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Shortly before his appointment to the Supreme Court, Chief Justice Burger gave new dimensions to the concept of self-fulfilling prophecy when he told those in attendance at a judicial conference that close Warren Court civil liberties decisions could be undone "by so simple a happening as the advent of one or two new Justices."[1] Richard M. Nixon appointed four new Justices to the Court,[2] and the consequences of his selections for Warren-era rulings are now being reflected in virtually every field of Supreme Court decision-making involving civil liberties claims.

With varying degrees of enthusiasm, the Chief Justice and his fellow Nixon appointees, Justices Blackmun, Powell, and Rehnquist, have thus far acquiesced in continued adherence to Warren Court doctrine in certain civil liberties fields. In fact, some of their number have joined decisions which must be viewed as markedly libertarian even by Warren Court standards. In the 1973 abortion cases,[3] for example, Justice Blackmun spoke for the majority in opinions hardly characteristic of Nixonian "strict constructionist" thinking and of the Nixon Justices, only Justice Rehnquist dissented. In the main, however, the Nixon appointees—particularly the Chief Justice and Justices Blackmun and Rehnquist—have come down on the side of government, in some cases joining Justice White and, on rarer occasions, Justice Stewart in limiting the scope of Warren Court civil liberties precedents, and in other cases in attacking the majority's expansion of Warren-era precedents and failure to break faith with established doctrine.

In general, the presence of the Nixon Justices has resulted in a pattern of gradual civil liberties retrenchment on the Burger Court. Retrenchment has been most clearly evident, perhaps, in criminal procedure and equal protection cases, but conservative trends have also emerged in first amendment litigation. In certain free expression

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[1] Duscha, *Chief Justice Burger Asks: "If It Doesn't Make Good Sense, How Can It Make Good Law?"*, N.Y. Times, October 5, 1969 (Magazine).

[2] Chief Justice Warren Earl Burger was cohmissioned on June 23, 1969; Justice Harry Andrew Blackmun on May 14, 1970; Justice Lewis Franklin Powell, Jr., on December 9, 1971; and Justice William Hubbs Rehnquist on December 15, 1971.

[3] Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

issue areas, doctrinal ties with the Warren era remain strong. A majority on the Court, for example, has given the fighting-words exception to free speech a narrow construction. Among other developments, however, the Court has modified and limited application of facial overbreadth review; and the Nixon appointees have launched a massive general assault on overbreadth-vagueness analysis; the law of obscenity has been substantially rewritten; the scope of the public forum concept has been curtailed; military regulations have in effect been exempted from facial review; and the Nixon Justices have begun an effort to expand generally the fighting-words and other exceptions to freedom of expression first set forth by Justice Murphy in the *Chaplinsky* case.[4]

I. OVERBREADTH, VAGUENESS, AND FIGHTING WORDS

Justice White has cast the decisive vote in a number of first amendment battles on the Burger Court. He and the Nixon appoint-

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

[5] Omitted from discussion, however, are a number of issue areas in which the court has been embroiled in controversy over the application of free expression doctrines sculpted essentially during the Warren Court years and before. Excluded from discussion, for example, are those cases invoking the advocacy-of-doctrine/advocacy-of-action and mere membership/active, knowing membership distinctions long recognized in the subversive advocacy and association field, including Baird v. State Bar, 401 U.S. 1 (1971); *In Re* Stolar, 401 U.S. 23 (1971); and Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971), involving bar admission regulations; and Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974), invalidating a loyalty oath requirement conditioning political party access to the ballot on the filing of an affidavit that the part did not advocate forceful or violent overthrow of local, state, or national government. *See also* Cole v. Richardson, 405 U.S. 676 (1972). It should be noted, however, that there is already some evidence of an interest, among the Nixon appointees, in limiting the reach of the rule that government may penalize only those who advocate concrete action directed at illegal overthrow of government, or who are active, knowing members of organizations dedicated to illegal overthrow. *See, e.g.*, Communist Party of Indiana v. Whitcomb, 414 U.S. at 451 (Powell, J., concurring, joined by Burger, C.J., and Blackmun and Rehnquist, JJ.). *See also* Healy v. James, 408 U.S. 169, 201 (1972) (Rehnquist, J., concurring).

For much the same reason, I have omitted examination of certain cases involving prior restraints on expression, including New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). The dissenting opinions of Chief Justice Burger and Justice Blackmun in the *New York Times* case provide considerable insight, however, into their first amendment views.

Of course, by denial of certiorari or application of jurisdictional and related standards, the Court has avoided ruling on a number of controversial first amendment issues. *See, e.g.*, Laird v. Tatum, 408 U.S. 1 (1972), where the Court, on grounds of lack of standing, refused to rule on the validity of an army surveillance system chal-

ees joined forces in *Broadrick v. Oklahoma*[6] a 1973 case, to impose what may prove to be a significant restriction on the reach of facial overbreadth analysis. The *Broadrick* majority, *per* White, reasoned

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lenged by persons who claimed that the mere existence of the program, without more, chilled the exercise of first amendment freedoms by others; New Rider v. Board of Education, 414 U.S. 1097 (1973), where the Court, with Justices Douglas and Marshall dissenting, refused once again to rule on constitutional claims raised against school hair-length regulations; O'Brien v. Brown, 409 U.S. 1 (1972), where the Court refused to rule on first amendment and other constitutional challenges raised against recommendations of the credentials committee of the 1972 Democratic National Convention and stayed a court of appeals decision granting relief, on the grounds that the Convention was available as a forum to hear challenges to credentials committee recommendations, the extraordinary relief granted by the appellate court lacked precedent, and a large public interest was served by allowing the political processes to function free of judical supervision; Board of Regents v. New Left Education Project, 404 U.S. 541 (1972), refusing to rule on the constitutionality of rules applied by a state university board of regents to prohibit a political organization from distributing newspapers or making commercial or noncommercial solicitations on campus; Mitchell v. Donovan, 398 U.S. 427 (1970), declining a ruling on the constitutionality of the federal Communist Control Act of 1954; Reynolds v. Tennessee, 414 U.S. 1163 (1974), where the Court, over the dissent of Justice Douglas, refused to review the constitutional claims of a university instructor who had participated in an antiwar demonstration at a Billy Graham rally which President Nixon had attended, and had later been convicted for violating a law prohibiting willful disturbance of religious, education, literary, and temperance meetings; Yale Broadcasting Co. v. Federal Communications Commission, 414 U.S. 914 (1973), where, again over Justice Douglas' objection, the Court denied certiorari in a case involving FCC regulations about the broadcast of songs containing drug-oriented lyrics; and Board of School Commissioners v. Jacobs, 420 U.S. 128 (1975), where, yet again over Justice Douglas' dissent, the Court dismissed as moot an action against school board regulations alleged to interfere with publication and distribution of a student newspaper. *See also* United States v. New Jersey State Lottery Commission, 420 U.S. 371 (1975). In that case, the majority vacated judgment and remanded so that the lower court could consider dismissal on mootness grounds a challenge to the constitutionality of a federal law which prohibited the broadcast of advertisements or other information regarding lotteries, but had been amended during the litigation to exempt lawful state lotteries and related broadcasts. Justice Douglas dissented, contending that the case was not moot, that the regulations at issue constituted "simple and unadulterated" prior restraint, and that it was "shocking" to him that government could prevent publication of "any item of 'news' of the day." *Id.* at 374.

The free speech guarantee extended specially to congressmen under the Constitution's speech-and-debate clause has been the subject of two important recent cases, United States v. Brewster, 408 U.S. 501 (1972), and Gravel v. United States, 408 U.S. 606 (1972). *See also* Doe v. McMillan, 412 U.S. 306 (1973) and Eastland v. Servicemen's Fund, 43 U.S.L.W. 4635 (1975). An examination of these cases is beyond the scope of this paper.

[6] 413 U.S. 601 (1973). *See also* Civil Service Commission v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

that statutes touching conduct within the shadow or penumbra of the first amendment are less likely to deter the exercise of protected expression than regulations of "pure speech," and held that such regulations of communicative conduct can be ruled facially overbroad only on a showing of "substantial" overbreadth. "[P]articularly where conduct and not merely speech is involved," White wrote, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to [its] plainly legitimate sweep."[7] White

[7] 413 U.S. at 615. Justice White's interest in limiting the sweep of overbreadth doctrine first surfaced in his dissenting opinion in Coates v. Cincinnati, 402 U.S. 611, 617 (1971), which held facially void-for-vagueness and overbreadth a city ordinance which made it criminal for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by." CINCINNATI, OHIO, CODE § 901-L6 (1956). In his *Coates* dissent, Justice White suggested that whereas facial overbreadth review might be appropriate for "statutes clearly reaching speech," facial analysis was unacceptable in cases involving regulations which did "not purport to bar or regulate speech as such." 402 U.S. at 620. Where a statute regulated conduct, even that communicative in nature, constitutional review should be limited, Justice White asserted, to the statute's application in specific cases. The substantial overbreadth test enunciated in *Broadrick*, it might be added, seems clearly to have been foreshadowed in Calfiornia v. LaRue, 409 U.S. 109 (1972), rejecting facial challenges to California liquor regulations which prohibited sexually explicit entertainment—"live" or on film—in establishments licensed to dispense liquor by the drink. The *LaRue* decision and the nature of Justice Rehnquist's opinion of the Court in the case have been the subject of considerable comment. *See, e.g.*, Note, *California v. LaRue: The Supreme Court's View of Wine, Women, and the First Amendment*, 68 NW. U. L. REV. 130 (1973).

Younger v. Harris, 401 U.S. 37 (1971), it might be added, reaffirmed the Court's traditional reluctance to enjoin state enforcement of criminal statutes claimed to be facially overbroad or otherwise unconstitutional. *Younger* and Samuels v. Mackell, 401 U.S. 66 (1971), held, respectively, that, absent bad-faith enforcement or other special circumstances requiring intervention, principles of equity, comity, and federalism precluded federal courts from (1) issuing an injunction against enforcement of a challenged statute in pending criminal proceedings, and (2) in all but the most unusual circumstances, rendering a declaratory judgment on the statute's constitutionality. *Samuels* reserved the question whether declaratory relief is precluded when a state prosecution has been threatened, but is not pending, and a showing of bad faith enforcement or other special circumstances requiring federal intervention has not been made. In Steffel v. Thompson, 415 U.S. 452 (1974), the Court decided that question. Steffel had twice been warned to stop distributing antiwar handbills on an exterior sidewalk of a shopping center, and had been threatened with arrest by police if he failed to do so. When a companion who had continued to distribute the handbills was arrested for criminal trespass, Steffel sought declaratory and injunctive relief in a federal district court. The district court dismissed the action and a court of appeals affirmed. The Supreme Court reversed the dismissal. Speaking through Justice Brennan, the Court held that the considerations of equity, comity, and federalism on which its decisions in *Younger* and *Samuels* had been based had little vitality where no state

and the Nixon appointees also compose the majority which has substantially modified the obscenity doctrine. Justice Douglas continues to reject all obscenity controls and Justices Brennan, Stewart, and Marshall now argue that government may control the manner of its distribution but may not wholly suppress sexually-oriented material, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults."[8] Justice White and the Nixon Justices, however, concluded in *Miller v. California*[9] that prurient, patently offensive material may be condemned as obscene unless it possesses "serious literary, artistic, political, or scientific value,"[10] and further held that judges and juries can apply "local" community standards rather than national standards in determining whether challenged matter meets the requirements of the prurient-appeal and patent-offensiveness obscenity guidelines.[11]

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criminal proceeding was pending when federal relief was sought. It was further held that declaratory relief was not precluded when a prosecution based on an assertedly unconstitutional state statute had been threatened, but was not pending, even if no showing of bad-faith enforcement or other special circumstances had been established.

In Huffman v. Pursue, 420 U.S. 592 (1975), however, a divided Court, in a case involving a motion picture theater closed as a public nuisance for exhibiting allegedly obscene films, held, over the dissents of Justices Douglas, Brennan, and Marshall, that the *Younger* principles apply in civil proceedings that are more akin to a criminal prosecution than are most civil cases. *See also* Allee v. Medrano, 416 U.S. 802 (1974); Ellis and Love v. Dyson, 43 U.S.L.W. 4615 (1975); Doran v. Salem Inn, Inc., 43 U.S.L.W. 5039 (1975).

[8] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73, 113 (1973) (Brennan J., joined by Stewart and Marshall, JJ., dissenting). Justice Brennan, of course, authored the obscenity guidelines announced by the majority in Roth v. United States, 354 U.S. 476 (1957), and by a plurality of Justices in Memoirs v. Massachusetts, 383 U.S. 413 (1966). In the past, Justice Stewart would have allowed governmental suppression only of "hard-core pornography." *See, e.g.*, Ginzburg v. United States, 383 U.S. 463, 497 (1966) (dissenting); Jacobellis v. Ohio, 378 U.S. 184, 197 (1963) (concurring). Justices Brennan, Stewart, and Marshall base their present position in part on a belief that it is simply not possible to construct obscenity tests free of vagueness and related defects. They also have voiced concern about the institutional stress which the obscenity problem has placed on the judiciary.

[9] 413 U.S. 15 (1973).

[10] *Id.* at 24.

[11] In Jenkins v. Georgia, 418 U.S. 153 (1974), overturning the obscenity conviction of a theatre manager who had exhibited the film "Carnal Knowledge," the Court made clear, however, that the standards which are of utmost importance in obscenity cases are those of the community of Supreme Court Justices. For another recent case applying the Burger Court's obscenity formulae and further elaborating the Court's position on the community-standards issue, *see* Hamling v. United States, 418 U.S. 87 (1974).

In other obscenity cases decided before and after the arrival of the full Nixon contingent on the Court, the majority has refused to extend beyond the confines of the

Justice White has helped to form a different majority in another line of cases in which the Court has employed overbreadth-vagueness principles and a narrow reading of the fighting-words exception to free speech to overturn convictions arising from the use of scurrilous language in public places. In those areas, the Nixon appointees—particularly Chief Justice Burger and Justices Blackmun and Rehnquist—have vigorously attacked the majority's approach to facial review. Moreover, they have defended an expansive interpretation of Justice Murphy's assertion in *Chaplinsky v. New Hampshire*[12] that:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, 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

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home the right to possess obscene matter first announced in Stanley v. Georgia, 394 U.S. 557 (1969). *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); United States v. Twelve 200-Foot Reels, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973); United States v. Thirty-seven Photographs, 402 U.S. 363 (1971); United States v. Reidel, 402 U.S. 351 (1971).

