

## The Dark Side of the First Amendment

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### ABSTRACT

Each year, the UCLA School of Law hosts the Melville B. Nimmer Memorial Lecture. Since 1986, the lecture series has served as a forum for leading scholars in the fields of copyright and First Amendment law. In recent years, the lecture has been presented by many distinguished scholars. The *UCLA Law Review* has published these lectures and proudly continues that tradition by publishing an Article by this year's presenter, Professor Steven Shiffrin.

### AUTHOR

Steven H. Shiffrin is the Charles Frank Reavis, Sr., Professor of Law Emeritus at Cornell University and is currently working on a book entitled *What's Wrong with the First Amendment*. I am grateful for helpful comments from Michael Dorf, Aziz Rana, Seana Shiffrin, and the student editors at the *UCLA Law Review*.

It is great to be back home here at UCLA, and it is an honor to give the Melville Nimmer lecture. It is an honor because Mel was an outstanding lawyer, a brilliant and exceedingly important scholar, and an extremely influential teacher. It is touching to be asked to do this because Mel was so good to me when I began my law school teaching career. He supported me in a very generous way by commenting on my first article, despite the fact that he disagreed with both the article's first half, as he later said in print, and its second half, as he had already said in print. Mel was not remotely defensive about criticism. He not only tolerated disagreement by an upstart, he genuinely enjoyed it. In addition, I recall with gratitude how he helped me when I was giving prepublication legal advice to *New West*, which later became *California Magazine*. I was then, and still am, quite ignorant of copyright law, but Mel freely told me what to tell the magazine when copyright problems arose. Mel was and still is a copyright giant,<sup>1</sup> but I admired most his love of ideas, intellectual curiosity, pursuit of truth, and generous humanity toward students and colleagues.

Of course, from a scholarly perspective, Mel was more than a copyright giant. When I joined the UCLA faculty, he was already established as a nationally prominent First Amendment scholar. I want to use this opportunity to explore one of his significant First Amendment contributions, but first, I need to explore the background that led up to it. Then I will suggest that his contribution provides a basis for criticizing the current Court, which, as I see it, has taken major steps into outer darkness. I will then explore some of my disagreements with Mel and close on a note of important agreement.

First, the background: In Nimmer's time, Justice Hugo Black was the preeminent defender of the First Amendment on the Court. He was particularly famous for suggesting that the phrase "Congress shall make no law abridging the freedom of speech" meant "Congress shall make NO LAW abridging the freedom of speech." Justice Black's stance was part of a larger judicial philosophy which required judges to faithfully follow the written words of the Constitution. This brand of legal fundamentalism was compatible with his Southern Baptist upbringing.<sup>2</sup> Accordingly, he opposed judicial policy judgments that required choosing between one value and another in concrete contexts or in the formulation of general rules. As far as he was concerned, the Constitution had done all the balancing that needed to be done.

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1. This aspect of the Nimmer tradition is carried on by David Nimmer.  
2. Black ultimately drifted away from organized religion, though he maintained Protestant attitudes and a suspicion of Catholicism. See ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 521 (2d ed. 1997).

Although Justice Black was an eloquent advocate for the First Amendment, given his interpretive approach, he was not the best exemplar of the kind of absolutism that came to be associated with the American Civil Liberties Union (ACLU). To my mind, Justice Douglas was the stereotypical ACLU liberal. Yes, Justice Douglas was late in coming to the view that absolutism is the appropriate approach to First Amendment interpretation.<sup>3</sup> But contrary to popular stereotypes, so was the ACLU. In 1948, for example, the ACLU indicated that the First Amendment did not protect verbal and graphic expression that was indecent, obscene, or immoral if the charges were substantiated by objective proof.<sup>4</sup> Moreover, in *Dennis v. United States*,<sup>5</sup> when the federal government charged the leaders of the Communist Party with conspiring to advocate the overthrow of the government, the ACLU did not subscribe to an absolutist position, but settled for the argument that the government had not shown a clear and present danger.<sup>6</sup> Similarly, Justice Douglas's *Dennis* dissent argued that no clear and present danger to the Nation had been shown, but he explicitly renounced an absolutist approach, stating: "The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality."<sup>7</sup> Nonetheless, Justice Douglas and the ACLU moved toward an absolutist approach. By 1957, in the obscenity case of *Roth v. United States*,<sup>8</sup> Justice Douglas maintained that he "reject[ed] . . . the implication that problems of freedom of speech and of the press are to be resolved by weighing against the values of free expression, the judgment of the Court that a particular form of that expression has no redeeming social importance." Douglas believed that "[t]he First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. . . . Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it."<sup>9</sup>

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3. See JAMES C. DURAM, JUSTICE WILLIAM O. DOUGLAS 100 (Warren French, ed. 1981) (noting that Douglas started with a balancing approach and ended up shifting to an absolutist approach). In his autobiography, Douglas denies that he ever endorsed the clear and present danger test. WILLIAM O. DOUGLAS, THE COURT YEARS: 1939-1975, THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 103 (1980).
  4. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 228 (1990).
  5. *Dennis v. United States*, 341 U.S. 494 (1951).
  6. See WALKER, *supra* note 4, at 187. The American Civil Liberties Union (ACLU) wanted to file a brief at the Supreme Court level, but was blocked from doing so. *Id.*
  7. *Dennis v. United States*, 341 U.S. at 581 (Douglas, J., dissenting).
  8. *Roth v. United States*, 354 U.S. 476 (1957).
  9. *Id.* at 514 (Douglas, J., dissenting).

It is not clear why Justice Douglas moved to an absolutist position. I imagine, however, that several factors may have played a role, including the failure of courts to apply the clear and present danger test with any rigor, the censorial overreaching of governments in lashing out at sexually oriented materials, and his desire to close the distance between himself and his good friend Justice Black.

