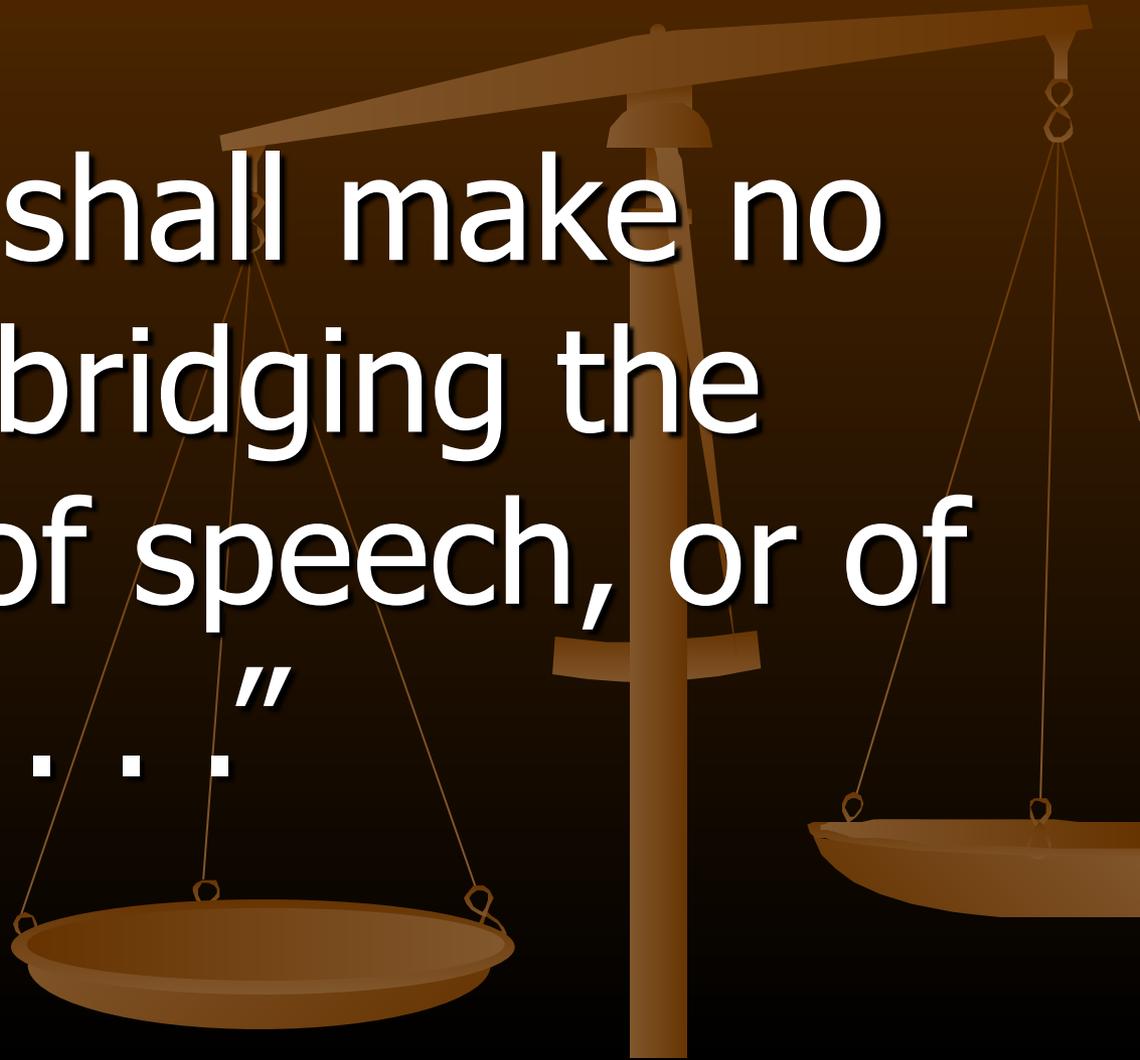


# Introduction to First Amendment

“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”



# Historical Development

- Freedom of press in England.
- Crown controlled information. Then printing press invented. Government realized unrestricted publication and printing could dilute its power.
- Government devised ways to control press
  - Seditious libel laws. Punish those who criticized government (whether truthful or not).
  - Licensing Laws.
  - Bonds/Taxation.



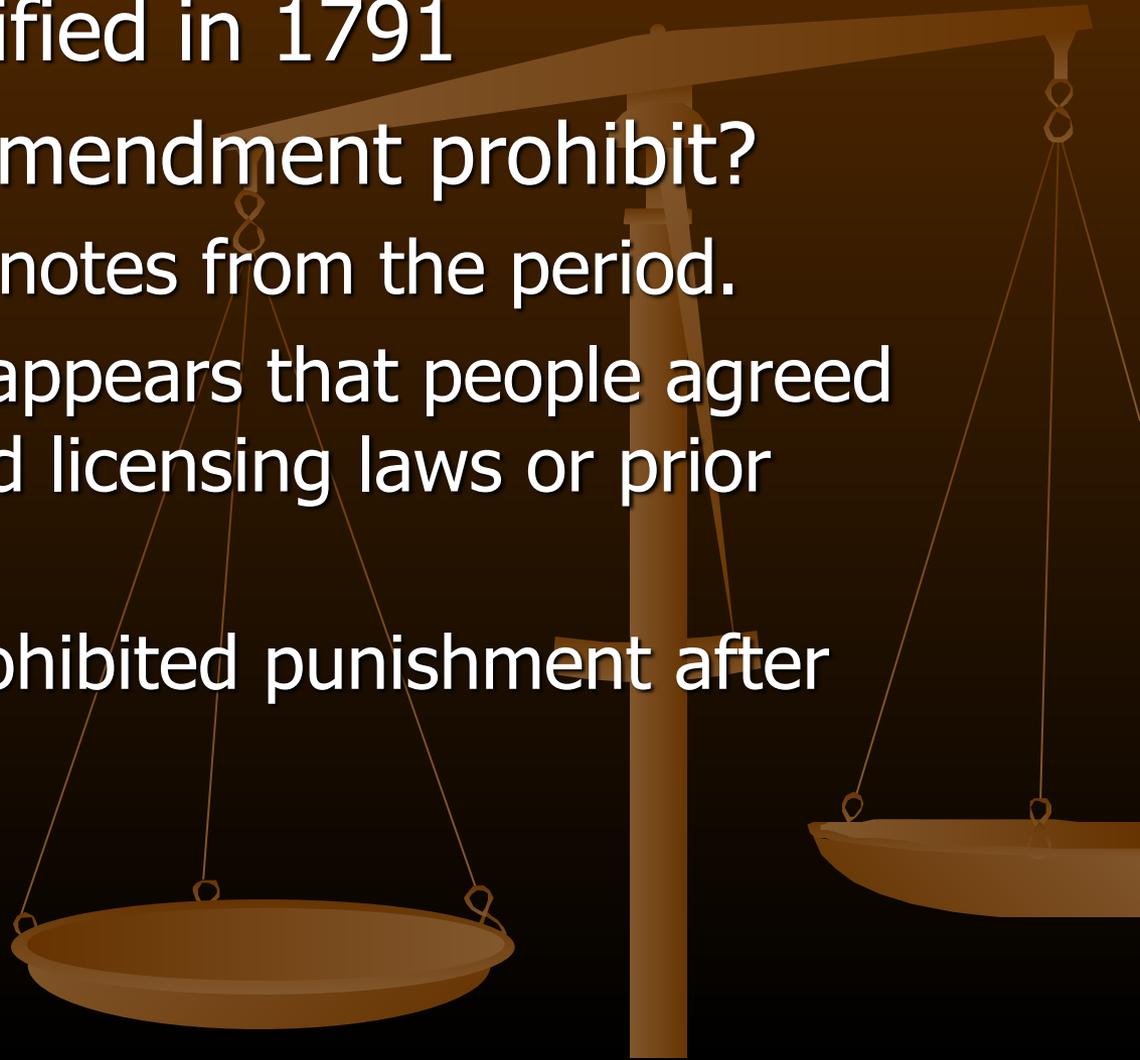
# Freedom of Speech In Early Colonial America

- Many laws restricting press.
  - 1662 – law in Massachusetts made it a crime to publish anything without getting approval from government.
- Seditious libel trial of printer John Peter Zenger.
  - Published New York Weekly Journal.
  - Opposed governor William Cosby.
  - Jailed in 1734
  - Attorney argued that truth was defense (even though it wasn't).
  - Zenger acquitted.
  - Galvanized public opinion against Sedition laws.



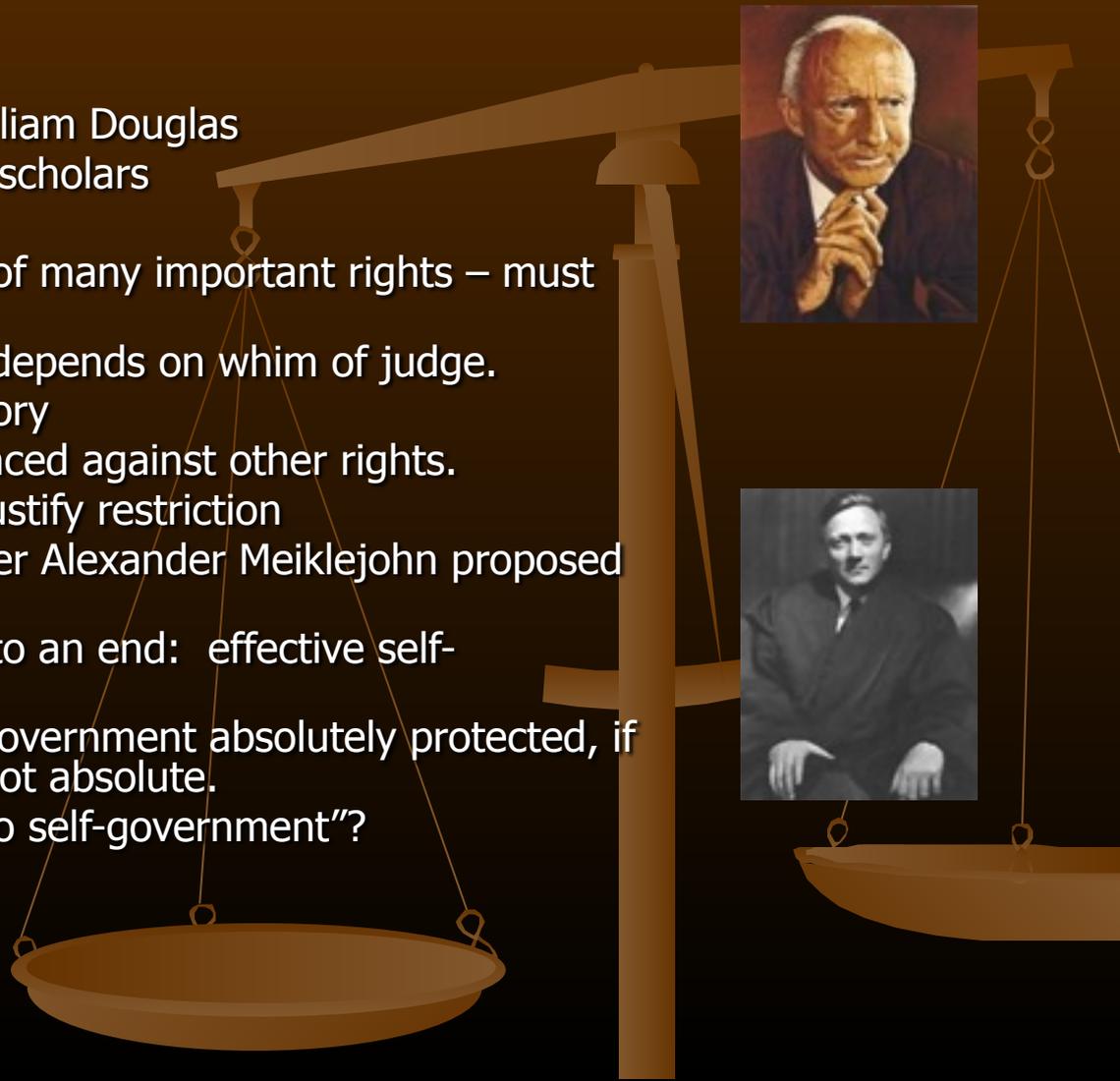
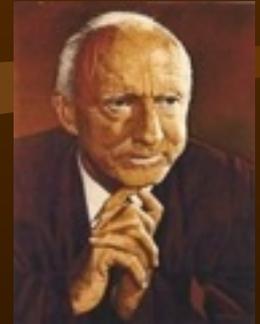
# Ratification of First Amendment