Although the Court has continued to require that censorship schemes conform to the procedural standards elaborated in Freedman v. Maryland, 380 U.S. 51 (1965), *see, e.g.*, Blount v. Rizzi, 400 U.S. 410 (1971); United States v. Thirty-seven Photographs, 402 U.S. 351 (1971); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), in one recent case, Heller v. New York, 413 U.S. 483 (1973), the majority ruled that an adversary hearing prior to seizure of a film claimed to be obscene is unnecessary where the judge who signed the warrant authorizing seizure first viewed the entire film, the film was seized to be preserved as evidence in a criminal proceeding, and there was no claim that the seizure prohibited continuing exhibition of other prints of the film. *Cf.* Roaden v. Kentucky, 413 U.S. 496 (1973). In Alexander v. Virginia, 413 U.S. 836 (1973), moreover, the Court ruled that trial by jury is not constitutionally required in a state civil proceeding against magazines alleged to be obscene. Finally, in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), the majority concluded that "expert" affirmative evidence that materials are obscene is not necessary in obscenity proceedings.

In a number of recent cases, of course, the Burger Court has upheld first amendment and related constitutional claims raised in obscenity cases. *See* Jenkins v. Georgia, 418 U.S. 153 (1974); Kois v. Wisconsin, 408 U.S. 229 (1972); Rabe v. Washington, 405 U.S. 313 (1972); Papish v. Board of Curators, 410 U.S. 667 (1973); Vachon v. New Hampshire, 414 U.S. 478 (1974); Southeastern Promotions, Ltd. v. Conrad 402 U.S. 546 (1975); Erznoznik v. City of Jacksonville 43 U.S.L.W. 4809 (1975).

Recent studies of various aspects of the continuing obscenity controversy include Schoen, *Bill Jenkins and Eternal Verities: the 1973 Obscenity Cases*, 50 N.D.L.REV. 567 (1974); Clor, *Obscenity and the First Amendment; Round Three*, 7 LOYOLA (L.A.) L. REV. 207 (1974); Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

[12] 315 U.S. 568 (1942).

> which have never been thought to raise a Constitutional problem. 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. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.[13]

The first decision in the scurrilous-language line of cases was *Cohen v. California*,[14] decided before Justices Powell and Rehnquist had been appointed to the Court. Cohen had been convicted of disturbing the peace after he wore a jacket bearing the words "Fuck the Draft" in the corridor of a courthouse. A divided Court, speaking through Justice Harlan, reversed Cohen's conviction, holding that a state, absent a "particularized and compelling reason," may not make "the simple public display" of expletives a criminal offense.[15]

In his opinion for the Court, Justice Harlan first emphasized what, in the majority's judgment, the case did not involve. Cohen's conviction did not rest on conduct; it rested solely on speech. Nor did the case involve obscene speech, fighting words, an "intent to incite disobedience to or disruption of the draft," or efforts of the state to protect "substantial privacy interests" of a "captive audience." Instead, the issue to be decided was solely:

> whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory . . . that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.[16]

The court rejected out of hand the rationale that Cohen's use of a four-letter expletive could be suppressed because of its "inherent"

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[13] *Id.* at 571-572, *citing* Cantwell v. Connecticut, 310 U.S. 296, 309-310 (1940).
[14] 403 U.S. 15 (1971).
[15] *Id.* at 26.
[16] *Id.* at 22-23.

tendency to cause "violent reaction." "At most," said Justice Harlan, "it reflects an 'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.'"[17] While less certain that states are constitutionally "disable[d] . . . from punishing public utterances of [an] unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic,"[18] Justice Harlan also rejected the notion that states may suppress "offensive language." Such an approach, he maintained, seemed "inherently boundless"[19] and failed to recognize that speech serves important emotive as well as cognitive functions. Moreover, it would be difficult to allow excision of particular words from the public vocabulary:

> without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.[20]

Justice Blackmun filed a brief dissent from the *Cohen* holding which the Chief Justice and Justice Black joined. In Blackmun's view, "Cohen's absurd and immature antic . . . was mainly conduct" subject to state control and "little speech," and the case was "well within the sphere of" the *Chaplinsky* exceptions to free speech.[21] At the very least, Justice Blackmun would have remanded the case for reconsideration by the California court of appeal which had affirmed Cohen's conviction. The California Supreme Court had refused to review Cohen's claims but in a subsequent case had construed, "evidently for the first time," the statute under which he had been convicted. The state court of appeal, Justice Blackmun maintained,

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[17] *Id.* at 23.

[18] *Id.*

[19] He wrote:

> How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm [Cohen's conviction]. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make prinicipled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual *Id.* at 25.

[20] *Id.* at 26.

[21] *Id.* at 27.

should have an opportunity to reconsider Cohen's claims in light of the intervening statutory construction. Justice White concurred with this latter portion of the Blackmun dissent.

The Court's reversal of Cohen's conviction had been grounded on its conclusion that the speech at issue in the case was entitled to constitutional protection. In *Gooding v. Wilson* (1972)[22] the Court, with only Chief Justice Burger and Justice Blackmun dissenting, struck down a statute proscribing scurrilous language without pausing to consider whether "the words . . . used might have been constitutionally prohibited under a narrowly and precisely drawn statute."[23] Johnny Wilson was part of a group of antiwar demonstrators who blocked the entrance to a building housing an army headquarters when military inductees attempted to enter. When officers attempted to remove the protestors, Wilson said to one officer: "White son of a bitch, I'll kill you" and "You son of a bitch, I'll choke you to death." To another, he said: "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." Later, he was convicted under a Georgia statute which provided: "Any person who shall, without provocation, use to or of another, and in his presence, . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor."[24]

Justice Brennan held for the Court in *Gooding* that the statute at issue was unconstitutionally vague and overbroad on its face. Brennan agreed that states have power to punish " 'fighting words—'those which by their very utterance inflict injury or tend to incite an immediate breach of the peace;' "[25] but he concluded that dictionary definitions and earlier state court constructions of the statute had given the words "opprobrious" and "abusive" a greater reach than fighting words.

In post-*Gooding* cases involving scurrilous-language convictions, the Court, normally through memorandum or per curiam opinion, has either vacated judgment and remanded for reconsideration in light of *Gooding* and *Cohen*, reversed the conviction on authority of *Gooding*, or ruled that the speech in question was constitutionally protected.[26] On the last day of the 1971-72 term, the Court vacated

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[22] 405 U.S. 518 (1972).

[23] *Id.* at 520.

[24] GA. CODE § 26-6303 (1973).

[25] 405 U.S. at 522.

[26] In addition to the post-*Gooding* scurrilous-language cases to be discussed here, *see* the two related cases, Colten v. Kentucky, 407 U.S. 104 (1972); and Norwell v. City of Cincinnati, 414 U.S. 14 (1973).

judgment and remanded *Rosenfeld v. New Jersey*,[27] *Lewis v. City of New Orleans*,[28] and *Brown v. Oklahoma*.[29] The appellant in *Rosenfeld* had addressed a school board meeting attended by about 150 people, including women and children, and during the course of his remarks had used the adjective "mother fuckers" to describe teachers, the school board, the town, and the nation. He had been convicted under a statute prohibiting the utterance of "loud and offensive or profane or indecent language" in public places. The petitioner in *Lewis* had been convicted for violating an ordinance making it a crime "wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty." She had characterized police attempting to cite her husband as "god-damned mother fucker police." The appellant in *Brown* was convicted for violation of a statute banning use of "obscene or lascivious language" in public places or in the presence of females. During a political gathering of men and women in the chapel of a college, he had referred to certain policemen as "mother fucker fascist pig cops" and to a particular officer as a "black mother fucker pig."

During the 1972 term, the Court summarily reversed a conviction under a Columbus, Ohio, ordinance which provided: "No person shall abuse another by using menacing, insulting, slanderous, or profane language."[30] In *Plummer v. City of Columbus*,[31] decided during the 1973 term, the Court ruled the same ordinance void on its face. *Plummer* reversed the conviction of a cab driver whose response to a female fare's complaint that he had passed her destination had been, in the words of the trial court, "a series of absolutely vulgar, suggestive and abhorrent, sexually-orientated statements."

Shortly after the *Plummer* decision was announced, the Court, in *Hess v. Indiana*,[32] overturned the disorderly-conduct conviction of Gregory Hess, a campus demonstrator who had told other participants in an antiwar rally, "We'll take the fucking street later," as a sheriff and his deputies attempted to clear a street of protesters obstructing vehicle traffic. Under *Cohen*, said the Court, utterance of the critical word in Hess' statement could not be punished as ob-

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[27] 408 U.S. 901 (1972).

[28] 408 U.S. 913 (1972).

[29] 408 U.S. 914 (1972).

[30] COLUMBUS, OHIO, CITY CODE § 2317.03. The case was Cason v. City of Columbus, 409 U.S. 1053 (1972).

[31] 414 U.S. 2 (1973) (per curiam).

[32] 414 U.S. 105 (1973) (per curiam).

scene. Nor did the statement amount to fighting words. "Even if under other circumstances [his] language could be regarded as a personal insult, the evidence [was] undisputed that Hess' statement was not directed to any person or group in particular."[33] Nor, the Court concluded, did Hess' statement so invade substantial privacy interests as to constitute a public nuisance, or constitute advocacy of imminent lawless action subject to state control. "At best, . . . the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time."[34]

The 1973 term also saw *Lewis v. City of New Orleans*[35] again before the Court. On this occasion, the Court ruled facially overbroad, as construed by the Louisiana Supreme Court, the New Orleans ordinance making it a crime to revile a police officer attempting to perform his duties. As construed, observed Justice Brennan for the majority, the ordinance's reach was clearly broader than the constitutional definition of fighting words. Finally, in *Eaton v. City of Tulsa*,[36] the Court overturned the contempt conviction of a defendant who, on cross-examination, had used the expletive "chicken shit" in reference to an alleged assailant. Applying the imminent-danger standard traditionally employed in contempt-by-publication cases, the Court held: "This single isolated usage of street vernacular, not directed at the judge or any officer of the court, cannot constitutionally support the conviction of criminal contempt."[37]

Of the Nixon appointees, Justice Powell's differences with the majority in the *Cohen-Gooding* line of cases have been least pronounced. Powell was not on the Court when *Cohen* was decided, and neither he nor Justice Rehnquist participated in the Court's disposition of *Gooding*; but Powell, joined by Chief Justice Burger and Justice Blackmun, filed a brief dissent from the Court's remand of *Rosenfeld* in which he urged restraint in the application of vagueness-overbreadth principles and maintained that neither doctrine was applicable in the *Rosenfeld* context. He quickly dismissed any implication in the majority's remand that the statute at issue in the case was void-for-vagueness. Only a "person of infirm mentality," he wrote, would have been unaware that the "deliberate use . . . of what Mr. Justice Harlan termed in *Cohen* a 'scurrilous epithet', in the

[33] *Id.* at 107.
[34] *Id.* at 108.
[35] 415 U.S. 130 (1974).
[36] 415 U.S. 697 (1974) (per curiam).
[37] *Id.* at 698.

presence of a captive audience of women and children," would violate a state banning "loud and offensive or profane or indecent language" in public places.[38] Moreover, he thought it highly unlikely "that sustaining appellant's conviction under this statute [would] deter others from the exercise of legitimate First Amendment rights."[39]

In his *Rosenfeld* dissent, Justice Powell also endorsed an interpretation of *Chaplinsky* which would deny constitutional protection to other scurrilous language than that falling within the fighting words category. He asserted that the *Chaplinsky* exception to free speech was "not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends," he said, "to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience."[40] Along these same lines, he further observed:

> I agree with [the] view that a verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription, whether under a statute denominating it disorderly conduct, or, more accurately, a public nuisance.[41]

And again, in concluding his dissent, he wrote:

> One of the hallmarks of a civilized society is the level and quality of discourse. We have witnessed in recent years a disquieting deterioration in standards of taste and civility in speech. For the increasing number of persons who derive satisfaction from vocabularies dependent upon filth and obscenities, there are abundant opportunities to gratify their debased tastes. But our free society must be flexible enough to tolerate even such debasement provided it occurs without subjecting unwilling audiences to the type of verbal nuisance committed in this case. The shock and sense of affront, and sometimes the injury to mind and spirit, can be as great from words as from some physical attacks.[42]

In the other post-*Gooding* cases, Justice Powell has generally voted with the majority on a variety of grounds. He concurred with the Court's remand of *Lewis* I, but only for reconsideration in light

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[38] 408 U.S. at 907 n.1.

[39] *Id.* at 908.

[40] *Id.* at 905.

[41] *Id.* at 906.

[42] *Id.* at 909.

of *Chaplinsky*, not *Gooding*. He saw "no genuine overbreadth problem" in the case and said that, had the words at issue in the case "been addressed by one citizen to another, face to face and in a hostile manner, [he] would have [had] no doubt that they would be 'fighting words.' "[43] It was his view, however, that remand was appropriate since the words used had been directed at "a police officer trained to exercise a higher degree of restraint than the average citizen."[44] He joined the majority in *Brown* because of the breadth of the statute involved and because he believed that the scurrilous language used by the appellant—a Black Panther party member who had been invited to a political meeting to present the Panther point of view—"might well have been anticipated by [his] audience."[45] In *Hess*, he joined the majority without opinion, and he concurred in the result when *Lewis* II was decided. He agreed that the ordinance at issue in *Lewis*, as construed, was facially overbroad, conferring on police "a virtually unrestrained power to arrest and charge persons with a violation."[46] He also noted:

> [W]ords may or may not be 'fighting words' depending upon the circumstances of their utterance. It is unlikely, for example, that the words said to have been used here would have precipitated a physical confrontation between the middle-aged woman who spoke them and the police officer in whose presence they were uttered. The words may well have conveyed anger and frustration without provoking a violent reaction from the officer, . . . [who] may reasonably be expected to "exercise a higher degree of restraint" than the average citizen, and thus be less likely to respond belligerently to "fighting words."[47]

Justice Powell also voted to reverse the contempt conviction reviewed in *Eaton*, claiming that Eaton had been denied due process by the judge's failure to caution him about "court etiquette." In *Plummer*, on the other hand, he dissented. He characterized the language used by the cab driver there as a "public nuisance" and asserted that the ordinance at issue "was certainly sufficiently explicit to inform petitioner that his verbal assault of [the] female passenger in his cab was 'menacing and insulting.' "[48]

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[43] 408 U.S. at 913.
[44] *Id.*
[45] 408 U.S. at 914.
[46] 415 U.S. at 135.
[47] *Id.*
[48] 414 U.S. at 4.

