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The Media and Law section of this collection of conference presentations contains the following 12 papers: "An Analysis of the Role of Insurance, Prepublication Review and Correction Policies in Threatened and Actual Libel Suits" (Elizabeth K. Hansen and Roy L. Moore); "Private Defamation Plaintiffs and Falsity since 'Philadelphia Newspapers, Inc. v. Hepps'" (Brian J. Steffen); "'Craft v. Metromedia, Inc.' and Its Social-Legal Progeny" (Jeremy Harris Lipschultz); "Words That Might Get You SLAPPED: Economic Interests vs. the First Amendment's Speech and Petition Clauses" (Paul H. Gates, Jr.); "Journalists' Right to Copy Audio and Video Tapes Presented as Evidence during Trials" (Sherrie L. Wilson); "A Rupture in Copyright" (Frederick Wasser); "Expansion of Communications Freedom by the European Court of Human Rights" (Robert L. Spellman); "The 'Opinion Defense' Is Not Dead: A Survey of Libel Cases Decided under the 'Milkovich' Test" (W. Robert Nowell, III); "Editorial Coverage of 'Rust v. Sullivan'" (Elizabeth Atwood-Gailey); "Access to Discovery Records in Florida Criminal Trials: Public Justice and Public Records" (Charles N. Davis); "The Use of Search Warrants in Canada and the U.S. To Obtain Photographic Evidence from Journalists" (Cindy M. Brown); and "Too Much Power in the Hands of Too Few: Congress, the FCC and the Superpower Debate, 1939-1942" (James C. Foust). (RS)

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AN ANALYSIS OF THE ROLE OF INSURANCE, PREPUBLICATION REVIEW AND CORRECTION POLICIES IN THREATENED AND ACTUAL LIBEL SUITS

By

Elizabeth K. Hansen
Assistant Professor
Eastern Kentucky University

and

Roy L. Moore
Professor
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The results indicate that libel is increasing as a major concern and that precautions such as prepublication review of articles by attorneys, libel insurance and written or unwritten policies for handling corrections do not necessarily insulate newspapers from libel suits.

In fact, newspapers that hire attorneys, buy insurance and develop formal correction policies are more likely to have been sued for libel than those that do not. Respondents overwhelmingly believed that most people who threaten to sue for libel would be satisfied with a retraction or apology from the newspaper, indicating a need for newspapers to pay closer attention to their correction policies and thus defuse potential libel suits.

While editors and publishers felt chilled by threatened and actual libel suits, they also agreed that the possibility of being sued made them better journalists.

Paper presented to the Law Division of the Association for Education in Journalism and Mass Communication Annual Convention, August 11 - 14, 1993, Kansas City, Missouri

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INTRODUCTION

In the late-1980s some experts predicted that libel suits would become less of a concern for media because, although damage awards were large, the number of new libel cases filed was declining (Sanford, 1988). That prediction has not materialized. The threat of megabuck libel verdicts has not diminished; instead, jury awards to libel plaintiffs are skyrocketing, according to a 1992 report from the Libel Defense Resource Center (Survey: Juries Hiking Libel Penalties). The average libel award made by juries in 1990-91 was \$9 million, a record for libel awards and six times higher than the \$1.5 million average award to libel plaintiffs during the 1980s. The only bright spots the LDRC study revealed were that the news media fared better before judges in the last two years and on appeals than they had in the previous decade. Judges ruled in favor of the media in 66.7 percent of cases, compared to 52.6 percent of cases in the 1980s. On appeal, only 34.7 percent of libel awards were affirmed.

Recently, the media have lost several major libel suits before the U.S. Supreme Court, including ones involving public officials and opinion (Harte-Hanks v. Connaughton and Milkovich v. Lorain Journal Co.), or the court, in denying certiorari, has allowed lower court decisions against the media to stand. What these decisions and the LDRC study indicate is that the possibility of being sued for libel and being hit with a megabuck verdict

continues to be a serious concern for the media. As one editor who participated in our study put it:

The defenses that seemed rock solid don't seem so solid now...The courts have poked holes in all of our defenses against libel suits...One lawsuit could put you out of business even if you win."

PURPOSES OF STUDY

The purposes of this study are to examine (1) how publishers and editors view libel and its impact on their newspapers and (2) the role of libel insurance, prepublication review of articles by attorneys and complaint policies for correcting errors in threatened and actual libel suits against a newspaper.

BACKGROUND

Since the U.S. Supreme Court constitutionalized American libel law with its decision in New York Times v. Sullivan in 1964, only a handful of empirical studies have examined the impact of libel on newspapers. That decision prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct "unless he proves that the defamatory statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

Three years later the U.S. Supreme Court extended the actual malice standard to public figures in a decision combining two cases (Curtis Publishing Co. v. Butts and Associated Press v. Walker). The court ruled against the media in the Butts case and for the media in the other. It was 22 years later before the U.S. Supreme Court again upheld a libel award against the news media that

involved a public figure (Harte-Hanks Communications, Inc. v. Daniel Connaughton, 1989).

The rash of multimillion dollar libel awards against the media followed the Court's 1974 ruling in Gertz v. Welch, which provided little guidance on awarding damages against the press. In Gertz the court ruled that public officials and public figures in libel actions would still have to prove actual malice to recover any damages, but it left the states relatively free to enact legislation to permit private citizens to successfully recover for libel so long as states did not impose liability without fault. As a result, private citizens suing for libel involving issues of public concern must demonstrate at least negligence. Gertz also set forth rules regarding damages, forbidding recovery of punitive damages without a showing of actual malice.

Post-Gertz trial court judgments against the media included \$9.2 million against the Alton (Ill.) Telegraph, \$1.6 million against the National Enquirer, \$1.5 million against The Sun, \$2.8 million against the Pittsburg Post-Gazette, and \$22.6 million against NBC, although some of these were reduced or reversed on appeal. Still on appeal is a state court jury decision in Philadelphia that awarded a former prosecutor \$34 million against the Philadelphia Inquirer, at that time the largest libel judgment ever against a news organization (Sprague v. Philadelphia Newspapers, Inc., 1990). It was surpassed by a 1991 jury award of \$58 million against WFAA, a Dallas television station that had accused a former district attorney, Vic Feazel, of taking bribes to

fix drunk driving cases. The suit was later settled out of court for an estimated \$20 million.

In reviewing trends in libel awards during 1990 and 1991, the Libel Defense Resource Center found not only that the average libel award had risen to \$9 million during that period, but also that the median jury award had jumped 750 percent to \$1.5 million, up from \$200,000 during the 1980s. The report also revealed that more than one in four jury verdicts exceeded \$10 million, compared to 2 percent in the 1980s. Three of five awards exceeded \$1 million, compared with one in four earlier. Punitive damages were awarded in three out of four successful libel suits, up from 57 percent in the 1980s, with the average punitive award at \$8.2 million, compared to \$1.5 million the decade before. The median punitive award increased 1,250 percent to \$2.5 million (Survey: Juries hiking libel penalties).

During the 1970s and 1980s many lower courts appeared to grant pure opinion absolute constitutional protection based on dicta in Gertz in which the court said:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Ollman v. Evans (1985) provided increased protection for opinion, but in Milkovich v. Lorain Journal Co. (1990), the Supreme Court rejected the interpretation other courts had made regarding its opinion in Gertz. A majority of the justices held that opinions that reasonably imply false and defamatory facts can serve as the basis for a libel action.

The recent decisions that seem to signal less protection for media in libel suits (Milkovich, Harte-Hanks v. Connaughton) and the continuing escalation of jury awards in libel suits would seem to make libel a continuing concern for newspaper publishers and editors.

Empirical studies of the impact of libel have tended to focus on the chilling effect libel has on newspapers. Most have been regional, dealing with newspapers in a single state. An exception was Anderson and Murdock's 1981 national mail survey of managing editors that found that more than 8 out of 10 editors said they were not "less aggressive" when deciding to print potentially libelous passages, while almost three-fourths of the sample agreed they were "increasingly careful" when editing stories (p. 527).

Hansen and Moore (1989, 1990) developed an eight-item Likert scale for measuring chilling effect to determine the impact, if any, of threatened and actual libel suits on small circulation newspapers. They surveyed by mail the editors and/or publishers of all 167 newspapers in Kentucky with a circulation of less than 50,000. Almost 70 percent of the 69 newspapers that returned questionnaires had been threatened at least once with a libel suit within the past five years. The findings suggest that even the threat of a libel suit may chill smaller papers. Respondents who had been threatened at least once scored significantly higher on that chill index than those who had not been threatened. Significantly, newspapers owned by local families or local corporations were significantly more likely to be chilled by a

threatened libel suit than those owned by regional or national chains.

Bowles and Marcum (1990) replicated the Kentucky study in Tennessee, with questionnaires sent to all 134 Tennessee newspapers. They found that 67 percent of the 61 editors responding reported their paper had been threatened with a libel suit during the past five years and those who had been threatened showed greater fear of libel. Unlike the Kentucky study, the Tennessee study did not find statistically significant correlations between the chilling effect scale and type of ownership. Bowles and Marcum did find daily newspapers were significantly more likely to be chilled than weekly newspapers. They also found a significant correlation between chilling and use of a private attorney for pre-publication review.

Judge Lois G. Forer, author of A Chilling Effect, contends that prepublication review of stories by lawyers before publication, although intended to save defendants the expense of future litigation, is a costly and essentially nonproductive practice. "When defensive journalism is practiced, readers and viewers are given sanitized print and electronic material, not for their benefit, but to save the authors, publishers, and producers the expense of litigation and the possibility of substantial damage awards," Forer wrote (p. 31).

Bunker (1992) mailed to the managing editors of all daily newspapers in Kansas eight factual situations concerning libel law based on eight Kansas Supreme Court decisions. He found that

editors who worked for larger newspapers, whose newspapers had been sued for libel within the past five years and whose papers had libel insurance were more cautious in evaluating the situations than were their counterparts who worked for smaller papers, had not been sued and whose newspapers were uninsured. Bunker concludes that his findings suggest the existence of a chilling effect on protected speech among editors who are more involved with and aware of libel issues.

Paralleling the escalation of libel litigation and concern about size of jury awards was Bezanson, Cranberg and Soloski's study (1987) of libel plaintiffs which found that "even those plaintiffs who reported that the alleged libel caused them financial harm said they were more interested in obtaining a retraction, correction or apology from the media than they were in obtaining money" (p. 28). That finding is significant for editors who want to avoid costly libel suits.

METHODS

A national sample of 305 editors and publishers of newspapers was interviewed by telephone between June 17 and July 1, 1992. The random sample was drawn from the 1992 Editor & Publisher Yearbook. All interviewing was conducted by professional interviewers at the University of Kentucky Survey Research Center. Of the 354 newspapers contacted, 305 agreed to participate, giving the survey a completion rate of 86 percent. The survey's margin of error was plus or minus 5.5 percent at the 95 percent confidence level.

The questionnaire included items dealing with respondents' attitudes about libel, newsroom practices such as prepublication review of articles by attorneys and complaint policies, libel insurance, threatened and actual libel suits filed against the newspaper and demographic information.

DEMOGRAPHICS

Newspapers responding to the survey had circulations ranging from 400 to 6 million, with a median circulation of 14,000. About 84 percent had a circulation of 50,000 or less. One hundred thirteen (37 percent) of the newspapers were published seven days a week, 140 (45.9 percent) six days a week, and 49 (16.1 percent) five days a week. Three papers (1 percent) were published two to four times a week. Over half of the newspapers (54.1 percent) were owned by regional or national media chains. The others were owned by individuals (33.8 percent), local corporations (7.5 percent) or had some other type of ownership (4.6 percent). At most newspapers, the person responding to the survey was the editor, although publishers, managing editors, executive editors and general managers answered for some newspapers. Respondents were overwhelmingly male (86.6 percent).

FINDINGS

Libel continues to be a concern for American newspapers and that concern is not diminishing, according to this survey. Overwhelmingly, respondents strongly disagreed (42 percent) or disagreed (50.5 percent) with this statement: In general, newspapers the size of mine can be less concerned today about libel

suits than they were five years ago. Only 4.6 percent of respondents agreed with the statement. Not only did most respondents see libel as a continuing concern, but most (72.5 percent) see it as a daily concern for newspapers the size of theirs. More than half (54.1 percent) strongly agreed or agreed that the possibility of being sued for libel has a "chilling effect" on newspapers the size of theirs. But on a personal level, only 45.6 percent of respondents strongly agreed or agreed with this statement: I think about libel almost every day.

Most newspapers surveyed (78 percent) had been threatened with a libel suit at least once in the past five years. Only 13.8 percent had not been threatened. About eight percent of respondents were unsure whether their publication had been threatened.

A third of newspapers (32.8 percent) had been sued for libel at least once in the past five years while 64.3 percent had not. Of those newspapers that had been sued, 44 percent had been sued for libel more than once. Three percent of respondents did not know if their newspaper had been sued.

Despite the high cost of libel, seven out of 10 respondents (69.8 percent) reported their newspaper had published a story when it knew in advance it was risking a libel suit. Of those who took the risk, 17.8 percent were actually sued, while more than 80 percent were not.

Respondents were asked how frequently their newspaper has an attorney review a story before publication. Almost half (48.5 percent) have an attorney check a story fewer than six times a year

and 17.7 percent never have an attorney review a story before publication. About the same percentage (17.4) have stories checked six to 11 times a year, while about 7 percent have stories checked once a month, about 5 percent twice a month and about 3 percent once a week. Almost three quarters of all respondents said investigative stories are the type of story most likely to be reviewed by an attorney before publication. Among newspapers that at least occasionally submit stories to attorneys prior to publication, a third (34.9 percent) are more likely to have an attorney review a story now than five years ago, while more than half (56.6 percent) reported no change in frequency of prepublication review.

Most newspapers surveyed (65.9 percent) had libel insurance, compared to 16.7 percent that did not. Interestingly, about 17 percent of respondents did not know if their newspaper had libel insurance.

Nine out of 10 newspapers surveyed (89.8 percent) have a policy for handling public complaints about inaccuracies in stories. Fewer than half of those policies (47.8 percent) are written. Among newspapers with complaint policies there was no consistency as to who handled the initial complaint. For a fifth (21.5 percent) of the newspapers, the person who wrote the story also handled the complaint. At other papers, complaints were handled by the writer's immediate supervisor (16.4 percent), the editor (37.6 percent), the publisher (1.5 percent) or no one person in particular (22.3 percent).

Practices also varied as to who handled corrections. The most common practice was for the person making the mistake to handle his/her own correction (41.6 percent). Editors of sections were designated to handle corrections for their sections at 27.2 percent of the newspapers, while 23 percent designated one person to make corrections. At 7.9 percent of newspapers, whoever received the correction wrote it for insertion in the paper.

Pearson correlations were performed to determine relationships among selected variables, including whether the newspaper had been threatened with a libel suit, whether the newspaper had been sued for libel, frequency of attorney prepublication review of stories, whether the newspaper had libel insurance, whether the newspaper had a formal complaint policy and whether that policy is in writing, whether the respondent viewed libel as less of a concern today than five years ago, circulation of the newspaper and type of ownership.

The larger a newspaper's circulation, the more likely it had been threatened with one or more libel suits ($r = .4220$, $p \leq .001$) or sued for libel ($r = -.3806$, $p \leq .001$).¹ Ownership was only weakly related to whether a newspaper had been threatened or sued,

¹ Respondents were not asked whether they had been threatened. Instead, they were asked if they had been threatened by a public figure, a private citizen, an elected official, a business, and anyone else. The threatened variable was created by summing responses to these five questions. A score of zero meant a newspaper had not been threatened while higher scores meant the newspaper had been threatened one or more times. Respondents were asked directly if their newspaper had been sued for libel, with a yes response coded as 1 and a no response coded as 2.

although the correlation between chain ownership and being threatened with a libel suit approached statistical significance ($r = .0962, p = .054$).

Newspapers that had been threatened or sued had attorneys review stories prior to publication more often than newspapers that had not been threatened ($r = -.3050, p \leq .001$) or sued ($r = .2120, p \leq .001$). Those same newspapers were also more likely to have libel insurance if they had been threatened ($r = -.1365, p \leq .05$) or sued ($r = .1298, p \leq .05$). Respondents from newspapers that use prepublication review more often and that have libel insurance were significantly more likely to disagree with this statement: In general, newspapers the size of mine can be less concerned today about libel suits than they were five years ago.

Newspapers that had been threatened with a libel suit were more likely to have a policy for handling public complaints about inaccuracies in stories ($r = -.1007, p \leq .05$). No relationship was found between a newspaper being sued for libel and having a policy for handling public complaints. However, a statistically significant relationship was found between a newspaper having been sued for libel and having its complaint policy in writing, with newspapers that had been sued more likely to have written policies ($r = .1339, p \leq .05$). Not surprisingly, larger circulation newspapers were more likely to have complaint policies ($r = -.1064, p \leq .05$) and to have those policies in writing ($r =$

-.1556, $p \leq .01$). While the relationship was weak, chain-owned newspapers also were more likely to have complaint policies in writing ($r = -.0968$, $p = .058$).

DISCUSSION

As this study shows, libel continues to concern editors and publishers of the nation's daily newspapers and that concern is increasing instead of declining. Precautions such as prepublication review of articles by attorneys, libel insurance and written or unwritten policies for handling corrections do not necessarily insulate newspapers from libel suits. Newspapers that hire attorneys, buy insurance and develop formal corrections policies are actually more likely to have been sued for libel than those that do not. Of course, it may be that these practices were instituted in response to threatened and actual libel suits rather than having been in place before suits were threatened or filed.

Because these practices are also related to circulation, it may be that larger newspapers with more resources are more likely to have funds available for attorneys' fees and libel insurance. The positive relationship between written correction policies and libel suits may also be a function of circulation size, with larger newspapers more likely to have formal, written policies in general.

Larger newspapers, too, are more likely to devote resources to investigative reporting, which often produces the types of stories that lead to threatened or actual libel suits. Larger newspapers also typically carry more stories, offering greater opportunity for libelous information to be published.

The experience of respondents in this study seems to parallel what Bezanson, Cranberg and Soloski (1987) found in their study of libel plaintiffs. Seven out of 10 (72.8 percent) of the editors and publishers agreed or strongly agreed that most people who threaten to sue for libel would be satisfied by a retraction or apology by the newspapers. This finding, combined with the results from the libel plaintiff study, would seem to indicate the need for newspapers to pay close attention to their correction policies, including designating someone to field complaints initially and to handle all corrections. Careful handling of initial complaints could defuse potential libel suits.

Despite the "chill" newspaper editors and publishers feel from threatened and actual libel suits, respondents see a positive side to libel law. Eight out of ten agreed or strongly agreed that the possibility of being sued for libel makes them better journalists.

For some editors and publishers, however, doing a better job of covering their communities by being more aggressive and doing more investigative reporting has increased the likelihood of being sued and the need for prepublication review and libel insurance. The litigious nature of American society undoubtedly accounts for some of the suits. As one managing editor put it:

We've been threatened with more libel suits and more libel suits have been filed in recent years. People are going crazy with all these lawsuits.

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TABLE 1

Pearson Correlation Coefficients for Selected Variables

	Think about libel daily	Less Concerned	Attorney review	Libel insurance	Complaint policy	Policy in writing	Circulation	Ownership	Sued	Threatened
Think about libel daily										
Less concerned than 5 years ago	.2185***									
Frequency of attorney review	.2065***	.1449**								
Libel insurance	.0412	.1676**	.1845**							
Complaint policy	.0133	.0893	.0633	-.0265						
Complaint policy in writing	-.0100	.0717	.0860	-.0425	^a					
Circulation	.0392	-.0345	-.2862***	-.0989	-.1064*	-.1556**				
Ownership	-.0559	.0377	.0272	-.0483	-.0968	.1276*				
Sued	-.0775	.0986*	.2120***	.1298*	.0192	.1339*	-.3806***	-.0805		
Threatened	-.1300*	-.0502	-.3050***	-.1365**	-.1007*	-.0909	.4220***	.0962	-.3539***	

^a = coefficient could not be computed

$p \leq .05^*$

$p \leq .01^{**}$

$p \leq .001^{***}$



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**Private Defamation Plaintiffs and Falsity Since
*Philadelphia Newspapers, Inc. v. Hepps***

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INTRODUCTION

Two decades following the constitutionalization of defamation law in *New York Times Co. v. Sullivan*,¹ in which the U.S. Supreme Court focused on the public or private status of the plaintiff as the primary factor in the determination of the standard of fault for the recovery of damages in defamation cases,² the Court shifted its attention to the character of the speech implicated in libel suits. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*³ and *Philadelphia Newspapers, Inc. v. Hepps*,⁴ the Court refocused its analysis on whether the speech involved in the libel claim was of a public or private nature.⁵

In *Hepps*, a case arising from a series of investigative stories published in the *Philadelphia Inquirer* in 1975 and 1976 regarding a private business owner's efforts to lobby the state government with the help of an individual with alleged ties to organized crime, the Court ruled that private plaintiffs bear the burden of proving fault and falsity to recover damages against a media defamation defendant when the speech at issue is of public concern.⁶ *Hepps* permitted the Court to return to an analysis of the character of the allegedly defamatory speech in making libel determinations, an approach it had rejected in 1974 and replaced with an emphasis on the public or private nature of the

¹ 376 U.S. 254 (1964).

² In *Sullivan*, the Court ruled that "public officials" could not prevail in a libel case absent a showing of "actual malice," defined as publishing with "knowledge that [the publication] was false or with reckless disregard of whether it was false or not." *Id.* at 279-80, 283-84. The Court required that proof of actual malice must be made with "convincing clarity," rather than the traditional preponderance-of-evidence standard required in most tort actions. *Id.* at 285-86. Prior to the application of First Amendment guidelines to the law of defamation, publishers of defamatory statements were held to a standard of strict liability if they published false and defamatory statements of public or private individuals absent the successful pleading of common-law privilege. See Pember, *Mass Media Law* (5th ed. 1990) 107-109, 164-183.

³ 472 U.S. 749 (1985).

⁴ 475 U.S. 767 (1986).

⁵ A study subsequent to the *Dun & Bradstreet* and *Hepps* cases concluded that lower courts consider dissemination of information by the mass media to be critical in determining whether the speech is of public concern. Additionally, public plaintiffs have not been able to successfully argue that speech regarding their activities is of private concern. Speech regarding governmental or political activity has been almost universally held to be of public concern, regardless of the status of the plaintiff or the defendant. Finally, a motive of economic or political self-interest on the part of the defendant is more likely to result in the speech being ruled to be a matter of private concern. Robert Drechsel, *Defining "Public Concern" in Defamation Cases Since Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 43 *Fed. Comm. L.J.* 1, 10-18 (1990).

⁶ 475 U.S. at 776. The Court left open the question of whether a similar standard would be applicable in cases involving a non-media defendant.

plaintiff.⁷

The Court had for 12 years focused on the nature of fault in libel cases. Most pertinent to *Hepps* was *Gertz v. Robert Welch, Inc.*,⁸ in which the Court held that "so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."⁹

The creation of differing levels of protection for libel defendants engaged in litigation with public and private plaintiffs, while part of a well-intentioned judicial desire to protect the private individual from reputational harm that the public person must risk, nonetheless harms public discourse and life by overvaluing the privatization of individual conduct. Privatization is a persistent theme in classical Western liberalism despite the many criticisms of the role of unrestrained individualism in diluting notions of public life.¹⁰ The U.S. Supreme Court implicitly sought to address this situation via its ruling in the *Hepps* case.¹¹

⁷ Under constitutional defamation analysis, there are four kinds of plaintiffs: Public officials, those elected to public office (*New York Times v. Sullivan*, 376 U.S. 254, 279-280 [1964]) and those public appointees "who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs" (*Rosenblatt v. Baer*, 383 U.S. 75, [1966], and *Kassel v. Gannett Co., Inc.*, 875 F.2d 935 [1st Cir. 1989]); all-purpose public figures, those individuals of "pervasive fame or notoriety" (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 [1974]); limited-purpose public figures, exemplified by the individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues" (*Gertz*, 418 U.S. at 351-52); and private individuals.