Finally, in considering the background leading to Nimmer's intervention in the field, the towering academic figure of Thomas I. Emerson, a Yale Law professor and influential ACLU member, cannot be ignored. In 1963, Emerson published "Toward a General Theory of the First Amendment" in the *Yale Law Journal*, and later followed it with a landmark book.<sup>10</sup> Emerson recognized that all expression involved conduct and argued that in drawing the line between unprotected action and protected expression, it was necessary to determine if the qualities of expression or action predominated.<sup>11</sup> If expression predominated, he maintained, it should be absolutely protected even if it conflicted with other social interests of importance.<sup>12</sup>

And now we turn to Mel Nimmer. Mel, himself a member of the ACLU, was attracted to the absolutist approach. He stated that it was supported by the "clear, unequivocal language of the Constitution."<sup>13</sup> He concluded, however, that "if the civil libertarian heart would accept it, the mind will not."<sup>14</sup> Wholly aside from the problems posed by time, place, and manner restrictions,<sup>15</sup> Nimmer advanced the now-familiar objection that the absolutist position could not explain the constitutionality of antitrust laws applied to speech designed to restrain trade,<sup>16</sup> laws against fraud,<sup>17</sup> or laws prohibiting perjury.<sup>18</sup> To be sure, in the antitrust or fraud examples, absolutists like Emerson could argue that action predominates, or Justice Douglas could argue that speech is brigaded with illegal conduct, but I see no escape from the perjury example. Perjury is clearly speech, and if it is defined as conduct, then the work is being done by balancing the state interest against the value of the speech, a process the absolutist purports to avoid. Nor do I see an escape from another example Nimmer gave, namely that the copyright

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10. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

11. *Id.* at 17.

12. *Id.*

13. Melville B. Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 936 (1968) [hereinafter Nimmer, Times].

14. MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT* § 2.01, at 2-4 (Student ed. 1984) [hereinafter NIMMER, TREATISE].

15. See Nimmer, Times, *supra* note 13, at 936.

16. *Id.* at 937.

17. *Id.* at 937 n.6.

18. *Id.* at 937.

laws prohibit speech, not conduct.<sup>19</sup> And we should remember that the First Amendment amended the Constitution including the Copyright Clause. Copyright laws are constitutional because the state interests are thought to outweigh the free speech interests. If “Congress shall make no law” means NO LAW, then copyright laws are dead in the water.

If Nimmer thought absolutism, as he put it, would not wash,<sup>20</sup> he sought to rescue the First Amendment from absolutist quick sand and leave it on a firm foundation. Nimmer called his alternative approach “definitional balancing.”<sup>21</sup> He meant to distinguish it from ad hoc balancing.<sup>22</sup> Under an ad hoc approach, a court would balance the relevant interests applicable to the specific litigants involved in a specific case.<sup>23</sup> By contrast, under a definitional approach, the Court would balance the general interest put forward by the state against the interest in, for example, free press, not the interest of the particular press institution before the court.<sup>24</sup> In other words, the task before the court would not merely be to decide the case before it, but to fashion a rule that defined the nature and extent of the freedom guaranteed to speech and press under the First Amendment.<sup>25</sup>

Nimmer argued that an ad hoc approach would not yield the clarity generally needed by speakers to guide their conduct<sup>26</sup> and it would not provide a rule that would lead judges away from being swayed by public passion in deciding cases.<sup>27</sup> He conceded that ad hoc balancing might provide more nuance and more just results in some concrete cases<sup>28</sup> and he recognized that definitional balancing did not guarantee that judges would be immune from public passion in some contexts.<sup>29</sup> Nonetheless, he concluded that definitional balancing offered more secure protection for free speech freedom than ad hoc balancing.<sup>30</sup>

Nimmer’s analysis is thoroughly consistent with the First Amendment. The First Amendment does not say that Congress shall make no law abridging speech. It says Congress shall make no law abridging the freedom of speech, and then does not define “freedom of speech.” Nimmer was exactly right in contend-

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19. *Id.* at 937–38.

20. *Id.* at 936.

21. *Id.* at 942, 944.

22. *See id.* at 942–48.

23. *Id.* at 942.

24. *See id.* at 943–44.

25. *Id.* at 944–45.

26. *Id.* at 939.

27. *Id.* at 940.

28. *Id.* at 945.

29. *Id.*

30. *Id.*

ing that it was up to courts to determine what freedom of speech might mean.<sup>31</sup> Nonetheless, as we will see, within the framework of definitional balancing, he argued for quite strong protections for freedom of speech, with some exceptions. Implicitly, Nimmer recognized, however, that speech interacts with too many other important values and interests in too many different contexts for us to either hope or expect that it should always be privileged in all situations.

I recognize that this history is familiar to many, if not most, in this room. And, even if not, surely most of you are aware that the legal literature is permeated with sophisticated discussions about rules and standards.<sup>32</sup> But Nimmer's intervention was special. Before he spoke out, ACLU absolutists were, for the most part, the liberals in U.S. legal literature; the balancers were the conservatives.<sup>33</sup> The absolutists were reacting against puritanical censorship and the political witch hunting of the McCarthy era. But Nimmer argued that this was an overreaction. Liberals could endorse a balancing of the definitional form, and doing so could provide a firmer foundation for free speech. The real battle between liberals and conservatives, then, could be fought over the importance of free speech in the formulation of legal rules, not over the niceties of constitutional methodology. Nimmer's intervention was not unprecedented,<sup>34</sup> but it became the most influential liberal statement against absolutism.

I now want to argue, with some qualifications, that until recently Nimmer's methodology has best described First Amendment decisions involving content discrimination.<sup>35</sup> Additionally, the Court has retreated in some recent decisions to an indefensible form of absolutism.

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31. See *id.* at 947–48.

32. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–1713 (1976); Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995).