- Bill of Rights ratified in 1791
- What did First Amendment prohibit?
  - Little help from notes from the period.
  - At a minimum, appears that people agreed that it prohibited licensing laws or prior restraint.
  - Not sure if it prohibited punishment after publication



# First Amendment Theories

- Absolutist theory
  - “no law” means NO LAW!
  - Justices Hugo Black and William Douglas
  - Never accepted by court or scholars
- Ad hoc balancing theory
  - Speech rights are only one of many important rights – must balance all of them.
  - Not used – no set of rules, depends on whim of judge.
- Preferred position balancing theory
  - Preferred status when balanced against other rights.
  - Burden on government to justify restriction
- Meiklejohnian theory (philosopher Alexander Meiklejohn proposed in late 1940’s).
  - First Amendment is means to an end: effective self-government.
  - Expression relating to self-government absolutely protected, if relates to private matters, not absolute.
  - Problem: what is “related to self-government”?



# Why Need First Amendment?

- Societal Interests
  - “Marketplace of ideas”
  - Safety Valve
  - Self-Governance
  - Check on Government
- Individual Interests
  - Natural law
  - Self-expression



# Sedition Act of 1798

- Signed into law by President John Adams
- Fear of U.S. being drawn into war between England and France
- Made it a crime to engage in harmful criticism of President Adams and his policies
- Few saw this as violation of First Amendment
- Expired in 1801



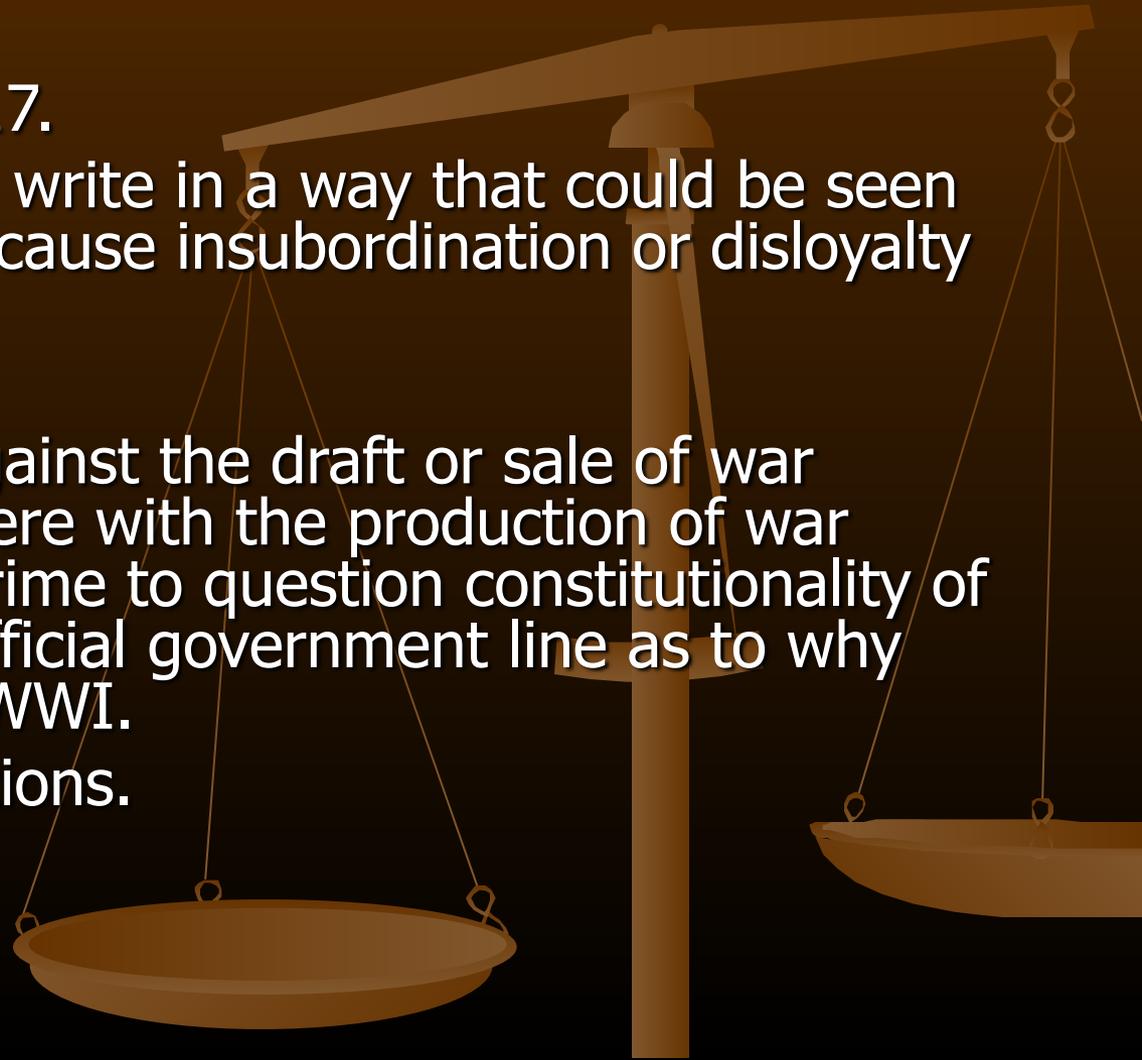
# Supreme Court Cases Re: First Amendment From 1791 - 1919

**NONE**



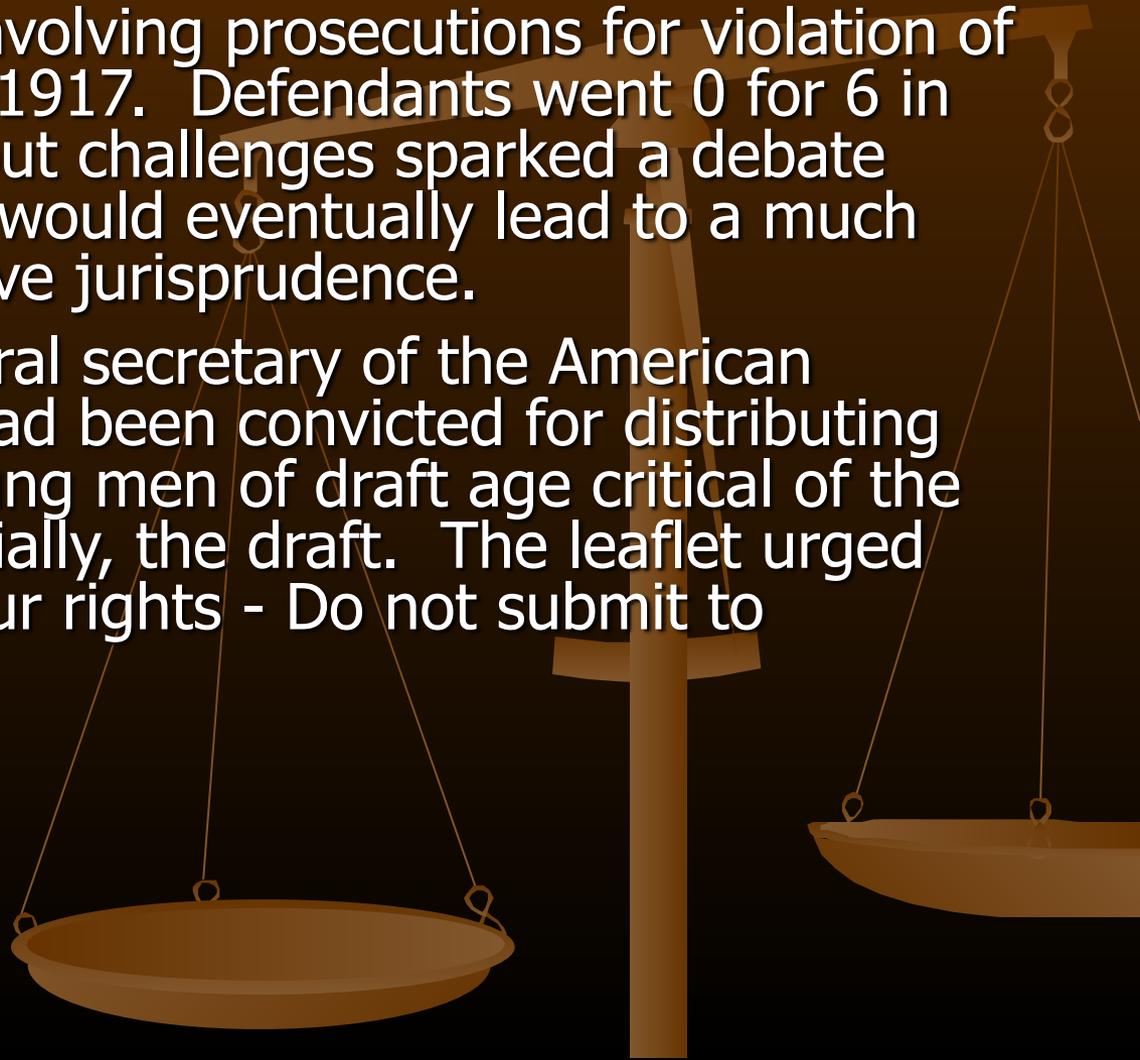
# Sedition Act Revisited

- WWI - 1917
- Espionage Act of 1917.
  - Crime to speak or write in a way that could be seen to help enemy or cause insubordination or disloyalty to military
- Sedition Act of 1918.
  - Crime to speak against the draft or sale of war bonds or to interfere with the production of war goods (strike). Crime to question constitutionality of the draft or the official government line as to why U.S. entered the WWI.
  - About 877 convictions.



