Law Day 2019: Free Press, Free Speech, Free Society

"Free Press & the Supreme Court"

Supporting Materials for Classroom Instruction

The Massachusetts Bar Association is proud to partner with the American Bar Association to promote civics education in the classroom for Law Day 2019: Free Press, Free Speech, Free Society.

This year, classroom presentations will be focused on "Free Press & the Supreme Court." As you prepare to speak to the students in your community, we invite you to use the U.S. Supreme Court case studies found on the following pages, as well as the companion PowerPoint presentation. The materials include notes and other helpful suggestions to encourage a robust dialogue between presenters and students.

Civics education is incredibly important as we strive to teach students to be informed and engaged citizens. We are grateful for your interest and participation in promoting Law Day 2019.

Free Press & the Supreme Court: Incorporating Case Studies in the Classroom

The following case studies reflect how the Supreme Court has grappled to apply "Congress shall make no law . . . abridging the freedom of speech, or of the press." These cases show the considerations the court has evaluated when creating protections for speakers and the press in light of the many restrictions placed on speech and the press under principles of English common law. These principles were adopted by the early American Republic.

Cases Included

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

***Near v. Minnesota* (1931)**

Background:
After its ratification and until the early 20th Century, the First Amendment protected citizens from federal government censorship. State governments, on the other hand, routinely censored newspapers.

In 1925, Minnesota passed a statute, known as a "gag law," permitting the county attorney, the attorney general, or any citizen acting on behalf of the county attorney, to begin proceedings in district court for a temporary restraining order against the publication of any periodical thought to be "obscene, lewd, and lascivious" or "malicious, scandalous, and defamatory." Then a judge, acting without a jury, could determine if the periodical should be permanently stopped from future publication.

Key Definitions:

Prior Restraint: The government censorship of speech before publication.

Injunction: A judicial order that restrains a person from beginning or continuing an action.

Facts: In 1925, Jay Near, an editor of the Minneapolis newspaper *The Saturday Press*, was stopped from publishing the paper on the basis of the Minnesota gag law. Near had regularly printed stories devoted to sensational news and "exposé" reports on police and government corruption in Minnesota.

The prosecutor, Floyd Olson, sought a permanent injunction against *The Saturday Press* on the grounds that it violated the law with its malicious, scandalous, and defamatory content. He received a temporary injunction after an initial hearing. At a subsequent formal hearing, Near was required to show cause for why he should not be permanently prevented from publishing the newspaper.

The Minnesota Supreme Court upheld both the temporary injunction and the subsequent permanent injunction. Near appealed to the U.S. Supreme Court.

Issue before the Court: Does a state law prohibiting the publication of certain material violate the free press provision of the First Amendment?

Court Ruling: In a 5-4 decision, the court issued a strong prohibition against prior restraints or government censorship. According to the majority, government officials are not allowed to regulate speech before it reaches the public. Chief Justice Charles Hughes authored the majority opinion, holding:

> This statute . . . raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion of state action.

In fact, said Chief Justice Hughes, "it is the chief purpose of the guaranty [of a free press] to prevent previous restraints upon publication." Chief Justice Hughes did admit that the ban on prior restraints was not unlimited. In some situations, such as when speech is obscene, incites violence, or reveals military secrets, the government might be able to justify a prior restraint.

Speaking for the four dissenters, Justice Pierce Butler argued that the decision would put unprecedented restrictions on states, which had traditionally used their police powers to promote public welfare. Prohibiting publication of scandalous or defamatory claims, such as those allegedly published by *The Saturday Press*, surely fell within this scope.

Focus Questions:

1. According to Chief Justice Hughes, why is prohibiting prior restraint important?

2. According to the court, in what circumstances might the government be justified in preventing the publication of certain speech?

3. How does Justice Butler's reasoning differ from that of the majority?

4. Does this ruling further First Amendment protections for a free press?

***New York Times Co v. Sullivan* (1964)**

Background: Traditionally, defendants in a defamation case were required to prove that the statements they made were true. The outcome of this case puts the burden of proof on the plaintiff.

Key Definitions

Defamation: To make false and injurious statements against a person or party.