33. To be sure, Republican appointee Justice Brennan had engaged in what is now recognized as liberal balancing in *New York Times v. Sullivan*, 376 U.S. 254 (1964), but he was outflanked on the left by Justices Black and Douglas. Brennan's liberal free speech opinions had yet to accumulate (though *Sullivan* was an important early entry), and he did not enter into the methodological debate.

34. See, e.g., CHARLES L. BLACK JR., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, in THE OCCASIONS OF JUSTICE: ESSAYS MOSTLY ON LAW 89 (1963); Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962). Probably because of his treatise, however, Nimmer became the most important proponent.

35. I follow here a line of argument I initially introduced in a previous article. *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978). See last year's Nimmer Lecture, Neil Woodstock Netanel, *First Amendment Constraints on Copyright After Golan v. Holder*, 60 UCLA L. REV. 1082 (2013) for an excellent exploration of definitional balancing in cases involving content discrimination with an emphasis on the copyright context.

Anyone familiar with First Amendment decisions knows that, for many decades, the Court has presented no general explanation of its interpretative approach to deciding which categories of speech are beneath the protection of the First Amendment. Instead, there are pockets of cases involving advocacy of illegal action, defamation, privacy, intentional infliction of emotional distress, obscenity, copyright, and fighting words, in which the Court has employed various approaches. The Court has not made a genuine effort to state a test for determining what speech is protected and what is not.

Yes, in the context of fighting words and obscenity, the Court has said that the slight contributions toward truth advanced by such speech are outweighed by society's interest in order and morality.<sup>36</sup> Even in these doctrines, however, the Court has not used a systematic approach. It did not indicate what the range of First Amendment values might be before concluding that only truth counted in this context; it did not even explain the conception of morality that lay behind its moral conclusion. Even if the Court had been systematic about applying the "slight contribution toward truth" approach, it cannot plausibly be claimed that the approach was applied across the broad range of cases. Indeed, the approach is not even mentioned in the cases involving advocacy of illegal action, defamation, privacy, or copyright.

The pockets of cases involving exceptions from First Amendment protection cannot be explained by the clear and present danger test. Some speech that presents a clear and present danger to an important social and individual interest is protected (negligent defamation of public officials);<sup>37</sup> sometimes it is not (knowing defamatory falsehoods about public officials).<sup>38</sup> A politically centered conception of the First Amendment does not explain the cases. Some politically centered speech is not protected: some defamation of public officials,<sup>39</sup> some copying of political speech,<sup>40</sup> and some advo-

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I should note that Nimmer was prepared to accept more ad hoc methods in cases where content discrimination was not present. See NIMMER, TREATISE, *supra* note 14, § 2.06. Indeed, I do not think Nimmer gets enough credit for highlighting the distinction between content-neutral and content-based regulations, which he rightly explored in terms of the state interests characterized as anti-speech or non-speech interests. *See id.* § 2.04.

36. *See* Roth v. United States, 354 U.S. 476, 485 (1957) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (fighting words).

37. New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

38. *Id.*

39. *Sullivan*, 376 U.S. at 279–80.

40. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 555–69 (1985) (holding that the publication of excerpts from President Ford's memoirs was not constitutionally protected from a claim of copyright infringement).

cacy of illegal action.<sup>41</sup> Similarly, much nonpolitical speech, including literature, is protected so long as it does not run afoul of defamation, obscenity, or copyright constraints and the like. Indeed, there are millions of daily conversations—nonpolitical in character—that are clearly protected under the First Amendment. Imagine a law prohibiting private conversations on Monday afternoons, but containing an exception for conversations about politics (assuming a line between the two could be drawn). Few would suppose that the law could survive a First Amendment challenge. The protection for private conversations makes it clear that a distinction between public and private discourse, however reasonably defined, cannot wholly explain the range of cases creating categorical exceptions to First Amendment protection.

I do think there is an explanation across the range of cases, however unsatisfying it may be for those who crave tidy theories and methodologies that dictate concrete outcomes. Without so stating, the Court has applied a balancing test which considers the following factors: the importance of the state interest; the extent to which the regulation advances the state interest; the possibility of less restrictive alternatives to restricting speech; the extent to which the regulation impinges of free speech or press values; and the nature of the free speech values implicated. This becomes evident by examining how the factors apply in various First Amendment contexts. Thus, in the defamation context, the Court considers reputation and free press to be important and fashions a complex set of rules designed to accommodate both. In the advocacy of illegal action context, the Court recognizes political, cathartic, and self-expression values and fashions a test designed to protect those values insofar as the speech does not become dangerous. In the fighting words context, the Court is concerned about order and dignitary injury and obviously believes no serious First Amendment values are present. In the obscenity context, the Court is rather fuzzy about the nature or strength of the state interests, but is not impressed with the free speech values involved. Finally, in the copyright context, the Court seeks to protect incentives to produce and safeguard against unjust enrichment while permitting the dissemination of ideas and fair use of some expression, but it generally does not believe that the copying of expression is rich with First Amendment value. I conclude that the Supreme Court's decisions are best understood to define the scope of the First Amendment by adopting a

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41. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding the advocacy of illegal action protected unless it is directed to inciting or producing imminent lawless action and likely to incite or produce such action).



balancing approach that accommodates the First Amendment interests against the interests of concern to the government.

With some qualifications that I will address shortly, Nimmer would have been pleased with this conclusion. But the Court has recently abandoned its prior methodology. A loathsome case authored by Chief Justice Roberts, with only Justice Alito dissenting, has rejected the Nimmer approach and has embraced a form of First Amendment stupidity. The case, *United States v. Stevens*,<sup>42</sup> considered a federal law criminalizing the creation, sale, or possession for commercial gain in interstate commerce of depictions of animal cruelty unless the depictions had serious religious, political, scientific, educational, journalistic, historical, or artistic value.<sup>43</sup> The analysis not only abandoned any semblance of definitional balancing but also concocted an approach that assumes categories of speech possess important value even when the categories of speech are without any value that would be recognized by a reasonable person.