⁸ 418 U.S. 323 (1974).

⁹ *Id.* at 347. The majority of states have adopted a fault standard of negligence regarding private individuals, although some still hold to an actual malice standard regardless of the status of the plaintiff. States continuing to require, regardless of the latitude granted in *Gertz*, that private figures prove actual malice when the speech at issue is of public concern include: Alaska (*Gay v. Williams*, 486 F.Supp. 12 [D.C. Alaska 1979] [applying Alaska law]), Indiana (*AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 321 N.E.2d 580 [Ind. 1974], *cert. denied*, 424 U.S. 913), and New York (*Safarets, Inc. v. Gannett Co.*, 361 N.Y.S.2d 276 [1974] [applying a "gross irresponsibility" standard analogous to actual malice]). See Michael DiSabatino, Annotation, *State Constitutional Protection of Allegedly Defamatory Statements Regarding Private Individual*, 33 ALR 4th 212 (1991).

¹⁰ Among First Amendment theorists, the philosopher Alexander Meiklejohn was most concerned with the tension between individualism and community. See *infra* notes 19-24 and accompanying text. For further historical contexts on the individualism-community debate, see de Tocqueville, *Democracy in America* (1835); Bryce, *The American Commonwealth* (1886); Godkin, *Problems of American Democracy* (1896); Lukacs, *Outgrowing Democracy* (1984).

¹¹ While not specifically citing Meiklejohn as the theoretical basis of its *Hepps* decision, the Court has been guided by his writings in many First Amendment cases, most notably *New York Times Co. v. Sullivan*, *supra* note 1. See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 *Harv. L. Rev.* 1 (1965).

Critics argued in the wake of the *Hepps* ruling that the holding regarding proof of falsity created an undue burden that could not be met by private plaintiffs and that widespread "character assassination" and deprivation of private reputation would result.¹² But such criticism fails to pass muster against the theory that, in a robust democracy, all individuals must take part in public life. It is not enough to claim merely that, as a private individual, one should be shielded from the vicissitudes of public discourse. A public-discourse theory goes beyond arguing for protection of speech of a public nature and posits that individual members of the polity have a *responsibility* to take part in the rigors of discourse.

The privatization of conduct and the shield it offers to private individuals seeking to vindicate their reputations in libel suits is hardly a development of the constitutional libel standards. It has its roots in the common law of defamation. But the facts of the *Hepps* case show how the distinction between public and private individuals can retard the conduct of public life. Plaintiff Maurice Hepps had hired a lobbyist to argue on behalf of his private interests before the state legislature and before a state regulatory agency.¹³ Arguing on behalf of one's private interest is hardly anti-democratic, but the use of surrogates to do battle in the public arena raises questions. The use of lobbyists permit the private individual to have an impact on public policy without having to personally enter the fray that is public discourse. As a result, private individuals in such instances can try to argue, when they feel they have been defamed, that there was no public interest in their activities. Popular conceptions of the public interest follow the notion that the business operator's pursuit of economic gain generally is a matter of private interest.

Given that larger philosophical background to the public-private distinction, the Supreme Court's shift of focus in *Hepps* provides new avenues of defamation scholarship by offering an opportunity to re-examine issues of truth and falsity in

¹² See *infra* notes 114-118 and accompanying text.

¹³ See *infra* notes 61-89 and accompanying text.

private-figure libel litigation, factors often neglected in pre-*Hepps* constitutional defamation analysis. This study analyzes lower-court rulings since *Hepps* to determine how its mandate is being carried out.

Traditionally, the elements of libel include falsity, defamation, identification and publication.¹⁴ Until the *Times* ruling, however, falsity had always been presumed when a plaintiff filed a libel suit. Since the *Times* ruling, the Supreme Court's decisions in public-figure cases had interpreted the actual malice standard as placing the burden of proving falsity on the plaintiff,¹⁵ but common law¹⁶ and numerous state statutes¹⁷ continued to assume falsity and place the burden of proving truth on the defendant when the plaintiff was a private individual. *Hepps* was an important contribution to the law of defamation in that it provided the rule that the private plaintiff has the burden of proving falsity in defamation suits arising from speech of public concern.¹⁸

This paper begins with a presentation of the ideas of Alexander Meiklejohn and Robert C. Post that form the theoretical background for the project. It then conducts an analysis of the constitutionalized tort of libel before, during and following the *Hepps* decision. This study's methodology is presented, followed by an examination of post-*Hepps* decisions that have further interpreted the ruling's mandate. A concluding section summarizes the study and offers suggestions for further judicial and academic scrutiny.

¹⁴ See Franklin and Anderson, *Cases and Materials on Mass Media Law* (4th Ed.) 229-247.

¹⁵ See *New York Times v. Sullivan*, 376 U.S. 254, 279-280, 283-284; see also *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (requiring the plaintiff to prove recklessness by producing sufficient evidence for the trier of fact to conclude that the "defendant in fact entertained serious doubts as to the truth of his publication").

¹⁶ At common law, truth is an affirmative defense to defamation; it is also an issue to be raised and proved by the defense. See Restatement (Second) of Torts § 581a (1977) ("One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true."); *id.* comment b ("It has been consistently held that truth is an affirmative defense which must be raised by the defendant and on which he has the burden of proof.")

¹⁷ At issue before the trial court in *Hepps* was the constitutionality of 42 Pa. Cons. Stat. Ann. §8343 (b)(1). This statute provides in pertinent part: "[I]n an action for defamation, the defendant has the burden of proving, when issue is properly raised: (1) The truth of the defamatory communication." *Id.* The trial court ruled the statute unconstitutional at the close of evidence, although the Pennsylvania Supreme Court reversed that position on appeal and remanded for a new trial on those grounds. 485 A.2d 374, 382-387 (Pa. 1984).

¹⁸ See *infra* notes 61-89 and accompanying text.

THEORETICAL FOUNDATION

A number of theorists try to guide normative views as to how courts should weigh the competing values in cases where private individuals are implicated in speech that is of public concern. Most prominent in communication is the theory of free speech as an essential element in public discourse, advocated initially by the philosopher Alexander Meiklejohn. Put simply, the public-speech theory places speech of a public nature in a preferred position in First Amendment analysis and argues for absolute protection of such speech under the First Amendment. Forms of speech considered "private" in character are to be accorded lesser protection under the First Amendment. Under the public-speech theory, the public or private status of the plaintiff should bear no weight in judging the level of protection for the speech.

Meiklejohn, an early student of what is termed the "central meaning" of the First Amendment, believed the speech and press clause to be absolute, said as much in the title of his famed law review article,¹⁹ but then qualified his absolutism with the caveat that one must properly operationalize the terms of the First Amendment to locate oneself in the debate over the meaning of free expression. To Meiklejohn, the key terms in the First Amendment are "abridgement," "speech" and "press." He ponders what phenomena constitute each. His answer on the first term is that "regulation" of speech is not the same thing as an abridgement, and, most importantly, it is the function of the speech in question that should determine whether the government action limiting speech should be considered a regulation or an abridgement. As he wrote:

We are looking for a principle which is not in conflict with any other provision of the constitution, a principle which, as it now stands, is absolute in the sense of being "not open to exceptions," but a principle which also is subject to interpretation, to change, or to abolition, as the necessities of a precarious world

¹⁹ The First Amendment is an Absolute, 1961 *Sup. Ct. Rev.* 245. Meiklejohn considered the law review article a logical step in the development of his public-speech views, starting with the publication of *Free Speech and Its Relation to Self-Government* (1948), in which he simply argued without definition that all speech of a public nature deserves absolute protection under the Constitution. *See also* Meiklejohn, *Political Freedom, The Constitutional Powers of the People* (1960); Donald Meiklejohn, *Public Speech and the First Amendment*, 55 *Geo. L.J.* 234 (1966)

may require.²⁰

The absolutism of the First Amendment, Meiklejohn argues, applies to speech of "public concern,"²¹ which he considers those "activities of thought and communication by which we 'govern'."²² Such absolute protections are a necessity of liberal government in which the governed have the responsibility to understand political issues, to pass judgment on the actions of elected agents with regard to those issues, and to devise methods ensuring the wisdom and effectiveness of those decisions.²³

The problem, of course, is in determining what speech is to be deemed as being "of public concern." This definitional difficulty dogged Meiklejohn throughout his work, and the problem continues today. Meiklejohn considered public speech as that regarding government and politics, education, philosophy, science, literature and the arts, all of them deserving absolute protection under the First Amendment as primary to the maintenance of liberal self-government and critical to the development of intellectual capacities necessary for the exercise of democratic prerogatives.²⁴

While Meiklejohn was one of many theorists of the First Amendment, few have addressed the problem of conceptualizing the notion of private reputation and its relative value in relation to free speech. Robert C. Post²⁵ has blamed this absence of a concept of reputation for a Supreme Court libel doctrine described by defamation scholar Rodney Smolla as "dripping with contradictions and confusion and [a] vivid testimony to the sometimes perverse ingenuity of the legal mind."²⁶

²⁰ *Id.* at 253.

²¹ As such, Meiklejohn's conception of absolutism differs from that of Justice Black, perhaps the Supreme Court's only free-speech absolutist. Black's famous argument that "no law means no law" led him to accord absolute protection to public *and* private speech. Black, however, drew sharp lines between speech and conduct in his application of the absolutist standard. See e.g. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and *Cohen v. California*, 403 U.S. 15 (1971). See also Edward Cahn, Justice Black and First Amendment "Absolutes": A Public Interview, 37 *N.Y.U. L. Rev.* 549 (1962).

²² Meiklejohn, *supra* note 19 at 255.

²³ *Id.*

²⁴ Meiklejohn, *supra* note 19 at 257.

²⁵ The Social Foundations of Defamation Law: Reputation and the Constitution, 74 *Cal. L. Rev.* 691 (1986).

²⁶ *Dun & Bradstreet, Hepps and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 *Geo. L.J.* 1519 (1987).

Post proposes three models of private reputation — those based on property, honor and dignity. The property model of reputation considers a good name as something earned through the efforts and labors of the individual.²⁷ Such a view of reputation is essential to business and economic relationships, with the good name of the individual understood to be a form of “capital” that “creates funds” along with “patronage and support.”²⁸ The purpose of defamation law is purely private under this model — that of preventing the wrongful deprivation of the proper market value of the private individual’s reputation.²⁹

By comparison, the model of reputation as a form of honor views the good name as having its source in the status of the defamed party rather than being earned through his or her labors.³⁰ Finally, reputation as a measure of individual dignity seeks to ensure individual happiness and community identity.³¹ As such, the purpose of defamation law under this final model is more public in nature in that it is partly designed to promote civility. It may even be viewed as more consistent with the values of public discourse in that it helps build a sense of community within the polity.

The problem for defamation analysis, Post argues, is that the Supreme Court has neither articulated a notion of what a reputation should mean nor how a libel suit can serve to compensate the defamed reputation. He uses as an example the Court’s language in *Gertz*, which hints at a preference for measuring reputation as a property interest,³² but whose “actual holding is explicable only within the framework of

²⁷ Post, *supra* note 25, at 693.

²⁸ *Id.* at 694 (quoting J. Hawes, Lectures Addressed to the Young Men of Hartford and New Haven 95 [Hartford 1828]).

²⁹ *Id.* at 695.

³⁰ *Id.* at 697-98. Post argues that such a model of reputation is probably incapable of serving as the basis for libel recovery in the United States, given the egalitarian myth of American society and the Constitution’s ban, U.S. Cons. Art. I, §9, Cl. 8, on titles of nobility without the consent of Congress. *Id.* at 723.

³¹ *Id.* at 715.

³² Justice Powell’s opinion in *Gertz* emphasized the “strong and legitimate state interest in compensating private individuals for injury to reputation,” while adding that the interest “extends no further than compensation for actual injury.” 418 U.S. at 348-49.

reputation as dignity."³³

Similarly, in *Hepps*, there is no theoretical justification as to the reason why the plaintiff's reputation warrants protection. Was plaintiff Hepps concerned that the property value of his business interests would be harmed as a result of the stories in the *Inquirer*? Or was it a non-economic vindication he sought, one more in accord with Post's notion of reputation as dignity? The failure of the Court to conduct a searching inquiry of the nature of reputation, Post argues, needlessly complicates libel doctrine. Why we value private reputation is just as important a question as our society's ongoing discussion of the meaning of free speech.

Given the necessity of a community for the existence of public discourse, it is proper to prefer a model of reputation as a function of dignity rather than one of property. It is a way of reconciling the private individual's interest in maintaining a good name versus the broader social and political interest in maintaining public discourse that is "uninhibited, robust and wide-open."³⁴ Property models of reputation can be viewed as more appropriate to social systems dedicated *solely* to the pursuit of private interests in which active self-government of the kind envisioned by Meiklejohn does not exist.³⁵ Part of the purpose of public discourse is to create a stable community, in the words of Meiklejohn's theoretical successor, Thomas I. Emerson;³⁶ a model of reputation as purely a property interest clashes with free speech values.

³³ Post *supra* note 25 at 730. Specifically, Post argues for a reputation-as-dignity rationale behind *Gertz* due to its refusal to define actual injury "except to say that it includes, over and above 'out of pocket loss,' such harms as 'impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.'" *Id.* at 729 (quoting *Gertz*, 418 U.S. at 350).

³⁴ *New York Times Co. v. Sullivan*, 376 U.S. at 270.

³⁵ "[The notion of the] private ... is a record of the legitimation of a bourgeois view of life: the ultimate generalized privilege, however abstract in practice, of seclusion and protection from others (the public); of lack of accountability to "them;" and of related gains in closeness and comfort of these general kinds. As such, and especially in the senses of the rights of the individual (to his private life or, from a quite different tradition, to his civil liberties) and of the valued intimacy of family and friends, it has been widely adopted outside the strict bourgeois viewpoint."

Raymond Williams, *Keywords: A Vocabulary of Culture and Society* (1976 ed.) 204.

³⁶ Toward a General Theory of the First Amendment, 72 *Yale L.J.* 877 (1963); *see also*, Emerson, *The System of Freedom of Expression* (1970).

RESEARCH QUESTIONS

The tension between private reputation and free speech forms the major question to be addressed in the present research project: Has the erection of a proof-of-falsity burden for private defamation plaintiffs become an insurmountable hurdle in libel litigation?

Private-figure libel actions receive relatively little attention from defamation scholars, perhaps due to the impression that the bulk of journalistic exposure to situations out of which libel suits might arise involve the coverage of public officials and public figures. Yet the print and broadcast media often turn their attention to matters relating to private individuals, and the discipline's failure to adequately analyze this area of the law represents a hole in scholarship.³⁷

Seven years have passed since the Supreme Court handed down its ruling in the *Hepps* case, giving lower federal and state courts an ample period of time during which patterns of application of the new burden-of-proof standard could emerge through case analysis.³⁸ Indeed, a review of case law since 1986 reveals a number of instances in which the *Hepps* ruling has had an effect on the outcome of libel litigation through the granting or denial of summary judgment or the outcome of a trial or appeal.

In line with the major question addressed by this study, two specific questions are addressed in the wake of the *Hepps* ruling:

- 1) What standard of proof of falsity are jurisdictions requiring of private plaintiffs in public-speech libel actions?
- 2) Are private plaintiffs succeeding in proving falsity or at least raising material issues of falsity to preclude summary judgment for defendants?

³⁷ An examination of such databases as *Communication Abstracts*, *Dissertation Abstracts International*, the Wilson indexes, ERIC and other sources yield little scholarship on private-figure libel and none focusing primarily on the falsity burden as a result of the *Hepps* decision.

³⁸ Prior to the *Hepps* ruling, according to one recent study, courts did not determine the underlying truth or falsity of allegedly defamatory statements in up to 78 percent of cases in a year. In the 10 years prior to *Hepps*, the courts, on average, determined truth or falsity in less than 40 percent of libel cases. Since 1986, that average percentage has risen to 63 percent. John Soloski, *Libel Law and Journalistic Malpractice: A Preliminary Analysis of Fault in Libel Litigation* (Paper presented to the Law Division, Association for Education in Journalism and Mass Communication, 1991).

LIBEL ANALYSIS BEFORE HEPPS

Despite the well-known maxim of seditious libel that "the greater the truth, the greater the libel," recovery for defamation has long assumed the existence of false statements of facts.³⁹ The Ninth Circuit Court of Appeals noted in *Dworkin v. Hustler Magazine*, "A large body of case law establishes that the First Amendment prohibits defamation liability for otherwise protected speech, unless the speech contains a defamatory statement of untrue fact."⁴⁰

Even though falsity was required for defamation to be actionable, the falsity of the published material and damage to the plaintiff was legally presumed at common law if it could be shown that the statement in question was defamatory. A commonly cited definition of a defamatory communication is that it "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."⁴¹ Before the 1964 *Times* ruling, libel defendants had the affirmative burden to plead and prove the truth of the published statements in all their particulars.⁴²

Partly due to the difficulty of such a task, the Supreme Court adopted the actual malice rule with regard to public officials in *New York Times Co. v. Sullivan*.⁴³ There, the Court ruled that holding defendants strictly liable in defamation actions relating to the official conduct of elected officials, regardless of whether the defendant had actually been at fault in publishing the defamatory communication, chilled First Amendment

³⁹ Statements of pure opinion are accorded absolute First Amendment protection and are not subject to defamation actions. See *Gertz v. Robert Welch, Inc.*, 418 U.S. at 339-340:

"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact" (footnote omitted).

Cf. *Milkovich v. Lorain Journal Co.*, 110 S.Ct. at 2707-8 (setting definitions as to what constitutes statements of opinion for First Amendment purposes).

⁴⁰ 867 F.2d 1188, 1196 (9th Cir.), cert. denied, 493 U.S. 812 (1989). Footnote 5 adds the comment that "the requirement that the speech contain a false statement of fact applies not just to defamation claims, but to all claims seeking to impose civil liability for speech not otherwise outside the protection of the First Amendment."

⁴¹ Restatement (Second) of Torts § 559 (1977).

⁴² See *supra* notes 14-18 and accompanying text.

⁴³ 376 U.S. 254 (1964).

freedoms unacceptably.⁴⁴ Instead, the Court ruled, elected public officials suing for defamation must demonstrate that the publisher either knew the statements were false or published them with reckless disregard as to whether they were false or not.⁴⁵

The emergence of the new constitutional standard prompted some initial confusion as to whether the burden of proving truth or falsity remained with the defendant or had been transferred to the plaintiff. *Garrison v. State of Louisiana*⁴⁶ placed the burden squarely on the public-official plaintiff. Twenty-two years later, *Hepps* established the rule that public and private libel plaintiffs must prove falsity to recover when the speech at issue is of public concern.⁴⁷

Through 1971, the Court greatly expanded the classes of plaintiffs required to prove "actual malice." The standard was applied to criminal libel actions,⁴⁸ to civil suits brought by non-elected public officials with authority over public policy,⁴⁹ to public figures,⁵⁰ and to private individuals involved in controversies of public concern.⁵¹ By 1974, however, the Court abandoned the latter focus on the nature of the speech as a

⁴⁴ "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism even though it is believed true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to 'steer far wider of the unlawful zone.' The rule thus dampens the vigor and limits the variety of public debate."

Id. at 279 (citations omitted).

⁴⁵ *Id.* at 279-280.

⁴⁶ 379 U.S. at 74 (1964) (reading *New York Times* as meaning that a "public official [is] only allowed the civil [libel] remedy only if he establishes that the utterance was false").

⁴⁷ *Cf. King v. Tanner*, 539 N.Y.S.2d 617, 621 (Sup. 1989):

"[I]t appears that the result of *Dun & Bradstreet* has been to clearly leave the States with the authority to 'revive' (although they apparently never went away) the pre-*New York Times v. Sullivan* common-law standards for [private-speech] libel wherein ... after the showing of the defamation by plaintiff, the falsity is presumed and the defendant ... then has the burden of proving the 'truth' of such statement."

⁴⁸ *Garrison v. State of Louisiana*, 379 U.S. 64 (1964).

⁴⁹ *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (holding that former supervisor of county recreation area must prove actual malice despite his limited policy-making responsibilities).

⁵⁰ *Curtis Publishing Co. v. Butts and Associated Press v. Walker*, 388 U.S. 130 (1967).

⁵¹ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

"If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety."

Id. at 43-44. (Brennan, J., plurality opinion)

means of determining the fault burden of the plaintiff and returned to a determination based on the public or private nature of the plaintiff.

In *Gertz v. Robert Welch, Inc.*,⁵² a prominent Chicago attorney brought a libel action against the author and publisher of a John Birch Society-related magazine article which described Gertz as a communist fronter engaged in a conspiracy to discredit the Chicago police. At trial, the jury awarded Gertz \$50,000 in unspecified damages, but the judge determined that the *New York Times* standard of actual malice applied and entered judgment notwithstanding the verdict in favor of the defendant.⁵³ The Seventh Circuit Court of Appeals affirmed,⁵⁴ but the Supreme Court reversed and remanded in a case that overruled *sub silentio* the *Rosenbloom* public-concern test as a standard for setting the fault level in defamation cases.

The Court in *Gertz* replaced the public-concern formulation with three new rules designed to reach a proper balance between the private plaintiff's reputational interests and the free-speech rights of defendants: 1) Only public officials and public figures need be required to prove actual malice to collect damages in defamation actions; the requirement is not necessarily the burden of private plaintiffs, even when the speech at issue is of public concern.⁵⁵ 2) States may define their own standards of fault in private-figure libel actions at any level higher than that of strict liability.⁵⁶ 3) In those cases in which the private plaintiff seeks punitive damages, actual malice on the part of the publisher must be proven.⁵⁷

The Court in *Gertz* was credited by many commentators with providing a more reasonable balance of reputational and free-speech interests,⁵⁸ but the case was limited in its holding to determining the fault standard in those instances in which the plaintiff

⁵² 418 U.S. 323 (1974).

⁵³ 322 F.Supp. 997, 998 (N.D.Ill. 1970).

⁵⁴ 471 F.2d 801 (7th Cir.1972). The Court of Appeals doubted the validity of the trial court's finding that Gertz was not a public figure, but it reached the same result by applying the public interest test as articulated in *Rosenbloom. Id.* at 805, n. 8.

⁵⁵ *Id.* at 343.

⁵⁶ *Id.* at 348.

⁵⁷ *Id.* at 350.

⁵⁸ *Cf. Post supra* notes 25-33 and accompanying text.

was private and the speech at issue was of public concern. One question left unanswered in the case was what level of constitutional protection, if any, was to be afforded to allegedly defamatory speech of a private nature involving a private plaintiff. *Gertz* also provided no constitutional answers as to which party in a private-plaintiff defamation action bore the burden of proving truth or falsity.⁵⁹ It would be more than a decade before the Court would consider those questions.