Libel: A published false statement that is damaging to a person's reputation; a written defamation.

Punitive damages: Awarded in addition to actual damages in certain circumstances. Punitive damages are considered punishment and are typically awarded at the court's discretion when the defendant's behavior is found to be especially harmful.

Facts: In 1960, *The New York Times* ran a full-page advertisement paid for by civil right activists. The ad openly criticized the police department in Montgomery, Alabama, for its treatment of civil rights protestors. Most of the descriptions in the ad were accurate, but some were false. The police commissioner, L. B. Sullivan, sued *The New York Times* in an Alabama court. Sullivan argued that the ad had damaged his reputation, and he had been libeled. The Alabama court ruled in favor of Sullivan, finding that the newspaper ad falsely represented the police department and Sullivan. After losing an appeal in the Supreme Court of Alabama, *The New York Times* took its case to the U.S. Supreme Court, arguing that the ad was not meant to hurt Sullivan's reputation and was protected under the First Amendment.

Issue before the Court: Do public officials have to prove "actual malice" before they can recover damages in defamation actions against persons criticizing their official conduct?

Court Ruling: The court unanimously ruled in favor of the newspaper. The court asserted America's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Free and open debate about the conduct of a public official, the court stated, was more important than occasional, honest factual errors that might hurt or damage officials' reputations. Justice William J. Brennan, writing for the six-member majority of the court, held:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official

> conduct unless he proves that the statement was made with "actual malice" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

In his concurring opinion, Justice Hugo Black wrote,

> I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials … An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.

Focus Questions:

1. How does the court define "actual malice?"

2. According to the *New York Times v. Sullivan* majority, who has the burden of proving actual malice?

3. How does Justice Black's reasoning differ from that of the majority?

4. Does this ruling further First Amendment protections for a free press?

***Curtis Publishing Co. v. Butts* (1965)**

Background: In *New York Times Co. v. Sullivan* (1964), the Supreme Court ruled that public officials in libel cases must show that a statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." Shortly after this ruling, two cases from Southern college campuses came before the court that raised questions on libel as it relates to *public figures* who are not *public officials*.

Key Definitions

Defamation: To make false and injurious statements against a person or party.

Libel: A published, or printed, false statement that is damaging to a person's reputation; a written defamation.

Slander: Spoken defamation.

Punitive damages: Awarded in addition to actual damages in certain circumstances. Punitive damages are considered punishment and are typically awarded at the court's discretion when the defendant's behavior is found to be especially harmful.

Facts: *Curtis Publishing Co. v. Butts*: Wally Butts, a college football coach, was accused of conspiring to fix a major game by giving crucial information to the other team. *The Saturday Evening Post,* published by Curtis Publishing Co. (Curtis), contained a story about the incident saying that Butts was under investigation and "would likely never" work in college football again. Butts sued Curtis for libel and a jury awarded him $60,000 in general damages and $3,000,000 in punitive damages.

After *New York Times Co. v. Sullivan* was decided, Curtis requested a new trial. The court denied Curtis's request on the grounds that *New York Times Co. v. Sullivan* did not apply because Butts was not a public official. The trial court further found that the record showed the article was published with reckless disregard for the truth.

Associated Press v. Walker: A reporter from the Associated Press published an eyewitness account of a riot on a university campus over the enrollment of an African American student, James Meredith. The story said that Edwin Walker took command over the crowd and personally led their uprising against the federal marshals who were dispatched to enforce the

court-ordered enrollment of Meredith. Walker, a decorated military veteran, denied the claims and stated that he had not taken part in challenging the federal marshals. Walker sued the Associated Press for libel. The jury found in his favor, but the judge in the case refused to award punitive damages, finding that there was no malicious intent. The judge specifically noted that *New York Times Co. v. Sullivan* was inapplicable. The decision was affirmed on appeal.

The United States Supreme Court granted certiorari over both cases.

Issue before the Court: Do public figures have to prove "actual malice" before they can recover damages in defamation actions against persons criticizing their official conduct?

Court Ruling: In a 5-4 decision, the court ruled that public figures asserting a defamation claim must show that a statement was made "with knowledge that it was a false or with reckless disregard for whether it was false or not," the same standard to which public officials are held under *New York Times Co. v. Sullivan*.

