Animation: On Click, Napoleon rides in, saying he fears four hostile newspapers

We've talked about the power of information…Napoleon professing to fear hostile newspapers more than bayonets.
This week, we talk about the government's power to regulate information in a democracy.

Let's start with a phrase from your Fifth Grade social studies class: "Freedom of the Press"
ASK: In a sentence, who can tell me what it means?
ASK: Does it mean the freedom to publish anything you want, any time you want?

…Aren't there <u>any</u> limitations to freedom of the press in the United States?

…In the digital age, when everyone basically owns a printing press AND the means to distribute worldwide, shouldn't there be MORE limits than there were in the past?
Let's find out.

ANIMATION: CLICK ACTIVATES GAME BANNER WITH DRUM ROLL

Today, we start and finish with the game of YOU MAKE THE CALL.

In this game, I summarize a scenario in which you are preparing to broadcast or publish something controversial and someone wants to stop you.
The class will vote whether the courts, acting on a complaint from the government or from a citizen, will restrain you from publishing.
We'll record the overall vote and then return to the scenarios at the end of lecture to reflect on them some more.

(LECTURER: REMEMBER TO RECORD PERCENTAGES FOR EACH, SO YOU CAN COLLECT THEM AGAIN AT THE END AND SEE HOW THE ROOM HAS CHANGED)

It is 1924. Times are tough and people are eager for a scapegoat to blame for their problems. Enter Henry Ford. He didn't just give the people what they wanted in the form of the Model-T. He also used his newspaper, The Dearborn, Michigan, Independent to give them a scapegoat. "The Jews" he said, were ripping off farmers by encouraging them to band together in co-ops to buy materials and sell their wares.

The *Independent* accused Aaron Sapiro, the Farm Co-Op movement's leader, of defrauding American farmers to advance an international Jewish conspiracy. Pretty blatant hate speech, don't you think?

Could Ford be stopped?

ANIMATION: CLICK ACTIVATES GAME BANNER

It is 2009. Osama Bin Laden still has not been caught. You are the Executive Producer at the nightly news at a national network.

A young reporter finds a fascinating story: The CIA has been tracking Osama Bin Laden for months, monitoring his satellite phone calls.

You assign a Washington, DC reporter to call the CIA for comment and within 15 minutes a very angry CIA Deputy Director in charge of field operations calls to order you not to run the story because you'll waste months of field agent work in Northern Pakistan. You explain that if your reporter found out about it, it's obviously not very secret. And that itself is a story. Plus, if we know where he is, why are we letting him roam free? You both say regrettable things and then he threatens to have you jailed if you air the story. You tell him to go ahead and try.

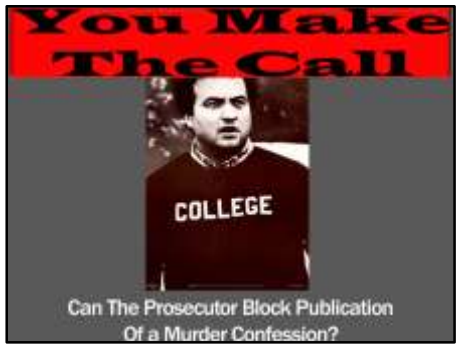
VOTE: Can the CIA go to court and stop you from airing the story?

ANIMATION: CLICK ACTIVATES GAME BANNER

Bored and over-caffeinated on Red Bull one night, you go to the ProPublica website and begin reading the documents they have used to report their latest story about the NSA's ability to decrypt any email message in the world.

The documents, leaked by Edward Snowden, were written by CIA, military and other U.S. officers. Stamped "Top Secret," the documents include detailed lists of the encryption services that have been broken by US spies, plus the kinds of intelligence gathered by the US government's PRISM program, which monitors domestic and foreign online communications of all kinds: phone, email, text messages, skype.

You post these Snowden documents to your blog and comment on what is in them. When you get back from dinner, a NY State Trooper is at your dorm room and asks you to sit down. Ten minutes later, an FBI agent arrives. An hour later, a CIA agent comes knocking. They tell you to take down the documents or you will be arrested for releasing CIA and military secrets. Can you be ordered to stop sharing this information?



ANIMATION: CLICK ACTIVATES GAME BANNER

You are the Editor of the local newspaper.

The campus is shocked by the murder of Sally Albright, a popular junior gymnast, found strangled in the "Nookie Room," a TV lounge in the attic of her sorority…

It's a double-shock when police interrupt a News Literacy lecture to arrest Big Man On Campus John Blutarski and charge him with the murder.

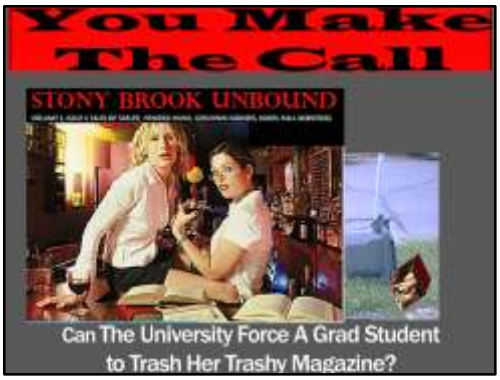
After lunch, you find a grocery bag hanging from your rear-view mirror. In it, a tape of Blutarski confessing he accidentally choked Albright to death while playing Twister™.

With the tape is a photocopy of his signed statement. A reporter calls Blutarski's lawyer for comment and she who demands that you not publish the confession because she says Bluto was drunk when he was interrogated and the confession is therefore inadmissible in court.

Worse yet, he confesses he is also a Red Sox fan, which will prejudice the community, making it impossible for Blutarski to get an impartial jury of his peers. Can the courts prevent you from publishing the confession?

ANIMATION: CLICK ACTIVATES GAME BANNER

You are a reporter for the student TV station.
A speeding Chevy Suburban T-bones a school bus, putting a dozen elementary school students in the hospital.
You call the hospital to confirm as tip that two of the injured students are the adopted children of a popular young professor who studies the psychology of adoption.
The hospital refuses, citing federal privacy law (HIPAA).
But, your room-mate works as an orderly at the hospital. You call and he finds the two names on the room roster. Plus, he sees the professor pacing the hall outside the E.R. You call back the hospital, hoping to get a comment on the nature of the childrens' injuries. The spokesperson threatens legal action and demands you not air the story, saying you will have violated federal privacy law if you do.
If she finds a judge ready to hear the case right away, can the judge prevent you from airing the story?



ANIMATION: On Click, Magazine Image fades out, Trash Bins Fade in. SECOND CLICK ACTIVATES GAME BANNER

An impoverished Marine Biology grad student from Babylon decides to publish a magazine of erotic web-cam "selfie" photos solicited from Stony Brook students.

Working on her own computer at her apartment in Jericho on her own time, she builds the first issue of "Stony Brook Unbound" and pays a printer in Mount Sinai to make 5,000 copies. At off-campus stores, it sells out at $5 per copy. This is fantastic, paying her tuition and living expenses for the whole first semester. Now she can focus on her dissertation about juxtabranchial organ secretions in the lower mollusks.

In an interview with the local TV station, she declares that new pictures flooded in as soon as students bought the first issue. Standing in front of the Tuckaho Book Lair in old Stony Brook, she promises the next issue will be raunchier and more racy than any other magazine on the racks in local stores.

From home Head of the Harbor, the Provost calls Stony Brook's lawyer in Sag Harbor to direct him to get a court order blocking publication of Issue 2 of Stony Brook Unbound.

The lawyer, who is on the fourth tee at Shinnecock Hills, raises his putter and declares that an obscenity this extreme cannot be published and the university has to stand for decency. Can the Courts satisfy the Provost's censorial urge? At the end of lecture, we'll circle back and decide if we've got it right.

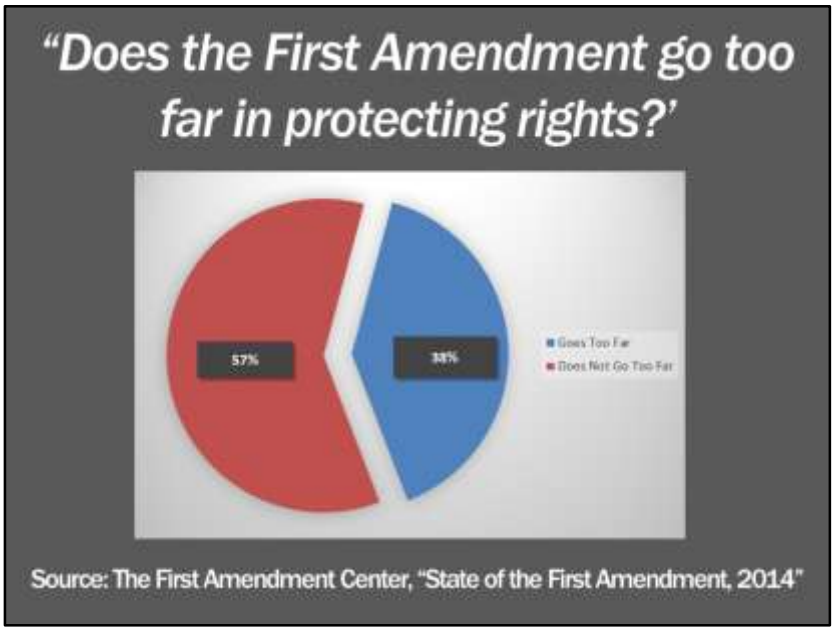

Housekeeping, Announcements & Notes

Last week's Quick Quiz results

1. "Four hostile newspapers are more to be feared than a thousand bayonets," said Napoleon Bonaparte, military genius and Emperor of France.
2. On September 29, 1690, British Colonial authorities in Boston shut down the first multi-page newspaper in the Americas, which was called "Publick Occurrences Both Forreign and Domestick."

Student Questions and Comments:

This slide intended for instructors as a focusing tool, but can be shared with students to prime them. Each lecture will include a slide like this with specific lecture outcomes that refer to course outcomes.
Here is what the syllabus declares students will be able to do if they successfully complete the course:
1.Analyze key elements of news reports - weighing evidence, evaluating sources, noting context and transparency - to judge reliability.
2.Distinguish between journalism, opinion journalism and un-supported bloviation.
3.Identify and distinguish between news media bias and audience bias.
4.Blend personal scholarship and course materials to write forcefully about journalism standards and practices, fairness and bias, First Amendment issues and their individual Fourth Estate rights and responsibilities.
5.Use examples from each day's news to demonstrate critical thinking about civic engagement.
6.Place the impact of social media and digital technologies in their historical context.



