CHAPTER 11

UNPROTECTED SPEECH

Outline

I. Introduction
  A. First Amendment protections are not absolute
  B. Speech considered to be harmful or valueless that cannot be cured by more speech is unprotected by the First amendment
  C. Categories of unprotected speech
    1. Advocacy of illegal conduct
    2. Fighting words
    3. Obscenity
    4. Defamation
    5. Commercial speech
  D. These categories are not completely without protection
    1. Over time distinction between protected and unprotected speech has blurred
    2. Restrictions are premised on content and subject to judicial scrutiny
    3. Speech falling within unprotected categories may be completely proscribed when regulation is content-neutral
    4. Time, place, and manner ordinances regarding speech in public forums are presumptively valid when speech is in unprotected categories

II. Advocacy of Illegal Conduct
  A. Political speech has the greatest protection
    1. Peaceful change will result from public discussion
    2. Some types of political speech pose threat to democratic government
      a. Line-drawing problem
        (1) Depends on historical context and perceived nature of threat
        (2) Clear and present danger test for determining where to draw the line
  B. Clear and present danger test
    1. Allows punishment of speech creating clear and present danger that the advocated illegal act would occur
    2. Set forth by J. Holmes in *Schenk v. United States*
      a. Defendants charged under Espionage Act, which made it a crime to interfere in the country's pursuit of World War I by sending documents opposing the draft
      b. Unanimous Court finds conviction constitutional
      c. Analysis
        (1) Whether particular speech is protected depends on surrounding circumstances
        (2) Factfinder must determine whether conduct posed a danger
          (a) No right to yell "fire" in a crowded theater
    3. Weakening of test by J. Holmes in *Debs v. United States*
      a. Standard is whether speech had "natural tendency and reasonable probable effect" of obstructing the war effort
    4. Court's unanimity fractured in further prosecutions under the Espionage Act
      a. *Abrams v. United States*
        (1) J. Holmes dissents
          (a) Focused on intent
            i. Consequences must be the aim of the deed to satisfy intent requirement

(b) Advocacy of "free trade in ideas"
i. Should be suppressed only if ideas "so imminently threaten immediate interference with lawful and pressing purposes of the law than an immediate check is required to save the country"

5. Weakness of clear and present danger test
a. Provided little protection for speech in the early cases
b. Reliance on factfinder's opinion—that is, immediacy of threat makes political speech vulnerable to public fears
c. Standard is vague, impeding the ability to overturn a verdict
d. Can make inference that speech is permissible so long as it does not succeed in its objective
(1) At odds with the goal of the First Amendment

C. Learned hand test
1. Different test for determining the extent to which political speech may be curtailed
a. Focus on words, not circumstances under which words are spoken
(1) *Masses Publishing Co. v. Patten*
(a) Words could be punished when they urged a violation of law
(b) Words critical of the law were unpunishable
(c) Likely effects of speech not relevant
b. Not accepted by other courts

D. Endurance of clear and present danger test
1. Speech not proscribed, only acts
a. Speech relevant because it amounted to an attempt of conspiracy to bring about an illegal act
b. Changed with passage of statutes proscribing certain kinds of speech
2. Court adopted position that legislative conclusion that some speech inherently dangerous is deserving of deference
a. *Gitlow v. New York*
(1) Statute banning advocacy of overthrowing government by violent means
(2) Court upheld statute as constitutional, rejecting the applicability of the clear and present danger test
(3) Js. Holmes and Brandies dissents
(a) Test should be applicable in these cases
(b) In this case, speech had no chance of leading to action
b. *Whitney v. California*
(1) Statute prohibiting knowing membership in the Communist Party
(2) Defendant did not agree with party advocacy of violent change
(3) Historical context
(a) Fear resulting from Communist revolution in Russia
(4) Majority upheld conviction, giving deference to the legislature
(5) Js. Brandies and Holmes dissent
(a) Concerned with how to evaluate statute
(b) Standard should be clear and present danger
(c) Wrote about value of free speech
i. Combat bad ideas with good ones
ii. Speech should not be suppressed unless danger "relatively serious"
(6) *Whitney* overruled 52 years later with *Brandenburg*
c. *Dennis v. United States*
(1) Historical context
(a) After World War II fear of Communist threat to American democracy
(b) Passage of the Smith Act
i. Paralleled statute in *Gitlow*
ii. Defendants convicted of conspiring to advocate overthrow of government and reorganize the Communist Party
iii. Majority found that government did not have to wait until the threat was imminent
a) Claimed to use clear and present danger test

