiased reporting of newsworthy charges regarding a public figure. See, e.g., *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113, 120 (2d Cir.), cert. denied, 434 U.S. 1002 (1977) (refusing to hold a republisher liable for accurately and objectively reporting the libelous utterance of a responsible spokesman on a matter of public controversy). The concept does not require the reporter to be free from uncertainty about the validity of the claims before he or she reports such charges. *Id.*

236. See, e.g., *Appleby v. Daily Hampshire Gazette*, 478 N.E.2d 721, 724 (Mass. 1985) (relieving newspapers that relied entirely upon established wire services without independent corroboration from liability for printing libelous information).

237. See *Reske*, *supra* note 79, at 28 (conveying the majority's view that broadcasting judicial proceedings could potentially threaten defendants' right to a fair trial).

238. The author believes that the Court will eventually find a ban on cameras in the courtroom no longer directly advances these interests (assuming that it ever did), that the process is far better served by the presence, as opposed to the absence, of cameras and that no constitutional justification exists for barring television from every courtroom.

Finally, although few governmental interests appear sufficient to overcome the combination of historical hostility to prior restraints and the futility principle, one such interest may be the protection of intellectual property through injunctive relief allowed for copyright<sup>239</sup> or trademark<sup>240</sup> infringement. This interest is exclusively proprietary, utterly unrelated to the content of the speech in question, and unquestionably advanced by injunctive relief. In addition, the protection of intellectual property enjoys the cachet of independent constitutional authorization.<sup>241</sup>

In sum, the futility principle imposes a presumption of constitutional stature against the validity of government efforts to suppress speech — whether by prior restraint, denial of access, or subsequent punishment — where suppression would be futile because that speech is accessible to the same audience through some other medium or at some other place. The government may rebut the presumption only where it asserts an important interest that is unrelated to the content of the speech in question and where suppression directly advances that interest.

### *B. Justifying the Futility Principle*

Having defined the futility principle as it currently exists in First Amendment jurisprudence, this Article now considers why the Court ought to acknowledge the principle. In other words, what additional values are served by expressly recognizing the futility principle that are not now being realized. The cases suggest three important values that courts would be enhanced by formally recognizing the futility principle. First, the government would conserve resources that would otherwise be wasted in trying to “force the genie back into the bottle.” Second, express recognition of the futility principle would increase respect for the law and its servants, who tend to look foolish when they try to suppress publicly available speech. Third, such acknowledgment would protect the integrity of the speech itself by increasing the number and diversity of information providers.

When Justice White lamented that “a substantial part of the threatened damage” wrought by the theft and release of the Pentagon Papers has already occurred,<sup>242</sup> he was acknowledging the futility of any further injunctive relief as a waste of time and judicial effort. Sim-

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239. See 17 U.S.C. § 502(a) (1994) (granting courts with jurisdiction the authority to award a temporary or permanent injunction to prevent copyright infringement).

240. See 15 U.S.C. § 1116 (1994) (providing injunctive relief for trademark infringement).

241. U.S. CONST. art. I, § 8, cl. 8.

242. *New York Times Co. v. United States*, 403 U.S. 713, 733 (1971) (J. White, concurring).



ilarly, when Chief Justice Burger spoke of restraining a whole community from "discussing a subject intimately affecting life within it"<sup>243</sup> and when Justice Marshall spoke of restraining the "backyard gossip who tells 50 people,"<sup>244</sup> they each called attention to the Sisyphian task of any court or legislature that would try to contain publicly available information. Likewise, when Justice Thomas decried "the overall irrationality of the Government's regulatory scheme,"<sup>245</sup> he was expressing his frustration with a wasteful and ineffectual bureaucracy.

Taxpayers, who have precious little patience for such nonsense, will likely share Justice Thomas's frustration. How are taxpayers supposed to respect a judicial system that denies one radio station the right to carry advertising that its audience hears anyway on another station? Or one that denies a magazine the right to carry factual information that is readily available in the public library? Or a system that refuses to grant the general public the right to see and hear evidence that has already been played to a jury, the press, and the ordinary citizens who were lucky enough to get seats in the courtroom?

Assuming *arguendo* that some circumstances may exist in which containing or slowing the dissemination of publicly available information has value and that the public will recognize and accept such value, there remains a bona fide concern that the government may jeopardize the integrity of the information by imposing restraints on its dissemination. Thus, Chief Justice Burger warned that rumors, not covered by the *Nebraska Press* gag order, "could well be more damaging than reasonably accurate news accounts" of the murders.<sup>246</sup> Similarly, Judge Gesell found "illuminating" the "aural atmosphere, emphasis and connotations" of President Nixon's taped conversations, information that the printed transcripts could not convey.<sup>247</sup> And Justice Stevens branded as "paternalism," "informational protectionism," and "government-induced ignorance" the consequence of excessive controls on commercial speech.<sup>248</sup>

Underlying each of these expressions is the notion that the integrity of the information is best served by allowing it to be carried by many and varied information providers. This same multiplicity and diversity of voices has long been considered fundamental to the proper func-

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243. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 567 (1976).

244. *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

245. *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995).

246. 427 U.S. at 567.

247. *United States v. Mitchell*, 386 F. Supp. 639, 642 (D. D.C. 1975).

248. *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2717 (1993) (Stevens and Blackmun, J.J., dissenting).

tioning of the Millian marketplace of ideas.<sup>249</sup> Yet this value is clearly threatened by the kind of discriminatory suppression that can be found in several of the cases discussed above. In *Nebraska Press*, *Bigelow*, and *Posadas*, for example, the regulations at issue prevented the local media from publishing certain information while national and international media remained free to release the same information. In *Daily Mail*, the Court restrained the print media, but not broadcasters; and in *Nixon*, the Court constrained broadcasters, but not the print media. Finally, in *Providence Journal* and *Edge Broadcasting*, the court decisions shut a single information provider out of the competitive marketplace.

This type of discriminatory suppression affects the audience as well as the media, threatening what Justice White called the “paramount” right of the public to be informed and “capable of conducting its own affairs.”<sup>250</sup> The threat becomes especially serious as information becomes the driving force behind the modern economy; in contemporary society, lack of access to information intensifies the disparity between the “haves” and “have nots.”<sup>251</sup> Given the government’s denial of information to Virginians about abortion services in New York, to Puerto Ricans about gambling in San Juan, and to North Carolinians about lotteries in Virginia, what other information will the government try to withhold from selected segments of the public?<sup>252</sup>

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249. See, e.g., *Red Lion Broadcasting Co. v. Federal Communications Comm’n*, 395 U.S. 367 (1969). In that case the Court explained that

[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private [broadcast] licensee . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

*Id.* at 390.

250. *Id.* at 390, 392.

251. Indeed, the objectives of the Clinton Administration’s plan for developing a National Information Infrastructure include “extend[ing] the Universal Service concept to the information needs of the American people in the 21st century.” The National Information Infrastructure: Agenda for Action, 58 Fed. Reg. 49,025, 49,028 (1993). See also Ralph J. Andreotta, *The National Information Infrastructure: Its Implications, Opportunities, and Challenges*, 30 WAKE FOREST L. REV. 221, 227 (1995) (explaining the impact that the Information Infrastructure will have on our future society).

252. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 215 (1991) (Blackmun, J., dissenting) (arguing that restrictions on the ability of federally funded family planning clinics to counsel patients regarding abortion unconstitutionally suppresses truthful information about constitutionally protected conduct vitally important to the listener). Significantly, the restrictions at issue in *Rust* affected only those women who were dependent upon federally funded clinics for prenatal counseling, i.e., those of lower socio-economic status. *Id.* at 178-191.

The futility principle advocated by this Article would minimize any discriminatory suppression, whether media-focused or audience-focused, and would help to preserve the integrity of information, the efficiency of government, and respect for the courts in an era of vast changes in the way in which we communicate with each other. To test these theories, this Article now turns to three legal issues which the new computer-assisted communications technology has generated and examines how the futility principle might influence the resolution of each.