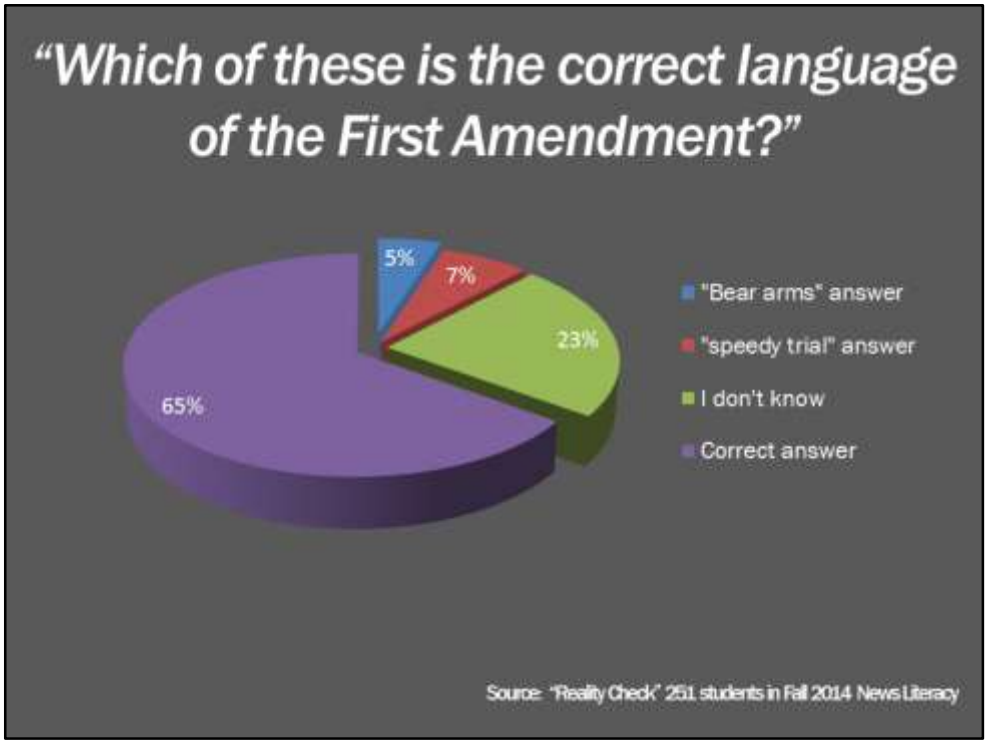
ANIMATION: Image appears with slide, source text fades in.

(9/6/2013 Update: the SOFA survey has stopped asking the question this way. For now, we'll use this to make our survey data match, but in future years, we'll revise our survey to match SOFA so that we can make public vs. student comparisons)

You're not alone, if the press seems too free to you.

The last time Americans were asked in a First Amendment Center poll if the press has too much freedom or too little, half of Americans say it's about right, but more than a third say the press has too much freedom.

http://www.firstamendmentcenter.org/sofa

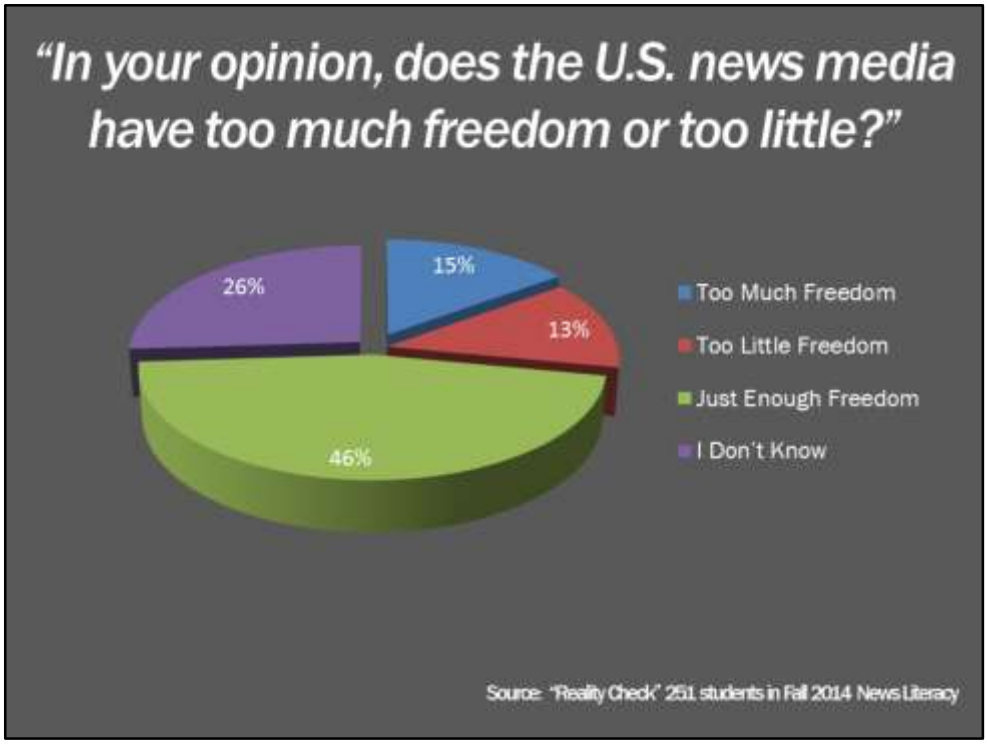


UPDATED WITH Spring 2012 STATS
ANIMATION: image and title appear together, Subheading fades in.

In our Reality Check questionnaire, the breakdown was similar, but with a big difference:

The largest group of students says the US News Media has just enough freedom in the same proportion as the nation. But only half as many students as general public say “Too much” Interestingly, the “Too much Freedom” percentage has been falling, almost 10%, since we started collecting this data in 2011.

ASK: What events might cause that attitude shift?



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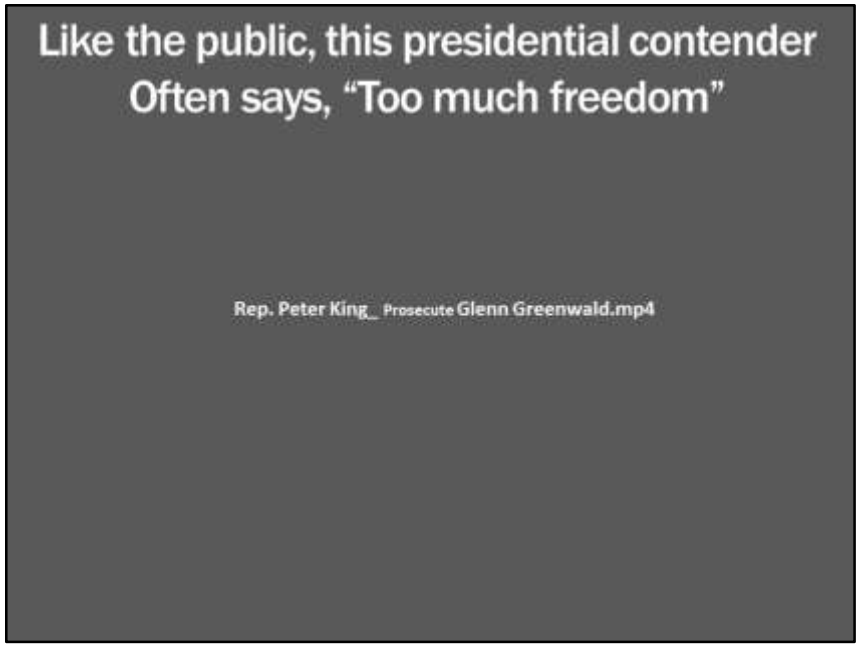
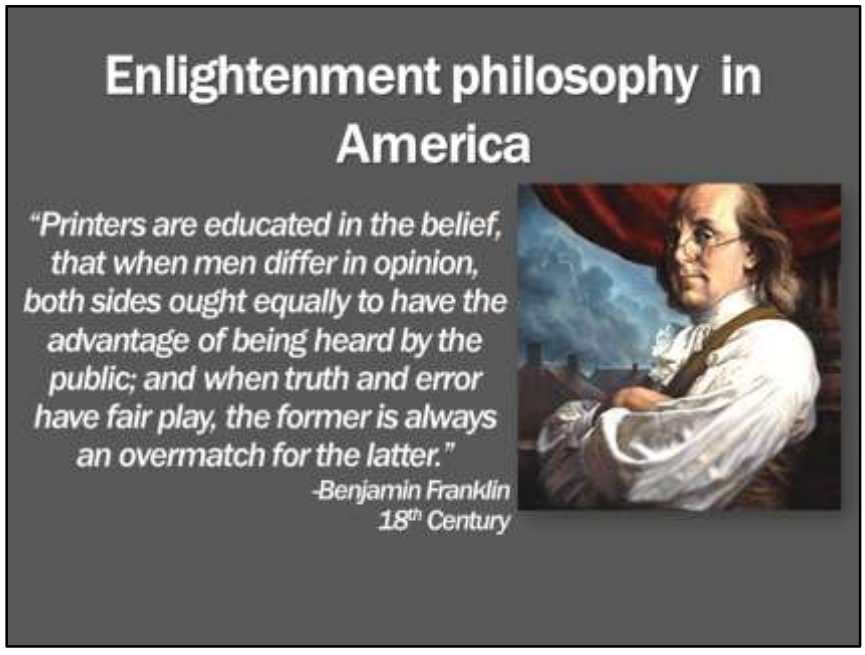


11-term Congressman Peter King, now running for President on the Republican ticket, is Chairman of the House Homeland Security's Sub-Committee on Counterterrorism and Intelligence.
Every time reporters publish national secrets, he calls for them to be thrown in prison for treason or espionage.
He went to law school, he has read the Constitution.
He says this kind of behavior goes way beyond what The Framers meant when they wrote that Congress shall write no law that restricts Freedom of the Press.

ANIMATION: Image fades in

That question we asked at the start of the lecture: “What is Freedom of the Press?” has an answer, at least in the U.S. Constitution.

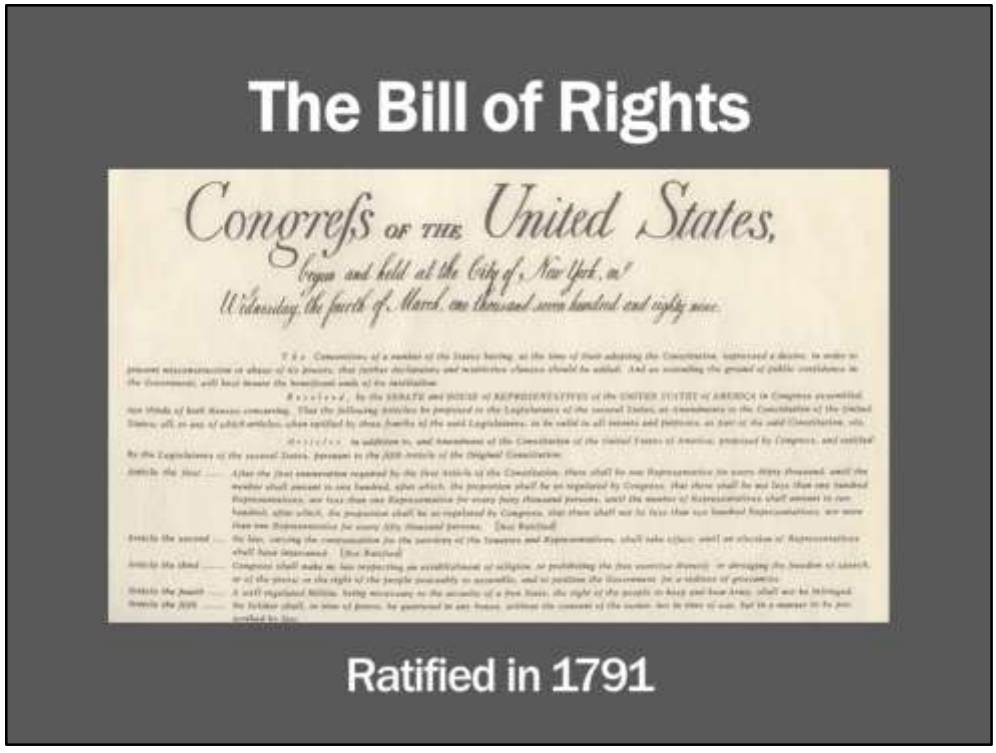
The First Amendment is possibly the 45 most powerful words in American history, reserving to the public some remarkable powers that on good days define us as a country and on bad days…define us as a country.