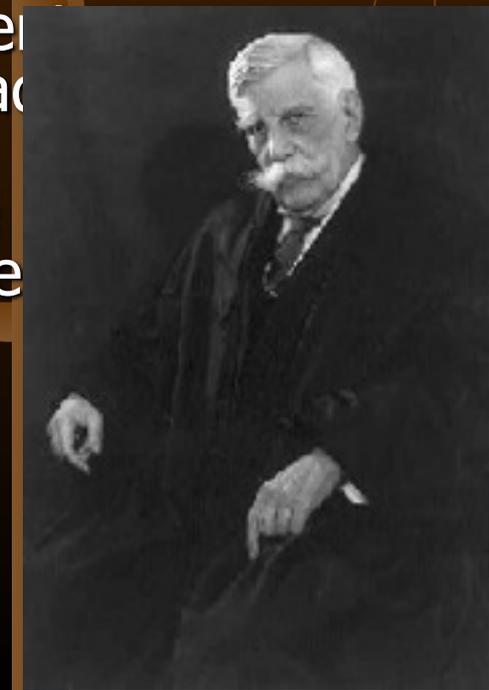
# Schenck v. U.S. (1919)

- First of many cases involving prosecutions for violation of the Espionage Act of 1917. Defendants went 0 for 6 in the Supreme Court, but challenges sparked a debate within the Court that would eventually lead to a much more speech-protective jurisprudence.
- Schenk was the general secretary of the American Socialist Party, who had been convicted for distributing 15,000 leaflets to young men of draft age critical of the war effort and, especially, the draft. The leaflet urged readers to "Assert your rights - Do not submit to intimidation."



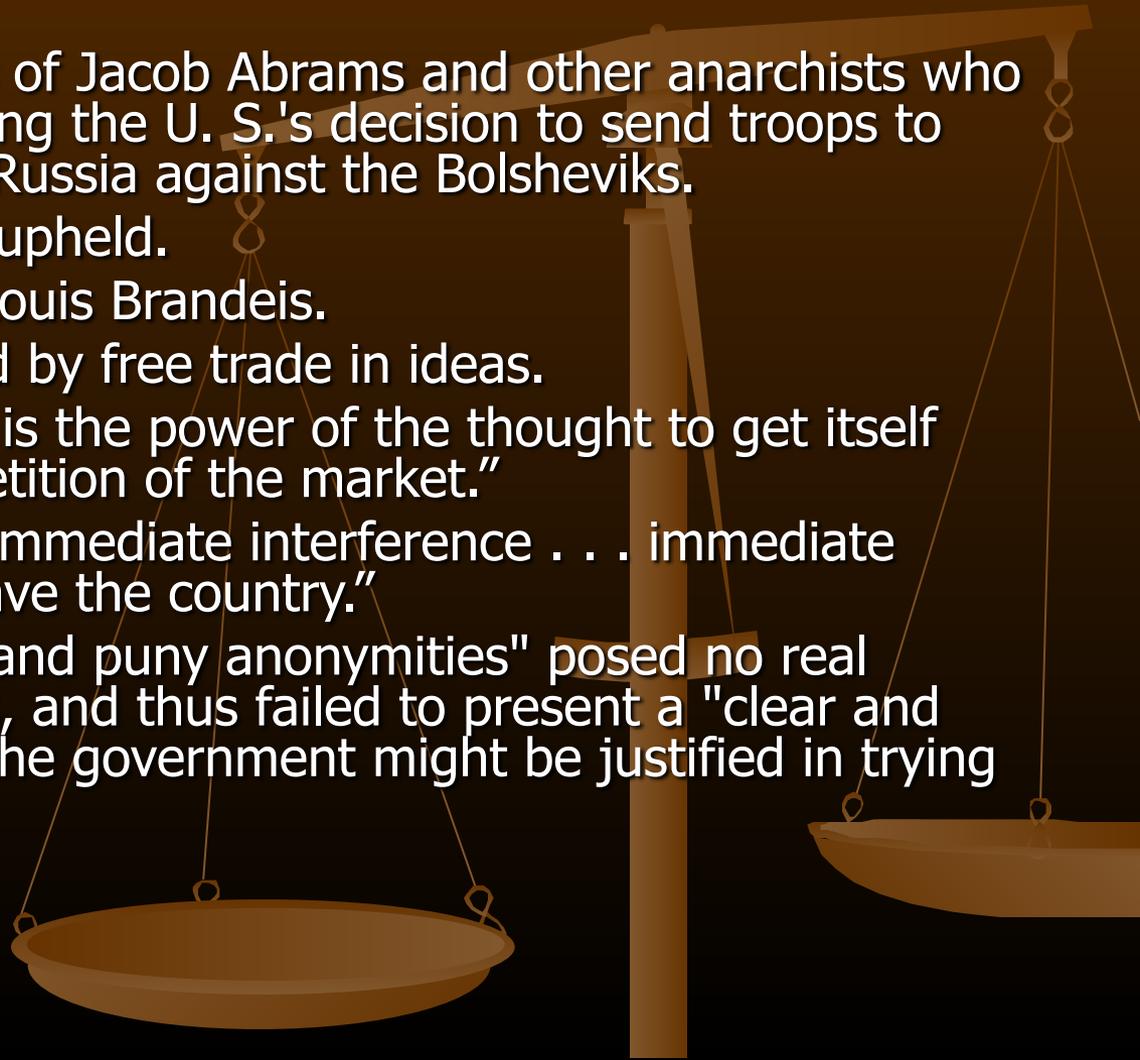
# Schenck v. U.S. (1919)

- Writing for the Court, Justice Oliver Wendell Holmes asked whether "the words create a clear and present danger that they will bring about substantive evils Congress has a right to prevent?"
- As used in Schenk, Holmes' test seemed to demand little more than that the government show that the words in the leaflet had a bad tendency - no proof demanded that the words actually persuaded anyone to evade the draft, or even that they were highly likely to have that effect.
- "Falsely shouting fire in crowded theater"
- Schenk's conviction was upheld.



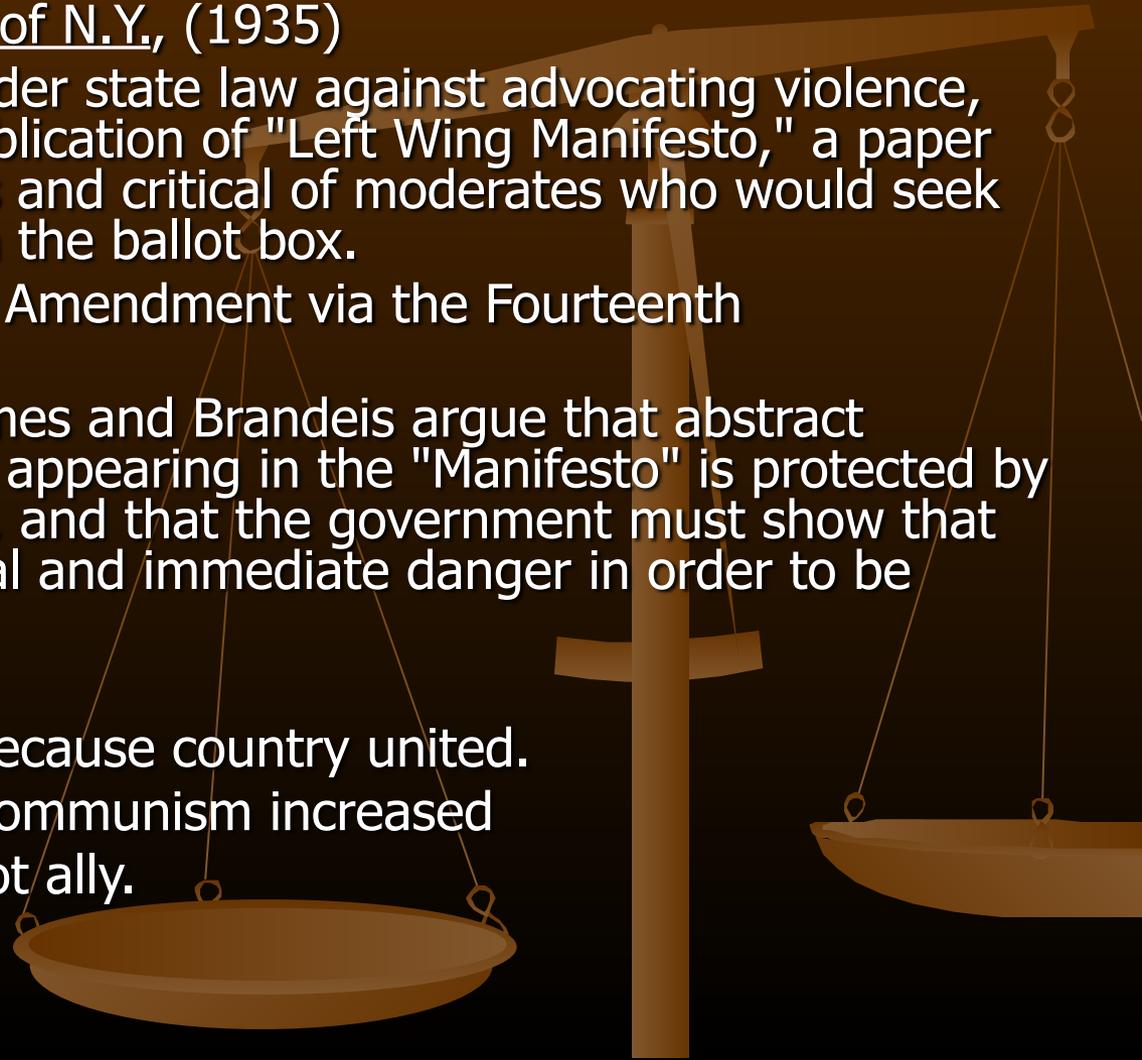
# Abrams v. U. S. (1919)

- Espionage Act convictions of Jacob Abrams and other anarchists who distributed leaflets attacking the U. S.'s decision to send troops to Europe to defend Czarist Russia against the Bolsheviks.
- 20 year prison sentences upheld.
- Dissent by **Holmes** and Louis Brandeis.
  - Good is better reached by free trade in ideas.
  - "the best test of truth is the power of the thought to get itself accepted in the competition of the market."
  - "imminently threaten immediate interference . . . immediate check is required to save the country."
  - "silly leaflet" of "poor and puny anonymities" posed no real danger to U. S. efforts, and thus failed to present a "clear and present danger" that the government might be justified in trying to suppress.



