

V. The American Constitution: Rights and Freedoms of Individuals

The American Constitution: Rights and Freedoms of Individuals

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Among the most significant American contributions to political thought is the written constitution. The purpose of a written constitution is formally to define and limit the powers of government. With that in mind, while creating the new government, the framers made a curious and significant omission to the Constitution: they excluded from its terms most protections of individual rights. While Congress, for example, was explicitly granted certain powers in Article I, section 8, and explicitly denied others in Article I, section 9, little mention, either as a grant or a denial of power, was made in the original Constitution on the matter of protection of individual rights.

It is true that certain protections against federal encroachment were specified in the Constitution. The prohibitions against bills of attainder, ex post facto laws, the suspension of habeas corpus except in extraordinary circumstances, and the guarantees of the right to trial by jury and to all the privileges and immunities of citizenship are suggestive of the framers concern about protecting individual rights.¹¹⁵ As respects most liberties, though, the Constitution is silent. There are several reasons for this.

¹¹⁵ Of contemporary interest was the extensive discussion by the framers of impeachments and its subsequent specification in the Constitution. Intended as “the haviest peice of artillery in the congressional arsenal” [Lord Bryce, 1 American Commonwealth (rev. Ed., New York: MacMillan & Co., 1914), p. 212], it represents the greatest check against arbitrary government. The Congress, as representative of the people, could by the impeachment provision remove members of the executive and the judicial branches; neither of those branches, however, alone or in concert, could remove a member of Congress. Bryce continues by noting that “because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at.” Id. Recent experience only corroborates his judgment.

Above all, the framers assumed that the newly created federal government would not have the power to regulate or diminish individual rights. They concluded that as the federal government was one of delegated powers, and as no authority to intrude upon the rights of individuals had been delegated to it in the Constitution, no constitutional protection of individual rights was necessary. As Hamilton stated, “why declare [in the Constitution] that things shall not be done which there is no power to do?”¹¹⁶ Further, if varying constitutional protections were specified, such as liberty of the press, then the government might pass regulations to enforce those protections. Those regulations themselves would represent restrictions upon an otherwise unfettered right to publish.¹¹⁷ Thus, the framers concluded that since the new government did not have the power to act to restrict liberties, it should not. But what if it did?

Historically, a large territory had implied the existence of a tyranny to govern it. Only through unified rule had diverse peoples and territories been capable of being united. Confronted with the large expanse of America, the framers turned the lessons of history to their advantage. Instead of the large territory’s providing a rationale for tyranny, it would provide a natural protection against tyranny. The protection would emanate from the fact that the large territory would militate against groups’ being able to join together to diminish the rights of others. The simple fact of largeness would make it difficult for persons of like interests to communicate and act in concert in ways that would have the effect of depriving others of freedoms.

A concomitant of the large territory would be a large population. The framers believed that the larger the population, the greater the likelihood that good men could be selected to govern. They chose to create a republic (a representative system), not a democracy (direct participation in government), in order to allow the best to govern. If the proportion of good men to the remainder be equal in a small and in a large population, then the larger the population the greater the number of good men from whom the people might select their leadership. Those leaders would not be inclined to the pursuit of private interests at the expense of others; rather, they would govern in the interests of all. Thus, the large territory and the large population would work hand in hand as natural forces to protect freedoms of all.¹¹⁸

Finally, on the assumption that the absence of Constitutional authorization and the existence of natural restraints might not prove to be adequate, artificial constraints were conceived. While man in isolation may be timid, by nature he tends to join others of like interest. His reason “acquires firmness and confidence in proportion to the number with [whom he] ... is associated.”¹¹⁹ It is in groups that his true nature emerges, characterized by “ambition, avarice, personal animosity, party opposition, and many other motives not more laudable”¹²⁰ and he is naturally inclined to joining others in pursuit of his aims. Since the natural checks of large territory and population might not be enough to check man’s natural impulse, artificial

116 Hamilton, Madison and Jay, The Federalist, #84 (New York: The Modern Library, n.d.), p. 559.

117 Id.

118 Id., #10, pp. 59-61.

119 Id., #49, p. 329.

120 Id., #1, p. 4.

restraints had to be established. They centered in the system of separation of powers, checks and balances, federalism, and republicanism.¹²¹ Instead of assuming the people would in fact act in their own best interests, the framers assumed that they would not. They assumed that institutional restraints, including the representative principle which tied directly into the assumption of a large population and a large number of potential leaders, were additionally necessary and appropriate to protect individual rights.

The existence of natural and artificial checks upon man's nature would only work if the government were actively seeking to protect freedoms. The framers believed the "vigor of government is essential to the security of liberty..."¹²² The paradox was that while fearful of the tendency of government to deprive the citizenry of liberty, the framers nevertheless viewed vigorous governmental activity as essential to the preservation and protection of civil rights. The resolution of the apparent anomaly was left to subsequent generations, a resolution which first assumed the form of constitutional amendment and second actual practice under those amendments. The result is a system of government which prohibits intrusions on specified rights (civil liberties) and simultaneously one which by action protects others rights (civil rights).

The Constitutional Amendments

Hamilton had argued the dangers of attempting to include a listing in the Constitution of the various protections citizens should have.

Bills of rights...are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.¹²³

In spite of the logic of his position, several of the framers sought to have a bill of rights included in the original Constitution. They were not persuasive. After three months of work on the new Constitution the framers left Philadelphia in September, 1787. They had created "a large, powerful republic with a competent national government regulated under a wise Constitution,"¹²⁴ one which, nevertheless, significant numbers of people believed fatally defective in its failure adequately to protect individual rights. At least in New York, Massachusetts, and Virginia the price of ratification was agreement that a Bill of Rights would be proposed immediately upon the creation of the new government.

Madison soon introduced twelve amendments to the first Congress. Two did not receive adequate support for ratification, but the others were quickly adopted and appended to the original Constitution. Though not viewed as a Bill of Rights, and scoffed by some as being

121 See Tab III for an extended discussion of the form and structure of the governmental system.

122 Hamilton, Madison and Jay, *op. cit.*, #1, p. 5.

123 *Id.*, #84, p. 559.

124 Diamond, Martin, "What the Framers Meant by Federalism," in Robert A. Goldwin (ed.), *A Nation of States* (Chicago: Rand McNally & Company, 1963), p. 37.

unnecessary, over time the ten amendments came to be recognized as the hallmarks of American liberty, and the basis of much of the freedom in America.

The First Amendment is the best known with its basic command that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Some, to include the late Justice Black, a great civil libertarian, have argued that the language of the Amendment means precisely what it says, that "Congress shall make no law" in the constitutionally protected areas of religion, speech, press, and assembly.¹²⁵ This absolutist position has never been accepted by a majority of the Supreme Court. Rather, practice suggests that Congress may pass certain laws concerning speech, press, assembly and religion that the Court majority will deem constitutional; however, that majority's opinion may change according to time, circumstance, and its own composition.¹²⁶

The Second and Third Amendments of the Constitution concern the right of the people to bear arms ("a well regulated Militia, being necessary to the security of a free State") and not to have soldiers quartered in their homes. The third is of little contemporary significance, though some today argue that the Second's right to bear arms means that the government may not regulate hand guns and other firearms.

Amendments Four through Eight deal with rights of citizens involved in the criminal process. Protecting against unreasonable searches and seizures, self-incrimination, double jeopardy, and cruel and unusual punishments, and guaranteeing the right to a speedy, public, and fair trial with assistance of counsel, these rights are central to civil liberty. Justice Frankfurter has noted that "the history of American freedom is, in no small measure, the history of procedure,"¹²⁷ and Justice Douglas has asserted that "it is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."¹²⁸

Under the Constitution the states have primary responsibility for the administration of criminal justice. While the Fourth through Eighth Amendments were held only to restrict the federal government and not to apply to the states by an early Court,¹²⁹ practice has overcome

¹²⁵ See, for example, Meiklejohn, Alexander, "The First Amendment Is an Absolute," in Phillip B. Kurland (ed.), The Supreme Court Review: 1961 (Chicago: The University of Chicago Press, 1961).

¹²⁶ Cf. The flag salute cases, Mintersville School District v. Gobitis, 310 U.S. 586 (1940) and West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), in which the Court overruled itself within a three year period, principally through the efforts of Justices Black and Douglas who stated in the latter case "reasons for ...[their] change of view" since Gobitis.

¹²⁷ Malinski v. New York, 324 U.S. 401, 414 (1945).

¹²⁸ Concurring, Join Anti Fascist Refugee Committee v. McGrath, 341 U.S. 123, 149 (1951).

¹²⁹ Barron v. Baltimore, 7 Peters 243 (1833)

that decision. By a process of selective incorporation within the meaning of the due process clause of the Fourteenth Amendment more recent Courts have concluded that state action is essentially limited by those amendments. The history of which of the protections in the Bill of Rights restricts only the federal government and which in addition restrict the states has centered on judicial determinations of which rights are in fact "implicit in the concept of ordered liberty."¹³⁰ Those that are, determined on a case-by-case basis, have been found applicable to, and restrictive of, state action.

The Ninth and Tenth Amendments contribute little to protection of rights. Each was essentially an expression of the status quo, and established little that was not publicly understood at the time of their adoption. They neither delegate nor restrict powers which the people or the states might reasonably be thought to possess. The Ninth meets Hamilton's fear that an enumeration of rights would imply that rights not specified were foresaken by the people. It states that "the enumeration ... of certain rights shall not be construed to deny or disparage others retained by the people." The Tenth applies similar reasoning to the fact of federalism, stating that those "powers not delegated to the United States... nor prohibited...to the States, are reserved to the States respectively, or to the people." It is from the Tenth Amendment that so-called "states rights" have emanated.¹³¹

One further Amendment is central to understanding civil rights in the United States. In the aftermath of the Dred Scott decision,¹³² which perhaps as much as anything precipitated the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments were adopted. Their collective purpose was to protect the newly freed Negro, giving him citizenship, non-discriminatory treatment, and the right to vote,¹³³ but the Fourteenth Amendment assumes center stage in any

¹³⁰ Palko v. Connecticut, 302 U.S. 319, 325 (1937).