In the opinion by Justice John Marshall Harlan II, the court reasoned that

> A "public figure" who is not a public official may recover damages for defamatory falsehood substantially endangering his reputation on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

The court concluded that Curtis Publishing Co.'s investigation of its allegations against Butts failed to meet this standard. The company printed a questionable source's allegations without any attempt to verify his claims, and the story in question was not a pressing event or immediately newsworthy. The court affirmed the lower courts' denial of a retrial. The situation in *Butts* contrasted with *Walker*, where the Associated Press relied on a correspondent on the scene of an event that was immediately newsworthy. In turn, the court upheld the decision of the judge in Walker's case to deny Walker's claims to damages.

In his concurring opinion, Chief Justice Earl Warren noted that public figures are those that are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large . . . "'Public figures,' like 'public officials,' often play an influential role in ordering society. And surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities.

Justice Hugo Black, joined by Justice William Douglas, drafted a separate opinion agreeing with the result in *Walker,* but dissenting with the majority in *Curtis Publishing Co. v. Butts.* Justice Black argued for greater press immunity and expressed a belief that the standard in *New York Co v. Sullivan* failed to adequately protect the press from libel judgments. He would have

reversed the *Butts* ruling because the article was a matter of public interest.

Focus Questions:

1. How does the majority of the court view the relationship between public figures and public officials?

2. Based on the outcome of this case, if public figures want to sue for libel, what must they prove in court?

3. Why does the majority of the court rule differently for Curtis Publishing Co. than it does for the Associated Press?

4. Who are some examples of people that might be considered public figures?

5. Does this ruling further protect the press's First Amendment rights?

Branzburg v. Hayes **(1971)**

Background: In *Branzburg v. Hayes,* the court reviewed three separate cases that each dealt with journalists who refused to testify in court and reveal their confidential sources. These cases were combined into one appeal.

Key Definitions

Testimonial privilege: A right granted by law to a person not to testify, or in some instances to prevent another from testifying.

Writ of Certiorari: An order a higher court issues so it can review the decision and proceedings in a lower court and determine whether there were any irregularities.

Facts: *Branzburg v. Hayes:* Paul Branzburg was a reporter with the *Kentucky Courier-Journal*. During the late 1960s, much of his work focused on the production and use of illegal drugs in Louisville, Kentucky. He was called to testify before a state grand jury investigating drug crimes. He refused to testify and to potentially disclose the identities of his confidential sources, citing reporter's privilege. The trial court denied this privilege and, on appeal, the Kentucky Court of Appeals denied Branzburg's petition. Branzburg then filed a writ of certiorari before the U.S. Supreme Court.

In re Pappas: Paul Pappas, a television reporter from Massachusetts, gained access to a Black Panther headquarters on the condition that he wouldn't disclose anything that he saw. He never published any story based on the access but was later issued a subpoena to testify before the grand jury about what he witnessed; he refused. On appeal, the Massachusetts Supreme Judicial Court ruled that no such reporter's privilege existed; Pappas appealed to the Supreme Court.

Caldwell v. United States: Earl Caldwell was a reporter for *The New York Times* who was assigned to San Francisco to report on the activities and attitudes of the Black Panther Party. He was subsequently subpoenaed to appear and testify before a federal grand jury and to bring with him notes and tapes covering interviews with Black Panther members; he refused to appear. The district court ruled that while Caldwell had to appear before the grand jury, he did not have to reveal confidential communications unless the court was satisfied that there was a "compelling and overriding national interest." On appeal, the Court of Appeals said that forcing

a journalist to reveal confidential sources of information jeopardized a First Amendment freedom. The appeals court concluded that Caldwell did not have to appear before the grand jury. The government appealed to the U.S. Supreme Court.

Issue before the Court: Is it a violation of First Amendment freedom of speech and press protections to force news reporters to appear and testify before state or federal grand juries?