### III. THE FUTILITY PRINCIPLE APPLIED

#### A. *Mayhem Manuals and the Internet*

On April 19, 1995, a crude bomb made of diesel fuel and fertilizer destroyed the Alfred P. Murrah Federal Building in Oklahoma City, killing 167 men, women and children. The story dominated the media, including the Internet, where users exchanged information, spread rumors, coordinated relief efforts, and argued about responsibility.<sup>253</sup> Several of those debates focused on the responsibility of the Internet itself, particularly its use by right-wing militants to disseminate their paranoid political ideas, anti-government propaganda and instruction in explosives and other weaponry.<sup>254</sup> Within weeks of the bombing, politicians warned about the "dark underside" of the new technology.<sup>255</sup>

These politicians fully aired their concerns on May 11, 1995, when the Senate Judiciary Subcommittee on Terrorism, Technology and Government Information conducted a hearing on "Mayhem Manuals and the Internet."<sup>256</sup> Then presidential hopeful Senator Arlen Specter chaired the hearing, opening with an introduction to the Internet

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253. John Schwartz & Howard Kurtz, *Internet, Talk Radio Let Citizens Sound Off*, WASH. POST, Apr. 23, 1995, at A22. See generally Margot Williams, *Internet Relay Chat: 'Breaker One-Nine' for the '90s*, WASH. POST, May 15, 1995, at F18 (explaining the Internet's increasing significance in the media).

254. John Schwartz, *Advocates of Internet Fear Drive to Restrict Extremists' Access*, WASH. POST, Apr. 28, 1995, at A22.

255. *Id.* See also John F. Harris, *Clinton Rejects 'Patriot' Claim of Armed Groups; Long Struggle With Domestic Terrorism Foreseen*, WASH. POST., May 6, 1995, at A01 (quoting President Clinton, who stated that "technology like the Internet has a "dark underside" that, combined with America's traditional openness and liberty, leaves the nation "very, very vulnerable to the forces of organized destruction and evil""). President Clinton further stated that "the great security challenge . . . in the 21st century will be to determine how to beat back the dangers while keeping the benefits of this new time." *Id.*

256. *Mayhem Manuals and the Internet: Hearings Before the Subcomm. on Terrorism, Technology, and Government Information of the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995), available in LEXIS, LEGIS library, CNGTST file [hereinafter *Mayhem Hearings*].

that conveyed a sense of both awe and fear.<sup>257</sup> Asserting that “purveyors of hate and violence” communicate on the Internet, Senator Specter pointed to a 93-page on-line document entitled “Big Book of Mischief,” which details how to make explosives.<sup>258</sup> He also cited an electronic mail posting that offered information on building a bomb like the one used in Oklahoma City, and he exhorted the subcommittee to determine the extent of such usage and whether anything could or should be done to curb it.<sup>259</sup>

Senator Specter explicitly acknowledged that these issues implicated First Amendment concerns and implicitly considered the futility principle. He not only referred to the *Progressive* case in his opening remarks, but also called former U.S. Attorney for the Western District of Wisconsin, Frank Tuerkheimer, as a witness.<sup>260</sup> Professor Tuerkheimer helped prosecute the *Progressive* case almost 20 years earlier and is now a Professor of Law at the University of Wisconsin Law School.<sup>261</sup> In the course of the hearings, Professor Tuerkheimer spoke most eloquently against attempts to enjoin the dissemination of publicly available information. In particular, Professor Tuerkheimer pointed out that information is neutral, that the Internet is only one of several means by which that information may be communicated, and that children do not have access “willy-nilly” to information on the Internet.<sup>262</sup> Above all, Professor Tuerkheimer argued, “[t]he widespread availability of information whose electronic transmission is to be enjoined argues conclusively . . . against such extraordinary exercise of government power.”<sup>263</sup>

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257. Senator Specter explained that

[t]he Internet is an international, cooperative computer network composed of over 28,000 computer networks in 60 countries. The Internet links thousands of users of all types: governments, schools, libraries, corporations, non-profits, individuals, virtually all users of computers can gain access to the Internet. No one controls the Internet. It is a cooperative group of computer networks. It is the most democratic means of communication today. Without going through an intermediary, a person on the Internet can communicate with all other users. The Internet represents a revolutionary form of mass communication. No longer does someone need to write a book that others must purchase or speak over the radio or television that others can turn off in order to reach mass audiences. No longer does a person who wishes to communicate have to rely on the vagaries of the market, of an editor, or time constraints. On the Internet, people from all over the world can communicate directly with each other.

*Id.* (statement of Sen. Specter).

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* (statement of Frank Tuerkheimer).

262. *Id.*

263. *Id.* To support his argument, Professor Tuerkheimer provided the following information:

If necessary, Professor Tuerkheimer suggested, Congress could criminalize the dissemination of information via electronic media by a person with knowledge that the dissemination was in furtherance of designated criminal activity.<sup>264</sup> Professor Tuerkheimer suggested that Congress could base such a law on the many examples already existing in Title 18 where Congress has addressed the criminal use of interstate facilities.<sup>265</sup> Such measures would prove more effective than injunctive relief, he said, because arrest would prevent the criminal from using any means of communication to achieve his illegal end and would significantly minimize the risk of needless government interference with legitimate activities.<sup>266</sup>

Professor Tuerkheimer and other witnesses also raised First Amendment concerns, some seeing it a shield to be preserved, others as an obstacle to be overcome.<sup>267</sup> Subcommittee member Senator Di-

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Attached to this statement is a copy of pages 275-282 of Volume 21 of the 1986 Encyclopedia Britannica. It reveals great detail on explosive manufacture, similar in many respects to the information disseminated electronically of concern to the Committee and others, including on page 279, a description of the Ammonium Nitrate/Fuel oil mixture used in the Oklahoma City bombing. Also attached is a list of books containing similar information to the kind transmitted electronically. The books on this list were obtained from the Engineering and Agriculture libraries at the University of Wisconsin in the one day between the invitation to appear before this Committee and the preparation of this statement and are generally available. Among these books is a "Blasters Handbook" published by the Department of Agriculture Forestry Service which in turn includes a description of the Ammonium Nitrate/Fuel Oil explosive used in Oklahoma City along with the recommended mixture of the two chemicals.

*Id.*

264. *Id.*

265. *Id.* Professor Tuerkheimer specifically mentioned (1) using the mails in furtherance of a scheme to defraud, 18 U.S.C. § 1341 (1994); (2) using wire facilities in furtherance of a scheme to defraud, 18 U.S.C. § 1343 (1994); (3) transporting an explosive in interstate commerce with intent to unlawfully damage a building, 18 U.S.C. § 844 (1994); (4) traveling in interstate commerce or using any facility in interstate commerce with intent to facilitate designated illegal activity, 18 U.S.C. § 1952 (1994); and (5) transmitting in interstate commerce any threat to injure another, 18 U.S.C. § 875 (1994). *Id.*

266. *Id.*

267. Rabbi Marvin Hier of the Simon Wiesenthal Center, for example, denied advocating an attack on the First Amendment freedoms of Americans, but urged that law enforcement be "free to investigate clearly expressed intentions to commit violence." *Id.* (testimony of Rabbi Marvin Hier). Jerry Berman, Executive Director of the Center for Democracy and Technology, who insisted that no new laws were needed, supported current Justice Department guidelines that require "speech-plus" before launching a full-scale investigation. *Id.* (testimony of Jerry Berman). Deputy Assistant Attorney General Robert S. Litt acknowledged the constraints imposed by the First Amendment but asked the committee to report "gap-filler" anti-terrorist legislation proposed by President Clinton. *Id.* (statement of Robert S. Litt). William W. Burrington, speaking for the commercial on-line services represented by the Interactive Services Association, defended the full First Amendment protection now accorded to on-line communications, but promised to work with the subcommittee to "protect the interests of a free and safe society." *Id.* (testimony of William W. Burlington).

anne Feinstein, however, seemed to find this discussion irrelevant if not obstructionist. Expressing her annoyance with the witnesses' deference to the First Amendment, Senator Feinstein remarked that, "You gentlemen are pushing the envelope to extremes. . . . I have a hard time with people using the First Amendment to teach others how to kill and to purvey that all over the world."<sup>268</sup> Referring to the so-called "Terrorist Handbook," Senator Feinstein said, "This isn't a remote book hidden on the back shelf of a library that some physics student may find. It's going out on the internet to anybody who might have access to it and might want to engage in a terrorist act."<sup>269</sup> When asked whether she would outlaw the same information in bookstores, she responded that "[t]here is a difference between free speech and teaching someone to kill."<sup>270</sup> All we're doing here, she said, "is protecting [terrorist information] under the mantle of free speech."<sup>271</sup>

Senator Feinstein vowed to attach an amendment to pending anti-terrorist legislation<sup>272</sup> that would make it a felony for any person "to disseminate by any means information pertaining to, in whole or in part, the manufacture of explosive materials if the person . . . reasonably should know that' the materials are likely to be used to further a federal crime."<sup>273</sup>

On June 7, 1995, the Senate passed Senate Bill 735 (the "Comprehensive Terrorism Prevention Act of 1995"), which included a revised Feinstein amendment by a 91-8 vote.<sup>274</sup> The Bill's version of the Fein-

268. "How to Make a Bomb"; *Senate Subcommittee Eyes Curbs on Inflammatory Language on Internet*, COMM. DAILY, May 12, 1995, at 3.