Thus, although Justice Powell has frequently voted with the majority in the *Cohen-Gooding* line of cases, his approach has differed from the prevailing position in a number of respects. While obviously refusing to abandon facial review entirely in such cases, he has advocated restraint. In his judgment, the analysis in scurrilous-language cases normally should focus on the circumstances in which the speech was uttered. Was the object of verbal assault an "average citizen" or a policeman trained to exercise restraint? Could the speaker's audience easily have anticipated his resort to scurrilous epithets? For Justice Powell, questions of this sort are crucial in cases of the *Gooding* genre. Additionally, of course, his willingness to extend Justice Murphy's *Chaplinsky* dictum beyond fighting words to "the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience" suggests a stronger concern for the plight of the captive audience than that evident in the majority's pronouncements.

Although Justice Rehnquist was not a member of the Court when *Cohen* was decided and did not participate in the *Gooding* decision, Chief Justice Burger and Justice Blackmun dissented in both cases. In subsequent cases, moreover, the three Justices have consistently favored affirmance of scurrilous-language convictions and have registered a number of vehement dissents against the majority's stance. Where the Court has ruled statutes invoked against scurrilous language facially invalid, they have urged caution in the application of the vagueness-overbreadth doctrine and have charged the majority with usurping legislative prerogative. Dissenting from the majority holding in *Lewis* II, for example, Justice Blackmun, joined by the Chief Justice and Justice Rehnquist, maintained:

> Overbreadth and vagueness in the field of speech . . . have become result-oriented rubberstamps attuned to the easy and imagined self-assurance [expressed by Justice Harlan in *Cohen*] that "one man's vulgarity is another's lyric." . . . The danger is apparent. Inherent in the use of these doctrines and this standard is a judicial-legislative confrontation. The more frequent our intervention, which of late has been unrestrained, the more we usurp the prerogative of democratic government. Instead of applying constitutional limitations, we . . . become a "council of revision." If the Court adheres to its present course, no state statute or city ordinance will be acceptable unless it parrots the wording of our opinions.
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> This surely is not what the Framers intended and this is not our constitutional function.[49]

[49] 415 U.S. at 140. In urging restraint in the application of overbreadth doctrine,

The trio has also attacked the majority's "indiscriminate" application of the vagueness-overbreadth formula and the abstract quality of facial review. Again, from Justice Blackmun's *Lewis* I dissent:

> These doctrines are being invoked indiscriminately without regard to the nature of the speech in question, the possible effect the statute or ordinance has upon such speech, the importance of the speech in relation to the exposition of ideas, or the purported or asserted community interest in preventing the speech. And it is no happenstance that in each case the facts are relegated to footnote status, conveniently distant and in a less disturbing focus. This is the compulsion of a doctrine that reduces our function to parsing words in the context of imaginary events.[50]

Their contention, in short, is that the majority, relying on little more than dictionary definitions of statutory language, has simply reached out to invalidate, "in wholesale lots," regulations which further important social interests and pose no significant threat to the free exercise of protected expression.

Where scurrilous-language convictions have been reversed on the ground that the speech in question was subject to constitutional protection, Chief Justice Burger and Justices Blackmun and Rehnquist have taken issue with the Court's reading of the trial record and have accused the majority of "substituting a different complex of factual inferences for [those] reached by" lower courts.[51] Dissenting in *Hess*, for example, Justice Rehnquist challenged the majority's conclusion that, given the circumstances in which they were uttered, the words, "We'll take the fucking street later," constituted neither fighting words nor an incitement of imminent public disorder. Emphasizing that the record of the case was "perhaps unusually colorless and devoid of life,"[52] Rehnquist suggested that the events leading to Hess' arrest and conviction were susceptible to a variety of interpretations, and observed:

> [T]here are surely possible constructions of [Hess'] statement which would encompass more or less immediate and continuing action against the harassed police. They should not be

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it might be added, Chief Justice Burger's dissent in the *Gooding* case foreshadowed the substantial overbreadth doctrine which the *Broadrick* majority later endorsed for cases involving statutes touching communicative conduct.

[50] *Id.* at 136-37.

[51] Hess v. Indiana, 414 U.S. 105, 109 (1973) (Rehnquist, J., dissenting).

[52] *Id.*

> rejected out of hand because of an unexplained preference for other acceptable alternatives.[53]

In his judgment, the Court's resolution of *Hess*, like its application of facial-review standards in other scurrilous-language cases, exceeded the boundaries of judicial authority. "The simple explanation for the result in this case," he asserted,

> is that the majority has interpreted the evidence differently than the courts below. . . . Rather than considering the "evidence" in the light most favorable to the appellee and resolving credibility questions against the appellant, as many of our cases have required, the Court has instead fashioned its own version of events. . . . [T]his is not the traditional function of any appellate court, and is surely not a wise or proper use of the authority of this Court.[54]

Prominent also in the three Justices' dissents in scurrilous-language cases is support for a broad interpretation of Justice Murphy's *Chaplinsky* dictum. Murphy spoke in *Chaplinsky* of "obscene," "libelous," and "fighting" words. He also included among the exceptions to free expression, however, "lewd," "profane," and "insulting" speech. While the former categories have been the subject of numerous narrowing Supreme Court pronouncements, the latter classes of speech have rarely engaged the Court's attention. Chief Justice Burger, Justice Blackmun, and Justice Rehnquist seem anxious to activate these previously dormant exceptions to free expression. In his *Lewis* II dissent, for example, Justice Blackmun exclaimed: "The speech uttered by Mrs. Lewis to the arresting officer 'plainly' was profane, 'plainly' it was insulting, and 'plainly' it was fighting."[55] And Justice Rehnquist has charged that the language at issue in *Rosenfeld* and *Brown* was " 'lewd and obscene' and 'profane' . . . [and therefore] clearly falls within the class of punishable utterances described in *Chaplinsky*."[56] Certainly, moreover, the trio would give the fighting-words exception to free speech a broader reading than would the present majority.

Finally, Chief Justice Burger and Justices Blackmun and Rehnquist have warned that the majority's disposition of scurrilous-

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[53] *Id.* at 111.

[54] *Id.* at 111-12 (asterisk omitted). Justice Rehnquist proceeded along essentially these same lines in attacking the majority's disposition of the *Eaton* case, 415 U.S. at 701.

[55] 415 U.S. at 141.

[56] 408 U.S. at 911-12.

language cases threatens the principle of rule of law and encourages a return to the "law of the jungle." If people believe that government can no longer protect them from the scurrilous epithet, the argument runs, they will attempt to defend themselves and their families from verbal assault. The Chief Justice's opinions have stressed this aspect of the Nixon appointees' criticism of the majority position. In his *Gooding* dissent, he wrote: "There is no persuasive reason to wipe the [challenged] statute from the books, unless we want to encourage victims of such verbal assaults to seek their own private redress."[57] In a later opinion, he expanded this theme, observing:

> When we undermine the general belief that the law will give protection against fighting words and profane and abusive language . . . we take steps to return to the law of the jungle. . . . If continued, this permissiveness will tend further to erode public confidence in the law—that subtle but indispensable ingredient of ordered liberty.[58]

Unless confidence in government can be maintained, the Chief Justice has contended, those outraged by the "foul mouthing" of a speaker "will resort to the 19th Century's vigorous modes of dealing with such people."[59]

The opinions of the Nixon appointees in the scurrilous-language cases reflect clearly the unfortunate breadth of Justice Murphy's *Chaplinsky* dictum. The *Chaplinsky* Court upheld a statute which prohibited verbal assaults involving the use of offensive, derisive, or annoying words. The Court there emphasized, however, that, as construed by New Hampshire's highest court, the statute was "narrowly drawn and limited to" reach only fighting words likely to produce immediate violent reaction.[60] At the time *Chaplinsky* was decided, moreover, Justice Jackson said of the case: "The Constitution does not include a right to brawl and that's about all that seems to be involved."[61] And shortly before his death, Justice Black—the preeminent absolutist in "pure" speech cases—explained that he had joined the Court in *Chaplinsky* because he saw the case as one in which the speech in question was merely part of a course of conduct.[62] The Court

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[57] 405 U.S. at 530.

[58] Rosenfeld v. New Jersey, 408 U.S. at 902.

[59] *Id.* at 903.

[60] 315 U.S. at 573.

[61] Justice Jackson appended his impressions to a draft of Justice Murphy's opinion. The draft is on file in the Frank Murphy Papers, Container 61, Michigan Historical Collection, University of Michigan.

[62] Interview with Justice Hugo L. Black in Washington, D.C., July 6, 1971.

in *Chaplinsky*, then, was dealing with speech closely brigaded with imminent lawless conduct and with a statute authoritatively construed to reach only expression of that character. Justice Murphy's litany of exceptions to free speech—at Justice Frankfurter's suggestion, only "instances by way of illustration" rather than "a comprehensive catalogue"[63]—was totally inconsistent with the narrow grounds on which the decision of the case rested, and clearly was unnecessary to the Court's ruling. It is particularly ironic, therefore, that this gratuitous dictum, penned by a jurist with impeccable libertarian credentials, has become a principal tool of those willing to empower government with broad power to cleanse the public vocabulary.[64]

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[63] Justice Frankfurter appended his impressions to a draft of Justice Murphy's opinion. The draft is on file in the Frank Murphy Papers, Container 61, Michigan Historical Collection, University of Michigan. Originally, Justice Murphy had prefaced his list of exceptions to free speech with the words "They are." Justice Frankfurter "suggest[ed] a slight change in phrasing to avoid claim hereafter that enumeration was a comprehensive catalogue rather than instances by way of illustration." In the final draft of the opinion, Murphy's list was introduced, of course, with the words "These include."

[64] It is also difficult, incidentally, to reconcile the majority pronouncements in *Miller* and other recent obscenity cases with *Chaplinsky*. In *Chaplinsky* Justice Murphy excluded the "obscene" from first amendment protection. "Mere labels," however, are given no weight in constitutional adjudication, *see, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 269 (1964); and in his *Chaplinsky* dictum, Justice Murphy made clear that the Court would include within the exceptions to free speech only those forms of expression "which by their very utterance inflict injury or tend tc incite an immediate breach of the peace." 315 U.S. at 572 (footnote omitted). "[S]uch utterances," he asserted, "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* The *Chaplinsky* characterization of unprotected expression as that which by its "very utterance inflict[s] injury" stands in marked contrast to the majority's conclusion in Paris Adult Theatre v. Slaton, [413 U.S. at 60-61], decided along with *Miller*, that obscenity controls, like commercial regulations, can rest on "unprovable assumptions" and its assertion that "[a]lthough there is no conclusive proof of a connection between antisocial behavior and obscene material, [a] legislature . . . could quite reasonably determine that such a connection does or might exist." Furthermore, while the *Chaplinsky* dictum provides some support for the *Miller* Court's conclusion that material need not be completely lacking in social value to be condemned as obscene, the "serious value" standard endorsed in *Miller* seems inconsistent with the *Chaplinsky* Court's assumption that unprotected expression has "slight social value."

Libel, of course, was another exception to free expression which Justice Murphy cited in *Chaplinsky*. Recent terms have seen comparatively few libel cases before the Court. In Rosenbloom v. Metromedia, 403 U.S. 29 (1971), Chief Justice Burger and Justice Blackmun joined Justice Brennan's plurality opinion extending the knowing-or-reckless-falsehood rule of *New York Times* to libel suits prompted by comment

about a private individual's involvement in an event of public or general interest. The *Rosenbloom* Court was badly divided, however, and in Gertz v. Welch, 418 U.S. 323 (1974), a five-man majority, speaking through Justice Powell, held that a publisher or broadcaster of defamatory falsehoods about a private individual's involvement in a public issue may not assert the *New York Times* rule as protection against liability for actual damages, at least where "the substance of the defamatory statement 'makes substantial danger to reputation apparent.'" *Id.* at 348 (footnote omitted). Justice Powell's majority opinion, which largely incorporated views advanced in *Rosenbloom* dissenting opinions filed by Justices Harlan and Marshall, cited two reasons for drawing constitutional distinctions between statements about the public activities of private persons and the sort of comment about the public activities of public officials and public figures which had been accorded the benefit of the knowing-or-reckless-falsehood standard in the *Times* case and Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). First, he said, private individuals are more vulnerable to injury and the state's interest in protecting them is greater since public officials and public figures usually enjoy significantly greater access to the channels of effective communication and have a more realistic opportunity to counteract falsehoods than private individuals normally enjoy. Second, private persons have not thrust themselves into the public arena and thus are more deserving of recovery than public officials and public figures. *Id.* at 344-45.

As noted above, the *Gertz* majority limited its ruling to suits for actual damages. Allowing recovery of presumed or punitive damages "under a less demanding standard than that stated by *New York Times*," Justice Powell asserted, would "unnecessarily" exacerbate "the danger of media self-censorship." *Id.* at 350.

Justice Blackmun filed a brief concurring opinion in the case which underscored the tenuous nature of the majority's stance. Justice Blackmun reaffirmed his support for the position assumed by the *Rosenbloom* plurality. He joined the *Gertz* majority-however, because he believed that its removal of the "specters of presumed and punitive damages in the absence of *New York Times* malice . . . [had] eliminate[d] significant and powerful motives for self-censorship," and because of his support for "a clearly defined majority position." *Id.* at 354. Chief Justice Burger filed a brief dissent in which he noted that "[a]greement or disagreement with [the law of libel] as it has evolved to this time [did] not alter the fact that it [had] been orderly development with a consistent basic rationale." *Id.* at 354. Chief Justice Burger favored allowing the Court's approach in *New York Times* and its progeny "to continue to evolve as it has up to now with respect to private citizens rather than embark on a new doctrinal theory which has no jurisprudential ancestry." *Id.* at 355. In their dissents, Justice Douglas reiterated his view that the first amendment prohibits all libel controls, and Justice Brennan reaffirmed his support for application of the *New York Times* rule in cases involving comment about the public activities of private individuals. Justice White registered a lengthy dissent in which he reasserted his view that application of the *New York Times* rule should be limited entirely to defamatory comment about public persons and criticized the majority's attempt to distinguish libel suits for actual damages and those involving claims of punitive or presumed damages.

Other recent libel cases include Letter Carriers v. Austin, 418 U.S. 264 (1974); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Time, Inc. v. Pape, 401 U.S. 279 (1971); Minitor Patroit Co. v. Roy, 401 U.S. 165 (1971); Greenbelt Cooperation Pub. Ass'n v. Bresler, 398 U.S. 6 (1970). *See also* Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974), involving application of the knowing-or-reckless-falsehood standard in an invasion of privacy suit. In Cox Broadcasting Corp. v. Cohn, 420 U.S.