THE HEPPS CASE

The first of the unanswered questions left from *Gertz* was answered in *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, a libel claim pursued by a private construction firm falsely accused in a limited-circulation credit report of filing for bankruptcy protection. The Court ruled that private individuals pursuing a defamation claim regarding speech of purely private concern need not prove actual malice to collect punitive damages against non-media defendants.⁶⁰

Having distinguished between *Gertz* and *Dun & Bradstreet*, the Court settled the question of the fault standard regarding private plaintiffs. But it still had not determined which party bore the burden of proof when a defamation action filed by a private plaintiff concerned allegedly defamatory speech of public concern. Such was the question facing the Court, 10 months after its *Dun & Bradstreet* ruling, in *Philadelphia Newspapers, Inc. v. Hepps*.⁶¹

The *Philadelphia Inquirer* in 1975 and 1976 published a series of five investigative stories by reporters William Ecenbarger and William Lambert concerning Maurice Hepps, the principal stockholder in Thrifty Stores, Inc., a chain of retail outlets

⁵⁹ The issue of truth or falsity, traditionally at the core of defamation claims, receded to the background with the development of constitutional defenses. See Randall Bezanson, Gilbert Cranberg and John Soloski, *Libel Law and the Press: Myth and Reality* 183-195 (1987) (arguing, on the basis of an empirical study of libel cases, for the establishment of alternative dispute resolution programs to provide low-cost means of attaining an equivalent of declaratory judgment processes to determine truth or falsity, which, authors claim, remains the critical issue of dispute in most defamation actions).

⁶⁰ 472 U.S. at 761. Cf. *Gertz*, *supra* note 8-9 and accompanying text, in which the speech at issue was deemed to be of public concern.

⁶¹ 475 U.S. 767 (1986).

specializing in beer sales. The stories also concerned the activities of a number of Hepps' business partners. Hepps had developed during the 1960s a then-novel marketing concept for selling beer: Rather than selling from warehouses or delivering to customers, Hepps opened large, supermarket-type, self-service stores in shopping malls.⁶² Hepps' marketing concept had been successful but was threatened by state legislation that would have had an adverse impact on his business.⁶³

The general theme of the *Inquirer* series was that Hepps and his associates had links to organized crime figures and had used those links to influence the legislative and administrative processes in state government.⁶⁴ The *Inquirer* reported that when a bill in the Pennsylvania Legislature threatened Thrifty's purchasing abilities, Hepps hired a lobbyist to defeat the measure. Lobbyist Joseph Scalleat was reputed to have connections with organized crime. He allegedly contacted State Senator Frank Mazzei, who opposed the bill, which never passed.⁶⁵

At another time, the *Inquirer* reported, state officials suspended the liquor licenses of Hepps' chain of stores, apparently a result of improprieties in the chain's management. Mazzei tried arranging a meeting between Hepps and Alexander Jaffurs, the chief counsel of the state Liquor Control Board, which had suspended the licenses. Jaffurs refused to attend the meeting and was discharged shortly afterward in a move he claimed was partly a result of his suspension of the Thrifty licenses.⁶⁶

Following publication of the *Inquirer's* reports, Hepps brought a defamation suit in the Pennsylvania Court of Common Pleas. He testified at length there that the statements at issue were false, and he extensively cross-examined the authors of the stories as to the truth of the published statements.⁶⁷ The parties had raised the issue of which side bore the burden of proving truth or falsity prior to trial, but the trial court

⁶² John V.R. Bull, *Philadelphia Newspapers, Inc. v. Hepps*: New Hope for Preserving Freedom of the Press, 38 *Mercer L. Rev.* 785 (1987).

⁶³ *Id.*

⁶⁴ 475 U.S. at 769.

⁶⁵ *Philadelphia Newspapers, Inc. v. Hepps*, Brief for Appellant at 5 (No. 84-1491).

⁶⁶ *Id.* at 6.

⁶⁷ 475 U.S. at 770.

reserved its ruling until the close of evidence. At that point the court determined that a state statute placing the burden of proof of truth on the defendant in defamation actions⁶⁸ unconstitutionally devalued First Amendment freedoms in favor of Hepps' reputational interest. The trial court instructed the jury that plaintiff bore the burden of proving falsity, even though a state shield law⁶⁹ permitted institutional media defendants to refuse to reveal the names of their sources of allegedly defamatory information. The jury ruled for Philadelphia Newspapers.⁷⁰

Hepps appealed to the Pennsylvania Supreme Court, which reversed and remanded for a new trial.⁷¹ That court held that placing the burden of proof on the defendant was not constitutionally unreasonable, given the fault standard plaintiff still was required to meet.⁷²

Noting post-*Gertz* confusion among lower jurisdictions,⁷³ the U.S. Supreme Court noted probable jurisdiction⁷⁴ and reversed.⁷⁵ Justice O'Connor wrote for the majority:

"When the speech is of public concern but the plaintiff is a private figure, as in *Gertz*, the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern."⁷⁶

⁶⁸ 42 Pa. Cons. Stat. Ann. §8344 (1982).

⁶⁹ *Id.* at §5942(a) (1982).

⁷⁰ 475 U.S. at 771.

⁷¹ *Hepps v. Philadelphia Newspapers, Inc.*, 485 A.2d 374, 382-387 (Pa. 1984).

⁷² "[U]nder our law the inability of the publisher to overcome the presumption of falsity of the defamatory statement will not insure (*sic*) recovery by the plaintiff. The recovery is dependent upon plaintiff's ability to establish malice or negligence on the part of the publisher in disseminating the defamatory falsehood."

Id. at 385. The Pennsylvania high court additionally rejected Philadelphia Newspapers' contention that plaintiff must prove falsity as a requirement of demonstrating fault. *Id.* at n. 13.

⁷³ See e.g. *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 375-376 (6th Cir. 1981), *General Motors v. Piskor*, 352 A.2d 810 (1976), and *Jacron Sales Co. v. Sindorf*, 350 A.2d 688 (1976) (all requiring that private plaintiffs prove falsity as well as fault in defamation actions). Cf. *Denny v. Mertz*, 318 N.W.2d 141, 153, n. 35 (Wis. 1982), *cert. denied*, 459 U.S. 883, and *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978) (both requiring all defendants, regardless of status, to prove truth as affirmative defense).

⁷⁴ 472 U.S. 1025 (1985).

⁷⁵ The Court's vote was 5-4 in favor of Philadelphia Newspapers. Justice O'Connor delivered the majority opinion in *Hepps*, joined by justices Brennan, Marshall, Blackmun and Powell. Justice Brennan delivered a separate concurrence, joined by Blackmun, to argue the point, specifically left unaddressed by the majority, that the plaintiff's burden of proving falsity should obtain regardless of whether the defendant is a member of the institutional media. 475 U.S. at 779-780.

⁷⁶ 475 U.S. at 775.

While the Court would not require private plaintiffs to prove actual malice to collect damages for allegedly defamatory statements of public concern, it would at least require them to prove negligence and falsity as a matter of law. In such cases, O'Connor wrote, a balancing of reputational and free-speech interests is necessary:

"[W]here the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting [presumptively] true speech. To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."⁷⁷

O'Connor acknowledged that placing the burden of proof on the plaintiff in such cases will result in protecting speech which is false but not demonstrably so. But she relied on the *Gertz* admonition that the Court must "protect some falsehood in order to protect speech that matters"⁷⁸ and that speech concerning the legitimacy of the political process "clearly matters."⁷⁹ Additionally, O'Connor wrote, placing the burden of proving falsity on the plaintiff only marginally increased the overall evidentiary burden of the plaintiff because a showing of fault often involves demonstrating falsity.⁸⁰ Consequently, the majority argued that its *Hepps* ruling did not constitute the breaking of new ground but rather the reaffirmation of constitutional principles in a formerly ambiguous area.⁸¹

Narrowing the reach of the decision, the Court declined to pass on the constitutionality of placing the burden of proving truth on the defendant in instances, such as this case, in which a shield law permitted the defense to withhold the names of its sources from the plaintiff. That issue was not before the Pennsylvania Supreme Court and was not preserved for appeal to the U.S. Supreme Court.⁸² Similarly, O'Connor added in a footnote that the Court was not considering the quantity of proof

⁷⁷ *Id.* at 776-777.

⁷⁸ *Id.* at 778 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 [1974]).

⁷⁹ *Id.*

⁸⁰ *Id.* See *Prosser and Keaton on The Law of Torts*, §116, at 839 (5th ed. 1984).

⁸¹ 475 U.S. at 778.

⁸² *Id.* at 779. O'Connor, however, noted that the majority was "unconvinced" that the existence of the shield law would make a difference in the constitutionality of the Pennsylvania statute. *Id.*

required in private-figure/ public-speech defamation actions, whether a different standard might apply if the defendant was not a member of the media, or the potential impact on burdens of proof of a declaratory-judgment option for private plaintiffs.⁸³

Justice Brennan's concurrence, joined by Justice Blackmun, reiterated his long-standing position that there should be no media-nonmedia distinction in determining standards of fault or the placement of the burden of proof.⁸⁴ The dissent, written by Justice Stevens and joined by Chief Justice Burger and justices Rehnquist and White, attacked the majority for providing a new rule of law that will benefit only "those who act negligently or maliciously."⁸⁵ Stevens repeated Justice Stewart's argument that the value of reputation "reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty"⁸⁶ and that it would be difficult for private plaintiffs to prove a negative:

"Indeed, in order to comprehend the full ramifications of [the *Hepps*] decision, we should assume that the publisher knew that it would be impossible for a court to verify or discredit the story and that it was published for no other purpose than to destroy the reputation of the plaintiff. Even if the plaintiff has overwhelming proof of malice — in both the common-law sense and as the term was used in [*New York Times*] — the Court ... seems to believe that the character assassin has a constitutional license to defame."⁸⁷

As a result of *Hepps*, plaintiffs bear the burden of proving falsity in two kinds of cases. One involves media defendants, public plaintiffs and speech of public concern.⁸⁸ The other involves media defendants, private plaintiffs and speech of public concern.⁸⁹ The burden-of-proof question as a constitutional matter, however, remains open in cases involving public plaintiffs and speech of private concern,⁹⁰ private plaintiffs and

⁸³ *Id.* at n. 4

⁸⁴ *Id.* at 780 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 781 [1985] [Brennan, J., dissenting], and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 [1978]).

⁸⁵ *Id.*

⁸⁶ *Id.* at 781 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92-94 [1966] [Stewart, J., concurring]).

⁸⁷ *Id.* at 785.

⁸⁸ *Id.* at 775. Such has been the case since *New York Times Co. v. Sullivan*, *supra* note 1.

⁸⁹ *Id.* at 768-69.

⁹⁰ The Supreme Court has never specifically addressed libel in this factual situation. Many commentators argue that no speech involving a public plaintiff could be held as a matter of private concern. See Leading Cases, 99 *Harv. L. Rev.* 212 (1985).

speech of private concern,⁹¹ and non-media defendants involving speech of public concern.⁹² Such distinctions may be addressed in subsequent lower-court decisions. The present study, however, only considers that configuration of cases in which defendants are accused of defaming private plaintiffs with speech of public concern.

In order to succeed at proving falsity, plaintiffs must demonstrate to the satisfaction of the fact-finder that the statements in question are more than literally false. A showing of literal falsity will not suffice when the statements, while not literally true, are substantially true. Such was the issue in *Masson v. New Yorker Magazine, Inc.*,⁹³ when defendant acknowledged the alteration of quoted material but claimed the alteration brought about no material change in the meaning when compared with the speaker's actual words. Statements are considered substantially true when the "gist" or the "sting" of the published material accords with literal truth.⁹⁴

Just when a statement ceases to be substantially true and enters the universe of false statements is still unclear. A demonstration of this is in *Rouch v. Enquirer & News of Battle Creek*,⁹⁵ a Michigan case prompted by a newspaper's report that a private individual had been "arrested and charged" with the rape of a 17-year-old girl when in fact he had only been arrested and later released after an investigation cleared him.⁹⁶ The record of the case showed five additional errors throughout a 10-paragraph story.⁹⁷ While the Michigan Supreme Court majority found the story substantially

⁹¹ *Dun & Bradstreet* only addressed standards of fault; falsity was admitted by the defendant. See *supra* note 3. Cf. *King v. Tanner*, 539 N.Y.S. 2d 617 (1989) (placing the burden of proving truth on a non-media defendant in a case involving a paternity allegation, judged by the court to be speech of private concern).

⁹² See Smolla *supra* note 26 at 1528-29.

⁹³ See *infra* note 108-9 and accompanying text.

⁹⁴ See *Haueter v. Cowles Publishing Co.*, 811 P.2d 231, 239 (Wash Ct. App. 1991) (finding of substantial truth regarding report that for-profit corporation had kept 80 percent of funds it had raised for local charities): Where "the 'sting' portion of the article is true," the "content of the articles is insufficient to create a genuine issue of material fact, even under the preponderance of the evidence standard, as to whether the gist of allegedly defamatory articles was false." See also *Hovey v. Iowa State Daily Publication Board*, 372 N.W.2d 253 (Iowa 1985) (ruling that student newspaper was not liable for reporting that plaintiff had been "raped" when in fact she had been "sexually abused" under Iowa criminal code definition).

⁹⁵ 487 N.W.2d 205 (Mich. 1992)

⁹⁶ *Id.* at 215.

⁹⁷ *Id.*

true,⁹⁸ a dissent argued that the story ceased to be substantially true due to the quantity of errors over the relatively short length of the story.⁹⁹

SUBSEQUENT SUPREME COURT DECISIONS AFFECTING *HEPPS*

Subsequent cases in the U.S. Supreme Court have further refined the meaning of *Hepps* and holds import for the present study. *Anderson v. Liberty Lobby, Inc.*¹⁰⁰ established the rule that libel defendants are entitled to summary judgment in their favor as a matter of law when they can demonstrate that there is no genuine issue of material fact as to falsity or any essential element of a defamation claim.¹⁰¹ A non-defamation case, *Celotex Corp. v. Catrett*,¹⁰² further established that those who move for summary judgment need not produce any affidavits or other materials negating the opponent's claim, but may prevail by only "pointing out" to the trial court "that there is an absence of evidence to support the nonmoving party's case."¹⁰³ The opinion, however, does not define what constitutes an absence of evidence.

In *Harte-Hanks Communications, Inc. v. Connaughton*,¹⁰⁴ a public-official defamation case, the Supreme Court again declined to consider the standard of proof of falsity required of plaintiffs, public or private.¹⁰⁵ *Milkovich v. Lorain Journal Co.*,¹⁰⁶ in which the Court clarified its position regarding the actionability of defamatory statements of opinion, resulted in the opinion by Chief Justice Rehnquist that statements which are provably false will result in liability, assuming some level of fault is shown:

⁹⁸ "The substantial truth doctrine is frequently invoked to solve two recurring problems: minor inaccuracies and technically incorrect or flawed use of legal terminology." *Id.* (opinion of Boyle, J.).

⁹⁹ "Indeed, when the entire newspaper article consists of only ten sentences, and those ten sentences contain six factual inaccuracies, this Court should not lightly overturn the jury's conclusion that the overall effect was materially false." *Id.* at 225 (Cavanaugh, J., dissenting).

¹⁰⁰ 477 U.S. 242 (1986).

¹⁰¹ *Id.* at 247-248.

¹⁰² 477 U.S. 317 (1986).

¹⁰³ *Id.* at 325.

¹⁰⁴ 491 U.S. 657 (1989).

¹⁰⁵ *Id.* at 661, n.2. "There is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence. We express no view on this issue" (citations omitted).

¹⁰⁶ 497 U.S. 1 (1990).

Foremost, we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved. Thus, unlike the statement, "In my opinion Mr. Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.¹⁰⁷

Finally, in *Masson v. New Yorker Magazine, Inc.*,¹⁰⁸ the Court ruled that a media defendant's acknowledged alteration of quotations may not suffice as a demonstration of falsity as part of the plaintiff's *prima facie* case. "If an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner of fact or expression, the speaker suffers no injury to reputation that is compensable as a defamation," Justice Kennedy wrote for the majority.¹⁰⁹ A public-figure case, *Masson* did not address the issue of whether the same standard would necessarily apply to private individuals.

COMMENTARY REGARDING *HEPPS*

Little research has been performed in the wake of *Hepps*. What follows is a brief summary of law-review articles, most of them student-written notes, that form the *Hepps* literature. The literature, written immediately following the ruling, is speculative in nature, with writers raising questions and concerns this study seeks to answer.

Generally, scholarly support for *Hepps*' burden-of-proof rule focused on the procedural soundness and practicality¹¹⁰ of the rule and its possibilities of limiting press

¹⁰⁷ *Id.* at 16 (Rehnquist, C.J.)

¹⁰⁸ 111 S.Ct. 2419 (1991).

¹⁰⁹ *Id.* at 2433.

¹¹⁰ Thomas Cushing, et al, Comment, *Hepps v. Philadelphia Newspapers, Inc.*: The Validity of the Common Law Presumption of Falsity in Light of *New York Times* and Its Progeny, 61 *Notre Dame L. Rev.* 125 (1986), and Joan Shaffner, Protection of Reputation vs. Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation, 63 *S. Cal. L. Rev.* 435, 478-480 (1987). Shaffner also argues that *Hepps* brings private-figure defamation actions more into line with public-plaintiff actions and with tort law generally, in which plaintiffs always must prove the impropriety of actions taken by defendants. *Id.* at 480.

self-censorship.¹¹¹ Others applauded the Court's siding with free-speech values¹¹² at a time during which it is perceived as taking a conservative (and, apparently, anti-expression) turn.¹¹³

Opponents of the *Hepps* rule regarding falsity attacked the decision for its creation of an undue burden of proof for private plaintiffs,¹¹⁴ for its refusal to acknowledge that private individuals do not voluntarily enter into public debate,¹¹⁵ for its unduly high protection of false speech,¹¹⁶ and for errors in logic.¹¹⁷

The most strenuous objections to the *Hepps* ruling argued that placing the falsity burden on the plaintiff creates a virtually impossible situation for private figures who would be placed in the position of proving a negative. As one commentator theorized:

A news organization publishes a story stating that John Doe is "corrupt." In a subsequent libel action, the court finds that use of "corrupt" implies that the news organization was privy to undisclosed defamatory facts. While the court deems the statement actionable, current law dictates that the plaintiff bear the burden of proving he is *not* corrupt, even though he may never discover the specific allegations underlying the charge. Moreover, John Doe's conclusory declaration of "non-corruptness" may be deemed insufficient to create a triable issue of fact under present summary judgment standards.¹¹⁸

Some research, such as the ongoing Iowa Libel Project, has concluded that more libel cases are turning on the issue of truth or falsity as a result of the *Hepps* ruling. But there has been no study of individual cases. The challenge of this project will be to examine the cases and find patterns of adjudication.

¹¹¹ Marian Carlson, Note, *Philadelphia Newspapers, Inc. v. Hepps*: A Logical Product of the New York Times Revolution, 64 *Denv. U. L. Rev.* 65 (1987).

¹¹² Linda Kalm, The Burden of Proving Truth or Falsity in Defamation: Setting a Standard for Cases Involving Non-Media Defendants, 62 *N.Y.U. L. Rev.* 812 (1987).

¹¹³ See *supra* note 62.

¹¹⁴ Evdoxia Beroukas, Note, The Over-Constitutionalization of Libel Law: *Philadelphia Newspapers, Inc. v. Hepps*, 36 *DePaul L. Rev.* 391 (1987), and Donna Hilliard Phillips, Note, The Burden of Proving the Truth of Allegedly Libelous Statements: *Philadelphia Newspapers, Inc. v. Hepps*, 12 *Okla. City U. L. Rev.* 933 (1987).

¹¹⁵ Thomas P. Branigan, Note, Truth or Consequences: *Philadelphia Newspapers, Inc. v. Hepps*, 1986 *Det. C.L. Rev.* 1219.

¹¹⁶ Phillip G. Greenfield, Note, Private Reputation vs. Freedom of Speech: *Philadelphia Newspapers, Inc. v. Hepps*, 53 *Mo. L. Rev.* 121 (1988).

¹¹⁷ Keith Burgess-Jackson, The Perils of Error Analysis in Defamation Law, 12 *Comm. & L.* 3 (1990).

¹¹⁸ Stephen P. Anthony, Note, Vague Defamatory Statements and the Libel Plaintiff's Burden of Proving Falsity, 87 *Col. L. Rev.* 623 (1987).

METHODS

The author used *Shepard's Citations* on the Lexis on-line system to generate a list of cases subsequent to *Hepps* citing that case. The author then skimmed opinions in the more than 250 citations produced by that method to determine whether the case was a defamation case, whether the plaintiff was considered a private individual for purposes of the defamation action, whether the speech at issue was of public concern and whether the issue of the burden of proving truth or falsity was implicated in the court's decision.

Additionally, the author conducted an on-line search of the Lexis database utilizing combinations of search terms "defamation," "libel," "private," "plaintiff," "public concern," "burden," and "falsity." That search uncovered some cases involving the same factual situations that did not directly cite the *Hepps* decision as authority. All cases identified through the two methods were further Shepardized in an effort to uncover additional case law.

In all, the search uncovered eight federal and 17 state court decisions rendered through January 1993 that further interpreted the *Hepps* standards. The decisions come from the federal district and circuit courts, as well as state appellate and high courts.

FINDINGS

What quantity of proof of falsity are jurisdictions requiring of private plaintiffs in public-speech libel actions? The question has presented itself in only a small number of libel cases since 1986, with the majority of courts requiring that plaintiffs prove falsity by a "preponderance of the evidence,"¹¹⁹ the typical evidentiary burden of plaintiffs in civil suits, and one demanding plaintiffs provide "clear and convincing evidence" of falsity.¹²⁰

¹¹⁹ *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990), cert. denied, 111 S.Ct. 1586 (1990); *Pearce v. E.F. Hutton Group, Inc.*, 664 F.Supp. 1529 (D.D.C. 1987); and *Haueter v. Cowles Publishing Co.*, 811 P.2d 231 (Wash.App. 1991).

¹²⁰ *Landsdowne v. Beacon Journal Pub. Co.*, 512 N.E.2d 979 (Ohio 1987).

In *Unelko Corp. v. Rooney*, a private company sued *60 Minutes* correspondent Andy Rooney for stating on his occasional network television commentary that the company's product, a chemical treatment designed to repel raindrops from automobile windshields (and sent to Rooney by the plaintiff in the hope of securing free publicity), "didn't work" when applied to Rooney's windshield. Without explanation, the Ninth Circuit Court of Appeals ruled that the evidentiary standard in the case should be preponderance of the evidence.¹²¹

Haueter v. Cowles Pub. Co. arose from stories published by the Spokane (Wash.) *Spokesman-Review* and *Chronicle* in 1983 that plaintiff's corporation had kept 80 percent of the proceeds it had raised for local charitable organizations. The Washington Court of Appeals ruled that plaintiff need prove falsity only by a preponderance of the evidence when seeking to recover "only actual damages."¹²² The court was silent as to whether a stricter quantity of proof would be required if punitive damages were sought.

Ohio has opted for the more stringent evidentiary burden of clear and convincing evidence, the same burden of proof required in *New York Times* to demonstrate actual malice in public official and public figure defamation cases and in private-plaintiff, public-speech cases in which punitive damages are sought. *Landsdowne v. Beacon Journal Pub. Co.*, an appeal by the *Akron Beacon Journal* of an Ohio trial jury award of \$7,500 in actual damages over a report that the plaintiff engaged in questionable betting practices at a harness racing track, resulted in the Ohio Supreme Court's finding tacit support in *Hepps* for a heightened evidentiary standard even though the U.S. Supreme Court specifically left the issue unaddressed. Because the U.S. Supreme Court in *Hepps* was seeking to strengthen protections for speech of public interest, the Ohio court wrote, "we find that the standard of proof required should be heightened from the 'preponderance of the evidence' standard..."¹²³ The Ohio court found "glaring

¹²¹ 912 F.2d at 1057.