269. David Phinney, *Feinstein May Propose Criminal Penalty for Teaching Bomb Making*, STATES NEWS SERVICE, May 19, 1995.

270. "How to Make a Bomb," *supra* note 268, at 3.

271. Brock N. Meeks, *Internet as Terrorist*, CYBERWIRE DISPATCH, May 11, 1995, available on the Internet @ cwd-1 cyberwerks.com (on file with author).

272. S.735, 104th Cong., 1st Sess. (1995).

273. *Feinstein Amendment Would Censor Online Info. About "Explosive Materials,"* American Civil Liberties Union Cyber-Liberties Alert, May 26, 1995 (quoting preliminary draft of Feinstein Amendment) (on file with author). The American Civil Liberties Union (ACLU) attacked the draft on the ground that it covered "pure speech," without a particularized threat of violence, and thus would be unconstitutional. *Id.* The ACLU also argued that such a law was unnecessary since it is already a felony under federal law, 18 U.S.C. § 231 (1994), to teach explosives to any person if the teacher intends, or knows, or should know that the explosives will be used unlawfully to further a civil disorder. *Id.*

274. The Amendment reads as follows:

TITLE IX—Miscellaneous Provisions Sec. 901. Prohibition on Distribution of Information Relating to Explosive Materials for a Criminal Purpose.

(a) Section 842 of title 18, United States Code, is amended by adding at the end the following new subsection: "(1) It shall be unlawful for any person to teach or demonstrate the making of explosive materials, or to distribute by any means information pertaining to, in whole or in part, the manufacture of explosive materials, if the person intends or knows, that such explosive materials or information will be used for, or in

stein amendment prohibits the distribution, by any means, of information pertaining to the manufacture of explosive materials if the person intends or knows that such explosive materials or information will be used to commit a federal crime.<sup>275</sup>

If Congress adopts the Feinstein amendment as it appears in the Senate Bill 735, any challenge will undoubtedly implicate the futility principle. Assume, for example, that the proscribed information subsequently appears in an anonymous post to a Usenet newsgroup<sup>276</sup> known to be frequented by right-wing radicals. Assume further that the poster belongs to a militia which trained regularly with firearms and explosives to defend the Constitution against the federal government when the inevitable Armageddon arrived. The government arrests, tries, convicts, and sentences him to 20 years in prison.

On appeal, the poster might argue that the statute is facially unconstitutional under *Brandenburg v. Ohio*,<sup>277</sup> which requires both a subjective intention on the part of the defendant to incite "imminent lawless action" and an objective likelihood that such action will ensue, before one may be punished for advocating the use of violence.<sup>278</sup> In his statement at the Mayhem Hearings, Deputy Assistant Attorney General Robert S. Litt appeared to agree with civil libertarian Jerry Berman that *Brandenburg* would apply in this situation.<sup>279</sup> Something more than mere words, such as a criminal conspiracy or some overt act, would be required to support the poster's prosecution. But Litt

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furtherance of, an activity that constitutes a Federal criminal offense or a criminal purpose affecting interstate commerce."

(b) Section 844 of title 18, United States Code, is amended by designating subsection (a) as subsection (a)(1) and by adding the following new subsection: "(a)(2) Any person who violates subsection (1) of section 842 of this chapter shall be fined under this title or imprisoned not more than twenty years, or both."

141 CONG. REC. S7875 (daily ed. June 7, 1995).

275. *Id.* The actual Senate language is narrower than that originally proposed by Senator Feinstein in that it requires considerably more certainty as to both scienter — by excluding one who "reasonably should know" — and the criminal nexus — by excluding information that will "likely" be used in a criminal way. 141 CONG. REC. S7684 (daily ed. June 5, 1995) (statement of Sen. Biden).

276. Usenet is an Internet service similar to an independent bulletin board system, which allows participants to post messages for others to read and to browse messages posted by others. Thousands of newsgroups exist on the Internet, covering topics that range from computers to religion to sex.

277. 395 U.S. 444 (1969).

278. *Id.* at 447.

279. See *Mayhem Hearings*, *supra* note 256 (statement of Robert S. Litt) ("The First Amendment protects speech, even speech that advocates or instructs illegal action, unless there is an imminent danger of, and an incitement to, lawless action, or unless the speech itself constitutes a crime.").

also referred to the Smith Act,<sup>280</sup> which *Scales v. United States*<sup>281</sup> held punished the teaching of revolutionary “techniques,”<sup>282</sup> and the post-*Brandenburg* case of *United States v. Featherston*,<sup>283</sup> in which the Fifth Circuit upheld a conviction under 18 U.S.C. § 231<sup>284</sup> of individuals who gave instructions at a meeting on how to make and assemble explosive and incendiary devices in order to prepare the attendees for “the coming revolution.”<sup>285</sup>

Thus, *Brandenburg* would not necessarily control a case brought under the Senate’s version of the Feinstein amendment.<sup>286</sup> Nor is it certain that an appellate court would require a criminal conspiracy or

280. 18 U.S.C. § 2385 (1994).

281. 367 U.S. 203 (1961).

282. *Id.* at 233. Professor Harry Kalven, Jr., however, expressed serious doubts as to whether *Brandenburg* truly applies to the Smith Act cases of *Dennis v. United States*, 341 U.S. 494 (1951), *Yates v. United States*, 354 U.S. 298 (1957), *Scales v. United States*, 367 U.S. 203 (1961), and *Noto v. United States*, 367 U.S. 290 (1961). Professor Kalven argued that

[t]he standard that emerged from those cases was incitement, but incitement adjusted to meet the problem of a group that is being organized to act not immediately but in the future . . . . But the standard announced in *Brandenburg* is incitement to *immediate action*. What then has become of the distinction between group and individual speech which seemed implicit in the earlier decisions? One possibility is that the *Brandenburg* Court intended to erase any such distinction . . . . It is also possible, however, that the Court regarded *Brandenburg* as an instance of individual speech and hence has preserved the group/individual distinction. Under such an approach the *Yates* incitement-to-future-action standard would apply to group speech and the *Brandenburg* incitement-to-imminent-action standard would apply to the individual speaker . . . .

The question of whether a group, on analogy to conspiracy, is governed by different standards than the individual speaker when it is a matter of regulating content is a critically important one. For, as we saw in *Scales*, the *Yates* standard of incitement-to-future-action, although a marked improvement over unfocused general advocacy, proves treacherously subtle in practice. Unfortunately, this question cannot be said to be settled by *Brandenburg* and so must await future clarification.

HARRY KALVEN, JR., A WORTHY TRADITION, FREEDOM OF SPEECH IN AMERICA 234 (Jamie Kalven ed., 1988).

283. 461 F.2d 1119 (5th Cir.), *cert. denied*, 409 U.S. 991 (1972).

284. 18 U.S.C. § 231 (1994) governs crimes and criminal procedure.

285. *United States v. Featherston*, 461 F.2d at 1121. *See also Mayhem Hearings*, *supra* note 261, (statement of Robert S. Litt) (“Because this presentation was made to a cohesive, organized group preparing for “the coming revolution,” ready to strike quickly, and including some members regularly trained in explosives, the court found no violation of the First Amendment.”).

286. Indeed, Senator Feinstein welcomed the opportunity her bill would provide for the Supreme Court to reconsider *Brandenburg*. During that Senate hearings on the amendment, Senator Feinstein stated that:

[t]he last time the Supreme Court directly dealt with the issue of freedom of speech restrictions was over 20 years ago, in *Brandenburg versus Ohio*, 1969. As I understand it, this case involved a Ku Klux Klan leader’s right to advocate destruction of property and other violence as a means of obtaining political reform. I think it may be time, especially in light of Oklahoma City and the World Trade Center bombings, for the Supreme Court to deal with this issue again.

141 CONG. REC. S7684 (daily ed. June 5, 1995).



imminent crime to affirm the conviction.<sup>287</sup> The futility principle might not change that outcome, but it would force a court to closely examine the true effects of criminalizing readily available speech, rather than merely deferring to the fear, and perhaps guile, of a President and Congress reacting to a national tragedy.

In particular, the futility principle would create a presumption that on-line bomb-making information constitutes protected speech, unless the government could demonstrate some interest, unrelated to the information itself, which suppression would directly advance. The only interest Congress asserted in passing the Feinstein Amendment was keeping bomb-making information out of terrorist hands. Such an interest is not only content-focused, it is also very poorly served as long as bomb-making instructions are readily available in libraries, bookstores, and encyclopedias in millions of homes.<sup>288</sup> Any library patron who does not advise the librarian that he is a terrorist and plans to blow up a building would have access to the very same information as would be banned on the Internet.

