Lecture Notes

# Chapter 7: Freedom of the Press

## Annotated Chapter Outline

1. Prior Restraint
   1. Establishing a Standard
      1. *Near v. Minnesota (1931)*
         1. Chief Justice Charles Evans Hughes’s opinion took a strong stance against censorship.
         2. But he acknowledged that the protection against “previous restraint is not absolutely unlimited.”
         3. There may be exceptional circumstances, such as protection of vital national security interests, under which government restraint is necessary.
   2. Prior Restraint and National Security
      1. *New York Times v. United States (1971)*
         1. This case concerned the government’s attempt to stop the *New York Times* and the *Washington Post* from publishing classified documents pertaining to the Vietnam War.
         2. The Court held that the government had not proved that publication would “result in direct, immediate, and irreparable damage to our Nation or its people.”
      2. *United States v. Progressive, Inc. (1979)*
         1. The federal government tried to prevent the publication of a magazine article that detailed the workings of nuclear weapons.
         2. The United States argued that the article would harm national security and that, under the Non-Proliferation Treaty, the United States had an obligation to prevent nonnuclear nations from obtaining atomic weapons.
         3. Although the government was initially successful, a similar article soon appeared in another publication and the case was abandoned before reaching the Court.
   3. A Free Press v. A Fair Trial
      1. Suppose that upholding the rights of the press ends up violating another constitutional protection.
         1. The media certainly have a strong interest in informing the public about court proceedings.
         2. In a criminal case, the accused is guaranteed by the Sixth Amendment the right to “an impartial jury.”
         3. It is possible that media coverage of some criminal cases can have the unintended effect of impairing the objectivity of jurors.
      2. *Nebraska Press Association v. Stuart (1976)*
         1. Even though the Court recognized that it was reasonable for the judge to be concerned about the effect of media attention, it concluded that there were other steps that could be taken to preserve the right to a fair trial.
   4. Prior Restraint and the Student Press
      1. *Hazelwood School District v. Kuhlmeier (1988)*
         1. The Court considered whether the educational needs of a public school can sustain a prior restraint.
         2. The Court generally has recognized more limits on the First Amendment rights of students and juveniles than on those of adults.
2. Government Control of Press Content
   1. Regulating the Press by Prohibiting Content
      1. ***Cox Broadcasting Corporation v. Cohn (1975)***
         1. At issue was a Georgia statute making it a crime for “any news media” to publish or broadcast “the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made.”
         2. At a party, several teenage boys raped 17-year-old Cynthia Cohn, and, at some point during the assault, she suffocated and died.
         3. While covering this story, a reporter for a television station owned by Cox Broadcasting found the name of the victim in the indictments and reported it in a news broadcast.
         4. Martin Cohn, Cynthia’s father, filed suit against Cox Broadcasting, claiming that the news reports containing the name of his daughter violated his right to privacy.
         5. The Court held that a state may not, consistent with the First and Fourteenth Amendments, impose sanctions on the broadcast of a rape victim’s name obtained from judicial records that are open to public inspection.
      2. *The Florida Star v. B.J.F. (1989)*
         1. The Court held that a newspaper cannot be barred from publishing lawfully obtained, truthful information about the identify of a victim of sexual assault.
      3. *Bartnicki v. Vopper (2001)*
         1. A local radio station broadcast an intercepted phone call between representatives of a teachers’ union, who had been in negotiations with a local school board.
         2. The justices concluded that the media cannot be barred from transmitting newsworthy information, even if the source of that information obtained it in violation of the law.
   2. Regulating the Press by Mandating Content
      1. ***Miami Herald v. Tornillo (1974)***
         1. This suit challenged a Florida law that compelled newspapers to offer candidates for political office a right to respond to articles that criticized or attacked those candidates’ records.
         2. The *Miami Herald* refused to comply, arguing that the government had no constitutional authority to order the newspaper to publish anything.
         3. The justices agreed unanimously, saying that press responsibility is not mandated by the Constitution.
   3. Beyond Newspapers: Regulating the Electronic Media and the Internet
      1. ***Red Lion Broadcasting v. FCC (1969)***
         1. The federal government owns radio frequencies and Congress regulates their use through its power over interstate commerce.
         2. The Federal Communications Commission (FCC), which Congress created, carries out the day-to-day regulatory activity.
         3. The justices heard a challenge to an FCC policy requiring radio and television broadcasters to discuss public issues on their stations and to provide fair coverage to each side of those issues.
         4. Since there are a limited number of broadcast frequencies, the government thought this fairness doctrine was necessary to ensure that all viewpoints could be expressed.