# From Schenk to Brandenberg

- Gitlow v. People of State of N.Y., (1935)
  - Gitlow prosecuted under state law against advocating violence, case involving the publication of "Left Wing Manifesto," a paper urging general strikes and critical of moderates who would seek changes only through the ballot box.
  - Incorporation of First Amendment via the Fourteenth Amendment.
  - In their dissent, Holmes and Brandeis argue that abstract advocacy of the form appearing in the "Manifesto" is protected by the First Amendment, and that the government must show that speech presents a real and immediate danger in order to be punishable.
- The Smith Act of 1940
  - Little used in WWII because country united.
  - Post WWII - fear of communism increased
  - Russia was enemy, not ally.



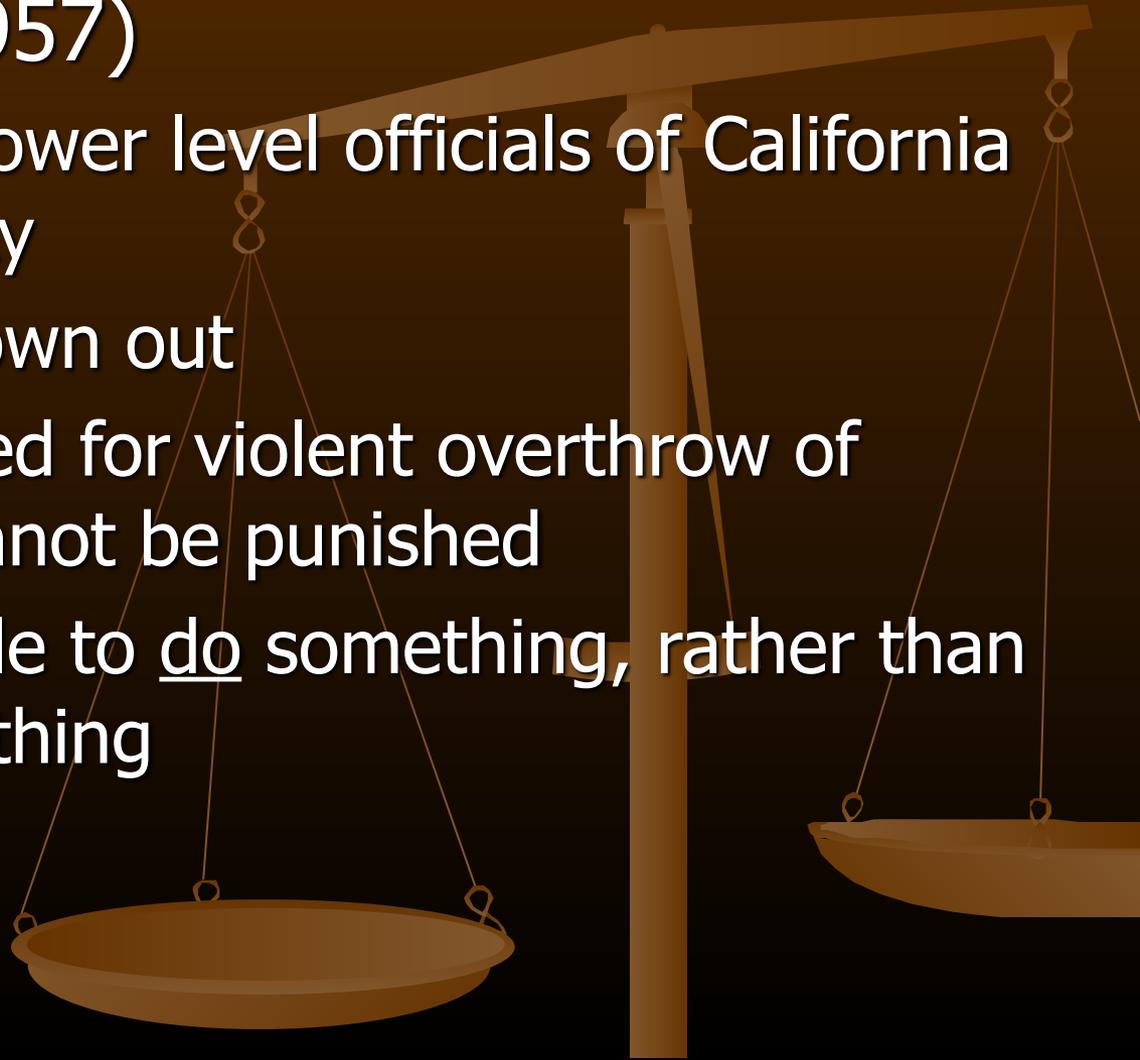
# From Schenk to Brandenberg

- Dennis v. U.S. (1951)
  - Prosecution of communist party leaders. Eugene Dennis was general secretary of U.S. Communist Party.
  - Conviction upheld, convicted for advocating violent overthrow of government
  - 6-2 decision. 4 justices said party represented clear and present danger. Advocacy, not discussion. Government doesn't have to wait until the plan is about to be executed. Frankfurter - in Congress' power. Jackson - this was a conspiracy.



# From Schenk to Brandenberg

- Yates v. U.S. (1957)
  - Prosecution of lower level officials of California Communist Party
  - Convictions thrown out
  - Advocacy of need for violent overthrow of government cannot be punished
  - Must urge people to do something, rather than believe in something



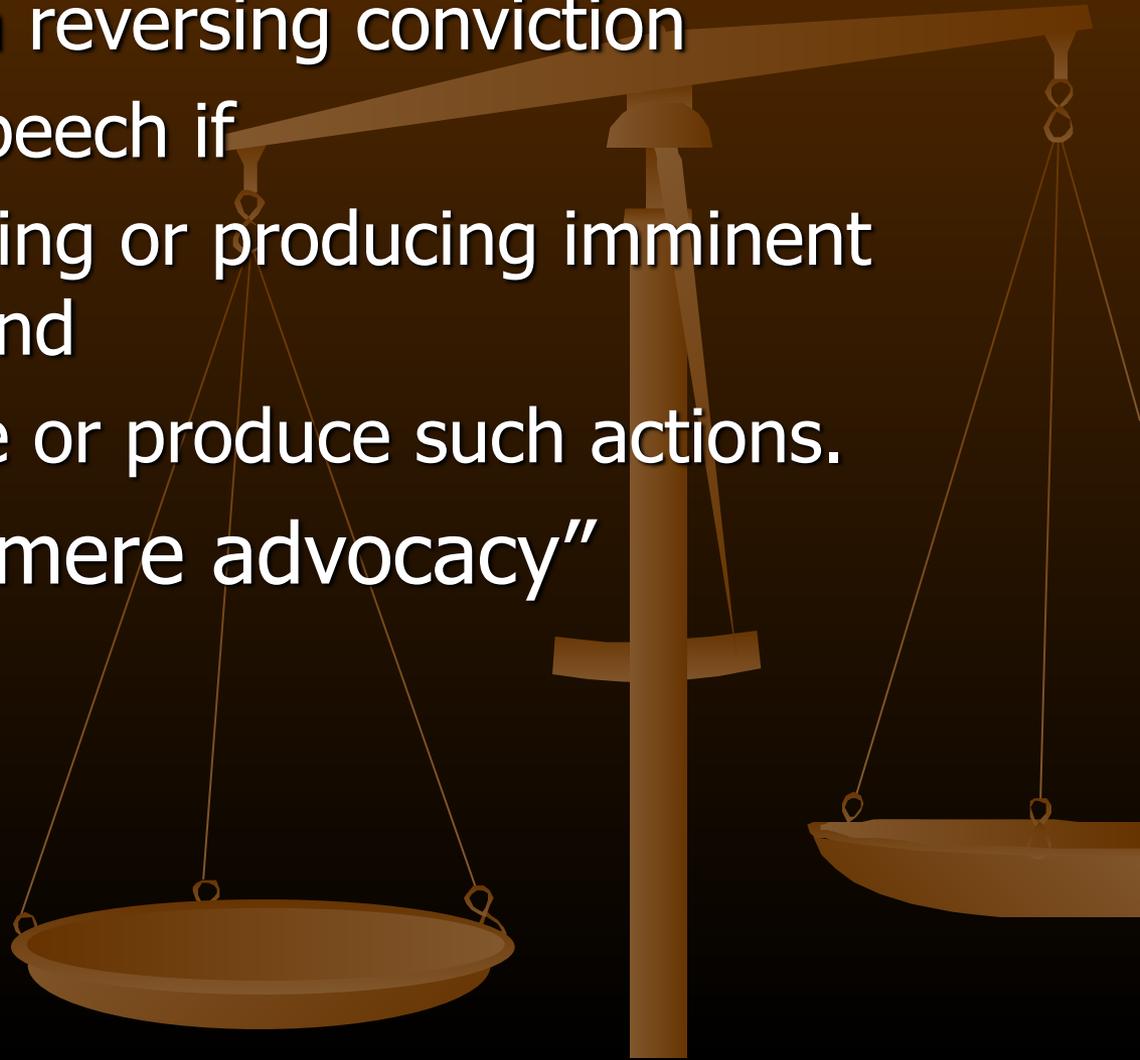
# Brandenberg v. Ohio (1969)

- Meeting in Ohio of Ku Klux Klan
- Speech regarding taking revenge against government officials who aided racial integration
- “We’re not a revengent organization, but if our President, our Congress, our Supreme Court continues to suppress the white Caucasian race, it’s possible there might have to be some revengence taken”
- Ohio law punished persons who “advocate or teach the duty, necessity or propriety” of violence “as a means of accomplishing industrial or political reform.”