b) Employed learned hand test
c) Danger so great that even minor chance of success justified suppression
d) Danger to be determined by judge, not jury
1) Question of law, not fact
iv. J. Frankfurter concurred
a) Standard was not clear and present danger
b) Congress should use balancing test not the judiciary
v. Js. Black and Douglas dissents
a) J. Black found Court undermined preferred place of First Amendment
b) J. Douglas found the majority misapplied the clear and present danger test
vi. Criticism of *Dennis*
a) Narrowness of protection of political dissent
b) Balance had become one between seriousness of evil against the probability that it would occur from any cause, not just speech

d. *Yates v. United States*
(1) Retreat from *Dennis*
(2) Interpretation consistent with learned hand test
(a) Only counseling of illegal acts, not advocacy of abstract theory, should be proscribed

e. *Scales v. United States*
(1) Expansion of protection afforded in *Yates*
(2) Conviction under Smith Act constitutional only if defendant had the specific intent to carry out the Communist Party's aims by illegal means
(a) Membership in the party insufficient to trigger a conviction
(b) Punishment of membership is a violation of First Amendment guarantees

E. Present standard
1. *Brandenburg v. Ohio*
a. Most expansive interpretation of political dissent
b. Weaving of clear and present danger test with learned hand test
c. Requirements of test:
(1) Statute prohibiting speech is constitutional only when
(a) Advocacy is "directed to inciting or producing imminent lawless action," and
(b) "Likely to incite or produce such action"
d. Test does not address the severity of harm threatened
e. *Brandenburg* explicitly overrules *Whitney*

2. Persistence of *Brandenburg* standard
a. Warren Court cases
(1) *Watts v. United States* and *Bond v. Floyd*
(2) Vietnam era
b. Post-Warren Court cases
(1) *Hess v. Indiana*
(a) Only words intended to produce imminent disorder could be punished
(2) *NAACP v. Claiborne Hardware Company*
(a) Same analysis as *Hess*
(b) Speaker "must be free to stimulate the audience"
(c) Implication that if unlawful acts did not result from speech, then intent to incite is not likely to be found

3. Summary
a. Protection of political speech narrowed in times of perceived danger
(1) Wars and threat of wars trigger narrowing of protections
(a) Exception was during Vietnam War era

III. Fighting Words
A. Words that are likely to provoke an act of violence by the listener

B. Unprotected because it does not necessarily fall into communication of ideas intended to be protected
C. *Chaplinsky v. New Hampshire*
    1. Defendant convicted pursuant to statute proscribing "offensive, derisive or annoying" words addressed to anyone lawfully on the streets or in public places
    2. Court upheld conviction based on the fact that the words were likely to provoke the average person to retaliate
    3. Court ruled that fighting words were not designed to be protected under the First amendment
    4. Court definition
        a. Words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace"
        b. Not "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"
D. Narrowing of definition
    1. Definition so broad as to include protected speech
        a. *Terminillo v. Chicago*
            (1) Conviction for breach of peace
            (2) Court reversed
            (3) Reasoning: most important speech may be that which produces an emotional response
                (a) Speech stirring an audience to anger or that invites dispute is protected by the First Amendment
                (b) Ordinance overbroad
E. Obligation of authorities when audience is provoked
    1. *Cox v. Alabama*
        a. Civil rights demonstration where leader arrested for breach of peace
        b. Reversal of conviction
            (1) Where police can physically control an angry crowd to prevent violence there is an obligation to do so rather than to arrest the speaker
    2. Where police cannot control the crowd they must have more than a generalized concern that violence will ensue before employing the fighting words doctrine
        a. Police must point to specific words by the speaker that threaten violence
    3. Fighting words doctrine is applicable where
        a. Audience violence is imminent, and
        b. Cannot be controlled through the use of ordinary crowd control tactics, and
        c. The speech itself constitutes the seeming cause of the imminent violence
            (1) *Feiner v. New York*
                (a) Last case upholding fighting words conviction
                (b) Court found legitimate government interest in preventing disorder and interference with traffic
                (c) Officers acted reasonably and without intent to suppress defendant's views

IV. Offensive Speech
A. Government ability to ban/punish speech that audience finds offensive but not sufficient to provoke violence
    1. Speech that is profane may not be punished
        a. *Cohen v. California,* 403 U.S. 15 (1971)
            (1) Defendant wore jacket embroidered with "Fuck the Draft" on the back in a courthouse where women and children were present, convicted of disturbing the peace
            (2) Reversed
            (3) Reasoning
                (a) Reject contention of obscenity because not erotic
                (b) Audience could avert eyes
                (c) Underlying purpose is to limit government restraint
                (d) Matters of taste left to the individual, not the government

