PORNOGRAPHIC MOVIES, OBSCENE BOOKS, FIGHTING WORDS, AND PINK-HAIRED STUDENTS: CONSTITUTIONAL FREEDOM OF EXPRESSION AND SOME COMPARISONS WITH IRISH CONSTITUTIONAL LAW

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"My dear, I don't care what they do, so long as they don't do it in the streets and frighten the horses."

Beatrice Stella Tanner Campbell, Early 20th Century British actress

Dame Campbell's words might well have been directed toward the liberality of American constitutional freedom of speech and expression. Perhaps even the drafters of the American Bill of Rights would cringe over the breadth of the judiciary's construction of this provision. Or would they concur with the latitude of protection the courts have provided with regard to freedom of expression?

This first of the 27 amendments to the 1787 United States Constitution was ratified and adopted in 1791, simultaneously with those others among the first 10 amendments (collectively known as the Bill of Rights).[1] Its four "freedoms"[2] have provided the source for a geometrically increasing rise in litigation. The freedom of speech provision in particular has been noted as the most absolute in its terms among all those provisions in the constitution securing rights of the people against undue restriction by federal and state governments.[3]

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[1] U.S. CONST. amend. I -X.

[2] The First Amendment prohibits the federal government from interfering with the people's freedom of speech, press, and religion, and the right peaceably to assemble and to redress the government for grievances. U.S. CONST. amend. I.

This paper will address only freedom of speech.

[3] *See* William Van Alstyne, FIRST AMENDMENT, CASES, AND MATERIALS 5 (2d. ed. 1995). It is significant to note that the Bill of Rights assures the people of their freedom from

Some of the more controversial areas have involved the pornography and obscenity cases from the 1950's through the 1970's and statutory limitations on the use of words or other means of communication which incite anger and/or unlawful activity.[4] These situations evidence some of the judicial exceptions to constitutional protection.[5] Some oppose *any* such exceptions, and many legal scholars hold First Amendment rights as the most revered and cherished of all those assured under the U.S. Constitution.[6] This position rings contrary to the oft-stated conclusion that the drafters never intended the right of free speech to extend as far as the Court has at times held.[7]

This paper will trace the evolvement of some of the judicial exclusions from the shield of the First Amendment, such as communications which meet the current three-prong standard for obscenity and those which qualify as "fighting words." Unfortunately, the Court has not been precise as to the extent of protection vis-a-vis exceptions, but has rather sent mixed signals without articulating distinct standards, which are lucid and easy to apply.

In a cursory final section, the parallel constitutional freedom of speech assurance in the Constitution of the Republic of Ireland is noted, solely for the purpose of comparing and contrasting with the relatively absolute language of the American constitution. The Irish jurist and/or legal scholar is asked to ponder the U.S. Constitution's unconditional language and some of the Supreme Court's expansive constructions of its protective scope and to contemplate whether one's right of free and open expression is more restricted in Ireland than in its counterpart across the Atlantic.

I. HISTORICAL BASES FOR THE U.S. FIRST AMENDMENT

Tolerance was indisputably one of the bedrocks of the founding of the colo-

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excessive *federal* governmental power over their exercise of fundamental rights. *Id.* The Fourteenth Amendment (1868) has been construed by the U.S. Supreme Court to apply these same protections with regard to the *state* governments. *See* discussion *infra*.

[4] *See* discussion *infra*.

[5] *Id.*

[6] The late Justice William O. Douglas was among these. *See, e.g.*, Feiner v. New York, 340 U.S. 315, 330-31 (Douglas, J., dissenting).

[7] Striking examples of this conclusion can be found among the many dissents in some of the more controversial U.S. Supreme Court opinions upholding freedom of expression. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 421 (1989) (Rehnquist, J., dissenting).

nies which were to become the United States of America.[8] The subjection to British royalty which instigated the movement to the so-called New World made the assurance of basic freedoms a fundamental objective when the new nation was established.[9]

To be sure, struggles against the Crown had been reflected even in England, as is evidenced by those written guaranties set forth in England in the 1215 Magna Carta, the 1628 Petition of Rights, and the 1689 Bill of Rights.[10] Eight of the 13 American colonies followed this model by including a Bill (or Declaration) of Rights in their state constitutions.[11]

Generally regarded as the most influential among the original colonies which adopted the Bill of Rights is the southern state of Virginia, which embraced her own such slate of freedom in 1776.[12] Indeed, Virginia's Bill of Rights is usually cited as the model for the first 10 federal constitutional amendments which were to follow some 15 years later.[13]

Virginia's role in constitutional development is further evidenced by the leadership of James Madison in the move to add the Bill of Rights to the Constitution, a promise which was made on behalf of the Federalist Party during its campaign efforts for constitutional ratification in 1787.[14]

At least one constitutional scholar has deemed the major significance of the adoption of the Bill of Rights to be its strengthening and solidifying of public

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[8] EDWARD L. BARRETT, JR., PAUL W. BRUTON, AND JOHN HANNOLD, CONSTITUTIONAL LAW, CASES, AND MATERIALS 38, 574-75 (1959).

[9] *Id.*

[10] *Id.* at 575.

[11] *Id.* at 574.

[12] *Id.* Note that the 1776 Virginia Bill of Rights contained 16 listed rights, rather than 10, as in the federal constitution. *Id.* Of particular interest is No. 16, which makes it the "mutual duty of all to practice *Christian* forbearance, love, and charity, towards each other. . . ." *Id.* (emphasis added). This reference to Christianity was later preempted by the adoption of the First Amendment, which not only assures that the government shall not "prohibit. . . the free exercise of religion," but also forbids the government from "respecting an establishment of religion." *Id.*

[13] *Id.* at 575.

[14] Merrill D. Paterson, *Chapter on 1789-1801 in* AMERICAN CONSTITUTIONAL HISTORY 38 (Leonard W. Levy, Kenneth L. Karst, and Dennis J. Mahoney, eds., 1989) (hereinafter "Levy *et al.*").

confidence in the government[15]. This confidence perhaps best explains the superfluity of legal challenges to governmental power, in particular those challenges based upon the First Amendment.

II. OBSCENITY, PORNOGRAPHY, AND "DIRTY WORDS"

A. THE U.S. SUPREME COURT'S EVOLVING TEST: WHAT QUALIFIES AS "OBSCENITY" AND/OR "PORNOGRAPHY"?

1. *ROTH* AND ITS PROGENY

The Court first recognized the relevance of the First Amendment in the area of obscenity in 1957.[16] The 13 obscenity cases decided between 1957 and 1968 produced 55 separate opinions, and there remained a marked difference between the group of justices who during this time, would clothe obscene speech with full constitutional protection (Justices Douglas and Black), and those who believed obscene matter was beyond the freedoms insured by the First Amendment (Justices Brennan, Warren, and White).[17]

It is important to note that the Court in *Palko v. Connecticut* interpreted the 14th Amendment's application to the states to extend it to the protections listed in the Bill of Rights.[18] Despite some contention among the justices as to whether this extension should depend on which of the Bill of Rights are assumed by the 14th Amendment, or whether the first 10 amendments are incorporated in their entirety,[19] there has never been any question after *Palko* with regard to the First Amendment's applicability to the states.

Roth v. United States (and its companion case *Alberts v. State of California*)[20] addressed laws which criminally sanctioned the mailing (through the U.S. mails

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[15] *Id.*

[16] *See* Roth v. United States, 354 U.S. 476 (1957), Alberts v. State of California, Cal. App. 2d Supp. 909 (1956).

[17] Levy *et al.*, *supra* note 14, Chapter on the Warren Court, 1953-1969, by G. Edward White, at 286.

[18] 302 U.S. 319 (1937).

[19] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968).

[20] *See supra* note 16.

or distribution), writing, or publishing of obscene matter. The two petitioners had been convicted of violating these laws and had requested Supreme Court review to determine the constitutionality of the laws under the First Amendment.[21]

The federal statute addressed in *Roth* forbade use of the U.S mail system to distribute and/or deliver any "obscene, lewd, lascivious, or filthy book, pamphlet. . . or other publication of an indecent character. . . ."[22] The California law addressed in *Alberts* made it a misdemeanor to "willfully and lewdly. . .write, compose, stereotype, print, publish, sell, distribute, keep for sale, or exhibit an obscene writing, paper or book. . ."[23]

In a 7-2 opinion authored by Justice Brennan, the Court stated that the Constitution "gave no absolute protection for every utterance,"[24] that the "unconditional phrasing of the First Amendment was not intended to protect every utterance,"[25] and that "*obscenity is not within the area of constitutionally protected speech.*"[26] The Court then posited a three-prong test for obscenity, placing the burden of proof upon the government to show that the challenged material met each of the three parts to the test.[27]

In order to be regarded as obscene, the *Roth* Court held that the (1) dominant theme of the material, taken as a whole, must (2) appeal to the prurient interest in sex and be "*utterly* without redeeming social importance"[28] as (3) judged by the average person under contemporary community standards.[29] In affirming the convictions, the majority upheld the restrictions imposed by the two statutes and rejected the position that the federal and/or state governments are powerless to limit any display of obscene material.[30] Justice Douglas' dissent, in which he

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[21] *Roth*, 354 U.S. at 479-81; *Alberts*, 138 Cal. App. 2d Supp. at 910.

[22] 18 U.S.C. § 1461 (1994). A violation of this statute was punishable by not more than $5,000 and/or imprisonment for not more than five years. *Id.*

[23] CAL. PENAL CODE ANN. 1955 – 311 (West 1955).

[24] *Roth*, 354 U.S. at 482.

[25] *Id.* at 483.

[26] *Id.* at 485 (emphasis added).

[27] *Id.* at 489.

[28] *Id.* at 484 (emphasis added).

[29] *Id.* at 489.

[30] *Id.* at 492.

was joined by Justice Black, chastised the majority for virtually exercising censorship as "free range over a vast domain" and punishing "*thoughts* rather than anti-social conduct."[31] Accordingly, these two justices would have given all speech (or press) the full protection of the First Amendment, regardless of whether or not it was obscene, as long as the speech was not an "inseparable part" of an illegal act.[32]

One of the most notable of the decisions following the establishment of the *Roth* three-prong rule is *Jacobellis v. Ohio*,[33] probably more for Justice Stewart's concurring remark than for the significance of the holding itself. In *Jacobellis*, the appellant was a manager of a motion picture theater in Ohio who had been convicted under a state anti-obscenity statute.[34] The Court's reversal of the conviction was by a vote of 6-3, but the six different opinions made it difficult to extract any abiding principles.[35] To his chagrin, Justice Stewart perhaps became most remembered by his statement that he would not try to define obscenity, but that "I know it when I see it. . . ."[36]

In 1967, the Court reversed 6-3 a Massachusetts court's holding that John Cleland's book, MEMOIRS OF A WOMAN OF PLEASURE (commonly called FANNY HILL), written in the mid 1700's, was obscene.[37] The case, *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General of Massachusetts,* was unusual in that the book itself, rather than its publisher or distributors, was put on trial.[38]

The Supreme Court's reversal was based upon its holding that the state court had misconstrued the "utterly without social value" provision of *Roth*.[39] Even though the Court deemed the book clearly to appeal to the reader's prurient in-

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[31] *Id.* at 509 (Douglas, J., dissenting) (emphasis added).

[32] *Id.* at 514 (Douglas, J., dissenting).

[33] 378 U.S. 184 (1964).

[34] *Id.* at 185-86.

[35] *See id.* at 185-98.

[36] *Id.* at 197 (Stewart, J., concurring).

[37] A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General, 383 U.S. 413, 415-21 (1966).

[38] *Id.* at 415.

[39] *Id.* at 418-20 (citing Roth v. United States, 354 U.S. 476, 489 (1957)).

terest in sex as required under *Roth*, the writing indicated some, albeit minimal, social value.[40] Conceding that under some circumstances—for example, commercial exploitation for the sake of prurient value alone—might justify limiting the protection, the Court nonetheless refused to forbid the sale or availability of the book completely.[41]

Decided the same day as *A Book* was *Ginzburg v. United States*,[42] in which the Court addressed the so-called "pandering" issue. The Court affirmed 5-4 the petitioner's conviction under the federal obscenity statute primarily because of his deliberate presentation of the publications at issue as erotically arousing, and his exploitation of potential purchasers' interest in "titillation" through pornography.[43] *Ginzburg* suggests that the manner in which material is distributed may be the factor which legitimizes governmental restrictions.

The final significant decision under the *Roth* standards was *Ginsberg v. New York*.[44] In a 6-3 decision in which Justice Brennan wrote the majority opinion, the issue was not whether the material was obscene (the petitioner who had been convicted of a state protection-of-minors-from-obscene-material statute had not challenged on this basis), but rather whether such a statute affording special protection to minors was constitutional.[45] In *Ginsberg*, the Court approved a state's prohibition of distribution and/or showing of matter deemed inappropriate for minors, establishing a separate category for which special protections might be afforded.[46]

2. *MILLER*: A NEW 3-PRONG TEST

The *Roth* standard was significantly altered in 1972 by *Miller v. California*,[47] where the Court substantially revised the three-prong test. The new test also en-

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[40] *Id.* at 419-20.

[41] *Id.* at 420. As had been the case in *Jacobellis*, the opinions in *A Book* were so numerous (five) that gleaning a crystallized point of law is difficult at best.

[42] 383 U.S. 463 (1966).

[43] *Id.* at 471-76.