469 (1975), the Court, *per* White, overturned a Georgia statute making it a crime to publish the names of rape victims and held that the press could not be sued for invasion of privacy for publication of truthful information that is disclosed in public trials or contained in court documents which are open to public inspection. In a concurring opinion, Justice Powell took issue with the *Cox* majority opinion's characterization as "open" the question whether the first and fourteenth amendments require that truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure. He wrote: "[I]n cases in which the interests sought to be protected are similar to those considered in *Gertz*, I view that opinion as requiring that truth be recognized as a complete defense." *Id.* at 500.

Justice Douglas filed a brief dissent emphasizing once again his view that government has no power to impose damages for the discussion of public affairs. Justice Rehnquist would have denied a ruling on the merits on jurisdictional grounds. For a recent examination of first amendment privacy questions, *see* Bloustein, *The First Amendment and Privacy: the Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1974).

In one recent case, the court reiterated the commercial speech exception to free expression, apparently first recognized in Valentine v. Chrestensen, 316 U.S. 52 (1942). By a five-four vote, the Court, in Pittsburgh Press Co. v. Pittsburg Comm'n on Human Relations, 413 U.S. 376 (1973), relied on the commercial speech exception to reject a first amendment attack on a local human relations commission order prohibiting a newspaper from listing advertisements for jobs covered by an anti-sex discrimination ordinance in sex-designated help-wanted columns. Replying to the contention that the sex-designated column headings represented an editorial judgment protected under the Constitution, Justice Powell concluded for the majority that the headings were not "sufficiently dissociate[d]" from the want-ads "to make the placement severable for First Amendment purposes from the want-ads themselves. The combination, which conveys essentially the same message as an overtly discriminatory want-ad, is in practical effect an integrated commercial statement." *Id.* at 388. Justice Powell also emphasized that the employment discrimination was *illegal* commercial activity under the human relations ordinance, and added: "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal to a valid limitation on economic activity." *Id.* at 389.

Surprisingly, Chief Justice Burger registered a vigorous dissent in which he characterized the majority's position in the case as "a disturbing enlargement of the 'commercial speech' doctrine" and "a serious encroachment on the freedom of the press." *Id.* at 393. While assuming that restrictions could be imposed on commercial advertisements, Chief Justice Burger would deny government control over "the layout and organizational decisions of a newspaper." *Id.* Not so surprisingly, Justice Douglas filed a brief dissent in which he observed: "My views on the [commercial speech] issue have changed since 1942, the year *Valentine* [which Douglas joined] was decided. As I have stated on earlier occasions, I believe that commercial materials also have First Amendment protection." *Id.* at 398. Justice Stewart, joined by Justice Douglas, also wrote a strong dissent contending that, in his judgment, no "government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot." *Id.* at 400. Justice Blackmun dissented in *Pittsburgh Press* "substantially" for the reasons set forth in the Stewart dissent. Compare the Stewart dissent in *Pittsburgh Press* with the opinions filed by Justices Stewart and Blackmun in New

The prevailing position in the scurrilous-language cases is also vulnerable to criticism. Facial review is obviously susceptible to easy abuse, and the Nixon appointees' complaints along those lines—with considerable allowance for overstatement—are well taken. So, too, are their concerns about the possible adverse practical consequences of the majority's approach and the ease with which the majority reached its summary conclusion in *Hess* and *Eaton* that the convictions at issue there had rested on speech alone.

More fundamentally, the present majority has not attempted to develop needed refinements in the *Chaplinsky* Court's conception of fighting words. Under modern rulings, government cannot normally sanction a public speaker simply because he is confronted with a hostile audience, and presumably the same principle would apply in situations where a speaker verbally attacks a specific person. Whether speech constitutes punishable fighting words, therefore, should not be allowed to turn merely on its tendency to provoke violent reaction; the crucial question should be whether the reaction

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York Times Co. v. United States, 403 U.S. 713 (1971).

The commercial speech doctrine has been the target of frequent criticism, *see, e.g.*, Note, *The Commercial Speech Doctrine: The First Amendment at a Discount*, 41 BROOKLYN L. REV. 60-90 (1974); Capitol Broadcasting v. Mitchell, 333 F. Supp. 582, 592 (D.D.C. 1971) (Wright, J., dissenting), *aff'd*, 405 U.S. 1000 (1972). In Bigelow v. Virginia, 43 U.S.L.W. 4734 (1975), Justice Blackmun attempted to outline the doctrine's limits. *Bigelow* overturned the misdemeanor conviction of a Virginia newspaper managing editor who had published an advertisement for a New York abortion counselling and referral service in violation of a state statute punishing those who "encourage or prompt" abortions by publication or in any other manner. In his opinion for the Court, Justice Blackmun construed precedent cases as conferring a qualified first amendment protection on commercial speech. Moreover, in distinguishing the advertisement at issue in *Bigelow* from those involved in *Valentine* and *Pittsburgh Press*, he suggested that commercial speech is entitled to "some degree of First Amendment protection" if its proposal is legal or "pertain[s] to constitutional interests," *id.* at 4738, and if "[v]iewed in its entirety, [it] conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a genuine curiosity about, or genuine interest in" its subject matter. *Id.* "The relationship of speech to the marketplace of products or of services," he concluded, "does not make it valueless in the marketplace of ideas." *Id.* at 4739. Regulations of advertising, like those directed at "all public expression," are subject only "to reasonable regulation that serves a legitimate public interest." *Id.*

Justices Rehnquist and White were the only *Bigelow* dissenters. In a brief opinion joined by Justice White, Justice Rehnquist labelled the challenged advertisement "a classic commercial proposition directed towards the exchange of services rather than the exchange of ideas." *Id.* at 4741. He contended, moreover, that even if the advertisement was something more than a purely commercial proposal, there were legitimate public interests—maintenance of high ethical standards and protection of the public from unscrupulous practices—which the regulation served.

provoked is—for lack of a better term—justifiable. If likely violent response to speech is justifiable, then government may punish the speaker; if not, then government has an obligation to protect the speaker. *Cohen* emphasized that government cannot excise particular speech from the public vocabulary on the basis of theories about its inherent tendency to provoke violence. Ultimately, however, it would appear that courts must make qualitative judgments about language in order to determine whether verbal harangues constitute fighting words subject to control or protected expressions whose utterance should be safeguarded from physical retaliation. Perhaps out of a belief that the scope of the fighting-words exception to free expression is intuitively obvious, the Court to date has not seen the need to establish guidelines to assist lower courts in making such judgments; and, indeed, any efforts which it might make in that direction could prove no more successful than its definitional attempts in the obscenity field. If the fighting-words concept is to remain viable, however, it should be subjected to more thoughtful judicial analysis than heretofore reflected in the Court's opinions in the scurrilous-language cases.

II. REGULATIONS OF TIME, PLACE, AND MANNER

The civil-rights and antiwar movements of the 1960's produced numerous Supreme Court decisions regarding the constitutional status of speech-plus and symbolic-speech activities and the scope of governmental authority over the time, place, and manner of expression in public places.[65] The Burger Court has infrequently confronted such questions, and the ultimate impact of the Nixon appointments in these areas of first amendment concern is thus difficult to assess. It is probable, however, that the Nixon Justices will accept the general outlines of the prevailing view, which holds that the forms of speech-plus and symbolic speech are entitled to some degree of direct first amendment protection and that government may impose narrowly drawn, precise, reasonable, and nondiscriminatory controls of time, place, and manner on speech-related activities. Plainly, in any event, none of the Nixon appointees appears likely to embrace the broad objections to the majority approach which Justice Black so

[65] *See, e.g.*, Gregory v. City of Chicago, 394 U.S. 111 (1969); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); United States v. O'Brien, 391 U.S. 367 (1968); Adderley v. Florida, 385 U.S. 39 (1966); Brown v. Louisiana 383 U.S. 131 (1966); Cox v. Louisiana, 379 U.S. 536 (1965); Bell v. Maryland, 378 U.S. 226 (1964).

frequently and forcefully voiced during his last years on the Court.[66] Nevertheless, their participation in the few Burger Court demonstrative-speech and related cases thus far decided, taken together with their stance in the offensive-language cases, suggests clearly that the Chief Justice, Justice Blackmun, and Justice Rehnquist support extensive governmental power in these fields, and that Justice Powell, depending on the specific issue, can be expected to line up slightly to the left or right of Justice White, the most conservative of the Court's remaining members. Moreover, the Nixon appointees have joined Justice White to form a majority which has substantially curtailed the expansive conceptions of "state action" endorsed by the Warren Court in first amendment cases and other civil liberties contexts.

During the 1971-72 term, the Nixon Justices voted with the Court in *Police Department v. Mosley*[67] and *Grayned v. City of Rockford*,[68] in which equal protection standards were applied to invalidate ordinances which prohibited picketing near schools but exempted peaceful picketing of any school involved in a labor dispute. Justice Marshall set forth the rationale for the ruling in his opinion for the Court in *Mosley*. Largely tracking the reasoning of earlier cases, Justice Marshall agreed that reasonable regulations "of picketing may be necessary to further significant governmental interests,"[69] and observed that "there may be sufficient regulatory interests justifying selective exclusions or distinctions among pickets."[70] He emphasized, though, that "[s]elective exclusions from a public forum may not be based on . . . [or] justified by reference to content alone."[71] Since an exemption of picketing involving labor disputes from a general ban on picketing related to "the message on a picket sign,"[72] such a regulation was clearly invalid. In answering an assertion that the provision was designed not to censor the content of expression but to prevent disruption, Justice Marshall wrote: "If peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor

[66] For a thorough critique of Justice Black's views, *see* McBride, *Mr. Justice Black and his Qualified Absolutes*, 2 LOYOLA (L.A.) L. REV. 37 (1969). For a more sympathetic treatment, *see* Yarbrough, *Justice Black and his Critics on Speech-Plus and Symbolic Speech*, 52 TEX. L. REV. 257 (1974).

[67] 408 U.S. 92 (1972).

[68] 408 U.S. 104 (1972).

[69] 408 U.S. at 98.

[70] *Id.*

[71] *Id.* at 96.

[72] *Id.* at 95.

picketing, both peaceful and nonpeaceful."[73] He also rejected the contention that nonlabor picketing was more prone to violence than labor picketing. "Predictions about imminent disruption from picketing," he maintained, "involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter."[74]

Justices Blackmun and Rehnquist concurred—unfortunately without opinion—only in the result with respect to the Court's disposition of the antipicketing ordinances. Chief Justice Burger joined the Court's opinion, though characterizing as "misleading," if read out of context, a statement in Justice Marshall's opinion that people "are guaranteed the right to express any thought, free of government censorship."[75]

In *Grayned*, the Court also ruled on the constitutionality of an antinoise ordinance which made it a crime for a person, while on grounds adjacent to a school building, to make a noise or diversion disturbing, or tending to disturb, the peace and good order of a school session. Ruling on its facial validity only,[76] the Court rejected vagueness and overbreadth claims raised against the ordinance. In answering the overbreadth charge, the Court relied principally on its holding in *Tinker v. Des Moines Independent Community School Dist.*[77] that expressive activity may be prohibited if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[78]

> Rockford's anti-noise ordinance goes no further than *Tinker* says a municipality may go to prevent interference with its schools. It is narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and does not unnecessarily interfere with First Amendment rights.[79]

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[73] *Id.* at 100.

[74] *Id.* at 100-101.

[75] *Id.* at 102-103.

[76] In his dissenting opinion in *Grayned*, Justice Douglas disputed the majority's conclusion that questions regarding the constitutional status of the behavior of the appellant challenging the validity of the ordinance were not properly before the Court. "If the ordinance applies to appellant's activities and if appellant's activities are constitutionally protected," Justice Douglas contended, "then the ordinance is overly broad and, thus, unconstitutional," 408 U.S. at 124 (dissenting in part). In his view, "the entire picketing, including appellant's part in it, was done in the best First Amendment tradition." *Id.*

[77] 393 U.S. 503 (1969).

[78] *Id.* at 513.

[79] 408 U.S. at 119.

The Chief Justice and Justice Rehnquist joined the Court's reasoning regarding the antinoise ordinance, but Justice Blackmun concurred only in the result, again without opinion.[80]

What is most intriguing and troublesome about *Mosley* and *Grayned* is Justice Marshall's suggestion that "selective exclusions and distinctions among picketers" may be upheld in future cases. Selective bans on picketing, whatever their nature, would appear extremely vulnerable to abuse by governmental authorities. Moreover, except to say that exemptions from general bans on picketing could not be based on content alone, Justice Marshall made no attempt in *Mosely* and *Grayned* to indicate what sorts of selective prohibitions may be allowed. One might have assumed that the relationship between a picketer's cause and the uses of property from which certain picketing is excluded would be the determinative factor. Had the Court agreed with that premise, however, *Mosley* and *Grayned* would have required a different mode of resolution than that reflected in the Court's approach, since picketing in connection with a school labor dispute is clearly related to school operations. A ban on picketing near schools which exempts picketing of schools involved in a labor dispute may well be constitutionally defective for failing to exempt also from the ban other forms of picketing relevant to school operations (e.g., the sort of picketing to challenge alleged discriminatory school practices at issue in *Mosley* and *Grayned*); but the ordinances challenged in *Mosley* and *Grayned* were not condemned on that ground. They were invalidated by the Court on the theory that they simply constituted an exemption to a general ban based on content alone. If, however, the relation of a picketer's cause to the uses of property is not a constitutionally appropriate basis for selective bans on picketing, it is difficult to imagine what bases for distinction the Court might consider acceptable. Hopefully, the question of selective bans on picketing will be given a more thorough airing in an appropriate future case.