¹³¹ It has been alleged by some, including former Governor George Wallace of Alabama, that at some point in the drafting of the Amendment the words "...reserved exclusively to the States" were used, and that "exclusively" was inadvertently omitted in the final draft. While such an allegation would lend support to a theory of strong if not dominant states rights, there appears to be little evidence corroborating it.

¹³² Dred Scott v. Sanford, 19 How. 393 (1857).

¹³³ In the Slaughter-House Cases, 16 Wall. 36 (1873), when the Supreme Court first considered these amendments, it stated (at pp. 71-72):

...on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and protection of the newly made free men and citizen from the oppressions of those who had formerly exercised dominion over him. It is true that only the 15th Amendment, in terms, mentions the negro (sic) by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

discussion of civil rights. It contains three significant protections of rights in its privileges and immunities, due process, and equal protection clauses.

While an unfriendly Court gutted the privileges and immunities clause of substantive meaning in the Slaughter-House Cases, the due process and equal protection clauses have, by judicial interpretation, been the central focus and force for protection of rights. The equal protection clause has been used to prevent discrimination especially on grounds of race and through the due process clause the Court has prohibited, for the most part, state action against individuals by stipulating that the First and Fourth through Eighth Amendments limit the federal government. Although "the notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by [the] ... Court again and again after impressive consideration"¹³⁴ by a "gradual and empiric process and 'inclusion and exclusion,'"¹³⁵ which may be defined as what the majority of the Court believes, "is all that is 'implicit in the concept of ordered liberty,'"¹³⁶ the Fourteenth Amendment's due process clause to all intents and purposes has come today to mean that which the federal government may or may not do, the states may or may not do.

Finally, a group of amendments at the core of discussion of civil liberties, but usually ignored, concerns the franchise. In any nation truly free, an uninhibited, untrammled right to vote is central to checking governmental abuse of power. It is no accident that the largest number of constitutional amendments deal with voting than with any other subject. The Fifteenth Seventeenth, Nineteenth, Twenty-Third, Twenty-Fourth and Twenty-Sixth Amendments all concern and enlarge the right to vote. Whether for the newly-freed slaves or popular election of Senators, women's suffrage, or that of the residents of the District of Columbia, prohibiting intrusions upon the right to vote for failure to pay taxes or granting eighteen year olds the franchise, the various amendments attempt to broaden public participation in the electoral process. In all probability the next franchise amendment will seek to abolish the electoral college and institute direct popular elections of presidents.¹³⁷

Constitutional Practice

Formal constitutional amendment is the first method by which civil liberties and rights have been protected in the United States. As with much of the original constitution, however, the language of the amendments is ambiguous. Just what constitutes constitutionally protected

Unused since 1873, the privileges and immunities clause had a resurrection in a California welfare case, Sanez v. Roe, in May, 1999. Its future is unclear.

¹³⁴ Justice Frankfurter for the Court in Wolf v. Colorado, 338 U.S. 25, 26 (1949). See too Frankfurter concurring in Malinksi V. New York, 324 U.S. 401, 414 (1945) where the same point in nearly the same words is made.

¹³⁵ Id., at 27.

¹³⁶ Id., quoting 302 U.S. at 325.

¹³⁷ U.S. Senate, Committee on the Judiciary. Report (To Accompany Senate Joint Resolution 1), Direct Popular Election of the President. Report No. 93. 93d Cong., 2d Sess., 1974.

free speech, or the right to counsel, or an unreasonable search and seizure has required a significant amount of interpretation, especially by the courts. Consider, for example, the following two situations involving allegations of deprivations of the protections against self-incrimination and unreasonable searches and seizures.

In the first, the police had information that a person possessed and was selling drugs. They went to his home and entered illegally. They found him sitting on his bed and asked him what two capsules lying on his night stand were. He immediately reached for them, placed them in his mouth and swallowed them. The police responded by attempting to make him regurgitate and when that failed took him to a hospital where over his objection they had his stomach pumped and retrieved the capsules. They were subsequently identified as morphine and were used as evidence to obtain a conviction.¹³⁸ Did what occurred constitute a violation of the defendant's rights not to incriminate himself? What of his protection against unreasonable searches and seizures?

Compare this to a similar set of circumstances. Here, a man was apparently the driver of an automobile involved in an accident. He was taken to a hospital for treatment of injuries received in the accident. While there, a police officer directed a physician to take a blood sample over the objection of the patient. The subsequent analysis indicated that he was intoxicated and was later used in court to obtain a conviction. He protested on the grounds that the taking of the blood against his wishes constituted both an unreasonable search and seizure and a violation of his right not to incriminate himself.¹³⁹

The Supreme Court heard both of these cases. On the face of things they appeared to present the same issues. Interpreting the same constitutional provisions in each case the Court concluded that in the first instance there were constitutional violations and in the other there were not. This is how constitutional law is made, on a case-by-case basis. The results, interpreting and reinterpreting the constitutional language, represent the best insight into what constitute civil liberties and rights in America.

First Amendment Freedoms

The fundamental and central role of First Amendment freedoms in the democratic process has always been recognized in light of the fact that individual freedom and national security interests may conflict, that as both are essential to the community, neither is absolute. Each imposes constitutional restraints upon the other. The purpose of individual rights is to promote the welfare of the community, and that of the community is to promote individual rights. They are interlocking and interdependent, yet at the same time frequently in conflict with one another.

It is primarily the ambiguity of constitutional language and seeming conflict among its provisions which has generated these conflicts. When the community moves in one direction

¹³⁸ Rochin v. California, 342 U.S. 165 (1952)

¹³⁹ Schmerber v. California, 384 U.S. 757 (1966). See, too, Breithaupt v. Abram, 352 U.S. 432 (1957).

under its Tenth Amendment police power, it may well collide directly with a citizen's rights under the First Amendment. For example, the Court has long been clear that obscenity is not protected by the First Amendment, that a community may prohibit its distribution, say, to minors. But the First Amendment guarantees a free press and does not make age distinctions as to whom it protects. Minors, as well as adults have constitutional rights.

To compound the difficulty, just what obscenity is varies from individual to individual, from judge to justice. Justice Stewart in a 1964 case commented that he could not define obscenity, but knew it when he saw it; such insight does not provide much of a standard as to what is constitutionally permissible. This sets the stage for litigation about what the community may do to control obscenity in what it believes to be the public interest, and determination of the extent to which attempts at regulation intrude upon protected rights.

Countless other examples exist, generated by the friction between community needs and individual rights and compounded by the ambiguity of constitutional phraseology. May New Hampshire legislate voluntary recitation of prayers in the public schools or does that violate the First Amendment's ban on establishment of religion? May a city prohibit any performance of Hair in its public auditorium on the ground that it is obscene or would that constitute prior restraint or censorship in violation of the First Amendment? May the Washington Post publish classified material under the First Amendment's freedom of the press, or may the government on grounds of national security obtain a court order to enjoin the publication? Is a city obliged to protect the speech rights of one speaking in a private forum, but whose presence as a known racist and fascist is causing mob disturbances outside the forum? Does free speech extend to using a loud speaker to broadcast the message or does that use intrude upon any right of the community to peace and quiet?

To compound the problems, may private, as opposed to public, persons violate constitutional rights? Does society have an obligation to protect liberties against encroachment by private parties? What if, for example, a state university were to dismiss a professor because of alleged criticisms of the administration of the university? Would that violate the professor's First Amendment rights? As a public institution, what public responsibilities does a university have? But what if it were a private college? Suppose the professor in his effort to make his institution better had established outside his office a bulletin board on which daily he placed varying criticism of college practices. Soon that bulletin board became the center of student and faculty attention and the subject of much conversation critical of the college. Could an officer of the college indicate to the professor that he would be dismissed for his criticisms in spite of the First Amendment's freedom of the press (and the college's expressed support of academic freedom)? Even if he were not dismissed, could the officer so "chill" the professor's disposition to criticism as to violate his right to expression? This push and pull is at the heart of discussion of rights and of constitutionalism. Through the resolution the meaning of constitutional language becomes clearer, if not actually clear.

The First Amendment freedoms of speech, religion, press, and assembly have never been interpreted by a majority of the Supreme Court as absolute.¹⁴⁰ Since some regulation of these

¹⁴⁰ The Court's position on the extent of these freedoms may be seen for religion in Cantwell v. Connecticut, 310 U.S. 296 at 303-304 (1940); for press in Near v. Minnesota, 283 U.S. 697 at 716

rights is constitutional, the Court has constantly been confronted with the task of deciding just how much. In the process it has had to attempt to balance individual liberties against the rights and needs of society to regulate and protect those liberties. It is clear, for example, that freedom of speech would extend to shouting "Fire!" in a vacant meadow: it is also clear that it would not extend to a person's shouting "Fire!" in a crowded theater when there was no fire and when the result could be a stampede for the exits that endangered all. The question becomes one of time, place, and circumstance for determination of the extent to which one may exercise First Amendment freedoms.