¹²² 811 P.2d at 238.

¹²³ 512 N.E.2d at 984-85.

deficiencies" in a reliance on the preponderance standard:

"In the normal civil suit where [the preponderance] standard is employed, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. ... In libel cases, however, we view an erroneous verdict for the plaintiff as most serious."¹²⁴

A dissenting opinion, however, argued that most members of juries would not be able to determine the difference in the quantities of proof.¹²⁵

Some confusion persists among the limited number of jurisdictions that have considered the question of standards of proof of falsity. While most require proof of falsity by a preponderance of the evidence, the stricter standard of clear and convincing evidence seems more justified, as the Ohio Supreme Court argued in light of the Court's reasoning in *Hepps*. In seeking to provide greater protection for speech of public interest, the Court is trying to elevate that speech to protected levels near that provided by *New York Times*.

Are private plaintiffs succeeding in proving falsity or at least raising material issues of falsity to preclude summary judgment for defendants? An analysis of case law subsequent to *Hepps* indicates that plaintiffs are succeeding in a substantial number of instances of at least creating triable issues of fact to preclude summary judgment. In at least three reported instances, proof of falsity has been upheld on appeal of libel verdicts. The following discussion of cases centers on elements of falsity that have been deemed sufficient and insufficient to at least create triable issues of fact in private-figure libel litigation.

Proofs of falsity upheld. Plaintiffs in three cases have succeeded in having their trial proof of falsity upheld on appeal.¹²⁶

In *Weller v. American Broadcasting Companies*, KGO-TV, the ABC-owned and -operated station in Los Angeles, aired a series of broadcasts allegedly implying that

¹²⁴ *Id.* at 985 (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50 (1971)).

¹²⁵ *Id.* at 986 (Wright, J., dissenting).

¹²⁶ *Weller v. American Broadcasting Companies*, 283 Cal. Rptr. 644 (Cal.App. 1 Dist. 1991); *Caruso v. Local Union No. 690*, 730 P.2d 1299 (Wash. 1987); *cert. denied*, 108 S.Ct. 67 (1988); and *Straw v. Chase Revel*, 813 F.2d 356 (11th Cir. 1987); *cert. denied*, 484 U.S. 856 (1987).

Weller, an antique broker, had (among other things) sold a stolen candelabra at a "grossly inflated price" to a museum and that he had misrepresented the quality and origin of the piece.¹²⁷ Weller had responded in court by offering expert testimony contradicting the conclusions presented in the broadcast report. A jury awarded Weller \$2 million in general and presumed damages on its finding that the statement was "substantially false."¹²⁸

On appeal, ABC argued that the true value and origin of the candelabra were implied facts not objectively verifiable and not provably false as required under *Hepps* and *Milkovich*. But the California Court of Appeals held that, even though estimations of the value of such antiques were the result of "inexact science," the question of whether the price of the candelabra was "grossly inflated" could be objectively verified and that plaintiff had met his burden of showing at trial that the purchase price had not been grossly inflated.¹²⁹ ABC also argued that it could not be held culpable for its reporting regarding the origin of the candelabra because Weller had refused to disclose the name of the former owner, identified in the court opinion as a woman named Barbara Herbert, at the time of broadcast. Therefore, ABC argued, it could not judge at the time of the broadcast whether the statement was true or false. But the appeals court was again unmoved and ruled that speakers will be held liable even when they can't determine the truth or falsity of the defamatory statement:

Obviously, the assertion that the candelabra were [sic] once owned by Barbara Herbert and had been stolen or otherwise acquired from her house is either true or false, and subject to being disproved by demonstrating that they had in fact belonged to a Texas family for at least the last 40 years, and that a member of this family sold the candelabra to Weller. In connection with their demand for a retraction, respondents even offered to demonstrate the falsity of appellants' assertions by permitting appellant's attorneys to meet with the former owners.

...The question is whether the statement is provably false in a court of law, not whether the defendants knew it was false at the time it was made. In any event, disclosure of the *name* of the former owner was simply not essential to demonstrating the falsity of appellants' assertions.¹³⁰

¹²⁷ 283 Cal. Rptr. at 648.

¹²⁸ *Id.*

¹²⁹ *Id.* at 652.

¹³⁰ *Id.* at 653 (citations omitted).

Caruso v. Local Union 690 was appealed from a jury verdict in a libel action involving a small business operator and a local union of the International Brotherhood of Teamsters. Caruso had won a \$244,000 jury award after the union newsletter had urged members not to patronize his business in Spokane, Wash. The newsletter claimed Caruso had harassed union members, took the keys to their trucks and ordered their vehicles impounded when they parked in Caruso's parking lot to make deliveries to nearby stores.¹³¹ The allegation had been made originally to the union by a third party, the owner of a neighboring tavern who later denied having made the charge.¹³²

The Washington Supreme Court found that the trial judge had erred by requiring proof of *both* parties in the case — falsity on the part of Caruso and substantial truth on the part of the Teamsters. But the state high court nonetheless let the award stand because "the evidence was sufficient 'to persuade a fair-minded person' that the article's statements were false." The plaintiff's evidence of falsity had included testimony by Caruso's employees that Caruso had never removed keys or ordered that vehicles be impounded. Also, the deposition of a union member whose argument with Caruso prompted the article in the newsletter "contained inconsistencies which bolstered Caruso's assertions of falsity."¹³³

The controversy in *Straw v. Chase Revel, Inc.* started with an editorial published in *Business Opportunities Digest* and written by J.F. Straw charging that rival *Entrepreneur Magazine* was "in bankruptcy."¹³⁴ In response, *Entrepreneur Magazine* publisher Chase Revel wrote an editorial charging that Straw "extracts his 'opportunities' from [daily newspaper] classified sections or accepts payment from people to editorialize their business opportunities."¹³⁵ Straw filed a libel suit and a trial jury in Georgia awarded him \$125,000 in compensatory and punitive damages.¹³⁶

¹³¹ 730 P.2d at 1301.

¹³² *Id.* at 1303.

¹³³ *Id.*

¹³⁴ 813 F.2d at 358.

¹³⁵ *Id.* at 359.

¹³⁶ *Id.*

On appeal, the 11th Circuit Court of Appeals accepted Straw's mere denials of Revel's allegations as sufficient evidence to meet the burden of proving falsity. While Revel argued that Straw had offered nothing beyond his denials in his effort to prove the falsity of the allegations, the appeals panel faulted Revel's argument as being "unelaborated by explanation, citations to the record, or citations to applicable authority."¹³⁷ The appeals court concluded that Straw's denials "contradict those things reported as facts in the challenged editorial. The jury could therefore conclude that the article was false and defamatory."¹³⁸ The upshot seems to be that, at least in this case, ties in defamation cases will go to the plaintiff.

Evidence of falsity defeating motions for summary judgment. More often than determining whether proof of falsity is sufficient to uphold a jury award, appeals courts have confronted the issue of whether evidence of falsity is enough to create a triable issue of fact and preclude defense motions for summary judgment. Such a judgment is the disposition of a suit without trial when there is no material issue of fact to be decided at trial or no inference is to be drawn from undisputed facts. Plaintiffs must create such an issue generally under the standards of *Celotex Corp. v. Catrett*¹³⁹ and in libel actions under the authority of *Anderson v. Liberty Lobby, Inc.*¹⁴⁰ In six post-*Hepps* cases,¹⁴¹ appeals courts have deemed evidence of falsity sufficient to permit a case to go to trial.

In two cases, triable issues of fact were established after plaintiffs introduced affidavits contradicting the allegedly defamatory material. In *Sisemore v. U.S. News and World Report*, a Vietnam veteran sued the national newsmagazine for reporting that he had withdrawn to the Alaska wilderness as a result of his suffering post-traumatic stress

¹³⁷ *Id.*

¹³⁸ *Id.* at 360.

¹³⁹ *See supra* note 102 and accompanying text.

¹⁴⁰ *See supra* notes 100-1 and accompanying text.

¹⁴¹ *Sisemore v. U.S. News and World Report*, 662 F.Supp. 1529 (D.Alaska 1987); *Pearce v. E.F. Hutton*, 664 F.Supp. 1490 (D.D.C. 1987); *Cunningham v. United Nat. Bank*, 710 F.Supp. 861 (D.D.C. 1989); *J & J Sheet Metal Works, Inc. v. Picarazzi*, 793 F.Supp. 1104 (N.D.N.Y. 1992); *Wiemer v. Rankin*, 790 P.2d 347 (Idaho 1990); *Dougherty v. Boyertown Times*, 547 A.2d 778 (Pa.Super. 1988).

syndrome and the fear that he would "hurt someone."¹⁴² Sisemore defeated a motion for summary judgment by providing an affidavit from a psychiatrist stating that Sisemore had not suffered from post-traumatic stress. Sisemore also introduced his own affidavit that he had never served in Vietnam or in combat.¹⁴³ Similarly, in *J & J Sheet Metal v. Picarazzi*, in which a union official charged the plaintiff's workers with being unqualified in terms of technical knowledge, skills, planning and judgment, plaintiff established a triable issue of fact by introducing affidavits of the company's workers disputing the defamatory charge. The court ruled that the union official's charges were verifiable as true or false under the *Hepps* and *Milkovich* standard and ordered a trial on the merits.¹⁴⁴

In other instances, the issue of whether the defamatory material constituted actionable statements of fact or inactionable assertions of opinion created jury questions as to falsity. Such was the case in *Wiemer*, in which an Idaho man sued a free weekly newspaper for hinting that the man had lied to police during the investigation of his wife's shooting death several years earlier.¹⁴⁵ The defendant argued that his published claim that evidence against plaintiff was "overwhelming" was unprovable as to its truth or falsity, but the Idaho Supreme Court ruled that the implication that Wiemer had lied to police was a defamatory statement capable of being proved true or false.¹⁴⁶ Further establishing a material issue of falsity, the Idaho court said, was the defendant's admission that he did not read everything in the police file, which included a polygraph examination concluding that the plaintiff had told the truth about the circumstances of his wife's death. Also, an FBI report, which the defendant had admitted to reading but not including in his story, concluded that it could not be determined whether the

¹⁴² 662 F.Supp. at 1531.

¹⁴³ *Id.* at 1532.

¹⁴⁴ 793 F.Supp. at 1109.

¹⁴⁵ 790 P.2d at 347. The story prompting the libel suit, written by Rankin, reported that Wiemer "stated [to police] that his wife shot herself... [But t]he evidence collected [indicating] the victim did not shoot herself — and which I have viewed personally — is overwhelming." *Id.* at 349.

¹⁴⁶ *Id.* at 353.

plaintiff or his wife had fired the weapon.¹⁴⁷ Accordingly, the Idaho court remanded for a new trial on the question of falsity.¹⁴⁸

Similarly, in *Dougherty v. Boyertown Times*, the Superior Court of Pennsylvania reinstated the libel suit of a chiropractor who had been charged in a newspaper letter to the editor with being incompetent and unethical.¹⁴⁹ The trial court had dismissed the suit at the close of the plaintiff's case because the charges were deemed to be assertions of opinion incapable of being proved true or false. The Superior Court, however, deemed the statements to be potentially verifiable and subject to a jury's determination of falsity.¹⁵⁰

Two federal cases resulted in plaintiffs being permitted to present evidence of falsity at trial without providing any evidence at a hearing over a motion for summary judgment. *Cunningham v. United National Bank*, a suit brought by a fired Washington, D.C., bank vice president, concerned a series of newspaper interviews by top bank officials that concerned problems in the bank's operations in 1987. Without offering any evidence that the undisclosed charges were false, Cunningham was permitted by the District of Columbia District Court to stave off a motion for summary judgment and prepare evidence for trial.¹⁵¹ The court offered no reasoning as to why it would permit Cunningham to proceed.

*Pearce v. E.F. Hutton & Co.*¹⁵² arose out of the publicity attending the investigation of mail and wire fraud at the brokerage house during the mid-1980s. The district court judge permitted Pearce to introduce evidence from news reports that contradicted a private investigator's claim that Pearce was solely responsible for the fraud and that he

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 358.

¹⁴⁹ 547 A.2d at 788. Specifically, the letter written by the wife of one of plaintiff's patients and published in the *Boyertown Times*, charged Dougherty with rendering treatments that were "ineffective and possibly harmful." A later passage complained that, during the treatment period, the letter writer's husband "became worse and had to go to another doctor for treatment." *Id.* at 786. The court found both statements to imply undisclosed facts to be considered as containing both fact and opinion. *Id.* at 787.

¹⁵⁰ *Id.* at 788.

¹⁵¹ 710 F.Supp. at 863.

¹⁵² 664 F.Supp. 1490 (D.D.C. 1987).

knew his actions were wrong. The judge denied a defense motion for summary judgment.¹⁵³

Evidence of falsity deemed insufficient. Private-figure libel plaintiffs failed to meet the burden of proving falsity at trial or on motions to preclude summary judgment in 11 cases. The reasons included procedural grounds,¹⁵⁴ findings that the defamatory matter was substantially true,¹⁵⁵ findings that statements implying defamatory content could not be proven as true or false,¹⁵⁶ conclusions that the plaintiff's assertions of falsity created "ambiguity" rather than proof,¹⁵⁷ and a judge's ruling that the plaintiff's mere denial of the defamatory statement insufficient evidence of falsity.¹⁵⁸

The foregoing findings illustrate that judges in many cases are providing plaintiffs some latitude in proving falsity. In *Weller*, the court accepted expert testimony contradicting the defamatory statement as proof of falsity. In *Caruso*, it can be argued that the case for falsity was somewhat stronger than in *Weller* given the multiplicity of sources calling the truth of the defamatory charge into question. But in *Straw*, the plaintiff's mere denial of the defamatory statement was deemed sufficient as *de facto* proof of falsity.

Still other cases in the study show the importance of the *Milkovich* decision's standards for statements of opinion in relation to *Hepps*. Plaintiffs in *Wiemer* and

¹⁵³ *Id.* at 1490. Specifically, former Attorney General Griffin Bell, hired by E.F. Hutton to conduct an internal investigation of the fraud (for which Hutton pleaded guilty to 2,000 criminal counts), had concluded in a report issued at a press conference that a few low-level employees, including Pearce, had been wholly responsible for the illegalities. The court, however, noted several sources publicized in the press who supported Pearce's theory that upper-level managers were aware of the abuses.

¹⁵⁴ *Law Firm of Daniel P. Foster v. Turner Broadcasting*, 844 F.2d 955 (2nd Cir. 1988), *cert. denied*, 488 U.S. 852 (1988); *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270 (N.Y. 1991); *George v. Iskcon of California*, 4 Cal. Rptr. 2d 473 (Cal.App. 4 Dist. 1992).

¹⁵⁵ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437 (Minn.App. 1986); *Rouch v. Enquirer & News of Battle Creek*, 398 N.W.2d 245 (Mich. 1986) (hereinafter *Rouch I*); *Rouch v. Enquirer & News of Battle Creek*, 487 N.W.2d 205 (Mich. 1992) (hereinafter *Rouch II*); *Haueter v. Cowles Publishing Co.*, 811 P.2d 231 (Wash.App. 1991).

¹⁵⁶ *Locricchio v. Evening News Ass'n.*, 476 N.W.2d 112 (Mich. 1991), *cert. denied*, 469 U.S. 1018 (1991); *Friedman v. Boston Broadcasters, Inc.*, 522 N.E.2d 959 (Mass. 1988).

¹⁵⁷ *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1586 (1990).

¹⁵⁸ *Spears v. McCormick & Co.*, 520 So.2d 805, 808 (La.App. 3 Cir. 1987). *Cf. Cunningham and Pearce* cases, *supra* notes 151-53, in which plaintiffs' denials of published defamatory materials was considered sufficient to create triable issue of fact as to falsity.

Dougherty were able to create triable issues of falsity by successfully arguing that the statements in question were matters of fact rather than opinion.

But confusion remains in this area. What is to constitute evidence of falsity? Is a plaintiff's mere denial of a defamatory statement to be considered sufficient to meet the burden of proving falsity? The variety of answers provided among the many state and federal jurisdictions prevents the articulation of coherent principles.

CONCLUSIONS

Three conclusions can be drawn from this study of federal and state cases guided by the *Hepps* standard that private plaintiffs bear the burden of proving that defamatory statements are false before liability can be shown:

1) Most important as an answer to early criticism that *Hepps* would erect in insurmountable hurdle for private plaintiffs is the finding that, in many instances, plaintiffs are succeeding in proving falsity or least making a material issue of falsity to preclude summary judgment. Plaintiffs are most often meeting the burden of proof in those instances in which falsity can be demonstrated with some form of evidence. That evidence can take the form of affidavits or news reports disputing the defamatory charge.¹⁵⁹

2) Plaintiffs sometimes are meeting the burden by merely denying the defamatory charge in court. In other cases, the denials are considered insufficient. No method of distinguishing the cases can be determined. In *Cunningham v. United National Bank*,¹⁶⁰ a federal district judge, without comment, permitted the plaintiff's denial of the defamatory material to suffice as a basis for permitting a trial to proceed. But in *Spears v. McCormick & Co.*,¹⁶¹ a Louisiana appellate court held that the plaintiff must produce more than a denial to preclude summary judgment.

3) Few jurisdictions have addressed the question of what standard of proof is to be

¹⁵⁹ See *supra* notes 126-144 and accompanying text.

¹⁶⁰ See *supra* note 151 and accompanying text.

¹⁶¹ See *supra* note 158.

required to meet the burden of proving falsity. Most of those jurisdictions confronting the issue have opted for a "preponderance of the evidence" standard.¹⁶² One jurisdiction, Ohio, has opted for the more stringent standard that falsity must be proven by private plaintiffs with "clear and convincing" evidence.¹⁶³

At first blush, most American courts are at least implicitly applying the Meiklejohnian standard in their approach to private-plaintiff / public-speech libel cases in the wake of *Hepps*. Most courts are providing additional constitutional protections for defendants when they are speaking on matters of public concern, with the spirit of the shift best exemplified by the Ohio Supreme Court's finding that private-figure libel suits will be considered under standards different from other tort actions because "we view an erroneous verdict for the plaintiff as most serious."¹⁶⁴

Yet, as is the case following many Supreme Court libel rulings, the answering of some questions in *Hepps* leads to the asking of others. The major question remaining at the conclusion of this study is what kinds of evidence will be deemed sufficient to meet the burden of proof or to permit libel cases to go to trial. This question is troubling in light of the Supreme Court's consistent policy of promoting "uninhibited, robust and wide-open" debate¹⁶⁵ on matters of public concern.

An orthodox Meiklejohnian approach to libel litigation would establish firm standards of proof as well as a requirement that some kind of evidence beyond a pleading or plaintiff affidavit be offered to refute a publication which the plaintiff contends is defamatory. Treating defamatory-speech cases as any other tort claim, something which a "preponderance of the evidence" standard encourages as do provisions that mere denials of defamatory statements will suffice to create triable issues of fact, hardly elevates speech of public concern to the heightened position which a Meiklejohnian analysis and the spirit of the Supreme Court's rulings would warrant.

¹⁶² *See supra* notes 121-22 and accompanying text.

¹⁶³ *See supra* note 119-125 and accompanying text.

¹⁶⁴ *Landsdowne v. Beacon Journal Pub. Co.*, 512 N.E.2d at 985 (quoting, 403 U.S. at 50 [1971]).

¹⁶⁵ *See supra* note 34 and accompanying text.

Additionally, such confusion in lower courts can be viewed as doing nothing to dispel the much-debated "chilling effect" that is said to inhibit the free flow of information by a journalism profession wary of adverse libel judgments.¹⁶⁶ In *Weller v. American Broadcasting Companies*,¹⁶⁷ the holding of a California appeals court — that the test of proof of falsity is not whether the speaker can determine truth or falsity at the time of publication but whether at some future time the plaintiff can prove falsity — places an undue burden on free-speech interests.¹⁶⁸

Such problems beg for further attention by the U.S. Supreme Court in its effort of nearly 30 years to redefine libel in accord with the commands of the First Amendment. But the Court also could aid the development of a coherent theory of constitutional defamation by considering the meaning of private reputation. The primary question is: Does the private individual's right to a good reputation rise to constitutional levels? Post's theories of reputation¹⁶⁹ provide a conceptual starting ground for such an inquiry but courts generally have assumed the good reputation of the private individual¹⁷⁰ without questioning the premises of that assumption.

¹⁶⁶ "The list of irrational, inconsistent, and unfair decisions in free speech cases is virtually endless. Although the Supreme Court declared that seditious libel is dead, the announcement in premature." Lois G. Forer, *A Chilling Effect* (1987) 19.

¹⁶⁷ See *supra* notes 127-130 and accompanying text.

¹⁶⁸ And, arguably, conflicts with the "actual malice" standard enunciated in *New York Times Co. v. Sullivan*, *supra* note 1.

¹⁶⁹ See *supra* notes 25-33 and accompanying text.

¹⁷⁰ Although in the cases of so-called "libel-proof plaintiffs," some courts have moved toward dismissing cases on the ground that the plaintiff's reputation is so bad that there is no chance that further defamation of character will result in plaintiff loss. See *Jackson v. Longcope*, 476 N.E.2d 617 (Mass. 1985) (Convicted multiple murderer's libel suit over statement that he had raped and killed all of his victims dismissed for failure to demonstrate even nominal damages).

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Craft v. Metromedia, Inc. and its Social-Legal Progeny*

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The Craft case has had the most legal impact in the 8th Circuit of the federal courts, but nearly all cases found did not deal with the broadcasting industry.

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The broadcasting industry reported that pressures to cut television news budgets have placed the careers of anchorwomen over the age of forty in danger.

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Despite media attention, scholarship on the issues of sex and age discrimination in the nation's newsrooms has been scarce. In the communication field, there has been a tendency to oversimplify the issues considered in Craft's case.

Legal scholars have advanced theories of "sex plus" discrimination to explain the plight of anchorwomen: "Title VII must be interpreted to prohibit stereotypic customer impressions" as creating a "business necessity" to hire younger women.

The Craft case has had the most legal impact in the 8th Circuit of the federal courts, but nearly all cases found did not deal with the broadcasting industry.

The social impact of Craft's case on the broadcasting industry is not known. We do not know to what extent stations have insulated their organizations by resorting to more specific contract language. Still, aging anchorwomen seem to continue to face loss of job security -- a condition that may require more litigation.

