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respecting an

establishment of religion,

or prohibiting

# Speechless in Scotts Valley

Cassandra Brown and Amy Courtney hit the hallowed halls of justice to fight for their rights to free speech  
by Laurel Chesky

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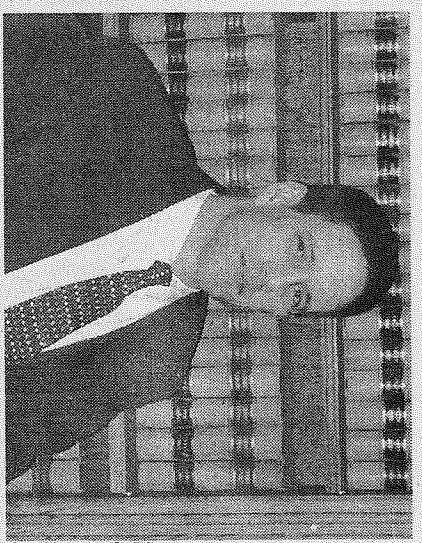
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*"When the government invites the public to express itself, it creates a forum for speech. That's when you have a First Amendment issue. The government can't say, 'Say your piece, but only say it in the form of a flag.'"*

**—Nathan Benjamin, attorney**

Cassandra Brown and Amy Courtney have an inside joke around their shared house near Davenport. It goes: "Wanna hang a banner today?" It means, "So, do you want to start something simple and watch it snowball out of control until we're in way over our heads?"

The two friends can laugh a little, albeit nervously, about the situation they find themselves in. But for the most part, they're walking wide-eyed into the fight of a lifetime. They never dreamed of suing the city of Scotts Valley, much less the state of California. But that's exactly what they're doing. They're taking the California Department of Transportation (Caltrans) and the Scotts Valley Police Department to federal court because Brown and Courtney believe those two agencies have violated their First Amendment rights to freedom of speech.

Their case strives to defend their deeply personal convictions about a war they abhor and their right to publicly speak out against it; but the implications of their legal challenge go far beyond themselves. Their lawsuit stands to test the federal court system's tolerance of the current erosion of Americans' civil liberties not seen since McCarthyism.

Courtney, a sales associate for a local organic farm and a UC Santa Cruz graduate, and Brown, a Spanish teacher and writer, lead simple existences. They commute by bike, eat organic foods, and try to live their lives in a sustainable fashion. They're both politically aware—Brown spent three years in the Peace Corps and participated in the WTO protest in Seattle—but they're not what you'd call rabble rousers. Yet the fervent jingoism following Sept. 11 and lack of critical dialogue regarding the so-called war on terrorism have left the women feeling isolated.

Their tale begins shortly after U.S. planes started showering bombs on Afghanistan in October: "I felt like there wasn't much being said in the public sphere, not very much dissent," Brown says. "The question 'At what cost?' wasn't being asked—how we support this war and what are the costs, monetarily, physically, the people in the world dying, domestic opportunity costs, and our civil liberties. I mean, we all were just going along with it."