The greater the importance of safeguarding the security of the community...the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.¹⁴¹

With agreement that First Amendment freedoms are not absolute, the Court has attempted to determine what are "reasonable" limitations on their exercise. To inject fairness and stability into its opinions, members of the Court have formulated "rules" or "tests" by which the "reasonableness" of a statutory restriction may be judged. Critical analysis of these tests provides insight into what the Court has done. It reveals that there has never been agreement as to the appropriateness of a given test and that the multiple tests that have been created suggest only that each is a creation of its author to justify a desired result. Effectively the tests are devices to support a fundamental posture of judicial activism (tending to restrict or strike down legislative or executive action) or of judicial restraint (tending to support the executive and/or the legislature). Above all, whether a given Court majority and the individual justices who constitute it will intervene depends upon the issue. On an issue of free speech a given justice may be viewed as a judicial activist; on an issue concerning privacy that same justice may be judged a staunch reactionary, refusing to recognize that such a right exists on the ground that no where is it mentioned in the Constitution. To justify his position that justice invokes an absolutist interpretation of the entire Constitution, yet in his consistency is found on both sides of the activist/restraint spectrum.

In spite of their intrinsic ambiguity, which may or may not compound the very imprecision of the Constitution that they are designed to clarify, sensitivity to the varying judicial tests provides understanding of the way the Court confronts trying issues. The fertile minds of the justices have generated many tests, some in direct conflict with others, yet each

(1931) and Ginzburg v. U.S., 383 U.S. 463 at 475-76 (1966); for speech, Chaplinsky v. New Hampshire, 315 U.S. 568 at 571-72 (1942); and for assembly, Communist Party of America v. Subversive Activities Control Board, 367 U.S. 1 at 94-103 (1961). "...[A] state, in the exercise of its police power, may punish those who abuse...freedom by [expression]...inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace..." Gitlow v. New York, 268 U.S. at 667 (1920). See too, Toledo Newspaper Co. v. United States, 247 U.S. 402, 419, where the Court stated: "The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions."

¹⁴¹ DeJonge v. Oregon, 299 U.S. 353, 365 (1937).

providing insight into constitutional interpretation. Surveying each would involve significantly more than is appropriate here, but reviewing how the Court has used one concerning free speech, the clear and present danger test, and a second concerning expression, the Roth test, is illustrative.

The Clear and Present Danger Test

Perhaps the most famous test to determine impermissible speech that the Court has used is the "clear and present danger" test. This test says that when men use speech in such a way as to create an immediate danger that substantive evils will follow, against which society has a right to protect itself through legislation, then the words themselves may be declared unlawful and those who utter them punished. Substantive evils are those inimical to the security and welfare of society which the legislature specifies as crimes.

This test originated in 1919, when Justice Holmes for a unanimous court in the case of Schenck v. U.S. used the words "clear and present danger" to justify legislation which patently suppressed speech. This case arose during World War I, an era of "Red Scares," bombings, and allegedly Communist-inspired labor strikes, and a time when great fear of a socio-economic revolution gripped the American public.

Schenck had transmitted a circular through the mails which urged those eligible for the draft to oppose it. The circular labelled the draft despotism in its worst form and advocated insubordination upon entrance into the armed forces. He was indicted for violating the Espionage Act of 1917, which penalized actions and speech designed to "interfere with the prosecution of the war." Justice Holmes did not question whether the provisions of the Espionage Act were "reasonable" limitations upon the right of free speech; rather, he sought to determine the proximity and degree of Schenck's actions and words to those made unlawful by the act.

The question in every case is whether the words used are used in such circumstance 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.¹⁴²

Holmes continued by noting that the "character of every act depends upon the circumstances in which it is done." Here, "when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." It is speech that may be prevented, not just action, for "if the act, its tendency and the intent with which it is done are the same, there is ... no ground for saying that success alone warrants making the act a crime."¹⁴³ Holmes assumed that the intent of the document was obstruction within the meaning of the Act.

Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon

142 249 U.S. 47, 52 (1919)

143 Id.

persons subject to the draft except to influence them to obstruct the carrying of it out.¹⁴⁴

Thus, it seems that while formulating what was to become the standard for cases of this kind, Holmes was actually deciding the case on grounds of intent rather than the existence or absence of a "clear and present danger."

The effect of Schenk was to give judicial blessing to legislative attempts to restrict speech in the name of national security. It created a general rule for determining when speech may be restricted -- when words are in such proximity to illegal acts and of such a degree as to urge or incite such illegal acts so as to constitute a clear and present danger to the state. It clearly established that the First Amendment freedoms are not absolute; they may be restricted in special circumstances. Above all, it set a standard subject to the vagaries of the Court because of the number of central questions it left to subsequent determination and discretion. What is a clear and present danger? How proximate must the words be to the illegal act? To what degree must the words urge the prohibited act? What is the character of the words in relation to the circumstances in which they were uttered that is proscribed? What constitute a threat to national security? These and other questions placed the Court in the position of having to interpret the constitutionality of law relative to the facts and circumstances of each case. In that effort the Court could apply the test not only to restrict speech, but also to protect it.

That Holmes viewed his opinion as creating a new judicial standard is not apparent. One week after the Schenk case, Holmes again wrote for a unanimous Court in Frowerck v. U.S. and Debs v. U.S. upholding convictions again under the Espionage Act, the Court cited Schenk as analogous, but did not refer explicitly to the clear and present danger test.¹⁴⁵ The cases set the stage for the next Espionage Act conviction which came to the Court in Abrams V. U.S.¹⁴⁶

The Espionage Act had been amended in 1918 to include within its proscriptions advocating reduction of production of war materials with the intent of hindering the prosecution of the war. This addition constituted a direct regulation of speech as speech, not just speech as it related to conduct, and only intent needed to be proved to violate it. While the nation was involved in World War I, the defendants were convicted under the act of unlawfully writing and publishing language "intended to incite, provoke and encourage resistance to /and criticism of/ the United States" and conspiring "to urge, incite and advocate curtailment of production of .ordinance and ammunition necessary and essential to the prosecution of war."¹⁴⁷

144 Id., at 51 (emphasis added).

145 Frowerck v. U.S., 249 U.S. 204 (1919), was decided on the basis of intent, the Court's holding that "a conspiracy is criminal even without the means with which to carry out the intent." Debs v. U.S., 249 U.S. 211 (1919), was similarly decided on the basis of intent and effect. "One purpose of the Speech, whether incidental or not does not matter, was to oppose not only war in general but this war. ***The opposition was so expressed that its natural and intended effect would be to obstruct recruiting."

146 U.S. 616 (1919).

147 Id., at 617.

Their conviction was upheld by the Supreme Court. Justice Clarke wrote for the majority that although appellants were interested primarily in aiding the Russian Revolution, they “must be held to have intended, and to be accountable for, the effects which their acts were likely to produce.”¹⁴⁸ These effects included hindering the war effort; therefore, the majority held them within the reach of the statute. Although relying upon the Schenck case as precedent, the Court did not mention the clear and present danger test.

The conviction generated one of the most famous Holmes dissents in which Justice Brandeis concurred. “Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, ‘Congress shall make no law abridging freedom of speech.’”¹⁴⁹ While “we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country,”¹⁵⁰ surely that is not the case here. Since Abrams’ intent was not to obstruct war production in order to hinder the war, he could not have created a clear and present danger. No such danger could be created by “the surreptitious publishing of a silly leaflet by an unknown man”¹⁵¹

...when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free-trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market...¹⁵²

Thus, for Holmes, speech could be restricted, but only when "lawful and pressing" purposes of the law are so "imminently" threatened as to imperil the safety of the nation. The clear and present danger test could be used only on very narrow grounds as a justification for limiting the right to free speech.

In Schaefer v. U.S., 251 U.S. 466 (1919), an Espionage Act case involving statements published in two newspapers concerning the war, Brandeis with Holmes dissented. After quoting the Schenck clear and present danger formulation, they stated the test “is a rule of reason. Correctly applied it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities and from abuse by irresponsible, fanatical minorities.”¹⁵³ And in Pierce v. U.S.,¹⁵⁴ again Holmes quoted his Schenck formula and argued that its requirements had not been met, although the majority as in Schaefer relied upon it to uphold

148 Id., at 621.

149 Id., at 630-31.

150 Id., at 630.

151 Id. at 628.

152 Id., at 630.

153 251 U.S. at 482.

154 252 U.S. 339 (1920).

convictions. While the majority of the Court was using the new formula for restricting speech, its creator was dissenting on the ground that the majority was improperly applying it.

In Gitlow v. N.Y., 268 U.S. 652 (1925), the appellant was a publisher convicted under a New York criminal anarchy statute which made it unlawful to advocate, advise, or teach the overthrow of the government by force or violence or to publish anything which so advocated, advised, or taught. The majority rejected use of the clear and present danger test on the ground that the legislature had already determined that the danger of such speech was sufficient to merit suppression. Whether the specific utterance was within the prohibited class was not subject to review, for “the state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration.” The State “cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger to its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency.”¹⁵⁵

Holmes and Brandeis dissented, holding that the Schenck standard should be applied. “It is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who share the defendant's views. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”¹⁵⁶

Finally, in Whitney v. California, 274 U.S. 357 (1927), the test received its most definitive statement, although the case was decided on other grounds. Here, the defendant was convicted under a California statute which made it unlawful to teach or advocate crime, sabotage, or violence as a means of affecting political or industrial change. Miss Whitney violated the California Syndicalism Act of 1919 by assisting in organizing the California Communist Party and by joining and attending meetings of that party. As in Gitlow, Justice Sanford delivered the opinion of the Court, and reaffirmed that the right of free speech was not unlimited. He concluded:

The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. *** That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals, is clear. We cannot hold that, as here applied, the act is an unreasonable or arbitrary exercise of the police power of the state, unwarrantably infringing any rights of free speech, assembly or association, or that those persons are protected from punishment by the due process

155 268 U.S. at 669.

156 Id., at 673.

clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State.¹⁵⁷

The Court found that the Act did not violate free speech guarantees. It did not determine whether Miss Whitney's actions were of such a character and use as to come within the prohibitive provisions of the statute, nor was it asked to do so.