Although the *Stevens* case involved vicious dogfights,<sup>44</sup> the federal law was initially drafted in response to so-called crush videos. In those videos, women are shown from the waist down (to make police identification difficult) torturing small animals including mice, hamsters, cats, and dogs by crushing them with high heels. In some of the videos the women can be heard talking to the animals in a dominatrix patter. The painful cries of the animals can also be heard.<sup>45</sup> Surprisingly, there are enough people who have a sexual fetish for these materials to make for a profitable business.<sup>46</sup> But the market for depictions of animal cruelty was broader than that for crush videos. The market embraced everything from cockfights to dogfights, and the legislation was crafted to combat such commerce as well.

The defendant, Robert J. Stevens, did not sell crush videos, but he did run a business called Dogs of Velvet and Steel, and an associated web site in which he sold videotapes of pit bulls fighting each other and attacking other animals, sometimes to the death, in gory, gruesome, and bloody fights.<sup>47</sup> These videos were squarely prohibited by the federal statute, and for good reason. The statute is based on the moral view that it is wrong to treat animals in an inhumane way, and it is wrong to market displays of their suffering for commercial gain. The United States has much to be ashamed of with regard to its treatment of animals.

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42. *United States v. Stevens*, 559 U.S. 460 (2010).

43. 18 U.S.C. § 48 (2012).

44. *Stevens*, 559 U.S. at 466.

45. *Id.* at 465–66.

46. *Id.* at 466.

47. *Id.*

It permits unspeakable cruelty in the treatment and slaughtering of animals for food. The consumption of animals treated in this way raises serious moral issues (indeed, many argue that the consumption of animals itself raises serious issues apart from cruelty in their treatment). Many consume meat despite knowledge of the horrible ways in which they have been treated. Regardless of the morality of that consumption, it strikes me that those who buy video tapes of animal cruelty precisely because they enjoy witnessing the torture of animals are clearly sick and twisted, whether their preferences are sadistic or masochistic. In addition to the needless harm to innocent animals, the commercialization of the depictions of animal cruelty appeals to the baser side of human beings, a side which is inconsistent with human dignity.

On appeal, the defendant argued that the statute was unconstitutional. In resisting this argument, the government argued that depictions of animal cruelty are of minimal constitutional value<sup>48</sup> and that any value in such depictions was overwhelmingly outweighed by the government interests.<sup>49</sup> In reaction, the Court struck a blow against the idea of balancing, definitional or otherwise. The Court specifically rejected the idea that First Amendment protection should be determined by balancing the value of the speech against the interests in regulating the speech. Indeed, it insisted that the government's argument was "startling and dangerous."<sup>50</sup> Instead of balancing, the Court stated that the categories of unprotected speech were confined to a few limited areas and concluded that the judiciary had no discretionary authority to add new categories of unprotected speech to those that were historically and traditionally unprotected.<sup>51</sup> Instead, as recognized in a subsequent case, a new category of unprotected speech will be recognized only if the government can show that the prohibition is justified by a compelling interest and is narrowly drawn to serve that interest (the so-called strict scrutiny test).<sup>52</sup> In other words, new case law suggests that the categories of unprotected speech are forever frozen, and speech, regardless of its value, will be protected under our Constitution unless a quite demanding test is satisfied.

A number of observations come to mind in responding to the Court's renunciation of balancing in favor of an historical approach. First, there was nothing at all startling about the government's call for balancing. In fact, it is startling that the Court claimed to be startled by the argument. The Court had engaged

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48. *Id.* at 469.

49. *See id.* at 470.

50. *Id.*

51. *See id.* at 470–71.

52. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011).

in a balancing of interests many times.<sup>53</sup> Writing for the Court, the Chief Justice conceded that balancing language existed in many cases. But he maintained that the Court had not said balancing was the test to be used in those cases; instead, the Court had merely concluded that the free speech interest was outweighed by other interests in those cases.<sup>54</sup> I do not dispute the Justice's characterization of the Court's language in the prior cases, but the same could be said for references to history in prior cases, and in many cases no reference to a historical approach appears at all. The truth is that the Court has been irresponsibly sloppy about its general approach to the creation of unprotected categories of speech. Nonetheless, with *Nimmer*, I have argued for more than thirty years that the only way to understand the cases is to recognize that balancing has permeated the interpretive exercise.<sup>55</sup> It is shocking to hear that the Court was startled by this characterization. Moreover, it is surprising to hear the Chief Justice announce that the American jurisprudence of free speech so widely praised in this country has been dangerous all along.

Second, many of the categories of unprotected speech are defined in ways that have no historical pedigree of the kind suggested by the Court. The categories of unprotected obscenity,<sup>56</sup> defamation,<sup>57</sup> and advocacy of illegal action,<sup>58</sup> as defined today, are entirely different than at the time of the framing; indeed their most recent definitions have been refined in a line of cases beginning in the late 1960s. To be sure, these definitions are more protective now than before, but these protections are the product of balancing, not a historical test. Moreover, there are categories of unprotected speech that did not develop until the twentieth century and thus were wholly unknown to the Framers.<sup>59</sup> One of these is the tort of intentional infliction of emotional distress (IIED). In IIED cases, the Court has not paused to inquire whether speech causing emotional distress was one of the historical exceptions to First Amendment protection. If it had, it would have needed to explore what a long-settled tradition might be, and it would have needed to determine whether a long-settled tradition distinguished between infliction of emotional distress on public issues and infliction of emotional distress on private issues. Although the Court has protected some forms of intentional infliction of emotional distress, the Court has not disposed of this category of unprotected speech altogether even though the historical test would seem to re-

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53. See, e.g., *Stevens*, 559 U.S. at 470.