It is true of course that the legislation would deprive potential terrorists of one communications channel by which to hatch their nefarious schemes. To achieve that purpose, however, the government

287. Although the *Featherston* Court did not expressly mention *Brandenburg*, it did quote *Dennis v. United States*, 341 U.S. 494 (1950), in response to defendants' First Amendment argument:

[I]t is urged . . . that the statute was unconstitutionally applied because the government failed to prove the happening or pendency of a particular civil disorder and thus failed to show a clear and present danger justifying an interference with activity protected by the First Amendment. We find this argument unpersuasive.

The words "clear and present danger" do not require that the government await the fruition of planned illegal conduct of such nature as is here involved. As stated in *Dennis v. United States*, "[T]he words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the government is required."

Here the evidence showed a cohesive organized group, lead by Featherston and aided by Riley, engaged in preparation for "the coming revolution." This group included a force regularly trained in explosives and incendiary devices, standing ready to strike transportation and communication facilities and law enforcement operations at a moment's notice.

461 F.2d at 1122 (citations omitted) (quoting *Dennis*, 341 U.S. at 509).

288. In addition to the references discussed above, evidence exists that a 1978 novel, *The Turner Diaries*, is among the more influential sources of bomb-making and -using instructions in right-wing militia circles. Marc Fisher & Phil McCombs, *The Book of Hate; Did the Oklahoma Bombers Use a 1978 Novel as Their Guide?*, WASH. POST, Apr. 25, 1995, at D01. The novel's publishers claim to have sold some 200,000 copies through "mail-order houses, radio pitches and gun show display tables." *Id.*

would also have to outlaw anonymous and encrypted communications over the Internet,<sup>289</sup> as well as monitor otherwise legitimate political activities, which could impose extraordinary costs in time, money, and personal privacy.<sup>290</sup> Further, that intrusion could destroy public confidence in computer-assisted communications media as free and safe fora in which the public can debate political issues — resulting in the loss of one of the world's most democratic institutions.<sup>291</sup>

Beyond these concerns, any such legislation could actually feed the paranoia of the radical militia whose provocations led to its enactment. The legislation could also force the few truly dangerous users to abandon a medium where the general public can read, respond to, and largely reject their ideas. This could cause these dangerous users to move underground, making law enforcement's legitimate function of apprehending and punishing criminals even more difficult.<sup>292</sup>

Viewed in the light cast by the futility principle, the Senate's Feinstein amendment would either be invalidated or construed to require something more than subjective intent. Perhaps a reviewing court would even be disposed to forsake *Dennis* and *Featherston* and impose the safeguards that the Supreme Court wisely adopted in *Brandenburg*.

### B. *The Memphis Obscenity Convictions*

In July 1993, United States Postal Inspector David H. Dirmeyer, based in Memphis, Tennessee, received a complaint from a self-described computer "hacker" about a computer bulletin board system that offered photos and videos of nude children.<sup>293</sup> Using a fictitious name, Inspector Dirmeyer subscribed to the Amateur Action Bulletin

289. In fact, on June 27, 1995, Senator Charles Grassley introduced the Anti-Electronic Racketeering Act of 1995, S. 974, 104th Cong., 1st Sess. (1995), which would create a new 18 U.S.C. § 1030A. The proposed section would make it unlawful

to distribute computer software that encodes or encrypts electronic or digital communications to computer networks that the person distributing the software knows or reasonably should know, is accessible to foreign nationals and foreign governments, regardless of whether such software has been designated nonexportable [unless] . . . the software at issue used a universal decoding device or program that was provided to the Department of Justice prior to the distribution.

*Id.* See *infra* part III.C (discussing cryptography export controls).

290. See *Mayhem Hearings*, *supra* note 256 (statement of Jerry Berman).

291. *Id.* See also ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 251 (1983) (stating that new electronic media "allow for more knowledge, easier access, and freer speech than were ever enjoyed before").

292. *Mayhem Hearings*, *supra* note 256 (statement of William W. Burrington).

293. Affidavit of David H. Dirmeyer, U.S. Postal Inspector, before Wayne D. Brazil, U.S. Magistrate-Judge, Northern District of California, *available on* the Internet at <http://www.eff.org> (on file with author) [hereinafter Affidavit of David H. Dirmeyer].

Board System, operated by Robert and Carleen Thomas of Milpitas, California.<sup>294</sup> He then ordered several pornographic videotapes, and downloaded a number of pornographic images to his own computer.<sup>295</sup>

The Thomases were arrested and tried before a jury in U.S. District Court for the Western District of Tennessee. The jury convicted them in June 1994 for shipping obscene videotapes to Inspector Dirmeyer by common carrier in violation of 18 U.S.C. § 1462,<sup>296</sup> and for transporting obscene images by private conveyance in violation of 18 U.S.C. § 1465.<sup>297</sup> In December 1994, Robert and Carleen Thomas were sentenced to 37 and 30 months in prison, respectively.<sup>298</sup> In March 1995, they were ordered to forfeit more than \$18,000 worth of computer equipment used in their business.<sup>299</sup> At the time of this Article's publication, Robert Thomas remained in prison pending appeal to the Sixth Circuit Court of Appeals, and Carleen Thomas was seeking a new trial on the ground that she lacked independent and effective counsel at the first trial.<sup>300</sup>

This Article suggests that the futility principle presumptively invalidates the law under which the government convicted the Thomases because the obscenity standards by which the Thomas's service was judged allows the criminalization of speech in one location that is perfectly legal in another. Where the medium of transmission is mail, broadcast, cable, or telephone, the presumption may be overcome by the government's interest in supporting community standards of decency and the relative effectiveness of its control; where the medium is computer-assisted communications, however, the balance may yield a different result.

To convict the Thomases, prosecutors first had to persuade a jury that the materials which Inspector Dirmeyer had acquired from them were obscene. That determination, in turn, depended on three factors enunciated by the Supreme Court in *Miller v. California*.<sup>301</sup> The three *Miller* factors are

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294. *Id.*

295. *Id.*

296. 18 U.S.C. § 1462 (1994).

297. 18 U.S.C. § 1465 (1994); Brief Amicus Curiae of the American Civil Liberties Union in support of Appellants at 4, *Thomas v. United States, appeal filed*, 6th Cir. 1995, (Nos. 94-6648 & 94-6649), available on the Internet at [gopher://aclu.org:6601](http://gopher://aclu.org:6601) (on file with author) [hereinafter ACLU Amicus Curiae Brief].

298. ACLU Amicus Curiae Brief, *supra* note 297, at 4.

299. Chris Conley, *High-Tech Seized in Obscenity Case*, COM. APPEAL, Mar. 8, 1995, at 2B.

300. Michael Kelley, *Banned in Memphis, City Has High Profile in Obscenity Case History*, COM. APPEAL, June 1, 1995, at 1C.

301. 413 U.S. 15 (1973).

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>302</sup>

While the third *Miller* factor contemplates a national, objective standard, the first two are based on contemporary community standards. As Chief Justice Burger wrote, “It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City.”<sup>303</sup> Following Chief Justice Burger’s reasoning, *Miller* also dictates that the people of Las Vegas or New York City cannot be forced to live by the obscenity standards adopted by Maine or Mississippi, thus creating a geographical analog to the rule that an adult population may not be reduced to reading only what is fit for children.<sup>304</sup> Consequently, a sexually explicit image might be considered obscene in Memphis, Tennessee but not in Milpitas, California.<sup>305</sup>

The Thomases have said that they believed the material in their computers was legal because they purchased it from stores in San Francisco.<sup>306</sup> Perhaps they actually did. After all, San Jose authorities declined to prosecute them after examining it. Moreover, the government did not bring suit in San Francisco, but in Memphis, a city celebrated for its powerful and arbitrary Board of Motion Picture Censors and tradition of pornography prosecutions.<sup>307</sup> Nonetheless, United

302. *Id.* at 24 (citations omitted).

303. *Id.* at 32.

304. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

305. No finding exists as to whether the videotapes or scanned images in this case were obscene under community standards in the San Francisco Bay area. Affidavit of David H. Dirmeyer, *supra* note 293. The San Jose police investigated the Thomases while looking for child pornography, but did not file any charges. *Id.*

306. Howard Mintz, *Offensive to Professional Standards*, LEGAL TIMES, Jan. 23, 1995, at S35.

307. Kelley, *supra* note 300, at 1C. In his article, Mr. Kelly recounted that legendary censorship board chairman Lloyd Binford once banned the film *Stromboli* because

[*Stromboli*’s] star, Ingrid Bergman, and its director, Roberto Rossellini, were living together without a marriage certificate. He wouldn’t permit the showing of Charlie Chaplin movies because of what he considered Chaplin’s unsavory private life and politics.