2. Offensiveness to audience is not the basis for suppressing speech
   a. *Collin v. Smith,* 578 F. 2s 1197 (7th Cir. 1978)
      (1) Survivors of the Holocaust sought to prevent a Nazi march in their neighborhood; city passed ordinances in attempt to neutralize effects
      (2) Federal trial and appellate courts found the ordinances unconstitutional
         (a) Seventh Circuit found ordinances content-based
         (b) No captive audience

B. Strict scrutiny applied even where intent is to burden but not prohibit speech
   1. *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803 (2000)

V. Hate Speech
   A. Speech directed against citizens based on race, ethnicity, gender, and/or sexual orientation
   B. Hate crime statutes are designed to punish acts motivated by bias with additional penalties
      1. Constitutionality is questionable
         a. *R. A. V. v. City of St. Paul,* 505 U.S. 377 (1992)
            (1) Defendant convicted under city hate crime ordinance for cross-burning on lawn of his African-American neighbor
            (2) Court unanimously agreed that ordinance was unconstitutional
               (a) 5/4 split on reasoning
               (b) Majority found ordinance overbroad and content-based
                  i. Extends content-neutrality doctrine to unprotected speech category
                  ii. Rejects need for strict scrutiny
         b. *Virginia v. Black,* 123 S.Ct. 1536 (2003)
            (1) Challenge to state statute proscribing hate speech or expressive conduct by defendants convicted of cross-burning with intent to intimidate
            (2) Distinguished from *R. A. V.*
               (a) Symbolic expression is not the only factor relevant to determination
               (b) *R. A. V.* unconstitutional because it imposed restrictions on speech involving unpopular political subjects
               (c) First Amendment does not prohibit cross-burning with intent to intimidate a particular individual or group when intimidation that is prohibited has a history of signaling impending violence
      2. *R. A. V.* and *Virginia v. Black* do not invalidate laws providing for enhanced penalties
         a. *Wisconsin v. Mitchell,* 508 U.S. 476 (1993)
            (1) Upheld enhanced penalties based on defendant's motive
            (2) Statute aimed at conduct not speech
               (a) Aimed at redressing societal harm
   C. Impact
      1. *R. A. V.* had an impact on university codes seeking to eliminate harassing or insulting speech based on broad categories
         a. Limits codes aimed at preventing speech
      2. Court now provides some protection for speech that falls within restricted category
         (1) Imposes content-neutral requirement for previously unprotected speech
         (2) Still remains distinction between forms of speech
            (a) Making some speech more valuable than others

VI. Obscenity
   A. *Roth,* first case to consider whether obscene speech entitled to First Amendment protection
      1. *Roth v. United States,* 354 U.S. 476 (1957)
         a. Violation of state and federal obscenity laws for sending out circulars advertising obscene book
         b. Roth argued that only obscene speech posing a clear and present danger could be punished
         c. Government argued for balancing test that considered the value of the speech involved
         d. Holding

(1) Obscenity is not protected
(2) First Amendment limits what may legitimately be considered obscene

e. Definition of obscenity
(1) Material which the "average person applying contemporary community standards [would find] dominant theme . . . taken as a whole appeals to . . . prurient interest"
(2) Prurient material has a tendency to "excite lustful thoughts"
(3) Court distinguished between obscenity and material having redeeming social values

B. Since *Roth* Court asked to determine whether materials were obscene
1. No standard was provided that could be consistently applied
2. Cases decided on an individual basis

C. *Miller v. California,* 413 U.S. 15 (1973)
1. Five members of the Court agreed on a three-part test to identify material that is obscene
2. Test
a. Average person applying contemporary community standards
b. Would conclude that the work, taken as a whole, appeals to prurient interest
c. Material depicted or described, in patently offensive way, sexual conduct specifically defined by state law, and lacks serious literary, artistic, political, or scientific value
3. All three parts of test must be satisfied
4. Material to be judged by local community standards
5. States required to be specific about what is prohibited to give fair notice and prevent chilling effect