ANIMATION: Image fades in followed by quote

Tolerance for the ideas we hate was a kind of article of faith of the Enlightenment, when philosophic inquiry and the scientific method began to flower across Europe. Voltaire, Rousseau and others proposed a radical idea: Uncensored discussion as antidote to the tyranny of the church and the inherited aristocracy

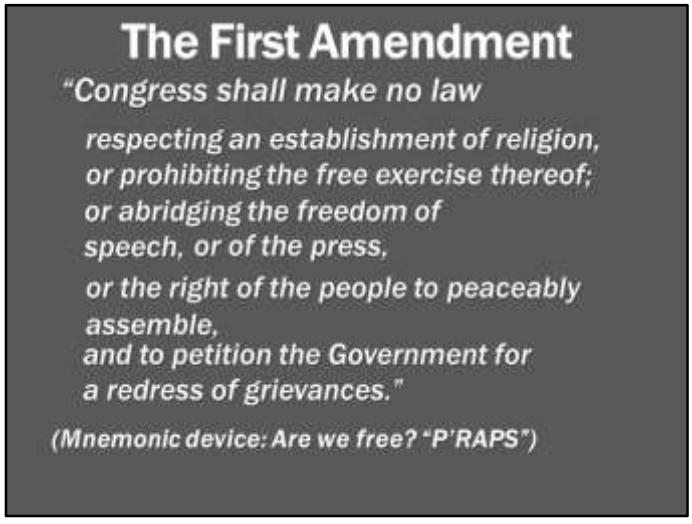
Franklin, an admirer of Enlightenment philosophers, steals this idea from John Milton's "Areopagitica"
"And though all the winds of doctrine were let loose to play upon the earth, So Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?"
Sounds dangerous, doesn't it?



Animation: Image fades in followed by sub heading

The Bill of Rights (the first 10 amendments to the Constitution) was not universally hailed when the amendments were adopted in 1791. Three states didn't vote for ratification until 1941 and then only for ceremonial reasons (the 150th anniversary of Bill of Rights)

And…They didn't initially work out as the founders had believed they might.



ANIMATION COMPLEXITY ALERT! 12 ANIMATIONS
SLIDE OPENS WITH "CONGRESS SHALL MAKE NO LAW" AND THEN YOU CLICK THROUGH EACH OF THE FIVE FREEDOMS FIRST CLICK BRINGS IT UP, NEXT CLICK ERASES IT, NEXT CLICK BRINGS THE NEXT UNTIL ALL YOU HAVE IS THE MNEMONIC

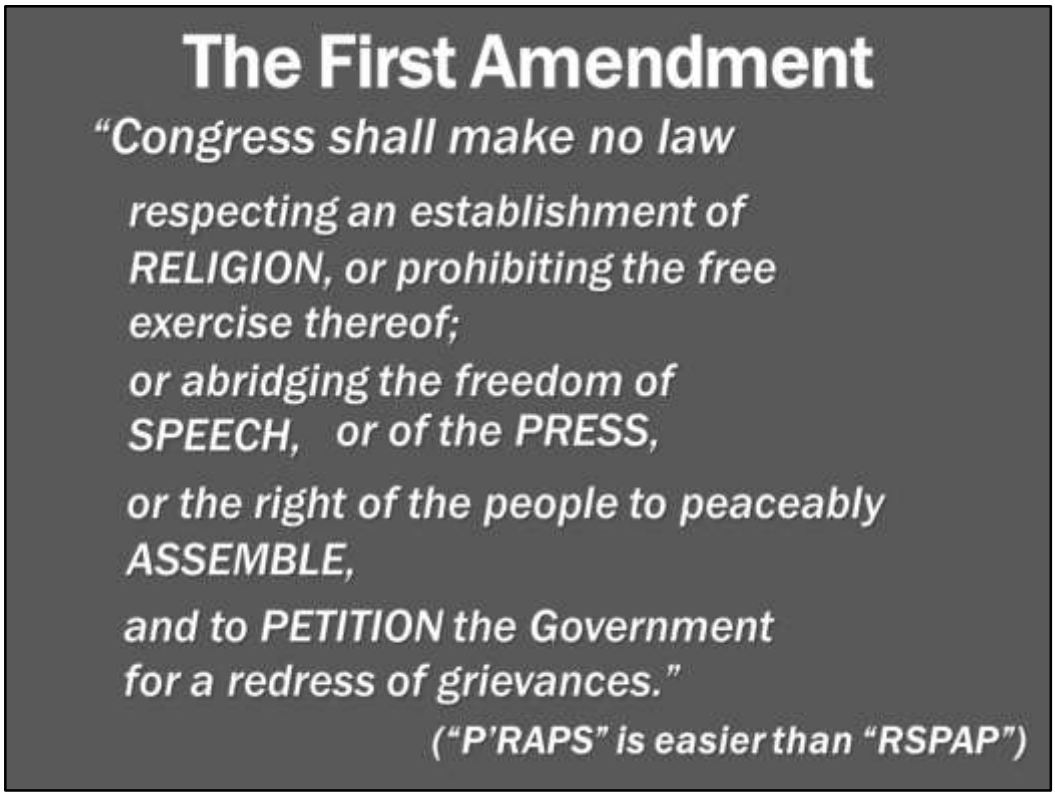
When the First Amendment Foundation surveyed Americans in May of 2014, 30% could not name ANY of the rights guaranteed by the First Amendment. (In our Fall 2013 Reality Check, 65% of students selected the correct version of the First Amendment, but 23% would not even pick one of the three, saying they "do not know.")

So, let's fix that right here and now.

The First Amendment prevents your government from infringing the following rights: (**Click now**)

- Religion,
- Speech
- Press
- Assembly
- Petition

(Mnemonic is "P'RAPS"…AS IN ARE WE FREE? "PERHAPS")



(LECTURER: READ IT ALOUD SLOWWWWLY, COUNTING OFF EACH FREEDOM)

ASK: What was the big problem with the first amendment?
There's no definition.
What, exactly, does "Freedom of the Press" mean?
It would take 140 years to figure it out.
Here's what it has come to mean…for now…

ANIMATION: CLICK1=BLINKING ARROW TO EMPHASIS PRINTING PRESS

A clarification:

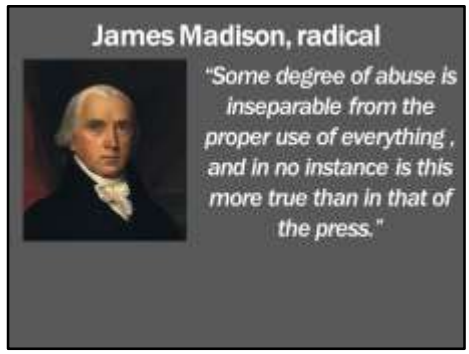
The First Amendment protects individual rights: to petition, worship, march, speak out and…to spread your ideas.

Newspapers, Radio, TV and the Web are merely the vessels through which citizens' ideas are distributed.

When they wrote *"Freedom of the Press,"* the framers literally meant Gutenberg's contraption…Not the Press Industry.

We'll circle back to this, but needed to plant this

firmly in your memory.



ANIMATION: Image fades in followed by text, then quote.

This radical idea, defended to this day by the political right and left in their own ways, is every American's intellectual inheritance, to be squandered, spent or invested as you alone see fit.

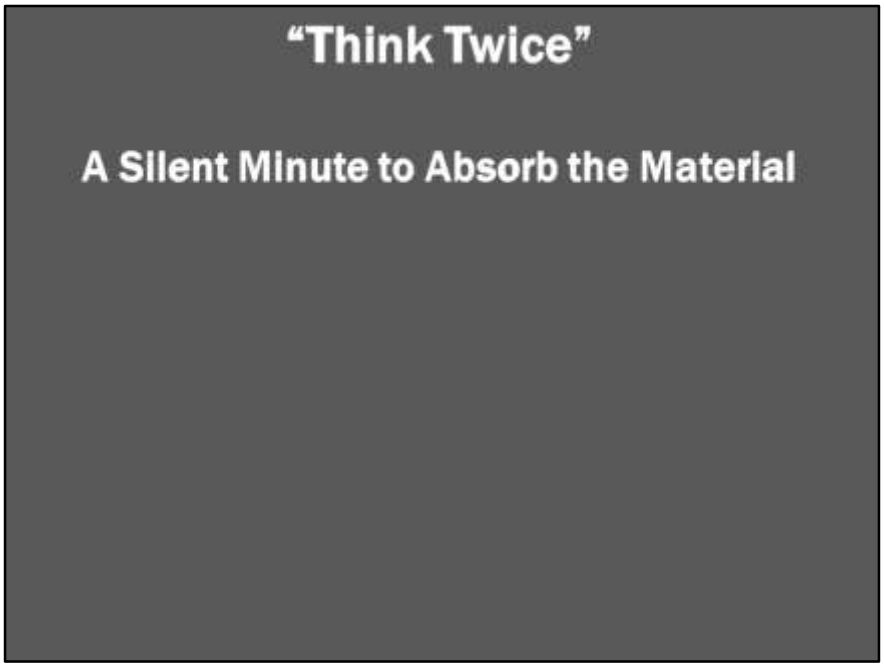
Is this like the right to bear arms, another crazy idea with disastrous consequences?

That's the point of today's lecture.

There aren't many historical precedents for this kind of primacy of the rights of the individual because, as we assert in this course, history is one long battle for control over information. And why would you tolerate misuse of freedom by mere individuals? Yet protection of even irresponsible freedom took root with Madison's argument, was included in Pennsylvania's constitution in 1790 and in the Bill of Rights a year later. Crazy. Free enquiry frees minds. That is dangerous talk.

One corollary can be found in the biblical story of Abraham haggling with God. Would the vast sinning cities of Sodom and Gomorrah (Genesis 18:23-32) be saved if 50 righteous individuals could be found there? How about 40? And so on to 10. You might say that story proposes the idea that it's better to tolerate even widespread iniquity so that the individual can be free. With apologies to the faithful…that's a CRAZY idea.

Crazy regard for the individual pops up again in English Common Law. The jurist William Blackstone proposed that it is "Better that ten guilty persons escape than that one innocent suffer." Another CRAZY idea with staying power.