Justice Brandeis, joined by Justice Holmes, concurred. He asserted that the states may restrict speech when it “would produce, or is intended to produce, clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent.” Speech and assembly rights may be curtailed “if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral.”¹⁵⁸ For there to be a clear and present danger that would justify restrictions.

...there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.¹⁵⁹

If these criteria do not exist, the corollary is that speech must be unfettered. Free speech is a fundamental principle of American government, for

To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.¹⁶⁰

Withal, Brandeis supported upholding the conviction because the defendant had failed to challenge the statute on the ground that there was no clear and present danger. She had not asked the trial court to ascertain the existence of the necessary circumstances for conviction. Lacking such evidence in the record, Brandeis felt compelled to join the majority, though not without qualification.

Whitney v. California was the last case in which the originators of the clear and present danger test wrote opinions explaining its meaning. When used by the majority of the Court, it became the basis for convictions restricting speech and the occasion for further definition by Holmes and/or Brandeis. In spite of their efforts, no general agreement emerged about the meaning of the test, or, indeed, when and if it should even be applied.

157 Id., at 371-72.

158 Id., at 372.

159 Id., at 376.

160 Id., at 376.

By 1927, the virtues of the test were unclear, its future definition and application left to the judgment if not the whim of any majority of the Court. As a judicial test on the basis of

which free speech rights might be ascertained, it only served notice that the government might use it to justify suppression of expression. By appearing to be a “test,” it may well have generated more mischief than guidance because of the uncertainty and ambiguity it compounded.

More than a substantive test, it actually appeared to be a device to justify the opinion in a given case. If a majority found it suitable for supporting its posture, it invoked the standard; if it did not, it found another suitable for achieving the desired result. Clearly, the extensive litigation surrounding constitutional rights and involving an extraordinary array of issues, necessarily required the Court to deliberate matters that could not be accommodated by a single test or approach. Such a doctrinaire approach to the Constitution would have stifled the very feasibility that is among its major virtues. In the process, multiple tests have emerged.

Each formulation of an encompassing judicial principle with which to address the constitutionality of regulations involving speech and press has given way through the decisional process to new approaches. The Court has been sensitive to the fact that primary involvement in regulating activity belongs to the legislature which has deliberated the clash of interests in creating laws and presumptively weighed the significance for society of its actions. It is for the judiciary to decide not the wisdom of the legislation, but its constitutional permissibility, a process that has involved case-by-case deliberation that has allowed the Constitution to grow with the times. The struggle to ascertain how obscenity may be constitutionally regulated indicates that the Court's search for appropriate tests continues.

Freedom of Expression - The Roth Test

The First Amendment grant of freedom of speech and press provides for liberties that are especially precious to a free society. These freedoms denote more than an individual's right to utter or to print words. The First Amendment has been construed, particularly since the pervasive appearance of films, television, and radio, to protect expression, the communicating of information or opinion. Indeed, one of the major questions the Court has had to decide has centered on just what is expression, for it is clear that

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.¹⁶¹

161 Cohen v. California, 403 U.S. 15, 20 (1971).

Especially in the area of expression the Court has developed tests to determine the constitutionality of restrictions that various governmental agencies have imposed. Attempting as much as possible to further the right, the Court has nevertheless confronted the reality that in an orderly society free rein to expression would be imprudent. The varying tests have been applied when the Court has confronted allegations of prior restraint upon expression -- the previous censorship of unexpressed ideas -- and subsequent punishment -- the penalizing of expression already made. Generally, prior restraint has been found to be unconstitutional; subsequent punishment, dependent upon time, place, and circumstance, may be upheld.

The Court has concluded that there is speech which is not expression under the First Amendment and therefore not under its regulatory ban.

It is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problems. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.¹⁶²

Thus, there are types of speech which have no redeeming social value and which are detrimental to society and individuals. Two cases presenting similar facts, but receiving contrary constitutional protection, provide examples of protected and unprotected speech.

Father Terminiello, well-known for his anti-Semitism and racist views, was arrested and convicted for a breach of the peace which occurred when demonstrators, gathered outside the hired hall in which Terminiello was speaking to an audience, attempted to disrupt the assembly. The Court reversed his conviction, albeit on a technicality.¹⁶³

In a parallel case, Feiner delivered a speech through a loud speaker on a street corner. His speech contained derogatory remarks about the city's mayor and the American Legion and urged blacks to fight for their rights. He attracted a crowd which blocked the sidewalk for pedestrian traffic. Some listeners protested to the police in attendance and indicated that if the police did not act to remove Feiner they would. When Feiner refused to stop speaking, he was arrested and later convicted for disorderly conduct. The Court upheld this decision, seemingly in contradiction to the Terminiello case.¹⁶⁴

In the first case the Court reversed on the ground that the trial judge provided a definition of illegitimate speech in his charge to the jury that had changed the issue from one of an application of a breach of the peace statute to a too broad and sweeping limitation of speech. In the second case no such unconstitutional charge interfered with the properly applied disorderly conduct statute. Still, the Court's difficulty in interpreting First Amendment free speech protections is apparent in a comparison of these decisions.

162 Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

163 Terminiello v. Chicago, 337 U.S. 1 (1949).

164 Feiner v. New York, 340 U.S. 315 (1951).

Terminiello had hired a hall and was addressing his remarks primarily to an audience that clearly desired to hear them. The outside demonstrators chose to be affected by the insulting speech. Feiner, on the other hand, was speaking in a public place, using a device which accosted the ears of all nearby though they were not necessarily in the vicinity with the intent of listening to the speaker. Thus, Feiner's speech provided a direct, unavoidable confrontation with the public that led to a disruption. The disturbance surrounding Terminiello's speech, on the contrary, could be deemed to be manufactured; the circumstances of the speech did not necessitate a direct confrontation with public order, safety, and tranquility.

The distinction between protected and unprotected speech involved in cases where the public order or serenity is impaired is clearly a necessary, but difficult, one to make. The problem typifies the confrontation between the state's responsibility to the individual speaker as well as to the public in providing protection. Where is the line between the responsibility of the community to secure a platform for speech, however controversial, and its responsibility to protect the public peace?

The Court has been sensitive to the fact that primary involvement in regulating activity belongs to the representative body which has deliberated the clash of interests in creating legislation and presumptively weighed the significance for society of its actions. It is for the judiciary to decide not the wisdom of the legislation, but its constitutional permissibility, a process that has involved case-by-case deliberation, that has allowed the Constitution to grow with the times.

This process is exemplified by the Court's efforts to cope with the constitutional problems presented by obscenity. The Court has been clear in every case in which it has addressed the question that obscenity is within the regulatory power of the Congress and the States, that it is not protected by the First Amendment. In its first great censorship case, Near v. Minnesota, the Court emphasized that "the primary requirements of decency may be enforced against obscene publications."¹⁶⁵

The Court's first substantive review of the control of the distribution of obscene materials produced the "Roth test," a functional principle named for the case in which it originated.¹⁶⁶ After reasserting that some classes of speech could not receive First Amendment protection and stating that obscenity fell into this realm as being "utterly without redeeming social importance," the Court set forth the standard by which allegedly obscene material was to be judged: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."¹⁶⁷ As with other tests, this one has caused the Court almost as much difficulty as relief and guidance.

Applying it, the judiciary has supported several regulations intended to protect society from the evils of pornography. Decisions have sustained the constitutionality of a board's

¹⁶⁵ 283 U.S. 687, 716 (1931).

¹⁶⁶ Roth v. United States, 354 U.S. 476 (1957).

¹⁶⁷ Id., at 489.

reviewing and censoring alleged obscene films before a public showing¹⁶⁸ and affirming restraints placed upon the use of the mails for disbursement or selling of obscene literature.¹⁶⁹ In each instance, the Roth test was reviewed, redirected, refined, and reapplied, but without consistency or certainty. On a case-by-case basis, the Court proceeded to judge whether each film or book appealed to prurient interest and had no redeeming social value. Necessarily, this resulted in divided decisions, casting uncertainty upon just what the Court's posture was in this area.¹⁷⁰

It seemed that the Court was reassessing its original stance of placing obscenity outside constitutional bounds when in Stanley v. Georgia¹⁷¹ it reversed a conviction for possession of obscene materials. The films were discovered in a search by police of the defendant's home for items related to another matter of criminal concern. The specific language of the Stanley decision indicated that on privacy grounds one might possess things that would otherwise be viewed beyond the bounds of constitutional protection. In permitting the private possession of things judged obscene, the Court appeared to be affording constitutional protection to obscenity, a novel application for the Court. Though divided on just what "obscenity" was, the Court nevertheless supported the right of an individual to have "obscene" materials in his home.

Whatever may be the justification for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.¹⁷²

To get those obscene materials to his home suggests a right to create them in the first place, though the Court did not go this far. Rather, it centered its concern on a right to privacy, itself an implicitly protected constitutional right, and went no further. The step, though, from voluntarily watching a film in one's home to paying voluntarily to watch a film in a theater is not far.

In the area of obscenity "we have seen a variety of views among the members of the court unmatched in any other course of constitutional adjudication."¹⁷³ "As the court's many decisions in this area demonstrate, it is extremely difficult for judges or any other citizens, to

168 Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961).

169 Rowan v. Post Office Department, 397 U.S. 728 (1970).

170 See Manual Enterprises v. Day, 370 U.S. 478 (1962); Jacobellis v. Ohio, 378 U.S. 184 (1964); Ginzberg v. United States, 383 U.S. 463 (1966); A Book Named "John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts, 383 U.S. 413 (1966); Mishkin v. New York, 383 U.S. 302 (1966).

171 394 U.S. 557 (1969).