         5. The government also argued that the policy did not violate the First Amendment because it did not prohibit speech.
         6. Red Lion Broadcasting argued that the policy cannot be justified by the limited number of broadcast frequencies because the same holds for daily newspapers.
         7. They also claimed that by requiring broadcasters to provide response time, the FCC was in fact dictating the content of programming.
         8. The Court agreed with the government’s argument from limited frequencies, and explained that, unlike the print media, radio and television stations operate by using the public airways.
         9. Congress has the right to insist that the airways be used in a manner consistent with the public interest.
      2. ***FCC v. Pacifica Foundation (1978)***
         1. A radio station’s afternoon programming broadcast a recorded monologue by humorist George Carlin titled “Filthy Words.”
         2. A man wrote a letter of complaint to the FCC, claiming that he heard the monologue on his car radio while he was driving with his young son.
         3. The FCC declared the broadcast to have been in violation of a federal statute.
         4. Pacifica appealed and was initially successful, but the Supreme Court reversed.
         5. The justices held that of all forms of communication, broadcasting has the most limited First Amendment protection.
      3. ***FCC v. Fox Television Stations (2009)***
         1. For decades after the Court’s decision in *Pacifica Foundation*, the FCC took a relaxed stance toward fleeting or isolated expletives.
         2. In 2004, after a live broadcast in which the singer Bono briefly used profane language, the FCC announced that it would treat even a single, isolated word as indecent.
         3. Fox and other broadcasters challenged the new indecency policy as “arbitrary and capricious.”
         4. The Court disagreed, finding in favor of the FCC.
      4. *Turner Broadcasting v. FCC (1997)*
         1. Congress enacted a law requiring cable companies to set aside some of their channels to carry local television programming.
         2. Cable companies claimed that this law violated freedom of the press; just as in *Miami Herald*, these media claimed that the government could not force them to carry content they did not wish to include.
         3. The justices sided with the government, which argued that the regulation helped sustain the business of local broadcasters, and held the regulation was not based on content.
      5. *Reno v. ACLU (1997)*
         1. The Court considered the constitutionality of the Communications Decency Act of 1996 (CDA).
         2. This law prohibited communication to minors that is “indecent” or “obscene.”
         3. The Court invalidated the law, explaining that it was a content-based restriction that was not sufficiently clear about the kind of material to which the law would apply.
3. News Gathering and Special Rights
   1. Reporter’s Privilege
      1. As far back as 1848, reporters asserted the need for unusual legal privileges.
      2. *Branzburg v. Hayes (1972)*
         1. The government asserted that reporters were just citizens and therefore not entitled to an exemption from the law.
         2. The media pointed to other privileged relationships, such as those with attorneys and patients.
         3. Reporters also argued that, if they were forced to answer questions about their sources, those sources would be reluctant to assist with news gathering.
         4. The Court’s majority emphatically denied the existence of reporter’s privilege.
         5. Journalists still face the threat of imprisonment if they refuse to answer questions pertaining to their stories.
      3. ***Zurcher v. Stanford Daily (1978)***
         1. The *Daily*, a Stanford University student newspaper, published a special edition devoted to an incident that had occurred at the university’s hospital.
            1. A group of demonstrators had seized the hospital’s administrative offices and barricaded the doors.
            2. When police forced their way in, a riot broke out, resulting in injuries to the officers.
            3. The police could not identify their assailants, but one officer claimed to have seen a photographer in the building.
         2. The *Daily* published several pictures of the incident, none of which fully revealed the identities of the demonstrators.
            1. The next day, police obtained a warrant to search the Daily’s office for the pictures, but found none.
            2. The *Daily* initiated a civil action against all those involved in issuing and executing the warrant.
            3. Its lawyers argued that the First Amendment, together with the Fourth Amendment, forbade such searches.
         3. The Court dismissed the *Daily*’s claim, with the justices aligning themselves much as they had in *Branzburg*.
   2. The Right of Access
      1. ***Houchins v. KQED (1978)***
         1. This case raised the question of press access to inmates in a county jail, access that ordinarily would be denied to other individuals.
         2. A divided Court once again ruled against the press, explaining that the right of the press to gather news does not imply a right of access to information, over and above that available to the general public.
      2. *Richmond Newspapers v. Virginia (1980)*
         1. The Court overruled a trial court judge who had denied the press access to a highly publicized murder trial.