[44] 390 U.S. 629 (1968).

[45] *Id.* at 631.

[46] *Id.* at 634-47.

[47] 413 U.S. 15 (1973).

compassed three-prongs and essentially facilitated the government's case by broadening the scope of the definition of obscenity.[48]

A strongly divided (5-4) Court retained the first part of the *Roth* test—that the challenged material must be taken as a whole and judged by its dominant theme.[49] However, *Miller* refined the Roth's second prong by changing the definition of obscene from "*utterly* without redeeming social importance,"[50] to without "*serious* literary, artistic, political, or scientific value."[51] Moreover, part three of the *Roth* standard had implied a nationwide test of obscenity, since it was determined according to "contemporary community standards."[52] *Miller* changed this concept, holding that the standard for what might offend a community is to be determined by state law.[53] Thus, what might be routinely acceptable in a more liberal state can legally be declared obscene in a more conservative forum.

Also significant in *Miller* was Justice Brennan's change of position. This time he dissented, joining his brethren Stewart and Marshall in their view that obscene matter should not be excepted from First Amendment protection.[54] Brennan had indeed been the author of the majority opinion in *Roth,* in which the Court first held that obscenity was not contemplated by the framers of the First Amendment to be within the scope of its protection.[55]

Even state restriction of concededly non-obscene material or activity has been permitted by the Supreme Court, provided the state shows the law in question furthers a legitimate state interest. For example, in *Barnes v. Glen Theatre, Inc.*, an Indiana statute prohibiting nude dancing was upheld by a 5-4 Court.[56] Both the Court and the parties agreed that the material could not be classified as obscene under the *Miller* standard.[57] The Court, however, was of the opinion that

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[48] *See* discussion *infra*.

[49] *Id.* at 22-23.

[50] Roth v. United States, 354 U.S. 476, 484 (1957) (emphasis added).

[51] *Miller*, 413 U.S. at 26 (emphasis added).

[52] *Roth*, 354 U.S. at 429.

[53] *Miller*, 413 U.S. at 27.

[54] *Id.* at 47-48 (Brennan, J., dissenting).

[55] *Roth*, 354 U.S. at 481.

[56] 501 U.S. 560 (1991).

the statute furthered the legitimate state interest of "order and morality."[58]

The *Miller* Court assessed the law under the federal standard articulated in *United States v. O'Brien.*[59] The Court in *O'Brien* affirmed a lower court conviction of a defendant who had violated federal law by burning his selective service registration card in public.[60] The law made it a criminal offense to knowingly destroy or mutilate such a certificate.[61] In *O'Brien,* the defendant had testified that his action was a symbolic protest made for the purpose of persuading others to embrace his anti-war philosophy.[62] The Court upheld the law, finding that there were several legitimate purposes for its enactment, primarily, (1) to keep the government informed as to whether an individual has registered for the draft, (2) to facilitate communication between the individual and his local draft board, (3) to assure that the individual notifies the board in case of a change of status or address and (4) to prevent forgeries of these cards or the use of them for deceptive purposes.[63] The *O'Brien* majority opinion justified legislation enacted within a constitutional governmental power which furthers an important or substantial government interest unrelated to suppression of free expression, provided it is no greater a restriction of First Amendment freedoms than is necessary to accomplish the purpose of the law.[64] The Court in *O'Brien* required that, in order to be constitutional, a restriction on content-neutral symbolic expression must be (1) within the governmental entity's constitutional power—here, as in *Barnes*, the city's interest in protecting public health and safety; (2) in furtherance of this interest/purpose; (3) based upon a primary purpose unrelated to any impingement upon free expression; and (4) no greater than necessary in order to further this purpose.[65]

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[57] Justice Rehnquist's opinion described the prohibited dancing as "within the outer perimeters of the First Amendment, though *only marginally* so." *Id.* at 566 (emphasis added).

[58] *Id.* at 568.

[59] 391 U.S. 367 (1968).

[60] *Id.* at 369.

[61] 50 U.S.C. § 462 (b) (3) (1986).

[62] *O'Brien*, 391 U.S at 370.

[63] *Id.* at 378-79.

[64] *Id.* at 376-77.

[65] *Id.*

Applying *O'Brien*, the Indiana statute in *Barnes* was viewed by the Court to be directed at public nudity *per se*, and not at any perceivably erotic message it might communicate.[66] *Barnes* seemingly lowered the bar of constitutional protection for some forms of expression usually assumed to be within the concept of the First Amendment.

More recently, the *Barnes* rationale was strengthened when the Court upheld an Erie, Pennsylvania city ordinance modeled after the state statute in *Barnes*. In *City of Erie v. Pap's A.M.*[67] an establishment which featured erotic dancing by totaliy nude women challenged the law on First Amendment grounds.[68]

The Pennsylvania Supreme Court held that the law was an unconstitutional infringement on freedom of expression, but the U.S. Supreme Court reversed.[69] The Court applied the four-prong test of *O'Brien*,[70] and held 6-3 that the *Erie* ordinance met this test.[71]

The majority cited *Barnes* as involving a nearly identical law.[72] The Court perceived both the statute in *Barnes* and the ordinance in *Pap's* as banning all public nudity, regardless of whether it contained any expressive elements.[73] The Court noted that such a restriction was content-neutral and was based upon preventing "indecency and immorality," rather than upon limiting artistic expression.[74] The majority justified the law because of its stated purpose of eliminating the secondary effects of nude dancing - such as violence, sexual harassment, and prostitution - which are harmful to public health, safety, and welfare.[75] Justice Souter, who concurred in part and dissented in part, viewed the effect of the or-

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[66] *Id.* at 566 and 570.

[67] 120 S. Ct. 1382 (2000).

[68] *Id.* at 1387.

[69] *Id.* at 1387-88.

[70] U.S. v. O'Brien, 391 U.S. 367 (1968).

[71] *City of Erie*, 120 S. Ct. 1387, 1398.

[72] *Id.* at 1391. The major distinction between the ordinances in *Barnes* and *Pap's* was that the former did not ban all nude dancing, but required simply that the dancers wear g-strings and pasties, whereas the *Pap's* law prohibited any "state of nudity."

[73] *Id.* at 1391-92.

[74] *Id.* at 1392-93.

[75] *Id.* at 1392, 1396.

dinance to be a complete suppression of protected speech.[76] Further, Souter noted that the state had presented neither sufficient evidence to meet the strict scrutiny standard, nor enough proof that the ordinance was the least intrusive means to accomplish its stated purpose.[77]

The *Pap's* decision was both soundly criticized and lauded by syndicated editorialists.[78] One well-known such editorialist, Steve Chapman, chastised the Court for having allowed the First Amendment to be "roundly abused."[79] In apposition to this view, another columnist, Jonathan Yardley, distinguished the facts in *Pap's* from the "dirty-movies-as-free-speech" decisions, the latter having plots, characters, and dialogues.[80] He termed the labeling of the Kandyland dancers' activity as an exercise of free speech "pure humbug," contrasting their dancing with that of Fred Astaire and Ginger Rogers and Mikhail Baryshnikov, which he deemed clearly to be an "expression."[81] Yardley assessed nude dancing, on the other hand, as "simply a product, a commodity, whose only 'message' cannot be printed in this newspaper."[82]

The *Barnes* and *Pap's* decisions indicate that a majority of the current Court is less skeptical of governmental action which limits speech for purposes unrelated to "expression," than it is, for example, of mandates which sanction statements against the federal or state government simply because of their "unpatriotic" content.[83] This is a factual distinction between conduct which is unprotected by the First Amendment, and speech or expression, which is protected.

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[76] *Id.* at 1402-08 (Souter, J., concurring in part and dissenting in part). Justice Stevens wrote a separate dissenting opinion, in which he was joined by Justice Ginsberg. *Id.* at 1406-1414 (Stevens, J., dissenting).

[77] *Id.* at 1404, 1405 (Souter, J. concurring in part and dissenting in part).

[78] *See* discussion *infra*.

[79] Steve Chapman, *The Court's Adventure in Kandyland*, RICHMOND TIMES – DISPATCH, Apr. 5, 2000.

[80] Jonathan Yardley, *Nude Show at Kandyland Had Zilch To Do with Free Speech*, RICHMOND TIMES-DISPATCH, Apr. 9, 2000.

[81] *Id.*

[82] *Id.*

[83] *See, e.g.*, Texas v. Johnson, where a Texas statute outlawing desecration of the national flag was struck down.

3. OBSCENITY AND THE RIGHT OF PRIVACY

The Court has held that even unquestionably obscene material cannot be restricted in a purely private setting in which consenting adults are the viewers. In *Stanley v. Georgia,* a unanimous Court reversed a conviction under Georgia's obscenity statute on invasion of privacy grounds.[84]

The facts in *Stanley*, which actually began as a Fourth Amendment unlawful-search-and-seizure claim,[85] read somewhat like an American television sit-com. The defendant's home had been searched by Georgia police officers for evidence of his alleged bookmaking activities,[86] and during the search, they found three obscene films.[87] A Georgia statute made knowing possession of obscene matter a felony, unless a jury deemed it appropriate to reduce the charge to a misdemeanor.[88]

The officers viewed the films in an upstairs room in defendant's home in order to determine whether they were in fact obscene prior to charging him.[89] He was subsequently convicted, and his conviction was affirmed by the Supreme Court of Georgia.[90]

In reversing, the Supreme Court avoided tampering with its prior decision in *Roth* and its progeny to date, holding simply that the governmental interest noted in *Roth* to deal with the "problem of obscenity"[91] does not reach so far as to permit a state to "tell. . . a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[92] Thus,

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[84] 394 U.S. 557 (1969).

[85] 394 U.S. at 569 (where the majority opinion expressly states that the appellant's motion to suppress had been raised on the Fourth and Fourteenth Amendments). Despite the seizure issue, First Amendment privacy protection is peripherally involved in the holding.

[86] *Id.* at 558.

[87] *Id.*

[88] GA. CODE ANN. § 26-6301 (1968).

[89] *Stanley*, 394 U.S. at 558.

[90] *Id.* at 559 (citing Stanley v. State, 161 S.E.2d 309 (Ga. 1968).

[91] *Id.* at 563.

[92] *Id.* at 565.

whether or not the films were obscene was not in issue.[93]

Although the U.S. Constitution does not expressly mention any protected privacy right, on several occasions the Court has held such a right to be implied within the First Amendment.[94] For example, the *Stanley* Court cited cases such as *Griswold v. Connecticut,*[95] the landmark constitutional privacy right case, to form the basis of its decision.[96] Due to the Constitution's protection of "unwanted governmental intrusions into one's privacy,"[97] the Court in *Stanley* held that the defendant could not be precluded from possessing obscene matter in the confines of this home and for his personal viewing.[98]

The *Griswold* Court spoke of a "penumbra" of rights, which are encompassed by, and emanate from, those freedoms expressly included within the Constitution. The Court viewed these implied rights as those which "help give. . .[the express Constitutional freedoms] life and substance."[99] The holding in *Griswold*, and the concept of these "penumbra" rights, gave rise to highly publicized opinions such as *Roe v. Wade*,[100] the first of the Court's abortion rights decisions.[101]

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[93] *See id.* at 559 n.2. The appellant did not contest that the films were obscene, and for the purpose of the opinion, the Court assumed that they were. *Id.*

[94] 381 U.S. 479 (1965).

[95] *Id.*

[96] *Stanley*, 394 U.S. at 564. *Griswold* involved the constitutionality of a state statute which made criminal the use, or aiding and abetting such use, of contraceptives. *Griswold*, 381 U.S. at 480.

[97] *Stanley*, 394 U.S. at 564.

[98] *Id.* at 565.

[99] *Griswold*, 381 U.S. at 484.

[100] 410 U.S. 113 (1973).

[101] *See id.* at 726 (citing *Griswold* for the proposition that within the Constitution there exists "a right of personal privacy, or a guarantee of certain areas or zones of privacy").

B. CENSORSHIP AND/OR RESTRICTION OF OBSCENITY UNDER THE *ROTH* AND *MILLER* STANDARDS IN TWO SOUTHERN CITIES: THE MEMPHIS, TENNESSEE AND RICHMOND, VIRGINIA EXPERIENCES

1. MEMPHIS AND THE STATE OF TENNESSEE

Memphis, Tennessee is perhaps best known for its history as the city of the "blues," Elvis Presley's home, and Martin Luther King's assassination. In the heart of the so-called Bible Belt in the Mid-South, the city also has a memorable past with regard to its efforts to restrain, and even censor, movies with content the relevant powers determined to be unacceptable.[102]

Memphis' five-member Board of Censors was created by a 1949 city ordinance.[103] This body, with members appointed by the mayor for a one-year term, was empowered to require that it view any movie, play performance, book, magazine, or other written or visible means of communication prior to its exhibition to the public.[104] This authority included the right to ban an item completely, a decision which was final and without recourse to the court system.[105]

The determinant, which could preclude a showing to the general public, was whether the representation was "immoral, lewd or lascivious. . .[or which] denounc[ed],. . .or s[ought] to overthrow the. . .national government."[106] In 1964, the City Code was amended to include under the umbrella of the Board's power its authority to censor any item which included any reference to "excreta."[107]

The patriarch of the Board had been its first chair, Lloyd T. Binford, who banned such classics as "Limelight" in 1952 (because of his objections to the personal and political life of the star, Charlie Chaplin);[108] a 1951 revival of "City Lights" (an older film starring Chaplin, whom Binford then termed a "London gutter snipe. . .a traitor to Christian American way of life and an enemy of de-

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[102] *Id.*

[103] MEMPHIS CITY CODE § 31-10 (1949).