172 Id., at 564.

173 Miller v. California, 413 U.S. 15, 22 (1973), quoting Interstate Circuit, Inc. v. Dallas, 390 U.S. at 704-05.

agree on what is obscene.”¹⁷⁴ Indeed, “apart from the initial formulation in the Roth case, no majority of the Court has at any time been able to agree on what constitutes obscene, pornographic materials subject to regulation under the State’s police power.”¹⁷⁵ Mark Twain may have been contemplating the Court’s difficulties at definition when he remarked, “the more you explain it, the more I don’t understand it.” Or, as a court observer concluded, “the law of obscenity [can only be viewed] a Constitutional disaster area.”¹⁷⁶

Undaunted, the Court in 1973 once again attempted creation of "concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment.”¹⁷⁷ Three were established:

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest ... ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁷⁸

The hazardous removal of First Amendment protection from published material depends ultimately on a clear, unambiguous, narrowly limited definition of "obscene." The Court's repeated decisions that "obscenity" is constitutionally unprotected may in fact be premature and meaningless without clear understanding of just what it is.

In Marcus v. Search Warrant the Court warned that “a state is not free to adopt whatever procedures it pleases for dealing with obscenity... without regard to the possible consequences for constitutionally protected speech.”¹⁷⁹ By that and other statements, the Court indicated it would be very sensitive to encroachments and that sensitivity was given definite form when the Court stated that “any system of prior restraints comes...bearing a heavy presumption against its constitutional validity.”¹⁸⁰ It is in this context that the new standard must be weighted, for “the freedoms of expression...are vulnerable to gravely damaging yet barely visible encroachments.”¹⁸¹

By the new Miller test, the three guidelines must all coalesce before the existence of "obscenity" may be demonstrated. Failure to demonstrate any one would mean that a work was

174 U.S. v. Reidel, 402 U.S. 351, 379 (1971).

175 Miller v. California, 413 U.S. 15, 22 (1973).

176 C. Peter Magrath, “The Obscenity Cases: Grapes of Roth,” in Philip B. Kurland (ed.), The Supreme Court Review, 1966 (Chicago: The University of Chicago Press, 1966), p. 56.

177 Miller v. California, 413 U.S. 15, 29 (1973).

178 Id., at 24 (emphasis added).

179 367 U.S. 717, 731 (1961), quoted in Magrath, op. cit., p. 22.

180 Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963).

181 Id., at 66.

not obscene. In point of fact analysis of the Miller criteria suggests in application nothing will be found obscene, for they are nearly impossible to apply.

The first guideline contains four criteria, each compounding the problems of the others. The first question centers on who is an "average person." Roth first introduced the notion of judging the effect of questionable material on the average person though admitting the imprecision of the term.¹⁸² In a subsequent decision the Court acknowledged confusion about who was an average person, but refused to decide whether he was a person likely to receive the material in question (in this case, an "average" homosexual) or simply another, non-homosexual, "average" person.¹⁸³ The definition ultimately relies on variable personal intuitions of normalcy, hardly a standard for judicial determinations.

The second criterion involves considering a work "taken as a whole," and that, too, leaves important questions unanswered. In Ginzburg v. U.S. the Court based its five-to-four decision that a publication was obscene because of the manner in which it was advertised. Here, the work, taken as a whole, included the manner in which it reached the public, suggesting that if it had not been advertised it might well have been judged not to be obscene. A publication according to Ginzburg is obscene in some circumstances and not obscene in others, depending on whether it was "exploited entirely on the basis of its appeal to prurient interest."¹⁸⁴ And so the Court heaped vagueness on top of vagueness, leading Justice Black to protest that

The criteria declared by a majority of the Court today as guidelines [for determining] obscene material are so vague and meaningless that they practically leave the fate of a person charged with violating censorship statutes to the unbridled discretion, whim, and caprice of the judge and jury which tries him.¹⁸⁵

Justice Harlan agreed on the ground that what the Court had "done is in effect to write a new statute, but without the sharply focused definitions and standards necessary in such a sensitive area."¹⁸⁶ The "taken as a whole" test has served to protect works from censorship when isolated passages are challenged. It has also permitted a broadened, unrestricted interpretation to include evidence apart from the material itself that taints the material as obscene.

"Contemporary community standard" is no less ambiguous. From Roth to Miller, just which community was to establish the standard was uncertain. Miller concluded that it was not a "national" community standard. Within two weeks a Georgia court established that the community standard to be applied was a "local" one in upholding the conviction of one Billy Jenkins for violating a censorship statute by showing the film "Carnal Knowledge." By the local community standard the movie was obscene. The intention of the Miller decision was to protect all but "hard core pornography," in which category Carnal Knowledge fell for one local community. It did so in spite of the fact that

182 Roth v. United States, 354 U.S. 476, 491 (1957).

183 Manual Enterprises v. Day, 370 U.S. 478, 482 (1962).

184 Ginzburg v. U.S., 383 U.S. 463, 474 (1966).

185 Id., at 478.

186 Id., at 494.

Carnal Knowledge is a motion picture which was acclaimed critically as one of the "10 Best" films of the year 1971. Actress Ann-Margaret received an Academy Award nomination for her performance. The film enjoyed popular acceptance throughout the nation, including many cities and towns within the State of Georgia.¹⁸⁷

Thus, what for one local community is obscene may be worthy of highly critical praise from its neighbors. The contemporary community standard does not refine serious attempts at definition of obscene.

The "prurient interest" criterion is similarly vague and imprecise. Justice Douglas noted in *Roth* that appeal to such interest is a commonly used technique for the marketing of many consumer products. "The arousing of sexual thoughts and desires happens every day in normal life in dozens of ways."¹⁸⁸ Indeed, "The advertisements of our best magazines are chock full of thighs, ankles, calves, bosoms, eyes, and hair to draw the potential buyer's attention to lotions, tires, liquor, clothing, autos, and even insurance policies."¹⁸⁹ In point of fact, prurient interest refers to commonplace occurrences of everyday life, but what precisely it is remains vague and unclear. What is clear is that what is of prurient interest for one person, or justice, may or may not be for another.¹⁹⁰

The second guideline contains two criteria, "patently offensive" and "specifically defined by ... state law." The patently offensive portrayals of sexual conduct test was first introduced in *Manual Enterprises v. Day* (370 U.S. 478) by a divided Court and applied in *Ginzburg*. It defies precise definition, abstractly or in application. *Miller*, however, makes the attempt:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.¹⁹¹

The attempt appears to be unhelpful. It does not appear substantively to enlighten the uninitiated about what actually is patently offensive obscenity. As with community standards, what is offensive to one may be commonplace with another, especially during this enlightened sexual era. Thus, greater specificity is needed and is required by the second criterion which requires a state specifically to define what is patently offensive.

State attempts at definition have resulted in very lengthy dissertations on what is patently offensive. Examination of the relevant Massachusetts statute suggests that its attempt at comprehensiveness actually raises as many questions as it resolves and virtually makes discourse

187 Brief for the Appellant, *Jenkins v. Georgia* (No. 73-557), p. 6.

188 Dissenting, 354 U.S. at 509.

189 *Ginzburg v. U.S.*, dissenting, 383 U.S. at 482.

190 See Alpert, "Judicial Censorship of Obscene Literature," 52 *Harvard Law Review* 40, 73.

191 413 U.S. at 25.

on sexual subjects suspect. It also arouses pity for the poor author or bookseller who must wade through it to ascertain his legal liability.

Finally, in the third concrete guideline the Court would apply a "social value" criterion. First used in Jacobellis v. Ohio, 378 U.S. 184 (1964), the test has proved as elusive of precision as the others. In an attempt to be more specific, the Court in Memoirs v. Massachusetts established that a work must be "utterly without social value"¹⁹² before censorship would be permitted. Miller rejected this standard on the ground that it constituted "a burden virtually impossible to discharge under our criminal standards of proof."¹⁹³ It took a divided Court nine years to reach this startling conclusion.

In its place Miller proposed that a work must maintain a minimal level of "serious literary, artistic, political or scientific value."¹⁹⁴ The new version represents a dubious improvement. It is only through a very individualized, subjective analysis that an absence of value may be shown, for what may have no value for one may have high virtue for the next. There is no clear, comprehensive understanding of what is "valuable" either within communities or among them. Equally, how is a demonstration of "serious" to be made in the absence of common understanding of "serious," itself? This question is particularly troublesome in the subject-matter of sex where emotions are involved and opinions vary widely.

Sex, a great and mysterious motive force in human life has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.¹⁹⁵

The value of sexual material is not clear, but discussions of sex may in fact be valuable. They may be serious. They may not be obscene no matter how they are articulated or depicted, for "What is pornography to one man is the laughter of genius to another."¹⁹⁶ The value criterion makes a mockery in its pretense to precision.

Whether a particular treatment of a particular subject is with or without social value in this evolving dynamic society of ours is a question upon which no uniform agreement could possibly be reached among politicians, statesmen, professors, philosophers, scientists, religious groups or any other type of group.¹⁹⁷

The value of a work is partly determined by the audience that reads it. That is, a work of great value to a physician, an historian, a marriage counselor or a congressman may become

192 383 U.S. at 419.

193 413 U.S. at 22.

194 Id., at 24.

195 Roth v. U.S., 354 at 487-88.

196 Magrath, op. cit., pp. 7 and 71, ft. 277, quoting D.H. Lawrence.

197 Justice Black, dissenting in Ginzburg v. U.S., 383 U.S. at 480.

"obscene" in the hands of another.¹⁹⁸ Thus, a work could be serious, have value, be simultaneously obscene, and be subject to censorship. Yet to deprive the doctor, lawyer or Indian chief of that serious work because it might land in the hands of someone who would view it as lacking serious value would be akin to what Justice Frankfurter once described as burning the house to roast the pig.