Although *Mosley* and *Grayned* furnished little insight into the Nixon appointees' views on the questions raised there, in a related case decided the same term the Chief Justice and Justice Rehnquist differed markedly with the majority over the application of first

[80] During the same term that *Mosley* and *Grayned* were decided, it might be added, the Court, with neither Justice Powell nor Justice Rehnquist participating, reaffirmed the familiar principle that first amendment rights are not immunized from regulation where they are used as an integral part of conduct violative of valid antitrust laws. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

amendment freedoms on military property. *Flower v. United States*[81] summarily reversed the conviction of a civilian member of the American Friends Service Committee who had distributed leaflets on a military post. The petitioner, previously barred from the post for attempting to distribute "unauthorized" literature, had been convicted under a federal statute making it criminal to reenter a military post after having been removed and ordered not to reenter by the officer in charge. In a per curiam opinion, the Court noted that the street on which the leaflets had been distributed was open to the public and held that the military had thus "abandoned any claim that it had special interests in who walks, talks, or leaflets on the avenue."[82] Justice Blackmun dissented without opinion, indicating only that, in his judgment, the case should have been accorded a full review by the Court. But Justice Rehnquist, joined by Chief Justice Burger, filed a brief dissent. Rehnquist read the Court's decision in *Adderley v. Florida*,[83] a 1966 case upholding the trespass convictions of civil rights protestors who had demonstrated on the grounds of a jail, to suggest "that civilian authorities may draw reasonable distinctions, based on the purpose for which public buildings and grounds are used, in according the right to exercise First Amendment freedoms in such buildings and on such grounds."[84] Extending this principle to the military context, Justice Rehnquist concluded that "the unique requirements of military morale and security may well necessitate control over certain persons and activities on the base, even while normal traffic flow through the area can be tolerated."[85]

Justice Rehnquist noted in his *Flower* dissent that the Court's decision was not based on any finding that the petitioner had been treated differently from other leafleteers. However, his interpretation of *Adderley* to allow the imposition of reasonable distinctions in the exercise of first amendment freedoms on public property, and his intimation that leafleteers may be denied access to military property to promote the "morale" of servicemen, combine to suggest that, in Justice Rehnquist's view, and presumably in that of Chief Justice Burger, selective controls of expression on public property may be based on the expression's content. Clearly, this was not the stance assumed by the *Adderley* Court, for Justice Black emphasized for the majority there:

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[81] 407 U.S. 197 (1972).

[82] *Id.* at 198.

[83] 385 U.S. 39 (1966).

[84] 407 U.S. at 200.

[85] *Id.* at 200-201.

> The sheriff, as jail custodian, had power . . . to direct that this large crowd of [civil rights demonstrators] get off the grounds. There is not a shred of evidence in this record that this power was exercised, or that its exercise was sanctioned by the lower courts, because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest. The record reveals that he objected only to their presence on that part of the jail grounds reserved for jail uses. There is no evidence at all that on any other occasion had similarly large groups of the public been permitted to gather on this portion of the jail grounds for any purpose.[86]

Plainly, too, this conception of governmental power over public property is at odds with the Court's position in *Mosley* and *Grayned*.

In two recent cases, questions of governmental authority over the uses of public and private property merged with obscenity issues, producing interesting voting splits. *Southeastern Promotions, Ltd. v. Conrad*[87] overturned the refusal of the city of Chattanooga, Tennessee, to permit performance of the musical "Hair" in a city-leased theater. Speaking for a majority which included Justice Powell, Justice Blackmun held that a system for licensing theatrical productions in municipal theaters must conform to the procedural standards required of motion picture censorship schemes in *Freedom v. Maryland*.[88] Chief Justice Burger and Justices White and Rehnquist dissented. In a dissenting opinion joined by the Chief Justice, Justice White complained that procedural weaknesses in the Chattanooga licensing system were not properly before the Court. He observed, moreover, that "Hair" had been held violative of state statutes in the lower courts, that the Court had not reversed or otherwise disapproved that finding, and that the consequence of the Court's ruling in the case would thus be the licensing of a production held subject

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[86] 385 U.S. at 46-47 (footnote omitted).

[87] 95 S. Ct. 1239 (1975).

[88] 380 U.S. 51 (1965). Justice Douglas dissented from the majority's conclusion in the case that injuries to the first amendment could be adequately treated through application of "a few procedural band-aids." He wrote: "The critical flaw in this case lies not in the absence of procedural safeguards, but rather in the very nature of the content screening in which respondents have engaged." 95 S. Ct. at 1249. Noting that "Hair" was "undoubtedly offensive to some, but its contribution to social consciousness and intellectual ferment is a positive one," Justice Douglas suggested that the musical might someday merit comparison to "the most highly regarded works of Aristophanes, a fellow debunker of established tastes and received wisdom. . . ." *Id.*

to governmental suppression in the lower courts. Noting that government clearly could forbid the production's exhibition to children, Justice White further asserted that a city constitutionally could "reserve its auditorium for productions suitable for exhibition to all the citizens of the city, adult and children alike."[89]

Justice Rehnquist also registered a brief dissent. In his view, the municipal action at issue was simply part of a reasonable, nondiscriminatory control over public property within the sphere of the Court's ruling and opinion in the *Adderley* case. Of necessity, he contended, public auditoriums must be selective in the scheduling of performances; and so long as a city drew such distinctions in a manner sufficiently "reasonable" to satisfy due process and equal protection requirements, the courts should not intervene.[90] Justice Rehnquist conceded that a municipal theater could not be equated with a private theater in terms of the scope of its constitutional discretion. He added, however: "But, just as surely, that element of it which is 'theater' ought to be accorded some constitutional recognition along with that element of it which is 'municipal.' "[91]

As with his *Flower* dissent, Justice Rehnquist's reliance on *Adderley* in the *Southeastern Promotions* case seems misplaced. *Adderley* did hold that government can prevent general public access to some forms of public property, even where access is sought for purposes of communication. But the *Adderley* decision and the Court's opinion there hardly support the proposition that government may develop property to be utilized primarily for a wide variety of expression related purposes, and then deny access to activities viewed as not "in the best interest of the community," the ground asserted for the denial of a license to the "Hair" production company.

Erznoznik v. City of Jacksonville[92] also raised obscenity issues colored with questions about the scope of governmental regulations of time, place, and manner. The *Erznoznik* Court invalidated as overly broad a Jacksonville, Florida, ordinance which made it a public nuisance and criminally punishable for drive-in theaters visible from a public street or public place to exhibit films containing nudity. Speaking for the majority, Justice Powell rejected city contentions that the ordinance could be justified as a reasonable safeguard of substantial privacy interests, as a protection of minors, or as a traffic regulation. In rejecting the privacy claim, Justice Powell noted

[89] 95 S. Ct. at 1252.
[90] *Id.* at 1253, n.2.
[91] *Id.* at 1254.
[92] 95 S. Ct. 2268 (1975).

that the ordinance had the effect of deterring exhibition of all movies containing any nudity, however innocent or even educational, and asserted that such an overbroad infringement of expression could not be justified where offended persons could readily protect their privacy by simply averting their eyes. He further observed that the case did not involve a properly drawn zoning ordinance or nondiscriminatory nuisance ordinance designed to protect the privacy of the home from visual or audible intrusions.[93] That the ordinance was not directed merely at sexually explicit nudity nor otherwise limited in its scope led Justice Powell to conclude for the Court also that the regulation could not be defended as a narrowly drawn attempt to control exhibition of material whose exposure to children can be proscribed by government. "In most circumstances," he wrote, "the values protected by the First Amendment are not less applicable when government seeks to control the flow of information to minors."[94] Since the ordinance applied to films visible from "public places" as well as "public streets," the Court rejected the notion that the regulation could be labelled a mere traffic safety regulation. Justice Powell concluded, however, that even if viewed as a regulation designed to prevent motorist distraction, the ordinance was extremely underinclusive, since it singled out movies depicting nudity from all others which contained matter, "ranging from soap opera to violence,"[95] also likely to distract motorists.[96]

Justice Powell was joined in the majority by fellow Nixon appointee Justice Blackmun, but the Chief Justice and Justice Rehnquist, along with Justice White, dissented. In an opinion joined by Justice Rehnquist, Chief Justice Burger characterized the first amendment interests at stake in the case as "trivial at best."[97] Passersby saw but did not hear segments of motion pictures subject to the challenged ordinance, and "the communicative value of such fleeting exposure," said Burger, fell "somewhere in the range of slight to nonexistent."[98] Under those circumstances, he thought it "absurd to suggest that the ordinance operates to suppress expression of

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[93] *Id.* at 2274, n.9.

[94] *Id.* at 2275 (footnote omitted).

[95] *Id.*

[96] Justice Douglas filed a brief concurrence indicating that he did "not doubt" the power of government to fashion a narrowly drawn ordinance which could be utilized to protect the interests of a captive audience or to promote highway safety. He rejected as unconstitutional, however, attempts to discriminate among motion pictures on the basis of content.

[97] 95 S. Ct. at 2280.

[98] *Id.* at 2279.

ideas."[99] Moreover, the R-rated film whose exhibition was challenged under the ordinance in the case had been screened at several indoor theaters in the area, and films depicting nudity could be exhibited at drive-in theaters if effectively shielded from public view. On the other hand, the Chief Justice contended, "giant displays which through technology [were] capable of revealing and emphasizing the most intimate details of human anatomy" were "highly intrusive and distracting."[100] In such a setting, where first amendment interests were highly attenuated and society's interest in control was great, government had power, Burger concluded, to impose regulations of the sort contained in the challenged ordinance, "[w]hether such regulation [was] justified as necessary to protect public mores or simply to insure the undistracted enjoyment of open areas by the greatest number of people—or for traffic safety."[101] Justice White also registered a brief dissent in which he, too, focused on what he viewed as the unfortunate implications of the majority opinion's treatment of the privacy interests asserted in support of the ordinance. If language in the Court's opinion is "taken literally," he charged, "the State may not forbid 'expressive' nudity on the public streets, in the public parks or any other public place since other persons in those places at that time have a 'limited privacy interest' and may merely look the other way."[102]

The *Erznoznik* dissenters were rather effective in their conceptualization of the challenged ordinance as a largely noncensorial control over the place of expression designed to protect individual privacy and assure traffic safety. The importance which they attached to the privacy interests asserted in support of the regulation stand in marked contrast, however, to their refusal to extend beyond the confines of the home the privacy-first amendment-based right to possess obscene matter first recognized in *Stanley v. Georgia*.[103] Indeed, the narrow conception of the *Stanley* privacy doctrine endorsed by Chief Justice Burger and Justice White, among others, led Justice Black to remark shortly before his death: "[P]erhaps in the future [*Stanley*] will be recognized as good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room."[104]

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[99] *Id.* at 2280.

[100] *Id.* at 2279.

[101] *Id.* at 2280.

[102] *Id.*

[103] 394 U.S. 557 (1969). *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

[104] United States v. Thirty-seven Photographs, 402 U.S. 363, 382 (1971).

The Public Forum

While their impact thus far appears to have been negligible in related areas of litigation, the Nixon appointees have had a significant influence on the Court's stance with regard to the constitutional obligations of private property. Private activities permeated with state involvement and those found to possess a public character are subject to first amendment and other constitutional limitations on state action.[105] Justice Black, speaking for the Court in *Marsh v. Alabama*,[106] decided in 1946, employed a public forum or public function rationale in overturning the trespass conviction of a Jehovah's Witness who had attempted to distribute religious literature on the streets of a privately-owned company town. The Court's 1968 decision in *Food Employees Union v. Logan Valley Plaza*[107] relied on *Marsh* to invalidate an injunction broadly prohibiting nonemployee handbilling and peaceful picketing of a store located in the Logan Valley Plaza, a shopping center characterized by the Court as the "functional handbilling equivalent" of a municipal business district. In 1972, however, the Nixon Justices joined Justice White, a *Logan Valley* dissenter, to form the majority in *Lloyd Corp. v. Tanner*,[108] an important decision restricting the reach of the *Marsh* and *Logan Valley* rulings.

The five-to-four *Lloyd Corp.* majority reversed the finding of a federal district court that a company's policy of banning handbill distribution from the interior mall area of Lloyd Center, a large shopping complex, infringed first-fourteenth amendment free expression guarantees. Justice Powell delivered the majority opinion. In *Logan Valley*, Justice Powell asserted, the Court had limited its decision to cases in which the free expression activities at issue were directly related to shopping center operations and no adequate alternative means of communication were available. Since neither of these elements was present in *Lloyd Corp.*, the *Logan Valley* principle was inapplicable.

While the majority purported merely to limit *Logan Valley* to its facts, Justice Powell's opinion largely rejected the interpretation of *Marsh* on which the *Logan Valley* decision seems obviously to have been based. Justice Powell branded as "an incorrect interpretation"

[105] *See, e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Terry v. Adams, 345 U.S. 461 (1953).

[106] 326 U.S. 501 (1946).

[107] 391 U.S. 308 (1968).

[108] 407 U.S. 551 (1972).

of *Marsh*,[109] and unnecessary to the *Logan Valley* ruling, any suggestion in the Court's *Logan Valley* opinion

> that the key focus of *Marsh* was upon the "business district", and that whenever a privately owned business district serves the public generally its sidewalks and streets become the functional equivalents of similar public facilities.[110]

Instead, Justice Powell endorsed the interpretation of *Marsh* which Justice Black had advanced in his *Logan Valley* dissent, noting that since Justice Black had authored the Court's opinion in *Marsh*, "his analysis of its rationale [was] especially meaningful."[111] In his *Logan Valley* dissent, Justice Black had emphasized that the company town in *Marsh* "had all the attributes of a town" and stressed the differences between a company town and a privately-owned shopping center. Justice Powell's *Lloyd Corp.* opinion substantially incorporated Justice Black's views.[112] Adoption of the theory that businesses open to the public have been dedicated to certain types of public use, including the exercise of first amendment rights, would represent, Justice Powell concluded, an insufficient regard for the fifth-fourteenth amendment rights of private property.

Justice Marshall, author of the Court's opinion in the *Logan Valley* case, registered a forceful dissent, which Justices Douglas, Brennan, and Stewart joined. Justice Marshall challenged the majority's assertion that the size and complexity of an enterprise had no bearing on its constitutional obligations. The basic principle underlying *Marsh* and *Logan Valley*, he asserted, was that the right of property owners to prohibit the exercise of constitutional rights on their premises diminishes as the property expands to the point that, in reality, it becomes the business district of a community. Under that principle, "Lloyd Center [was] much more analgous to the company town in *Marsh* than was the Logan Valley Plaza,"[113] for the Lloyd Center was larger, contained more commercial facilities, provided a wider range of professional and nonprofessional services, and, unlike Logan Valley Plaza, had a private police force with full municipal police power.