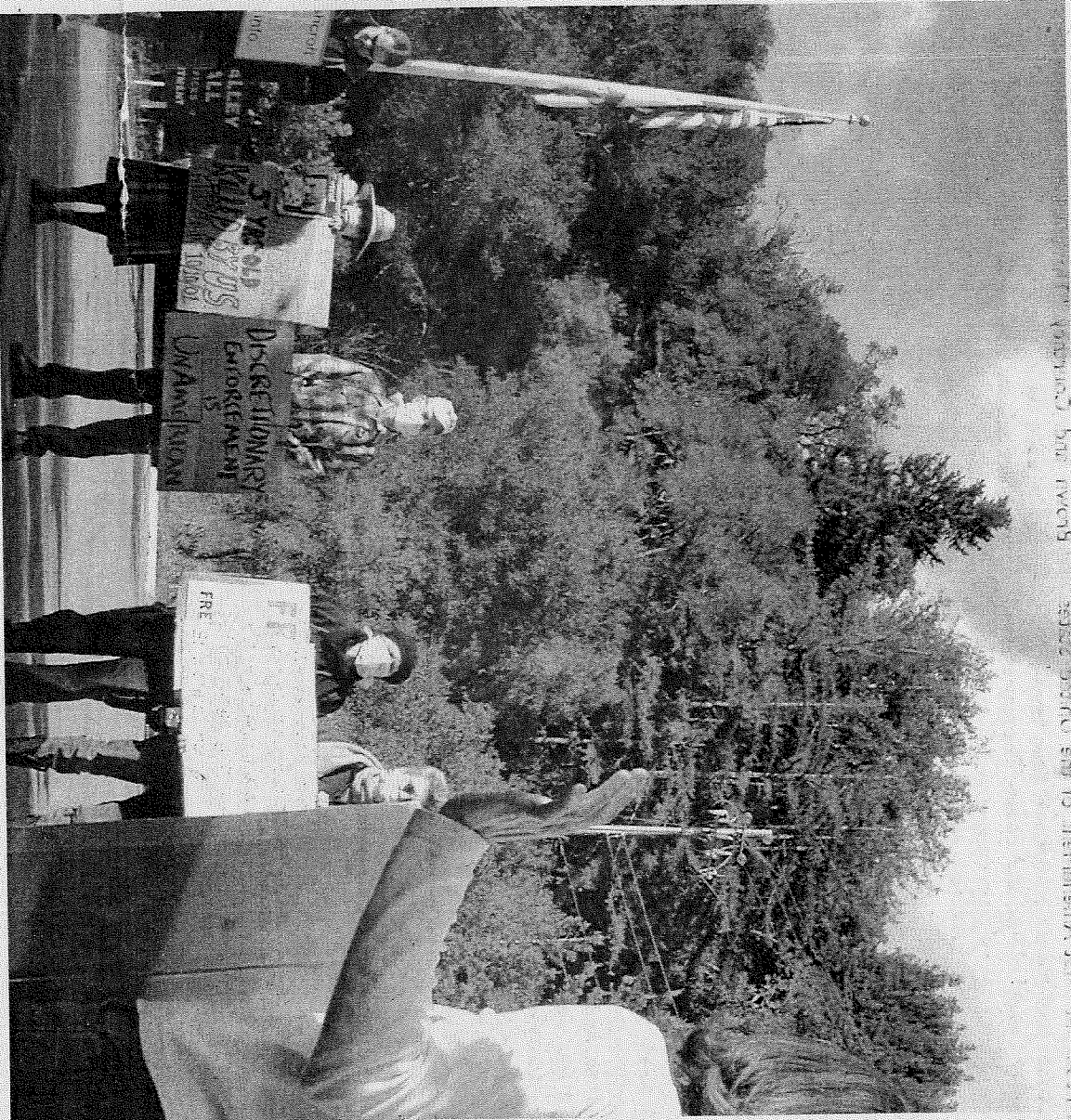
"I think that we were frustrated for lack of media coverage of the other questions, the many other questions [regarding the war]," Courtney says. "All kinds of questions just weren't being asked. We were feeling kind of alienated by that, a little bit alienated in the community, like, hey wait a minute ... this is the hub of peace-loving people, and where is our voice? And feeling like, hey wait, that's us. Who are we waiting for? We need to get our voice out there, and how do we do it? And so we went with what we had—bed sheets."

On old, white bed linens, the women painted two simple signs that raised two simple questions. One read, "Are you buying this war?" The second begged the question, "At what cost?" On a chilly November morning, the two women borrowed a car and set out to hang their banners from a Hwy. 17 overpass. They chose Hwy. 17 because of



Cassandra Brown leads a group of protestors outside of the Scotts Valley Police Department.





BRUCE WILLEY

the array of American flags and signs supporting New York and the United States posted along the highway.