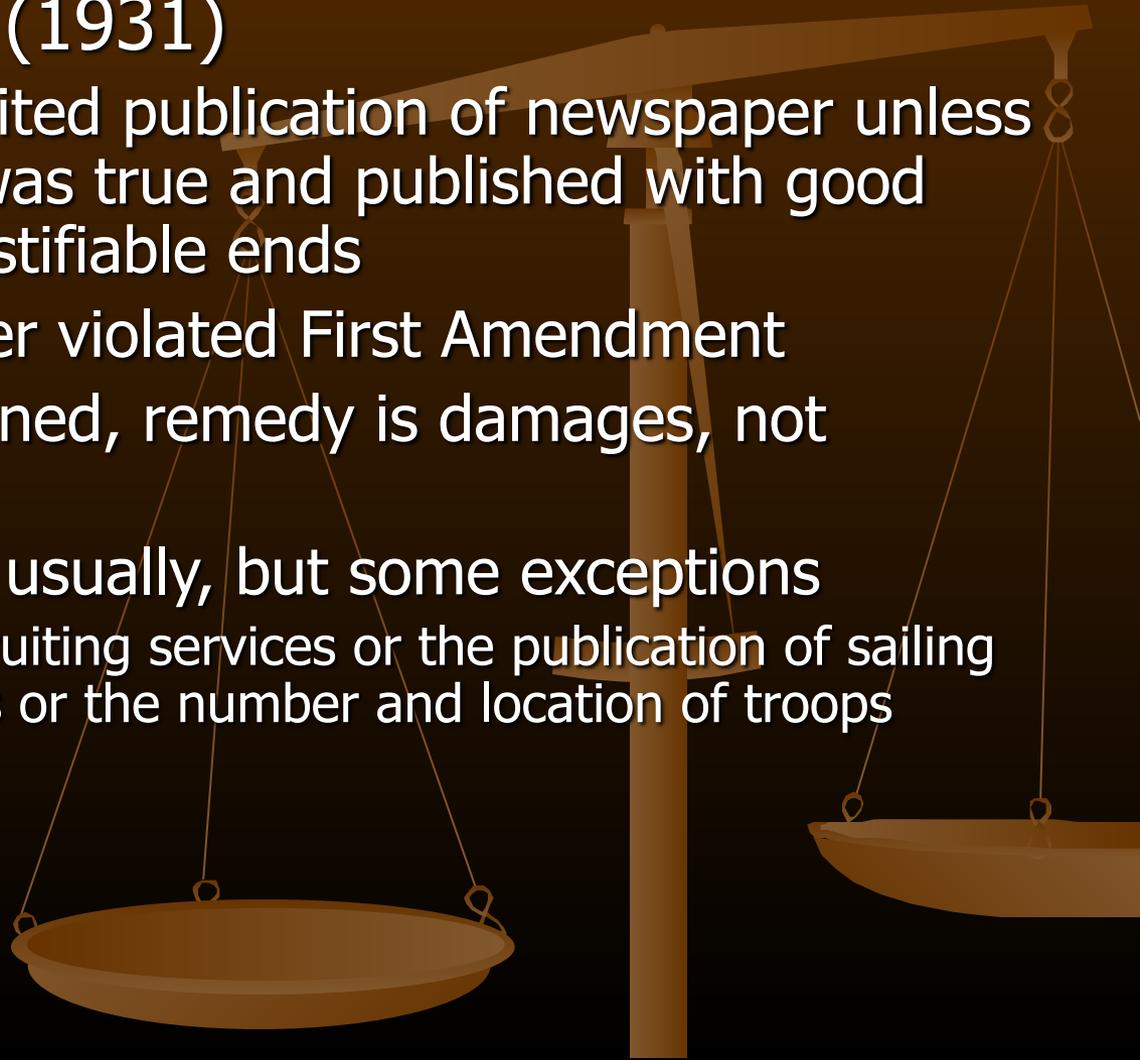
# Brandenberg v. Ohio (1969)

- Per curiam opinion reversing conviction
- Can only punish speech if
  - Directed to inciting or producing imminent lawless action and
  - Is likely to incite or produce such actions.
- Cannot punish “mere advocacy”



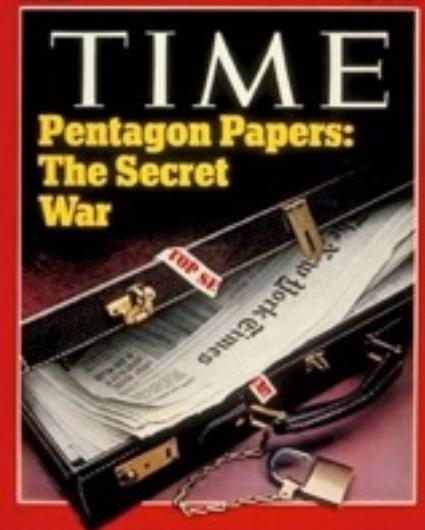
# Prior Restraint Doctrine

- Near v. Minnesota (1931)
  - Court order prohibited publication of newspaper unless first shown story was true and published with good motives and for justifiable ends
  - 5-4 decision: Order violated First Amendment
  - Where libel concerned, remedy is damages, not injunction
  - No prior restraints usually, but some exceptions
    - Obstruction of recruiting services or the publication of sailing dates of transports or the number and location of troops
    - Obscenity
    - Incitements



# Prior Restraint Doctrine

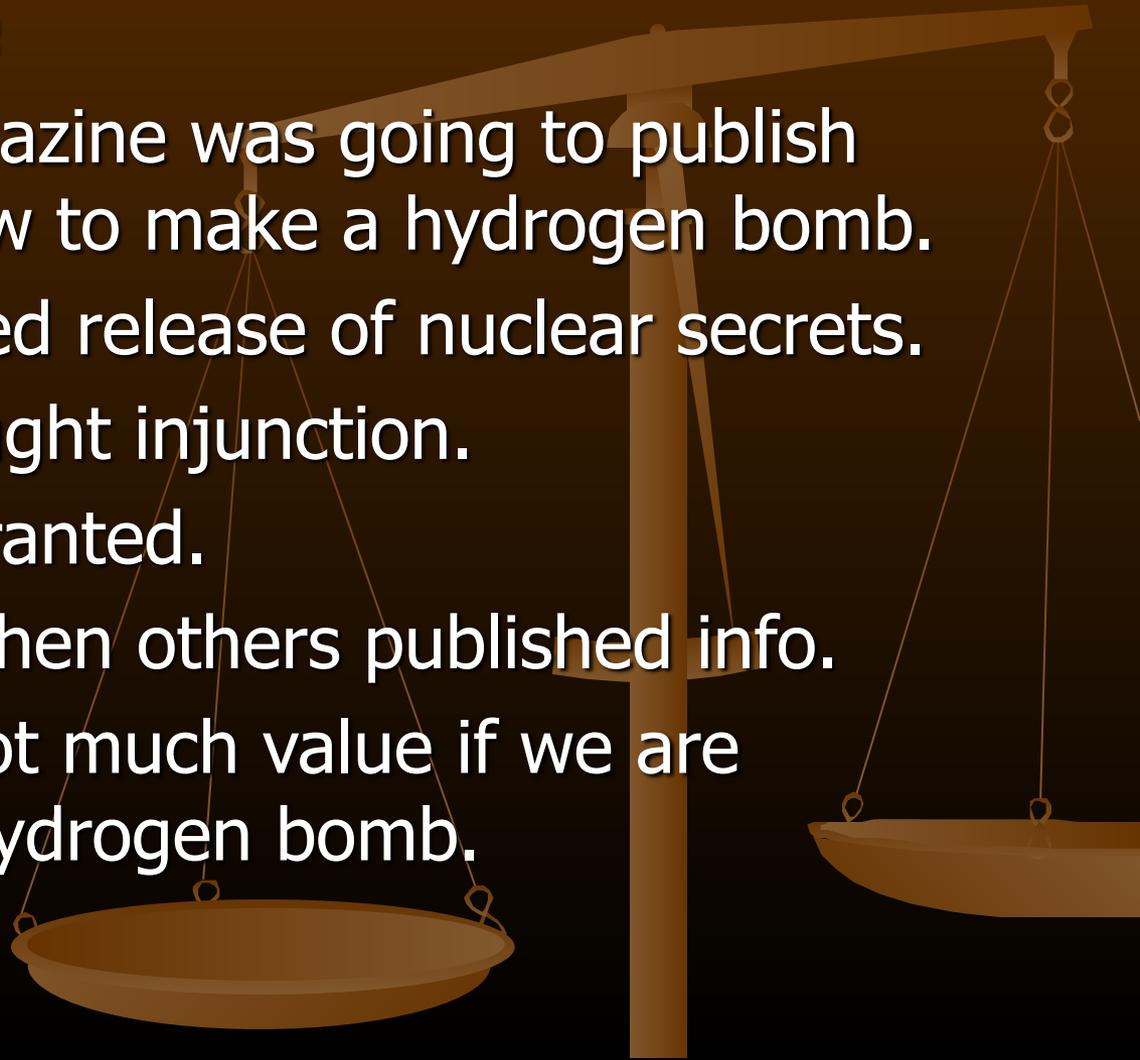
- “Any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity”
- New York Times v. U.S. (1971)
  - Pentagon Papers re Vietnam war
  - Government sought injunction
  - 6-3 decision rejecting
  - Every justice wrote opinion
  - Douglas/Black – absolutists
  - Brennan: not publication of troops, etc.
  - Three justices: no law allowed claim.
  - Three justices: not enough facts, too quick.