Craft v. Metromedia, Inc. and its Social-Legal Progeny

Introduction

December 1992: The Radio-Television News Directors Association magazine Communicator reported that women television news anchors in their 40s -- "older women" -- are in more danger than older men from station budget cuts.¹

Quoting Alfred Geller:

"There is no question in my mind that the business has not yet matured enough to accept mature women gracefully," he admits. "It's a lot better than it used to be. There are many women in their 40s going into their 50s," he stresses.²

The publication, targeted at the nation's news directors, told how an agent explained to a 42-year-old anchor woman that relocation would be difficult: "He complained that news executives are only interested in people who are young, who are willing to work hard, and who will work for little or no money."³

More than a decade after Kansas City anchor woman Christine Craft battled her station, its parent company and some in the industry in a much-publicized case, surprisingly little has been written about the issues of age and sex discrimination in the nation's newsrooms.⁴ In fact, this paper will show, the popular view of the Craft case promoted in her autobiography is, at least, an over-simplification:

"Christine, our viewer research results are in and they are really devastating. The people of Kansas City don't like watching you anchor the news because you are too old, too unattractive, and you are not sufficiently deferential to men."⁵

The industry issues raised by the Craft case have not gone away. For example, Philadelphia TV anchor woman Diane Allen, 44, in 1992 filed a complaint against the CBS-owned WCAU saying "the station's general manager demoted her because, among other reasons, he felt that she didn't make her male co-anchor look 'softer.'"⁶

The Craft case has spawned few academic papers since its public flash. Ferri and Keller surveyed female television news anchors and found "physical appearance" was perceived as the strongest career barrier.⁷

One anchor reported that her male general manager described the job hunt from which she was selected as a "Miss America search." One commented, "People ask my co-anchor about the latest 'hot' story, and they ask me about my clothes!" One summarized simply, "I'm tired of hearing about my hair!"⁸

The women television news anchors also identified hiring procedures, overcoming stereotypical attitudes, additional pressures to prove their worth, family pressures and lack of professional networks as additional career barriers.⁹

Legal analyses citing the Craft case have linked it to a broad range of issues including physical appearance discrimination,¹⁰ handicapped employment discrimination,¹¹ management-employee relationships,¹² and jury advice and judicial behavior.¹³ There were two law review articles, in 1985, on the topic of sex discrimination in newscasting,¹⁴ but there have been no legal analyses dealing directly with the Craft case.¹⁵ The purpose of this paper is to describe the case, and then to trace its social and legal impact.

The District Court Cases

Christine Craft's complaint filed in January 1983 contained four counts:

- (I) that Metromedia, then the licensee of KMBC-TV 9, had discriminated on the basis of sex in violation of Title VII of the Civil Rights Act;¹⁶
- (II) that Metromedia violated the Equal Pay Act by paying Craft "less than similarly situated male employees" at KMBC;¹⁷
- (III) that management induced Craft to take a job at KMBC by making "intentional fraudulent misrepresentations" to her;¹⁸ and
- (IV) Metromedia's actions toward Craft "were intended to injure her and therefore constituted a prima facie tort."¹⁹

Following "an accelerated discovery schedule," the July 1983 eleven day trial led a two man, four woman jury "sitting only in an advisory capacity" to find for Craft only on counts I and III.²⁰ The jury found that Metromedia had discriminated on the basis of sex (Count I), but that was not the basis for a monetary award.²¹ The jury found that Metromedia's intentional fraud of Craft (Count III) warranted the award of \$375,000 in actual damages and \$125,000 in punitive damages.²² The jury rejected Craft's claim of equal pay violations (Count II), and the attempt to claim intentional injury (Count IV) was abandoned at trial.²³

Judge Joseph E. Stevens, Jr., who presided over the trial, was left to deal with three issues: 1) review of the findings of fact by the jury; 2) Craft's motion to reconsider the equal pay issue; and 3) Metromedia's motion to set aside the jury verdict on the fraud count.²⁴

1. Findings of fact

Judge Stevens highlighted Craft's University of California at Santa Barbara 1968 degree in English and anthropology; her first job teaching disturbed and retarded children for two years; and her other interests in the early 1970s -- "particularly surfing" --before deciding to pursue a career in broadcasting.²⁵

Her first broadcasting job in 1975 was as weeknight weather reporter at KSBW-TV Salinas, California.²⁶ By late 1976, she had jumped to KPIX-TV, San Francisco, the sixth largest market, to do weekend weather.²⁷ She was hired by the CBS Sports Spectacular and hosted a "Women in Sports" segment until the show was canceled.²⁸

While at CBS, plaintiff's appearance was altered by network make-up specialists. Her hair was cut short and bleached blonde, and she was required to use black eyebrow pencil and dark red lipstick. Plaintiff voiced objection to this treatment but did not voluntarily leave her employment at CBS because of it.²⁹

In 1979, Craft landed a job at KEYT-TV, Santa Barbara, where she worked until accepting the job at KMBC-TV in 1980.³⁰

KMBC's ratings leadership under solo anchor Scott Feldman had been slipping, and research identified two factors: "the appearance of co-anchors at KMBC's competitors, and a perception among viewers that Feldman lacked warmth..."³¹

V.P./General Manager R. Kent Replogle and News Director Ridge Shannon agreed to a co-anchor format to "soften" the news image, and Craft's tape was provided by a media consultant.³²

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During their first telephone conversation in November of 1980, plaintiff told Shannon she was interested in the position so long as it did not involve a "makeover" of her appearance, such as she had experienced at CBS...³³

Following a November 1980 audition, clothing and make-up again surfaced as issues:

Plaintiff acknowledged her lack of expertise in matters of make-up and hair and indicated her willingness to work on her appearance with a consultant.³⁴

She was offered a Metromedia three year contract at a salary of \$28,000, but she negotiated a two year deal for \$35,000 the first year and \$38,500 the second; it was a contract that gave Metromedia the freedom to remove her from the anchor desk and reassign her with no effect on pay.³⁵

Despite her work with KMBC's Dallas consultant, "it became apparent to Shannon and Replogle that on several occasions plaintiff's on-air make-up and clothing were inappropriate."³⁶ Even though KMBC management was concerned about Craft's clothes, they had refused her request during contract negotiations for a clothing allowance.³⁷ News Director Ridge Shannon claimed there was not a strict dress code, although he "made occasional suggestions or criticisms."³⁸ By April, KMBC had negotiated a trade-out with Macy's Department Store for clothing: "Plaintiff was not ordered to wear any of the clothes selected, and in fact she rejected several items suggested," judge Stevens wrote.³⁹

Following focus group and survey research, consultant Steven Meacham of Media Associates (later re-named Audience Research and Development or A.R.D.) advised Replogle and

Shannon to remove Craft from the anchor desk (it is interesting that both wanted to continue working on her appearance).⁴⁰ Shannon, in a closed-door meeting with Craft, cited the continued appearance problems and the research results (that showed competitor KCMO's female anchor was more popular):

At no time during their discussion on August 14, 1981, did Shannon tell plaintiff she was being reassigned because she was too old, too unattractive, and not deferential enough to men or that she was being reassigned because the audience so perceived her.⁴¹

Shannon told Craft that KMBC intended to honor its contractual obligation, but Craft refused the reassignment.⁴² Instead, she returned to Santa Barbara to co-anchor at KEYT.⁴³

Judge Stevens found that KMBC was concerned about the appearance of *all* employees, male and female; male anchor Scott Feldman had been directed about his choice of shirts, a weekend weatherman was told to lose weight, a male reporter was advised to blow-dry his hair and try contact lenses, and another male reporter was told to lose weight and improve his wardrobe.⁴⁴

Judge Stevens found that Feldman was paid more than Craft because he was educated in broadcasting, he had several years major market anchor experience, and he was established in Kansas City.⁴⁵ Judge Stevens concluded that Christine Craft was not the victim of sex discrimination:

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The measures taken by defendant with respect to her appearance were necessary and appropriate considering her individual shortcomings. Plaintiff's salary was determined on the basis of factors other than sex. Plaintiff was not constructively discharged since defendant did not render her working conditions intolerable, and they were not, in fact, intolerable. Plaintiff voluntarily resigned rather than accept a reassignment pursuant to the terms of her contract. Accordingly, she suffered no damages attributable to any wrongful act of defendant.⁴⁶

Judge Stevens relied upon case law that supported an employer's right to be concerned about physical appearance of employees.⁴⁷ He concluded that Metromedia's actions were not based on Craft's gender "--with one ironic exception: but for the fact that she is a female, plaintiff would not have been hired as a co-anchor in December, 1980, regardless of her other abilities."⁴⁸

The judge's findings of fact appeared to settle the two remaining issues before him -- equal pay and fraud.

2. Equal Pay Issues

Judge Stevens upheld the jury's verdict in favor of Metromedia with just five sentences: "Contrary to plaintiff's assertion, the verdict was not against the clear weight of the evidence."⁴⁹

3. Fraud Issues

Judge Stevens failed to deal directly with the fraud allegation contained in Count III. Instead, he concluded that the jury award of \$375,000 in actual damages was "excessive" and was a "miscarriage of justice."⁵⁰ "The court is firmly convinced that this verdict is excessive and is the result of passion, prejudice, confusion, or mistake"

○

on the part of the jury."⁵¹ He suggested that the court erred in its jury instructions in a way that warranted a new trial.⁵² He found that news media publicity before and during the trial -- including on the weekend before deliberations led to a verdict -- affected the unsequestered jury:

News reports and commentary on the circumstances surrounding plaintiff's departure from KMBC began within days after she was removed as co-anchor and increased as trial approached...

Although the jury was repeatedly admonished not to discuss the case with anyone and to disregard news accounts of the trial, even the most conscientious juror would have been unable to ignore the pervasive and relentless publicity and could not have been immune from its effect.⁵³

Judge Stevens ordered retrial on all issues raised by Count III -- the fraud claim only, and that twelve jurors would be impaneled in January 1984 at the Federal Courthouse in Joplin, Missouri.⁵⁴

The second jury trial again found in Craft's favor, awarding \$225,000 actual and \$100,000 punitive damages.⁵⁵ When Metromedia appealed the decision on the fraud count to the U.S. Court of Appeals, Eighth Circuit, Craft cross-appealed her earlier failure on the sex discrimination and equal pay counts.⁵⁶

The Appeals Court Decision

It was Summer 1985 by the time Circuit Judge John R. Gibson, writing for a three judge panel, ruled in Craft v. Metromedia, Inc.⁵⁷ The appeals court reconstructed Craft's four count claim:

The primary focus of the suit was KMBC's concern with appearance--whether the station's standards for on-air personnel were stricter and more strictly enforced as to females than as to males and whether the station misrepresented to Craft its intentions as to changing her appearance to persuade her to accept the anchor job.⁵⁸

The appeals court began its review with a rehash of Craft's employment history leading to the KMBC job offer, and the pre-employment discussions over her appearance:

Craft described her unpleasant experience at CBS and made plain that she was not interested if KMBC intended a makeover of her appearance. She continued to stress this point while in Kansas City for the audition, and Shannon and R. Kent Replogle, vice president and general manager of KMBC, assured her they planned no changes such as those at CBS. Shannon did mention that KMBC made some use of consultants, and Craft indicated some willingness to work on her appearance and dress.⁵⁹

Management, the record showed, continued to work with Craft during her tenure as co-anchor, and the court found she "ultimately agreed to cooperate" -- by early August a "clothing calendar" had been established:

The "clothing calendar" was a calendar given to Craft showing in detail for each day the blazer, blouse, and skirt (or occasionally slacks) she was to wear. A note in one corner indicated that the appropriate accessory would be either a single strand of pearls or a single gold chain.⁶⁰

When it came to the Metromedia decision to reassign Craft as a reporter, the appeals court referenced the "devastating and unprecedented" consultant research results, which Shannon said he characterized to Craft during the August 14 closed-door meeting which remains in dispute:

Craft states that Shannon also told her she was being reassigned because the audience perceived her as too old, too unattractive, and not deferential enough to men. Shannon, however, specifically denies making such a statement, and the district court believed his version of the conversation.⁶¹

The appeals court supported the decision by Judge Stevens to dismiss the jury award. Citing Harmon v. May Broadcasting Co. (1978), the court held, "There is no right to a jury trial in a Title VII suit."⁶² Further, "Advisory use of the jury is authorized by Rule 39(c) of the Federal Rules of Civil Procedure."⁶³

The appeals court refused, as Craft had sought, to re-examine the factual record of evidence before the district court; instead, the court ruled that the factual findings were not "clearly erroneous."⁶⁴ Under civil procedure, the integrity of district courts is sustained by vesting them with broad fact-finding powers.⁶⁵

We may not duplicate the function of the district court by making our own determination of the facts and reversing if we believe we would have decided the case differently: "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."⁶⁶

Craft testified Shannon told her the reassignment was "because she was too old, too unattractive, and not deferential enough to men," a statement Shannon denied.⁶⁷ Co-anchor Feldman in his pre-trial deposition supported Craft's position, but at trial "did not recall Shannon making such a comment."⁶⁸ The appeals court, additionally, found that the consultant's survey did not ask questions about age, but results showed, "Craft actually was lowest among her female counterparts as to the *strength* 'does not play second fiddle' to male anchor."⁶⁹

Even though the appeals court sought to avoid challenging the district court's role as fact-finder, the

court appeared anxious to dig deeper into the fraud allegation sidestepped by the lower court.

For example, while Metromedia by late 1981 had developed "dos" and "don'ts" for females and male newscasters: "Shannon testified that the tips for females were prepared in May 1981 primarily for Craft while the guides for males were not prepared until November 1981, around three months after Craft left the station."⁷⁰ However, the appeals court found the lists did not violate Title VII because they did not involve "demeaning stereotypes as to female characteristics and abilities or stereotypical notions of female attractiveness or use of female sexuality to attract business."⁷¹

The "dos" and "don'ts" for female anchors addressed the need to avoid, for example, tight sweaters or overly "sexy" clothing and extreme "high fashion" or "sporty" outfits...⁷²

The appeals court accepted the district court's conclusion that KMBC "appearance standards were shaped only by neutral professional and technical considerations and not by any stereotypical notions of female roles and images."⁷³

The appeals court used Missouri law to find that Craft had "failed to make a submissible jury issue."⁷⁴ The station's concern over clothing and appearance, in the eyes of the court, had not constituted a "makeover" of Christine Craft:

Even if Craft does have an arguable position that the representation of "no makeover or substantial changes" had application to clothing, a reasonable jury could not have found a "makeover" until KMBC's efforts reached their extreme extent in the late days of Craft's employment. There is, however, no evidence that the station at the time it made the challenged representation knew it would exercise such an intrusive degree of control of knew that such control would be in its eyes necessary.⁷⁵

The appeals court reversed the judgment of the jury verdict on the fraud allegation, and upheld the district court's rulings on Title VII and the Equal Pay Act in favor of Metromedia.⁷⁶

Christine Craft exhausted her last legal avenue of appeal, the U.S. Supreme Court, and in March 1986 the court denied a petition for writ of certiorari.⁷⁷ The court's lone female justice, Sandra Day O'Connor went on record as the only justice wanting to hear the case.⁷⁸

The Craft Progeny

Legal Progeny: Cases After Craft

The ruling of the Eighth Circuit Court of Appeals, if adopted in other circuits, would establish a model that makes it very difficult for television news anchors to successfully sue their stations for age or sex discrimination, fraudulent representations on matters not specified by contract, equal pay violations or intentional injury. The Craft case shows a fact-finding process at the district court level that essentially places a complaining employee in a "my word against theirs" position.⁷⁹ In Craft v. Metromedia, Inc. the courts afforded Metromedia broad latitude to control on-air (and presumably off-air)

employee behavior on grounds of "professional" or "technical" considerations.⁸⁰

Sixty-one cases citing Craft v. Metromedia, Inc. have been located, and two generalizations emerge: (1) the influence of the case has extended beyond the Eighth Circuit only to the Seventh Circuit; and (2) all but one of the cases did not involve the broadcasting industry.⁸¹

In Charles Woods Television v. Capital Cities/ABC (1989) a purchaser of a Springfield, Missouri station won a jury award of \$3.5 million by showing the network defrauded him by canceling affiliation after completion of the sale.⁸² However, the district court judge issued judgment notwithstanding the verdict in favor of Capital Cities/ABC, and the appeals court upheld that judgment.⁸³ Under Missouri law, plaintiffs alleging fraud must show: 1) representation, 2) falsity, 3) materiality, 4) knowledge of falsity or truth, 5) intent, 6) hearer's ignorance, 7) hearer's reliance on truth of representation, 8) right to rely, and 9) consequential injury.⁸⁴ Citing Craft v. Metromedia, Inc., the appeals court held: "A failure to make a submissible case on any one of the elements defeats the entire claim."⁸⁵ It is the non-broadcasting cases, however, that relate more directly to Christine Craft's allegations.

In Lydel Willis v. Watson Chapel School District (1990), a teacher passed over for promotion eight times claimed she was intentionally discriminated against.⁸⁶ The appeals court affirmed a district court finding that the hiring of males instead of Willis was discrimination, and

that she was eligible for back pay.⁸⁷ Citing Craft v. Metromedia, Inc., the court held that Willis had shown the schools intentional discrimination.⁸⁸

Two Seventh Circuit cases represent uses of Craft v. Metromedia, Inc. that suggest its influence is just now beginning to be felt.

In Soto v. Adams Elevator Equipment Co. (1991), a wage discrimination case, a female high school graduate was demoted from Senior Buyer to Buyer after a male with a college degree was hired for the position.⁸⁹ His initial salary was higher than that of Soto.⁹⁰ Soto was awarded back wages and damages, and the verdict was accepted by the district court judge.⁹¹ On appeal, however, the higher court cited Craft v. Metromedia, Inc. that a higher salary based on "permissible factors" such as education does not violate the Equal Pay Act.⁹² The court went further in citing Fallon v. Illinois (1989): "And it is not our province to second-guess employers' business judgment."⁹³

On the same issue, the Soto court cited Covington v. Southern Illinois University (1987).⁹⁴ In that case, the university successfully defeated Title VII and Equal Pay Act claims of a female assistant professor who was paid less than her male predecessor.⁹⁵ The appeals court held the disparity was the "result of male predecessor's more considerable experience in field of music, including extensive teaching experience, and possession of degree that qualified him for tenure..."⁹⁶

Social Progeny: Craft's Book

Craft's 1986 book An Anchorwoman's Story revealed a view of the legal process in the Craft v. Metromedia, Inc. case that directly challenged the decisions by the district and appeals courts.⁹⁷

Craft described, in detail, KMBC management's concern over make-up, clothing and appearance during her first six months on the job.⁹⁸ Further, she told how the July 17, 1981 Hyatt Hotel skywalk collapse coverage had begun to show her journalistic abilities.⁹⁹ She had said the news team had begun to make the show work. Amid reports of faulty construction and inspection, Craft encountered the Mayor and told of the exchange:

I asked the required panoply of questions... and then I had just one last question for him. "Mr. Mayor, many people think of Kansas City as a company town [i.e. Hallmark]. If you as mayor were to learn that Donald Hall [Hallmark patriarch] or any of his associates knew implicitly or complicitly of shoddy building practices in the construction of that lobby, would you pursue that evidence with the full strength of your office as mayor?"

Richard Berkley blanched, took a few steps backward toward the elevator opening, and said, "I have complete faith in Donald Hall and his associates."¹⁰⁰

A week later, she reports, she had come in early to work on an Agent Orange series when Ridge Shannon motioned her to his office for the August 14 meeting.¹⁰¹ Beyond the disputed statement ("too old, too unattractive, and not sufficiently deferential to men"), Craft claimed Shannon said:

I know it's silly, but you don't hide your intelligence to make the guys look smarter. For example, people don't like that you know the difference between the American and National League... Oh, you can stay on and earn the rest of your contracted salary as a reporter, but when the people of Kansas City see your face, they turn the dial."¹⁰²

Craft said her reaction was anger:

Ridge Shannon had just told me that he was taking away my job because I wouldn't pretend to be stupid in order to make my peers look smarter. If that wasn't a blatant example of sex discrimination, I don't know what was.¹⁰³

Following press accounts of the station decision, there was a final meeting between the station manager, news director Shannon and Craft at the Kansas City Club:

"You can't fight us," said Kent. "We're Metromedia, we have teams of corporate lawyers, and we win every case. You're a soon-to-be-divorced woman going back to a small town... How will you ever raise the money to fight us?"¹⁰⁴

Craft returned to California, and she filed a formal Equal Employment Opportunity Commission complaint that cleared the way for the lawsuit.¹⁰⁵

In her book, Craft took aim at what the evidence showed about how Media Associates consultant Steven Meacham moderated focus group sessions:

"You can speak up and say I really hate that guy or I really like that broad." ... "This is your chance to unload on these sons of bitches who make \$100,000 a year." One group of women between the ages of twenty-five and thirty-five was by far the toughest on me. Meacham made the following statement to this group: "Let's spend thirty seconds destroying Christine Craft."¹⁰⁶

Craft recounted the testimony of Brenda Williams in the first trial; Williams, tapped to replace Craft, was unsuccessful in asking for equal pay to that of co-anchor Scott Feldman: "My honest feelings are that the managers at

that station had created a position for a woman, and a female anchor was only going to get so much money."¹⁰⁷

Craft argued in the book that the opinion by Judge Stevens rejected the collaborating testimony of Scott Feldman and the evidence of discrimination: "He was decrying the fact that the first jury had not been sequestered and that it had not come to the decisions he would have preferred."¹⁰⁸

Judge Stevens refused to allow the second jury to hear the focus group tapes on ground that they were "too inflammatory."¹⁰⁹ The disputed facts in the case became important because of the second jury's smaller award in favor of Craft, and the subsequent appellate decision to set the verdict aside. In Craft's words: "The black-robed bastards had done it to me again."

I thought of the jurors in Kansas City and Joplin. They had not been frothing feminists or civil rights activists. These had been Midwestern, middle-class, grass roots people --foreman, schoolteacher, beautician... both juries, after observing the demeanor or witnesses and the presentation of all the evidence, had awarded damages, both actual and punitive.¹¹⁰

Craft cited a Yale study that documented the trend of courts increasingly disregarding the jury as fact-finder.¹¹¹

Ridge Shannon, in an article for the RTNDA Communicator in September 1985, continued to make the case that Craft's story about what he said was a lie.¹¹² Shannon said getting caught between corporate policy and the lawsuit had damaged his professional career.¹¹³ That article led to in exchange of letters in the November issue of the magazine. Craft wrote: "His peers in Kansas City and Joplin decided who was

lying and who was telling the truth."¹¹⁴ Shannon replied:
"The American judicial system has proven itself just...
Christine filed suit knowing that the court eventually could
find that her fraud, discrimination, and unequal pay charges
were groundless..."¹¹⁵

Industry Reaction and Interpretation

Following the first Craft decision in 1983, but before
Judge Stevens had ruled, the Radio-Television News Directors
Association convention in Las Vegas was the site of a two-
hour session asking "What does the Craft decision really
mean?"¹¹⁶ The session was audio taped, and it was given
extensive coverage in Broadcasting magazine, which claimed
it was "...one of the most vexing questions plaguing the
local television news business these days."¹¹⁷

Moderator Skip Haley of WSFA-TV, Montgomery, said he
did not want to "retry" the case, and he focused discussion
on rights of management and employees, on-air roles of women
and use of consultants and research.¹¹⁸ Willis Duff, senior
partner in Audience Research and Development, the consulting
firm that led to the hiring and firing of Christine Craft
said:

There were really two Christine Craft trials:
there was the one in the courtroom in Kansas City, and
there was the one in the media. And I truly believe
that that larger constituency to the media trial is
where most of the fallout relative to you and to us ...
came from."