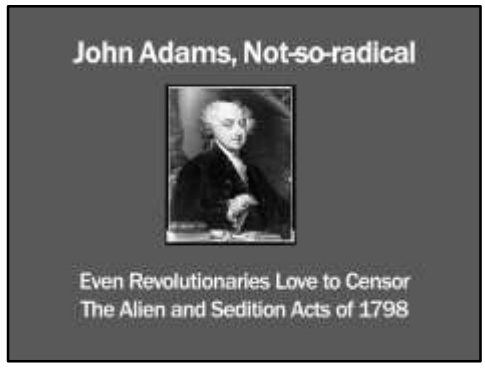


ANIMATION: Click once to start the fade-out, fade-in, which takes one minute

At Stony Brook, we've become interested in the effects of silence in the classroom.

At summer workshops in 2013, we began breaking up intensive lecture or discussion sessions with a minute of silence. It made participants uncomfortable the first time, but over the course of a few days they became quite enthusiastic about pausing every so often to let ideas sink in or to simply reflect. We find it works well to ask a question and then call for a minute of silence.

Let's take a pause to soak all that in



Animation: Image fades in followed by subheading.

No sooner have the states ratified the Bill of Rights, than we see the first big challenge: In 1798, Congress passes four bills, called the Alien and Sedition Acts. Sponsors claimed the intent was to protect the United States from alien citizens of enemy powers and to prevent seditious attacks on the government, which was fighting an undeclared war with France. History judges them, harshly, as craven attempts to stifle critics of John Adams, who signed them into law. Twenty five people were arrested for sedition, 15 indicted, 10 convicted- almost all were political opponents of Adams. Even after this act expired in 1801 (the law was made to expire the day before the next president was sworn in) newspapers and speech were routinely censored, particularly by the States.

Thomas Jefferson, that radical firebrand, thought the Bill of Rights ceded to the individual states the power to control the press. States did. Postmasters throughout the South were empowered to seize any mailed materials that might lead to insurrection.

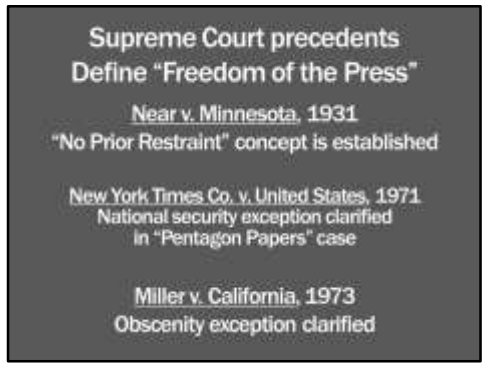
During the Civil War, the rights of Abolitionists to speak out and to publish anti-slavery writings were limited.

Then in 1917, just after the U.S. entered World War I, Congress adopted the Espionage Act, which sets new, tough penalties for anyone who violates a murky set of standards:”obtaining or delivering information relating to "national defense" to a person who was not "entitled to have it“

Yikes…

Maybe that Bill of Rights stuff was too crazy, after all. If you believe effective governance requires power…and we talked last week about the battle to control information… Government can’t function without some control over information, can it?

Crazy Yanks. That First Amendment…it was just a passing fad.



Animation: Each Case comes in on a click

This is NOT a constitutional law course, so future lawyers in this class will have to be satisfied with this very simplified history of the Supreme Court's rulings on freedom of the press.

I'll give you the formal names of the cases and then we'll discuss each one. Here they are:

CLICK1= Near v. Minnesota

CLICK 2= New York Times v. U.S.A (aka, the Pentagon Papers case)

CLICK 3= Miller v. California

ANIMATION: LECTURER CLICKS

So we have the First Amendment, some muddy 20th Century decisions about the Espionage Act and along comes 1931 and the first great press case: Jay M. Near, the anti-Catholic, anti-Semitic, anti-black and anti-labor publisher of the (Minneapolis) Saturday Press, published a story in 1927 linking the Mayor of Minneapolis, police chief, County Attorney and other officials with gambling syndicates in the city.

City officials moved to shut down Near's paper under the Minnesota Gag Law, which permitted permanent injunctions (closure) of newspapers if they were found to be publishing "obscene, lewd, scandalous, malicious, defamatory material." Local court upholds the injunction and goes so far as to ban Near from publishing a newspaper under any title.

Near Appeals.

The State Supreme Court upholds the local court's ruling and compares Near's Saturday Press to brothels, speakeasies, lotteries, noxious weeds, feral dogs and other threats to the public peace.

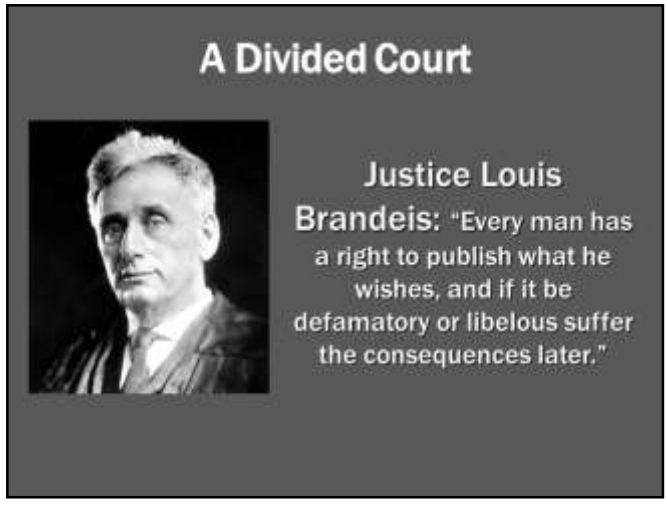
In ruling on Near's 2nd appeal, the court relented a little and said Near could publish a newspaper after all, but only "in harmony with the public welfare."

A Divided Court

Justice Pierce Butler:
"Permitting a scandal sheet such as Near's to destroy the reputation, peace of mind, and even personal safety of other citizens, society is not only encouraging malice and revenge but could inflict distressing punishments upon the weak, timid, and innocent." (dissent)

ANIMATION: Image fades in followed by text

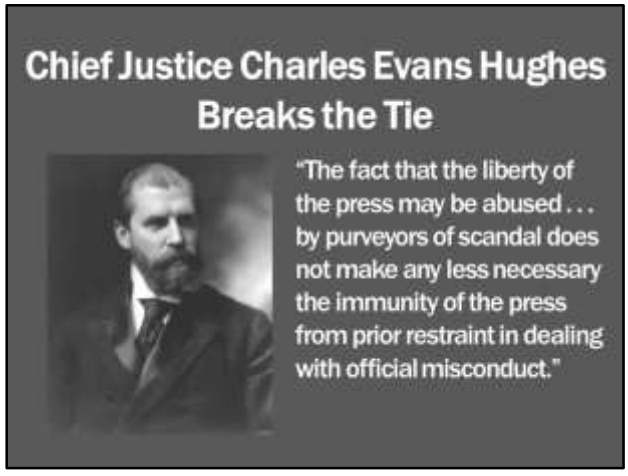
Jay Near appealed to the U.S. Supreme Court, arguing the First Amendment guarantees his right to print his paper.
In June, 1931, The Court agreed with him on a split ruling, 5-4 against the Minnesota Gag Law. Dissenting, Justice Pierce Butler, a Minnesota native, said the government had the right to control those who misused the freedom of the press. But he was in the minority.



ANIMATION: Image fades in followed by quote

In that decision, Justice Louis Brandeis lays down the fundamental definition of U.S. free press law: "*Every man has a right to publish what he wishes, and if it be defamatory or libelous suffer the consequences later.*"

Notice it is the right of the individual, not of the press industry. Also notice the most important word in U.S. free press jurisprudence…LATER. Not an ounce of prevention…a pound of cure.



ANIMATION: Image fades in followed by quote.

Chief Justice Charles Evans Hughes breaks the tie and coins a key phrase: **"Immunity from prior restraint."**

That idea…"No prior restraint" means it is almost impossible to stop the publication or broadcast of a story once a news organization has the material.

And that precedent stands today.

For your purposes, it can be easy to remember one word: LATER as in Publish **Near**ly anything, suffer consequences later.

ANIMATION: Image fades in followed by text in two successive groupings.

Hold it. WHAT?

Really?

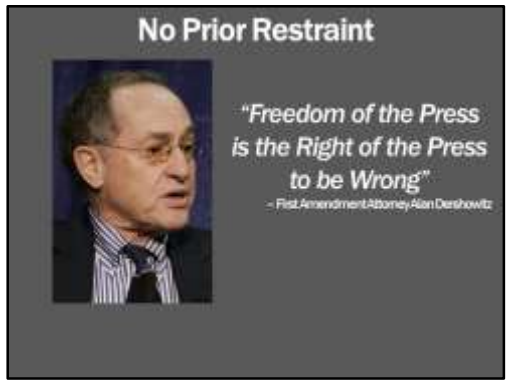
I can't be stopped from printing ANYTHING I want?

That's right… sort of.

A judge or sheriff can't step in and block publication before the harm is done?

No.

<u>But</u> the publisher/broadcaster/webmaster will face the consequences…LATER…if the information is found to be libelous or defamatory.



ANIMATION: Image fades in followed by quote.

Why such extraordinary protection of the right to publish?
What was the rationale?
What was the context in which the framers took such a radical stance?
Famous civil liberties lawyer Alan Dershowitz, of Harvard Law School, says the Near case's prohibition on prior restraint means that Freedom of the press is basically the right to be wrong.
That's what Madison said, isn't it? Some abuse is to be expected.
But the alternative, government control of publishing, was worse in his mind.

ANIMATION: CLICK1=QUOTE FROM JAMESON

The most common consequence when free press rights are used to slander or libel a person or their business is in CIVIL court instead of criminal court.
The civil law of slander and libel developed to settle disputes over injury to reputations by publishers and broadcasters.
So civil courts deal out consequences to publishers who harm people by publishing falsehoods.
By the way, don't be an ignoramus about this concept.
No less of an authority than the Editor of the Daily Bugle (J. Jonah Jameson) said it best in "Spiderman," correcting a colleague who was worried the Daily Bugle was slandering someone Jameson was out to get.
CLICK HERE
Slander is the defamatory stuff you spread around in conversation. Libel refers to defamation in print.

THREE-CLICK ANIMATION: EACH DEFENSE COMES UP, WITH AN IMAGE,

So…can a lawsuit silence investigative reporting? Not very often.

There is no grounds to sue when the information is True, or Privileged or Fair Comment

1. Truth is simple. But what do those other terms mean?
2. "Privilege" protects your right to publish court testimony, police reports or other public documents, even if they contain falsehoods. This is because the public has the privilege to review the contents of government files as a means of ensuring police, courts and other agencies are conducting themselves correctly. Since most people work, the press is a mechanism for reading those government files.
3. "Fair Comment" protects your right to criticize and comment on matters of public interest without being liable for defamation, provided that the comment is an honest expression of opinion and free of malice: the intent to cause harm without legal justification or excuse. (Up comes a nasty post from The Daily Beast in which documentary director Robert Weide knifes Mia Farrow for publicly accusing Woody Allen of child sex abuse, though Connecticut authorities investigated and cleared him)

Over time, two exceptions to No Prior Restraint have been recognized. They are rarely used because the U.S. Supreme Court essentially ruled that any prior restraint is presumed to be unconstitutional and therefore requires extraordinary circumstances.