# Prior Restraint Doctrine

- Progressive case

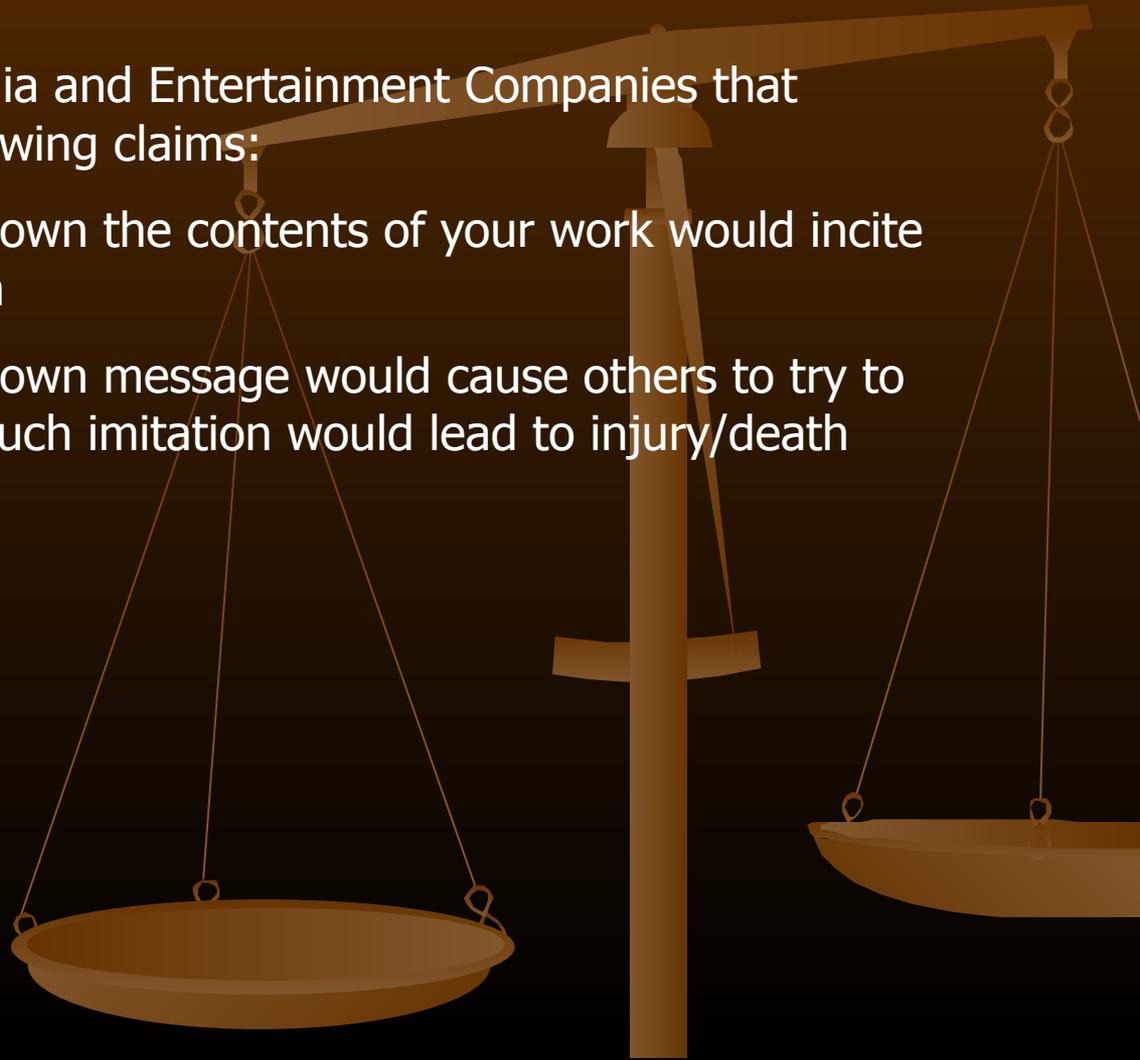
- Progressive Magazine was going to publish article about how to make a hydrogen bomb.
- Statute prohibited release of nuclear secrets.
- Government sought injunction.
- Prior restraint granted.
- Case dropped when others published info.
- Speech rights not much value if we are annihilated by hydrogen bomb.



# Incitement/Imitation Cases

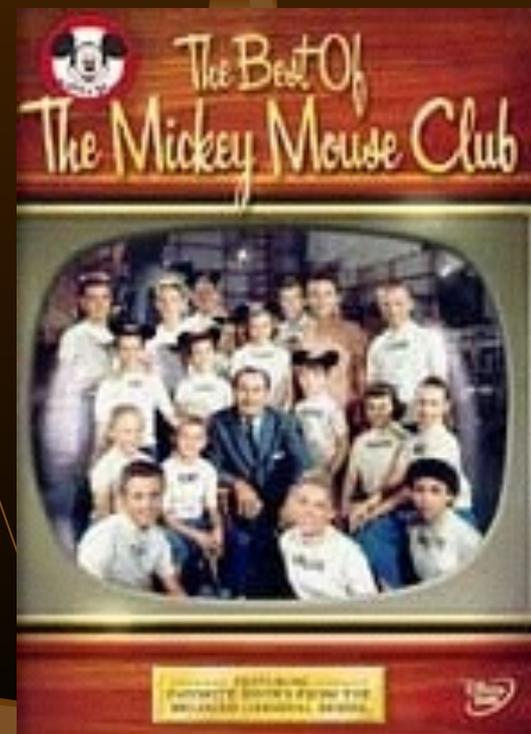
Cases against the Media and Entertainment Companies that typically raise the following claims:

- Should have known the contents of your work would incite others to do harm
- Should have known message would cause others to try to imitate and that such imitation would lead to injury/death



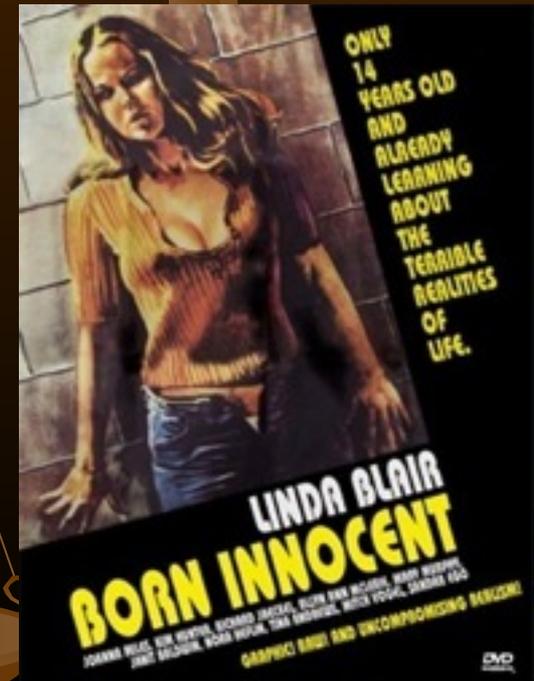
# Imitation/Incitement Cases

- Walt Disney v. Shannon (Ga. 1981)
  - *Mickey Mouse Club*
  - *Pellet in balloon.*
  - *Partially blinded.*



# Imitation/Incitement Cases

- Olivia N. v. NBC (Cal. App. 1981)
  - *“Born Innocent”*
  - *Girl raped with coke bottle, attackers said inspired by show.*



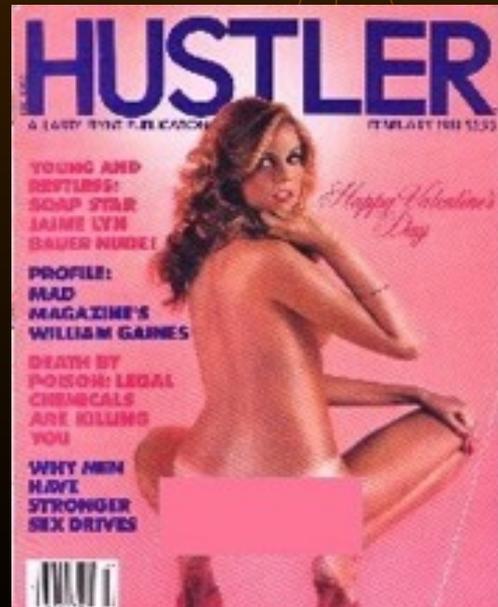
# Imitation/Incitement Cases

- Defilippo v. NBC (R.I. 1982)
  - *13 year old hung himself after watching hanging demonstration on Tonight Show*



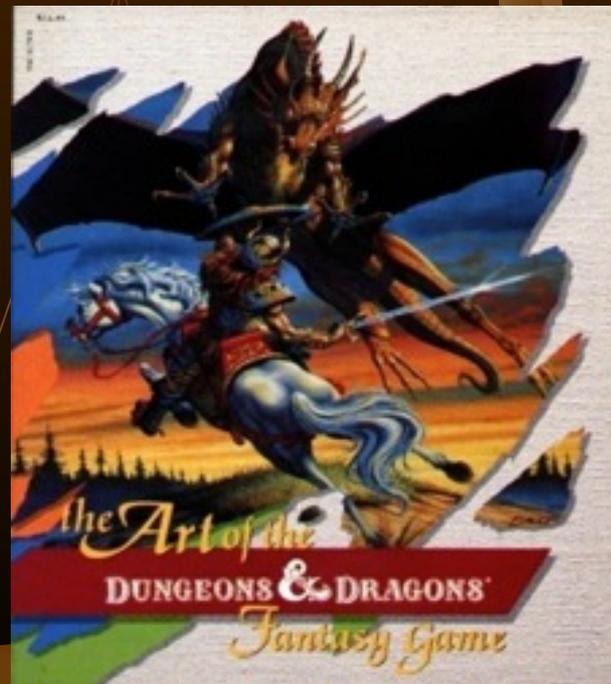
# Imitation/Incitement Cases

- Herceg v. Hustler Magazine (5th Cir. 1987)
  - *14 year old died from autoerotic asphyxiation.*