It has caste local news and local news
management...as anti-journalism, ageist and sexist.
That's grossly inaccurate... this is a progressive
business, this is a business that is an important and
meaningful institution to this country... and we don't
deserve this wrap.¹¹⁹

Joel Chaseman, president of Post-Newsweek Stations, Inc. added a plea for meritocracy which drew applause from the audience of news directors:

Only the best people will survive. Yes, they will be good communicators, and they'll be dressed acceptably and all that stuff, ... but also they will have to know how to write. They will have to know how to cover honestly. They will have to know how to do it without bias and under pressure. And, they will demand of management that consideration, that knowledge, that fore-thought, that level of communication that allows them to reach their potential in doing their job.¹²⁰

Gail Westrup, anchor and producer at KLAS-TV, Las Vegas acknowledge the double-standard for women on-air people:

From the day any woman walks into a newsroom she is very aware of the clock ticking away as far as the age issue, of course, that was raised in the Christine Craft case. You try not to worry about it because that might cause some more wrinkles, and that would just speed it up.¹²¹

But she added: "I have trouble calling the standard, the different standard for men and women, sex discrimination simply because in a lot of ways I think it's a reflection of the values that are in society."¹²²

Mary McCarthy, WYFF-TV, Greenville, one of the first female news directors in the country, told the group to be realistic:

You know you don't look for the journalist first, you look at the tape first. And if the tape is acceptable, then you say, okay, I'd rather have one who can talk, and who can present himself or herself in a reasonable format on his feet, can report, can write. And yes, those are all qualifiers, but that's not what we look for first, we look for good communicators.

Their job (anchors) is to take a piece of copy, become involved with it, and share it with other people. And yes, factors of dress and appearance enter into that. I don't think a woman has to be beautiful, I don't think a man has to be strikingly handsome, but they have to be acceptably pleasing in their appearance. And they have to dress in a manner just as you wear suits and I wear my dress-for-success dresses... to be perceived in the way which I want to be perceived.¹²³

She added:

I think the real questions that the Craft case raises is how we are going to be able to help our employees take all of those necessities, and help our employees mold themselves into good communicators, good journalists, people who dress acceptably, and people who present an image on the air that is pleasing, acceptable and enticing to our viewers without violating the rights of those employees.¹²⁴

Broadcasting concluded: "one answer that appeared to emerge was the old-fashioned one that honesty is the best policy in management-employee relations."¹²⁵

In an earlier article, the magazine told the industry that Craft v. Metromedia, Inc. was "a case that put television in the media spotlight again and raised sensitive and, for the most part, still unanswered questions about the relationship between station managers and their 'news talent' and the relative importance of cosmetics and journalistic ability in television news."¹²⁶

Immediately following the first jury decision, some of the best-known in broadcasting began to distance the industry from what had been going on at the Kansas City television station.¹²⁷ Consultant Frank Magid, for example, said: "Broadcasters are very responsible people, who are not caught up in the cosmetics... The most important consideration has always been the ability to communicate, not the pretty face."¹²⁸

Broadcasting editorialized that the case had been "oversimplified in its interpretation, and probably overplayed."¹²⁹

Everybody who knows anything about television knows that the appearance and demeanor of a news anchor are important: not more important than solid journalistic credentials, but important.¹³⁰

The magazine called for equal treatment of female anchors, but insulated management by defending "performance" decisions: "And performance in any news medium, print or broadcast, is in the end judged by the consumers--readers, listeners, viewers."¹³¹ Whether or not stations used consultants, the magazine argued, the industry agrees ratings are important: "Station managers and news directors must forever be on guard against lowering journalistic standards for the sake of ratings, but if within that paramount constraint they hire people to stand or fall on the basis of performance, without any intervening folderol, nobody should squawk at the outcome, including the courts."¹³²

Limited Play in Broadcasting Study

Despite the overwhelming attention given to Christine Craft in the popular press, the academic community seemed to heed the advice of the industry which essentially argued that the issues raised in the case were no big deal for the honest and open broadcaster. The result has been that students of broadcasting today learn little, if anything, about the case or the issues behind it. A survey of broadcasting textbooks in 1992 found few, general references

to the case or the issues. Head and Sterling's (1990) Broadcasting in America is typical -- relegating the case to a one paragraph footnote.¹³³ In it, the reader learns: "Craft claimed that, although she had been assured that her position depended on journalistic talent and not on her appearance, when her bosses critiqued her performance they spent most of their time picking apart her makeup and clothes."¹³⁴ The reference comes in a general section on employment of women and their salaries.¹³⁵

Lingering Questions from Previous Legal Analyses

Two 1985 law review articles on how Title VII affects newscasters appeared to be generated in the wake of the Craft media publicity.¹³⁶

Buchman argued that after the Federal Communications Commission ordered affirmative action in hiring in 1970, "discrimination against women in the field of broadcast journalism became more subtle."¹³⁷ So called "sex plus" discrimination against subgroups (for example women who have certain characteristics, i.e. physical (immutable), married or with children (mutable), or stereotyped) would seem to constitute Title VII discrimination.¹³⁸ Age, it has been argued, falls under this umbrella:

Because aging is a phenomena over which individuals have no control, age-related appearance is analogous to the 'immutable characteristics' of race and physical stature... Aging, like race, is a virtually unalterable aspect of one's physical appearance.¹³⁹

While age might be "semi-immutable" through "cosmetic surgery," the "effects are only palliative and merely temporary."¹⁴⁰ Such a policy, it is argued, would

"effectively prescribe face lift procedures for older anchorwomen."¹⁴¹

Buchman challenged the notion that the industry may treat the "sex plus" discrimination as a "bona fide occupational qualification" (BFOQ) or "business necessity" -- exempted from Title VII because of ratings or audience preferences.¹⁴² "Title VII must be interpreted to prohibit stereotypic customer impressions of male and female roles from transforming sex or sex plus any impermissible ancillary characteristic into a BFOQ."¹⁴³ The analysis suggests that Christine Craft's attorneys could have made a stronger case under the law:

For older anchorwomen suing under Title VII claiming discrimination on the basis of sex plus age related appearance rather than disparate treatment in makeup and dress requirements as Craft did, the issue of whether on employer's reliance on measures of audience response is permissible might well be determinative and therefore could not be so summarily discounted. Under such circumstances, a court would be compelled to consider whether relying on customer preference as evidence by ratings and survey statistics constitutes a legitimate job-related basis for the formation of employment policies which, although 'facially neutral,' have an adverse impact on a protected subclass of women.¹⁴⁴

Buchman concludes that personnel decisions based upon ratings are misguided under Title VII because an employer cannot argue the decision is "essential" to production of broadcast news, or for that matter, profit.¹⁴⁵ "Indeed, once all networks and stations were required to employ older anchorwomen any competitive disadvantage would disappear."¹⁴⁶

Gielow reaches a similar conclusion based on two theories used to establish a prima facie case: disparate

treatment and disparate impact.¹⁴⁷ Disparate treatment requires the plaintiff to show that "her employer intentionally treated her differently because of her sex or some sex-related characteristic."¹⁴⁸ Disparate impact "focuses on the consequences of a particular employment action rather than its motivation."¹⁴⁹ The business necessity defense, in Gielow's view, is a three-part, narrow balancing test: (1) management's practices must have a "manifest" relationship to the employment; (2) a "compelling business need...must outweigh the discriminatory impact," and; (3) "there must be no other practice that could accomplish the same business purpose with less discriminatory impact."¹⁵⁰ The trouble, then, with using audience research on how well-known (F quotient) or how well liked (Q quotient) a local television news anchor may be is that these are a function of "widespread... sexual stereotypes in society," and are therefore discriminatory.¹⁵¹

Current Gender Agenda: Numbers, Titles and Pay

The currently popular research agenda on the progress of women in the field of broadcasting does not reach to subtle issues of discrimination raised by Christine Craft's allegations.

Instead of probing the nature of the hiring, evaluation and firing processes of women -- particularly television news anchors -- the research considers overall numbers of women in the field as a measure of progress.¹⁵² Weaver and Wilhoit, for example, in their most recent national survey,

found "mixed gains" for women: "In spite of more hiring of women in the 1980s, they remain at the same workforce percentage as a decade ago: 34%. The problem may be one of retention, as well as poor job growth. Salary equity with men has improved."¹⁵³ The percentage of women with five years experience or less, according to the survey, was higher at 45 percent.¹⁵⁴ The sex plus age issue might well be evident in the 1992 data: only 22 percent of all U.S. journalists were 45-years-old or older.¹⁵⁵

Conclusions

The newsroom discrimination issues raised in the Craft v. Metromedia, Inc. case suggest the need for more social and legal communication research. The industry claim that the practices at KMBC-TV were not widespread has never been documented. The case law has not developed, despite a steady flow of Craft-like cases, to address sex plus discrimination under Title VII.

While the mass media have given increased attention to the aging of America -- including the so-called "baby boomers" -- the research has not yet documented any changes in newsroom hiring and retention procedures that encourage an older work-force.¹⁵⁶ We do not know how valid the conventional wisdom is that older men can show gray hair and wrinkles at the anchor desk, while women cannot.

Clearly, the Craft case muddied the legal and social waters about newsroom discrimination by focusing on make-up, clothing and attitude suggestions offered by management. While such practices were clearly distant from journalistic

concerns of Christine Craft, these facts did not form the basis of her strongest legal case: newsroom discrimination based on gender and age (and "validated" by audience preference measurement) cannot be legally justifiable under Title VII where job performance (writing, reporting, reading, presenting the news) has been previously established.

We do not know to what extent stations have insulated their organizations by resorting to more specific contracts in the wake of Craft v. Metromedia, Inc. because no study of employee contracts currently exists. However, as was the case with Christine Craft, it is likely that the prudent corporation would reserve the right to "reassign" an anchor. This emphasizes the need for anchor women, as well as all station employees to read carefully and negotiate employment contracts with an eye to the future -- a sense of the history of broadcast employment in this country: for perhaps a multitude of reasons, the aging newscaster,¹⁵⁷ particularly the anchor woman, might well expect a corresponding loss in job security, a loss that might well need to be challenged in court as discrimination.

A decade after the case sparked public debate on television news, Los Angeles Times television critic Howard Rosenberg's 1983 conclusion seems to hold: "this testimony in this case has been just a very illuminating primer on some of the practices of television news."¹⁵⁸ Those practices appeared to discriminate against older women:

Well, I think it tells us that to a large degree television news reflects society's preoccupation with age, and especially age when it connects to women. You know, it's a cliché, but it's really a true cliché, that women are said not to age gracefully, a man gets more distinguished as he gets older. On television news you see gray-haired men usually paired with women who are much younger. And for some reason when a woman get wrinkles, it's looked upon negatively. And I think a case like this can really, in the long run, ultimately help change that.¹⁵⁹

Craft, following the District Court decision not to accept the jury's finding, said her suit was about sex discrimination, not money, at its core:

I have only become more convinced and strengthened in my belief that news anchors should have real credibility, not the illusion of credibility as all too many TV consultants would try to convince station owners and news directors to believe. I believe the American public deserves a whole lot more than the illusion of credibility. I think they deserve the real thing.¹⁶⁰

Future research might be able to assess the role that television news consultants play in the industry today, the extent to which male and female anchors are treated differently, and the conditions that present and future female news anchors face when dealing with station managers, news directors and their consultants.

Notes

1. Kim Standish, "Younger and cheaper, What are news directors looking for when making hires?" Communicator, 46(12):17 (December 1992). Cf. Steve McClellan, "News directors battle shrinking budgets," Broadcasting, Sep. 28, 1992, pp. 10-11: Fox news executive Van Gordon Sauter told the RTNDA convention that broadcasters should "broaden their news audiences and reach more younger viewers." Also see McClellan, "Local TV news directors grapple with smaller budgets, changes in compensation, tabloid TV," Broadcasting, Sep. 21, 1992, pp. 50, 54-55. Quoting KING-TV Seattle's Bob Jordan: "Two-thirds of the budget you spend on payroll. So you have to have the right people in the right jobs and work smarter, not harder."

2. Ibid.

3. Ibid.

4. Two law review articles have been found: Patti Buchman, "Title VII limits on discrimination against television anchorwomen on the basis of age-related appearance," 85 Colum.L.Rev. 190 (January 1985); and Leslie S. Gielow, "Sex discrimination in newscasting," 84 Mich.L.Rev. 443 (December 1985).

It is more common to find passing references to the case, such as in Neil Postman, Amusing ourselves to death, Public discourse in the age of show business, New York: Viking, 1985, at pp. 100-101. Writing about hiring "likable" people for the entertainment that is television news: "You will try, in other words, to assemble a cast of talking hair-do's... Christine Craft has just such a face, and so she applied for a co-anchor position..." Although management initially "loved Christine's look," the "research indicated that her appearance 'hampered viewer acceptance.'"

5. Christine Craft, An anchorwoman's story, Santa Barbara: Capra Press, 1986, at pp. 9, 68.

6. Verne Gay, "Anchor charges age bias," Newsday, June 10, 1992, at p. 29.

7. Anthony J. Ferri, and Jo E. Keller, "Perceived career barriers for female television news anchors," Journalism Quarterly, 63(3):463-467 (Autumn 1986).

8. Ibid., at p. 464.

9. Ibid., at p. 465.

10. Pamela Whitesides, "Flight attendant weight policies: A Title VII wrong without a remedy," 64 S.Cal. L.Rev. 175 (November 1990).

11. "Facial discrimination: Extending handicap law to employment discrimination on the basis of physical appearance," 100 Harv.L.Rev. 2035 (June 1987).
12. Mary C. Manemann, "The meaning of 'sex' in Title VII: Is favoring an employee lover a violation of the act?" 83 Nw.U.L.Rev. 612 (Spring 1989).
13. Eric Schnapper, "Judges against juries -- appellate review of federal civil jury verdicts," 1989 Wis.L.Rev. 237 (March/April 1989); and "Practice and potential of the advisory jury," 100 Harv.L.Rev. 1363 (April 1987).
14. Supra, note 4.
15. It is the Craft case itself that received much national news media attention and raised concerns among news managers: "The August (1983) verdict had reverberated throughout the industry like a legal sonic boom, creating a number of questions about its effect on industry hiring and promotion practices... The judge's decision amounts to a clear vindication for KMBC and Metromedia... On more than one occasion, station management is given credit for going the extra mile in trying to accommodate Craft..." See "Judge reverses Craft decision, New trial ordered, judge cites 'pervasive and relentless publicity,'" Communicator, 27(12):4-5 (December 1983).
16. Craft v. Metromedia, Inc., 572 F.Supp. 868, 869-70 (8th Cir. 1983). Title VII of the Civil Rights Act of 1964 can be found at 42 U.S.C., Sec. 2000e, dealing with equal employment opportunities. "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions..." at (k). Some distinct issues are raised by the separate Age Discrimination in Employment Act, Title 29, Sec. 621.
17. Ibid., at 870.
18. Ibid.
19. Ibid.
20. Ibid.
21. Ibid.
22. Ibid.
23. Ibid.
24. Ibid.
25. Ibid.

26. Ibid., 870-871.

27. Ibid., at 871.

28. Ibid.

29. Ibid.

30. Ibid., 871-872.

31. Ibid., at 871.

32. "The Media Associates (later known as Audience Research and Development) of Dallas, Texas, a media consulting firm retained by KMBC, supplied a tape of plaintiff's work in Santa Barbara," at 871.

33. Ibid., at 871.

34. Ibid.

35. KMBC had "rejected... request that plaintiff's position be specifically described as co-anchor; instead, the standard language describing her position as staff announcer and permitting defendant to reassign her remained in the contract," at 872.

36. Ibid., at 872.

37. Ibid.

38. Ibid.

39. Ibid.

40. "Shannon and Replogle initially resisted the suggestion, but after discussing the matter in Replogle's office the next morning, Friday, August 14, they agreed to remove plaintiff as co-anchor and to reassign her to the position of general assignment reporter at no loss in pay or other contractual benefits," at 874.

41. Ibid., at 874.

42. Ibid.

43. Ibid., at 875.

44. Ibid.

45. Ibid., at 876.

46. Ibid.

47. Title VII, 42 U.S.C. s20002-(2)(a) makes it unlawful for an employer to discharge and employee, or to discriminate on such matters as pay on the basis of sex. Judge Stevens, however, cited the Title VII interpretation that the act "was never intended to interfere in the promulgation and enforcement of personal appearance regulations by private employers," Knott v. Missouri Pacific Railroad Co., 527 F.2d 1249, 1251-52 (8th Cir. 1975); and "That the image created by its employee dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an employer's proper desire to achieve favorable acceptance," citing Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973).

48. Craft v. Metromedia, Inc., at 879.

49. Ibid., at 880.

50. Ibid.

51. Ibid., at 881. However, a post-trial statement by jury foreman Kenneth Green suggests the jury simply believed Craft rather than her employer: "When they told her that they did not intend to change her, and then the fact that they did. They tried to make her into something that she was not used to being, and we thought that was the turning point, when they told her they did not intend to," infra note 106. Craft said at her visit to the headquarters of the Texas consultant ("where they have like a talent bank, a blood bank of people") she viewed a tape that showed the type of anchor she wanted to be: "At the end of one of those tapes was a woman who didn't look like everybody else -- she was spunky and streetwise, and I said, 'Wow, stop, let me take a look at her.' The consultant stopped the tape and said, 'Oh no, I don't want you to see her, she's too assertive.' It was Sue Simmons at WNBC in New York -- streetwise, spunky, and probably too assertive for what they wanted me to be."

52. Ibid.

53. Ibid.

54. Ibid., at 882. The attorney who represented Craft, Dennis Egan, in 1993 said that amendments to the Civil Rights Act now allow a plaintiff to "demand a trial by jury," 102 P.L. 166, 1991 S. 1745, 105 Stat. 1071 under damages.

55. Craft v. Metromedia, 766 F.2d 1205, 1210 (8th Cir. 1985), cert. denied, 475 U.S. 1058, 106 S.Ct. 1285, 89 L.Ed.2d 592 (1986).

56. Ibid., at 1210.

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56. Ibid., at 1210.

57. Christine Craft refers to judge Gibson in a political reference in her book: "The opinion of the three-man panel had been written by John R. Gibson, a friend of Judge Stevens, with offices in the same Kansas City building and, like Stevens, a new Reagan appointee," An anchorwoman's story, at p. 195. She continued: "With those facts in mind and considering the general anti-civil rights vigor of new court appointees, Gibson's opinion wasn't unexpected. But the shock this time came from the fact that the two judges who could have overridden Gibson did not. Judges Donald Lay and Theodore Macmillan have penned their names to the curious opinion as well. Supposedly reasonable men, what had prompted them to throw out the product of eighteen unanimous jurors as wasted and misdirected efforts?"

58. Craft v. Metromedia, Inc., at 1207.

59. Ibid., at 1208.

60. Ibid., at 1209, fn. 2.

61. Ibid., at 1209.

62. Ibid., at 1209, fn. 3, citing Harmon v. May Broadcasting Co., 583 F.2d 410 (8th Cir. 1978), and Rule 39(c), Federal Rules of Civil Procedure.

63. Ibid.

64. Craft v. Metromedia, Inc., at 1211.

65. Ibid., at 1212: "the burden is on the objecting party to clearly demonstrate error in factual findings," citing several Eight Circuit cases.

66. Ibid., at 1212, citing Anderson v. City of Bessemer City, 105 S.Ct. 1512 (1985).

67. Ibid., at 1212: "Feldman... testified on the stand at trial that he did not recall Shannon making such a comment but who had said in his deposition that Shannon had done so --again diametrically opposite testimony, this time from one witness. Credibility thus was central to the district court's finding on this point."

68. Ibid.

69. Ibid., fn. 6..

70. Ibid., at 1213, fn. 8.

71. Ibid., at 1215, fn. 12.

72. Ibid., at 1215.

73. Ibid., 1215-1216. Cf: fn. 11 at 1214: "...defendant's standards of appearance for its on-air personnel can in no way be considered discriminatory per se. Both men and women were required to maintain a professional, business-like appearance consistent with community standards."

74. Ibid., at 1217. See fn. 13. The ten-day trial created a 2,000 page transcript, but the fraud question rested on whether or not Metromedia intended a "makeover," something the corporation successfully argued was a statement of "opinion or value" and "too indefinite to be actionable," at 1218.

75. Ibid., at 1220.

76. Ibid., at 1221.

77. Craft v. Metromedia, Inc., 475 U.S. 1058, 106 S.Ct. 1285, 89 L.Ed.2d 592 (1986).

78. Ibid.

79. This is, of course, always the case when it comes to findings of fact. However, as a legal issue, so-called "sex plus" (adding age discrimination) concerns would place the burden on the employer rather than the employee at trial. See Buchman, infra, note 139.

80. The need for anti-discrimination laws originates with this employer defense. Without this recognition, an employer could make any arbitrary decision and treat it as based on "professional" norms.

81. A Lexis search in Fall 1992 produced the sixty-one citations. Each case was then examined to locate the references to Craft v. Metromedia, Inc.

82. Charles Woods Television v. Capital Cities/ABC, 869 F.2d 1155 (8th Cir. 1989).

83. Ibid., at 1156.

84. Ibid., at 1159.

85. Ibid.

86. Willis v. Watson Chapel School District, 899 F.2d 745 (8th Cir. 1990).

87. Ibid., at 746.

88. Ibid.

89. Soto v. Adams Elevator Equipment Co., 941 F.2d 543 (7th Cir. 1991).

90. Ibid., at 546.
91. Ibid., at 547.
92. Ibid., at 548.
93. 882 F.2d 1212.
94. Covington v. Southern Illinois University, 816 F.2d 317 (7th Cir. 1987).
95. Ibid., at 319.
96. Ibid., at 317.
97. Supra, note 5.
98. Ibid., p. 49, Craft recounts a "hideous makeup job" by consultant Lynn Wilford: "Ridge agreed that the makeup looked incredibly heavy, but assured me that Lynn Wilford knew all about TV makeup. After all they were paying her fees because they expected her to deliver... 'Ridge, I just want you to know that I am extremely uncomfortable going on the air like this. This is precisely what we agreed would not happen when I came here.' He just shrugged. At that, I left his office and headed back down to the studio."
99. Ibid., pp. 63-64. Craft anchored the live reports while Feldman reported from the scene of the catastrophe.
100. Ibid., p. 67.
101. Ibid.
102. Ibid., p. 68.
103. Ibid.
104. Ibid., p. 73.
105. Ibid., p. 84: "I had no expectations that the federal agency would do anything to see that its own standards were defended... The right-to-sue letter took one year to receive from the EEOC."
106. Ibid., p. 127. In the first trial, the jury heard an audio tape of the focus group session: "STEVE MEACHAM, media consultant: Is she a mutt? I mean, let's be honest about this?" See Joe Spencer, ABC News Nightline, "Christine Craft Verdict," Show #586, Journal Graphics transcript, Aug. 8, 1983, p. 3.

107. Ibid., p. 131. Craft claims she was making about half of what Scott Feldman had been earning as a co-anchor; Brenda Williams, she wrote, signed a contract for \$2,500 more than the Craft pact on a threat: "The station had told her if she didn't take it, they had some woman in Springfield, Missouri who would, and for only \$28,500." Williams later filed a sex and race discrimination suit against Metromedia and new owner Hearst Corporation, but that complaint was quickly settled out of court in early 1985, at p. 193.

108. Ibid., p. 164.

109. Ibid., p. 173.

110. Ibid., p. 194.

111. Ibid., p. 206.

112. The issues raised by Shannon's performance, eventual dismissal and banishment from the industry have not been dealt with in the research. In general, the corporate takeover of the broadcasting industry was accepted in the 1980s with little academic criticism. Soon after Craft left KMBC-TV, Metromedia sold the station to Hearst Corp. for \$79 million, see Broadcasting, August 15, 1983, at p. 28, infra, note 126.

113. Shannon did land a job teaching broadcasting courses at the University of Kansas, where he remains today. Cf. Craft, at 183. She quotes from Shannon's notes during the hiring process for a female co-anchor. Women were categorized as "horsey," "ugly," and "no beauty." His notes about Craft mentioned her "feathery hair," and later "excellent features."