D. Other obscenity issues
1. Possession
a. Simple possession of obscene materials by an adult could not be criminalized under the Constitution
(1) *Stanley v. Georgia,* 394 U.S. 337 (1969)
(a) Court applied balancing test, weighing state's interest in controlling private possession against the individual's privacy interest
(b) State interest weak and citizen's interest stronger
(c) State had interest in preventing possession of child pornography and could criminalize it
2. Possession of child pornography
a. Pornography showing children engaged in sexual activity
b. Concern with two dangers associated with child pornography
(1) Danger of children reading, viewing, or listening to pornography
(a) State may prohibit distribution of sexually explicit materials to children
i. Publisher's interest in distribution may be outweighed by the state's compelling interest in protecting minors
ii. State must not substantially impair adult access to forbidden materials
(2) Children may be induced to participate in sexual conduct
(a) State given wider control of material depicting children engaged in sexual conduct
(b) States may ban distribution even if materials do not constitute legal obscenity according to a state's definition
(c) State has compelling interest in preventing sexual exploitation and abuse of children
i. *New York v. Ferber,* 458 U.S. 747 (1982)
3. Adult pornography
a. Courts asked to place regulations on pornography because it promotes degradation and subordination of women
(1) Antipornography ordinances passed in some jurisdictions distinguish between materials that subordinate and degrade women
b. *American Booksellers Association, Inc. v. Hudnut,* 771 F.2d 323 (7th Cir. 1985)

(1) Indianapolis ordinance defining prohibited pornography as "graphic sexually explicit subordination of women," including presentation of women as "sexual objects"
(2) Seventh Circuit found ordinance content-based and struck it down
(3) Supreme Court summarily affirmed

4. Community standards
   a. *Jenkins v. Georgia,* 418 U.S. 153 (1974) and *Hamling v. United States* 418 U.S. 87 (1974)
      (1) Court rejected argument that standards for determining patently offensive material should be statewide
         (a) Town standard might be relevant community to determine whether materials may be regulated
      (2) National distribution may open publisher to prosecution if materials pass through an area where they are considered patently offensive
         (a) Government may criminalize mailing of obscene materials even to consenting adults
         (b) There is no right to acquire obscene materials
            i. *Stanley* is limited to freedom of thought and privacy in one's home
   b. Value of the work is not determined in reference to community's standards
      (1) Applicable standard is whether a reasonable person would find that the work as a whole has social value
         (a) Way in which work advertised may be considered
         (b) If marketed to underline the sexually provocative nature of the work, then it may be obscene and subject to regulation
5. Procedural rules
   a. Rules provide additional protection for freedom of expression
   b. Also indicate that obscene materials warrant less protection than other kinds of expression
   c. Rules are applicable in cases of prior restraint
      (1) *Freedman v. Maryland,* 380 U.S. 51 (1965)
         (a) Burden of proof on government
            i. Must be specified time period
            ii. Time period must be brief
            iii. Must be injunction before denial of license becomes effective
            iv. Court hearing on injunction must be decided within a short time
         (b) Applicable to films
         (c) For printed material, injunction may be sought
6. Sellers
   a. Seller must be shown to have knowledge of contents before being convicted

VII. Defamation and Invasion of Privacy
   A. Defamation
      1. Definition
         a. Transmission to others of false statements that harm the reputation, business, or property rights of a person
            (1) Spoken defamation is slander
            (2) Written defamation is libel
      2. Historically the Supreme Court took the position that defamation unprotected by the First Amendment
      3. *Beauharnais v. Illinois,* 343 U.S. 250 (1952)
         a. Made exclusion of defamation from First Amendment protection clear
         b. 5/4 decision indicating that states could define "libel" any way they wished
            (1) Only limit was that definition be related to the state's "peace and well-being"
         c. Dissent claimed this extension impeded the First Amendment
      4. *New York Times v. Sullivan,* 376 U.S. 254 (1964)
         a. Court revisited the libel questions
         b. *New York Times* sued for libel based on information contained in an advertisement, some of which was untrue

(1) State law provided for strict liability
(2) Under that standard, even though the errors were minor and there was no showing that the *Times* knew or should have known there were untruths in the ad, the *Times* was liable

c. Court reversed, making state libel laws subject to First Amendment principles
d. Reasoning:
(1) Case viewed as one in which the issue was about government criticism
(2) First Amendment designed to ensure citizens' ability to criticize the government and engage in public debate
(3) Debate would be constrained if required to guarantee the truth of the claim
e. Standard set forth as guide to speakers
(1) Public officials could not recover damages when falsehoods relating to official conduct were made unless the statement was made with knowledge of falsehood or reckless disregard of whether it was false
(2) If statement was within either category it was considered to be made with "actual malice" and subject to liability on the publisher's part