54. *Id.* at 471.

55. See Shiffrin, *supra*, note 35.

56. See *Miller v. California*, 413 U.S. 15 (1973).

57. See *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974).

58. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

59. See PROSSER AND KEETON ON THE LAW OF TORTS 54-55 (5th ed. 1984).

quire its burial. Similarly, many federal statutes restricting speech of relatively recent vintage will surely be upheld by the Court. For example, a favorite tool of federal law enforcement forbids making false statements to federal agents.<sup>60</sup> There is no way this law-and-order Court will invalidate that statute, but neither a historical test, nor a strict scrutiny test can provide adequate support for its validity. Although the Roberts opinion renounces balancing as “free-floating,”<sup>61</sup> “freewheeling,”<sup>62</sup> “highly manipulable,”<sup>63</sup> and even “dangerous,”<sup>64</sup> balancing has been routinely used not only to evaluate time, place, and manner regulations of protected speech, but also to determine the scope of categories of protected and unprotected speech. Finally, the strict scrutiny test is itself a balancing test and it surely could not meet the historical test. Indeed, so far as I can determine, a test even resembling strict scrutiny was not used in the First Amendment context until the 1960s.<sup>65</sup>

Third, the historical test imagines that the Framers were intent on freezing the set of then-unprotected categories. If the Framers thought that certain categories of speech should not be protected under the First Amendment, however, presumably they would not have wanted similar categories to be protected. The old categories developed under a common law process; there is little reason to believe that the Framers would have wanted the common law process to be abandoned. Indeed, given that, there is good reason to believe that the supposedly historical approach is unhistorical. In *Stevens*, the government argued that since it is constitutional to outlaw obscenity, it is constitutional to outlaw depictions of animal torture.<sup>66</sup> Under the historical test, this argument is out of bounds. But it fails to credit the practical and flexible common law wisdom underlying the unprotected categories. It leaves the law in a chaotic state in which some categories are protected for no better reason than that the technology giving rise to them was not in existence at an earlier point in our history.

Regrettably, the Court struck down the animal cruelty statute without reaching the question of whether Stevens’s activity could be regulated under the strict scrutiny test. It did so by imagining that the statute covered hunting maga-

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60. 18 U.S.C. § 1001 (2006).

61. *United States v. Stevens*, 559 U.S. 460, 470 (2010).

62. *Id.* at 472.

63. *Id.*

64. *Id.* at 470.

65. *See Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 124–28 (1991) (Kennedy, J., concurring).

66. Reply Brief for the United States at 7–10, *United States v. Stevens*, 559 U.S. 460 (2010) (No. 08-769).

zines<sup>67</sup> (despite the fact that the House Report specifically stated that the statute did not cover hunting!).<sup>68</sup> Having rewritten the statute to cover extensive material that Congress never intended to cover, the Chief Justice, who masquerades as an apostle of judicial restraint, had no difficulty in declaring that the statute was overbroad. Nonetheless, he did pause to observe that the Court had not decided whether a statute limited to crush videos or other forms of extreme animal cruelty could pass constitutional muster under strict scrutiny.<sup>69</sup>

Regrettably, *Stevens* is not an isolated case. In *Brown v. Entertainment Merchants Association*,<sup>70</sup> the Court applied the same interpretive methodology to a California statute prohibiting the sale of particularly gruesome video games to minors and required that such games be labeled for youth eighteen years and older.<sup>71</sup> Specifically, the law covered games “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted’ in a manner that ‘[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest in minors,’ that is ‘patently offensive to prevailing standards in the community as to what is suitable for minors,’ and that ‘causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors.’”<sup>72</sup>

After the *Stevens* case involving depictions of animal cruelty, it was easy to argue that the sale of especially violent video games to minors was a protected category. Like depictions of animal cruelty, there was no history of prohibiting violent video games, however gruesome and inappropriate they might be. To be sure, there was a history of restricting the sale of obscene materials to minors, and the statute closely tracked the obscenity definition for minors.<sup>73</sup> It differed by substituting violence for sex. Of course, there is not the slightest evidence that the Framers would have thought that violent video games should enjoy First Amendment protection. Similarly, there is no reason to believe that the Framers would have thought that the obscenity exception should be restricted to sexual conduct when there are good reasons to expand the category. Justice Scalia offered no rationale for the conclusion that commerce in graphic sexual materials was somehow more problematic than traffic in graphic violent materials, but he slammed the door on any attempt to expand the obscenity category to include vi-

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67. *Stevens*, 559 U.S. at 480–81.

68. *Id.* at 488 (Alito, J., dissenting).

69. *Id.* at 482 (majority opinion).

70. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

71. *Id.* at 2732.

72. *Id.* at 2732–33.

73. *See Ginsberg v. New York*, 390 U.S. 629 (1968).

olence.<sup>74</sup> Instead, he concluded that the statute could only be justified if it met the strict scrutiny standard.<sup>75</sup>

And he proceeded to apply the standard in a staggeringly strict way. The American Academy of Pediatrics, the American Academy of Child & Adolescent Psychiatry, the American Psychological Association, the American Medical Association, the American Academy of Family Physicians, and the American Psychiatric Association have issued statements deploring the developmental effects of violent video games on children.<sup>76</sup> In separate statements, the American Psychological Association and the American Academy of Pediatrics have opined that some of the effects on aggression are unique to interactive violent video games (as opposed to the depiction of violence in other media).<sup>77</sup> Justice Scalia was unimpressed by these assertions. In contrast to the conclusions of these professionals, he proceeded to engage in an independent, arrogant, and amateur analysis of the studies<sup>78</sup> and emerged with the conclusion that his nearly impossible standard of proof had not been met.<sup>79</sup>

Nietzsche once said that to have a system is to lack integrity.<sup>80</sup> I interpret this to mean that a system cannot rule out embarrassing applications, and that those who apply the system will cheat to avoid such embarrassment. If Nimmer is right that definitional balancing is needed, the system of frozen categories is unsustainable. It is surprising to me that a Court could be so morally insensitive as to claim that depictions of animal cruelty are such valuable speech that they could only be prohibited if the strict scrutiny standard were satisfied. It is also surprising to me that the Court would not have jumped ship from the frozen categories approach when it recognized that it would be used to protect the sale of games to children that the major medical associations have uniformly concluded are harmful.