(CLICK TO BRING UP CENSORED "DAVID") Some forms of speech enjoy no constitutional protection "Fighting words," obscene speech, and sexually explicit depictions of children fall within this category.

In Free Press cases, the courts have been willing to tolerate prior restraint of "obscene" material.

In 1973, in a case called Miller v. California, the U.S. Supreme Court established a three-tiered test to determine what was obscene—and thus not protected, versus what was merely erotic and thus protected by the First Amendment. Miller, after conducting a mass mailing campaign to advertise the sale of "adult" material, was convicted of violating a California statute prohibiting the distribution of obscene material. Some unwilling recipients of Miller's brochures complained to the police, initiating the legal proceedings.

Delivering the opinion of the court, Chief Justice Warren Burger wrote:

The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[3]

The second exception is national security.

It has evolved over time, from this broad statement in the Near decision (“ *No 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.”)* to a much broader theory of press freedom.

As the law stands, the Supreme Court says citizen cannot do their duty unless information is freely available and ideas all compete in an open marketplace.

The court has said national security is not a reason for prior restraint on publication unless there is proof of a clear and present danger that poses a serious and imminent threat of immediate and irreparable damage to the nation and its people. (language that Brandeis helped write, by the way.)

Let’s look at the case that most clearly established the national security exception’s standards, the so-called "Pentagon Papers" case, (New York Times Co. v. United States)

On June 30, 1971, the Supreme Court decided, 6–3, that the government failed to meet the heavy burden of proof required for prior restraint injunction. The nine justices wrote nine opinions disagreeing on significant, substantive matters.

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.

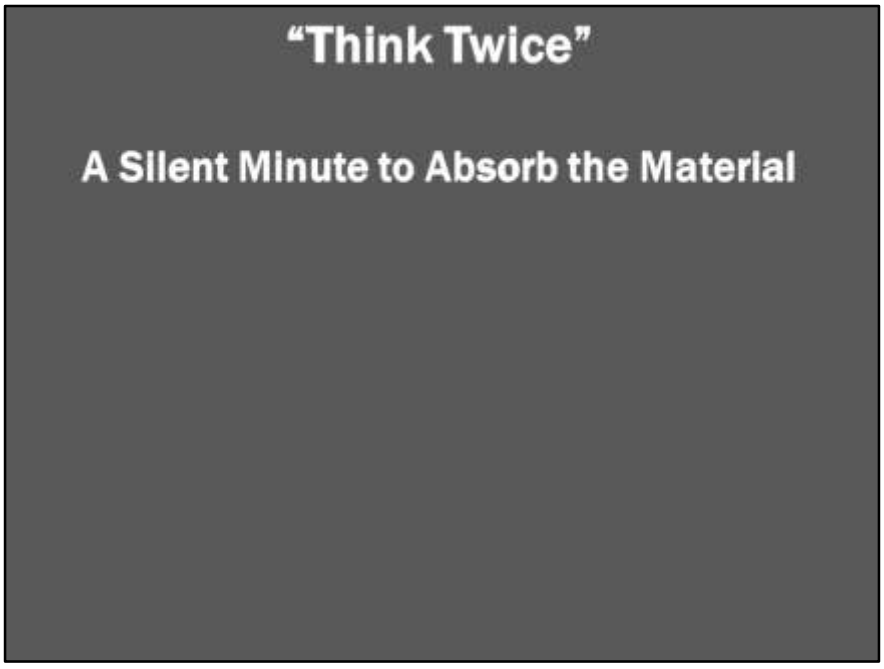
ANIMATION: Image fades in, moves right and text appears.
The **Pentagon Papers**, officially titled **United States–Vietnam Relations, 1945–1967: A Study Prepared by the Department of Defense**, was a top-secret history, (45 volumes!) first brought to the attention of the public on the front page of the New York times in 1971. Daniel Ellsberg, a White House military analyst and veteran of the Viet Nam ground war, was shocked to find that that Presidents from Truman to Johnson had systematically lied, not only to the public but also to Congress.
Seeking to end what he said was an unjust war, he leaked a copy to Congress, which was scared to publicly reveal it.
Next he went to the New York Times, which prepared to publish significant portions of it. The Nixon administration sought an injunction, saying the release of classified material was a matter of national security.
The courts enjoined the Times after it published the first batch of material.
But Ellsberg stayed one step ahead by sharing copies with other newspapers. Right after the Times, the Washington Post ran a story from the Pentagon papers and after that the Boston Globe and then Newsday. In all, he gave it to 17 newspapers.
The news media stayed one step ahead of the courts and publication continued uninterrupted, with the public learning what it had not known about the way we got into that war.
The U.S. Supreme Court two weeks later ruled (9-0) in favor of the Times, saying the bar "must be very high," to support a national security exemption… it only can do so when "immediate and irreparable damage to the country" would be done.
In 1970,

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

Justice Potter Stewart:

"In absence of governmental checks and balances, the only effective restraint upon executive policy and power in [national defense & international affairs] may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government."

Justice Potter Stewart used the case to re-state the Framers intent: that informed citizens are the bulwark against tyrannical impulses of executive power.



ANIMATION: Click once to start the fade-out, fade-in, which takes one minute

Okay, let's breathe for a minute and let it sink in.
What do you think now about the U.S. Press.
Too much freedom?
Too little freedom?
Just enough?

ANIMATION: CLICK REVEALS FOUR IMAGES OF CITIZEN JOURNALISTS

The Bill of Rights did not declare newspaper owners and journalists a special class.

The framers empowered you…US…the citizenry to use the extraordinary power of information to be a check on the tyrannical tendencies of the other three estates of power.

What are they? The Executive, legislative and judicial branches.

They reserved vast freedoms to citizens as a protection against tyranny, which the constitution's drafters had witnessed first-hand.

Learn this and you'll know more than most journalists: Freedom of the Press means US, not THEM.

The News Media may have no superior rights, but reporters do have the full time job of exercising their rights as citizens to gather and distribute information.

As such, they are granted broad protections, but only because the news media are a means by which citizens distribute their ideas or push for change.

So, what does the Press acting as watchdog look like?

In Florida, an organization called The Franklin Center provides training and other assistance to citizen journalists and helps draw attention to the best examples of people holding government accountable. In its first year (through June 2013), reports by citizen reporters led to **the firing of five campaign operatives and government employees**. This man in shades is a college professor who was forcing students to sign a pledge to vote for President Obama in the 2012 election. He was fired for abusing his position in that way, which was a citizen journalist's story.

Another organization, Photography is Not a Crime, documents cases like this Seattle incident, in which a Deputy Sheriff was videotaped threatening a citizen journalist. The officer was fired.

That power of citizens to document their grievances, articulate solutions, and demand change is increasingly a global role, and still rests in freedom of the technology, in the spirit of Gutenberg.

China officially censors and controls the news media, but consider how the Web and mobile phones are revising policy without Central Committee input:

The Chinese official at the right, in the top photo, lost his job because of citizen journalists using social media. The top photo shows him smiling at the scene of a crash that killed 36 people. the second is a collage of the photos netizens found of him wearing expensive watches, many of which cost more than his annual salary. Yang Dacai was removed from all party and government posts by the provincial party disciplinary department on September 21, 2012. One year later, he was sentenced to 14 years in prison on charges of corruption.

http://www.nytimes.com/2013/09/06/world/asia/yang-dacai-is-sentenced-in-china.html?ref=world&_r=1&

ANIMATION: THREE CLICKS, EACH BRINGING ANOTHER HEADLINE

The most famous case of a free press stopping an abusive government is a pair of simple criminal cases that took down a President.

In the Watergate case, Nixon White House operatives got caught trying to place an illegal wiretap in the offices of the Democratic Party. Two young reporters at the Washington Post, Bob Woodward and Carl Bernstein, followed the clues all the way to the White House, provoking a stand-off between the President and Congress that led to Nixon's resignation. About the same time, White House operatives looking for dirt on a political enemy wiretapped his phone illegally and broke into his psychiatrist's office. While we often say Watergate took down Nixon, there are those who argue this burglary forced Nixon to resign.

Certainly there are cases in which citizen investigators keep government honest, especially in the age of smart phones and social media.
But here is an example of a story that takes more time, skill and staff than the typical citizen blogger can bring to bear.
The Guardian newspaper, with the New York Times and an all-online investigative news organization called Pro Publica, sifted secret documents to uncover the NSA's success in cracking the codes that protect all kinds of internet data, from your bank accounts to the secret messages of spies. This story only broke on September 5, so we'll see what impact it will have.

ANIMATION: Images fade in together, followed by subheading.

In April of 1961, NY Times editor and columnist James Reston knew about the plans for the invasion of Cuba but did not publish the information, fearing he would jeopardize the operation or even cause deaths.
He later says that might have been a mistake .
And President John F. Kennedy, who oversaw the fiasco, once said he wished Reston had blown the lid. It might have saved the U.S. from embarassment.

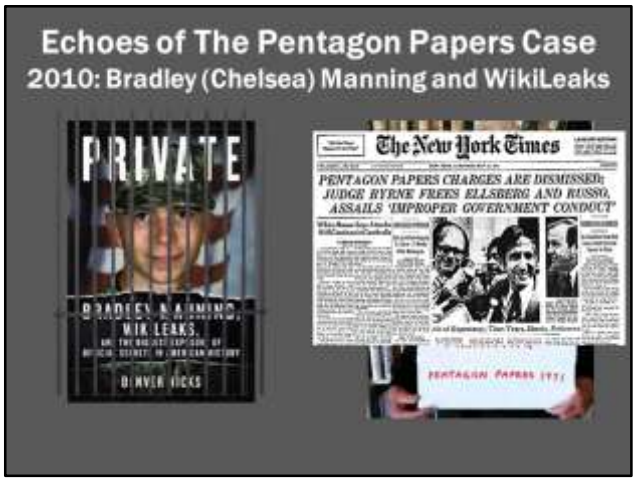
ASK: Could Reston have really published the information? What do you think?

Maybe because of incidents like this, the Fourth Estate has become bolder about prying into military matters, challenging decision-makers.

http://foreignpolicyblogs.com/2013/06/03/when-reporters-keep-silent-instead-of-scoops/

During the Bosnian conflict reporters kept quiet on at least two great stories. The first story kept secret was an 800-meter tunnel from Sarajevo that reached beyond the lines that had the city mostly surrounded. The tunnel brought in supplies and aid and let some people enter and leave the city with minimal risk. A news report on the tunnel would have led to its being closed. This tunnel was later dubbed Tunnel of Hope; it's now a tourist attraction (http://www.neatorama.com/2013/04/05/The-Tunnel-That-Saved-Bosnia/).