Court Ruling: In a 5-4 ruling, the court held that neither the First Amendment nor federal common law grants reporters a privilege that may prevent them from testifying in criminal matters before a grand jury. The court compared journalists to average citizens, finding that if a citizen isn't able to claim testimonial privilege and is forced to disclose their observations of criminal activities, then so is a journalist. Requiring reporters to disclose confidential information to grand juries served a "compelling and "paramount" state interest and did not violate the First Amendment. The court recognized the importance of confidentiality for protecting freedom of the press, but found the public interest in prosecuting criminals to far outweigh the journalist's confidentiality interest. Justice Byron White, in writing for the majority, argued:

> As we have indicated, the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called "bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification."

Justice Potter Stewart was joined in his dissent by Justice William J. Brennan and Justice John Marshall.

> The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not only will this decision impair performance of the press's constitutionally protected functions, but it will, I am convinced, in the long run harm, rather than help, the administration of justice.

In his separate dissent, Justice Douglas stated:

> It is my view that there is no "compelling need" that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime. . . And since, in my view, a newsman has an absolute right not to appear before a grand jury, it follows for me that a journalist who voluntarily appears before that body may invoke his First Amendment privilege to specific questions.

Focus Questions:

1. What two issues are in balance in this case? What issue does the court feel outweighs the other?

2. Do you agree with the majority of the court's ruling that compares journalists to average citizens?

3. In Justice Stewart's dissent, what does he view as a dangerous outcome of this ruling?

4. In what circumstance would Justice Douglas agree that it is necessary for a journalist to testify before a grand jury? What does this say about his views on the First Amendment free press protections?

5. Does this ruling further First Amendment protections for a free press?

***New York Times Co. v. United States* (1971)**

Background: By the late 1960s and early 1970s, the American public had become increasingly hostile to the ongoing U.S. military intervention in Vietnam. In 1970, analyst Daniel Ellsberg leaked a top-secret history of U.S. involvement in Vietnam to *The New York Times*. *The New York Times* published a front-page story with the headline, "Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement." The subject of that article and following articles was a 47-volume history of American involvement in Vietnam suggesting that President Lyndon Johnson (who had left office in 1969) had misled Congress and the American people about the extent of U.S. military action in Southeast Asia. The study, which was classified "Top Secret-Sensitive," was based on documents from the Department of Defense, the CIA, and the Department of State. This document became known as the Pentagon Papers.

Key Definitions

Prior Restraint: The government censorship of speech before publication.

Injunction: A judicial order that restrains a person from beginning or continuing an action.

Facts: On June 13, 1971, *The New York Times* published the first chapter of the Pentagon Papers. The administration of President Richard Nixon claimed the publication violated the Espionage Act and issued federal injunctions against publishing the remainder of the Pentagon Papers to both *The New York Times* and *The Washington Post*. The federal government argued that the publication of the sensitive information contained in the study would compromise relationships with other nations and would pose a threat to national security. The Supreme Court heard argument on June 26.

Issue before the Court: Did the Nixon administration violate the First Amendment by attempting to prevent the publication of the Pentagon Papers?

Court Ruling: On June 30, 1971, the U.S. Supreme Court issued a brief per curiam, or unsigned, order stating that the government had not met "the heavy burden of showing justification for the enforcement" of prior restraint. The court ordered the immediate end of the injunctions against publication. All nine justices wrote separate opinions to explain their views.

In his concurring opinion, Justice Hugo Black emphasized the role that free press plays in a democracy:

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.

Justice William Brennan issued his own concurring opinion, noting:

> . . . Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," during which times "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature.

In his dissenting opinion, Chief Justice Warren Burger expressed his concern for how quickly the Court ruled on this issue:

> It is not disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public's "right to know," has held up publication for purposes it considered proper and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged "right to know" has somehow and suddenly become a right that must be vindicated instanter . . .

> The consequence of all this melancholy series of events is that we literally do not know what we are acting on. As I see it, we have been forced to deal with litigation concerning rights of great magnitude, without an adequate record, and surely without time for adequate treatment either in the prior proceedings or in this Court.

Focus Questions

1. Why did the government seek a prior restraint against *The New York Times* and *The Washington Post*?

2. When, if ever, may the government limit the freedom of the press?

3. What are Chief Justice Burger's main objections to how the court ruled in this case?

4. Does this ruling further First Amendment protections for a free press?

***Gertz v Robert Welch, Inc.* (1974)**

Key Definitions

Defamation: To make false and injurious statements against a person or party.