# Imitation/Incitement Cases

- Watters v. TCR (W.D. Ky. 1989)
  - *5 years of playing Dungeons and Dragons.*



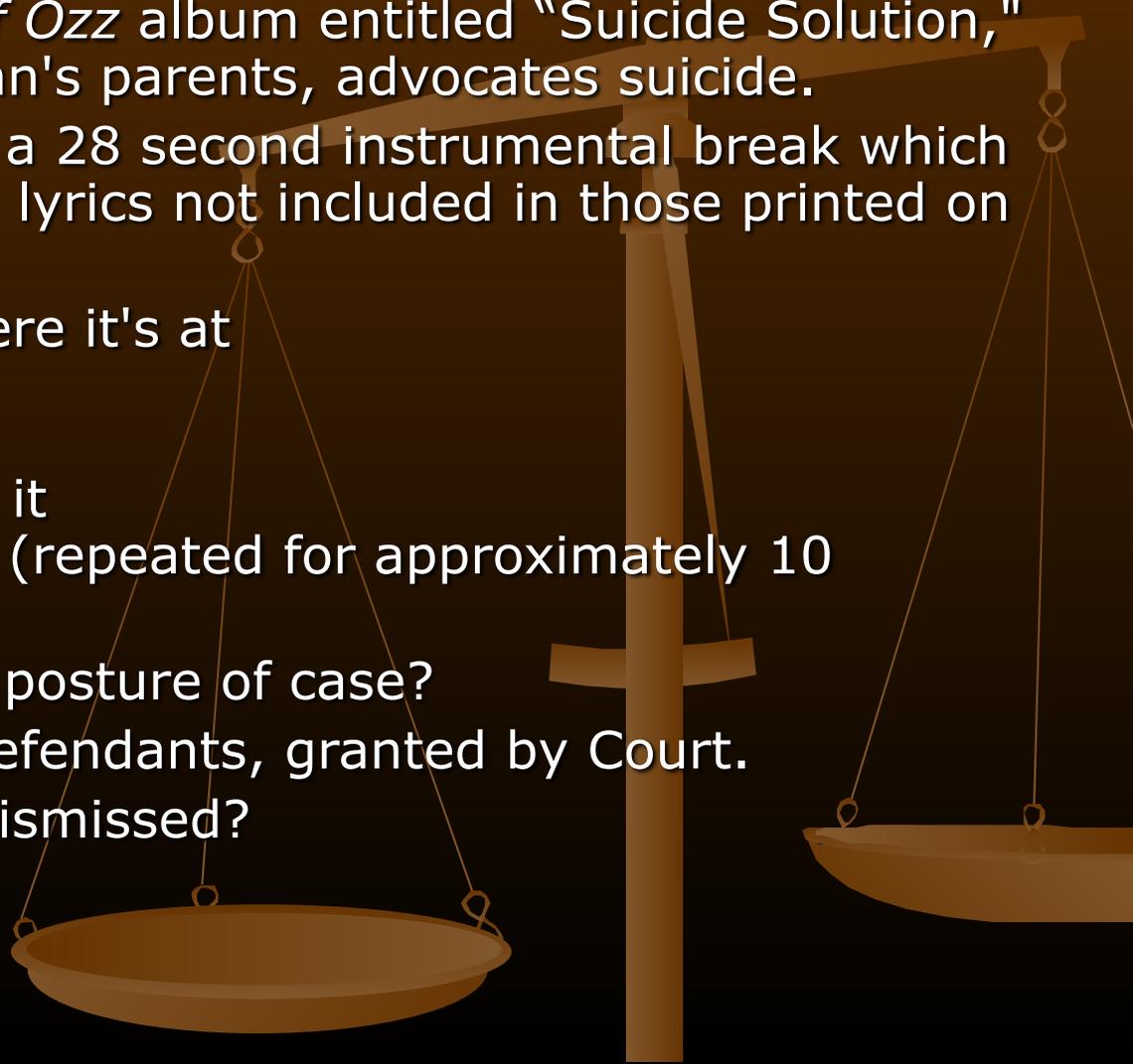
# Incitement/Imitation Cases

- McCollum v. CBS (Cal. App. 1988)
  - *19 year old shot himself after listening to Ozzy album.*



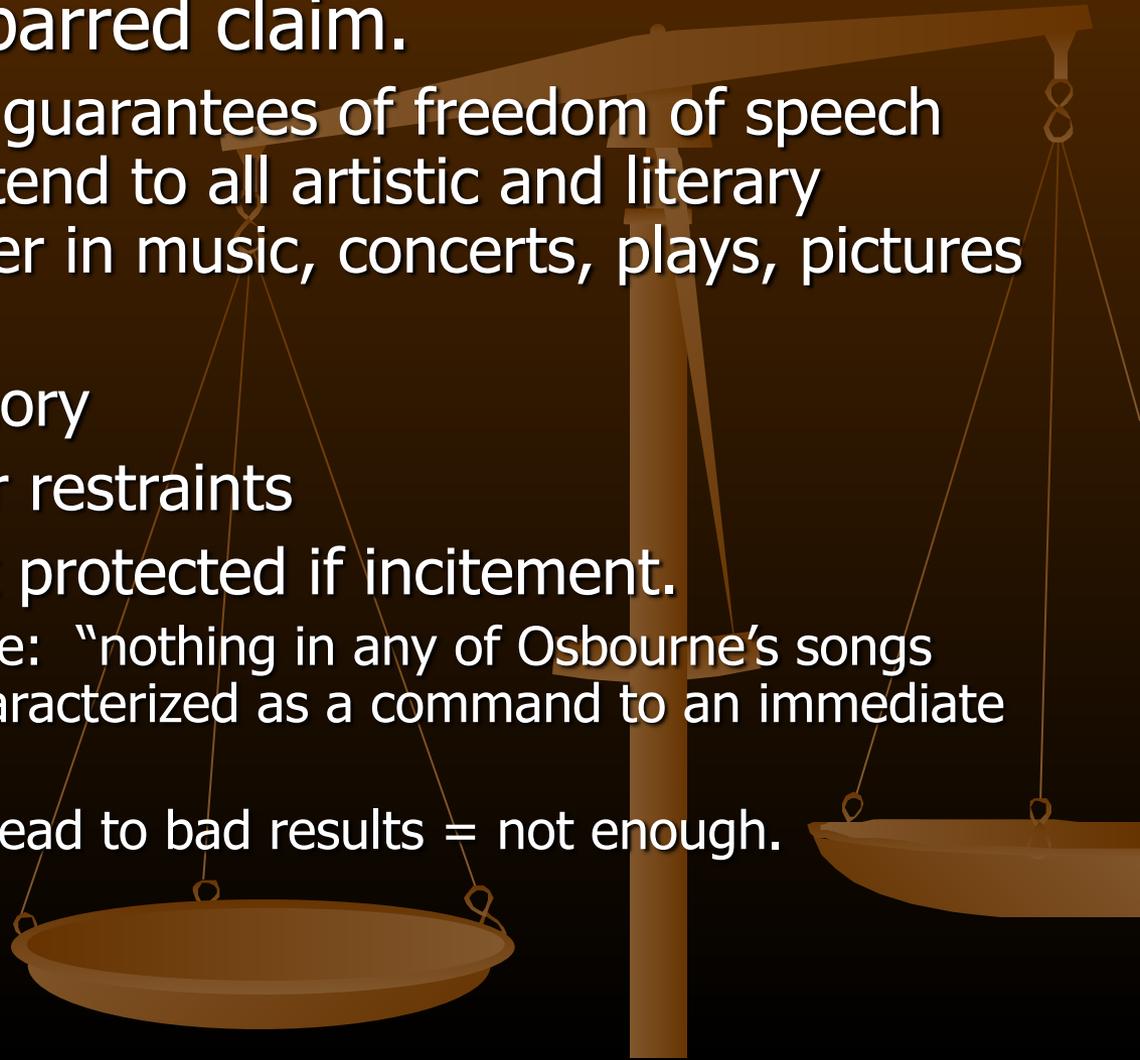
# McCollum v. CBS

- Song off the *Blizzard of Ozz* album entitled "Suicide Solution," which, according to John's parents, advocates suicide.
- Included in the song is a 28 second instrumental break which contained the following lyrics not included in those printed on the album cover:
  - You really know where it's at  
You got it  
Why try, why try  
Get the gun and try it  
Shoot, shoot, shoot (repeated for approximately 10 seconds).
- What is the procedural posture of case?
  - Demurrer filed by defendants, granted by Court.
  - Why was the case dismissed?



# McCollum v. CBS

- First Amendment barred claim.
  - “First Amendment guarantees of freedom of speech and expression extend to all artistic and literary expression, whether in music, concerts, plays, pictures or books”
  - Individual gain theory
  - Not limited to prior restraints
  - Not absolute – not protected if incitement.
    - Not incitement here: “nothing in any of Osbourne’s songs which could be characterized as a command to an immediate act.”
    - Mere tendency to lead to bad results = not enough.



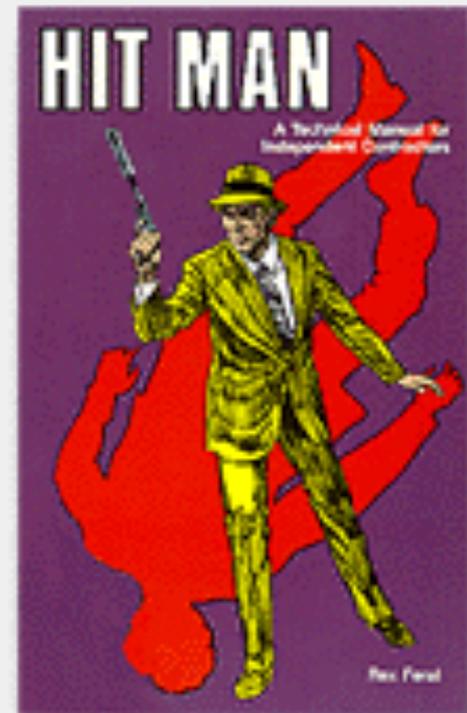
# McCollum v. CBS

- No basis for Negligence liability
  - Elements of Negligence claim: Duty, Breach, Causation, Damages.
  - No duty here: No foreseeability
  - Weirum v. RKO distinguished
    - Very high degree of foreseeability there
    - Encouraged risky conduct
    - “‘real time’ urging of listeners to act in a particular manner” – “dynamic interaction with, or live importuning of, particular listeners.”
- No Basis for Intentional Tort Liability
  - No showing of specific intent to cause injury.