114. Letters, Communicator, 39(11):6 (November 1985).

115. Ibid.

116. Top of the Week, RTNDA, "Critiquing the Craft case," Broadcasting, September 26, 1983, pp. 32-33.

117. Ibid., at 32.

118. The tapes of the session were obtained from Convention Tapes International, 7410 Beach View Drive, North Bay Village, Florida 33141. (305) 757-8666. They are referenced as RTNDA 1983 tapes #7 & #8.

119. Ibid.

120. Ibid.

121. Ibid.

122. Ibid.

123. Ibid.

124. Ibid.

125. Supra, note 117.

126. "Craft decision leaves questions, Anchorwoman awarded \$500,000; judgment on sex discrimination still to come; industry leaders don't see major fallout problems with case," Broadcasting, August 15, 1983, pp. 28-30. Craft challenged the wisdom of relying on research: "In her case, she said, the consultants had no experience in journalism. They were concerned with creating 'the illusion of credibility' for her by changing her appearance and delivery." KMBC's decision to reassign Craft was apparently based entirely on the consultants' conclusion, and not the ratings which were due out weeks later.

127. Ibid.

128. Ibid., at 29.

129. Editorials, "Best face forward," August 15, 1983, p. 98. Cf. The different tone in a story lead two weeks earlier as the Craft case went to court. In it the magazine suggested the lawsuit "...could strike a blow at what some in television news regard as the double standard management uses in judging its on-air newspeople: It's OK for men to show their age; it gives them the look of authority. But for women, age simply gives them wrinkles." August 1, 1983, p. 24. Craft was 38-years-old at the time of her lawsuit.

130. Ibid.

131. Ibid.

132. Ibid.

133. Sydney W. Head, and Christopher H. Sterling, Broadcasting in America, A Survey of Electronic Media, sixth edition, Boston: Houghton Mifflin Co., 1990, at p. 213 and noted by "*" at the bottom of the page.

134. Ibid.

135. Ibid., at 212.

136. Patti Buchman, "Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance," 85 Colum.L.Rev. 190 (January 1985); and Leslie S. Gielow, Notes, "Sex Discrimination in Newscasting," 84(3) Mich.L.Rev. 443 (December 1985).

137. Buchman, at p. 190.

138. Ibid., at 192, fn. 10. Buchman argues that "sex plus age-related appearance" targets the problem because "the television news industry appears to judge its anchorpersons by how old they look, rather than how old they actually are... age-related appearance is a reflection of chronological age... (and) is a personal attribute which is impossible to quantify objectively..."

139. Ibid., at 197.

140. Ibid., at 199.

141. Ibid., and see 201: "A youthful appearance is... not an attribute that can be achieved through corrective dress or grooming. No reasonable comparison can be drawn between requiring men and women to style their hair or attire themselves in a certain way, and constructively compelling anchorwomen, but not anchormen, to maintain a youthful appearance by whatever means necessary." And at 202: "By requiring their anchorwomen to possess and maintain youthful appearances... managements may hope to garner higher ratings by attracting male viewers. Such attempts to exploit female sexuality in the promotion of products or services have been struck down consistently by courts that have considered them."

142. Ibid., at 204.

143. Ibid., at 207.

144. Ibid., at 212.

145. Ibid., at 213.

146. Ibid., at 214.

147. Leslie S. Gielow, "Notes, Sex Discrimination in Newscasting," 84(3) Mich.L.Rev. 443, 454 (December 1985).

148. Ibid., at 454.

149. Ibid., at 455.

150. Ibid., at 467.

151. Buchman, at 209, fn. 81.

152. See David Weaver, and G. Cleveland Wilhoit, Preliminary Report, "The American Journalist in the 1990s," The Freedom Forum, Nov. 17, 1992.

153. News release, "Small change for women, minorities in journalism -- morale problem may loom," Nov. 17, 1992, p. 2.

154. Preliminary report, at p. 4.

155. Ibid.

156. Weaver and Wilhoit report: "Those 55-64 years old have continued to decline since 1971, suggesting relatively few 'elders' in American journalism now as compared with the early 1970s." One-fifth of all journalists surveyed by the pair hope to be out of the field five years from now.

157. See John Bell, "In Search of a Discourse on Aging: The Elderly on Television," The Gerontologist, 32(3):305-311 (June 1992). The mass media have fueled "stereotypes about elderly persons and their lives." Bell found that in network entertainment programming, older men could sometimes exhibit sexuality in the company of younger women, but that was not the case for older women: "Sexuality, thus, is an important absence in the lives of most elderly television characters, and especially in the lives of elderly women," at 309. Research might well consider how stereotypes of aging people of television might affect decisions by news managers and their consultants about whether an aging anchorwomen will "attract" audiences to the show.

158. Nightline, show # 586, p. 8.

159. Ibid.

160. Lynn Sherr interview of Christine Craft, Nightline, "Christine Craft -- New Trial," Journal Graphics transcript, Show #646, Oct. 31, 1983, p. 3.



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Words That Might Get You SLAPPED:
Economic Interests vs. The First Amendment's Speech
and Petition Clauses

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Words That Might Get You SLAPPED: Economic Interests
vs. The First Amendment's Speech and Petition Clauses

SLAPP Suits: A Brief Introduction

From an apparent genesis in the early 1970s, the tactic of suing citizen activists and other critics for libel and related claims surged in the mid-1980s as commercial interests and government entities sought to muzzle opposition to projects unpopular with some segments of the public. Plaintiffs achieved considerable success bringing civil actions for trade libel, interference with contract, interference with prospective economic advantage, defamation and similar established common-law torts.

The strategy was successful enough to attract the attention of University of Denver law professor George W. Pring and sociology professor Penelope Canan, who coined the term SLAPP (strategic lawsuit against public participation) to describe such actions in a 1988 article.¹ Not only have devastating civil judgments following a SLAPP often chilled public debate, but winning defendants have been seriously damaged by litigation expenses. SLAPP actions have often

been supplemented by additional claims, alleging malicious prosecution and abuse of process on the part of activists who have sued to stop developers.

In many cases, even the threat of a SLAPP suit has intimidated vocal critics into curtailing their activism. SLAPP plaintiffs are usually large commercial enterprises, most often real estate developers with extensive financial resources, and their targets typically ordinary individual citizens or relatively small neighborhood groups. Despite the David and Goliath settings, the controversy over SLAPP suits should focus not on whether they are used for good or evil purposes, but on whether civil litigation should be used to squelch discussion of issues of public importance.

Increasingly, however, defendants are beating SLAPP plaintiffs with help from the courts and legislatures. Sympathetic judges have dismissed many cases, and allowed countersuits, now popularly known as SLAPP-backs. Legislatures in the nation's two most populous states have also blunted the effects of plaintiffs' actions by passing bills controlling SLAPP filings in this year's sessions.²

In examining the SLAPP phenomenon, this paper seeks to determine whether the use of SLAPPs interferes impermissibly with a citizen's right to express opinions on matters of public concern, and if so, on what grounds and with what legal defenses might SLAPPs be opposed successfully? Part I of the paper will deal primarily with the threshold issue of what constitutes a SLAPP and the factual background of some prominent cases. It is clear that there are distinct

interests represented by each side of the issue, beginning even with the problem of whether a suit against a complaining citizen is intended to cut off public discussion.

Part II explores the positions of SLAPP plaintiffs and defendants, which occupy a gray area between the state's interests in a fixed and certain business environment and citizens' rights to air their grievances. Vital to the American way of life, each party's interests are governed and protected by a large body of law. The area of conflict between the two positions is where SLAPPs thrive.

To the citizen activist, public participation in important issues can involve one, and sometimes two, rights under the First Amendment. The speech clause protects verbal opposition to a proposed incinerator at a hearing or leafletting on the street afterwards. The petition clause, a relatively unexplored area, protects petition drives or legal actions to rescind or oppose official action on the incinerator proposal. For the developer, the interests at stake are personal. Business interests are often grounded in a mixture of financial and private matters such as reputation, property and contract.

Doctrines representing exceptions to the parties' claims are outlined in Part III. Neither side of this debate can point to protections for its position that are absolute. The protections and rights asserted by each have developed alongside specific exemptions for instances when the general rules do not apply.

Defenses to SLAPPs and sanctions against those who file them are covered in Part IV. Frivolous litigation has long been disfavored in the law and is subject to a number of court-imposed sanctions. Judges are often amenable to countersuits, or SLAPP-backs, against meritless actions. State legislatures have also pitched in with legislation designed to cut SLAPPs off soon after filing, saving the time and expense of defending against spurious claims.

I. What Constitutes a SLAPP Suit?

Professor Pring's definition of a SLAPP suit is:

1. [A] civil complaint or counterclaim (for monetary damages and/or injunction),
2. filed against non-governmental individuals and/or groups
3. because of their communications to a government body, official or the electorate,
4. on an issue of some public interest or concern.³

The most frequent use of SLAPP suits involve plaintiff real estate development firms bringing actions against environmental activists who have opposed their proposals for construction projects on land owned by them or land under contract.⁴ Using SLAPPs, developers use common-law tort

actions to punish citizens who exercise their constitutional rights to speech or petition.⁵

When Pring and Canan first studied SLAPPs in detail in 1988, they identified more than 100 filed by developers against citizen protesters in 26 states. Less than four years later, the Denver researchers have identified at least 400 more.⁶ The average SLAPP, they found, demands \$9 million in damages and wends its way through the court system for three years before resolution⁷ -- in the defendants' favor about 90 percent of the time⁸ -- if they can hang on that long. Legal fees for individual defendants in SLAPPs run at an average of \$10,000 to \$20,000.⁹

A. Wielding SLAPPs Against Environmental Activists

Annette Baecker's difficulties with a developer are typical of the events leading to a SLAPP. In the late 1980s, developer Sherman Whitmore drew up plans to tuck 129 luxury homes into the mountains above Burbank, Calif. Sensing the potential for opposition from environmentalists and in an effort to placate potential critics, he offered \$150,000 to the nonprofit Mountain Restoration Trust to be used for any damage his project might cause. Baecker got wind of the development plan, and fearing damage to Cabrini Canyon's wetlands below, called the trust to express her dismay and opposition to both the project and Whitmore's offer. That call dragged Baecker into a three-year lawsuit brought by Whitmore, who alleged that she had unlawfully

interfered with his private contract with the trust. Whitmore's lawsuit was dismissed in 1991 and the development plans have been canceled.¹⁰

In New York, where Pring finds that 20 percent of SLAPPs are filed,¹¹ Betty Blake had a similar experience. She was hit with a \$6.6 million suit in 1988 after organizing a candlelight vigil and passing out fliers in opposition to a developer's plans to cut down a dozen old oak trees in her Mineola, Long Island neighborhood. The suit, which alleged defamation of the developer and his partners, was dismissed by a state Supreme Court judge in March 1992.¹²

B. Non-environmentalists As SLAPP Defendants

Environmental activists are by no means the only persons susceptible to SLAPPs, and real estate developers are not the only plaintiffs ready to file suit in response to a perceived wrong. Businesses of many types have filed SLAPPs when officials have suspected negative publicity may have damaged their general corporate reputation or ability to earn a profit from a specific undertaking. The areas of interference with contract and defamation are broadly applicable areas of common law, easily tailored to serve the needs of a wide range of plaintiffs.

In March 1992, the American Civil Liberties Union's Wisconsin affiliate was sued for libel by American Family Mutual Insurance Co.¹³ The suit was prompted by an ACLU

fund-raising letter that highlighted an NAACP federal civil rights suit against the insurer for allegedly discriminatory sales policies in inner-city Milwaukee.¹⁴ The ACLU letter, mailed to 500 of the state ACLU's 5,000 members, quoted from a company memo by a manager who has since been fired. In the memo, the manager told an agent that he was selling policies to too many black families. The case is still in litigation.

Northern California construction unions have also used public petitioning methods to oppose projects with plans to use non-union labor. Having lost much of their power to influence employers with strikes and boycotts, unions are using the opposition to development technique and raising doubtful environmental concerns. Intervening aggressively in the permitting process is a tactic unions use to delay the proceedings and wring labor concessions from developers, opponents claim.¹⁵ Nonetheless, when the construction companies and developers countersue, their actions are called SLAPP suits.

In *Petrochem Insulation, Inc. v. Northern California and Northern Nevada Pipe Trades Council*,¹⁶ the company contended that the union had abused permit-granting procedures by making baseless environmental objections in an effort to force project owners to boycott non-union contractors. The union contended that the developers' suit infringed on their First Amendment right to participate in

public hearings. The U.S. District Court, displaying the increasingly-frequent tendency of judges in recent years to prefer First Amendment claims over claims of economic injury, dismissed the complaint.¹⁷

SLAPP suits are not necessarily confined to the private sector, and have been filed when there is opposition to a federal government plan. In Connecticut, the United States Department of Justice has filed what amounts to a SLAPP suit against a state court judge. In that case, government attorneys filed a civil rights suit against the judge, who led a group of her neighbors in an effort to block a woman with 10 adopted and foster children from moving into their neighborhood. The neighborhood association had tried to force the woman to seek zoning approval before moving into the single-family zoned area.¹⁸

There has been a marked increase in one of the earliest areas of SLAPP activity since the beating of Rodney King by Los Angeles police officers in March 1991. Police officers hit with brutality suits are responding with countersuits seeking to clear their names or retaliate against their accusers. Between 1975 and 1980, the Nassau County (Long Island) Civil Liberties Union counted 50 lawsuits against citizens who had complained of police misconduct.¹⁹

Most recently, Alameda, Calif. police officer Kevin McNiff was served with a complaint accusing him of false arrest, excessive force and other hostile actions during a routine traffic stop. The suit was dismissed in November 1990. Seven months later McNiff filed a \$2.1 million SLAPP

countersuit against not only the man who had sued him, but also the law firm that represented his accuser.²⁰

SLAPP actions have acquired the reputation of being the tools of ruthless business interests used against the principled and virtuous, but politically unconnected, citizen. Since 1966, however, they have become effective weapons which have dealt financially crippling blows to racist hate groups in two cases. In the most recent case, the White Aryan Resistance was assessed \$12.5 million in damages in a wrongful death case brought by the Southern Poverty Law Center following the beating death of an Ethiopian man by three skinheads. While not criminally liable for the beating, the suit successfully alleged that the Aryans' point of view alone was actionable. The jury found that the rhetoric of the leaders of the White Aryan Resistance incited the skinheads to provoke confrontations with minorities.²¹

II. Interests Implicated in the Litigation

A. The Private Interests of the Plaintiff

The injury most frequently asserted in a SLAPP suit is defamation.²² Defamation in this context is usually not solely individual, but may involve the reputation of the business in that industry and among members of the public generally. Other causes of action commonly advanced which

assert specific economic injury as a result of opposition are interference with contract and interference with prospective economic advantage. When a business is responding to a critic's lawsuit to block a proposed development with a countersuit, claims of abuse of process and malicious prosecution²³ are often included.

Of course, not every suit filed against a critic is motivated by a need or desire to stifle legitimate opposition, though that may be an incidental by-product of the action. Many suits alleging injury to personal or business interests are undoubtedly motivated by reasons independent of any design to dampen the speech or petitioning of the defendant. Therefore, any restrictions placed on SLAPPs forces a cost on at least some potential plaintiffs, denying those with legitimate injury full opportunity for compensation.

The two most frequently asserted claims, defamation and interference, bear little relation to each other. Each type of action has developed differently, with modern defamation law following from a well-developed line of cases beginning with the 1964 decision in *New York Times v. Sullivan*.²⁴ In *Sullivan*, the U.S. Supreme Court required a showing of actual malice by public officials seeking to press a libel suit. Since *Sullivan*, protections from defamation claims for defendants -- including defendants in a SLAPP suit -- have been made available by the U.S. Supreme Court based on a system of classification of plaintiffs.²⁵ Plaintiffs who are classified as public officials²⁶ or public figures²⁷

must prove actual malice on the part of the defendant. Private figures need only show a negligent misstatement of defamatory fact.²⁸

Interference with contracts, though, with its emphasis on protection of economic interests, takes little from the First Amendment.²⁹ The elements of the action for interference are easily made out in a SLAPP suit. All that is required is a showing of intentional disruption of a contract or other potential economic advantage, plus causation and damages. There is no requirement that the defendant committed the wrong alleged with ill will.³⁰ The classic case of interference involves attempting to induce another who is a party to a contract to not perform his obligations.³¹ Applying this analysis to SLAPPs, petitioning a government body to reverse a zoning decision in favor of a developer is likewise unlawful, and satisfies the initial requirements of a case for interference. Traditionally, intent has been a requirement of interference, but the California Supreme Court has expanded the concept to include negligent interference with contract as a legally recognizable claim.³²

The expansive reading of the tort of interference gives short shrift to First Amendment values, and has allowed SLAPPs to prosper. SLAPPs could be reined in by limiting the scope of the tort, but such a broad stroke would also eliminate suits having nothing whatever to do with the First Amendment. Increased protections for affected defendants with First Amendment defenses may be preferable to the

wholesale elimination of potential plaintiffs' opportunities for relief.

The lower constitutional hurdle for private figure plaintiffs who have only to prove negligence, allows SLAPPs to go forward even when the defendant is exercising a constitutional right to speak or petition. Applying the higher, actual malice standard for all plaintiffs, however, would regulate SLAPPs only when that standard could be met. That approach would afford more protection to vocal activists, but would carry with it a concomitant social cost in that private figures would have a heavier burden of proof in clearing their reputations.

B. The Public Participation Interests of the Defendant

Protection of criticism leveled at the government by ordinary citizens is one of the cornerstones of the American system of democracy. Justice William Brennan underscored the importance of this concept in his majority opinion in *New York Times v. Sullivan*. Brennan emphasized America's "commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."³³ Brennan's language in *Sullivan* is particularly pertinent given the typical SLAPP defendant's position of having opposed a developer's plans before a local governmental body with authority to regulate those plans.³⁴

Brennan's rationale is equally applicable to a SLAPP defendant's other participatory interest, the right of petitioning the government for redress of grievances. The right to petition is embodied in the last clause of the First Amendment, but the notion is of even more ancient lineage. The first known expression of the concept is found in King John I's Magna Carta of 1215, which provided the first written basis for redressing grievances by petitioning the Crown.³⁵

Despite the protection for petitioning activity written into the U.S. Constitution, federal jurisprudence did not reach the meaning of the clause's meaning for some 85 years. In one of the earliest U.S. Supreme Court considerations of a First Amendment issue, Justice Morrison Waite addressed the petition clause and wrote for the Court that the "very idea of government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition the government for a redress of grievances."³⁶

III. Legal Analysis of Claims in A SLAPP

A. Defamation

When a SLAPP is filed alleging defamation, often the court's decision turns largely on a determination of the

speaker's intent. Additionally, the typical SLAPP often follows an activist's allegation of potential harm to the public. As a statement of projected harm, the allegation of harm often involves a large measure of personal opinion. The issue of intent, and whether the speech is characterized as fact or opinion, was sharpened in 1990 by the U.S. Supreme Court in *Milkovich v. Lorain Journal Co.*,³⁷ which held that there is no broad exemption for any speech which might be labelled opinion. The Rehnquist Court narrowed the scope of protected "pure opinion" so that so-called opinions which relate to matters of public concern and "imply an assertion of objective fact" are actionable if the implication is false and defamatory. The Court also indicated that the dispositive factor is whether the statement carries a defamatory factual connotation that is provably false.³⁸

Immediately following the *Milkovich* court's softening of protection for opinion, state courts began to apply a protective doctrine known as the "new Federalism."³⁹ In New York, for example, the state's highest court has found that expressions of opinion are fully protected under state law⁴⁰ and that the protections afforded speech under the New York State Constitution⁴¹ are broader than those under the First Amendment to the Federal Constitution.

Under the New York high court's analysis, opinion-based defamation suits in New York are difficult at best to maintain. In *600 West 115th Street Corp. v. Gutfeld*,⁴² a citizen's remarks at a public hearing, which made him the

target of a 1992 SLAPP suit, were characterized as opinion and the action against him dismissed.

Robert Von Gutfeld, a 30-year resident of a Manhattan cooperative apartment building, spoke out against plans by the owners of the ground floor restaurant to build a sidewalk cafe. During the course of his remarks, Gutfeld called the expansion permit "fraudulent" and charged the restaurateurs with bribery. When it later came to light that a necessary step in the permitting process had been inadvertently overlooked, the city's approval was withdrawn and Gutfeld was sued.

Concentrating on the "general tenor" of the remarks at a public hearing and the skepticism a reasonable listener brings to such a proceeding, the court concluded that a reasonable person could not conclude that factual statements were being made about the plaintiff⁴³ and granted Gutfeld's cross-motion for summary judgment dismissing the complaint.

Earlier this year another New York appellate panel in *Chateau Stables v. The Carriage Horse Action Committee*⁴⁴ reached a similar result. *Chateau Stables* involved an animal rights group opposed to the horse-drawn carriage industry which carries tourists around the southern section of Central Park. The group had written six letters to various city publications alleging mistreatment of the animals and passed out fliers to tourists along 59th Street.

In dismissing the eventual SLAPP action, the court relied heavily on *Immuno A.G. v. Moor-Jankowski*,⁴⁵ a case which also concerned a defamatory letter from an animal

rights organization. The *Immuno* court wrote that in examining the letter and controversy in context and as a whole, "it would be plain to the reasonable reader . . . that [the writer of the letter] was voicing no more than a highly partisan point of view"⁴⁶ and could not be understood to be making factual assertions. In *Immuno*, the court seemed to assume that by the nature of SLAPPs, the injuries complained of by the letter-writer were still speculative and not able to be construed as factual.

B. Interference and the Petitioning Clause

Part II traced the development of the view at the U.S. Supreme Court which has recognized the value to democracy of the right to petition embodied in the First Amendment.⁴⁷ With two cases from the 1960s, the Court has drawn a bold line separating petitioning activity from whatever detrimental, or even illegal, result might flow from it.

The two cases, *Eastern Rail Presidents' Conference v. Noerr Motor Freight, Inc.*⁴⁸ and *United Mine Workers v. Pennington*⁴⁹ involved private groups agitating for favorable governmental action on issues in the fractious and highly competitive freight transport and coal industries, respectively. *Noerr* and *Pennington* can be viewed as early examples of SLAPP suits. Both cases grew out of petitioning government officials to take action which would reduce competition in the two industries involved. Normally, activities which reduce business competition are illegal

under the Sherman Antitrust Act,⁵⁰ a federal statute passed in 1890 which is designed to protect consumer choice and foster an efficient business environment through healthy competition.

Noerr, a 1960 case, involved a dispute between a group of railroads and a group of trucking companies for primary control of the nation's long-distance heavy freight hauling business. The railroads had engaged in an advertising campaign designed to discourage the use of trucks for cross-country shipments, and had even persuaded the governor of Pennsylvania to veto the Fair Trucking Bill in his state.⁵¹

Five years later, in *Pennington*, a union and two large coal companies were accused of conspiring to drive smaller companies out of business by petitioning the Secretary of Labor to set a high minimum wage for miners. The Court found the petitioning immune from Sherman Act liability, holding that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."⁵²

The Supreme Court put the value of petitioning ahead of protection of business interests in *Noerr* and *Pennington* and created a constitutional doctrine which may be the ugly duckling of First Amendment jurisprudence. The *Noerr-Pennington* doctrine provides that the mere act of petitioning the government to take anti-competitive action does not in itself violate the antitrust laws.