Instead of concrete guidelines the Court appears to have constructed its obscenity foundation in sand. In the final analysis the "right to receive information and ideas, regardless of their social worth... is fundamental to our free society."¹⁹⁹ The Court's purported differentiation between information of social value and that of no such value is tautological, an exercise in futility. In its attempt to create a test of obscenity, the Court has so muddied the waters as to make understanding all but impossible. It has not been an enlightening exercise, especially in the face of the First Amendment's strong language that restrictions upon expression may not be imposed.

"The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid...may be as much a trap for the innocent as the ancient laws of Caligula."²⁰⁰ By the vagueness of its newly created test, the Court appears to have violated a basic principle of democratic law, precision of prohibition. One expressing himself about things sexual cannot know how the test will be applied, and consequently is in legal jeopardy any time he addresses the subject. The Court "has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having potentially inhibitory effects on speech..."²⁰¹ Indeed, "because First Amendment rights need breathing space to survive, government may regulate in the area only with narrow specificity."²⁰² That is hardly the case here. Any attempt at ascertaining what might be censored through a test upon which a majority of the Court might agree shows only the futility of the exercise, an exercise that itself has little redeeming social value. Prior to Roth/Miller, the Court had held that the "lewd" and the "obscene" were within that group of "certain well defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem."²⁰³ There is nothing defining and narrowly limiting by the new test, and there is everything to suggest that the Court has been unable to find a reasonable way through the quagmire it created.

As with the clear and present danger standard and most others, this test serves only to justify judicial approval of a result. Reviewing the creation of the clear and present danger test and the application of the Roth/Miller formulation shows how dependent the nation is upon the government for protection of rights. The Constitution established what they are; the Court establishes in practice what they are at a given moment.

198 Ginzburg v. U.S., 383 U.S. 463 (1966).

199 Stanley v. Georgia, 394 U.S. 557, 564 (1969).

200 U.S. v. Cardiff, 344 U.S. 174, 176 (1952).

201 Smith v. California 361 U.S. 147, 151 (1959).

202 NAACP v. Button, 371 U.S. 415 (1963).

203 Chaplinsky v. New Hampshire, 315 U.S. at 571-72.

Free speech and free press issues extend far beyond questions of obscenity or leaflet distributions. Libel and slander laws confront the reality of the First Amendment command. If one has a constitutionally protected right to free speech, why may he not with impunity slander those whom he chooses? Equally, questions involving picketing or demonstrations as expression have had to be resolved by the Court. For example, may a crowd gather at a jail house and march back and forth carrying signs and singing in protest to the jailing of one of its members for allegedly disturbing the peace as a leader of a previous demonstration? May a person protesting the war in Viet Nam sew a United States flag on the seat of his pants as an expression of his feelings? Similarly, may a person walk through public streets and buildings wearing the message "Fuck the Draft" on his jacket as an expression of his views? Is that message even speech or press? In the face of these problems it nevertheless remains clear that both society and the Court value speech and press as fundamental to liberty. When confronted with issues raising these First Amendment questions, the Court must weigh the societal and individual conflicting claims. With this insight into and understanding of how the judiciary deals with similar issues, a summary of our rights may be undertaken.

Freedom and Establishment of Religion

Two clauses of the First Amendment deal with religion. They deny Congress authorization to establish a religion or to abridge its free exercise. The Establishment Clause means more than that the government cannot establish an official religion. It also generally forbids any action by the government which would aid or support religion of any particular sect. By its terms the separation of church and state is incorporated into the First Amendment.

The Supreme Court has applied various tests in ascertaining whether the government has in certain instances breached the "wall of separation"²⁰⁴ between church and state. One method has involved determining whether an enactment advances or inhibits religion rather than maintaining a neutral stance toward it. To withstand the test of constitutionality, there must be a demonstrated secular interest underlying legislation which may be construed as aiding religion.²⁰⁵

Another judicial approach to the meaning of the Establishment Clause involves examination of a governmental enactment to determine if it produces "an excessive government entanglement with religion."²⁰⁶ When continuing official supervision is mandated, the Court tends to strike the legislation down. The difficult questions, though, concern the degree of involvement of government and religion. The Court has had to decide whether there is "excessive entanglement" or really only governmental "neutrality" toward religion. The principal area where the Court has confronted these questions of the degree of entanglement has occurred in the field of public education.

204 Everson v. Board of Education, 330 U.S. 1 (1947).

205 Abington School District v. Schempp, 374 U.S. 203 (1963).

206 Walz v. Tax Comm. of City of New York, 397 U.S. 664 (1970).

Federal aid to parochial schools has highlighted this issue. For example, may local authorities provide free public transportation for students attending parochial schools? The Court has held that they could on the ground that the transportation was for the welfare of the children and similar to police and fire protection; it was not public aid to a religious institution contrary to the Establishment Clause.²⁰⁷ In like manner the Court reasoned that a state loan of textbooks to parochial school students was not prohibited by the First Amendment because the books were of secular, not religious, benefit to the students.²⁰⁸

On the other hand the Court has concluded that too much governmental entanglement in religious matters existed in a program which in effect subsidized parochial schools by supplementing teachers' salaries for the instruction of non-religious subjects and by reimbursing the schools for other expenses in the teaching of non-religious material. The justices maintained that in order to insure that these funds were not involved in the religious activities of the parochial schools the state would be required to apply continuing surveillance and that constituted too much involvement.²⁰⁹ Such involvement, though, would not apply to Federal construction grants to church-affiliated colleges. Once construction was completed, no governmental surveillance would be necessary.²¹⁰

Released time programs in public schools for purposes of religious instruction have also raised serious constitutional questions under the Establishment Clause. The Court has distinguished between released time programs operating physically within the schools and those outside school property. When the religious instruction conducted by teachers from outside the public system occurred within a school building, the wall of separation was impaired.²¹¹ Religious instruction which did not involve use of public school facilities or property and which had no appearance of public accommodation, however, was deemed constitutional.²¹²

A closely related issue has centered on whether prayers may be recited and the Bible read in public schools. Here the Court has unequivocally maintained a strong separating boundary. Bible reading has been held clearly repugnant to Establishment Clause requirements.²¹³ Even the recitation of a non-denominational prayer devised by public authorities has been viewed unfavorably.²¹⁴ However much local authorities have encouraged or authorized prayer recitation and/or Bible reading, the Court has adjudged it to be a prohibited establishment of religion.

207 Everson v. Board of Education, 330 U.S. 1 (1947).

208 Board of Education v. Allen, 392 U.S. 236 (1968).

209 Lemon v. Kurtzman, 408 U.S. 602 (1971).

210 Tilton v. Richardson, 403 U.S. 672 (1971);

211 McCollum v. Board of Education, 333 U.S. 203 (1948).

212 Zorach v. Clauson, 343 U.S. 306 (1952).

213 Abington Township School District v. Schempp, 374 U.S. 203 (1963).

214 Engel v. Vitale, 370 U.S. 421 (1962).

Other questions of separation given recent judicial consideration have involved tax exemptions for religious groups. The Court has held that such exemptions do not violate the Establishment Clause, reasoning that religious groups are like charities, hospitals, and libraries, all of which provide communities with important, non-profit services deserving of tax favors. By granting the tax exemption the community has not unconstitutionally entangled itself with religion.²¹⁵ School vouchers, allowing school choice, raise First Amendment issues when used to attend a parochial school.

The second First Amendment provision concerning religion is its Free Exercise Clause. It prohibits the government from regulating or interfering with religious freedom. The government may not require the possession of certain, or any, religious views, or the participation in religious activities. However, if certain religious practices have secular overtones, they may be regulated though founded in religious belief.

A large body of cases has come before the Supreme Court concerning the religious freedom of the Jehovah's Witnesses. It has struck down solicitation statutes that allow inquiry into the religious nature of a group,²¹⁶ licensing fees applied to sellers of religious literature,²¹⁷ and ordinances interfering with the ability of members of religious groups to advertise a meeting door-to-door.²¹⁸ Other cases involving members of other religious sects have held unconstitutional a requirement of taking a religious oath to obtain public employment²¹⁹ and the withholding of unemployment compensation from a person whose religion forbade working on Saturday.²²⁰

Not all regulations challenged as violating the Free Exercise Clause have been overturned by the Court. Bigamy, though founded on religious grounds, has been outlawed as against a claim that it was constitutionally protected. State statutes aimed at prohibiting this practice by Mormons have consistently been sustained.²²¹ The Court has also affirmed the state's interest in maintaining child labor laws even if the child were engaged in religious work.²²² Finally, the government's need to provide for and supervise in an orderly fashion a day when businesses are closed was asserted in the Sunday Closing Law cases. Store owners who were members of the Orthodox Jewish religion which has a Saturday Sabbath claimed that Sunday closing requirements discriminated against them, for they had the effect of compelling them to be closed five days a week when combined with their Sabbath. In order to remain open the sixth day they

²¹⁵ Walz v. Tax Comm. of City of New York, 397 U.S. 664 (1970).

²¹⁶ Cantwell v. Connecticut, 310 U.S. 296 (1940).

²¹⁷ Jones v. Opelika, 319 U.S. 103 (1943).

²¹⁸ Martin v. City of Struthers, 319 U.S. 141 (1943).

²¹⁹ Torcase v. Watkins, 367 U.S. 488 (1961).

²²⁰ Sherbert v. Verner, 374 U.S. 398 (1963).

²²¹ Reynolds v. United States, 98 U.S. 145 (1849); Murphy v. Ramsey, 114 U.S. 15 (1885); Davis v. Beason, 133 U.S. 333 (1890).