Justice Marshall also criticized the majority's conclusion that the first amendment activity at issue in the case was unrelated to shop-

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[109] *Id.* at 562.
[110] *Id.* (footnote omitted).
[111] *Id.* at 562, n. 10.
[112] *Id.* at 568-69.
[113] *Id.* at 576.

ping center purposes. Lloyd Center, he wrote, had deliberately opened its property to a broad range of expression; consequently, handbilling was clearly compatible with the shopping center's uses. Finally, he agreed with the district court's finding that the mall area, from which handbilling was banned, "was the only place where respondents had reasonable access to all of Lloyd Center's patrons";[114] and he could perceive no "logical reason" why, in striking a balance between free expression and property interests, speech unrelated to shopping center operations should receive different treatment under the Constitution than expression related to its activities—particularly since picketing, handbilling, and other free or relatively inexpensive means of communication were the only media of expression available to many persons.[115]

At first glance, Justice Powell's *Lloyd Corp.* opinion is perplexing. In attempting to distinguish *Logan Valley* from *Lloyd Corp.* and explain why Logan Valley Plaza was subject to the Constitution's commands, while the much larger and more complex Lloyd Center was not, Justice Powell seems to be suggesting that the relationship of proscribed first amendment activity to a shopping center's operations, and the adequacy of alternative avenues of communication, are controlling. Such factors are obviously relevant to a determination of the reasonableness of governmental controls over expression. But they would appear to have no bearing on whether ostensibly private activities or policies are sufficiently "public" to bring the Constitution into play—the threshold question in cases of the *Marsh, Logan Valley*, and *Lloyd Corp.* genre. On closer examination of Justice Powell's opinion, however, it seems evident that the *Lloyd Corp.* majority was actually overruling *Logan Valley sub silentio*, while declining to do so overtly, perhaps because of the ruling's recent vintage. The *Lloyd Corp.* decision was close, and in future cases involving fact patterns virtually identical to those of *Logan Valley*, first amendment obligations may be imposed on shopping complexes and related facilities. Even so, it is clear from *Lloyd Corp.* and other recent decisions[116] that the present Court's conceptions of state action and the

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[114] *Id.* at 583.

[115] *Id.* at 580-81.

[116] *See, e.g.*, Central Hardware Co. v. NLRB, 407 U.S. 539 (1972). In *Central Hardware*, decided along with *Lloyd Corp.* the Court held the *Logan Valley* principle inapplicable in a case involving union solicitation in the parking lots of free-standing stores. Justice Powell's opinion of the Court included the following observation:

> Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned

public forum are decidedly more restrictive than that advanced by the Warren Court.

The limited scope which the Court has attached to the public forum concept is vulnerable to attack on several fronts. First, as Justice Marshall has observed, as a practical matter the Court's approach places serious limitations on the expression opportunities of those individuals and groups denied meaningful access to the more orthodox channels of communication. By 1972, the year *Lloyd Corp.* was decided, over half (54.5 percent) the total population of the nation's metropolitan areas resided in suburbs,[117] where shopping complexes of the Lloyd Center variety are the major source of services and goods generally associated with the operations of city business districts. Moreover, even in small towns private shopping centers are rapidly replacing "downtown areas" as the focal point of consumer services. Under the *Lloyd Corp.* ruling, therefore, handbillers and

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> property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes. The only fact relied upon for the argument that Central's parking lots have acquired the characteristics of a public municipal facility is that they are "open to the public." Such an argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location. To accept it would cut *Logan Valley* entirely away from its roots in *Marsh*. It would also constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments. 407 U.S. at 547.

See also Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). For an interesting debate over the public forum issue in a rather unique setting, see Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). At issue in that case was a city transit system policy which prohibited political advertising but permitted other types of advertising on city transit vehicles. Justice Blackmun, joined by the Chief Justice and Justices White and Rehnquist, concluded that car space on a city transit system was not a public forum subject to first-fourteenth amendment requirements. Justice Douglas observed in a separate opinion that a political candidate has no right to force his message on a captive audience which uses a public transit system only as a means of transportation. Justice Brennan, joined by Justices Stewart, Marshall, and Powell, registered a dissent in which he maintained:

> In my view, the city created a forum for the dissemination of information and expression of ideas when it accepted and displayed commercial and public service advertisments on its rapid transit vehicles. Having opened a forum for communication, the city is barred by the First and Fourteenth Amendments from discriminating among forum users solely on the basis of message content. 418 U.S. at 310.

[117] BUREAU OF THE CENSUS, GENERAL POPULATION CHARACTERISTICS: UNITED STATES SUMMARY, 34 (1972).

picketers may be denied access to those locations where they would find their largest potential audiences. As has recently been emphasized by the Court,[118] the first amendment right to free expression is not a guarantee of *effective* expression. Nevertheless, the Court's present narrow conception of the public forum must be viewed with varying degrees of alarm by those who believe that the first amendment reflects "a profound national commitment to . . . uninhibited, robust, and wide-open" debate on public issues.[119]

Second, despite the narrow interpretation which Justice Black gave *Marsh* in his *Logan Valley* dissent, there is language in *Marsh* which is supportive of a broader application of the public forum doctrine than the *Lloyd Corp.* majority, purporting to rely on *Marsh*, was willing to accept. At one point, for example, Justice Black observed in *Marsh*: "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[120] That statement would appear to reflect a more flexible conception of the public forum than that set forth by Justice Black in his *Logan Valley* dissent or by Justice Powell in *Lloyd Corp.*

On the other hand, for those who subscribe to the belief that meaningful distinctions between private and state action can and should be made in constitutional litigation, the Court's approach might be viewed as a needed curtailment of an extremely elastic concept. An unduly expansive notion of the public forum represents a serious threat to the fifth-fourteenth amendment guarantee against the taking of property for public purposes without due process or just compensation. And it is at least arguable that the *Logan Valley* Court gave the doctrine a virtually limitless reach.

Of course, where a case involves competing sets of first amendment claims (e.g., where litigant A asserts a first amendment right of access to communication media controlled by litigant B, and litigant B cites the first amendment in resisting litigant A's claim), a limited conception of the public forum or other indicia of governmental action may serve to enhance the freedom of expression of certain litigants while defeating the first amendment claims of other litigants. In such instances, the usual lines of conflict in state action cases may substantially disappear. In *CBS v. Democratic National*

[118] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 36 (1973).
[119] New York Times v. Sullivan, 376 U.S. 254, 270 (1964).
[120] 326 U.S. at 506.

Committee,[121] for example, a seven-man majority upheld broadcaster programming discretion and rejected claims of a first amendment right of access to the broadcast media by holding that neither first amendment principles nor the "public interest" standard imposed by Congress on decisions of the Federal Communications Commission (FCC) required an FCC ruling that broadcasters accept paid editorial advertisements. Justice Brennan, joined by Justice Marshall, complained in dissent that broadcasters had first amendment obligations and charged that any legitimate interests served by an absolute broadcaster ban on editorial advertisements were outweighed by the significant first amendment interests in full discussion of public issues and self-expression by individuals and groups through the nation's most important modern forum for the expression of ideas. Included among the majority, however, was Justice Douglas, ordinarily a first amendment ally of Justices Brennan and Marshall and a staunch defender of free expression opportunities for those denied access to orthodox channels of communication.[122] In the past, Justice Douglas had frequently argued that the activities of government licensees operating in the public domain are governmental activities for constitutional purposes.[123] But application of that view in the *CBS* setting would obviously have conflicted with his absolutist interpretation of the first amendment. In resolving the problem, perhaps only to his satisfaction, he simply noted that his expansive position regarding the reach of the state action concept had never been accepted by a majority on the Court, assumed that broadcaster refusal of editorial advertisements was a private decision, and rejected as unconstitutional all controls over broadcast programming, including those implicit in the FCC's "fairness doctrine."[124] Where his position conflicts with other, more crucial aspects of his constitutional philosophy, therefore, a jurist may be expected to depart from his "normal" stance on the public forum and other state action issues.[125]

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[121] 412 U.S. 94 (1973).

[122] *See, e.g.*, Adderley v. Florida, 385 U.S. 39, 48 (1966) (Douglas, J., dissenting).

[123] *See, e.g.*, Garner v. Louisiana, 368 U.S. 157, 183-85 (1961) (concurring); Lombard v. Louisiana, 373 U.S. 267, 281 (1963) (concurring); Moose Lodge No. 197 v. Irvis, 407 U.S. 163, 179 (1972) (dissenting).

[124] Justice Douglas did not participate in the Court's decision of Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969), upholding an FCC order and regulations promulgated under the fairness doctrine.

[125] Another important recent case involving right-of-access claims is Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), in which a unanimous Court, *per* Chief Justice Burger, invalidated Florida's "right-to-reply" statute under which newspapers were required to provide free reply space to any political candidate wishing to

Symbolic Speech and Flag Desecration

In recent years, lower federal courts and state courts have frequently been confronted with symbolic speech and other constitutional claims raised against flag use and desecration statutes.[126] In 1969, the Supreme Court avoided a ruling on the first amendment status of flag burning intended to communicate an idea.[127] In *Smith v. Goguen*,[128] decided in 1974, the Court also declined to rule on first amendment overbreadth claims raised against a Massachusetts statute proscribing "contemptuous treatment" of the United States flag. Instead, Justice Powell, noting that the "skeletal record" in the case "afford[ed] a poor opportunity for the careful consideration" of the first amendment contentions raised against the statute,[129] held the statute unconstitutionally vague for failing "to draw reasonably clear lines between the kinds of nonceremonial treatment [of the flag] that are criminal and those that are not."[130]

Justice White concurred only in the judgment. For White, the flag statute presented no vagueness problems, at least as applied in *Goguen*.[131] Goguen had been convicted for wearing a small flag sewn to the seat of his trousers. "It should not be beyond reasonable comprehension of anyone who would conform his conduct to the law," Justice White contended, "to realize that sewing a flag on the seat of his pants is contemptuous of the flag."[132]

While thus rejecting the vagueness ground on which the majority decision had rested, Justice White concluded that the flag law infringed first-fourteenth amendment rights. He had "no doubt about the validity of laws designating and describing the flag and regulating its use, display and disposition." "The flag is national property," he wrote, "and the Nation may regulate those who would make, imitate,

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respond to newspaper attacks on his personal character or political record. Observing that a responsible press, while desirable, is not required under the Constitution, the Chief Justice concluded for the Court that the reply statute encouraged self-censorship and constituted an undue interference with journalistic discretion. For a sympathetic treatment of the right-of-access claim, see Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

[126] For a listing of recent cases, *see* Smith v. Goguen, 415 U.S. 566, 583 n. 1 (1974) (White, J., concurring).

[127] Street v. New York, 394 U.S. 576 (1969).

[128] 415 U.S. 566 (1974).

[129] *Id.* at 583, n. 32.

[130] *Id.* at 574.

[131] *Id.* at 584.

[132] *Id.*

sell, possess or use it."[133] It was his view, however, that the Constitution protected expressive uses of the flag and that the flag statute was constitutionally invalid because it could be applied "to punish for communicating ideas about the flag unacceptable to the controlling majority in the legislature."[134]

Although Justice Powell had authored the majority opinion in *Goguen*, the three remaining Nixon appointees dissented. Justice Blackmun, joined by Chief Justice Burger, filed a brief dissent in which he expressed agreement with Justice White's views on the vagueness issue, but concluded that, as authoritatively construed, the flag statute's reach had been limited to affronts to the "physical integrity" of the flag, not "speech—a communicative element."[135] In a more elaborate dissent, Justice Rehnquist, with the Chief Justice concurring, assumed a similar stance. Justice Rehnquist endorsed the view, set forth by the Court in *United States v. O'Brien*,[136] that although symbolic speech is entitled to constitutional protection, narrowly drawn regulations, which further legitimate and substantial governmental interests unrelated to the suppression of ideas, are valid even though they place incidental burdens on communicative conduct. Applying the *O'Brien* principle to *Goguen*, Justice Rehnquist concluded that the Massachusetts flag statute furthered substantial state interests in safeguarding the flag's "physical integrity" and asserted that Goguen had "simply [been] prohibited from impairing the physical integrity of a unique national symbol which has been given content by generations of his and our forebears."[137]

Justice Rehnquist assumed essentially this same stance in dissenting from the Court's *per curiam* disposition of *Spence v. Washington*.[138] *Spence* overturned a statute forbidding the public display of a United States flag with any mark added, as applied to a student protester who had suspended a flag bearing a peace symbol upside down from the window of his apartment. In reversing the conviction, the Court observed that the student had "displayed [the flag] as a flag of his country in a way closely analogous to the manner in which flags have always been used to convey ideas," and held that "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired" by the student's

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[133] *Id.* at 587.
[134] *Id.* at 588.
[135] *Id.* at 591.
[136] 391 U.S. 367 (1968).
[137] 415 U.S. at 604.
[138] 418 U.S. at 405 (1974).

gesture.[139] Justice Blackmun concurred only in the result, and Justice Rehnquist, joined by Chief Justice Burger and Justice White, emphasized in dissent a state's important interests in preserving the physical integrity of the flag.[140] It would appear, therefore, that while they may support broad governmental authority over communicative conduct, the three most conservative Nixon Justices have no interest in raising general objections to the symbolic speech concept.

In 1968, the Court refused in the *O'Brien* case to endorse the notion that "an apparently limitless variety of [communicative] conduct"[141] is entitled to constitutional protection. Since *O'Brien*, however, the Justices have declined to review symbolic speech claims except in those cases, such as *Spence*, where a communicative element was clearly dominant in the conduct as issue. Consequently, it has not yet been necessary for the Court to establish guidelines "for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression."[142] The attempts of commentators[143] to establish definitional standards reflect the difficulties inherent in such a task, but at some point the Court must either address itself to the question or concede that, *O'Brien* to the contrary, any conduct claimed to be communicative is within the scope of the first amendment and subject to some degree of constitutional protection.[144]

A court receptive to the symbolic speech concept may also be required eventually to confront what one writer[145] has termed the problem of overnarrowness. Just as an otherwise valid law is void for

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[139] *Id.* at 415.

[140] Justice Rehnquist said of the flag statute at issue:

> Its operation does not depend upon whether the flag is used for communicative or noncommunicative purposes; upon whether a particular message is deemed commercial or political; upon whether the use of the flag is respectful or contemptuous; or upon whether any particular segment of the State's citizenry might applaud or oppose the intended message. It simply withdraws a unique national symbol from the roster of materials that may be used as a background for communications. *Id.* at 422-23 (footnote omitted).

[141] 391 U.S. at 376.

[142] Cowgill v. California, 396 U.S. 371, 372 (1970) (Harlan, J., concurring in dismissal of appeal).

[143] *See, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 80 (1970); Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1117 (1968).

[144] Along these lines, see the approach advanced in Nimmer, *The Meaning of Symbolic Speech under the First Amendment*, 21 U.C.L.A. L. REV. 29-62 (1973).