5. *Times* standard was modified to include public figures
a. *Curtis Publishing Co v. Butts*
b. *Associated Press v. Walker,* 388 U.S. 130 (1967)
6. Definition of public figures narrowed over time
a. Three categories
(1) One having general fame and notoriety in the community
(a) Public figures for all purposes
(2) Those who have "voluntarily injected themselves into a public controversy" to influence its resolution
(a) Public figures only with regard to the issue
(3) Those that are "involuntarily" public figures
(a) This category is narrowly construed
7. *Sullivan* requirements are not applicable to private figures
a. Private figures do not have to prove actual malice on defendant's part
b. State may set standard at any one of three levels
(1) Negligence
(2) Recklessness
(3) Knowing falsity
c. Standard may not be set at strict liability without violating the First Amendment
d. Private citizens are entitled to more protection
(1) They have less access to media to remedy damage
(2) Damages are limited to actual injury defined broadly by the Court
8. *Sullivan* applies to actions where individuals sue for intentional infliction of emotional distress
a. *Hustler Magazine v. Falwell,* 485 U.S. 46 (1988)
(1) Public figure or public official could recover if publisher caused distress only where statement was false or made with reckless disregard of its falsity
(2) First Amendment protects political parody
(3) Political speech has primacy over harm resulting to political official or public figure

B. Invasion of privacy
1. Similar issues to defamation
2. Question as to extent of applicability of *Sullivan* and *Gertz*
3. Raised most often as "false light" actions
a. Individual claims s/he has been presented in public in a misleading way
b. Such presentation would be highly offensive to reasonable persons
4. Different from defamation
a. Not necessary for plaintiff to demonstrate that reputation is damaged
b. Only necessary to show there has been substantial misstatement of the facts
5. *Sullivan* remains the standard for public officials and public figures

VIII. Commercial Speech
- A. Expression related solely to the economic interest of the "speaker" and its audience
- B. Court has extended protection to commercial speech
  - 1. Receives most protection of the traditionally unprotected areas
- C. Change has concerned definitions
  - 1. Traditionally commercial advertising received no First Amendment protection
  - 2. *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748 (1976)
    - a. Statute made advertising prescription drug prices unprofessional conduct for which a pharmacist would lose license
    - b. Court accepted that commercial speech involved
      - (1) Found that society had strong interest in the "free flow of commercial information"
    - c. Analysis
      - (1) Employed balancing test, weighing consumer interest against the state interest
        - (a) Poor consumers had compelling interest in obtaining information
        - (b) State interest in maintaining high degree of professionalism by pharmacies
  - 3. Commercial speech that is false or deceptive may be regulated
  - 4. Decision in *Virginia Pharmacy* applied in *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85 (1977)
    - a. Town passed ordinance banning "for sale" signs in hopes of stemming "white flight"
    - b. Unanimous decision that ordinance was not content-neutral and state did not demonstrate necessity of ordinance to ensure integrated community
  - 5. Protection of commercial speech extended to regulation of attorney advertising for clients
    - a. *Bates v. State Bar of Arizona,* 433 U.S. 353 (1977)
      - (1) States may not ban all newspaper advertising of legal services
        - (a) Contrary to traditional prevention of actively soliciting clients
    - b. *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978)
      - (1) Solicitation for monetary gain could be proscribed
      - (2) Some in-person solicitation permissible
    - c. *Edenfield v. Fane,* 507 U.S. 761 (1993)
      - (1) Court struck down Florida's ban on direct in-person solicitation by Certified Public Accountants
      - (2) Not yet extended to attorneys
- D. Commercial speech still not entitled to full panoply of protection
  - 1. Commercial speech entitled to only "limited measure of protection"
    - a. *Ohralik*
  - 2. *Central Hudson Gas v. Public Service Commission,* 447 U.S. 557 (1980)
    - a. Sets forth test for determining whether regulation of commercial speech violates the First Amendment
      - (1) First, determination made whether speech entitled to any First Amendment protection
        - (a) If speech is misleading or concerns illegal activity it receives no protection
      - (2) Determination whether government interest is substantial
      - (3) Considers question whether regulation advances the asserted government interest
        - (a) If so, court goes on to final consideration
      - (4) Court determines whether regulation is narrowly tailored to the government interest
        - (a) Since modified to require that regulation be reasonably tailored to meet the government interest
  - 3. Current standard
    - a. Commercial speech entitled to First Amendment protection
    - b. Can be regulated in content-neutral manner
      - (1) If regulation directly advances a substantial government interest, and
      - (2) In a manner reasonably tailored to achieve that interest