Fortunately, there are some signs that the frozen categories approach will not invariably be employed. In a recent case, *United States v. Alvarez*,<sup>81</sup> Justice Breyer, joined by Justice Kagan, explicitly broke from the frozen categories approach by invalidating a statute that made it a crime to lie about receiving the

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74. *Brown*, 131 S. Ct. at 2734–35 (holding that precedent dictates that violent speech is not obscene in the same way that sexual materials are).

75. *Id.* at 2739 n.8.

76. *Id.* at 2769 (Breyer, J., dissenting).

77. *Id.*

78. *Id.* at 2739 (majority opinion).

79. *Id.*

80. Friedrich Nietzsche, *Twilight of the Idols*, in *THE PORTABLE NIETZSCHE* 463, 470 (Walter Kaufmann trans. 1968).

81. *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

Congressional Medal of Honor.<sup>82</sup> Moreover, Justices Scalia and Thomas joined a dissenting opinion by Justice Alito that is inconsistent with the frozen categories approach.<sup>83</sup> I believe that Justices Breyer and Kagan now recognize with Justice Alito that the frozen categories approach is bankrupt. I have less faith in Justices Scalia and Thomas. After all, they often claim to be originalists. Perhaps in signing Justice Alito's opinion, they simply liked the result and were too busy to write their own opinions. Some may accuse me of being too harsh, but I regard the opinion of the majority and the expressive conduct of Justices Scalia and Thomas as vindicating Nietzsche's observation: If you purport to have a system that locks you in, you will either reach foolish results or you will cheat in applying the system. In any event, it is not clear that the rejection of the frozen categories approach by five justices in *Alvarez* is stable. I am quite sure that Melville Nimmer would not have been happy with the break from the past inaugurated in *Stevens* and *Brown*.

If I can say with confidence that Nimmer would have not have been happy with the interpretive approach employed by the Court in *Stevens* and *Brown*, I am equally confident that he would have welcomed my disagreements with important aspects of his position. Mel loved a good argument, and as previously mentioned, I never knew him to be remotely defensive.

In my first article as an untenured member of the UCLA Law faculty,<sup>84</sup> I disagreed with his conception of definitional balancing. As I have discussed, Nimmer and I agreed that the absolutist position was not defensible, and we both endorsed balancing, but we disagreed about the form that balancing might take. Nimmer argued that a definitional balance should take the form of a rule, not a standard that could be manipulated in an ad hoc way.<sup>85</sup> He argued that a rule prohibiting excessive speeding would actually be a license for courts to engage in ad hoc balancing. While this may not seem obvious at first glance, answering the question would require ad hoc balancing of what was excessive. It would not count as a definitional balance.<sup>86</sup> To take a First Amendment case, *Gertz v. Robert Welch, Inc.* held that a private person suing a media defendant, at least on a public issue, must show that the defendant negligently published a defamatory falsehood in order to recover.<sup>87</sup> If we apply the excessive speeding example, surely

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82. *Id.* at 2551 (Breyer, J., concurring) ("I do not rest my conclusion upon a strict categorical analysis.").

83. *Id.* at 2561 (Alito, J., dissenting) (noting that liability for intentional infliction of emotional distress, false light privacy torts, and many criminal statutes involving false statements are constitutional despite lack of historical pedigree).

84. Shiffrin, *supra* note 35, at 960–61.

85. *See* Nimmer, *Times*, *supra* note 13, at 944–45.

86. *See* Nimmer, *Times*, *supra* note 13, at 946–47.

87. *See* *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974).

the negligence standard also licenses ad hoc balancing. Indeed, Nimmer specifically argued that the public issue standard licensed ad hoc balancing<sup>88</sup> in *Rosenbloom v. Metromedia*,<sup>89</sup> in which the Court required a private plaintiff involved in a public issue to show a knowing or reckless falsehood in order to recover. And Nimmer specifically argued against the *Gertz* negligence standard on the ground that it wrongly privileged speech over reputation.<sup>90</sup> Although I read his early work as requiring a definitional balance in all First Amendment cases outside of the time, place, and manner context, in his treatise, he left the question open as to whether ad hoc balancing might be appropriate in some contexts.<sup>91</sup>

I think it clear that the decisions of the Court before *Stevens* created rules that do not remotely meet Nimmer's standards for a definitional balance, and Nimmer was quite aware of this. Nimmer and I agreed that the Court did not uniformly produce a definitional balance and we agreed that ad hoc balancing had disadvantages. Nonetheless, I believe that the best resolution of a First Amendment problem might be a holding requiring courts to engage in a form of ad hoc balancing. I do not think the *Gertz* holding should be confined to media defendants or to public issues, but I do think the negligence standard best accommodates the interest in speech and reputation, even while functioning in practice as a form of ad hoc balancing.