In 1954, what was described as “a sexy dance by Jane Russell” brought down his stamp of disapproval on *French Line*.

The most embarrassing case of censorship here may have been the decision by Binford to ban the movie *Curley* because, as the chairman maintained in a letter to the United Artists Corp. and Hal Roach Studios in 1950, it portrayed white and black children playing together, and “the South does not permit Negroes in white schools or recognize social equality between races, even in children.”

States District Court Judge Julia Gibbons denied that the government had engaged in forum shopping.<sup>308</sup> Judge Gibbons stated that she didn't "believe there are places in this country . . . where this is not likely to be found obscene," and she rejected "[t]he suggestion "that this jurisdiction is anomalous, unlike any other."<sup>309</sup>

In any event, Judge Gibbons applied the community standards of Memphis to the question of whether or not the graphic interchange format (GIF) images were obscene. This was the only conclusion she could have reached consistent with the government's position that all of the Thomases' conduct involved interstate commerce; any other decision would have amounted to an admission that the Thomases had not transported the material to Memphis and that their conduct was therefore not criminal. As to the GIF images themselves, no nexus existed between the Thomases and Memphis: they had not traveled to Memphis, solicited business there, nor physically "sent" the images there.<sup>310</sup>

To protect the sensibilities of Memphis and similarly inclined communities, Congress has made it a federal crime for someone in Milpitas to mail such material across state lines to Memphis.<sup>311</sup> Congress also has criminalized the operation in Milpitas of a commercial "dial-a-porn" telephone service which trafficks in obscene material and which is available in Memphis.<sup>312</sup> The distributor bears the burden of restricting delivery or service to those communities where the material is not considered obscene; the standards of the recipient community are those that matter under *Miller*.<sup>313</sup> Congress has not, however, made it a crime for someone in Memphis to travel across state lines to Milpitas to view the very same material; if that person should

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*Id.*

308. See Chris Conley, *Calif. Couple Get Prison for Computer Porn Relayed Here*, COM. APPEAL, Dec. 3, 1994, at 1A (reporting U.S. District Judge Julia Gibbons' views about the case).

309. *Id.*

310. The Tennessee postal inspector, who worked closely with a Memphis assistant U.S. attorney in the sting operation that led to the Thomases' indictment, constituted the only active Memphis participant in the pornography's delivery. He downloaded sexually oriented images, ordered a videotape, and sent an unsolicited child-porn video to the Thomases. Affidavit of David H. Dirmeyer, *supra* note 293.

311. 18 U.S.C. § 1461 (1994). See *Hamling v. United States*, 418 U.S. 87 (1974) (construing 18 U.S.C. § 1461 as not requiring proof of a uniform national standard by which to judge obscenity); *United States v. Reidel*, 402 U.S. 351, 352 (1971) (explicitly holding that 18 U.S.C. § 1461 prohibits the knowing use of the mail to deliver obscene material).

312. 47 U.S.C. § 223(b) (1988 & Supp. IV 1992). See *Sable Communications v. Federal Communications Comm'n*, 492 U.S. 115, 117 (1989) (construing 47 U.S.C. § 223(b) as prohibiting obscene interstate telephone conversations).

313. See *e.g.*, *Sable Communications*, 492 U.S. at 125 (holding that the community standard where the material is distributed is the governing standard).

purchase the material in Milpitas and bring it back across state lines to Memphis, the seller in Milpitas will have committed no crime. The Thomases' case presents the issue of whether their conduct more closely paralleled the obscene mail and dial-a-porn cases, or the latter hypothetical traveler scenarios.<sup>314</sup>

One ground on which a court of appeals could ultimately reverse the Thomases' convictions is that Congress had failed to explicitly criminalize the Thomases' conduct.<sup>315</sup> The Senate has already passed a bill, however, which would do precisely that.<sup>316</sup> If enacted, the bill would criminalize everywhere speech that is obscene anywhere, if accessible via computer networks, thus implicating the futility principle. A second, albeit less likely, ground on which an appeals court might reverse the Thomases' convictions rests on the notion that neither Milpitas nor Memphis represents the appropriate community upon which to base an obscenity determination. The ACLU and the Electronic Frontier Foundation as amici argued that the appropriate community standards would be those of the virtual (rather than geographical) community inhabited by members of the Amateur Ac-

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314. ACLU Amicus Curiae Brief, *supra* note 297, at 18-19.

315. The Thomas's conduct consisted of scanning pornographic images into their computers as GIF files, then allowing that information to be retrieved and transferred by telephone across state lines for a fee to a destination computer where the information could be downloaded into the recipient's computer and restored to a viewable image. Appellate court reversal of convictions may increasingly occur in criminal cases which involve the Internet or other new communications technologies. In December 1994, for example, a federal district court dismissed criminal charges against a Massachusetts Institute of Technology student, Ralph LaMacchia, who had established a file repository on the Internet where users could upload and download copyrighted software. *United States v. LaMacchia*, 871 F. Supp. 535, 545 (D. Mass. 1994). The court found that Ralph LaMacchia did not profit or gain any commercial advantage from the infringements, which is an essential element of criminal infringement under 17 U.S.C. § 506(a). *Id.* at 539. The court suggested that Mr. LaMacchia's conduct probably deserved criminal sanctions, but Congress, not the court, would have to impose them. *Id.* at 544.

316. On June 15, 1995, the Senate approved the Telecommunications Competition and Deregulation Act of 1995, S. 652, 104th Cong. 1st Sess. (1995), which incorporated, as Title IV, the Communications Decency Act (CDA). 141 CONG. REC. S8480 (daily ed. June 15, 1995). The CDA, originally proposed by Senators James Exon and Dan Coats, would establish fines of up to \$100,000 and prison terms of up to two years for people who knowingly make, or make available, obscene communications, or send indecent material to minors, across electronic networks. *Id.*

While the indecency language of the bill has been extremely controversial, civil libertarians specializing in Internet speech issues appear to have accepted its obscenity provisions. *See, e.g., Constitutional Problems with the Communications Policy Amendment: A Legislative Analysis by the Electronic Frontier Foundation*, June 17, 1995 (on file with author) (stating that none of the CDA's prohibitions related to "obscene" communications raise any constitutional issues and that it is well-settled law that obscene content is not protected under the Constitution); CENTER FOR DEMOCRACY AND TECHNOLOGY, POLICY POST NO. 19, June 20, 1995 (on file with author) (asserting that, under the First Amendment, Congress has broad power to ban obscenity, but can only regulate indecency in very narrow circumstances, such as in the broadcast media where there is a captive audience).

tion Bulletin Board System.<sup>317</sup> Many scholars have written about the virtual communities created by computer-assisted communications,<sup>318</sup> and the idea has a certain appeal. Nonetheless, if the amici are correct, nothing constitutes obscenity in cyberspace, or at least in that corner of cyberspace visited by those who are looking for obscenity.<sup>319</sup>

If a court of appeals recognized the futility principle, the first issue it would face is whether suppressing the speech would be effective or futile. The court should consider that, where the government is in a position to enforce its standards of decency, the effectiveness of the control and the importance of the interest served might combine to overcome any presumption of invalidity. Examples include the federal postal service, licensed broadcasters and cable operators, and regulated common carriers. The outcome may differ, however, in cases where the government cannot effectively control the content carried by a particular medium, such as on the highly decentralized and worldwide Internet. In particular, computers located in other countries store much of the pornography available on the Internet because such countries obscenity laws are typically more liberal or nonexistent. The United States has no jurisdiction over these sites. It seems absurd for the United States to attempt to prosecute a resident of one foreign country, who posts a pornographic message on one of thousands of Internet newsgroups to a resident of another foreign country. Further, it would be equally absurd to attempt to prosecute an American who reads such a message in the privacy of his own home, or the commercial service which provided that American with access to the Internet.<sup>320</sup>

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317. ACLU Amicus Curiae Brief, *supra* note 297, at 20-31; Brief Amicus Curiae of the Electronic Frontier Foundation in support of Appellants, Thomas v. United States, *appeal filed*, 6th Cir. 1995 (Nos. 94-6648 & 94-6649), available on the Internet at [http://www.eff.org/pub/Legal/cases/AABBS\\_Thomas](http://www.eff.org/pub/Legal/cases/AABBS_Thomas) (on file with author).

318. See generally HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* 38-64 (1993) (discussing the way that computers have created a new "counterculture").