[145] *Id.* at 40.

overbreath if it sweeps within its ambit protected freedoms as well as conduct subject to governmental control, so also it has been said that a law may be unconstitutionally overnarrow if it regulates or prohibits only that portion of conduct within a general category which has a communicative impact, since the only purpose underlying such a regulation might be opposition to the proscribed conduct's communicative effect. The overnarrowness concept seems especially relevant to evaluations of symbolic speech claims raised against flag use and desecration statutes. Even where limited to affronts to the "physical integrity" of a flag, such regulations would appear to be designed ultimately to protect political ideals which the flag reflects; otherwise, their reach logically would extend to affronts against the physical integrity of all bolts of cloth. Viewed in this light, flag use and desecration statutes might be condemned as inherently overnarrow. Should the Court uphold such a regulation against other constitutional challenges in a future case, it must reach the overnarrowness issue.

III. THE ENVIRONMENT OF EXPRESSION

In *Tinker v. Des Moines Independent Community School Dist.*,[146] Justice Fortas observed that first amendment rights must always be applied "in light of the special characteristics of the school environment."[147] While all the members of the present Court subscribe to this proposition, there have been marked differences among the Justices with respect to its application in a number of recent cases involving the first amendment and related claims of students, prison inmates, and military servicemen. The Chief Justice and Justices Blackmun and Rehnquist have indicated, moreover, that they would subject challenged controls over expression in each of these areas to substantially more lenient standards of scrutiny than normally imposed in first amendment litigation.

Speaking through Justice Powell, the Court, in *Healy v. James*,[148] remanded for further hearings a case involving a state-supported college's refusal to grant campus recognition to a chapter of the Students for a Democratic Society (SDS). Justice Powell held that the organization's refusal to abide by reasonable campus rules would constitute a proper basis for nonrecognition. He emphasized, however, that recognition could not be denied because of the campus group's philoso-

[146] 393 U.S. 503 (1969).
[147] *Id.* at 506.
[148] 408 U.S. 169 (1972).

phy, its relationship with the national SDS, or a general, unsupported fear of disruption. Justice Rehnquist concurred only in the judgment rendered in the case, observing that some of the language in the Court's opinion "tend[ed] to obscure [the] distinctions"[149] recognized in earlier cases between application of free expression standards generally and their enforcement in a academic environment. He further remarked:

> The government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government upon all citizens. And there can be a constitutional distinction between the infliction of criminal punishment, on the one hand, and the imposition of milder administrative or disciplinary sanctions, on the other, even though the same First Amendment interest is implicated by each.[150]

In *Papish v. Board of Curators*,[151] Justice Rehnquist and Chief Justice Burger filed vigorous dissents which proceeded along these same lines. *Papish* summarily ordered reinstatement of a university graduate student suspended for campus distribution of a newspaper which contained a political cartoon depicting policemen raping the Statue of Liberty and the Goddess of Justice, and a headline story, entitled "Motherfucker Acquitted," which discussed the trial and acquittal of a member of an organization called "up Against the Wall, Motherfucker." Refusing to recognize "a dual standard in the academic community with respect to the content of speech,"[152] the majority held that neither the cartoon nor the story was obscene or otherwise unprotected. In dissent, however, Chief Justice Burger characterized a university as "an institution where individuals learn to express themselves in acceptable, civil terms,"[153] and asserted: "[I]t is not unreasonable or violative of the Constitution to subject to disciplinary action those individuals who distribute publications which are at the same time obscene and infantile."[154] Justice Rehnquist, joined by the Chief Justice and Justice Blackmun, argued that public use of the words at issue fell within the *Chaplinsky* exceptions

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[149] *Id.* at 203.

[150] *Id.* Note also the Chief Justice's concurrence in the case. In Board of Regents v. Roth, 408 U.S. 564 (1972), and Perry v. Sinderman, 408 U.S. 593 (1972), of course, the Court reviewed the due process and first amendment claims of college faculty.

[151] 410 U.S. 667 (1973) (per curiam).

[152] *Id.* at 671.

[153] *Id.* at 672.

[154] *Id.*

to free speech. He also condemned what he termed the majority's "wooden insistence on equating, for constitutional purposes, the authority of the State to criminally punish with its authority to exercise even a modicum of control over the university which it operates."[155]

During the 1973 term, a unanimous Court decided *Procunier v. Martinez*,[156] a case involving first amendment and procedural challenges raised against California regulations providing for censorship of prisoner mail. Speaking for the majority, Justice Powell declined to cast the first amendment issue in terms of inmate rights. Instead, he held the regulations invalid as overly broad infringements on the free expression guarantees of persons wishing to correspond with the prisoners, and further concluded that a mail censorship decision must be accompanied by minimum procedural safeguards.[157] Censorship regulations narrowly drawn to further important governmental interests in internal order and discipline, institutional security, and prisoner rehabilitation would present no constitutional problems, Justice Powell maintained; but the challenged regulations had an unnecessarily broad sweep. Noting that the regulations, *inter alia*, authorized censorship of statements that "unduly complain" or "magnify griev-

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[155] *Id.* at 677. In Goss v. Lopez, 95 S. Ct. 729 (1975), it might be added, Justice Powell joined the other Nixon appointees in dissenting from the Court's ruling that due process requires oral or written notice of the charges, an explanation of the evidence supporting the charges, and ordinarily some sort of hearing before a public school student can be suspended from school for misconduct, even for ten days or less. In an opinion joined by the Chief Justice and Justices Blackmun and Rehnquist, Justice Powell complained: "The decision unnecessarily opens avenues for judicial intervention in the operation of our public schools that may affect adversely the quality of education." 95 S. Ct. at 741. In his view, a ten-day suspension from school did not infringe a student's interest in education and to the extent that such a limited suspension might constitute infringement, it was too *de minimis* to justify imposition of a constitutional rule.

In Board of School Commissioners v. Jacobs, 43 U.S.L.W. 4238 (1975) (per curiam), the Court, over Justice Douglas' dissent, dismissed as moot an action against school board regulations alleged to interfere with publication and distribution of a student newspaper. In dismissing the suit, the Court noted that the student who originally had brought the action had graduated and concluded that the suit had never been properly certified as a class action by the trial court. In his dissent, Justice Douglas observed that the regulations at issue had been ruled facially void by the lower courts and charged, *inter alia*, that "absence of a written order [formally certifying the suit as a class action] is too slender a reed to support a holding of mootness, particularly in the face of incontrovertible evidence that certification was intended and did, in fact, take place." *Id.* at 4239. *Cf.* Wood v. Strickland, 95 S. Ct. 992 (1975).

[156] 416 U.S. 396 (1974).

[157] In the case, the Court also invalidated as an unjustifiable restriction on access to the courts, prison regulations banning attorney-client interviews conducted by certain law students and legal paraprofessionals.

ances," included expression of "inflammatory political, racial, or religious, or other views" and contained matter deemed "defamatory" or "otherwise inappropriate," he observed: "These regulations fairly invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship."[158]

In a separate opinion, Justice Marshall concurred with the judgment and Justice Powell's rationale, but he reached the issue of inmate rights which the majority opinion had avoided. Justice Marshall asserted that a "prisoner does not shed . . . basic First Amendment rights at the prison gate,"[159] and maintained that "prison authorities do not have a general right to open and read all incoming and outgoing prisoner mail."[160] Justice Marshall, whose opinion was joined by Justice Brennan, supported application of the compelling-interest and least-means concepts to regulations affecting the first amendment rights of prisoners. Justice Douglas, joined by Justices Brennan and Marshall, filed a brief concurrence in which he stated: "Prisoners are still 'persons' entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all of the requirements of due process."[161]

While the Court's opinion in *Procunier v. Martinez* had avoided a decision on the scope of prisoner rights under the first amendment, several cases decided toward the end of the 1973 term did examine that issue. In *Pell v. Procunier* and *Procunier v. Hillery*,[162] the Court upheld a California prison regulation prohibiting news media interviews with specific individual inmates against first amendment claims raised by newsmen and prisoners. Justice Stewart delivered the Court's opinion. He agreed that "under some circumstances the right of free speech includes a right to communicate a person's views to any willing listener, including a willing representative of the press for the purpose of publication by a willing publisher."[163] He also concluded that "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[164] Proceeding from these premises, he balanced the free speech interests of the inmates against the state interests in deterrence of crime, rehabil-

[158] 416 U.S. at 415.
[159] *Id.* at 422.
[160] *Id.*
[161] *Id.* at 428.
[162] 417 U.S. 817 (1974).
[163] *Id.* at 822.
[164] *Id.*

itation, and security which the challenged regulation was claimed to promote.[165] In striking the balance in favor of the regulations, he pointed out that the prison inmates had ample alternative means of communication, and maintained: "So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that . . . prison officials must be accorded latitude."[166]

The Court found the newsmen litigants' objections to the regulations even less persuasive. Justice Stewart wrote: "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally."[167] Under California policy, he asserted, the press had "broader" access to prisoners than was accorded members of the general public. The state conducted regular tours through its prisons for the benefit of interested citizens. Newsmen, however, were also permitted to enter the maximum and minimum security sections of prison facilities and speak—confidentially, if security considerations permitted—to any inmate whom they encountered. Furthermore, they were permitted to conduct interviews with inmates selected at random by corrections officials from the prison population. Under these circumstances, the challenged regulation could not be said to infringe the newmen's constitutional rights. In *Saxbe v. Washington Post Co.*,[168] Justice Stewart employed essen-

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[165] Justice Stewart summarized the policy considerations underlying the regulations as follows:

> In practice, it was found that the policy [of free face-to-face prisoner-press interviews] in effect prior to the promulgation of [the regulation] had resulted in press attention being concentrated on a relatively small number of inmates who, as a result, became virtual "public figures" within the prison society and gained a disproportionate degree of notoriety and influence among their fellow inmates. Because of this notoriety and influence, these inmates often became the source of severe disciplinary problems. For example, extensive press attention to an inmate who espoused practice of non-cooperation with prison regulations encouraged other inmates to follow suit, thus eroding the institution's ability to deal effectively with the inmates generally. Finally, . . . "[d]uring an escape attempt at San Quentin three staff members and two inmates were killed. This was viewed by the officials as the climax of mounting disciplinary problems caused, in part, by its liberal posture with regard to press interviews. . . ." *Id.* at 831-32.

[166] *Id.* at 826.

[167] *Id.* at 834.

[168] 417 U.S. 843 (1974).

tially this same rationale in rejecting newsmen's claims against a federal policy which was quite similar to the California regulation.

The Burger Court obviously has not rejected the rule that a regulation affecting first amendment rights is invalid unless it is necessary to further legitimate and compelling governmental interests and no less drastic means are available for fulfilling the government's objectives.[169] In several recent free expression cases which have seemed appropriate for a compelling-interest mode of analysis, however, the majority has refused to balance interests, or the balancing doctrine has been employed in a manner apparently inconsistent with the approach followed in Warren era cases, or the standard of scrutiny applied to the challenged regulation has been left obscure. Justice White's opinion for the majority in *Branzburg v. Hayes*,[170] rejecting a first amendment-based testimonial privilege for newsmen called before grand juries, suggested, for example, that in the future empirical evidence of an infringement on first amendment rights might be required in certain cases as a precondition to an application of the compelling-interest doctrine. As Justice Stewart contended in a *Branzburg* dissent, the Court had "never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist,"[171] yet the majority opinion stressed the "speculative" nature of the claim that grand jury subpoenas of newsmen could place substantial burdens on the free flow of information. Language in the opinions of certain other cases, particularly those involving regulations of party membership and party and candidate access to the ballot,[172] has seemed to adopt the view, moreover, that the more remote and incidental the impact of governmental action on first amendment freedoms, the more lenient the standard of scrutiny to be employed. That sort of approach may have been compatible with conceptions of balancing doctrine

[169] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972). First amendment balancing-of-interests doctrine had its genesis in labor picketing, *e.g.*, Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941), and handbill cases, *e.g.*, Schneider v. State, 308 U.S. 147 (1939). The Warren Court applied the doctrine primarily in freedom of association cases, *e.g.*, NAACP v. Button, 371 U.S. 415 (1963); Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963).

[170] 408 U.S. 665 (1972).

[171] *Id.* at 733 (Stewart, J., dissenting).

[172] *See, e.g.*, Rosario v. Rockefeller, 410 U.S. 752 (1973); Storer v. Brown, 415 U.S. 724 (1974); American Party v. White, 415 U.S. 767 (1974). For a somewhat related case, see Cousins v. Wigoda, 95 S. Ct. 541 (1975), subordinating conflicting state regulations to national party rules regarding the selection of national convention delegates.

advanced in a number of early Warren Court cases;[173] later cases[174] indicated, however, that while governmental burdens must be sufficiently serious to establish something more than a *de minimis* impact on first amendment freedoms, once that minimal threshold has been reached, a strict, compelling-interest standard is to be applied to challenged regulations. Certain cases have also reflected a reluctance to extend case-by-case balancing to litigation in which application of balancing doctrine would pose significant practical and conceptual difficulties;[175] and in one case,[176] which probably will have little precedential value, the majority seemed to suggest that an exercise of certain "plenary" governmental powers which "implicates" first amendment rights need only meet the requirement of "facial legitimacy" to withstand constitutional challenge. These aspects of the Court's thinking are clearly inconsistent with earlier cases requiring balancing in every instance where otherwise valid statutes are claimed to infringe fundamental rights.

The balancing formula which Justice Stewart applied in evaluating the inmate challenge to the interview regulations—particularly his emphasis on the availability of alternative means of communication for prisoners rather than on other means of achieving prison objectives—would appear to provide further evidence that the balancing doctrine may be undergoing a variety of changes on the Burger Court. Nevertheless, Justices Marshall and Brennan, the Court's most articulate defenders of a strict, compelling-interest standard of scrutiny in several civil liberties contexts, chose not to file opinions in *Pell, Hillery*, and *Saxbe*. Instead, they joined the separate opinions of Justices Douglas and Powell.

Justice Douglas agreed in dissent that prison officials could "impose reasonable limitations on visits by the media,"[177] but condemned what he termed "California's grossly overbroad restrictions on prisoner speech."[178] Emphasizing that freedom of the press ultimately

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[173] *E.g.*, Barenblatt v. United States, 360 U.S. 109 (1959); Konigsberg v. State Bar, 366 U.S. 36 (1961).

[174] *E.g.*, NAACP v. Button, 371 U.S. 415 (1963); Gibson v. Florida Legislative Comm., 372 U.S. 539 (1961).

[175] Branzburg v. Hayes, 408 U.S. 665 (1972); Kleindienst v. Mandel, 408 U.S. 753 (1972).

[176] Kleindienst v. Mandel, 408 U.S. 753 (1972), affirming the refusal of the Attorney General to waive the visa ineligibility of Ernest Mandel, a Belgian journalist and Marxist theoretician who had been invited to the United States to participate in a series of academic confernces.