Although I would protect more speech in the defamation context than Nimmer would, I think it is fair to say that Nimmer would have protected far more speech overall than I am prepared to protect. Indeed, I believe the dark side of the First Amendment has begun to shed its luster. In this respect, I recognize that Nimmer is still a part of the American mainstream and I am not. To begin with, Nimmer maintained that the tort of intentional infliction of emotional distress could constitutionally be applied only to false or misleading speech. In this contention, I think he would be joined by the majority of American free speech scholars. A strong example of this is the decision of *Snyder v. Phelps*,<sup>92</sup> which I believe most free speech scholars think was rightly decided. In *Snyder*, Phelps and members of his church carried signs near the funeral saying, "You're Going To Hell," "God Hates You," "Semper Fi Fags," "Fag Troops" "Fags Doom Nations," "Thank God for 9/11," "Thank God for Dead Soldiers," "Thank God for IED's," "God Hates the USA," "Don't Pray for the USA," "America is

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88. NIMMER, TREATISE, *supra* note 14, § 2.03, at 2–23.

89. *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971).

90. NIMMER, TREATISE, *supra* note 14, § 2.05 [C], at 2–49.

91. *Id.* § 2.03, at 2–24.

92. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).



Doomed,” “Pope in Hell,” “Not Blessed Just Cursed,” and “Priests Rape Boys.”<sup>93</sup> Despite the fact that the speech of the Westboro Baptist Church at a minimum was produced in reckless disregard of the fact that it would inflict severe emotional and resulting physical injury on a mourning father at his son’s funeral, the Court upheld its protection.

Chief Justice Roberts properly noted that there was some speech on public issues in this stream of invective,<sup>94</sup> that the demonstrators were in a place they had a right to be,<sup>95</sup> and that the tort included the fuzzy concept of offensiveness<sup>96</sup> (a term that probably does not bother him in the context of obscenity). Once he decided that speech on public issues was present, however, the game was up. Roberts wrote the opinion as if no balancing was needed. Nimmer would have objected to the failure to balance, but he was already on record as to how the balance should be struck. To my mind, a society unwilling to protect mourners at a funeral from verbal assaults of this kind has lost its way. It has committed the sin of First Amendment idolatry.

I wish I could say that the *Snyder* case was unusual in manifesting this idolatry. But it is not. The First Amendment is at odds with human dignity. As we have seen, it protects speech depicting animal cruelty, demonstrations inflicting emotional distress at funerals, and speech invading privacy, including the publication of the names of rape victims.<sup>97</sup> The First Amendment protects pretrial publicity that feeds public curiosity while jeopardizing the rights of the accused to a fair trial.<sup>98</sup> The First Amendment protects racist speech despite its undermining of racial equality.<sup>99</sup> The First Amendment protects pornography despite its encouragement of violence and discrimination against women.<sup>100</sup> As we have seen,

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93. *Id.* at 1216–17.

94. *Id.* at 1217.

95. *Id.* at 1218. The picketers were about 1000 feet from the funeral at St. John’s Church. *Id.* at 1213. The security, because of their presence, forced a lockdown of the school associated with St. John’s and created a circus-like atmosphere surrounding this solemn occasion. Brief for Petitioner at 4–5, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751). Snyder was well aware of the demonstrators at the time of the funeral—the Phelps family placed themselves at the entrance to the Church to force an encounter, but the Snyder family was then routed to a different entrance. *Id.* The Snyder family did not see the contents of the signs until watching a radio broadcast the next evening. *Snyder*, 131 S. Ct. at 1213–14. Given the reckless indifference to the mental distress foreseeably occasioned by the messages in the time period surrounding the funeral and the deliberate effort to cause it, I do not see the distance from the funeral or the delayed perception of the content as throwing a blanket of First Amendment protection over the picketer’s signs in that time and place.

96. *Snyder*, 131 S. Ct. at 1219.

97. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (holding that the press is free to publish the name of a rape victim).

98. See *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976).

99. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

100. See, e.g., *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

the First Amendment protects the marketing of violent video games to children despite the conclusions of respected medical associations that these games desensitize our children to violence and promote a needlessly violent culture. The First Amendment protects commercial advertising that encourages a materialistic and hedonistic culture, running the risk of substituting consumer pleasure for human flourishing. It even protects tobacco advertising,<sup>101</sup> which promotes the needless death and suffering of hundreds of thousands of people each year who have become addicted to tobacco products.

Finally, the First Amendment undermines American democracy by permitting corporations to dominate American political campaigns at local, state, and federal levels.<sup>102</sup> Simply put, a democracy cannot function when its representatives look to moneyed interests before they look at the will of the people and the common good.

Mel Nimmer would likely join the majority of American free speech scholars in protecting most of this speech (though I know he would not protect privacy-invasive speech),<sup>103</sup> and I would not be surprised if he balanced in a way that would not protect depictions of animal cruelty, violent video games sold to children (though the vagueness of the California law might have been problematic for him), and I very much doubt he would think that the First Amendment demands that our democracy be transformed into a corpocracy.

Although Mel Nimmer was an ACLU liberal in the early 1980s, I think his substantive positions on freedom of speech are somewhat more qualified than the positions of most contemporary First Amendment scholars. On the other hand, my own views are much more qualified than the views of contemporary scholars. I cannot help but notice that it generally would not occur to European countries to protect speakers who intentionally inflict emotional distress at funerals, invade privacy by publishing embarrassing facts about private lives, publish materials that create risks of unfair trials, advertise tobacco in ways that encourage teenagers to smoke, engage in hate speech, depict animal cruelty, market violent video games to children, and they certainly would not protect the ability of business corporations to spend millions of dollars to influence the outcome of election campaigns.<sup>104</sup> Moreover, if I may borrow an argument used by John Stuart Mill in a somewhat different context, I cannot refrain from observing that if the people

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101. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

102. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

103. See Nimmer, *Times*, *supra* note 13, at 959–62 (arguing with some nuance that the First Amendment should not protect the embarrassing disclosure of private facts).

104. See generally STEVEN H. SHIFFRIN, *WHAT'S WRONG WITH THE FIRST AMENDMENT?* (unpublished manuscript 2013).

in this room were born and raised in Berlin, Paris, or London, it is likely you would believe that the Europeans are right and the Americans are afflicted with a form of First Amendment idolatry.<sup>105</sup> This idolatry is the dark side of the First Amendment.