"Seeing the American flags and other things there, it was sort of like a red flag—OK, here's a forum for expression other people are doing it, it's consistent, people will go what we're talking about," Courtney says.

On Nov. 27 at about 7 a.m.—they wanted to start early enough to raise their questions with drivers commuting over the hill—the women headed towards Scotts Valley over their signs. They'd picked out the Granite Creek overpass to hang one sign, because an American flag and another banner reading, "SC ♥ NY" already hung there.

They took turns standing on each other's shoulders hanging the sign reading "At What Cost?" over an 8-foot, chain-link fence atop the overpass. The sign was placed on the outer side of the fence, but they say they used utmost caution to ensure the banner wouldn't fall into traffic below. Using industrial strength jute cord, they carefully secured the sign to the chain link in eight places.

They planned to hang the other sign from the Mount Hermon overpass. But it never got that far. Moments after Brown and Courtney pulled away from the area, a Scotts Valley police patrol car passed them. By the time they turned around on the highway and returned to the overpass, the officer, and their sign, had disappeared. The "SC ♥ NY" sign, which was draped inside the fence, remained—disappeared days later, but it's not clear who took it down. The American flag also remained and stayed in place more than a month. The Scotts Valley Police Department just recently removed the flag because it had torn and threatened to fall onto traffic.

By leaving the American flag and the sign supporting New York while trashing the war protest sign, Brown and Courtney felt like the Scotts Valley police stomped on their First Amendment rights.

### Red Flagged

Whether or not the officer removed the banner because of its content strikes at the heart of the lawsuit's consti-



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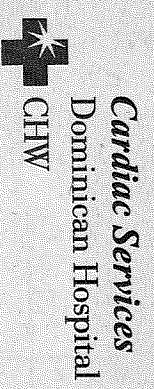
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"The question 'At what cost?' wasn't being asked—how we support this war and what are the costs, monetarily, physically, the people in the world dying, domestic opportunity costs, and our civil liberties. I mean, we all were just going along with it."

—**Cassandra Brown**

Constitutional issue. The First Amendment of the United States Constitution prohibits the government from "abridging the freedom of speech" of American citizens. The courts' interpretation of that basic right is steeped in two centuries of case law, but basically they have said that if a government opens up a forum for the public to express itself politically, it cannot favor one message over another. It can't discriminate based on content.

According to Scotts Valley Assistant City Attorney Kirsten Powell and Police Chief Tom Bush, who is also named as a defendant in the lawsuit, the sign was flapping in the wind and posed a danger of falling into traffic below, potentially causing an auto accident. Powell says that the officer who removed the sign approached from Scotts Valley Drive and could not have seen what the sign said from his vantage point. "This was a safety issue," Powell says. "It was not a content-based decision to remove the sign."

Courtney insists the banner was secure. "We were there. It was not flapping," she says. "Possibly in three months it could have started flapping—possibly. In the moment that it was up there and for a long duration after, it was going to stay. We didn't want it to fall on anybody."

But beyond what one police officer did in Scotts Valley, the bigger issue raised by Brown and Courtney's lawsuit is the constitutionality of a Caltrans "flags only" policy. Caltrans owns the Granite Creek overpass right-of-way. Following the Scotts Valley police incident, Caltrans spokesperson, Mike Galizio, said that the department was turning a blind eye towards American flags, which began popping up on highways across the state in the wake of Sept. 11. At the time, Galizio said that flags normally would not be allowed to adorn highway overpasses. Other banners or signs, he said, were being taken down by Caltrans maintenance crews.

By discriminating between political messages, Caltrans might be acting illegally. "When the government invites the public to express itself, it creates a forum for speech," says Santa Cruz attorney Nathan Benjamin, who represents

Brown and Courtney. "That's when you have a First Amendment issue. The government can't say, 'Say your piece, but only say it in the form of a flag.'"

Since the lawsuit was filed on Dec. 21, Caltrans' story has changed. Caltrans officials now say that flags posted on state highways are protected by state law and were allowed on state highways prior to Sept. 11.