319. The ACLU also has advanced the argument that *Stanley v. Georgia*, 394 U.S. 557, 568 (1969), which held that states may not criminalize mere possession of obscene material other than child pornography, should apply, although it acknowledges that the Supreme Court has been reluctant to extend that case beyond its own facts. ACLU Amicus Curiae Brief, *supra* note 297, at 28. See also, Michael I. Meyerson, *The Right to Speak, the Right to Hear, and the Right Not to Hear: The Technological Resolution to the Cable/Pornography Debate*, 21 U. MICH. J.L. REF. 137, 143 n.34 (1988) ("The Supreme Court has held that *Stanley* is not controlling in a case involving only speech or only privacy interests. Rather than treating *Stanley* as involving the combination of speech and privacy interest, the Court has somewhat inconsistently argued that *Stanley* rested only on whichever interest was not in the particular case before it.").

320. See ACLU Amicus Curiae Brief, *supra* note 297, at 26 ("If a Memphis resident obtains access to the Internet . . . and then simply reads messages on a board sent by a resident of

It would also be impossible to enforce such a law, without potentially destroy the Internet altogether. "Surely," as Justice Frankfurter said, "this is to burn the house to roast the pig."<sup>321</sup> Thus, the government could not assert a valid interest in suppressing pornography on the Internet, and any measure purporting to do so would be invalid.

That does not mean that the government lacks weapons with which to protect children or nonconsenting adults from the evils it sees in this kind of speech. Entrepreneurs are developing technical "screens" to make pornographic material on the Internet inaccessible to children.<sup>322</sup> Moreover, the government remains free to criminalize the kind of pandering suggested by Chief Justice Warren in *Roth v. United States*<sup>323</sup> and by Justice Brennan in a dissenting opinion in *Paris Adult Theatre I v. Slaton*.<sup>324</sup> Under such a rule, the Thomases would be free today. Accordingly, the legitimate interests of the state would be protected, the resources of the government and the courts conserved, and

Finland to a resident of Japan . . . is American law going to attempt to make the behavior of the service or of any of the three people involved illegal?").

321. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

322. One such filter, called Surfwatch, is already available to block sites on the Internet which contain pornographic information. *Modern Anxiety: What to Do When Smut Rides the Internet?; Admirably, Senate Acts to Shield Kids, But Legislation May be Unworkable*, L.A. TIMES, June 16, 1995, at B6.

323. 354 U.S. 476, 495 (1957) (Warren, C.J. concurring) (holding that "lewd and obscene" materials do not warrant constitutional protection).

324. 413 U.S. 49, 105-113 (1973) (Brennan, J., dissenting). Justice Brennan examined the government's interest in protecting juveniles and unconsenting adults from exposure to "obscene" materials and "pandering," which he seemed to find substantial, as well as preventing exposure that might lead even consenting adults to deviant or immoral behavior, which he clearly found to be invalid. He concluded that, "apart from the question of juveniles and unconsenting adults," the interests of the state in suppressing sexual speech

cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results from state efforts to bar the distribution even of unprotected material to consenting adults . . . [and held] therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and the Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly "obscene" contents.

*Id.* at 112-13 (Brennan, J., dissenting).

On Jan. 29, 1996, the Sixth Circuit rejected all of appellants' arguments and affirmed the Thomases' convictions. *U.S. v. Thomas*, No. 96 C.D.O.S. 609 (6th Cir. Jan. 29, 1996) (slip op. available at on the Internet at <http://www.callaw.com/tommy.html>). The unanimous panel found that the Thomases' assigning a password to Dirmeyer, knowing he lived in Memphis, brought this case within the rule of *Sable Communications*, 492 U.S. 115 (1989). See *supra* note 312-13 and accompanying text. Of particular interest vis-a-vis the Internet and its World Wide Web was the court's suggestion that the inability to identify the recipient community might preclude liability. "If Defendants did not wish to subject themselves to liability in jurisdictions with less tolerant standards for determining obscenity, they could have refused to give passwords to members in those districts, thus precluding the risk of liability. *Thomas*, No. 96 C.D.O.S. 609, slip op.



respect for the judicial system would no longer be jeopardized by an arbitrary and unworkable obscenity standard.

### C. *Cryptography Export Controls*<sup>325</sup>

If ever a case cried out for the benefits of a fully articulated futility principle, it is the case of Philip R. Karn, Jr., an electronics engineer from San Diego, California, who continues to struggle with the State Department and other federal agencies for the right to export a diskette containing source code for about a dozen encryption algorithms. All of the code at issue appears in a book that has already been sold to some 20,000 people worldwide and is available in any bookstore. Yet the government's interpretation of federal law and regulation has prevented Mr. Karn from exporting the diskette along with the book.

Mr. Karn's case is only one of a number of on-going legal actions involving encryption technology, the once-arcane art that the new computer-assisted communications medium has catapulted into the spotlight of public attention. In stark conflict are the public's interests in the privacy, integrity, and authenticity of electronic transmissions and the government's interest in the ability to monitor those transmissions when they are being made by, among others, terrorists, criminals, or pedophiles. One of the better known cryptologists caught up in this conflict is Philip Zimmermann. Mr. Zimmermann became the subject of a federal grand jury investigation after certain unknown parties placed his "Pretty Good Privacy" encryption system on the Internet, thus making it freely available to all the world.<sup>326</sup> Another is Daniel J. Bernstein, a graduate student in mathematics at the University of California at Berkeley, who has sued the federal government to allow him to publish his "Snuffle" encryption system and discuss it at public meetings, even though foreign nationals might attend such meetings.<sup>327</sup>

Once again, Philip Karn's case involves the government's attempt to suppress speech, albeit directed overseas, in spite of the fact that the same information is readily available both in the United States

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325. Cryptography consists of "the art or practice of preparing or reading messages in a form intended to prevent their being read by those not privy to secrets of the form." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 548 (3d ed. 1986).

326. On Jan. 11, 1996, the United States abruptly closed its three-year investigation of Philip Zimmermann. Assistant U.S. Attorney William P. Keane declined to comment on why the investigation was terminated, citing Justice Department policy. Elizabeth Corcoran, *U.S. Closes Investigation in Computer Privacy Case*, WASH. POST, Jan. 12, 1996, at A11.

327. The Electronic Frontier Foundation is supporting Bernstein's lawsuit. Richard Raysman & Peter Brown, *Regulation of On-Line Services*, N.Y. L.J., Aug. 22, 1995, at 3. The complaint, answer, and supporting documents in this case are available on the Internet at <http://www.eff.org>.

and abroad in another, easily converted medium. Again, the futility principle would make such suppression presumptively invalid. Moreover, as in the Thomases' case, the government could not overcome the presumption because no sound governmental interest could be directly advanced by the utterly futile attempt to suppress this speech.<sup>328</sup>

Before presenting the facts of Philip Karn's case, some background information on the applicable law is in order. At the height of the Cold War era, Congress enacted the Mutual Security Act of 1954,<sup>329</sup> which the Arms Export Control Act of 1976 superseded.<sup>330</sup> The Mutual Security Act gave the President "broad authority to identify and control the export of arms, ammunition and implements of war, including related technical data, in the interest of the security and foreign policy of the United States."<sup>331</sup> The President delegated his authority under the Act to the Department of State,<sup>332</sup> which published implementing regulations known as the International Traffic in Arms Regulations (ITAR).<sup>333</sup> Willful violations of the Act or the Regulations are punishable by fines of up to one million dollars or ten years imprisonment or both.<sup>334</sup> In addition, ITAR allows for the imposition of civil penalties.<sup>335</sup>

The ITAR essentially establishes a list of "defense articles," called the United States Munitions List, to be controlled under the act.<sup>336</sup> The Regulations also define various controlled "defense services," including the provision of technical data.<sup>337</sup> In order to export either defense articles or services, an applicant must submit a Commodity Jurisdiction (CJ) request to see if a license is required.<sup>338</sup> If the reviewing agency determines that a license is required, the would-be exporter must register as an arms dealer<sup>339</sup> and apply for a license.<sup>340</sup> The Regulations include encryption systems, software, and algorithms

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328. This analysis differs from the above analyses only in the clarity with which it emerges unassisted from the narrative.

329. 22 U.S.C. § 1934 (repealed 1976).

330. 22 U.S.C. § 2778 (1988).

331. Memorandum to Dr. Frank Press, Science Advisor to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, Department of Justice (May 11, 1978), available on the Internet at <http://www.eff.org> (on file with author).

332. Executive Order No. 11,958, 42 Fed. Reg. 4311 (1977).

333. 22 C.F.R. §§ 120-130 (1995).

334. 22 U.S.C. § 2778(c) (1988); 22 C.F.R. § 127.3 (1995).

335. 22 C.F.R. § 127.10 (1995).