The second story was how the synagogue in Sarajevo certified many non-Jews as Jews in order to let them pass through the lines—above ground—out of the city.



ANIMATION: ONE CLICK SLAMS PRISON BARS OVER MANNING, ELLSBERG DISMISSAL STORY OVER ELLSBERG, AND THEN SPIRITS ELLSBERG OFF THE SCREEN.

Private Bradley Manning was arrested in May 2010 in Iraq on suspicion of having passed classified material to the whistleblower website WikiLeaks. Assigned to an army unit based near Baghdad, Manning had access to databases used by the United States government to transmit classified information. The material included videos of controversial air strikes, plus 250,000 United States diplomatic cables; and 500,000 army reports that came to be known as the Iraq War logs and Afghan War logs. It was the largest set of restricted documents ever leaked to the public. Much of it was published by WikiLeaks or its media partners between April and November 2010.

Manning was convicted in July 2013 of violations of the Espionage Act and other offenses, after releasing the largest set of restricted documents ever leaked to the public. Manning, who is seeking sex change treatments and is now identified as Chelsea Manning was sentenced to 35 years in prison and a dishonorable discharge.

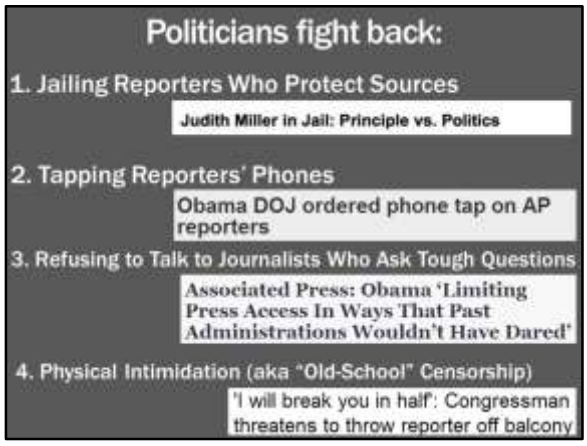
Why was he imprisoned, while Ellsberg was released?

It turned out that President Nixon's out-of-control henchmen were so bent on discrediting Ellsberg that they illegally tapped Ellsberg's phone and broke into his psychiatrist's office, looking for embarassing "dirt" . When those facts came to light, the Federal judge in the case against Ellsberg through the case out.

ANIMATION: CLICK SLAMS BARS OVER SNOWDEN

It's still too early to know how the Manning and Snowden cases will change the National Security exception. So far, no news organization have been blocked from printing what they know. But the individuals who leak secret information face relentless pursuit by the US government.

(Here's the recent Wikipedia backgrounder on Snowden, greatly abbreviated)
Edward Joseph Snowden (born June 21, 1983) is an American computer specialist who worked for NSA contractors and said that he was an employee of CIAand NSA before leaking details of several top-secret United States and British government mass surveillance programs to the press.[2][3]
Based on information Snowden leaked to *The Guardian*[4] in May 2013 while employed at NSA contractor Booz Allen Hamilton, the British newspaper published aseries of exposés that revealed programs such as the interception of U.S. and European telephone metadata and the PRISM, XKeyscore, and Tempora Internet surveillance programs. Snowden's release of NSA material was called the most significant leak in US history by Pentagon Papers leaker Daniel Ellsberg.[5][6][7]
On June 14, 2013, United States federal prosecutors charged Snowden with espionage and theft of government property.[8][9][10] Snowden had left the United States prior to the publication of his disclosures, first to Hong Kong and then to Russia, where he received temporary asylum and now resides in an undisclosed location.
Snowden has defended his leaks as an effort "to inform the public as to that which is done in their name and that which is done against them."[25] Some U.S. officials condemned his actions as having done "grave damage" to the U.S. intelligence capabilities while others, such as former president Jimmy Carter, have applauded his actions.[26][27]



ANIMATION: CLICK1=JAILING; CLICK2=TAPPING; CLICK3=REFUSING, CLI

Almost every year, reporters face contempt of court charges and some even serve jail time for refusing to respond to subpoenas demanding things like the names of their sources and even copies of unpublished photos that lawyers or police want.

The Justice Department in 2013 faced embarrassing questions about its decision to wiretap the phones of Associated Press reporters, which will make tipsters far more fearful of tattling on corrupt officials.

And, though they hold public office, politicians find ways to limit scrutiny, in part by refusing to talk at all.

And then there's the Old-School Method of blocking scrutiny.

After the 2014 State of the Union Address, Congressman Michael Grimm of Staten Island threatened to beat up a NY-1 reporter who persisted asking question the Congressman didn't like. Grimm stormed out of the picture.

Reporter Michael Scotto turns to the camera and reports that Grimm "does not want to talk about some of the allegations concerning his campaign finances. Grimm then appears back on camera and can be heard saying: "Let me be clear to you, you ever do that to me again I'll throw you off this f—— balcony," The reporter persists, telling him "it's a valid question."

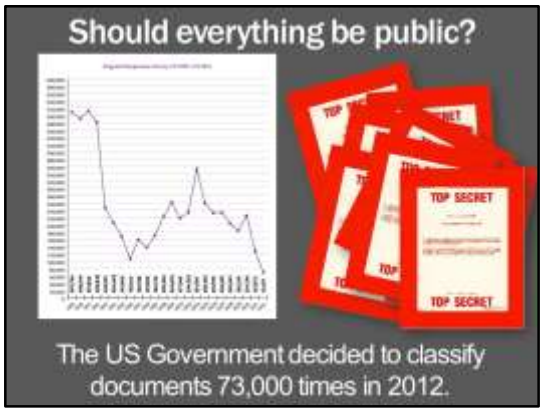
"No, no, you're not man enough, you're not man enough. I'll break you in half. Like a boy," Grimm says.

.

NEWS FELLOW INSERT VIDEO HERE

Harkening back to lecture #2, video like this is why a powerful person like Congressman Grimm fears uncontrolled spread of information.

He was forced to apologize when the public saw what he had done.



ANIMATION: Image fades in, followed by each bullet point successively.

From the beginning, the constitution's framers understood that freedom of the press was meaningless if the public didn't have the right to demand information from its servants in government.
Apart from espionage, what about just day-to-day workings of any federal agency? Do you have a right to know salaries and budgets and purchasing contracts? (yes)

In 1980, the U.S. Supreme Court reinforced the idea that newsgathering is constitutionally protected.
"The First Amendment protects the public and the press from abridgement of their right of access to information about the operation of their government," the court said in Richmond Newspapers Inc, v. Virginia.
This is all well and good, but the U.S. government is deciding to classify documents a remarkable number of times. While the number of times that government officials have decided to classify a document or set of documents has, on the whole, decreased over the last 5 years, the Government still decided to classify documents 127,072 times!"
Whatever the reason, that's a lot of information about government you aren't allowed to know.
Aren't those documents the deepest darkest secrets of government?
How many Americans have security clearance to read such documents?
One Dozen? One Hundred? One Thousand? One Hundred Thousand? A half-million?
How about 854,000? (Washington Post)

2012 ISO Report -- http://www.archives.gov/isoo/reports/2012-annual-report.pdf
Washing Post Article with 854,000 figure -- http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/

Your right to know is guaranteed in theory, but even in the U.S. reporters are jailed while doing their jobs.
Journalist Amy Goodman, (on the right in zip-tie handcuffs) is host of the syndicated program "Democracy Now!" Goodman and two of her producers were among an estimated 40 to 50 journalists arrested while they were filming and reporting on street protests outside the 2008 Republican National Convention in St. Paul, Minnesota.
"When journalists are arrested, it is not only a violation of the freedom the press, but of the public's right to know," Goodman said in a statement. "When journalists are handcuffed and abused, so is democracy. We should not have to get a record when we put things on the record."
Courts agreed.
The cities of Minneapolis and St. Paul agreed to pay $90,000 in fines. The U.S. government agreed to pay $10,000 because a Secret Service agent stripped press credentials off Goodman and her producers.
Under the settlement, St. Paul and Minneapolis have agreed to develop a policy and training for police officers on how to avoid infringing on the First Amendment rights of journalists who cover big protests.
The settlement was reached with the aid of U.S. Chief Magistrate Judge Arthur Boylan in St. Paul.
Goodman and About 800 demonstrators and bystanders were arrested during the convention. Authorities eventually dropped all charges against the arrested journalists and many of the protesters and bystanders.

http://www.foxnews.com/politics/2011/10/03/reporters-arrested-at-2008-republican-convention-reach-settlement/#ixzz1lAeiUQUM
http://www.huffingtonpost.com/2011/10/03/amy-goodman-settles-lawsuit-2008-republican-national-convention-arrest_n_992431.ht

ANIMATION: Bullet points fade in together

Can freedom of the press collide with your right to be tried in front of an impartial jury of your peers?

What about your personal privacy? Can a news photographer zoom her lens in on your apartment and take pictures of what's going on behind your closed door?

The Roberts Court basically recognizes no constitutional right to privacy, but still…

What about the Sixth Amendment's guarantee of a fair trial? Can a judge stop pre-trial coverage?

Which amendment is more powerful? First or Sixth?

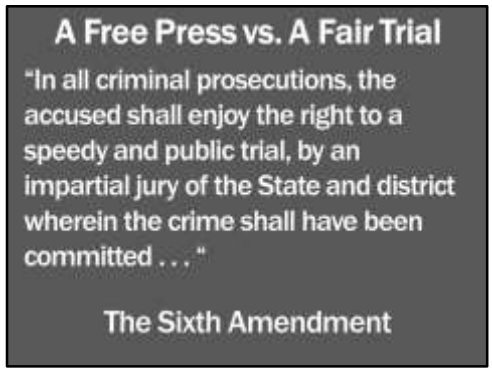
What about privacy?
Does the First Amendment give you the right to make a death public?
Lance Corporal Joshua Bernard, 21 of New Portland, ME, was on patrol in Dahaneh, Afghanistan in August of 2009 when a Taliban RPG hit him.
An Associated Press photographer, who had been with the patrol all day, took a picture of his comrades tending to him in the field. Bernard died in the hospital. The photographer finished her time with that military unit and put together an extensive report with dozens of photos for distribution to AP clients worldwide. AP made a courtesy call to the family to alert them that the photo would be part of an AP report on the war. The father strongly objected, saying it would dishonor the memory of his son. AP respectfully listens, but says the photo is integral to reporting on what happens in war. Fatal injury is a daily reality and while the AP does not set out to photograph dying soldiers, that will occasionally be part of the coverage. The Secretary of Defense calls the AP's chairman to argue for holding it.
AP distributes the photo. Does the First Amendment protect

that? (yes)

ANIMATION: Image fades in

Jennifer Garner has joined a bid by the Oscar-winning actor Halle Berry to push new laws in California aimed at protecting children from the activities of paparazzi photographers. California has passed it and Hawaii is considering a similar law, but press photographers say the effort to rein in obnoxious Paparazzi will wind up hampering legitimate reporting on public figures. Stay tuned for that case.