[104] *Id.*

[105] *Id.*

[106] *Id.* at § 31-10(b).

[107] MEMPHIS CITY CODE § 23.231 (1964.)

[108] *At the Guild*, MEMPHIS PRESS-SCIMITER, Oct. 9, 1974.

cency, virtue, holy matrimony and godliness in all their forms");[109] and the 1950 showing of "Stromboli", featuring Ingrid Bergman.[110] Binford explained that showing the latter film would directly violate the ordinance because it starred "a woman who is universally known to be living in open and notorious adultery."[111]

Other films banned by the Binford Board included any picture depicting a train accident (since Binford, as a young boy growing up in Mississippi, had witnessed such an accident and was personally upset over any revisitation of that experience); and any movies with interracial scenes, *e.g.*, one showing black and white children playing together.[112]

In view of the courts' general condemnation of censorship on First Amendment grounds[113] and the care taken by the *Roth* Court to salvage any work with "even the slightest social importance,"[114] it is somewhat paradoxical that the existence of this Board was not challenged until the mid-1960's in *Embassy Pictures Corporation v. Hudson.*[115] The case involved the Board's banning of the

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[109] *Twenty-five Years Ago*, MEMPHIS COMMERCIAL APPEAL, Nov. 11, 1976.

[110] *Twenty-five Years Ago*, MEMPHIS COMMERCIAL APPEAL, Feb. 4. 1975.

[111] *Id.*

[112] Interview with W.J. Michael Cody, Memphis attorney and later Attorney General of Tennessee, Memphis, Tennessee, February 10, 1998. Cody, with whom the author practiced law in Memphis, was attorney of record for some of the legal challenges to the constitutionality of the Board of Censors. *Id.*

The author (hereinafter in this footnote referred to in the first person) recalls an instance back in 1967, when Cody was defending a movie entitled "I, a Woman." He had invited every lawyer in the Memphis firm in which we practiced law except me to view the movie at his private showing in order to obtain support for its alleged "social redeeming value." Hurt, I asked why I had been omitted. Cody's response was shocked, "Well, you're a lady—I surely wouldn't ask you to see that dirty movie!"

Cody also successfully defended such movies as "I Spit on Your Grave", and he subsequently served as U.S. District Attorney for the Western District of Tennessee and as Attorney General for the State of Tennessee.

[113] *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (which placed a strong burden of proof on a party seeking prior restraint of material); Freedman v. Maryland, 380 U.S. 51 (1965) (which placed the burden of proof upon the censor, required prompt decisions within a specifically stated time period, and made judicial review mandatory).

[114] 354 U. S. at 484.

[115] 242 F. Supp. 975 (1965).

movie, "Women of the World."[116] The federal district court for the Western District of Tennessee held that the ordinance, which established the Board and its powers, violated the Fourteenth Amendment because of the absence of judicial review.[117] It therefore was not necessary for the court to address the vagueness of the language establishing such standards.[118]

Post-*Embassy Pictures* and the demise of Memphis' Board of Censors, the Memphis City Council created a 12-member Board of Review (also appointed by the mayor) in 1970.[119] Unlike its predecessors who were compensated for their duties, the new Board members served without pay.[120] This ordinance dramatically muted the Board's powers, which now were only to rate movies using a national rating system.[121] Moreover, its jurisdiction extended only to movies nationally rated G (suitable for all audiences) and PG (parental guidance advised).[122] The new ordinance permitted this body to re-rate a film nationally rated PG (parental guidance suggested) to R (restricted to persons age 18 and over).[123] The language of the ordinance incorporated the words of the Court in *Roth* regarding the test of obscenity, but further clarified that any material was unacceptable for juveniles if it included a "representation or image of a sado-masochistic abuse. . .or. . . excretal functions or excreta in terms which are patently offensive. . ."[124]

A challenge to the new Board followed its R rating for a popular 1974 movie, "Day of the Dolphin," about a scientist whose passionate project was teaching dolphins to communicate verbally.[125] The Board agreed that the national PG rat-

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[116] *Id.* at 976.

[117] *Id.* at 977-78.

[118] *Id.* at 976.

[119] MEMPHIS CITY CODE § 31-11.1 (1970).

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] MEMPHIS CITY CODE § 22-23.1 (1) (4)-11.1 (1970).

[125] This body had also assigned "R" ratings to "Paper Moon," "American Graffiti," "Touch of Class," "The Sting," "Live and let Die," and "Bang the Drum Slowly" until language identical to that in "Day of the Dolphin" was removed with consent of the producer(s).

ing would be restored for Memphis showings provided the producer would agree to a deletion of one four-letter word referring to bodily excretion. [126] The representative of the New York-based company's response was that he would not "take one frame out of that picture to satisfy Memphis, Tennessee, which is the most antiquated, backward, morally hypocritical city in the world." [127]

This time the attack was by eight nationwide film distributors.[128] The action petitioned the same court which had nullified the old Board of Review to declare its successor unconstitutional.[129] The grounds were the First and Fourteenth Amendment, specifically the "prior restraint" theory, since the Board was authorized to rate films prior to any review by a court.[130]

The local media revisited the negative perceptions of the old Board of Censors. One satirical commentary wrote of a hypothetical session of the Board discussing the Disney classic, "Bambi," with statements such as "there are guns going off and things being killed and I say nudity is nudity. . . .[f]irst they'll get away with showing nekkid animals. Then it'll be little babies. Where will it all end?" and ". . .let's cut the jabber and. . .[r]estrict 'em all. . . get out there and save the children."[131]

The breadth of the Memphis Board of Review's authority, however, was short lived. In *Allied Artists Pictures Corp. v. Alford,*[132] the federal district court for the Western District of Tennessee found no problem with the constitutionality of the ordinance on the "prior restraint" issue.[133] Moreover, the procedural safeguards in the ordinance, unlike the one creating the defunct Board of Censors, complied with the standards as set forth in *Freedman.*[134] The court noted, however, that the Supreme Court had required that any regulation of language, as

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[126] *Review Board Chairman Considers Change in Rating,* MEMPHIS COMMERCIAL APPEAL, Jan. 27, 1974.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] Thomas Fox, *Motto is Movies Gone in 60 Seconds,* MEMPHIS COMMERCIAL APPEAL, Feb. 25, 1975.

[132] 410 F. Supp. 1348 (W.D. Tenn. 1976).

[133] *Id.* at 1355.

[134] Freedman v. Maryland, 380 U.S. 51, 58-60 (1965).

contrasted with conduct, be narrow and specific,[135] and that the relevant provisions in the ordinance were overly broad and, therefore, unconstitutional.[136] The opinion expressly referred to the new *Miller* guidelines as appropriate in crafting such an ordinance.[137]

Memphis was also the site of a prosecution for conspiracy to distribute allegedly obscene material.[138] Defendants included Harry Reems, the actor in the movie "Deep Throat," and all others actually involved in post-production distribution.[139] A federal jury convicted all, but the judge set aside the verdict against Reems.[140] All of his activity had taken place pre-*Miller* and therefore was to be judged by a more lax standard than were the distributors, whose activities were post-*Miller*.[141] This decision illustrates the fundamental distinctions between the *Roth* and *Miller* rules.

Meanwhile, the Tennessee state legislature had already struggled with keeping stride with the altered standards in *Miller*.[142] The earlier statute defining "obscenity" in the express language of the Supreme Court in *Roth*[143] was held unconstitutional in light of the newer *Miller* standards.[144] An amended version

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[135] *Allied Artists*, 410 F. Supp. at 1356 (citing Gooding v. Wilson, 405 U.S. 518, 527 (1972)).

[136] *Id.* at 1356-57. The sections the court struck down empowered the Board to regulate showing to minors any motion picture of stage presentation referring to "portions of the human body, or sexual functions, excretal functions or excreta in offensive terms as defined in *Roth*." *Id.* at 1358. Other provisions in the ordinance were upheld. *Id.*

[137] *Id.* at 1357.

[138] As a federal crime, this has a maximum penalty of five years in prison and/or $5,000 fine for a first-time offender. 18 U.S.C.A. § 1461.

[139] *Allied Artsts*, 410 F. Supp., at 1357. "Deep Throat" was a so-called hard-core pornographic film with explicit, close-up depictions of human sexual activity.

[140] *Id.*

[141] *Id.* The prosecuting U.S. Attorney was Mike Cody, who decided not to appeal the seaside verdict against Reems. Cody had donned a different "hat" this time around, having earlier been the practitioner who had successfully challenged the old Board of Censors in *Embassy Pictures*.

[142] Memphis' failure to have reacted to the Supreme Court's new test for obscenity as had the state lawmakers, an apparent enigma.

[143] TENN. CODE ANN. § 39-3007 (1965).

[144] Art Theatre Guild v. Tennessee 510 S.W.2d 258 (Tenn. 1974) (involving the movie

was adopted immediately, based on the words of the *Miller* Court.[145]

2. RICHMOND AND THE COMMONWEALTH OF VIRGINIA

Although not geographically in the deepest part of the South, Richmond is arguably the most Southern of all American cities with respect to its atmosphere and mentality. Richmond was the capital of the Confederacy, much of the 1861-65 Civil War was fought on Virginia soil, and General Robert E. Lee has been perceived as Richmond's most revered "native son."[146] This author submits that Metropolitan Richmond is also regarded as among the most conservative in the country, a setting where the populace does not take lightly the availability of materials which are conceivably obscene.

A Virginia post-*Miller* state statute defined "obscenity" according to *Miller's* language,[147] and the highest state court held that the code's "community standard" was to be interpreted as local, rather than state-wide.[148] Virginia law further prohibits the preparation for sale, production, reproduction or sale of obscene material[149] and makes the sale or loan to a juvenile of anything depicting "nudity, sexual conduct, or sadomasochistic abuse and which is harmful to juveniles" a Class 1 misdemeanor.[150]

"Deep Throat," the same film which had given rise to federal criminal charges in Memphis, was held on two separate occasions by a Virginia state court judge to violate the Virginia law.[151] In 1977, a jury determined that a 48-minute edited version of the full-length film was obscene, and convicted the adult-bookstore owner who had sold the video.[152] This conviction resulted in a

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"Without a Stitch").

[145] TENN. CODE ANN. § 39-3007 (2) (A) (1974).

[146] Lee was actually born in Westmoreland County, Virginia, to the east of Richmond, but he spent all of the war years as a resident of Richmond.

[147] VA. CODE ANN. § 18.2-372.

[148] Price v. Commonwealth, 210 S.E.2d 798 (Va. 1974).

[149] VA. CODE ANN. § 18.2-374.

[150] VA. CODE ANN. § 18.1-391.

[151] This case was unreported.

[152] This case was unreported.

$1,000 fine. Ten years later, a Richmond state court judge determined the movie obscene and enjoined its showing by a local theater.[153]

A 1985 amendment to Virginia statutory law made it unlawful to display obscene matter where juveniles can readily peruse it.[154] An erudite group among literary figures (including James Michener, John Updike, Jackie Collins, Erica Jong, John Irving, Sidney Sheldon, and Irving Wallace) urged the U.S. Supreme Court to affirm two lower federal courts which had declared this law unconstitutional.[155] Their position was that the statute had a potentially inhibiting effect, impeding access to "all works of potential interest. . . .effectively supplanting what our constitution entrusts to the author with a heavy-handed censorship regime."[156]

The trial court viewed the statute as overly broad, and thus an unconstitutional restriction of adult access to non-obscene books, and granted the plaintiffs the requested injunction.[157] The appellate court's affirmance noted the financial and practical difficulty of bookseller compliance.[158]

The U.S. Supreme Court read the Virginia statute as one in need of construction by the highest court in the state and, accordingly, certified the case to the Supreme Court of Virginia.[159] The two questions referred to the state court were (i) whether the statutory phrase "harmful to juveniles" is construed under state law as encompassing any of the books in the plaintiffs' trial exhibit, and the general standard to be used in determining the scope of the law in view of the varying ages and levels of maturity of persons classified as "juveniles;" and (ii) the extent of the duty imposed upon booksellers.[160]

The Virginia Supreme Court approved the constitutionality of the statute as a

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[153] *Film Again Declared Obscene*, RICHMOND TIMES – DISPATCH, Oct. 24, 1987, at B-6.

[154] VA. CODE ANN. § 18.1-391 (1985) (currently codified as VA. CODE ANN. § 18.2-391 (1987)).

[155] Am. Booksellers Ass'n. v. Strobel, 617 F.Supp. 699 (E.D. Va. 1985); Am. Booksellers Ass'n. v. Strobel, 802 F.2d 691 (4th Cir. 1986).

[156] Peter Hardin, *10 Writers Unite Against Virginia's Smut Law*, RICHMOND NEWS LEADER, Sept. 3, 1987, at A1.

[157] Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 391 (1988).

[158] Am. Booksellers Ass'n v. Virginia, 802 F.2d 691, 69 (1986).

[159] Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 396 (1988).