Indeed, section 670.5 of the state Streets and Highway Codes, proclaims: "The Flag of the United States of America and the Flag of the State of California may be displayed on a sidewalk located in or abutting on a state highway situated within a city, if the type of flag-holder and the method of its installation and maintenance are not in violation of the department's rules."

But Benjamin says the state law doesn't apply in this case. And even if it did, it's unlikely that the flag hanging on Granite Creek was installed and maintained according to "department rules." So far, Caltrans has failed to provide the court with any such rules.

"The officer just exercised discretion without any policy behind him, except his decision that it was a safety hazard," Benjamin says. "In our First Amendment analysis, that's not good enough."

### Gagged and Bound for Court

All Brown and Courtney wanted was to hang a couple of signs and raise a couple of questions about the cost of war. They knew the signs wouldn't last long—someone was bound to tear them down sooner or later. "The political climate is such that someone is bound to not appreciate this question," Courtney says, "and that makes it subject to some kind of attack, whether it's a police officer or someone just driving by."

But on Nov. 27, as they stood looking up at the empty spot where their sign had hung just 10 minutes before, Brown and Courtney's mission changed. Ironically, the answer to their question, "At what cost?" already had an answer: They were paying with their free speech.

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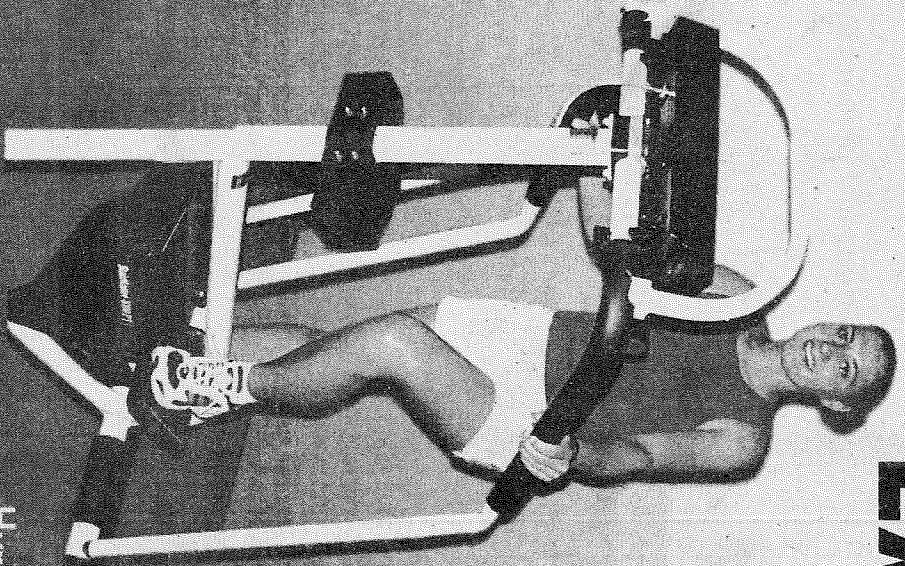
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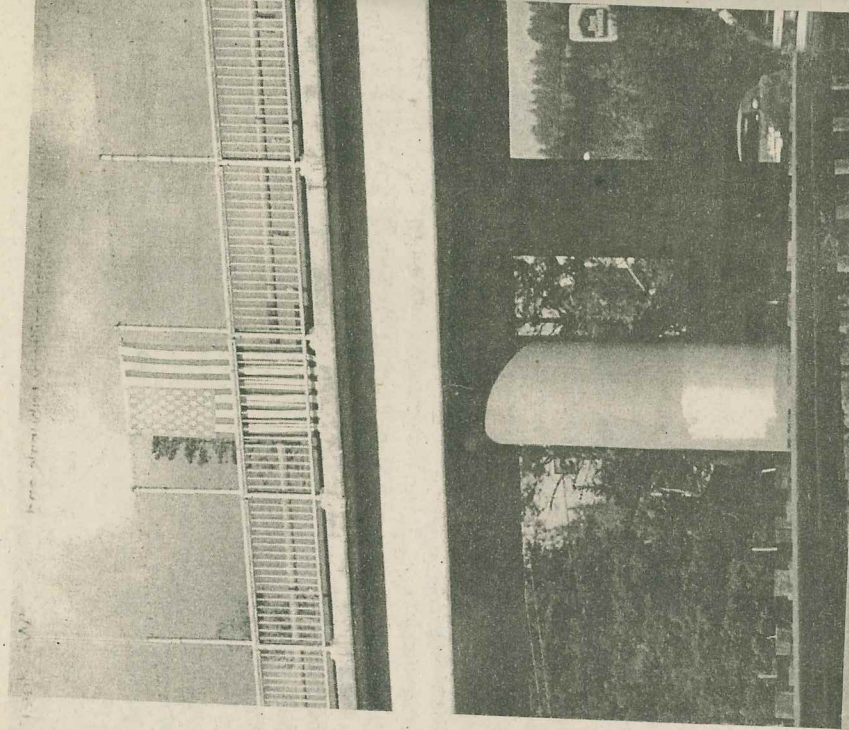
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American flags, like this one on the Hwy. 17 Granite Creek overpass, started popping up on state highways after Sept. 11.