²²² Prince v. Massachusetts, 321 U.S. 158 (1944).

would have to violate their right to the free exercise of religion on that day. Although the cases did not turn on grounds of religion, the effect of the Court decision was not to support their claims.²²³

It is evident that securing First Amendment protections of religion is not an easy task. The drawing of distinctions which maintain a proper wall of separation between church and state and distinguish the state's legitimate regulatory interests from encroachments upon religion and its exercise is difficult. They will continue to be made on a case-by-case basis which weighs the interests of the individual and the obligations of the state which so frequently appear to be in conflict with one another.

Freedom of Assembly and Petition - Association

The final mandate of the First Amendment is a guarantee to the rights of assembly and petition. They are designed to secure citizens the right of access to their government. Historically this right was designed to enable the citizenry to assemble in order to petition their government. It was a political right. Over time, however, the provision has been expanded to a more generalized right of assembly.

In Hague. v. C.I.O., in which an ordinance provided a city official with wide discretion to refuse a permit for any gathering in a public place when he concluded that the assembly might induce disturbances, the Supreme Court said:

Wherever the title of street and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, discussing public questions.²²⁴

The right of assembly was viewed as extending well beyond discussion of public concerns or the functioning of government: it included gathering to examine issues of general interest between people. Thus the modern derivative of freedom of assembly was denominated as the right of association.

Over time many attempts to abridge this right have been challenged in the courts. The Smith Act, for example, contained a provision proscribing membership in organizations which advocated the overthrow of government by force. Members of the Communist Party sought to have it declared unconstitutional on the ground that it violated the First Amendment by making guilty by association all members of the organization. The Court did not support the contention. It held that membership in an organization formed for the purpose of forcefully overthrowing the government constituted an association for illegal ends. Thus the Communist Party did not have constitutional protection and could be legitimately regulated by government.²²⁵

²²³ Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Koshers Market, 366 U.S. 617 (1961).

²²⁴ 307 U.S. 496, (1939).

²²⁵ Scales v. United States, 367 U.S. 203 (1961).

A successful defense against state regulation of the right to association occurred when the State of Alabama sought to have made public the membership lists of the National Association for the Advancement of Colored People. The Court agreed with the NAACP that “inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”²²⁶ The right to associate here was upheld since the Court found no substantial state interest in obtaining the names of the members of the NAACP.

Similarly, the Court voided a state requirement that teachers disclose the name of every organization to which they had belonged over a five year period. Though the state's interest in determining the fitness of teachers was acknowledged, the Court found this sweeping inquiry extended beyond permissible First Amendment limits.²²⁷

In the final analysis the right to assembly is tied closely to the other First Amendment protections and may be viewed as an integral part of expression. People do not assemble for its own sake. That assembly constitutes expression of some sort, ranging from overt articulation of controversial political views to silent protestation before the Pentagon of a foreign war. So closely intertwined with the other protections as essentially to be inseparable from them, the right to association is with them at the heart of individual liberty.

Criminal Justice

It is manifest in the Constitution that both the framers and subsequent amenders were concerned about the rights of individuals accused of crime. They viewed essential certain minimal protections against societal encroachment for persons involved in criminal proceedings. Anticipating that an individual would be alone in his legal battle against the massed resources of society, they sought to insure that fair and equal treatment would exist in criminal actions. That was achieved through an elaboration of the process that would be due an accused:

The requirement of “due process” is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But “due process,” unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, “due process” cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, “due process” is compounded of history, reason, the past course of

²²⁶ NAACP v. Alabama, 357 U.S. 449, (1958).

²²⁷ Shelton v. Tucker, 364 U.S. 479 (1960).

decisions, and stout confidence in the strength of the democratic faith which we profess. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.²²⁸

Though unfolding over time, minimal standards of that process which was due process were written into the Constitution.

Article I, Section 9 of the Constitution declares that the writ of habeas corpus, designed to prevent arbitrary or unlawful arrest or detention, cannot be suspended except when required for public safety. The most definitive statement of when habeas corpus might be suspended occurred during the period of the Civil War. The Supreme Court declared in Ex parte Milligan that the President had gone beyond constitutional bounds in suspending the writ of habeas corpus

²²⁸ Justice Frankfurter, concurring, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162-63.

in areas not directly involved in the actual rebellion.²²⁹ The fact that this decision was made from the vantage point of 1866, after the war, may have had something to do with the outcome. In any case, this has been the precedent upon which the courts have relied.²³⁰ No really substantial threat to this right has occurred since the Civil War.

The right to a jury trial in criminal proceedings is specified in Article III, Section 2. The Sixth Amendment furthers this right by mandating that the jury be impartial and that the accused shall have a speedy and public trial. The Seventh Amendment extends the right to a jury to civil as well as criminal cases.

The Eighth Amendment suggests one has a right to bail in its command that "excessive bail shall not be required...." It also prohibits the imposition of cruel and unusual punishments. Much litigation has occurred over this provision, for how much bail is excessive is as subjective as the degree of punishment which is cruel and unusual. What may be judged reasonable in one day and age may take a different coloration with the passing of time. Thus, capital punishment, once completely accepted as proper retribution for certain crimes, has recently been subjected to careful judicial scrutiny on the ground that it constitutes a cruel and unusual punishment.²³¹ An extraordinary test of this provision occurred in 1947 when one Willie Francis, convicted of murder and sentenced to death, was placed in the electric chair. When the switch was pulled, he received a mild current, but because of some mechanical failure was not electrocuted. He argued that if a second electrocution were attempted, it would be a cruel and unusual punishment. The Court, though, did not agree, and held that the constitutional protection extended to the method of punishment (and electrocution was not a cruel method), not to a problem of applying the method. A strong dissent argued that this was of the very essence of a cruel and unusual punishment -- it constituted punishment by installments -- and that the Amendment was intended to protect how the punishment was administered to one convicted.²³²

The Sixth Amendment extends other guarantees to an accused which are designed to give ample opportunity to defend himself. It requires notice of the charges against him, confrontation with witnesses against him, compulsory process for obtaining witnesses on his behalf, and counsel. The importance of counsel has in recent years been stressed by the courts again and again. In a landmark case, Gideon v. Wainwright, the Court maintained "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."²³³ Since that decision in 1963, the right has been extended to the beginning of the confrontation between the police and the accused.

²²⁹ 4 Wallace 2 (1866). This case emanated from President Lincoln's decision to suspend the writ. When tested in court, Chief Justice Taney on circuit found against the President (Ex parte Merryman, 17 Fed. Cases 144 [No. 9487 C.C.D. Md. 1861], whereupon the President requested Congress to authorize the suspension, which it did.

²³⁰ The question arose during World War II whether martial law might be imposed in Hawaii. In Duncan v. Kahanamoku, 327 U.S. 304 (1946), the Court held that the circumstances did not warrant it.

²³¹ Furman v. Georgia, 408 U.S. 238 (1972).

²³² Louisiana ex. rel. Francis v. Resweber, 329 U.S. 459 (1947).

²³³ 372 U.S. 335, 344 (1963).

The Fifth Amendment contains several important protections against government encroachment during a criminal process. Its first clause, in order to protect the innocent from an ordeal of an unnecessary trial, guarantees the right to an indictment by grand jury. This means that probable cause must be found that a crime has in fact been committed before a trial may be had. The double jeopardy clause means that no retrial of the same offense may occur. However, the setting aside of an original guilty verdict based on procedural errors does not prevent the initiation of a second trial by the prosecution.²³⁴ The Fifth Amendment further prohibits compelled self-incrimination and makes the encompassing demand that due process of law be followed before a person may be deprived of life, liberty, or property.

The self-incrimination clause has in recent years been substantially expanded from initial determinations. It was initially designed to guard against the sort of "Star Chamber" proceedings that had occurred in England and from which many had fled in coming to the new land. In the Star Chamber a person was subjected to severe inquisition while given no formal charges or opportunity to defend himself. It was an accusatory, inquisitory method of resolving questions of wrongdoing, applied when the accused did not know enough of the charges that he could defend himself. The accused became in effect his own worst witness, for anything he said could be used against him. The Fifth Amendment sought to remedy this. By its initial interpretation an accused in a criminal case could not be forced by the prosecution to take the witness stand and answer questions.

The Court soon found that in the face of modern approaches to crime solving and law enforcement the scope of this protection needed to be widened to include more than proceedings which occur within an actual courtroom. In the landmark *Miranda* decision the Court maintained that "the [self-incrimination] privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chose to speak in an unfettered exercise of his own will."²³⁵ The Court further noted that "today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect all persons in all settings in which freedom of action is curtailed from being compelled to incriminate themselves."²³⁶ The Court then specified certain procedural safeguards to protect a suspect's self-incrimination right which the police would have to follow during in-custody interrogation. Soon known as the *Miranda* rules, inevitably carried on a card in each policeman's pocket, the police were obliged to recite them at time of arrest to an accused. They stipulate that the accused must be informed that he may remain silent, that if he chooses to speak it can and will be used against him, and that he has a right to counsel at every step of the process.

The right has been extended to matters not directly pertaining to criminal investigations. A section of a city charter was struck down as abridging the self-incrimination clause by providing that any city employee who invoked the privilege to avoid answering questions relating to his official conduct would have his employment terminated. A tenured member of the faculty of a city college who claimed Fifth Amendment protection against questioning by a congressional committee investigating subversive activity in education was discharged. The

²³⁴ *Powell v. Alabama*, 287 U.S. 45 (1932).

²³⁵ *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

²³⁶ *Id.*, at 467.

Court did not agree with that action, holding that his exercising his constitutional right had been transformed “into a conclusive presumption of guilt,”²³⁷ precisely what the provision was designed to prevent.