[160] *Id.* at 398.

permissible modification of the *Miller* test, finding that the statute appropriately adapted the concept of obscenity for a somewhat stricter application of obscenity restrictions to minors.[161] Nonetheless, the Court held that none of the sixteen books in question met the *Ginsberg* test on what might adversely affect minors.[162] The Court held that none of the materials was "harmful to juveniles" within the meaning of the state statute.[163]

One of the more recent court rulings under the Virginia statute resulted in a acquittal of the owner of a Richmond bookstore.[164] Dennis Halloran, a bespectacled grandfatherly gentleman, carried such magazines as *Honcho, Small Tops*, and *Playguy*, concededly of the pornographic variety.[165] His alleged violation came not from his sale of these materials, but rather from his failure to wrap them or stash them in a back room in order to keep them out of view of minors.[166] (Other provocative magazines, such as *Playboy* and *Penthouse*, arrive at retail stores already wrapped).[167]

Halloran first pleaded guilty to the charge, a misdemeanor, in the non-jury General District Court, and was fined $50.[168] Since the statutory penalty is up to one year in jail and/or $2500 fine,[169] this was relatively slight. However, after he pondered his having been fingerprinted and forced to spend 1 1/2 hours in the city lock-up, the reality of being found guilty of a crime prompted his appeal.[170]

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[161] Virginia v. Am Booksellers Ass'n, 236 Va. 168, 372 S.E. 2d 618, 620 (Va. 1988) (where court referred to Ginsberg and the Virginia General Assembly's response to this holding by enacting § 18.2 39.1).

[162] Virginia v. Am Booksellers Ass'n, 236 Va. 168, 175-177 (1988).

[163] *Id.* at 177.

[164] Wes Allison, *Ex-Owner Acquitted Access to Bookstore's X-Rated Items at Issue*, RICHMOND TIMES – DISPATCH, Nov. 11, 1999 at B1.

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] VA. CODE ANN. § 18.1-391 has been amended. The current statute is VA CODE ANN. § 18.2-391. The maximum fine has been increased to $2,500, in line with other statutory crimes of this degree in Virginia.

[170] Wes Allison, *Ex-Owner Acquitted Access to Bookstore's X-Rated Items at Issue*, RICHMOND TIMES – DISPATCH, Nov. 11, 1999 at B1.

A 2-men, 5-women jury found him not guilty.[171] Presumably, the jury was persuaded, at least in part, by his counsel's point that the location of the material in question – i.e., on two top shelves next to the cash register – was situated such that an employee would always be able to prevent children from picking up an issue.[172] Despite the verdict, Halloran nonetheless took precautionary measures thereafter to wrap all adult magazines and post signs stating that they are not to be viewed by anyone under age eighteen.[173]

In November, 1999, the County of Henrico in greater Richmond adopted an ordinance requiring that *all* merchants who sell sexually explicit materials maintain them beyond the reach of persons under the age of eighteen.[174] This law expands the prior one, which applied only to so-called adult bookstores and video shops.[175] Another ordinance, passed on October 12,1999, prohibits the opening of any new store which would rent or sell "substantial amounts" of sex books and /or videos within 500 feet of any residence, school, or day-care center.[176]

Both ordinances appear to follow the *Ginsberg* Court's approval of special protections for minors and, as such, clearly should meet constitutional muster.

III. "FIGHTING" WORDS

Communication which presents a danger or which provokes the hearer(s) to engage in violence is generally regarded as beyond the scope of First Amendment protection. The "clear-and-present-danger" doctrine was originated by the eminent jurist Oliver Wendell Holmes, when he spoke for a unanimous Supreme Court in *Schenck v. United States*,[177] and noted that "the most stringent protection of free speech would not protect a man falsely shouting 'fire' in a theatre and causing a riot." [178]

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[171] *Id.*

[172] *Id.* His attorney was David Baugh, *id.*, the same lawyer for the defendant in the Ku Klux Klan case. *See* discussion *infra*.

[173] *Id.* Halloran has sold the store since his arrest, but he still works there. *Id.*

[174] Jeremy Redmon, *New Law Covers All Merchants: Supervisors Limit Access to Adults-Only Materials*, RICHMOND TIMES – DISPATCH, Nov. 17, 1999 at L1.

[175] *Id.*

[176] *Id.*

[177] 249 U.S. 47 (1919) (sedition case).

[178] *Id.* at 52.

The doctrine is succinct enough, but the application has presented abundant difficulty for the courts. Is public burning of the national flag—contrary to a state statute criminalizing such activity—tantamount to an offense sufficiently volatile so as to insult the average person and induce him to retaliate? A 5-4 Court held in 1989 that it is not. In *Texas v. Johnson*,[179] the Court invalidated a Texas law forbidding desecration of the American flag.[180] The Court did not view such action as a breach of the peace and held the defendant's freedom of speech to prevail over any alleged state interest in revering the flag as a national symbol.[181]

The facts of *Johnson* merit mention. During the 1984 Republican National Convention, the defendant participated in an anti-war demonstration in front of the Dallas City Hall to protest Reagan administration policies.[182] After having unfurled the American flag, he soaked it with kerosene and set it on fire amidst cheers of "America, the red, white, and blue, we spit on you."[183] No physical injuries or threats of injury had resulted.[184]

The Court first struggled with whether the statute regulated "speech" or simply non-communicative conduct.[185] If it was the latter, a less demanding standard would apply, since the activity would be outside constitutional protection.[186] Finding the flag burning to be speech within the First Amendment, the majority emphasized that forbidding governmental prohibition of an expression of an idea, albeit one offensive to general society, is the "bedrock principle underlying the First Amendment."[187]

Chief Justice Rehnquist's dissent conceded that many of the defendant's objectionable protest activities (which had not been cited in his indictment) were

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[179] Texas v. Johnson, 491 U.S. 397, 409 (1989).

[180] *Id.*

[181] *Id.* at 414-20.

[182] *Id.* at 399.

[183] *Id.*

[184] *Id.*

[185] *Id.* at 402-06

[186] *Id.* at 402-03; United States v. O'Brien, 391 U.S. 367, 381-82 (1968).

[187] *Id* .at 414.

constitutionally protected speech.[188] For example, he had led a march through the main part of the city, shouting such epithets as "Ronald Reagan, killer of the hour, Perfect example of U.S. power."[189] Justice Rehnquist would have drawn the line on constitutionality at burning the flag, and would have held that 200 years of history had embedded a national "awe and respect" for the flag.[190] The Chief Justice opined that the state statute had merely recognized that infractions of this respect would not be tolerated.[191]

In a seemingly direct response to the *Johnson* decision, Congress enacted the Flag Protection Act of 1989, making criminal any conduct by a person "who knowing mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon" the American flag.[192] The inevitable challenge to the constitutionality of a federal statute, by which Congress attempted to accomplish the same purpose as had the Texas state legislature prior to *Johnson*, came immediately thereafter.[193] In another 5-4 decision,[194] the Court held that the federal law violated the First Amendment.[195]

A sequential analysis of the Court's sojourn into the "fighting words" doctrine, one which began with Justice Holmes' phrase in *Schenck* is instructive. The "clear and present danger" doctrine, as enunciated by Justice Holmes in *Schenck*, was dubbed the "fighting words" rule in *Chaplinsky v. New Hampshire*.[196] *Chaplinsky* involved a Jehovah's Witness street proselyte's denunciation of organized religion, actions which persisted after a warning from a city marshal that some local citizens had complained and that the crowd was becom-

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[188] *See id.* at 430-31 (Rehnquist, C.J., dissenting).

[189] *Id.* at 431 (Rehnquist, C.J., dissenting).

[190] *Id.* at 434 (Rehnquist, C.J., dissenting).

[191] *See id.* at 434-35 (Rehnquist, C.J., dissenting).

[192] 18 U.S.C.A. § 700 (1989).

[193] United States v. Eichman, 496 U.S. 310 (1990).

[194] In *Johnson*, Justices Brennan, Marshall, Blackmun, Scalia, and Kennedy joined in the majority opinion; Chief Justice Rehnquist, as well as Justices White, O'Connor, and Stevens dissented. *Johnson*, 491 U.S. at 398. In *Eichman*, each Justice decided exactly the same way. *Eichman*, 496 U.S. at 311.

[195] *Eichman*, 496 U.S. 310, 312 (1990).

[196] 315 U.S. 568, 572 (1942).

ing restless.[197] The marshal then warned him not to incite a riot.[198] When a police officer led him to the police station, but prior to any arrest, the defendant was alleged to have cursed the marshal, referring to him as a "'God damned racketeer' and 'a damned Fascist and the whole government of Rochester [the city where the action occurred] are Fascists or agents of Fascists.'"[199] His conviction for violating a state law, which forbade the use of any "'offensive, derisive or annoying word to any other person who is lawfully in any street or other public place,'"[200] was affirmed by the United States Supreme Court.[201]

The *Chaplinsky* Court held that some words, such as those used by the defendant, are "fighting words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"[202] The statute, the Court held, merely banned the use of those words which were clearly likely to provoke violence or a breach of the peace.[203]

Less than a decade later, the Court seemingly limited the applicability of *Chaplinsky* in *Terminiello v. Chicago*,[204] in which the defendant had been convicted of disorderly conduct under a city ordinance which proscribed a "breach of the peace."[205] The trial court's instructions to the jury which convicted him defined "breach of the peace" as conduct which "stirs the public to *anger*, *invites dispute*, [or] brings about a condition of *unrest*."[206] The defendant in *Terminiello* had publicly criticized both the political and racial segment of society, referring to his opponents as "slimy scum,"[207] "snakes,"[208] "bedbugs,"[209] and other unflat-

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[197] *Id.* at 569-70.

[198] *Id.* at 570.

[199] *Id.* at 569 (citing the complaint used to charge the appellant).

[200] *Id.*

[201] *See id.* at 574.

[202] *Id.* at 572.

[203] *Id.* at 573.

[204] 337 U.S. 1 (1949).

[205] *Id.* at 2.

[206] *Id.* at 3 (emphasis added).

[207] *Id.* at 17 (Jackson, J., dissenting).

[208] *Id.* at 21 (Jackson, J., dissenting).

tering, if not offensive, names.[210]

A very divided (5-4) Court held that such dispute, which might indeed result in an angered group of hearers, cannot be stifled under the First Amendment.[211] Although the speaker's words had provoked an unruly crowd – which attempted to rip clothes off anyone who entered the auditorium where the defendant was speaking, broke some twenty-eight windows in the building, and threw stink bombs - [212] the Court noted that freedom of speech is "protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[213] It may appear puzzling on a first reading as to why the Court did not view *Chaplinsky* as applicable. The "invites dispute" instruction, however, which had been absent in *Chaplinsky*, was so broad that the Court construed the instruction as a direct infringement on First Amendment protection.

Two years later, the Court appeared to tilt slightly back in reverse, expanding the scope of *Chaplinsky* in *Feiner v. New York*.[214] The defendant spoke vitriolically on a public street in a predominately black neighborhood in Syracuse, New York to seventy-five or eighty persons, both black and white.[215] Because of the growing group of listeners, some pedestrians could pass only by walking in the street. [216] This created an element of impeded passage, which had not been the case in *Terminiello*. The defendant referred to the President as a "bum," to the American Legion as a "Nazi Gestapo," and to the city mayor as a "champagne-sipping bum. . .[one who]. . .does not speak for the Negro people."[217] Perhaps more significantly he urged the black people present to "rise up in arms and fight

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[209] *Id.*

[210] *See generally id.* at 16-22 (Jackson, J., dissenting) (providing segments of Terminiello's speech).

[211] *Id.* at 4.

[212] *Id.* at 17 (Jackson, J., dissenting).

[213] *Id.* at 4-5.

[214] 340 U.S. 315 (1951).

[215] *Id.* at 316-17.

[216] *Id.* at 317.

[217] *Id.* at 330 (Douglas, J., dissenting).

for [equal rights]."[218] One bystander was quoted at trial as having responded to the defendant's remarks that unless the police removed " that S.O.B.," he would take the matter into his own hands.[219] The crowd had not yet fomented into a riot, but evidence demonstrated that there was "some pushing, shoving, and milling around."[220]

A 6-3 Supreme Court upheld his conviction of disorderly conduct under New York state law.[221] The Court noted, "'When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.'"[222] Applying this standard to the fact findings of the New York courts, the majority concluded that the conviction did not "exceed the bounds of proper police action."[223] *Feiner* is difficult to distinguish from *Terminiello*, except for the jury instruction in *Terminiello*, since both contained indisputable evidence of angered crowds and likely imminent rioting.[224]

Subsequent to *Feiner*, the Court held in *Gregory v. Chicago*[225] that the statements of persons acting lawfully had unintentionally caused a breach of the peace and/or a riot; the true defendants in the disturbing the peace charge should have been the wrongly responding crowd, rather than the utterers of the statements.[226] The Court seemed to infer that peaceful marchers protesting segregated public schools, who were accompanied by police, could not constitutionally be arrested when they refused to follow police orders.[227] The order was that

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[218] *Id.* at 317.

[219] *Id.* at 324 (Black, J., dissenting).

[220] *Id.* at 317.

[221] *Id.* at 316.

[222] *Id.* at 320 (citing Cantwell v. Connecticut, 310 U.S. 296 (1940)).

[223] *Id.*

[224] There were, to be sure, two newly appointed justices by the time *Feiner* was decided: Clark and Minton replaced Rutledge and Murphy. Justice Minton, however, dissented in *Feiner*, joining with Justice Douglas, who would have reversed the conviction. *Feiner*, 340 U.S. at 329.

[225] 394 U.S. 111 (1969).