"It seemed like something had changed," Courtney says. "It's not about our banner anymore, this is about the First Amendment, and them violating our First Amendment [rights]."

The women sought advice from a former co-worker of Brown's, Paul Sanford, who happens to be an attorney and a constitutional law professor. Sanford opined that the police officer's actions indeed violated their free speech rights, and suggested that they go public with the incident. Subsequently, Brown and Courtney contacted local media and staged a protest in front of the Scotts Valley Police Department, for which about 20 protestors showed up and paraded in front of the department with symbolic gags across their mouths. In early December, the women attempted to re-hang their sign. They posted newly crafted banners on the Granite Creek and Mount Hermon overpasses, this time placed inside the fence, so the police couldn't claim a safety issue. The signs disappeared, but it's not clear who removed them. Police Chief Tom Bush says none of his officers touched them, and briefs filed by Caltrans attest that Caltrans maintenance crews were dispatched to remove reported banners, but they were gone by the time the crews reached the sites.

After the protest, the next step—and it was a big one—was deciding to sue. Brown and Courtney spent hours consulting with Benjamin and James Wheaton, an attorney with the First Amendment Project in Oakland, before deciding to file a lawsuit and subsequently become reluctant crusaders.

"It's not about us," Courtney says. "Unfortunately, we fell into this position, and it's our responsibility to see it through."

Their attorney, a fresh-faced, clean-cut former prosecutor, who sports locks cropped just shy of a crew cut, also wrestled with the decision. "I liked seeing flags up there like anyone else," Benjamin says. "It's a touching statement."

In the end he decided the constitutional implications of the case were too important to pass up. He took the case pro bono. Four days before Christmas, Brown and Courtney, represented by Benjamin, filed a lawsuit in federal court against the Scotts Valley Police Department and Caltrans.

"When I see in my own town that people are being denied the opportunity to speak their minds on probably the most important political issue of our time, that disturbs me greatly," Benjamin says. "I consider it my obligation to stand up and say, 'Let's make sure we're all paying attention to the constitution.'"