E. Limitations on First Amendment protection
   1. No protection for misleading or deceptive commercial speech
   2. Advertising of unlawful products not entitled to protection
   3. Question whether advertising of legal but harmful products may be regulated
      a. *44 Liquormart v. Rhode Island,* 517 U.S. 484 (1996)
         (1) Unanimous Court overturned state statute prohibiting all advertising of liquor prices
         (2) Disagreement as to reasoning
      b. Current standard
         (1) State's justification for regulating lawful but harmful products determines the standard to be employed
            (a) If the justification is that the regulation will limit consumption, the state must demonstrate that this is the fact
               i. Regulation "significantly reduces consumption, and
               ii. No means that are significantly less intrusive can be employed"
            (b) If justification is to prevent minors from gaining access
               i. Government must tailor regulation to prevent undue interference with adults' rights to the product
                  a) Necessary to prevent state from treating all citizens as if they were children

IX. Summary
   A. Some speech is traditionally considered outside the scope of First Amendment protection
      1. Underlying reason is because these areas are not central to the free exchange of ideas
   B. Advocacy of illegal conduct
      1. Three factors are generally considered in deciding whether regulation is appropriate
         a. Is the perceived illegality imminent?
            (1) If so, speech may be punished
         b. Is speech intended to produce illegality?
            (1) If no intention, may not be punished
         c. Is speech or conduct likely to produce illegality?
            (1) If speech ineffectual may not be punished
   C. Fighting words
      1. Likely to incite violence in the audience to whom the speech is addressed
      2. Government can prohibit or punish speech once it is published
      3. Responsibility of police to control crowd if they can and protect the speaker
      4. Distinction between fighting words and offensive speech
   D. Obscenity
      1. Relevant standard in determining what may be required is the particular community standard
      2. Determine whether standard applies when the work is considered as a whole
      3. Possession may not be punished but sale may be
   E. Defamation
      1. Public officials and public figures may recover only if they demonstrate that the statements were made with
         a. Knowledge of their falsity, or
         b. Reckless disregard of their truth or falsity
   F. Commercial speech
      1. Truthful speech not proposing illegal act triggers mid-level scrutiny
      2. Regulation will be upheld if there is a substantial government interest directly advanced in a manner no more expansive than necessary
   G. Lines between protected and unprotected speech have blurred over time

Key Terms and Definitions

advocacy: Forceful persuasion; arguing a cause, right, or position.

child pornography: Pornography showing children engaged in sexual activity.

clear and present danger test: A test of whether or not speech may be restricted or punished. It may be if it will probably lead to violence soon or if it threatens a serious, immediate weakening of national safety and security.

commercial speech: Expression, such as newspaper ads, related solely to the economic interest of the "speaker" and its audience.

defamation: Transmission to others of false statements that harm the reputation, business, or property rights of a person.

fighting words: Speech that is not protected by the First Amendment to the U.S. Constitution because it is likely to cause violence by the person to whom the words are spoken.

obscene: Lewd and offensive to accepted standards of decency.

pornography: Materials depicting sexual behavior to cause sexual excitement; non-obscene pornography is protected by the First Amendment, but child pornography is not.

prurient interest: A shameful or obsessive interest in immoral or sexual things.

public figure: Anyone who is famous (or infamous) for what he or she has done or who has come forward to take part in a public controversy.

Review Questions

1. What reasons support a hierarchy of speech protection? What categories of speech were traditionally unprotected by the First Amendment expression guarantees?

2. What distinction does the Court currently draw between protected and unprotected speech in its analyses of these cases?

3. What tests has the Court employed in determining which political speech is unprotected by First Amendment guarantees? Describe each in terms of what speech is precluded by each of these tests.

4. What is the Court's test for obscenity? How has it changed over time? What interpretations has the Court put on its definition with regard to community standards?

5. What test does the Court apply in defamation cases and what does it require plaintiff to demonstrate? Explain the difference in standards for public officials, public figures, and private figures.

Internet Connections

1. For more information on questions of protected and unprotected speech, you can visit the following sites:

   The First Amendment Lawyer's Association at *http://www.fala.org;*

   The Thomas Jefferson Center for the Protection of Free Expression at *http://www.tjcenter.org;*

   The American Civil Liberties Union at *http://www.aclu.org*.