[226] *Id.*

[227] *Id.*

the marchers disperse because onlookers had become angry.[228] *Gregory* clearly dampened the impact of the "fighting words" doctrine by shifting the burden onto the hearers to forebear from following their natural instincts.

In *Cohen v. California*[229], the Court reversed a conviction under California's general disturbing-the-peace law.[230] In a Los Angeles courthouse, in the presence of women and children, the defendant wore a jacket on which a profane anti-war message was written.[231] The defendant was convicted under a California statute which prohibited "'maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person. . .by . . .offensive conduct.'"[232] Justice Harlan, writing for the majority which held that the defendant's constitutional right had been violated,[233] stated his oft-quoted conclusion: "One man's vulgarity is another's lyric."[234] The Court determined that the words on the defendant's jacket were not "inherently likely to provoke violent reaction" under the "fighting words" doctrine because "[n]o individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult."[235] The defense relied upon the alleged reason for the act, for example, the defendant's desire to inform the public of his intense opposition to the war in Vietnam in particular and to the draft in general.[236] A three-member dissent viewed the apparel as conduct rather than communication and would have placed it beyond the constitutional protection afforded speech.[237]

In *Gooding v. Wilson,*[238] a broadly-worded Georgia statute simply prohibiting

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[228] *Id.* at 111-12.

[229] 403 U. S. 15 (1971).

[230] *Id.* at 26.

[231] The jacket bore the phrase, "F—— the draft." *Id.* at 16.

[232] *Id.* at 16 (citation omitted).

[233] *Id.* at 26.

[234] *Id.* at 25.

[235] *Id.* at 20.

[236] *Id.*

[237] *Id.* at 27 (Blackum, J., dissenting).

[238] 405 U.S. 518 (1972).

the use of "opprobrious words or abusive language, tending to cause a breach of the peace" was struck down by a 5-2 Court because of its vagueness and breadth.[239] Such unlimited language, the Court held, could be construed as prohibiting mere offensive words and would therefore not be limited to actual "fighting words."[240]

In another state—one with a tightly structured law—the defendant's conviction probably would have been upheld. During an anti-Vietnam War rally outside a draft center he shouted, "White son-of-a-bitch, I'll kill you" to a police officer[241] and was convicted under the statute at issue.[242] The facial unconstitutionality of the statute, however, precluded the Court's further analysis of the particular facts which formed the defendant's conviction.[243]

The Supreme Court refused to review a federal appellate court's decision in *Collin v. Smith*,[244] in which a Skokie, Illinois "racial slur" ordinance was held unconstitutional. This municipal law made dissemination of any materials which would promote and incite racial or religious hatred a misdemeanor.[245] The defendant-appellant, however, conceded that it did not "rely on a fear of responsive violence to justify the ordinance." The Court noted that this concession placed the case outside the scope of the *Feiner* and *Chaplinsky*.[246]

In *Collin*, the Court of Appeals refused to enforce a lower court injunction of a planned march by a Nazi organization whose members presumably would wear Nazi uniforms and display swastikas.[247] The state defended the ordinance on the ground that its purpose was to avoid the "infliction of psychic trauma" on the nearly 5,000 holocaust survivors residing in Skokie and on its other Jewish populace. The court, however, distinguished the symbols from conduct, holding them to be communicative in nature and thus within constitutional protections.

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[239] *Id.* at 528.

[240] *Id.*

[241] *Id.* at 534 (Blackmun, J., dissenting).

[242] *Id.* at 518.

[243] *See id.* at 520.

[244] 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

[245] *Id.* at 1202.

[246] *Id.*

[247] *Id.* at 1198.

The evident factual distinction between the *Collin* ordinance and the prohibited activity in *Chaplinsky* and *Feiner* was the evidence in those latter situations of the early stages of violent responses to the communications, whereas in *Collin*, the stated reason for the effort to prohibit the march was to prevent emotional and psychic trauma to others. However, the *Collins* court voided that Skokie ordinance as facially unconstitutional. As in *Gooding*, had the city council drafters of the ordinance in *Collin* worded the law in a different manner—*i.e.*, within the "disturbance-of-the-peace" and "disorderly conduct" language of the laws in *Chaplinsky* and *Feiner*—it is possible that the ordinance would have withstood constitutional scrutiny.

Many regard Justice Scalia's 1992 opinion for a 5-4 majority in *R.A.V. v. City of St. Paul, Minnesota*[248] as a near death-knell for the "fighting words" doctrine, or, at best, a substantial limitation on its applicability. In striking down a city ordinance which prohibited fighting words that insulted or provoked violence "on the basis of race, color, creed, religion, or gender,"[249] the majority conceded that some categories of speech "can consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc)."[250] The majority further stated, however, that these categories of speech are not "entirely invisible to the Constitution,"[251] which possibly implied the overruling of the "fighting words" exception. Finding the ordinance to be facially unconstitutional, the Court reasoned that while the ordinance permissibly limited its application to only those words which would arouse "anger, alarm or resentment in others," or "fighting words," the ordinance impermissibly applied only to fighting words which "insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'"[252] The Court explained that "[t]he First Amendment does not permit [the imposition of] special prohibitions on those speakers who express views on disfavored subjects."[253]

Justice White, now retired from the bench, concurred in *R.A.V.*, but warned

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[248] 505 U.S. 377 (1992).

[249] *Id.* at 380.

[250] *Id.* at 383.

[251] *Id.* at 383. Justice Rehnquist explains that the judicially crafted exceptions do not except the content of the speech, but rather limit speech where the "social interest in order and morality" outweighs any benefit to be derived from the expression. (Rehnquist, C.J., quoting from *Chaplinsky*, 315 U.S. at 57.)

[252] *Id.* at 391.

[253] *Id.*

that the decision had two potentially negative effects: (1) it undermined any categorical approach to free expression issues,[254] and (2) it questioned the applicability of a strict scrutiny analysis in such cases.[255] Justice White took the view that, even if a law were quite narrowly drafted, the Scalia approach would possibly invalidate it as not having proscribed *enough* speech.[256] Too limited a scope might infer that the law encroached upon a constitutionally protected area by reason of having singled it out, by permitting other questionable communication.[257]

Collaterally, some constitutional experts fear that *R.A.V.* will adversely affect the constitutionality of any laws which would prohibit so-called "hate crimes."[258] Such a limit would not invite intellectual discussions on the underlying purpose of the First Amendment, but would rather have the demeaning effect of silencing the victim(s).[259] This school views the future of hate-crime legislation as "not bright" in light of *R.A.V.*[260]

An indirect gleam of hope for advocates of hate crime statutes is *Wisconsin v. Mitchell*[261] in which the Court upheld a Wisconsin statute that increased penalties for existing crimes when evidence proved that the victim had been chosen because of his race.[262] In part, the Court's rationale was that the law simply takes into account motivation as one factor in determining an appropriate sentence, which is a method generally used in sentencing.[263]

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[254] *See id.* at 399-403 (White, J., concurring).

[255] *Id.* at 403-07 (White, J., concurring). Strict analysis closely judges a law which encroaches upon an otherwise protected right, requiring the government to show a compelling state interest, as well as proof that the law, as written, is the narrowest possible restriction which would advance that interest. *See* Bakke v. Regents of University of California, 438 U.S. 265 (1978), for an explanation of this rule.

[256] *R.A.V.*, 505 U.S. at 403-04 (White, J., concurring).

[257] *See id.*

[258] Jerome A. Barron and C. Thomas Dienes, CONSTITUTIONAL LAW IN A NUTSHELL at 351 (2d ed. 1995).

[259] *Id.*

[260] *Id.*

[261] 508 U.S. 476 (1993).

[262] *Id.* at 479.

[263] *Id.* at 485-87.

Wisconsin was only one of the forty states which had enacted hate-crime legislation during the 1980's.[264] The bases for the bias-motivated crimes in these statutes are the victim's religion and/or race. One of the most publicized was the 1998 killing of James Byrd, Jr., in Texas.[265] Byrd, a black man, was tied to the rear of a car by three white supremacists who then drug him to his death.[266] All three were convicted, and two have been sentenced to death.[267] A recent move has been to extend these crimes to include sexual preference as a base, a push which became particularly pronounced after the 1998 torture and murder of Matthew Shepard in Wyoming.[268] Shepard was a college student whose homosexuality had provoked his kidnapping and murder by an anti-gay group.[269]

The synthesis shows an earlier Court which would more freely prohibit communication tending to induce disturbances (*Chaplinsky* and *Feiner*). This judicial position seems to have progressed to one in which the Court would be more inclined to permit such expressions or communicative actions on First Amendment grounds (*Terminiello*, *Cohen* and *R.A.V.*).

If the current Court continues in the direction of *R.A.V.*, it is submitted that the "fighting words" exception could indeed be removed. Whether this latter direction will preclude any legislative success in adopting hate crimes likely will be closely watched by constitutional scholars.

IV. MISCELLANEOUS FREE EXPRESSION ISSUES

What about (1) intentionally hurtful communications, or (2) expressions which are offensive to a significant segment of the public? And what if the latter are the recipient(s) of federal, state or municipal funding? Suppose the publication arguably induces criminal behavior? Following are some of the most flagrant and more publicized examples of such questions and how the American courts have dealt with such "speech."

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[264] Ellen Goodman, *Hate Crime is Crime Against Community*, RICHMOND TIMES – DISPATCH (The Boston Globe Syndicate), Dec. 3, 1999, at A-21.

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Id.*

A. DEFAMATORY AND \ OR HURTFUL COMMUNICATIONS

Hustler Magazine v. *Falwell*[270] involved a lawsuit filed by a prominent Virginia clergyman who was an active commentator on public affairs politics.[271] The plaintiff was the Reverend Jerry Falwell, founder of the Moral Majority political action group, who boasts the largest Baptist congregation in Virginia. Falwell built and established a prosperous Bible-based college in Lynchburg, Virginia.

In 1983, *Hustler Magazine* published one of a series of liquor advertisements which featured well-known celebrities speaking about their "first time."[272] Although the "first time" referred expressly to the subject's first taste of Campari Liqueur, the innuendo was that it referred to his first sexual relation.[273] The magazine edition in question featured Falwell and included a hypothetical "interview" with him, during which he described his "first time" as incestuous drunken sex with his late mother in an outhouse.[274] In addition to the false slur about his mother, the inference, as charged in Falwell's motion for judgment, was that he was a hypocrite who preached only when he was drunk.[275] In small print at the bottom of the full-page ad appeared a disclaimer, "ad parody - not to be taken seriously," and the table of contents listed the ad as "Fiction: Ad and Personality Parody."[276] Fallwell sued the magazine and its owner and publisher Larry Flynt for invasion of privacy defamation and intentional infliction of emotional distress.[277] The defense cited the First Amendment.[278]

The trial judge dismissed the privacy count.[279] The jury held against plaintiff

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[270] 485 U.S. 46 (1988).

[271] *Id.* at 47.

[272] *Id.* at 48.

[273] *Id.*

[274] *Id.*

[275] *Id.*

[276] *Hustler Magazine*, 485 U.S. at 48.

[277] *Id.* at 47-8.

[278] *See id.* at 50.

[279] *Id.*

Falwell on the defamation ground because of the absence of proof of any statement of fact.[280] The verdict was based upon the conclusion that no reasonable reader would view this depiction as factual, not only because of the disclaimer(s), but also because of the repugnant and invidious nature of the contents of *Hustler* in general and the well-known Christian background of the plaintiff.[281] Nonetheless, the plaintiff was awarded $200,000 in compensatory and punitive damages on the intentional infliction of emotional distress count.[282] Both Falwell and the magazine appealed, and the eventual arbiter was the United States Supreme Court.[283]

The Court affirmed the verdict against Falwell on the defamation charge,[284] but reversed the verdict on the emotional distress count.[285] In *Hustler*, the Supreme Court imposed upon a "public figure" the same burden of proof as he/she would incur in an action for defamation.[286]

The *Hustler* decision virtually shields publishers from any legal responsibility for offensive portrayals of a public figure, even when false in nature, unless the plaintiff can prove malice on the part of the defendant.[287]

B. "OFFENSIVE" LANGUAGE WHEN THE PURVEYOR HAS BEEN FEDERALLY LICENSED

The pivotal case permitting governmental regulation of language or federally licensed media is *FCC* v. *Pacifica Foundation,*[288] often referred to as the "7-

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[280] *Id.*

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] The seminal case was *New York v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964), which held that public officials have the additional burden in libel or slander cases of proving malice on the part of the defendant. The Court extended this burden to public figures as defamation action plaintiffs in *Gerty v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

[285] *Id.*

[286] *Id.*

[287] This litigation provided the material for a major motion picture, "The People versus Larry Flynt," produced in 1996.