Stay tuned for this ruling as well: If the FBI identifies the hackers who stole nude photos from the iPhone cloud storage of celebrities and posted them on 4Chan, will there be a successful prosecution for violation of privacy?
If there is, as the Roberts court contends, no constitutional protection of privacy, what would be the basis for such a case?



ANIMATION: Quote fades in, followed by subheading

What happens when two parts of the Bill of Rights collide?

You have a right to read about how the courts are conducting the public's business. But doesn't pre-trial reporting on a case influence potential jurors?

After the series of protests and rallies about police declining to seek prosecution of George Zimmerman in the February 2012 killing of Trayvon Martin, charges were brought in April . Between that day and June of this year, when jury selection began, this was one of the most-watched, most-talked about criminal cases in history. Millions of people signed petitions. How is it possible that an impartial jury of INFORMED citizens could be selected?

ANIMATION: Bullet points all fade in together

Courts have given it some thought and here's what can be done to balance the competing First and Sixth Amendment claims.

It turns out the First Amendment kind of trumps the Sixth.

There is no prior restraint on publishing information about trials.

But, judges have remedies to reduce the likely impact.

•A judge can move a trial to another geographic area, to harvest jurors unlikely to have read or heard about the case.

•Gag orders can keep lawyers from grandstanding

* Cameras are often banned from the courtroom during pre-trial hearings.

*Lawyers and judges quiz prospective jurors in a process called voir dire, to see if they are impartial.

If coverage of a trial is intense, a judge can order sequestration, which is when jurors are kept out of the public eye and away from newspapers, radio and TV. Kind of a long-term News Blackout.

"We don't want to discourage citizens from being well informed. They can be on the jury provided they will be fair and decide the case on what they hear in the courtroom."

- Chief Justice John Marshall on empanelling an impartial jury

ANIMATION: AUTOMATICALLY, GAME BANNER SWIVELS, WITH DRUM ROLL

Let's take those big abstractions: Too Much, Too Little and Just Right and see if we can make them concrete with some examples.

Ready?

I'll summarize a scenario in which you are in a newsroom preparing to broadcast or publish something controversial and someone wants to stop you. The class will vote whether you can be stopped. We'll record the overall vote and then return to the scenarios at the end of lecture to reflect on them a bit.

So that's a First Amendment law course crammed into an hour…

Let's go back to our hypotheticals.

What do you think now?

Ready?

What do you think? Could Ford be stopped?
Was blaming "The Jews" for farmer's problem going to cause people to take illegal actions?
Could Ford be stopped from publishing his anti-semitic conspiracy theories?
(Take another vote: note any change)
No.
There is no restriction on publishing racist, sexist or any other bigoted opinions.
As recently as 1992, The Supreme Court re-confirmed its finding that only when words pose an imminent danger of unlawful acts, where the speaker has the intention to incite illegal acts and there is the likelihood they will be the consequence of that speech may be restricted and punished by law.

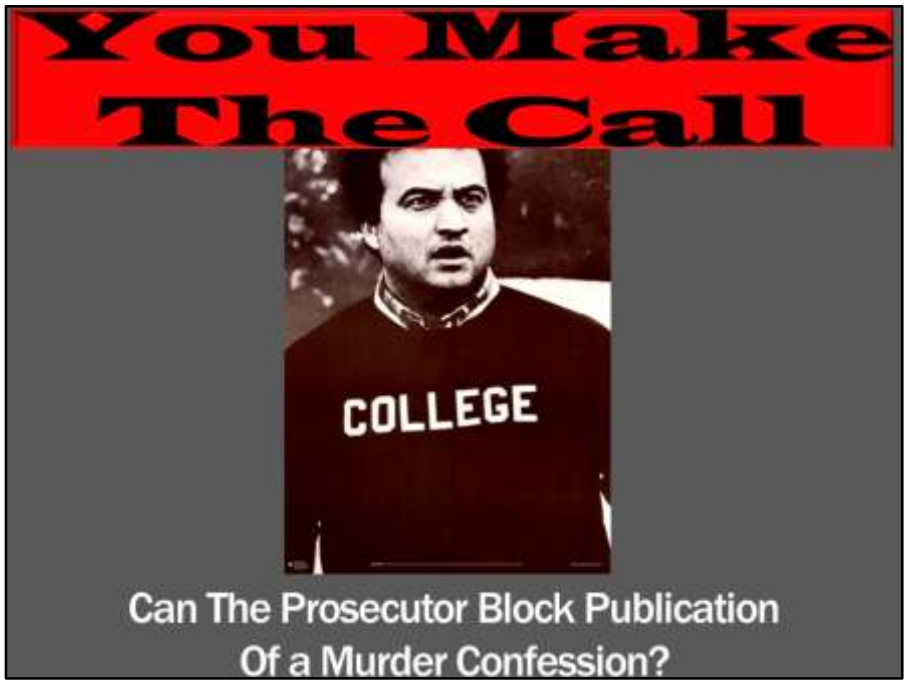
There were civil court remedies for Sapiro, though.
He demanded a retraction and then sued Henry Ford for $1 million. He was winning until Ford's bodyguard arranged some juror misbehavior that resulted in a mistrial. Ford immediately published an apology, but he went right on printing complex reports about Jewish conspiracies. So long as he wasn't damaging an individual Jew's reputation, there was no way to stop him and even today, Hate Speech laws would only stop Ford if you could prove his words would lead directly to illegal acts committed against someone.
Many publications and broadcasts refrain from distributing that kind of content, but that is a question of values, not of law. Self-censorship, not regulation.

ANIMATION: CLICK ACTIVATES GAME BANNER

ASK: Anyone want to change their earlier prediction and explain why?

(Take another vote, note any shift)

It's hard to imagine a court stopping publication. There is no evidence publication will constitute a risk of immediate and irreparable harm, even though it will waste a lot of intelligence work.



ANIMATION: CLICK ACTIVATES GAME BANNER

Can the court stop you from publishing it?

ASK: Anyone want to change their earlier prediction and explain why?

(Take another vote and note changes)

The judge has plenty of other remedies and the courts start from the presumption that an attempt at prior restraint is unconstitutional. You would not be stopped.

ANIMATION: CLICK ACTIVATES GAME BANNER

ASK: Anyone want to change their earlier prediction and explain why?

(Take another vote and note changes)

The bar, the Supreme Court has said, is very high. Those FBI and NSA and CIA agents at your dorm room door would have to show a judge that what you are doing will put troops at risk, or citizens at risk.

So, maybe…but so far, there have been no such cases and there is an awful lot of Top Secret material seeing daylight these days.

ANIMATION: CLICK ACTIVATES GAME BANNER

Can you publish?
ASK: Anyone want to change their earlier prediction and explain why?
(Take another vote, note changes)
There is no constitutional right to privacy that trumps First Amendment free press protections.
But many news organizations self-censor in cases like this, involving children.

ANIMATION: On Click, Magazine Image fades out, Trash Bins Fade in. SECOND CLICK ACTIVATES GAME BANNER

The grad student's Do-It-Yourself porn magazine…

Can the University, or the local prosecutor, stop publication of Issue #2?

ASK: Anyone want to change their earlier prediction and explain why?

(Take a vote and note any change)

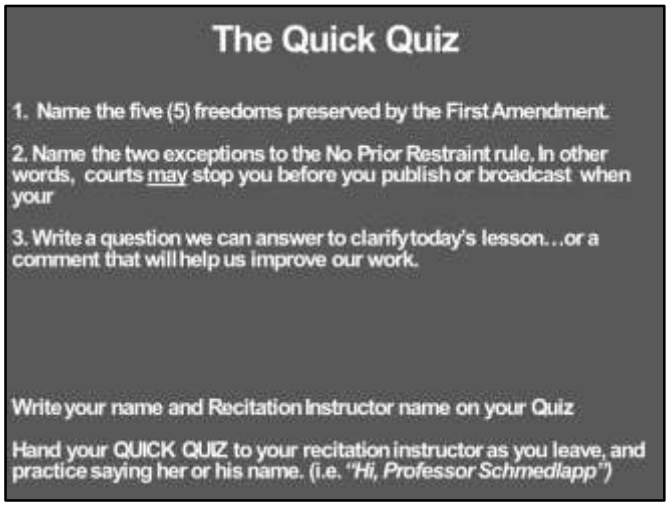
In Miller v. California , the U.S. Supreme court said a local judge facing a demand for prior restraint of a publication follows these guidelines:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, Roth, supra, at 489, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

If all those things are true, then (the Supreme Court said) First Amendment values are adequately protected… The jury may measure the essentially factual issues of prurient appeal and patent offensiveness by the standard that prevails in the community

Remember, she said on the TV news that Issue #2 would be far raunchier than anything else on local shelves. By definition, that exceeds community standards.

So, this one might be Censor-able. Back to Babylon with her.



Every lecture, we'll stop and give you a quick quiz, just three questions.
This helps cement key lessons in your memory.
Plus, it helps us see if we explained things well.
And the third question is a chance for you to improve your own course.
We'll start lectures with a selection of your comments and suggestions.

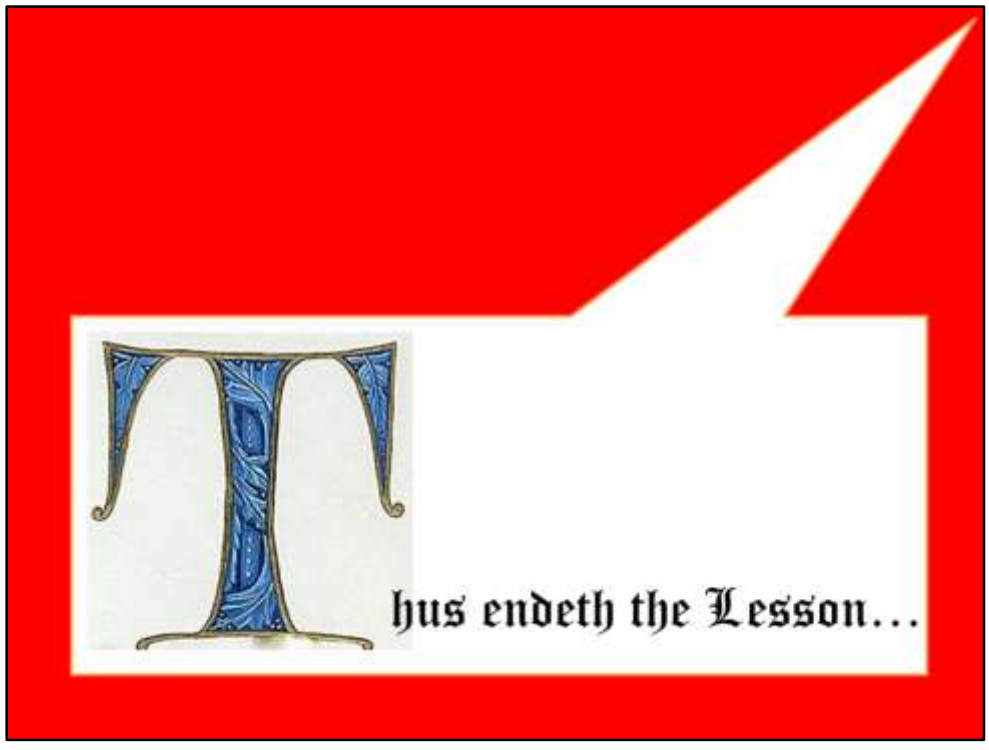
ANIMATION: All elements fade in together.