[177] 417 U.S. at 837-38.

[178] *Id.* at 837.

protects not media interests "but rather the right of the people, the true sovereign under our constitutional scheme, to govern in an informed manner,"[179] he also contended that an absolute ban on press-inmate interviews was "far broader than is necessary to protect any legitimate governmental interests."[180]

Justice Powell was the only Nixon appointee who dissented from the majority's disposition of the cases, and his was only a partial disagreement. Justice Powell concurred with the Court's conclusion that inmates possessed no "personal constitutional right to demand interviews with willing reporters."[181] In a lengthy dissent from the majority's disposition of the newsmen's claims, however, he concluded "that personal interviews are essential to accurate and effective reporting in the prison environment,"[182] newsmen have a right to gather news bottomed on the public's right to information about public institutions, and an absolute ban on press-inmate interviews thus unduly infringed first amendment freedoms. He opposed adoption of a policy whereby prison officials would evaluate interview requests on an *ad hoc* basis, but agreed that "[t]he balance should be struck between the absolute ban . . . and an uninhibited license to interview at will."[183] He suggested that a prison system might impose reasonable time, place, and manner restrictions on press interviews and maintained that all press interviews should obviously be suspended during periods of institutional emergency. "Such regulations," he asserted, "would enable [prison officials] to safeguard . . . legitimate interests without incurring the risks associated with administration of a wholly *ad hoc* interview policy."[184]

At the end of the 1973 term, the Court rendered a decision in *Parker v. Levy*,[185] its first ruling regarding the free expression and related constitutional rights of military personnel.[186] Army dermatologist Howard Levy had been convicted by a general court-martial under three provisions of the Uniform Code of Military Justice (UCMJ). For disobeying a hospital commandant's order to establish a training program for Army Special Forces medical aides, he was

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[179] *Id.* at 839-40.

[180] *Id.* at 841.

[181] *Id.* at 836.

[182] Saxbe v. Washington Post Co., 417 U.S. at 856.

[183] *Id.* at 872.

[184] *Id.* at 873.

[185] 417 U.S. 733 (1974).

[186] For a brief history of the Supreme Court's involvement with the Bill of Rights claims of servicemen, see J. BISHOP, JUSTICE UNDER FIRE: A STUDY OF MILITARY LAWS 113-73 (1974).

convicted of violating article 90 of the Code, which provides for the punishment of any person subject to the Code who "willfully disobeys a lawful command of his superior commissioned officer." He was also convicted for violating article 133, which prohibits "conduct unbecoming an officer and gentleman," and article 134, which punishes, *inter alia*, "all disorders and neglects to the prejudice of good order and discipline in the armed forces," including those not specifically mentioned in the Code. The article 133 and 134 convictions were based on public statements in which Levy had urged Negro enlisted men to refuse to obey orders to go to Vietnam and had referred to Special Forces personnel as "liars and thieves," "killers of peasants," and "murderers of women and children." After all military avenues of relief had been exhausted, Levy initiated habeas corpus proceedings in a federal district court, claiming that articles 133 and 134 were vague and overly broad. The district court denied relief, but a court of appeals reversed on vagueness grounds. The Supreme Court upheld the articles against vagueness and overbreadth claims. Justice Rehnquist, joined by the other Nixon appointees and Justice White, delivered the majority opinion.

Justice Rehnquist prefaced his examination of the constitutional issues involved in the case with a discussion of what he termed the "very significant differences between military law and civilian law and between the military community and the civilian community."[187] "While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community," he observed, "within the military community there is simply not the same autonomy as there is in the larger civilian community."[188]

With these "significant differences . . . in mind,"[189] Justice Rehnquist next examined Levy's vagueness claims. While conceding that there were "areas within the general confines of the articles' language which have been left vague,"[190] he asserted that the articles had been supplied with "considerable specificity" by interpretations of the Court of Military Appeals and other military authorities and by "less formalized usage and custom."[191] Levy's activities, he added, fell "squarely" within the "substantial range of conduct to which

[187] 417 U.S. at 752.
[188] *Id.* at 751.
[189] *Id.* at 752.
[190] *Id.* at 754.
[191] *Id.*

both articles clearly apply without vagueness or imprecision."[192] The court of appeals had concluded that the articles were facially vague even though applicable to Levy's conduct. Justice Rehnquist maintained, however, that under prior holdings of the Court, a statute could be struck down as facially vague only if it specified no standard of criminal conduct at all.[193] Articles 133 and 134 were subject to no such "sweeping condemnation."[194] While recognizing that greater precision may be required of statutes claimed to affect first amendment freedoms, he also observed that, "[f]or the reasons which differentiate military society from civilian society, . . . Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter."[195] Military regulations were to be subjected to the lenient vagueness standard applied to criminal statutes regulating economic affairs.[196] Under that standard, he concluded, Levy's vagueness claims "must fail."

Justice Rehnquist employed similar reasoning in rejecting the contention that articles 133 and 134 were facially overbroad. The first amendment claims of military personnel, he wrote, must be given different treatment than those of civilians.

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission require a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[197]

The Court in the past, he further observed, had refused to declare a statute facially overbroad "where there were a substantial number of situations to which it might be validly applied,"[198] and recent cases had required a showing of "substantial overbreadth" where a challenged statute regulated communicative conduct and not merely

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[192] *Id.*

[193] Coates v. City of Cincinnati, 402 U.S. 611 (1971); Winters v. New York, 333 U.S. 507 (1948); Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[194] 417 U.S. at 755.

[195] *Id.* at 756.

[196] *Id.*

[197] *Id.* at 758.

[198] *Id.* at 760.

speech. Under those standards, Justice Rehnquist said: "Articles 133 and 134 may constitutionally prohibit [Levy's] conduct, and a sufficiently large number of similar or related types of conduct so as to preclude their invalidation for overbreadth."[199]

Justice Blackmun filed a brief concurring opinion in the case, and Justice Douglas and Justice Stewart, joined by Justice Douglas and Justice Brennan, registered dissents. Justice Marshall took no part in the Court's deliberations.

Justice Blackmun "wholly" concurred with the majority opinion, but was disturbed by the dissenters' concern over the challenged articles' vagueness. He wrote:

> Relativistic notions of right and wrong, or situation ethics, as some call it, have achieved in recent times a disturbingly high level of prominence in this country, both in the guise of law reform, and as a justification of conduct that persons would normally eschew as immoral and even illegal. The truth is that the moral horizons of the American people are not footloose, or limited solely by [civil codes]. The law should, in appropriate circumstances, be flexible enough to recognize the moral dimension of man and his instincts concerning that which is honorable, decent, and right.[200]

In his brief dissent, Justice Douglas agreed that valid military commands amounted to "speech brigaded with action" and could not be countermanded.[201] He contended, however, that Congress had not authorized the punishment of controversial utterances under the UCMJ. Justice Stewart's more elaborate dissent found "it hard to imagine criminal statutes more patently unconstitutional than"[202] the challenged articles. "I cannot believe," he asserted, "that such meaningless statutes as these can be used to send men to prison under a Constitution that guarantees due process of law."[203] Justice Stewart was singularly unimpressed with the contention that "through a combination of military custom and instinct,"[204] servicemen would know automatically what conduct fell within the scope of the challenged articles. That may have been true in an earlier period when the military "cadre was small, professional, and voluntary,"[205]

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[199] *Id.* at 761.
[200] *Id.* at 765 (asterisk omitted).
[201] *Id.* at 768.
[202] *Id.* at 774.
[203] *Id.* at 789.
[204] *Id.* at 781.
[205] *Id.*

but it was not true in an era in which a massive military establishment had been manned largely by conscripts and by draft-induced volunteers like Howard Levy. "To presume that he and others like him who served during the Vietnam era were so imbued with the ancient traditions of the military as to comprehend the arcane meaning of the general articles," Justice Stewart exclaimed, "is to engage in an act of judicial fantasy."[206] Justice Stewart conceded that "the military may adopt substantive rules different from those that govern civilian society," but insisted that a serviceman, like a civilian, is entitled "to be informed as to precisely what conduct those rules proscribe before he can be criminally punished for violating them."[207] And to the suggestion that a certain amount of vagueness in military regulations helps to maintain high standards of conduct, he vigorously replied: "I should suppose that vague laws, with their serious capacity for arbitrary and discriminatory enforcement, can in the end only hamper the military's objectives of high morale and esprit de corps."[208]

In the recent student and inmate cases involving first amendment and related claims, the Court has emphasized that there are special governmental interests justifying greater control over expression on school and prison property than ordinarily allowed under first amendment standards, but the majority has seemed reluctant to apply substantially different constitutional standards in the education and prison environments than are normally employed in free expression cases involving controls over the uses of public property. The *Levy* Court held, however, that given the special security and discipline needs of the military community, military regulations are to be subjected to a different type of facial review standard than usually invoked in first amendment cases. It is difficult to accept the majority's rationale for such an approach. The special characteristics of the military environment are clearly relevant to a determination of the reasonableness of military regulations affecting expression, but such factors would appear to have no role in the resolution of facial vagueness claims raised against such regulations. Justice Rehnquist held for the *Levy* majority that military regulations should be subjected to the same lenient vagueness standards by which ordinary criminal statutes are evaluated. With all respect, however, criminal statutes which in no way affect first amendment freedoms are subjected to lenient vagueness standards not because of the setting

[206] *Id.* at 782 (footnote omitted).
[207] *Id.* at 787.
[208] *Id.* at 788.

within which they are applied, but because they do not touch important rights and the need for precision is thus far less compelling than in those cases where fundamental rights may be affected by vaguely drawn statutes.

Somewhat similar observations can be made about the *Levy* Court's treatment of the overbreadth claims raised against articles 133 and 134. The substantial overbreadth standard, adopted by the Court in *Broadrick v. Oklahoma* for facial review of statutes regulating communicative conduct rather than "pure speech" alone, incorporates what may be viewed as a sliding-scale conception of facial overbreadth review: under the *Broadrick* formula, as statutory language focuses less and less on activities clearly within the scope of the first amendment ("pure speech"), and increasingly on expressive conduct subject to governmental control ("speech-plus" and "symbolic speech"), the presumption that a statute imposes a chilling effect on protected expression (and thus the justification for facial review) weakens; as the likelihood of deterrence attenuates, the burden of those raising facial overbreadth claims increases. Although it is difficult to find any direct support for the *Broadrick* substantial overbreadth approach in prior cases,[209] the *Broadrick* test does seem basically consistent with the Court's view that the first amendment does not "afford the same kind of freedom" to communicative conduct as that which it extends to "pure speech."[210] Arguably, one who claims that a statute can be applied against activities on the fringe of the first amendment should bear a heavier burden of proving facial overbreadth than one who asserts that a statute touches activities clearly within the amendment's scope. In *Levy*, however, the Court appeared to suggest that the special requirements of security and discipline in the military community, rather than the nature of the first amendment rights affected, demand that the overbreadth of military regulations be even more substantial than that required for a finding of facial overbreadth in cases involving civilians. Yet, as with vagueness questions, the setting within which regulations are applied would appear to have little bearing on the validity of facial overbreadth claims or the nature of the overbreadth standard to be applied. Statutes are ruled facially overbroad because their very ex-

[209] In attempting in *Broadrick* to defend the suggestion that the substantial overbreadth approach had been foreshadowed in earlier cases involving regulations of communicative conduct, Justice White did little more than cite prior cases without comment. 412 U.S. at 613-14. In a *Broadrick* dissent, Justice Brennan effectively rebutted the majority's reading of precedent cases. *Id.* at 631-32.

[210] Cox v. Louisiana, 379 U.S. 536, 555 (1965).

istence deters the exercise of protected freedoms. The need for security and discipline may justify greater controls over expression in a military environment than allowed in the civilian community, but it is difficult to see how such governmental interests relate to the question whether challenged military regulations on their face deter the exercise of protected expression.

The *Levy* case did put the Court on record as supporting the notion that servicemen possess first amendment rights, and future cases involving the free expression rights of military personnel may reflect a greater sensitivity to first amendment claims raised against enforcement of military regulations in specific contexts. Under *Levy*, however, the serviceman appears to have little if any protection from the chilling effect which broad and vague regulations impose on the exercise of expression. It may be, therefore, that a news magazine misled its readers only slightly when it construed *Levy* to hold that the "Uniform Code of Military Justice supersedes the Constitution for members of the military subject to its provisions."[211]

IV. CONCLUSION

Despite former President Nixon's concern with appointing "strict constructionists" to the Court, one must avoid exaggerating the Nixon Justices' conservative impact on first amendment law. The Court has continued to lend a sympathetic ear, for example, to first amendment and related constitutional claims raised in speech-plus and symbolic speech cases; and where the content of expression has been the subject of regulation, the Court has refused to allow application of different standards in the academic community than are normally applied in free expression litigation. Certain of Justice Powell's opinions in first amendment cases, moreover, have been firm statements about the importance of free expression in a democratic society.

Even so, the Nixon appointments have produced a pattern of gradual retrenchment in a number of first amendment issue areas. A showing of "substantial" overbreadth is now required in cases involving facial review of statutes regulating communicative conduct rather than "pure" speech alone, and the Nixon appointees favor a general curtailment of vagueness-overbreadth review. A "serious value" obscenity guideline has replaced the "no value" standard endorsed by the *Memoirs* plurality—a standard which had seemed to foredoom most obscenity controls. A less elastic view of state action has been

[211] NEWSWEEK, July 1, 1974, at 61.

substituted for the expansive conception of the public forum advanced by the Warren Court. First amendment balancing doctrine appears to be undergoing change, though the precise nature and extent of that change remain somewhat unclear. And governmental regulations affecting the speech of military personnel are apparently to be subjected to substantially more lenient standards of scrutiny than those ordinarily imposed in first amendment cases.

As this article was being completed, Justice Douglas announced his retirement from the Court. The appointment of one more "strict constructionist" to the Court may produce a virtual moratorium on facial review, and since facial review is inherently a more effective safeguard of free expression than "as applied" challenges to statutes claimed to infringe individual rights, such a development would represent a serious threat to the meaningful exercise of first amendment freedoms. Appointment of an additional "strict constructionist" might also mean acceptance by the Court of a more expansive application of the *Chaplinsky* exceptions to free speech in scurrilous-language cases. The first amendment and other civil liberties issues confronting the Court are becoming increasingly difficult, however, and future litigation may at times cut across established lines of conflict. In that event, new voting patterns—and doctrinal trends—may emerge on the Burger Court.