[288] 438 U.S. 726, 98 S. Ct. 3026 (1978).

dirty-words" case. During an early afternoon broadcast in 1973, a New York City radio station aired a 12-minute segment from an album of George Carlin, a satiric comedian. The selection aired was a monologue in which Carlin referred to seven words, which no one is permitted to utter on public airways. He then stated these seven words, having prefaced his remarks by identifying them as "the ones you definitely wouldn't say ever. . .[and] the ones that will curve your spine, grow hair on your hand and . . .maybe, even bring us, God help us, peace without honor. . .and a bourbon."[289] He then repeated these seven words several times in a variety of colloquial form(s).[290]

A New York man lodged a complaint with the Federal Communications Commission (FCC), the federal administrative body which grants licenses to television and radio stations, among its other regulatory duties.[291] The complainant advised that his young son had heard Carlin's language on his father's car radio.[292] The FCC's response was to issue a Declaratory Order in the form of a warning to the station.[293] Moreover, the agency informed the station that the order would be retained in its file and that, in the event of future such complaints, the agency would determine whether the FCC would impose one of the statutory sanctions Congress had permitted.[294] The station appealed.[295]

The issue in *Pacifica* was whether the FCC opinion and its conclusion constituted censorship, prohibited by federal statute.[296] In a 7-2 decision, the United States Supreme Court held that the FCC's construction of the law was not so broad as to encroach upon the station's constitutionally protected rights.[297] In addition, the Court held that the fact that the language was not tantamount to the Court's definition of "obscenity" did not preclude administrative regulation, pro-

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[289] *Id.* at. 752-55.

[290] *Id.* The theme of the day for the program on which Carlin's album was played was contemporary language and attitudes toward them.

[291] *Id.*

[292] *Id.*

[293] *Id.*

[294] *Id.*

[295] *Id.* at 732.

[296] 47 U.S.C. § 326 (1934, as amended 1948).

[297] *Id.*

vided only that it was "indecent."[298] Even if the language—though characterized by the Court as indisputably "vulgar, offensive, and shocking"— was not obscene, whether or not it possessed the requisite "social value" for federally licensed activities would vary with the circumstances. While such language may be entitled to some constitutional protection, the Court held that this protection was not absolute.[299]

The Court upheld the authority of the FCC to issue the order in question, using the nuisance doctrine as its rationale.[300] The majority opinion emphasized the narrowness of the holding, mentioning that it was not an approval of criminal sanctions, nor was it a censorship.[301] The "host of variables" the Court viewed as significant factors in determining whether the FCC might act accordingly included the time of day of the broadcast. In Justice Stevens' words, "We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend upon proof that the pig is obscene."[302]

C. PUBLICLY FUNDED "ART" CRITICIZED AS OFFENSIVE

Does the fact that an operation is the recipient of governmental financial assistance render it subject to state approval as to what it might show a willing public? In recent years two controversies in particular regarding this issue have been widely publicized: (1) the Mapplethorpe photographic exhibit in the early 1990's, and (2) the 1999 Brooklyn Museum of Art exhibition.

1. MAPPLETHORPE:

The Contemporary Arts Center regularly displays works of art in downtown Cincinnati, Ohio. Traditionally, the city had provided tax funds to the center, which came under extensive criticism when it displayed 175 photographs taken by Robert Mapplethorpe. Seven of these pictures were attacked as being obscene.[303]

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[298] *Id.*

[299] 438 U.S. at 747-48.

[300] *Id.*

[301] *Id.*

[302] 438 U.S. at 751-52.

[303] The photographs included those of men having sex and a bullwhip growing out of a male rectum. Mapplethorpe, was a gay man devoted to homosexual themes. He died of AIDS

City and county prosecuting officials obtained an indictment against the Center, charging violation of the state anti-obscenity law.[304] The Center then responded by filing a federal civil rights action against these officials, seeking a temporary restraining order and preliminary injunction to prevent their interference with the exhibit pending trial on the criminal charge.[305] The federal district court granted the preliminary injunction, holding that any restrictions against the Center were premature until a final determination that the photographs met the *Miller* standard for obscenity.[306]

The trial court found the center not guilty of exhibiting pornography, circumventing the issue of control-coupled-with-public funding.[307] According to one juror who was interviewed after the verdict was announced and judgment entered, the panel had unanimously found the first two tests in *Miller* to have been met, *i.e.*, that the displays (a) appealed to the viewers' prurient interest in sex and (b) depicted sex in a manner patently offensive according to contemporary state standards.[308] However, the difficulty had been with the third prong of the test, the "LAPS" without-serious-value standard which might remove material from the concept of obscenity. [309] The curator of the art museum was an expert on whether the photographs had serious artistic merit, and the jurors simply deemed themselves not professionally competent to judge otherwise.[310]

The Mapplethorpe verdict is troublesome in that, according to this jury's rationale, no professional work—albeit photography, painting, sculpture, motion picture, or theater—might be adjudged obscene, unless the jury is comprised of like artists. Under this reasoning, the *Miller* standard is implicitly unworkable.

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after the Cincinnati controversy.

[304] *Id.*

[305] *Id.*

[306] Contemporary Arts Center v. Ney, 735 F. Supp. 743 (S.D. OH, 1990).

[307] *Id.*

[308] *Miller* held that in order to be obscene, the matter must be proven by the challenger to have no "*serious* literary, artistic, political or social value." *See Miller*, 413 U.S., at 24 (emphasis added).

[309] *Id.*

[310] William F. Buckley, *Giulani Stands Against Pretensions and Profanity*, RICHMOND TIMES – DISPATCH (Universal Press Syndicate), Oct. 1, 1999, at A-15.

2. BROOKLYN MUSEUM OF ART

A special display opening in New York City's Brooklyn Museum of Art on October 2, 1999, created a minor public furor. Perhaps most controversial was a painting by an Englishman, Chris Ofile, portraying a black Madonna bearing elephant dung on one of her breasts, with background pastings of photos of genitalia which had been extracted from pornographic magazines. Other displays in this exhibit also provoked outrage, *e.g.*, a bust composed of the sculptor's own blood; mannequins of small children with markedly oversized genitals; a cow's head in a stage of decomposition (complete with live munching flies); and the carcass of a pig.[311]

Mayor Rudy Giulani found the Virgin Mary painting especially offensive and threatened to terminate city funding if the exhibit, which Cardinal John O'Connor termed an "attack on religion,"[312] was not removed. The New York Civil Liberties Union refuted the mayor's statements as violative of the museum's First Amendment rights.[313]

The fact that the museums in the Brooklyn and Mapplethorpe instances received public aid supplies two crucial distinctions between those cases and the cases decided in the wake of *Miller*. In the Brooklyn Art Museum Affair, columnist William F. Buckley lauded the mayor's courage, characterizing Giulani's focus as being on "subsidized irreverence, rather than artistic independence."[314] Unrestrained First Amendment advocates, on the other hand, chastised Giulani's stand as one in total disregard of the constitution.[315] Columnist Steve Chapman described the mayor as one "who tends to regard the First Amendment the way a Hindu might regard the Ten Commandments—interesting and important, but in no way binding."[316]

The Mapplethorpe situation and Serano's "artistic" display at a federally

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[311] Perceiving such material as art, one is reminded of Justice Harlan's statement that "[O]ne man's vulgarity is another lyric." Cohen v. California, 403 U.S. 15, 19 (1950). *See supra* note 234.

[312] Carol Vogel, *Artist finds controversy confusing*, RICHMOND TIMES – DISPATCH (New York Times News Service), Oct. 1, 1999, at C-1, col. 1.,

[313] Steve Chapman, . . .*Museum stands Under First Amendment Umbrella*, RICHMOND TIMES – DISPATCH (Creators Syndicate), Oct. 1, 1999, at A-15, col. 1-4

[314] Buckley, *supra* note 310.

[315] *Id.*

[316] Chapman, *supra* note 313.

funded show of a crucifix in a jar of urine prompted Congress to enact an amendment to the statute governing the parameters for material funded by the National Endowment for the Arts, the federal granting agency.[317] Referred to as the "decency amendment," the NEA, in determining whether to grant financial support to an artistic project, must now "take into consideration *general standards of decency* and respect for the diverse beliefs and values of the American public."[318] Articulating what in fact these "general standards" are, however, could challenge even Solomon.

The Supreme Court's guidance regarding the effect on constitutional rights of restricting matter allegedly artistic has been murky at best. In 1998, the Court upheld the "decency amendment" in *National Endowment for the Arts v. Finley*,[319] cautioning the NEA, however, not to "leverage its power to award subsidies... into a penalty on disfavored viewpoints."[320] As a result, the government as financial patron, might constitutionally exercise some discretionary control over content, but not a control which is complete or absolute. However, the *Finley* Court has not provided a clear definition of what "some discretionary control" actually means.

D. PUBLIC SCHOOL DRESS AND /OR HAIR STYLE CODES

The oft-cited *Tinker v. Des Moines Independent Community School District* is the seminal case for the proposition that students in public schools have a constitutional right to dress as they choose.[321] The Supreme Court in *Tinker* extended First Amendment protection to students who had worn black armbands to school in protest of the Vietnam War, contrary to administrative mandates.[322]

In *Tinker* students aged 13, 15, and 16 and their parents, met in a group and collectively decided to wear black bands for the purpose of making known their anti-war sentiments.[323] In the holding, the Court stressed that the student's apparel was not aggressive nor disruptive and the facts did not involve a school

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317 *See* 20 U.S.C. § 954 (d) (1) (1965).

318 *Id.* (emphasis added.)

319 118 S. Ct. 2168 (1998).

320 *Id.* at 2178.

321 393 U.S. 508-09 (1969).

322 *See id.* at 504.

323 *See id.*

dress or hair-length code.[324] The Court did, however, hold that public schools must meet the burden of showing some justification for a prohibitory regulation,[325] adding that "it can hardly be argued that. . .students. . .shed their constitutional rights to freedom of speech or expression at the school house gate."[326]

In *Hazelwood School District v. Kuhlmeier,*[327] the Court seemingly retracted somewhat from its liberal position in *Tinker.* The Court upheld the right of the school administration to delete from the school newspaper two student articles—one on the author's pregnancy experience, and the other on the effect of parents' divorce on a student.[328] Some have viewed *Hazelwood* as a change in the Court's perception regarding the public schools' mission and how they might fulfill the goal of educating students.[329]

Although the Supreme Court has not addressed the constitutionality of dress- or hair length regulations in public schools, the general rule applied by the lower courts is that they will be upheld only if proven to be for the purpose of preventing substantial disruption to school activities.[330] For example, lower courts have upheld grooming regulations in the high school environment in some instances. In *Davenport v. Randolph County Board of Education* a football coach's "clean shave" rule was upheld as constitutional.[331] The federal appellate court, however, seemed to infer a distinction between such a rule for students who choose to participate in a school activity and a rule applicable to the student body at large.[332]

In autumn, 1999, a controversy arose in metropolitan Richmond, Virginia,

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[324] *See id.* at 514.

[325] *Id.* at 509.

[326] *Id.* at 506.

[327] 484 U.S. 260 (1988).

[328] *See id.* at 276.

[329] *See, e.g.,* Alison G. Myhra, *No Shoes, No Shirt, No Education: Dress Codes and Freedom of Expression behind the Modern Schoolhouse Gates,* 9 SETON HALL CONST. L.J. 337, 374 (1999).

[330] *See, e.g.,* Jeglin v. San Jacinto Unified School Dist., 827 F. Supp. 1459 (C.D. Cal. 1993) and Olesen v. Bd. of Educ., 676 F. Supp. 820 (N.D. Ill. 1987).

[331] 730 F.2d 1395, 1398 (11th Cir. 1984).

[332] *See id.* at 1397. Playing on the football team was designated by the court as a "privilege," rather than a right. *Id.*

when an eighth grade girl was sent home from her public school because of her pink hair and floor-length dress.[333] Her parents immediately contacted the ACLU, which threatened federal court litigation unless she were permitted to return to school without any such dress and/ or hair style restriction. However, the school administration had already begun negotiating a settlement at the time the ACLU intervened, and the outcome was to allow her to return, pink hair and long dress intact. According to school officials, this decision had been reached prior to their receipt of the ACLU's letter.[334]

It is important to note that the county school superintendent had fully supported the school principal's disciplinary action. He criticized the ACLU's actions, stating that the ACLU was neither "elected nor appointed to run Chesterfield County Schools," adding that "as families and schools, we're going to have to work together on these human qualities and not first throw down the gauntlet."[335] The Attorney General of Virginia responded with a correspondence to the State Superintendent of Public Instruction, copied to media outlets, accusing the ACLU of attempting to "intimidate school teachers and administrators with threats of litigation."[336]

Letters to the editor of the Richmond newspaper abounded, both in support of the student's rights and in affirmance of the school administration's obligation to enforce reasonable dress and hair regulations. Chesterfield school officials had taken the position that the student's hairstyle and attire were disruptive to the operation of the school, the linchpin of judicial affirmance of such regulations.[337] However it seemed apparent that the student's First Amendment right would prevail, absent some showing that the attire or hair style subject to objection presented a disruption to the orderly management of the school's educational function.

Shortly on the heels of the pink-hair publicity, a 17-year old male student stirred controversy when he wore a long flower-print skirt, a Grateful Dead T-shirt, and sandals to his rural Charlotte County, Virginia public school. Because

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[333] In Chesterfield County, the site of this occurrence, each school is given the discretion by the county board to draft and enforce its own reasonable dress and hair codes, so it is conceivable that the same disciplinary action would not have taken place in another school within the same district.

[334] Kristen Noz, *Eighth-grader With Pink Hair Back in School*, RICHMOND TIMES – DISPATCH, Sept. 9, 1999, at B-1, col. 4-5.

[335] *Id.*.

[336] *Id*.

[337] *Id.*.

of other students' giggles and finger pointing, the school principal sent the young man home and ordered him not to return until he was dressed appropriately.[338] The student's immediate reaction was to collect some 143 signatures of students in support of the "right for males to wear women's clothing at a public school."[339] He, too, contacted the ACLU, but there was no further media commentary on this situation.