336. *Id.* § 121.1.

337. *Id.* §§ 120.9(1) & (2).

338. *Id.* § 120.4.

339. *Id.* § 122.1.

340. *Id.* § 123.1.

as "defense articles" on the Munitions List.<sup>341</sup> Similarly, the ITAR considers the provision of information about cryptography a "defense service."<sup>342</sup>

On February 12, 1994, Philip Karn filed a CJ request with the State Department's Office of Defense Trade Controls (ODTC) regarding a brand new book called "Applied Cryptography: Protocols, Algorithms, and Source Code in C," by Bruce Schneier, published by John Wiley & Sons, Inc.<sup>343</sup> Mr. Karn stated that the book was widely available from retail stores or by mail order, that it contained encryption software source code listings that provided confidentiality, and that it provided sufficient information to allow for easy installation and use.<sup>344</sup> He noted that some of the software included in the book originated in the United States, while some had come from abroad.<sup>345</sup> Because of the book's public availability, Karn asked that ODTC relinquish jurisdiction over the book's export to the Commerce Department, which would grant it a general license for "technical data available to all destinations."<sup>346</sup>

Mr. Karn received word on March 2 that the Departments of Commerce and Defense had reviewed his CJ request and had effectively approved it with respect to the book.<sup>347</sup> The letter, however, qualified its ruling, limiting the approval to "only the subject book and not the two source code disks that the book references and that are available from the author."<sup>348</sup> Mr. Karn's original CJ request noted that the book did not include machine-readable media,<sup>349</sup> but it did contain an offer by Schneier to supply a two-diskette companion software set.

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341. *See id.* § 121.1 (XIII)(b)(1) (providing that Auxiliary Military Equipment, includes "Cryptographic (including key management) systems, equipment, assemblies, modules, integrated circuits, components or software with the capability of maintaining secrecy or confidentiality of information or information systems").

342. *Id.* § 120.9.

343. Letter from Philip R. Karn, Jr., to Maj. Gary Oncale, Office of Defense Trade Controls, U.S. Department of State (Feb. 12, 1994) [hereinafter CJ Request 038-94], available on the Internet at [http://www.eff.org/pub/Legal/Cases/Karn\\_Schneier\\_export/book\\_1st.request](http://www.eff.org/pub/Legal/Cases/Karn_Schneier_export/book_1st.request) (on file with author).

344. *Id.*

345. *Id.*

346. *Id.* The Commerce Department's Export Administration Regulations provide for unrestricted export to any destination of information, or "technical data," that is already publicly available or will be made publicly available under prescribed circumstances. 15 C.F.R. § 779.3 (a)(1) (1995).

347. Letter from William B. Robinson, Director, Office of Defense Trade Controls, Department of State, to Philip R. Karn, Jr. (Mar. 2, 1994), available on the Internet at [http://www.eff.org/pub/Legal/Cases/Karn\\_Schneier\\_export/book\\_1st.response](http://www.eff.org/pub/Legal/Cases/Karn_Schneier_export/book_1st.response) (on file with author).

348. *Id.*

349. CJ Request 038-94, *supra* note 343.

Following his interpretation of a telephone conversation with an Office of Defense Trade Controls (ODTC) official,<sup>350</sup> Mr. Karn submitted a second CJ request on March 9 seeking a general license for a single, \$15 diskette

strictly limited to the source code that already appears in the book, which you have already determined to be public domain. Character by character, the information is exactly the same. The only difference is the medium: magnetic impulses on mylar rather than inked characters on paper.<sup>351</sup>

Upon request, Mr. Karn also sent a copy of the diskette to the National Security Agency.<sup>352</sup>

When Mr. Karn did not receive a response from ODTC in more than a month, he sent a letter expressing some irritation at having to file a second request at all.<sup>353</sup> In the letter, Mr. Karn reiterated his comments from his first letter: "The only difference in this case is the recording medium; a floppy disk instead of printed page. I would have thought this an unimportant distinction that did not merit a second CJ request; after all, typing skills are hardly unique to Americans and Canadians."<sup>354</sup> In a telephone conversation with an ODTC official, Mr. Karn learned that policy-makers were having some problems with his request.<sup>355</sup>

When the response finally arrived, it was not the one Mr. Karn had expected. The ODTC told Mr. Karn the diskette would be designated a "defense article" on the Munitions List, requiring registration and license before export.<sup>356</sup> The ODTC based its decision on the "added value to any end-user."<sup>357</sup> The ODTC explained that each source code listing on the diskette was in a separate file capable of being

350. Memorandum from Philip R. Karn, Jr., to Internet address [gnu@cygnus.com](mailto:gnu@cygnus.com) (March 11, 1994) (on file with author).

351. Letter to Maj. Gary Oncale, Office of Defense Trade Controls, Department of State, from Philip R. Karn, Jr. (March 9, 1994), *available on the Internet at* [http://www.eff.org/pub/Cases/Karn\\_\\_Schneier\\_\\_export/floppy\\_\\_2nd.request](http://www.eff.org/pub/Cases/Karn__Schneier__export/floppy__2nd.request) (on file with author).

352. Letter to NSA 15-day CJ Request Coordinator from Philip R. Karn, Jr. (March 14, 1994), *available on the Internet at* [http://www.eff.org/pub/Legal/Cases/Karn\\_\\_Schneier\\_\\_export/floppy\\_\\_3rd.request](http://www.eff.org/pub/Legal/Cases/Karn__Schneier__export/floppy__3rd.request) (on file with author).

353. Letter to Office of Defense Trade Controls from Philip R. Karn, Jr. (April 18, 1994), *available on the Internet at* [http://www.eff.org/pub/Legal/Cases/Karn\\_\\_Schneier\\_\\_export](http://www.eff.org/pub/Legal/Cases/Karn__Schneier__export) (on file with author).

354. *Id.*

355. Memorandum from Philip R. Karn, Jr., to electronic mail address <199405101906.MAA02319@unix.ka9q.ampr.org> (May 10, 1994) (on file with author).

356. Letter to Philip R. Karn, Jr., from William B. Robinson, Director, Office of Defense Trade Controls, Department of State (May 11, 1994), *available on the Internet at* [http://www.eff.org/pub/Legal/Cases/Karn\\_\\_Schneier\\_\\_export/floppy\\_\\_2nd.response](http://www.eff.org/pub/Legal/Cases/Karn__Schneier__export/floppy__2nd.response) (on file with author).

357. *Id.*

easily compiled into an executable subroutine, which, in some cases, would not be exportable if incorporated into a product.<sup>358</sup> In other words, by saving an end-user the trouble of typing or scanning thousands of lines of code, the diskette became subject to export controls that did not apply to the very same material in the book.

Mr. Karn appealed the ODTC decision to the Deputy Assistant Secretary for Export Controls, denying any practical distinction between the book and the diskette.<sup>359</sup> Mr. Karn pointed out that, "With the widespread availability of optical character recognition (OCR) equipment and software, even printed information such as the Book is easily turned into 'machine readable' disk files equivalent to those on the Diskette."<sup>360</sup> He also argued that the diskette qualified for a "public domain" exemption independent of the book, since the diskette was readily available from the author and the software from many "anonymous FTP" repositories on the Internet, including many located outside the United States or Canada.<sup>361</sup>

Mr. Karn also raised a First Amendment claim, citing a number of court decisions for the proposition that free speech is not automatically subordinated to foreign policy considerations.<sup>362</sup> Mr. Karn also highlighted a Department of Justice (DOJ) opinion concluding that export controls on cryptographic information "are unconstitutional insofar as they establish a prior restraint on disclosure of cryptographic ideas and information developed by scientists and mathematicians in the private sector."<sup>363</sup>

Mr. Karn's efforts were to no avail. Martha C. Harris, Deputy Assistant Secretary for Export Controls, responded that the diskette did not qualify for the ITAR "public domain" exemption because that exemption applied only to "technical data" and cryptographic software does not come within the meaning of technical data as defined by the

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358. *Id.*

359. Letter to Dr. Martha C. Harris, Deputy Assistant Secretary For Export Controls, Department of State, from Philip R. Karn, Jr. (June 7, 1994) [hereinafter First Appeal], available on the Internet at [http://www.eff.org/pub/Legal/Cases/Karn\\_Schneier\\_export/floppy\\_appeal](http://www.eff.org/pub/Legal/Cases/Karn_Schneier_export/floppy_appeal) (on file with author).

360. *Id.*

361. *Id.*

362. Most notably, Karn cited *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1988), which affirmed a district court decision striking down certain regulations of the United States Information Agency as unconstitutional. More importantly, *Bullfrog Films* expressly rejected "the suggestion that the First Amendment's protection is lessened when the expression is directed abroad." *Id.* at 511-12.