SET UP THE IN-CLASS TRIAL DEBATE:
In March of 2005, the New York Times reported the Central Intelligence Agency had set up, with Presidential approval, a top-secret system by which terrorism suspects were handed over to interrogators in countries that have not signed anti-torture agreements the way the United States has. Critics called it "outsourcing torture."

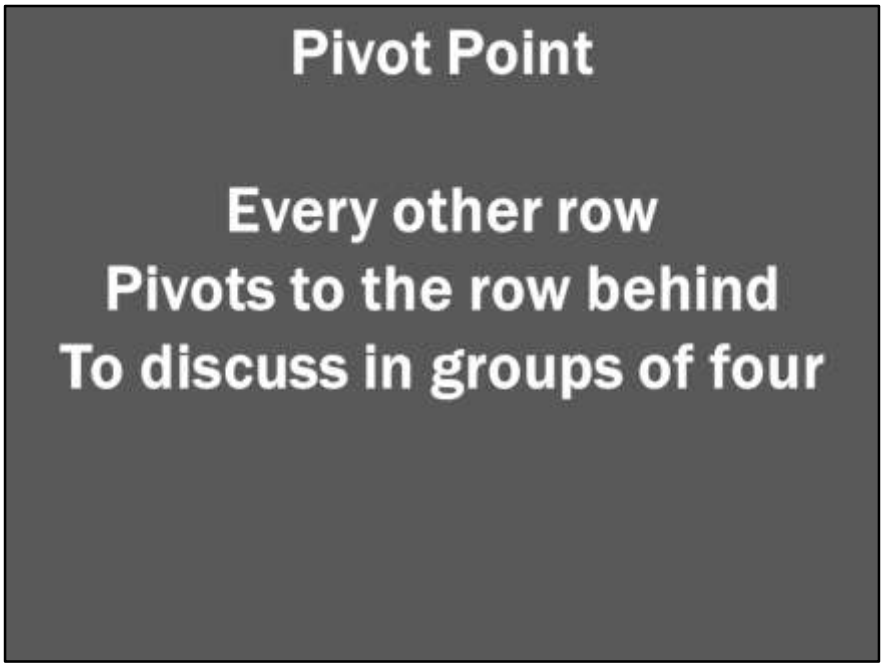
In June, 2006, the *Times exposed a secret Bush administration program (initiated weeks after the Sept. 11 attacks) by which counterterrorism officials gained access to financial records from a vast international database and examined banking transactions involving thousands of Americans and others around the world program. Privacy experts called it warrantless wire-tapping.*
In September of 2013, the Times (with The Guardian of London and Pro Publica) exposed a program by which the U.S. and U.K. governments have been decoding enormous amounts of Internet traffic thought to be encrypted and safe from prying eyes. This story is based on documents provided by Edward Snowden, the former intelligence community employee and contractor.

Your next assignment is to write the arguments in a Treason trial against The New York Times' editors. Are they assisting our enemies or informing U.S. citizens of the controversial actions of politicians?

You will write 5 talking points on each side of the question and prepare to be randomly selected to argue the case. Your arguments must rest on the constitutional questions we covered today.
Is this the press as watchdog or news executives as traitors?

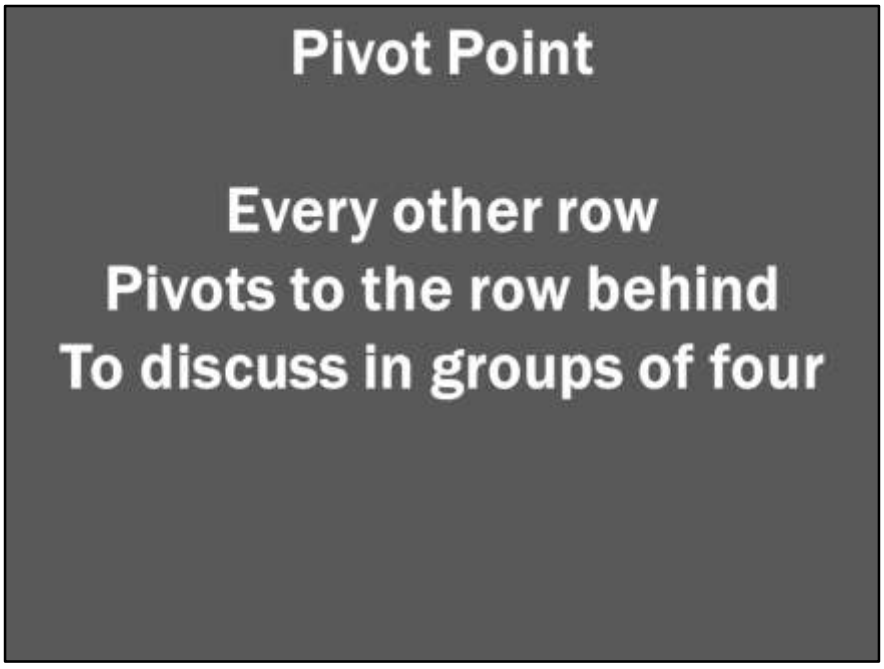


Slides after this are provided as alternatives or to serve long-standing lessons used at Stony Brook



We have done this informally in years past, but now provide a slide to prompt short in-class discussions among students.
At appropriate moments, the lecturer will pose a question to the room and then ask students to pivot into groups of 4, discuss the question and prepare to offer answers to the whole room.
This will be clumsy until students learn the drill, but the idea is to break up the lecture with small-group work, if only to give students a chance to shift positions.

What can be done to ensure an impartial jury?
Should the courts regulate coverage?
What about social media?



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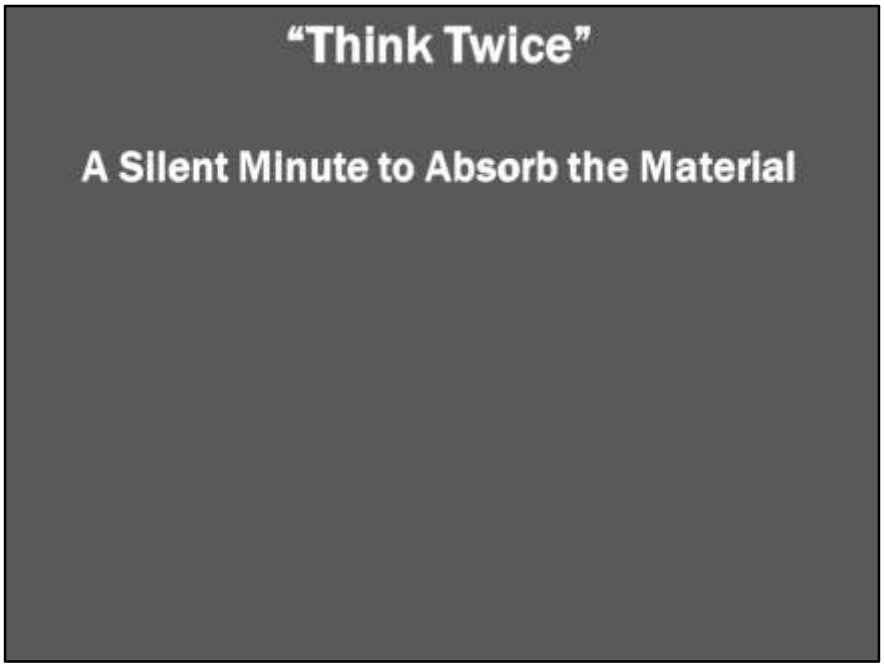
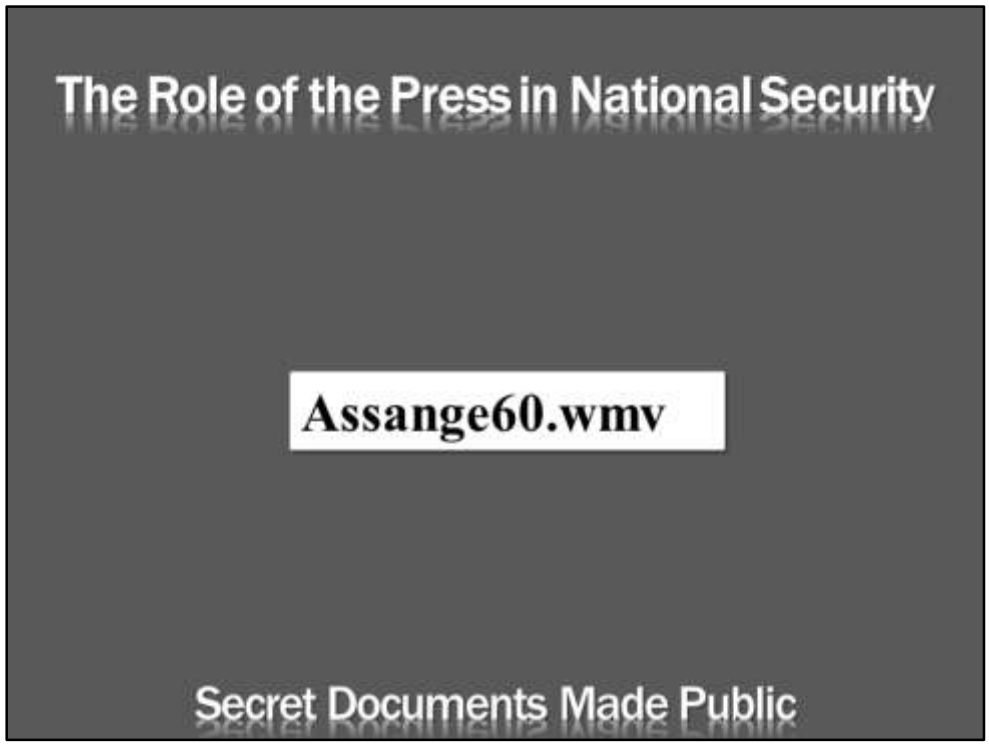
In the context of recent revelations of NSA code-breaking, how do you think the Roberts Court is likely to rule if citizens challenge the government's right to decrypt email and other online messages?



ANIMATION: Click once to start the fade-out, fade-in, which takes one minute

Okay, let's breathe for a minute and let it sink in.
What do you think now about the U.S. Press.
Too much freedom?
Too little freedom?
Just enough?

What about WikiLeaks founder Julian Assange?
He harvests stolen documents, documents from recycled hard drives and materials leaked to him by unknown players in global politics.
He's not even a citizen of the U.S.
Can he be stopped under the No Prior Restraint ruling and the national security exception?
Here's part of what he told "60 Minutes".



(AFTER VIDEO RUNS)

"…Disregard for U.S. traditions…"
What do you think he means by that?
ASK: Is he comparable to Daniel Ellsberg?
ASK: Is he a journalist and does that matter?