**Patriot Action**

President Bush has encouraged Americans to defy terrorism by refusing to surrender their way of life. He's urged Americans to fight back by returning to normalcy by working, playing, flying, and opening wallets to express love for the country. All the while, Bush-sanctioned, indefinite

**January 2002 Tide Chart**

Date	LOW TIDE		HIGH TIDE	
	AM	PM	AM	PM
24 Th	---	1:52	6:09	5:5
25 F	12:21	2:8	6:52	5:8
Sunrise 7:09    Sunset 5:16				
26 Sa	1:17	2:9	7:38	6:2
27 Su	2:09	2:8	8:24	6:5
28 M	3:00	2:6	9:11	6:6
29 Tu	3:52	2:5	9:59	6:6
30 W	4:46	2:3	10:48	6:4

**Marine Water Quality Index**  
Sample Date 1-13-02

Location	Approximate Enterobacteria Level*	Approximate fecal coliform bacteria level**
Rio Del Mar	<10	180
Aptos Creek	<10	130
La Selva	30	130
Manresa	<10	10
Sand Dollar	<10	<10
Capitola Jetty	<10	110
Capitola Wharf	<10	180
It's Beach	30	60
Cowell's Beach	<10	80
Cowell's @ Stairs	40	60
Black's	10	20
Mitchell's Cove	<10	20
Natural Bridges	300	<10
New Brighton	30	40
Twin Lakes	<10	1000

\* State standards specify levels of fecal coliform bacteria in swimming areas should not exceed 200 per 100 mL water.  
\*\* State standards specify levels of Enterococcus bacteria in swimming areas should not exceed 104 per 100 mL water.  
\*number of fecal coliform bacteria per 100 mL water  
\*\*number of Enterococcus bacteria per 100 mL water

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detentions of alleged criminals; military tribunals; and government pressure on the mainstream media to tow the party line threaten to chip away the most American thing we have: the U.S. Constitution.

Brown and Courtney feel the removal of their protest sign drives home the reality that Americans' rights are eroding quickly in every community. "It's a call for all of us to gather together and start working really hard to not let them take our civil liberties," Brown says. "They're slowly taking them away—the First Amendment, the Fourth Amendment. The [Bush] Administration is taking a lot of power, grabbing power and to me it's very opportunistic that it took advantage of the situation of people that were in a tragedy, I'm angry about that."

To liberal and conservative critics alike, the whitening away of "American Way of Life" as guaranteed by the Constitution only adds to the terrorists' Sept. 11 successes. "I'm concerned that Osama bin Laden and [his terrorists] win, if the outcome of their actions is that our rights are limited," Benjamin says. "That's a tactic win for them."

In Brown and Courtney's minds, the most patriotic thing they could do is defending their rights as Americans. "We're defending the principles of the flag," Courtney says. "Who were the first patriots? They were rebels. They were like, 'You can't take my money without letting me have a voice. No taxation without representation.' Well, right back at ya."

### Bittersweet Victory?

As the plaintiffs and their defense team walked into a San Jose courtroom last Friday morning, they knew that even if they win, their suit could bear bitter fruit. If the judge agrees that an American flag relays a political message, he could decide to silence all speech, flags or otherwise, on freeway overpasses.

"What I want is to see my message out there," Brown says. "I don't want other people to lose their right to put their message out there. I just want to see my message out there alongside."

"We don't want to see anybody denied an opportunity to express themselves," Benjamin says. "That is absolutely not our intent."

In court, where Brown and Courtney had asked the judge to grant them a preliminary injunction allowing them to hang their banner while their lawsuit goes forward, Judge Ronald M. Whyte seemed to be leaning towards stripping overpasses of all speech. As of press time, he had not yet handed down his decision on the injunction.

"The flag does send a message," he said from the bench. "To most of us, it's a very reassuring, uplifting, positive message. But it's a message."