363. See First Appeal, *supra* note 359 (citing Memorandum from J. Harmon, Department of Justice to Dr. Frank Press, Science Advisor to the President (May 11, 1978)).

ITAR.<sup>364</sup> Harris also said, without explanation, that the source code was “of such a strategic level as to warrant continued State Department licensing” and that continued control was “consistent with the protections of the First Amendment.”<sup>365</sup> The book was never mentioned.

Mr. Karn filed a second administrative appeal on Dec. 5, 1994, this time formally signed by counsel,<sup>366</sup> who found the “decisions thus far . . . not only irrational as a matter of policy, but . . . vulnerable to judicial invalidation with serious consequences for the entire export control regime.”<sup>367</sup> The appeal also hinted darkly about “various unstated policy goals,” particularly those of the National Security Agency, that might be dictating the results to date,<sup>368</sup> but focused primarily on constitutional arguments. Specifically referring to the Harmon Memorandum, the appeal argued that cryptography was due full First Amendment protection.<sup>369</sup> Mr. Karn further argued that the government’s licensing scheme as applied to “pure information” was a form of prior restraint and that the ITAR was inherently vague and overbroad.<sup>370</sup> Finally, he argued that absent a system for prompt judicial review, the ITAR scheme was facially unconstitutional.<sup>371</sup> Fundamentally, the appeal hammered home one point: Given the widespread availability of the very same information, domestically and abroad, in text and in digital format, “trying to prohibit the dissemination of the cryptographic algorithms in digital format on the

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364. Letter from Martha C. Harris, Deputy Assistant Secretary for Export Controls, Department of State, to Philip R. Karn, Jr. (Oct. 7, 1994), *available on* the Internet at <http://www.qualcomm.com/people/pKarn/export/harris-ruling.html> (on file with author) [hereinafter Denial of Appeal] (“The ITAR’s software definition, at section 121.8(f), specifically excludes cryptographic software from the software for which an exporter should apply for a technical data license.”).

365. *Id.*

366. Letter to Thomas E. McNamara, Assistant Secretary, Bureau of Politico-Military Affairs, Department of State, from Kenneth C. Bass, III, and Thomas J. Cooper, Veneble, Baetjer, Howard and Civiletti (Dec. 5, 1994) [hereinafter Second Appeal], *available on* the Internet at <http://www.qualcomm.com/people/pKarn/export/mcnamara-appeal.html> (on file with author). The letter clearly indicates that Karn had been represented by counsel at least as early as June 30, 1994, when counsel met with Dr. Harris, her staff, and a representative of another agency to explain Karn’s position. *Id.*

367. *Id.*

368. *Id.*

369. *Id.* Counsel also pointed out that the substance of the Harmon Memorandum had been reaffirmed by the Office of Legal Counsel on two subsequent occasions: First, in a memorandum from Assistant Attorney General T. Olson to William B. Robinson (July 1, 1981), and second, in a memorandum from Deputy Assistant Attorney General L. Simms for Davis R. Robinson (July 5, 1984). *Id.*

370. *Id.*

371. *Id.*

Diskette . . . reflects the pursuit of an irrational goal that bears no relationship to the real world.”<sup>372</sup>

The appeal closed on a pessimistic note, pointing out that the Department had refused to waive any arguments based on “failure to exhaust administrative remedies” in the event Karn sought judicial relief.<sup>373</sup> A subsequent meeting on February 28, 1995, also proved fruitless, and on April 28, 1995, Philip Karn’s attorneys again wrote to the Bureau of Politico-Military Affairs, claiming “a pattern of procrastination by federal agencies which appears to be based on the publicly stated policy of the National Security Agency to attempt to deter the further spread of strong cryptography as much as they can.”<sup>374</sup> The letter warned that Mr. Karn would seek judicial review not later than June 15, 1995, unless he received a favorable decision before that time.<sup>375</sup>

The futility of prohibiting the export of Schneier’s diskette is self-evident and amply discussed in Karn’s appeals. But, barring some legal fiction that utterly distinguishes cryptography from speech, or unprecedented deference to foreign policy, the elements of prior restraint inherent in the ITAR licensing scheme are equally self-evident. Should this case actually come to trial, Mr. Karn likely will have no difficulty proving that the ITAR is unconstitutional as applied to his case, if not to cryptography in general.

Recognition of the futility principle advocated in this Article might have encouraged the State Department to grant Karn’s requests for export clearance in the first place, obviating the need for legal process at all. It is probable that some State Department officials advocated

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372. *Id.*

373. *Id.*

374. Letter to Thomas E. McNamara, Assistant Secretary, Bureau of Political-Military Affairs, Department of State, from Kenneth C. Bass, III, and Thomas J. Cooper (April 28, 1995), available on the Internet at <http://www.qualcomm.com/people/pKarn/export/mcnamara-letter.html> (on file with author).

375. *Id.* In fact, Karn filed a complaint on September 21, 1995, in U.S. District Court for the District of Columbia (Karn v. U.S. Dept. of State, Case No. 1:95CV01812). The law suit seeks a judgment declaring that the relevant provisions of ITAR, as applied to Karn, are unconstitutional under the First and Fifth Amendments, and that subjecting the diskette to export licensing controls was “irrational, arbitrary, and capricious,” thus violating his Fifth Amendment right to substantive due process. Plaintiff’s Complaint at ¶ 31, Karn v. U.S. Dept. of State, Case No. 1:95CV01812. Mr. Karn also said that the licensing requirement was a “prior restraint on Plaintiff’s disclosure of ideas and information,” and thus contrary to his First Amendment right to free speech. *Id.* at ¶ 33. Finally, Karn said the regulations, as applied here, were unconstitutionally overbroad and vague, “chilling the exercise of free speech rights.” *Id.* at ¶ 34. Absent an adequate remedy at law for the “unusual hardship and irreparable damage” caused him, Mr. Karn said that he was entitled to declaratory relief. *Id.* at ¶ 28.

that course of action in any event,<sup>376</sup> and an acknowledged futility principle might have strengthened their hand. Even after Mr. Karn sought judicial relief, an early out-of-court settlement might have been facilitated by the application of a recognized futility principle by the judge in a pre-trial conference. Alternatively, the futility principle would have given the court a basis for deciding the issue without the “serious consequences for the entire export control regime” that Mr. Karn’s attorneys predicted in the second appeal.<sup>377</sup> Those issues would seem to be better reviewed in a case like Daniel Bernstein’s, where the broader issues seem more squarely presented and there is no publicly available book to muddle the question before the court.<sup>378</sup>

In the long run, the image of the judicial process as fair and rational is more important than governmental and judicial economy. An established futility principle would engender such an image. The parallel of Karn’s case to the *Spycatcher* case is striking, and the remarks of Lord Griffiths that began this Article seem perfectly appropriate here.<sup>379</sup> The law is not an “ass,” and it will ultimately strike down restrictions imposed on Mr. Karn’s export of the cryptographic diskette. And, acknowledged or not, it will do so because of the futility principle.

#### CONCLUSION

This Article has tried to show that our First Amendment jurisprudence contains an unacknowledged presumption against suppressing information that has already been made public through other media or to other audiences. It suggested that this presumption, designated “the futility principle,” may be overcome only by an important governmental interest, unrelated to the content of the speech, which can be directly advanced by governmental suppression.

Moreover, this Article has argued that recognizing the futility principle will serve the interests of governmental and judicial economy, as

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376. For example, in denying Karn’s first appeal, Martha Harris candidly wrote:

Please be assured that I reviewed your appeal with great care. The review process engaged attorneys, technical experts, and others both within the State Department and at various other government agencies. I personally spent a significant amount of time wrestling with the important and difficult issues raised by your request. Indeed, as I indicated to you in my letter of September 20, it was necessary to extend the normal period for consideration of such an appeal in order to ensure that the various legal and policy issues raised by your appeal were satisfactorily addressed.

Denial of Appeal, *supra* note 364.

377. Second Appeal, *supra* note 366.

378. For the context of Daniel Bernstein’s case see *supra* note 327 and accompanying text.

379. See *supra* note 1 (discussing the irrationality of denying British citizens information that is readily available throughout the rest of the world).



well as protect the integrity of the information itself through a multiplicity and diversity of voices in the marketplace of ideas, and engender respect for the courts and legal process. Those values and others have been affirmed by applying the principle to three very real cases that seriously threaten the viability of computer-assisted communications technology.

In short, the futility principle exists, it matters, and it works. All that remains is acknowledgment by the courts — a constitutional reaffirmation that, even today, neither law nor equity may do a vain or useless thing.