In light of the above examples, the rule itself is unambiguous: a student's constitutional right will be upheld unless there is some showing by the school that the hair style or attire in question actually interferes with the orderly purpose of the school, *i.e.*, to educate students. It is the application of the rule rather than its text that provides the catalyst for debate. It is up to the courts to determine on a case-by-case basis whether a student's dress or grooming habits are likely to present such an interference or disruption.

E. COMMUNICATIONS WHICH ENCOURAGE VIOLENT ACTIVITY: THE "CLEAR AND PRESENT DANGER" DOCTRINE

The Court first introduced the idea of a "clear and present danger" exception to First Amendment protections in *Schenck v. United States*, an Espionage Act case.[340] The *Schenck* Court held that an expression will sustain a conviction under the statute when the "words. . .are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[341]

Only a few years after *Schenck*, the Court refined the doctrine in *Gitlow v. New York*, upholding the constitutionality of a state statute designed to "suppress. . .a threatened danger in its incipiency."[342] The *Gitlow* Court applied the doctrine enunciated in *Schenck* involving an act of Congress to state legislation.

The Court again limited this doctrine in *Brandenburg v. Ohio,*[343] holding that

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[338] Jamie C. Ruff, *Mother's skirt OK, but not on son*, RICHMOND TIMES – DISPATCH, Sept. 14, 1999, at B-4, col. 5.

[339] Jamie C. Ruff, *Teen-ager petitions to wear a skirt*, RICHMOND TIMES – DISPATCH, Sept. 15, 1999, at B-4, col. 2-3.

[340] 249 U.S. 47 (1919).

[341] *Id.* at 52.

[342] 268 U.S. 652, 670 (1925).

[343] 395 U.S. 444 (1969).

even speech which abstractly encourages or engenders violence or any other unlawful act is constitutionally protected "except where such advocacy is directed to inciting or producing *imminent* lawless action *and is likely* to incite or produce such action."[344] The courts in such cases must determine how soon the ensuing violence follows the expression must have been in order to be regarded as "imminent."

Highly publicized murders allegedly committed after reading or watching violent entertainment have sparked recent civil actions against book publishers and authors and movie screenplay writers. For example, Timothy McVeigh, executed in June, 2001 for the 1995 Oklahoma City federal building bombing, alluded to a racist novel, THE TURNER DIARIES, as having been his source of his instruction on how to construct the bomb. Some families of those killed considered suing Paladin Books, the publisher, in wrongful death actions.[345] Writer and screen director Oliver Stone was sued in one civil action for his role in the 1994 film, "Natural Born Killers," a satiric account of a crazed young couple who traveled across the country and killed 50 people. The movie allegedly inspired at least 14 killings in the U.S.A. and Europe, a probable record number of media-induced murders.

Patsy Ann Byers, a 37-year-old convenience store worker and mother of three young children, survived such an attack. Two 18-year-old Texans, a man and a woman who admittedly had been motivated by Stone's film, had already killed a cotton gin owner in northern Mississippi (who had been a close personal friend of lawyer-author John Grisham) when they entered the Louisiana store in which Byers was working. The young woman shot Byers, and remarked to her, "poor old thing, you're not dead yet. I'll fix you. I'll finish you." She did not fire again, however, but the two stole $105 from the cash register and left the worker lying on the floor, presumably to die. Although she survived, she is a quadriplegic confined to bed. The young woman who shot her was convicted of armed robbery and attempted murder, and her companion pleaded guilty to the charge of murder in the Mississippi incident.[346] Byers sued Stone and Warner Bros. Studios in a Louisiana state court, but the case was dismissed. The legal precedent was *Burstyn v. Wilson*,[347] in which the Supreme Court ruled that movies qualify as "artistic" expression entitled to protection under the First Amendment.

The courts have not been consistent with regard to whether publishers, movie

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[344] *Id.* at 447 (emphasis added).

[345] John Gibeaut, *Deadly Advice Targeted*, A.B.A. J., July, 1999, at 24.

[346] *Id.*

[347] 343 U.S. 495 (1952).

producers, and/ or writers bear civil liability for injuries or deaths induced by what the criminals have read or seen of their products. The mother of a 14-year-old boy found nude and hanging in his closet sued *Hustler* magazine in the late 1980's. At the dead boy's feet was a copy of the periodical, opened to an article which described the increased sexual excitement derived from masturbation if the blood supply to the brain is stopped. [348] Although she was awarded a $182,000 jury verdict, the Fifth Circuit Court of Appeals reversed, holding that the magazine and its publisher were protected by the First Amendment.[349]

The Fourth Circuit Court of Appeals in Richmond, however came to a very different conclusion in a similar case. The murderer, James Edward Perry, was convicted and is currently on Maryland's death row awaiting execution.[350] Perry was hired by the former husband of one of his victims to kill his former wife, their 8-year-old paralyzed son, and the boy's nurse.[351] The former husband's motive had been the probability that he, as the father/former husband, would collect a $1.7 million settlement from a malpractice suit arising out of the boy's paralysis.[352] Convicted of aiding and abetting, the father/former husband is serving a life sentence.[353] He had contracted the killer and had supplied him with a 130-page book entitled HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS.[354] The book's instructions assured that the crimes would be accomplished efficiently and without the killer's being apprehended.[355]

On the defendant's motion for summary judgment, the Fourth Circuit Court held that the book was not within First Amendment protection and that the plaintiff had a right to sue the publisher.[356] The imminence requirement postulated by

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[348] Herceg v. Hustler Magazine, 814 F.2d 1017, 1024 (5th Cir. 1987).

[349] *Id.* at 1025.

[350] Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 239 (4th Cir. 1997).

[351] *Id.*

[352] *Id.*

[353] *Id.*

[354] *Id.*

[355] *Id.* Perry apparently did not follow the book's instructions to the letter, since he was detected by Maryland police when he checked into a motel near the scene of the crime and registered by his name and address. *See* John Gibeaut, *Deadly Advice Targeted*, A.B.A. J., July, 1999, at 25.

[356] *Rice*, 128 F.3d at 240-41.

the Supreme Court in *Brandenburg* was held by the appellate court to be inapplicable (by the time of the actual murders, more than a year had lapsed since Perry had read HIT MAN) because of the eerie and grim detail of the book.[357] Indeed, the defendant publisher conceded at the summary judgment stage that the purpose of the book was to provide instructions for murderers for hire.[358]

No federal appellate courts other the Fifth Circuit in *Herceg* and the Fourth Circuit in *Rice* have addressed the issue. Moreover, the Supreme Court's refusal to grant certiorari in *Rice*[359] leaves the split between these two circuits unresolved.

A postscript to *Rice* is instructive in that it indicates that even the most staunch First Amendment advocate might agree that some expression falls beyond its protection. Professor Rodney A. Smolla of the University of Richmond School of Law was one of the authors of an *amicus curiae* brief filed on behalf of the plaintiffs. Smolla is a nationally known constitutional scholar, and his stance on absolute First Amendment rights has been staunch. For the first time, however, he felt compelled to shift from his usual position. Indeed, Smolla earlier had referred to any exception to the umbrella of First Amendment protection as the "back side" of the constitution.[360] He described his departure in the *Rice* situation as a personally "painful" one,[361] and he went on to write a book on his experience in the *Rice* litigation.[362]

F. RACIST COMMUNICATIONS

The Ku Klux Klan is an organization which propounds white supremacy. The Klan, or "KKK", first appeared in the South following the Civil War (1861-1865). The origin of the name is a Greek word (*kyklos*) which means *circle*. Although originally formed for the innocuous purpose of providing a social association for war veterans, the Klan soon became a vehicle by which former slaves were terrorized. This group has impeded blacks from exercising voting rights;

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[357] *Id.*

[358] Gibeaut, *supra* note 355, at 25.

[359] 118 S. Ct. 1515 (1998).

[360] RODNEY A SMOLLA, JERRY FALLWELL VS. LARRY FLYNT 184 (St. Martin's Press, 1988).

[361] Robert Dean Pope, *Smolla Chronicles Case of Murder-for-Hire by the Book*, RICHMOND TIMES – DISPATCH, Sept. 26, 1999, at K-4, col. 2-6.

[362] RODNEY A SMOLLA, DELIBERATE INTENT (Crown Publishers, 1999).

threatened whites that have aided or befriended blacks; tortured and lynched blacks; and burned black churches. Its activities are also directed against Roman Catholics, Jews, persons the Klan deems "radical," and foreigners.[363] The traditional garb of the Klan is a long, whitehooded robe, with a face covering showing only the wearer's eyes through holes. This conceals the identity of the member.

Generally, states have been permitted to regulate or even prohibit certain KKK activity on the basis of the "imminent danger" theory. The starting point, however, is that such prior restraint is encumbered with a heavy presumption against its constitutionality.[364]

Brandenburg v. Ohio[365] provides some guidance. In *Brandenburg*, a conviction of a Ku Klux Klan member was reversed by the Supreme Court which held that the Ohio state statute under which he had been charged was unconstitutional. That statute made criminal any "advocati[on of] the duty, necessity or propriety of crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[366] The Court held that the constitution permitted mere advocacy of unlawful activity, unless it was "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[367]

In a 1990 federal district court case, *Ku Klux Klan v. Martin Luther King Worshippers*,[368] a parade permit ordinance adopted by the town of Pulaski, Tennessee came under constitutional attack by the KKK. The ordinance provided that a permit applicant would only be granted one permit per calendar month. Moreover, such permits would be granted on a first-come first-serve basis, thereby allowing only one permit per calendar date. The ordinance vested in officials the discretion to deny a permit to a group if it advocated unlawful activity, racial intimidation, or the overthrow of government. Permits would only be granted to groups with up to 250 marchers, and participants would not be allowed to wear masks or disguises. The Klan had requested three permits, for January 13, and 20, and February 3, 1990. Only the February 3 request was

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[363] 11 WORLD BOOK ENCYCLOPEDIA 310 [KU KLUX KLAN (1978)].

[364] *See, e.g.*, Walker v. Birmingham, 388 U.S. 307, 87 Ct. 1824 (1967) (involving a Klan street demonstration).

[365] 395 U.S. 444 (1969).

[366] *Id.* at 444-45.

[367] *Id.* at 447.

[368] 735 F. Supp. 745 (M.D. Tenn. 1990).

granted, expressly because other permits has been granted for the two January dates.

The planned parades were intended to celebrate a KKK "homecoming." The federal district court held the ordinance unconstitutional on its face because it empowered city officials to refuse a public forum in advance of any actual expression and arbitrarily to suppress free expression of views.[369]

More recently, New York City Mayor Rudy Giulani supported the city police department's refusal to grant the KKK a permit to conduct a rally in lower Manhattan. The stated reason was the Klan's intent for its members to don the traditional "masks," a violation of a city ordinance prohibiting the wearing of masks on public property, with the exception of Halloween masks on October 31. The KKK challenged the denial on First Amendment grounds and achieved a partial victory, as a New York municipal court granted the parade permit on constitutional grounds, but Klan members were denied the right to wear the masks. The court viewed the ordinance as legitimate because it prevented the engaging in acts of violence under a cloak of anonymity.[370]

On the Virginia front, Klan activity received a considerable degree of national publicity and even notoriety, largely because of the ACLU's selection of the attorney who would represent Barry Elton Black. Black is a KKK member who was charged with having violated a Virginia law in Carroll County, a sparsely populated and rural Virginia locale in the southern part of the state. The attorney was David Baugh, a black man whose advocacy for unrestricted constitutional rights has long been noted as impassioned and sincere.[371] The statute makes criminal the burning of a cross on public property or in the presence of others with the intent of intimidating any person or group.[372] A violation of this

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[369] *Id.* at 749 (citing Hague v. CIO, 307 U.S. 496 (1939), as controlling) The portion of the ordinance stating that only one permit for a day was upheld as a reasonable means of maintaining access on the streets of Pulaski, a small town, but the one-permit-per month stipulation was overturned. *Id.* The town officials conceded that the latter was intended solely to preclude KKK parades during January, the month of the Martin Luther King holiday. *Id.* at 752.

[370] Steve Chapman, The First Amendment Apples in New York City, Too, RICHMOND TIMES – DISPATCH, Oct. 30, 1999, at A-15. Chapman noted in this editorial that those who were in danger of being victims of violence proved to be the Klan members themselves. Three observers who attacked the leader of the Klan and several others who began fights with policemen were arrested. *Id.*

[371] Baugh has been quoted as having referred to the U.S. Constitution as "the most sacred document ever written by man... the first framing document where people gave power to government, not the other way around." Charles C. McGuigan, *Attorney David Baugh. The Man Who Would Be Robin Hood, Woe To the King's Men*, NORTH SIDE, June, 1998, at 58, 59.

[372] VA. CODE ANN. § 18.2-423.

statute is a Class 6 felony, punishable with 1-5 years in prison and/or fine up to $2500.[373] Baugh was soundly criticized by both local and national black groups such as the NAACP for his defense of a man who vocally promoted violence against blacks.

Burning crosses is a well known, albeit notorious, Klan ritual. After the county sheriff was anonymously notified of a planned Klan rally, he and one of his deputies went to the site to be certain that no illegal activities occurred.[374] They, and a woman who owned the adjacent mobile home, witnessed and testified that the defendant set fire to a 25-30'-high cross. "Amazing Grace" was played and amplified while the cross burned.