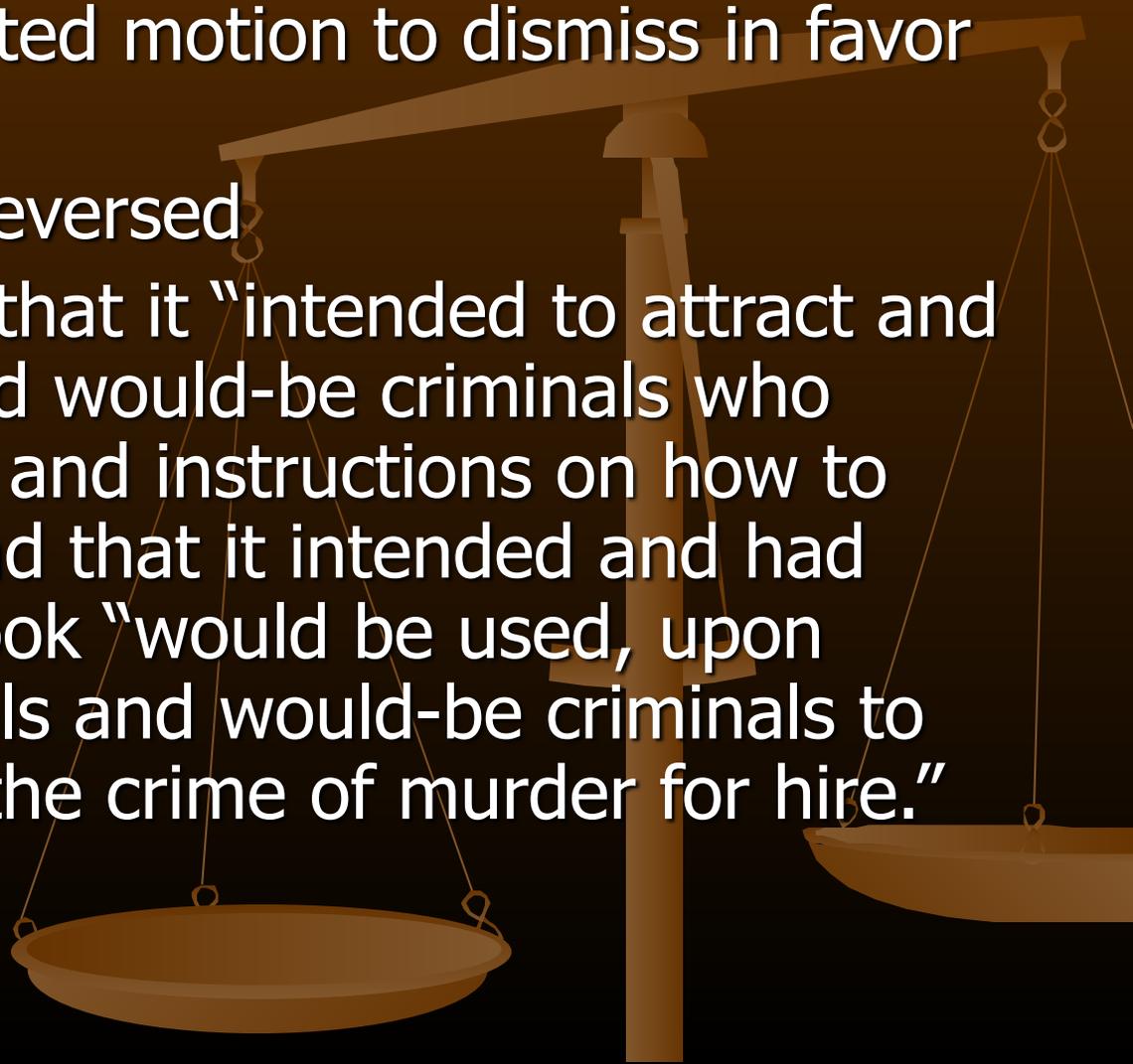
# Rice v. Paladin

- Book titled "Hit Man"
- Hired killer used book as guide when he murdered boy and his nurse so boy's father could collect money paid in settlement for accident that had left son paralyzed
- Wrongful death action against publisher



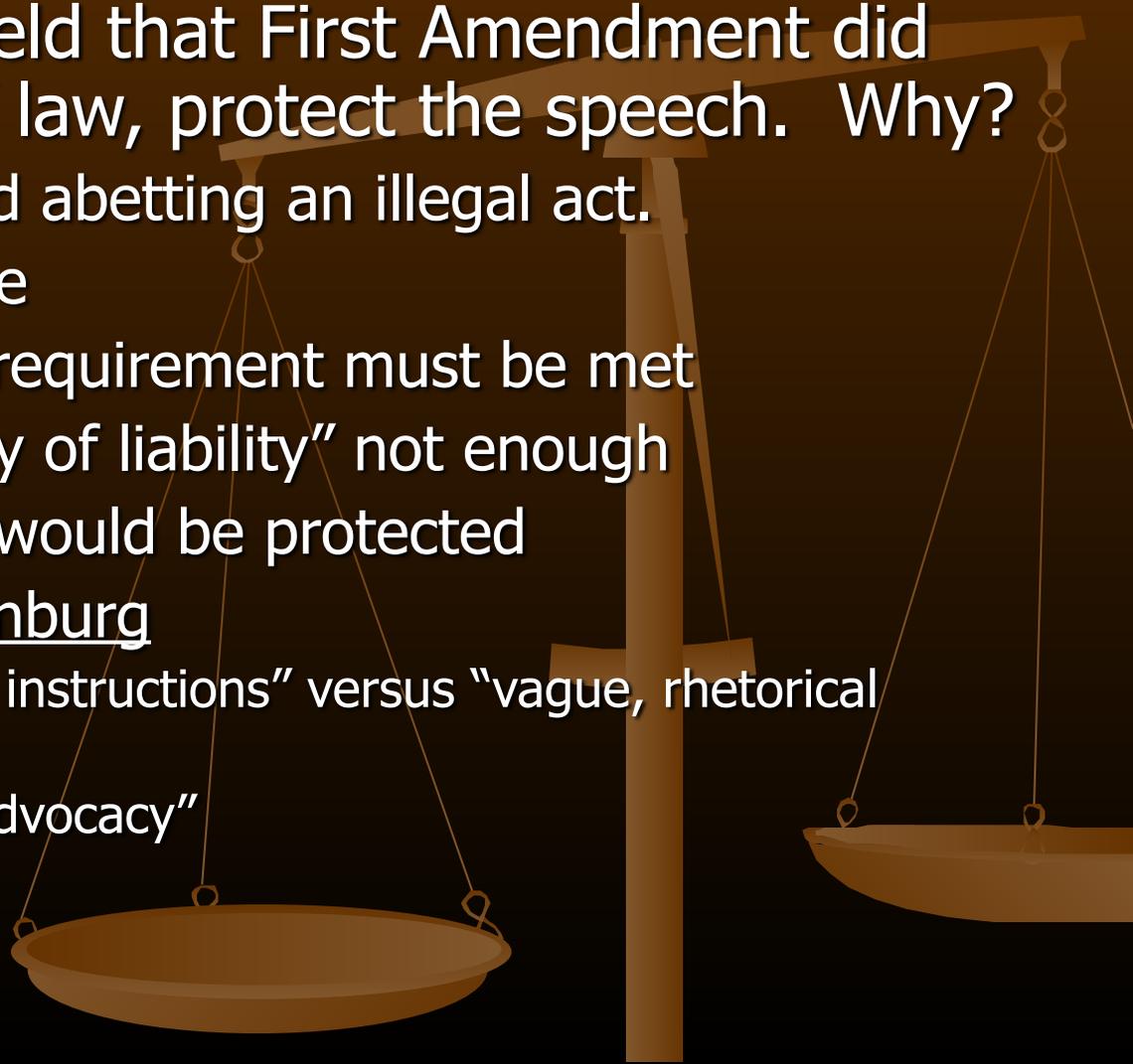
# Rice v. Paladin Enterprises

- District Court granted motion to dismiss in favor of defendants
- Court of Appeals reversed
- Paladin stipulated that it “intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes” and that it intended and had knowledge that book “would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire.”



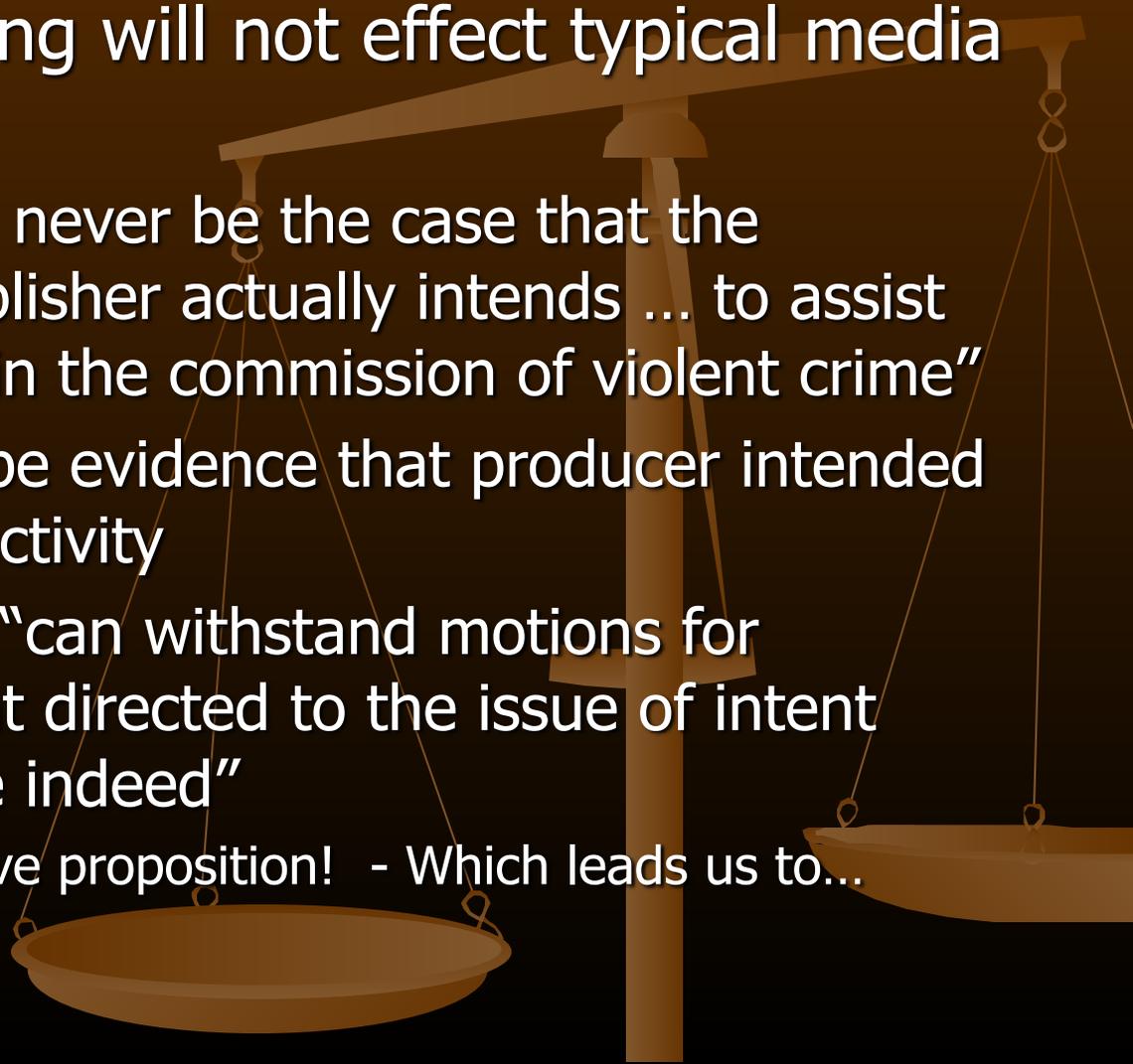
# Rice v. Paladin

- Court of Appeals held that First Amendment did not, as a matter of law, protect the speech. Why?
  - This was aiding and abetting an illegal act.
  - Speech/Act doctrine
  - Heightened intent requirement must be met
  - “mere foreseeability of liability” not enough
  - Abstract advocacy would be protected
  - Distinguish Brandenburg
    - “detailed, concrete instructions” versus “vague, rhetorical threats”
    - More than “mere advocacy”



# Rice v. Paladin

- Court argues holding will not effect typical media cases
  - “it will presumably never be the case that the broadcaster or publisher actually intends ... to assist another or others in the commission of violent crime”
  - Will almost never be evidence that producer intended to assist criminal activity
  - Chance that claim “can withstand motions for summary judgment directed to the issue of intent seem to us remote indeed”
    - That is an expensive proposition! - Which leads us to...



# Byers v. Edmondson

- Natural Born Killers
- Motion to Dismiss (similar to the Demurrer filed in McCollum) was denied
- Summary Judgment by defendants
- Not incitement
- No evidence of intent to incite