Libel: A published, or printed, false statement that is damaging to a person's reputation; a written defamation.

Actual Malice: To publish statements with the knowledge that they are false or to publish them with reckless disregard for the truth.

Facts: Elmer Gertz, an attorney, was hired by a family to sue a police officer who had killed the family's 19-year-old son. A magazine, *American Opinion*, accused Gertz of being a part of a conspiracy to discredit local police agencies. It claimed that Gertz was a "Communist-fronter," that he had framed the officer during his criminal trial, and that he had a lengthy criminal record himself. Gertz sued for libel, won a jury verdict and was awarded $50,000. However, the judge found that Gertz had not met the actual-malice standard for libel that the Supreme Court had established in *New York Times v. Sullivan* (1964). Consequently, the trial judge overturned the jury verdict and damages award. The Court of Appeals for the Seventh Circuit affirmed the trial judge's ruling.

Issue before the Court: Does the First Amendment allow publishers to assert defamatory falsehoods about a person who is neither a public official nor a public figure, but a private individual?

Court Ruling: In a 5-4 decision, written by Justice Lewis F. Powell, the court ruled that the actual-malice standard only applies to public officials or public figures and does not apply to private individuals. The court decided that individuals will have to prove some level of fault by the publisher and actual damage to the individual's reputation, but left it up to the states to determine the appropriate standard of care for publishers that defame private individuals.

The court determined that the actual-malice standard in *New York Times v. Sullivan* would place too heavy a burden on private individuals to prove defamation. Private individuals are less able to rebut false statements than public figures and officials because they have less access to channels of mass communication and are therefore more vulnerable to published falsehoods.

Public officials accept and understand the risk of public scrutiny when they take office. In contrast, private individuals never signed up for public scrutiny. The court reversed the lower court's ruling and remanded the case for a new trial.

Chief Justice Warren Burger dissented, stating:

> The petitioner here was performing a professional representative role as an advocate in the highest tradition of the law . . . The important public policy which underlies this tradition -- the right to counsel -- would be gravely jeopardized if every lawyer who takes an "unpopular" case, civil or criminal, would automatically become fair game for irresponsible reporters and editors who might, for example, describe the lawyer as a "mob mouthpiece" for representing a client with a serious prior criminal record, or as an "ambulance chaser" for representing a claimant in a personal injury action.

Justice William Douglas dissented, arguing:

> I have stated before my view that the First Amendment would bar Congress from passing any libel law . . . With the First Amendment made applicable to the States through the Fourteenth, I do not see how States have any more ability to "accommodate" freedoms of speech or of the press than does Congress . . . In our federal system, we are all subject to two governmental regimes, and freedoms of speech and of the press protected against the infringement of only one are quite illusory . . .

In a separate dissent, Justice William Brennan noted that debates can't flourish if states can impose minimal thresholds of fault on publishers for defaming private individuals. Justice Brennan would have applied the actual-malice standard to Gertz as a private individual.

Focus Questions

1. How does the court differentiate between the burden of proof that a private individual must show to prove libel versus that of a public official or public figure?

2. What concern does Chief Justice Burger express in his dissent?

3. Do you think Instagram bloggers would be considered private individuals or public figures?

4. Does this ruling further First Amendment protections for a free press?

Additional Resources:

Short animated videos on *New York v. Sullivan*

- Quimbee, https://www.youtube.com/watch?v=jmxIHwh-0Jc
- Federalist Society, https://www.youtube.com/watch?v=QeZ1mFTtn8s

Frontline PBS Interview with Earl Caldwell of *Branzburg v. Hayes* on the Black Panthers and the FBI, https://www.pbs.org/wgbh/pages/frontline/newswar/interviews/caldwell.html

C-Span Landmark Cases: *New York Co. v. United States* (1971)
http://landmarkcases.c-span.org/Case/25/New-York-Times-v-United-States

Short animated video on *Gertz v. Robert Welch* (1974)
https://www.youtube.com/watch?v=ULFJLBnJG0g