To put it another way, my view is that the European approach to freedom of speech is generally right and the U.S. approach is generally wrong, except when it comes to dissent. I believe that Europe and the United States do not protect dissent as much as they should, but that the United States does a better job. Indeed, some years after Mel Nimmer passed away, I came to the conclusion that dissent should be especially valued in First Amendment jurisprudence. In preparing for this lecture, I wondered if Mel would have agreed with me and expected that he would. I did not see much in his scholarship to support my expectation, but the specific topics on which he wrote did not require him to take a position on the subject. Finally, I decided that if I was going to find something along those lines, it would be in his brief to the Supreme Court in *Cohen v. California*.<sup>106</sup> Cohen, as most of you know, was convicted of breach of the peace for wearing a jacket in the halls of a courthouse that was inscribed with the words “Fuck the draft.”<sup>107</sup>

Nimmer, of course, argued in his brief that speech did not forfeit protection merely because it was offensive.<sup>108</sup> Nor could a court impose sanctions merely because the tendency of the speech was such that it *might* provoke a violent response.<sup>109</sup> Nimmer could have stopped there, but he did not. Nimmer argued that the words “Fuck the Draft” had positive First Amendment value.<sup>110</sup> It is useful to remember that the early 1970s were still part of the 1960s. It was a time of widespread student protests. Nimmer quoted *Time Magazine* for the proposition that protestors deliberately used profane language as “shock weapons . . . against ‘the Establishment.’”<sup>111</sup> As Nimmer put it, “[f]our-letter words are, to a large extent, the current language of dissent.”<sup>112</sup> He pointed to the use of profanity among poorer segments of the black community, argued that input of minority groups to the democratic dialogue was vital,<sup>113</sup> and concluded that such “input [would be] greatly crippled if the very words which many minority group mem-

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105. This follows an argument made by John Stuart Mill. See JOHN STUART MILL, ON LIBERTY 88 (David Bromwich & George Kateb eds., 2003).

106. *Cohen v. California*, 403 U.S. 15 (1971).

107. *Id.* at 16.

108. Brief for Appellant, at 30–31, *Cohen v. California*, 403 U.S. 15 (1971) (No. 299).

109. *Id.* at 12–17.

110. *Id.* at 31–45.

111. *Id.* at 35–36 (quoting TIME MAG., July 11, 1969, at 61).

112. *Id.* at 36.

113. *Id.*

bers find essential to the expression of their dissenting views are rendered legally taboo.”<sup>114</sup> Finally, he maintained that prosecutions for the use of profane language are confined to dissenters. Police officers, he suggested were notorious for using such language, but were never arrested for doing so.<sup>115</sup> Indeed, Nimmer established at trial that the police officer who arrested Cohen had heard the same words from his fellow officers but had not arrested them.<sup>116</sup>

It seems to me that Nimmer was wise to emphasize the place of profanity in the language of dissent. As I have argued for many years, the First Amendment ought to have particular respect for that speech which criticizes existing customs, habits, institutions, and authorities.<sup>117</sup> Injustice will always be present in any large-scale society.<sup>118</sup> Any large-scale society inevitably has hierarchies, and the leaders of those hierarchies often wield power in self-serving ways, either wrongly thinking that what they are doing is right or knowing that what they are doing is wrong but behaving selfishly.<sup>119</sup> Any contrary view simply misunderstands human nature. This does not mean we cannot improve society. It does mean the problem of injustice will never go away. Dissent will always be needed. But dissent does not merely combat injustice; indeed, it often consolidates other values associated with the First Amendment including liberty, freedom, equality, tolerance, respect, dignity, self-government, truth, marketplace values, the checking value, associational values, communitarian values, and cathartic values. This is not to say that dissent should always prevail in a First Amendment balance, and it is not to say that the First Amendment only protects dissenting speech. I know that Nimmer would have agreed with those qualifications, just as I believe he would have agreed that the practice of dissent should carry significant First Amendment value.

I should point out, however, that the Mel Nimmer I know would not have carried a jacket emblazoned with the words “Fuck the Draft” into a courthouse—maybe his smoking jacket, his ascot, and his omnipresent smoking pipe, but not a jacket like that. Nonetheless, Nimmer knew how to step up to the plate if needed in a pinch. When he was about to begin his argument in the *Cohen* case before the United States Supreme Court, he was greeted by Chief Justice Warren Burger who said he need not dwell on the facts because the Court was well aware of

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114. *Id.*

115. *Id.* at 36–37.

116. Conversation with Melville Nimmer, 1978.

117. See generally STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999) [hereinafter SHIFFRIN, *DISSENT*]; STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990).

118. SHIFFRIN, *DISSENT*, *supra* note 117, at 17.

119. SHIFFRIN, *DISSENT*, *supra* note 117, at 91–92.

them.<sup>120</sup> As Nimmer recounted this to me, he realized that Burger was saying, “Do not use the F-word in this courtroom.” Nimmer believed, however, that if he heeded Justice Burger’s counsel, he would lose the case. If he could not use the word, how could he defend Cohen’s wearing of the jacket? And so early in his argument, Nimmer said to a beet-red-faced Chief Justice Burger that this was a case in which a young man wore a jacket inscribed with the words “Fuck the Draft” in a courthouse hall.<sup>121</sup>

That was the Mel Nimmer I knew: a consummate lawyer, fiercely independent, tolerant and respectful. Mel loved ideas and arguments, and he stood for something quite important. I still miss him.

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120. Oral Argument at 0:38, *Cohen v. California*, 403 U.S. 15 (1971) (No. 299), *available at* [http://www.oyez.org/cases/1970-1979/1970/1970\\_299](http://www.oyez.org/cases/1970-1979/1970/1970_299).

121. *Id.* at 2:05.