In the same vein the Court held that a state judicial inquiry into allegations of professional misconduct lodged against a lawyer could not threaten him with disbarment unless he waived the privilege.²³⁸ And the Court concluded that the self-incrimination clause was infringed when policemen, under state investigation for suspected obstruction of the administration of traffic laws, were told they would lose their jobs if they refused to answer the questions put to them.²³⁹

While the issue of how far away from the witness stand in a criminal case the self-incrimination privilege may properly be applied has been under deliberation, another interesting problem has arisen. It centers on the extent to which the privilege encompasses more than verbal testimony. It is clear that compelled verbal communication is prohibited if it tends to incriminate, but is non-verbal communication similarly proscribed? Confronting the problem, the Court has differentiated between the compelling of a “confession” through tests and analyses which result in “communication” or “testimony” from an accused, and obliging an accused to be a source of real or physical evidence through fingerprinting, photographing, or measurement.²⁴⁰ Thus, a person may be compelled to provide a sample of his handwriting,²⁴¹ to speak,²⁴² or to exhibit his body for identification.²⁴³ At the same time the Court has noted that some tests seemingly directed at obtaining physical evidence might actually be aimed at extracting essentially testimonial responses from an individual. “To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to invoke the spirit and history of the Fifth Amendment.”²⁴⁴ It is on this reasoning that the use of a lie detector, not least its reliability, is judicially suspect.

The Fourth Amendment is the final constitutional provision protecting the individual in the criminal process. It prohibits unreasonable searches and seizures and is closely connected to the privilege against self-incrimination. Evidence illegally seized frequently is incriminating, or it probably would not have been seized in the first place. The Fourth Amendment protects property rights, the securing of individuals and their property from trespass unless there is probable cause of a crime. A warrant must be issued which describes carefully what is to be searched and/or seized. By this provision fishing expeditions, in which a place is thoroughly and generally searched and anything really or potentially damaging is seized, are prohibited. It applies:

237 Slochower v. Board of Higher Education, 350 U.S. 551 (1956).

238 Spovak v. Klein, 385 U.S. 511 (1967).

239 Garrity v. New Jersey, 386 U.S. 493 (1967).

240 Schmerber v. California, 384 U.S. 757 (1966).

241 Gilbert v. California, 388 U.S. 263 (1967), U.S. v. Wade, 380 U.S. 218 (1967).

242 United States v. Dioniso, 410 U.S. 1 (1973).

243 United States v. Vack, 388 U.S. 218 (1967).

244 Schmerber v. California, 384 U.S. at 764 (1966).

to all invasions on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitute the essence of the offense, but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense.... Any forcible and compulsory extortion of a man's own testimony or of his papers to be used as evidence to convict him of a crime or to forfeit his goods is within the condemnation of ... [the Fourth Amendment].²⁴⁵

The Fourth Amendment, like all others, was not created in a vacuum. It was based on the framers' experiences with governments which had little regard for a right of privacy. The framers had experienced the indignity of their privacy of person and possession's being invaded and trespassed by the actions of the King's forces in colonial America. They intended that their new government have no power to commit such travesties against individuals.

Most infringements of the guarantee have been made by law enforcement officials while investigating the extent of the protection. For example, in Chimel v. California the Court declared that a search by the police of the petitioner's entire three bedroom house incident to his arrest was too broad and general to be reasonable.²⁴⁶ In another case the police, believing that a suspect was hiding in a house, broke into it and searched the entire premises. Instead of finding the suspect, they found some lewd and lascivious publications, the possession of which they subsequently used as a basis for prosecuting the owner. The Court reversed her conviction and held the seized materials inadmissible. Applying the so-called exclusionary rule (evidence illegally seized may not be introduced at a trial), it concluded that such an exclusion was the most important judicial way to provide Fourth Amendment protection. It was the essential judicial method by which to protect the right of privacy guaranteed by it.²⁴⁷

The protection extends to persons as well as places²⁴⁸ and it is not limited to searches of a person or his property within his home. "This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs."²⁴⁹ However, when a policeman stopped and frisked two men whose behavior in looking over a store had appeared suspicious, though he found them carrying a concealed weapon, for which they were subsequently convicted, his search and seizure was found reasonable on grounds of officer safety.²⁵⁰ The taking of fingernail scrapings²⁵¹ and the use of electronic listening devices²⁵² have been held to fall within the ban of the Fourth

245 Boyd v. United States, 116 U.S. 616 (1886).

246 395 U.S. 752 (1969).

247 Mapp v. Ohio, 367 U.S. 643 (1961).

248 Katz v. United States, 389 U.S. 347 (1967).

249 Id., at 351.

250 Terry v. Ohio, 392 U.S. 1 (1968).

251 Capp v. Murphy, 412 U.S. 291 (1973).

252 Katz v. United States, 389 U.S. 347 (1967).

Amendment. Stomach pumpings²⁵³ and extracting blood samples, with or without the permission of the defendant,²⁵⁴ have invoked questions of the reasonableness of the search and seizure.

Even beyond the criminal process a person retains the protection. When a homeowner refused to permit a health inspector to enter and inspect her premises, the Court noted that “It is surely anomalous to say that the individual and his property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”²⁵⁵

Coupling this Fourth Amendment protection of person and property with a number of other constitutional provisions suggests that the state must have a strong need to impair it to obtain court approval. The Fifth Amendment’s provisions that private property may not “be taken for public use without just compensation” and that a person may not “be deprived of life, liberty, or property, without due process of law” protect property rights against government infringement. Article I, Section 10 stipulates that “No state shall ... pass any ... law impairing the obligation of contracts” and the Third Amendment proscribes forced quartering of troops in homes. The sum of these, and other constitutional protection, provides significant protection of privacy from government intrusion. In combination beyond these specifically mentioned, the constitutional provisions provide more formal restraints on government and protections of civil rights than any other governmental system known to man.

Conclusion

The American system of government provides for a protection of individual rights that is unfamiliar to most forms of government. It reflects a profound respect for an individual who will reach his potential only with liberty and freedom. It is from the interplay between the exercise of rights by individuals and the regulation of that exercise by society and government that freedom in the United States has emerged. The boundaries of those freedoms are continually being changed, frequently in fundamental ways. As with a jeweler’s scale that never hangs in the balance, rights tend to be significantly more restricted in times of national stress such as war,²⁵⁶ and more liberalized in times of tranquility.²⁵⁷ If there is no threat directly

253 Rochin v. California, 342 U.S. 165 (1952).

254 Schmerber v. California, 384 U.S. 757 (1966).

255 Camara v. Municipal Court, 386 U.S. 523, 530 (1967).

256 For example, in Korematsu v. United States, 323 U.S. 214 (1944), the case that Justice Black described to a national television audience as the most difficult in which he had participated, the Court, 6-3, went to “the very brink of constitutional power” (Justice Murphy, dissenting) in upholding the Japanese exclusion program. That program, initiated in 1942 to meet possible espionage and sabotage on the West Coast during World War II, excluded all persons of Japanese ancestry from the Pacific coast area on the ground that the military had concluded that there might be some disloyal persons within the group and the exigencies of war prevented the military’s taking the time to sort the loyal from the disloyal by more conventional measures. Even with the benefit of hindsight in 1944 when the Court heard the case and when it was clear that the threat of invasion from Japan was minimal, if non-existent, and that Japanese citizens were not disloyal, the Court was able to conclude that:

...hardships are part of war, and war is an aggregation of hardships.***Citizenship has its responsibilities as well as its privileges and in time of war the burden is always heavier.

Compulsory exclusion of large groups of citizens from their homes, except under circumstances of

perceived to the public weal, the Court will not only protect, but also will expand individual rights. While in wartime citizens may be removed from their homes on grounds of national security, in peacetime even wiretaps may not be used “to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of government.”²⁵⁸

Those invested with the creation of the new American society clearly had a vision of human nature, the purpose of society, and the function of government that emphasized the importance of the individual. Freedom and liberty were essential to his fulfillment. Society as an extension of individual man into a group of men had as its principal obligation the task of facilitating man’s existence and survival while maintaining the integrity of his nature through guaranteeing his freedom. Through a system of government ruled by law, the framers sought to provide a stable, vital society that would secure better than individuals could the substance of human freedom.

Those who won our independence believed that the final end of the state was to make men free to develop their faculties: and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and a means. ...[T]hey knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government.²⁵⁹

Thus, our governmental system emphasizes individual liberties. It professes that what is best for the individual is best for society. It is a system premised on extraordinary faith in the worth of the individual.

direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

For a well-written account of this frightening episode in modern American history, see Grodzins, Morton, Americans Betrayed: Politics and the Japanese Evacuation (Chicago: The University of Chicago Press, 1949). For a more general discussion of how the Constitution contracts in time of war, see Corwin, Edward S., Total War and the Constitution (New York: Alfred A. Knopf, Inc., 1947).

²⁵⁷ An interesting comparison may be made between the Japanese exclusions during World War II and how the Court will otherwise protect the sanctity of the home. From 1866, when the Court in Boyd v. United States, 116 U.S. 616, held that the Fourth and Fifth Amendments “apply to all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life,” to 1961, when in Mapp v. Ohio, 367 U.S. 643, the Court concluded that freedom from unreasonable searches and seizures was within “the concept of ordered liberty” and protected against state encroachment, the trend has steadily been to further the concept of a right to privacy. Indeed, in 1967, the Court extended the privacy of words to a public telephone booth (Katz v. U.S., 389 U.S. 347) and in 1972 rejected unanimously the President’s assertion that he could authorize electronic surveillance without a warrant in domestic security cases (United States v. U.S. District Court, 407 U.S. 297).

²⁵⁸ United States v. U.S. District Court, 407 U.S. 297 (1972).

²⁵⁹ Justice Holmes, dissenting, Abrams v. United States, 250 U.S. 616, 630 (1919).