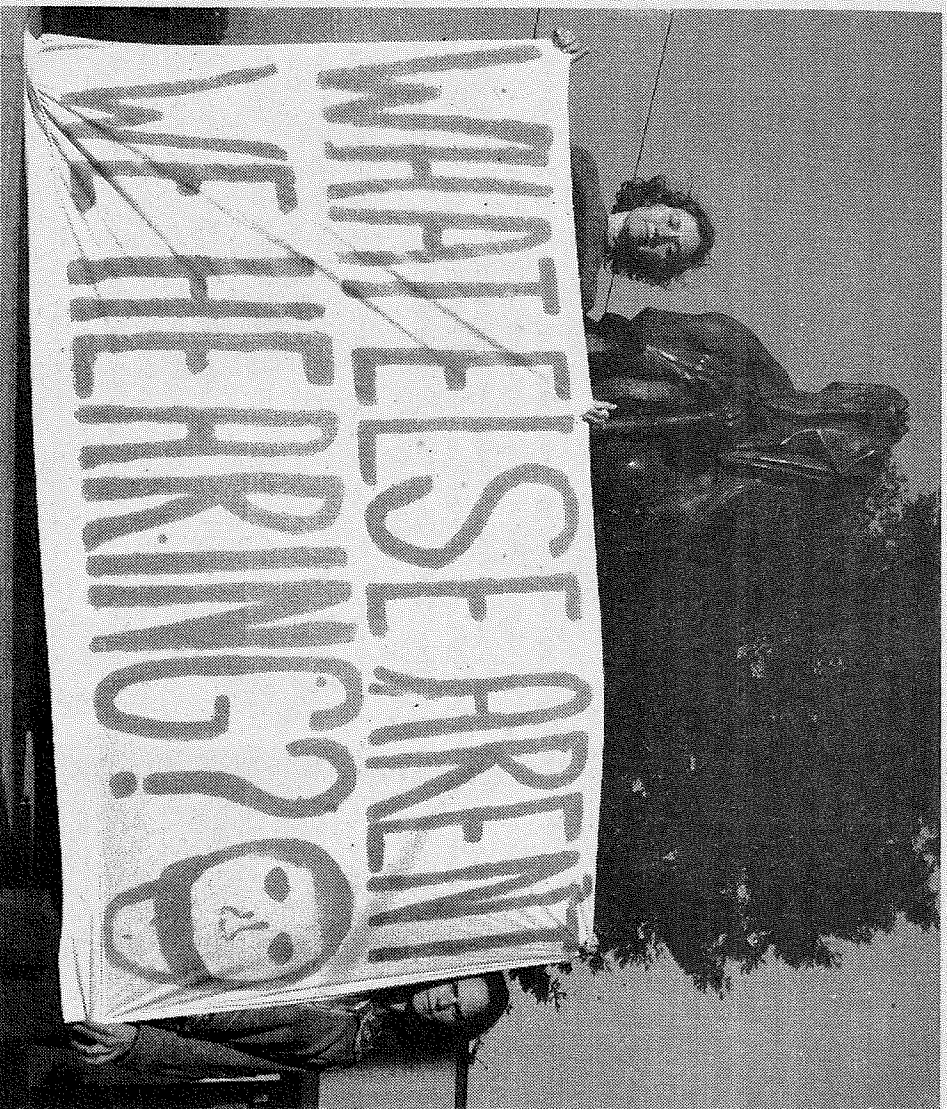
The judge warned Benjamin, "The logical outcome, if your motion is successful, is to not allow any flags or banners on overpasses."

"That's not an outcome we relish," the attorney replied, "but it might be the outcome the law demands." In the lobby of the courthouse after the hearing, Caltrans attorney Daniel Weingarten opined that such an outcome "would be a loss for them."

However, Benjamin points out that if Caltrans and its army of lawyers had thought a little about the constitutional implications of allowing people to post flags on state highways while thwarting other banners, Brown and Courtney never would have had to drag the state agency to court in the first place. "I'm disappointed that somebody didn't say, 'We're going to run into a [free] speech problem here,'" Benjamin says. "Somebody at Caltrans should have recognized that."

Even if the lawsuit win or lose, doesn't end as they had hoped, Brown and Courtney say that standing up for their rights, and possibly inspiring others to do the same, is success in itself.

"I think it's important for people, whatever their perspective is on the military action, to recognize that they can identify with this violation and that we share something in common," Courtney says. "We share in common that we want to defend the Constitution." ■



Cassandra Brown (left) and Amy Courtney were frustrated by the lack of critical dialogue during the war in Afghanistan.

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