On June 28, 1999, Black was convicted and fined $2500. Baugh petitioned the Virginia (state) Court of Appeals for review, and the petition was granted December 1, 1999.[375] The case will probably be heard in late spring-summer, 2000.

Unless this court, or potentially the United States Supreme Court, is able to distinguish the facts in the Black case from those in *Brandenburg*, the Virginia statute is likely to be abolished.[376]

V. CONSTITUTIONAL FUNDAMENTAL RIGHTS AND FREEDOM OF SPEECH IN IRELAND

The Constitution of Ireland was adopted in 1937 pursuant to a referendum called by Eamon De Valera, founder of Fianna Fail Party.[377] The document declared Ireland (Eire) a republic—a "sovereign, independent, democratic state."[378] This was a strikingly bold, if not defiant, act, since Ireland had achieved only the

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[373] VA. CODE ANN. § 18.2-22.

[374] Although the site of the cross burning was private property, the landowner consented to the activity and was also present at the meeting.

[375] Record No. 1581-99-3, from the Circuit Court of Carroll County, No. CR 98-461. Interestingly, Baugh's co-counsel on the appellate brief was Professor Smolla.

[376] If the Virginia Court of Appeals and Supreme Court uphold the statute, Baugh will likely petition the U.S. Supreme Court for certiorari. Under American federalism, a decision of the highest court in a state that a state law is constitutional can be appealed directly to the U.S. Supreme Court if the position is that the state statute violates the U.S. Constitution.

[377] De Valera thereafter became Ireland's first Prime Minister.

[378] IRELAND CONST. art. 5.

status of a Free State in 1921[379] and that of a dominion in 1931.[380]

The parallel section which corresponds to the United States Constitution's First Amendment freedom of speech clause reads as follows:

The State guarantees liberty for the exercise of the following rights, subject to public order and morality:

1. The right of the citizens to express freely their convictions and opinions.

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavor to ensure that *organs of public opinion*, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, *shall not be used to undermine order or morality or the authority of the State.*

The publication or utterance of *blasphemous, seditious, or indecent matter* is an offense, which shall be *punishable* in accordance with law.[381]

Perhaps the most obvious immediately noticeable distinction is the brevity of the First Amendment in contrast with the parallel section in the Irish Constitution.[382] Indeed, the United States Constitution in its entirety is remarkable for its succinctness,[383] a characteristic intentional on the part of the drafters.

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[379] 1920 Act of Partition.

[380] 1931 Act of Ireland. Ireland was not granted its status as a republic until 1949. Its parliament was independent from Westminster (United Kingdom), but not a republic separate from the United Kingdom.

[381] IRELAND CONST. art. 40, 6°, 1 (i) (1937) (emphasis added).

[382] Even in its shorter form, the First Amendment incorporates also freedom of the press, the right of the people peacefully to assemble and to petition the government for the readiness of grievances and freedom of religion, a subject more extensively addressed elsewhere in the Irish Constitution. *Compare* U.S. CONST. amend. I with IRELAND CONST. art. 44 (1937).

[383] The original constitution of 1787 included only seven articles, and in the more than 200 years since its adoption only 27 amendments have been added. *See generally* U.S. CONST. In contrast, the more recent 1937 Irish constitution has 50 articles. Furthermore, the language of its separate provisions is markedly more detailed than is the "bare-bones" wording of the U.S. Constitution. *See generally* IRELAND CONST. (1937).

Irrespective of length, there are patent differences between the language of the two constitutions' freedom of expression clauses. Notably, the U.S. Constitution's Bill of Rights' protection of the "people" vests many non-citizen immigrants in the United States with the right of free expression. On the other hand, the Constitution of Ireland protects citizens rather than people, and contains several provisos which are absent from its American counterpart. The Irish constitutional right to use the media as a vehicle for criticism of the government is qualified. Expressly forbidden is any "undermining of order or morality or the authority of the State."

The first from among these three provisos might indeed be similar in purpose to the U.S. Supreme Court's "fighting words" exception, a doctrine which remains alive, although with a palpably decreasing heart rate.[384] However, the second qualification of freedom of expression in Ireland, the exclusion of any material which has an adverse effect on "morality," is reminiscent of the Ohio court's permissibility of the Mapplethorpe exhibit as possibly evidencing "serious artistic" elements; the constitutionality of the message on the jacket worn in the courthouse hall in *Cohen*; the allowable Nazi march in *Collin*; and the permitted Klan activity in *Brandenburg*. The Nazi era is arguably the basest and most immoral in history, and the Ku Klux Klan's very organization is founded on the premise of hatred and immortality, but United States federal courts held those activities were constitutionally protected. If the wording of the First Amendment were identical to that in the Irish document, it is dubious that these activities would have been held lawful.

Moreover, although the Constitution of Ireland prohibits "indecent" and/or "obscene" communications, the document does not define either term. As opposed to the United States Supreme Court, which has held that obscene matter is beyond the protection of the First Amendment.[385] What indeed qualifies as obscene—and, in Ireland, indecency—is a matter for the courts to decide.

It is notable that the Irish constitutional condemnation of obscene or indecent publication or utterances[386] has not extended to mere possession of such materials.[387] This would appear to align Ireland with the United States Supreme Courts' position in this regard.[388] Among the legislation enacted pursuant to Ar-

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[384] *See supra* Part III.

[385] *See* Roth v. U.S., 354 U.S. 476 (1957).

[386] IRELAND CONST. art. 40.6.1.

[387] J.M. Kelly, *Freedom of Speech*, *in* THE IRISH CONSTITUTION 945, n.102 (Gerard Hogan and Gerry Whyte eds., 3rd ed. 1994).

[388] *See* Stanley v. Georgia, 394 U.S. 557 (1969).

ticle 40 is the Censorship Film Act,[389] which established the office of Official Censor of Films. This body is allowed to ban the showing of a movie it deems "unfit for general exhibition in public by reason of its being indecent, obscene, or blasphemous or because the exhibition. . .in public would tend to inculcate principles contrary to public morality or would be otherwise subversive of public morality."[390] This statute provides for appeal to the Censorship of Films Appeals Board, somewhat similar to the appeal process for the Memphis, Tennessee Board of Review, which replaced the unconstitutional Board of Censors.

Another statute, as amended, enacted under the Article 40 of the Irish Constitution authorizes censorship of video recordation, sales, and rentals.[391] It is not likely that these statutes, and the Censorship Film Act, would pass constitutional muster in the United States, at least not before the Court adopted the rationale used in *Barnes*[392] and *Pap's*[393], both arguably aberrations in First Amendment jurisprudence.[394]

With regard to live performances, in Ireland it is a common law criminal offense to produce or engage in obscene or indecent shows.[395] Unlike Ireland's common law basis, the laws at issue in *Barnes* and *Pap's* were municipal ordinances. In both cases, the U.S. Supreme Court permitted localities to determine local mores and how best to protect them, a variation on a position first approved by the Court in *Miller v. California*.[396] The dissenters in *Barnes* and *Pap's*[397] insisted that the majority unequivocally had unconstitutionally encroached on the

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[389] Censorship Film Act 1923, 1992.

[390] *Id.* § 7(2).

[391] Video Recordings Acts 1989 and 1992, § 3.1.

[392] Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

[393] City of Erie v. Pap's A.M. 120 S. Ct. 1382 (2000).

[394] *But see* Ginsberg v. State of New York 390 U.S. 629 (1968) (which limited the publication of materials done in a fashion which "panders" its obscene elements).

[395] J.M. Kelly, *Freedom of Speech*, *in* THE IRISH CONSTITUTION 945, n.102 (Gerard Hogan and Gerry Whyte eds., 3rd ed. 1994). Kelly notes here, however, that prosecutions for such activity have been rare. *Id.*

[396] 413 U.S. 15 (1973). The *Miller* Court held that a state is to determine what might offend mores within its boundaries. *See* discussion *supra*.

[397] JJ. Blackmun, Brennan, and Marshall in *Barnes*. 501 U.S. 560 (1991). JJ. Souter, Stevens, and Ginsberg in *Pap's*. 120 S. Ct. 1382 (2000).

right of free speech. The lingering spirits of Justices Douglas and Black, and later, Brennan, surely would have sided with these dissenting justices.

This indicates another slight distinction between the Irish statutes and the ordinances in *Barnes* and *Pap's*. The former actually empowers a national board to censor across the country performances it regards as inimical to public morality. The relative sizes of the United States and Ireland, however, probably makes this difference inconsequential. In smaller countries, such as the Republic of Ireland, there is little, if any, true-law making power below the national level. Each of the fifty American states, on the other hand, has its own legislature and court system.

With regard to the blasphemy ban, Ireland appears of late to be leaning toward a more permissive and modernized stance. In 1991, a Law Reform Commission[398] recommended that the constitutional provision prohibiting blasphemy[399] be deleted, characterizing it as "inappropriate in a free speech society."[400] Moreover, the Commission concluded that this constitutional provision violated European law.[401] While Ireland's membership in the European Union has imposed supranational obligations with regard to free speech, it is submitted that the breadth of the United States Supreme Court's constructions of the United States First Amendment render American free-speech protection as comprehensive as any which European Communities law dictates.

The third part of this conditional freedom of expression in Ireland, the exclusion of any expression which "undermine(s) the authority of the State," presumably would have rendered the public school students' defiant action in *Tinker*[402] and the recent Virginia pink hair[403] and male-dressed-in-mom's-skirt[404] controversies beyond the realm of constitutional protection. Moreover, the preclusion of "blasphemous" expression would surely have forbidden the elephant-dung adorned black Madonna painting in the Brooklyn museum,[405] were it to

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[398] Report on the Crime of Libel (1991), at 80-84.

[399] IRELAND CONST. art. 40.6.1. (i)

[400] J.M. Kelly, *Freedom of Speech, in* THE IRISH CONSTITUTION 945 (Gerard Hogan and Gerry Whyte eds., 3rd ed. 1994).

[401] *Id.*, at n.98 (citing SUNDAY TIMES v. U.K., Series A, No. 30, (1979) 2 EHRR (1983), and Gay News Ltd. V. U.K. Ap. 8710/79, 5 EHRR 123 (1983).

[402] *See* discussion of *Tinker supra*..

[403] *See* discussion *supra* notes 333-38 and accompanying text.

[404] *See* discussion *supra* notes 338-39 and accompanying text.

have appeared in Dublin rather than New York City.

The forbiddance of publication of "indecent matter" in Ireland would apparently have resulted in different outcomes in American cases involving the sale and /or exhibit of fundamentally objectionable materials which meet the *Miller* standard of evidencing "serious" literary value, although that value may be of minimal and dubious quality. To be sure, there are indeed materials available for purchase in Ireland which this author would deem obscene, and if this section of the Irish constitution were strictly enforced, they most likely would be banned.

The absence of any qualifying language in the First Amendment realistically makes obscenity, "fighting words," and other exemptions somewhat enigmatic: the exceptions are Supreme Court augmentations of language which is facially absolute. Recognition of these exceptions has been an aberrant deviation from an unambiguous provision. While these are clearly exceptions to the general rule, and are sparsely used in the United States, the Constitution of Ireland's proviso, on the other hand, which prohibits "blasphemous, seditious, or indecent," utterances or materials, limits freedom of speech in Ireland considerably beyond what the United States Supreme Court permits.

Finally, the conditional language of the Constitution of Ireland also appears to shift the burden of proof. One seeking to have an expression with "indecent" or "immoral" characteristics upheld seemingly has the onus of justifying and disproving any "indecent" quality. On the other hand, in the United States, courts have consistently presumed expressions to be constitutionally protected, absent proof by the challenger that they fall clearly within on of the narrow judicially crafted exceptions.[406] The Court has been parsimonious in holding words or expressive actions beyond the scope of constitutional protection.

CONCLUSION

American freedom of expression is foremost among constitutional rights. Nonetheless, the patently absolute language of the First Amendment has been modified somewhat by judicially created exceptions, and perhaps the most sweeping exception is the reduced protection afforded to obscenity or pornography. Such communications are subject to some degree of governmental restriction, particularly with respect to their accessibility to children. Indeed, the fundamental test for what might be classified as "obscene" was broadened by the 1973 *Miller* Court, which held that only sexually perverse material evidencing

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[405] *See* discussion *supra* notes 311-13 and accompanying text.

[406] *See, e.g.*, Jeglin v. San Jacinto Unified School Dist., 827 F. Supp. 1459 (C.D. Cal. 1993); Brandenburg v. Ohio, 395 U.S. 444 (1969); Herceg v. Hustler Magazine, 814 F.2d 1017 (5th Cir. 1987) (all discussed *supra*).

"serious" literary or artistic value will be constitutionally shielded.

The so-called "fighting words" exception recognized in the early 20th century, however, was subject to an erosion which quite nearly dispensed with the doctrine. The judiciary has consistently imposed a strong burden upon the party seeking to prove that a specified communication should be excepted from the general rule favoring constitutional protection. American courts hold as sacrosanct the historical concept of toleration, not only for what one has to say, but also for the manner in which he chooses to communicate his message, however crude and objectionable it might be.

In contrast, the Irish Constitution's qualifying language tempers the extent to which Ireland's courts might interpret this freedom of expression. Unprotected indecent, immoral, and/or blasphemous communications are expressly beyond the scope of freedom of expression in Ireland. United States courts, however, can only exercise such control over speech by carving a judicial exception, and this control is infrequently employed.