In 1982 the Court reaffirmed the *Noerr-Pennington* doctrine in *NAACP v. Claiborne Hardware*,⁵³ holding that the

First Amendment right to petition prevented Mississippi from finding the NAACP liable for interference for boycotting businesses in an effort to force change in segregationist state policies. The Court indicated that the doctrine stems from the First Amendment right to petition and not from a statutory interpretation of the Sherman Act.

Since *Claiborne*, the Noerr-Pennington doctrine has been asserted vigorously in SLAPP suits as a defense to the various tort claims brought against petitioning citizens. The simple invocation of the Noerr-Pennington rule is not a guaranteed defense, however. Several years after the development of the Noerr-Pennington rule, the Court created an exception to Noerr-Pennington immunity -- the "sham" exception. This exception applies when it can be shown that an ostensible campaign to petition the government is actually a cover for nothing more than an attempt to harass with repeated baseless or repetitive claims.⁵⁴

A clear example of a trial court's recent use of the Noerr-Pennington doctrine is the 1990 Illinois case, *Westfield Partners, Ltd. v. Hogan, et al.*⁵⁵ In the now-familiar SLAPP suit scenario, Westfield Partners, a real estate developer, brought charges of interference with prospective economic advantage against four homeowner couples who petitioned to change his building plans. The homeowners had opposed the plan which included a roadway to and from Westfield's planned subdivision that opened onto their quiet residential street, and the developer sued. Relying in part on Noerr-Pennington, the court held that the

defendants' petitioning of town officials was absolutely privileged under the First Amendment and dismissed the complaint.

IV. Affirmative Defenses and Sanctions

A. Cross-claims for Malicious Prosecution

Although eventual success is frequent in SLAPP suits,⁵⁶ long-deferred vindication itself may not be sufficient to overcome the general chilling effect of SLAPPs and the ordeal of pursuing a defense to a satisfactory conclusion. Increasingly, activists are responding to SLAPPs with suits of their own (SLAPP-backs), on grounds of malicious prosecution, defined simply as initiating a suit out of spite or without solid legal basis.⁵⁷ When successful, these SLAPP-backs vindicate the original defendant whose political activity resulted in their being wrongfully dragged into court, and recover the expenses and more of having been forced to defend a point of view.

There are drawbacks to the SLAPP-back strategy, however: as entirely new lawsuits, quick settlements of the original action becomes impossible, and courts consider the suits "disfavored"⁵⁸ because they impose an additional burden on the legal system. Though SLAPP-backs may ultimately prevail, and the award may be impressive indeed, the process can be long and arduous.

SLAPP-backs, for all their drawbacks, can be very rewarding. In *Manke v. Marcus*,⁵⁹ the plaintiffs charged that the owners of a Fremont, Calif. mobile home park, and their law firm, Thelen, Marrin, Johnson & Bridges, had threatened spurious litigation, issued mass subpoenas and demanded that plaintiffs pay defendants' attorneys' fees. In October 1992, 46 residents of the park settled a \$3.5 million abuse of process suit against the owners and the law firm and will share \$1,312,500.⁶⁰

In another California case earlier that month, a San Francisco federal jury awarded environmentalist Alan LaPointe \$205,100 after finding that a public sewer board illegally tried to intimidate him by naming him in a \$42 million SLAPP. The jury needed only 30 minutes to return the verdict against the West Contra Costa County Sanitation District which had been in litigation with LaPointe and 490 other unnamed defendants since 1988. Plans for the waste plant were scrapped during the suit.⁶¹

In February 1991, the California Sixth District Court of Appeal upheld a \$260,000 jury verdict in *Monia v. Parnas Corp.*,⁶² a case which had been in litigation since 1980. Monia, the former head of an association that favored a proposed city ordinance limiting hillside development in the Santa Cruz Mountains, had circulated a flier in opposition to Parnas, a proposed project's developers. When Parnas sued, a Santa Clara County Superior Court judge ruled it a SLAPP aimed at intimidating Monia, and dismissed the action.

Monia brought his counterclaim in 1983. Delays of various types kept the suit from going to trial until June 1989.⁶³

California's largest punitive SLAPP-back judgment, an \$11.1 million award for malicious prosecution, was allowed in October 1991 by a 6-1 vote of the state supreme court.⁶⁴ The nine-year battle between San Joaquin Valley agribusiness giant J.G. Boswell Co. and three farmers grew out of newspaper advertisements accusing Boswell of opposing an irrigation project in order to gain a monopoly on cotton farming in the Valley. The farmers won a \$13.5 million jury verdict in 1988 which was later reduced by \$2.4 million when punitive damages were cut to \$600,000 by the trial judge.⁶⁵

B. Procedural Remedies: Rule 11 and State Provisions

The substantive methods outlined above are not the only methods available to combat SLAPP suits. Federal and state procedural rules all contain provisions designed to discourage frivolous and unnecessary litigation. Sanctions, in the form of the awarding of attorneys' fees, are the modern procedural system's primary offensive tactic against baseless prosecutions.

Sanctions won't make anyone rich, but they may be a more certain, and certainly quicker, way to recover expenses. Environmental defendants in a vindictive mood might prefer cross- and counterclaims to sanctions because they threaten plaintiffs with greater exposure to liability. Sanctions, on the other hand, are designed not as a reward

system, but primarily as a mechanism to deter baseless filings at the district court level.⁶⁶ Federal sanctioning rules are codified in Rule 11 of the Federal Rules of Civil Procedure,⁶⁷ one of the original rules promulgated in 1938 and amended in 1983. Additionally, although Rule 11 imposes the principal responsibility for frivolous lawsuits on attorneys, recent cases demonstrate that it can be used to impose sanctions on clients as well, if they can be shown to have misled their attorneys.⁶⁸

In addition, a second federal statute⁶⁹ imposes yet another obligation on parties to initiate and litigate actions responsibly, so as not to "unreasonably or vexatiously belabor meritless proceedings."⁷⁰ The term 'vexatious' demands that conduct be more extreme than mere negligence, inadvertence or incompetence.

State codes uniformly provide additional means of compensation for frivolous litigation. New Jersey's statute⁷¹ is a straightforward example, similar to many found around the country. The statute provides a means to ask the court for attorneys' fees independent of any contemplated countersuit or other action. The aggrieved party can make a simple motion for the fees at any time, or the court can award them on its own.

New York statutes contain two sections dedicated to sanctions for frivolous conduct, one⁷² allowing attorney's fees and expenses, and another section⁷³ explicitly allowing attorneys' fees of up to \$10,000. The latter provision was recently interpreted to allow up to \$10,000 in

fees per defendant for frivolous filings in *Entertainment Partners Group, Inc. v. Davis*.⁷⁴ *Entertainment Partners* involved a suit by Manhattan nightclub owners who had sued officers of a block association for defamation and interference after they opposed the club's application for a zoning variance.

C. Anti-SLAPP Legislation

New York state's new anti-SLAPP statute,⁷⁵ amends the state's civil rights law and Civil Practice Law and Rules for "actions involving public petition and participation." It applies to actions filed by any party applying for official permits for damages related to "any efforts of the defendant to report on, comment on, rule on, challenge or oppose such applications or permission."

The statute treats developers and other plaintiffs as public figures, requiring them to meet an actual malice standard to recover for defamation. They must provide "clear and convincing evidence" that a statement was knowingly false or made with "reckless disregard" of its truth or falsity. It also explicitly provides for defendants to recover costs and attorneys' fees if an action was "commenced or continued without a substantial basis in fact and law." As a further deterrent to SLAPP suits, the new law allows recovery for compensatory damages if the suit was filed "for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free

exercise of speech." It finally provides for punitive damages if the "sole purpose" of the suit is harassment.

In order to resolve SLAPP suits quickly, the bill requires courts to grant a preference in hearing motions to dismiss or for summary judgment. It also requires the plaintiff to demonstrate that the suit "has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law," rather than the "reasonable" standard that commonly applies to other types of civil actions.⁷⁶

California's anti-SLAPP statute⁷⁷ subjects SLAPP suits to a motion by the defendant to dismiss the action. A successful motion to dismiss requires the defendant to show that the suit was aimed at the exercise of the defendant's right of free speech, such as speaking out or writing letters on issues before governmental bodies. After that, the burden shifts to the plaintiff, who must prove he has a "probability" of winning before the suit can proceed. Both the New York and California statutes apply to actions commenced on or after January 1, 1993.

CONCLUSION

This paper has examined two legal methods, the substantive remedy of dismissal and the procedural remedy of sanctions, that courts can avail themselves of to discourage the filing and limit the success of SLAPPs in the court

system. Either dismissal under the Noerr-Pennington doctrine or imposition of Rule 11 (or the state equivalent) sanctions for attorneys' fees are effective methods of protecting the speech and petitioning rights of those who may find themselves SLAPP defendants.

The lawsuits in which either the Noerr-Pennington analysis or the sanctions method lend themselves most effectively can be identified by a simple two-step analysis. A suit is a candidate for one or both remedies if it is either: a) brought following the exercise of certain forms of First Amendment petitioning rights, or b) unlikely to prevail on the merits, as determined by the sort of mini-trial used to determine whether to grant preliminary injunctive relief. Judicious use of this test is vital and must be kept as narrow as possible to avoid impinging on the court access rights of those with legitimate causes of action for relief at law.

ENDNOTES

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3. Pring, SLAPPs: Strategic Lawsuits Against Public Participation, 7 Pace Environmental L.Rev.3,7-8 (1989) He has also used language indicating an intimidation or punitive component, defining SLAPPs as "civil lawsuits . . . aimed at preventing citizens from exercising their political rights or punishing those who have done so." Canan & Pring, supra note 1, 506.
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27. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
28. Gertz v. Welch, 418 U.S. 323, 355,
29. Cf. Pacific Gas & Electric Co. v. Bear Stearns & Co., 50 Cal. 3d 1118; 791 P.2d 587 (1990) in which the Calif. Supreme Court threw out an interference allegation it felt blocked free access to the courts; supra note 17.
30. See Seaman's Direct Buying Service, Inc. v. Standard Oil Co., 36 Cal. 3d 752, 765; 686 P.2d 1158, 1164 (1984).
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32. See J'Aire Corp. v. Gregory, 24 Cal. 3d 799; 598 P.2d 60 (1979).
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67. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading . . . ; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . If a pleading . . . is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading . . . including a reasonable attorney's fee.
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**JOURNALISTS' RIGHT TO COPY
AUDIO AND VIDEO TAPES
PRESENTED AS EVIDENCE DURING TRIALS**

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JOURNALISTS' RIGHT TO COPY AUDIO AND VIDEO TAPES PRESENTED AS EVIDENCE DURING TRIALS

I. INTRODUCTION

"The courts and those who man them, the lawyers and judges, are continually faced with the need for utilization of new and varied techniques and technology in order to meet the ever-changing needs of the society for whose benefit they exist."¹ That sentence appeared in a law review article twenty-two years ago, but American courts still are struggling with technological issues today. Although changes occur slowly in the judicial system, judges have increasingly allowed the use of various communication technologies in courtrooms. Using audio and video tapes to present evidence during trials has become the most common application of these technologies in the U.S. judicial system. For journalists, this presents questions about whether tapes introduced as evidence can be copied and broadcast.

The specific question about media and public access² to taped evidence is part of the more general free press-fair trial debate. Courts must balance the first amendment right to a free press³ with the sixth amendment right "to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."⁴ Free press-fair trial conflicts occur relatively infrequently because only sensational cases draw extensive news coverage in urban areas. Also, many cases are plea bargained and never reach a jury, so no threat of jury

¹ Comments, *Judicial Administration -- Technological Advances -- Use of Videotape in the Courtroom and the Statehouse*, 20 De Paul L. Rev. 924, 924 (1971).

² The term "access" as used throughout this paper refers to the right to both inspect and copy evidentiary materials.

³ U.S. Const. amend. I. The first amendment provides, in part, that "Congress shall make no law ... abridging the freedom of speech or of the press."

⁴ U.S. Const. amend. VI.

prejudice exists.⁵ In highly publicized cases, however, court officials often express concern about ensuring fair trials.

Courts in the United States have recognized a common law right to copy tapes introduced as evidence, but they generally have not found a constitutional basis for this access. The federal courts of appeal that have ruled on the issue agree that there is a presumption of public access to these materials, but they disagree on the strength of that presumption and on the factors necessary to overcome it.⁶ Courts have assumed the broadcast of taped evidence could threaten jury impartiality in four situations: when trials are in progress and jurors could potentially be exposed to the materials outside the courtroom if the tapes were broadcast; when retrial of the defendant is a possibility; when the defendant will be tried subsequently on other charges; and when co-defendants or related parties will subsequently be tried on related charges.⁷

Journalists often argue that the right of access to criminal trial exhibits -- including audio or video tapes -- should coincide with the right of access to criminal trials. Allowing the media to broadcast evidence provides the right of access for the majority of the public who cannot attend a trial in person.⁸ "A denial of physical access to evidentiary material deprives the public of a meaningful opportunity to understand the proceeding."⁹

⁵ Giglio, *Free Press-Fair Trial in Britain and America*, 10 J. of Crim. Just. 341, 342 (1982).

⁶ Recent Developments, *Media Access to Evidentiary Materials: United States v. Edwards*, 1983 Wis. L. Rev. 1455, 1455-56 (1983).

⁷ *Id.* at 1464 (citation omitted).

⁸ *Id.* at 1470-71.

⁹ Comments, *In Defense of Broadcaster Access to Evidentiary Video and Audio Tapes*, 44 U. Pitt. L. Rev. 647, 652 (1983) [hereinafter cited as *In Defense*].

The U.S. Supreme Court has found a constitutional right for media and public access to trials and other court proceedings in *Richmond Newspapers v. Virginia*¹⁰ and other cases decided during the 1980s.¹¹ The *Richmond* decision has "had a positive impact on the media's right to inspect, copy, and broadcast or publish evidentiary documents, but courts have declined to directly recognize a constitutional right [of access] to these documents." This is true even though the Supreme Court has recognized a constitutional right to attend criminal trials into which these materials are introduced as evidence.¹²

Some journalists and legal commentators argue that *Richmond* constitutionalized the common law right to inspect court documents and records, which the Supreme Court recognized in *Nixon v. Warner Communications, Inc.*,¹³ but courts have not accepted this argument.¹⁴ Teri G. Rasmussen has proposed a constitutional right of media access to evidentiary recordings presented in criminal trials. The recognition of only a common law right has led some courts to "conclude that effects of access on a defendant's constitutional right to a fair trial should be given much greater weight than any improvement of public understanding that might result from permitting access [to tapes]."¹⁵

Like Rasmussen, this paper argues for a constitutional right of access. It first describes current uses of communication technologies, including video and audio tape, in American courtrooms. The paper then

¹⁰ 100 S. Ct. 2814 (1980).

¹¹ For a full discussion of *Richmond* and the other cases, see Section III of this paper.

¹² McLean, *The Impact of Richmond Newspapers*, 61 Journalism Q. 785, 785 (1984).

¹³ 98 S. Ct. 1306 (1978).

¹⁴ McLean, *supra* note 12, at 790.

¹⁵ Rasmussen, *Recognizing a Constitutional Right of Media Access to Evidentiary Recordings in Criminal Trials*, 17 U. of Mich. J. of L. Ref. 121, 126 (1983) (citation omitted).

looks at Supreme Court rulings that have found a constitutional basis for opening court proceedings to the public and the media. The next sections discuss the Supreme Court's decision in *Nixon v. Warner Communications, Inc.*, and at subsequent lower court decisions to demonstrate the confusion that exists about the media's right to copy and broadcast audio and video tapes introduced as evidence.¹⁶ The final section recommends that courts recognize a constitutional right for the media to copy and broadcast taped evidence presented during trials.

II. COURTROOM USES OF COMMUNICATION TECHNOLOGIES

In 1859, technology arrived in America's courtrooms when the U.S. Supreme Court admitted daguerreotypes as evidence in a case. Daguerreotypes were photographs made by an early method on plates of chemically treated metal or glass. In 1887, a U.S. court allowed a telephone conversation to be used as evidence for the first time.¹⁷ One of the first documented uses of videotape in a courtroom occurred in December 1971 when a deposition in a personal injury case was taken from a doctor in Oak Ridge, Tennessee, and used in a trial in St. Petersburg, Florida.¹⁸

As these examples demonstrate, U.S. judicial systems have allowed a variety of communication technologies to be used in courtrooms for more than one hundred years. Rapid advances in communication technologies in the past twenty years, however, have greatly increased the possibilities for their use.

¹⁶ Some other court decisions have dealt with media access to tapes that have been a part of law enforcement investigations or judicial proceedings other than trials, but those cases will not be considered here.

¹⁷ Berman, *Have Juries Gone to the Movies? -- The Use of Videotape in the Courtroom*, 12 Am. J. of Trial Advocacy 141, 143 (1988).

¹⁸ Salvan, *Videotape for the Legal Community*, 59 Judicature 222, 222 (Dec. 1975).

Various communication technologies have found their way into America's courtrooms. For example, telephone conferencing, usually consisting of a three-way conference call among the judge and attorneys for all sides in a legal suit, has been used for setting trial dates, for conducting hearings on motions made by the attorneys, and for conducting pretrial and settlement conferences.¹⁹ Satellite teleconferences have been used for presenting expert testimony during trials without requiring that the person testifying actually appear in the courtroom.²⁰ Some jurisdictions have adopted a third technology -- closed-circuit television -- for arraigning defendants from jails rather than physically transferring them to courtrooms.²¹

The most common technology found in American courtrooms, however, is videotape, which has been used for preserving the trial record instead of having written transcripts²²; for presenting depositions²³; for presenting

¹⁹ Hanson, Olson, Shuart & Thornton, *Telephone Hearings in Civil Trial Courts: What Do Attorneys Think?*, 66 *Judicature* 408 (Apr. 1983); Hanson, Olson, Shuart & Thornton, *Telephone Conferencing in Criminal Court Cases*, 38 *U. Miami L. Rev.* 611 (1984); DeFoor & Sechen, *Telephone Hearings in Florida*, 38 *U. Miami L. Rev.* 593 (1984); Corsi, Rosenfeld, Fowler, Newcomer, Niekerk & Bell, *Major Findings of the New Mexico Experiment of Teleconferenced Administrative Fair Hearings*, 38 *U. Miami L. Rev.* 647 (1984).

²⁰ Marcotte, *High-Tech Depositions*, 73 *A.B.A. J.* 26 (Dec. 1, 1987); Harbaugh, *Legal Video Teleconferencing: Cutting-Edge Technology for Depositions... and More*, 25 *Trial* 84 (Apr. 1989).

²¹ Gilmore, *Arraignment by Television: A New Way to Bring Defendants to the Courtroom*, 63 *Judicature* 396 (March 1980); Surette & Terry, *Videotaped Misdemeanor First Appearances: Fairness from the Defendant's Perspective*, in *Justice and the Media: Issues and Research* 305 (R. Surette ed. 1984); Terry & Surette, *Video in the Misdemeanor Court: The South Florida Experience*, 29 *Judicature* 13 (June-July 1985); Terry & Surette, *Media Technology and the Courts: The Case of Closed Circuit Video Arraignments in Miami, Florida*, 11 *Crim. Just. Rev.* 31 (Fall 1986); Jones, *Testimony via Closed-Circuit Television After Gonzales v. State: Is the Sixth Amendment Right to Confront Adverse Witnesses at Stake in Texas Criminal Trials?*, 44 *Baylor L. Rev.* 957 (1992).

²² Frank, *Video in Court*, 71 *A.B.A. J.* 26 (Nov. 1985); Burt, *The Case Against Courtroom TV*, 12 *Trial* 62 (July 1976); C.C. Clark, *Video Transcripts: A Survey of Washington's Current System*, 26 *Gonz. L. Rev.* 585 (1990-91).

²³ Kaminski & Miller, *How Jurors Respond to Videotaped Witnesses*, 34 *J. Com.* 88 (1984); Citrin, *Rules and Case Law Governing Videotape Depositions*, 12 *Am. J. Trial Advocacy* 87

evidence²⁴; and for conducting entire trials, where the testimony of all witnesses is videotaped in advance and then shown to a jury.²⁵ Using videotape to present depositions and evidence occurs most frequently. While the adoption of these technologies in judicial settings has been slow, the trend toward increased usage emphasizes the need for the media to pay attention to access issues that develop in this area.

III. HISTORY OF ACCESS TO COURT PROCEEDINGS

The Supreme Court decisions regarding access to court proceedings indicate a movement toward openness. The cases "reveal a judicial abhorrence against blanket orders that restrict media access to judicial proceedings."²⁶ Luis Salas lists these factors as influencing the trend toward openness: the public's distrust of the criminal justice system; an increased understanding of the communications industry and the measures needed to control media behavior during trials; an increase in general societal interests over the rights of individual defendants; and a recognition of the educational role the judicial system can play.²⁷

(1988); Drucker & Hunold, *Videotaped Depositions: The Media Perspective*, 60 N.Y. St. B.J. 38 (Nov. 1988); Henke, *The Taking and Use of Videotaped Depositions*, 16 Am. J. Trial Advocacy 151 (1992).

²⁴ Joseph, *Demonstrative Videotape Evidence: How to Use Videotape in Trials*, 22 Trial 60 (June 1986); Weiss, *Trial by Tape*, 7 Am. Film 61 (June 1982); Preiser and Hoffman, 'Day-in-the-Life Films' -- Coming of Age in the Courtroom, 17 Trial 26 (Aug. 1981); Berman *supra* note 17; C.M. Clark *Televised Testimony vs. the Confrontation Clause ... The Use of Videotapes in the Prosecution of Child Sexual Abuse*, 23 Hous. L. Rev. 1215 (1986); Bailey, *Videotape Evidence: Show Me, Don't Tell Me*, 27 Trial 52 (Mar. 1991).

²⁵ McCrystal, *Videotaped Trials: A Primer*, 61 Judicature 250 (Dec. 1978); G. Miller & N. Fontes, *Videotape on Trial: A View from the Jury Box* (1979); J. Buchanan and C. Bos, *How to Use Video in Litigation: A Guide to Technology, Strategies and Techniques* (1986).

²⁶ Salas, *The Press and the Criminal Justice System: Controversies Over Acquisition and Distribution of Information*, in *Justice and the Media: Issues and Research* 91, 105 (R. Surette ed. 1984).

²⁷ *Id.* at 105.

In 1980, the Supreme Court ruled in *Richmond Newspapers, Inc., v. Virginia*²⁸ that a Virginia court erred in upholding a defendant's request to exclude the public and media from his trial. "The ruling is important because for the first time the court held that the First Amendment grants to the public and to the media a virtually absolute right to attend criminal trials."²⁹ The rationale of *Richmond Newspapers* lies in two features of the criminal justice system. First, the criminal trial has historically been an open proceeding within the Anglo-American justice system.³⁰ Second, such a right of access is essential to assure "freedom of communication on matters relating to the functioning of government."³¹

In the 1982 case of *Globe Newspapers Co. v. Superior Court*,³² the Supreme Court ruled that a Massachusetts statute, which required judges to close trials when they involved sexual offenses with victims under the age of eighteen, violated the first amendment. While the court recognized the state's interest in protecting young sexual assault victims, the majority said a mandatory closure rule went too far. Cases must be evaluated individually, the court said.³³

In the 1984 case of *Press-Enterprise v. Superior Court of California (Press Enterprise I)*,³⁴ the Supreme Court overturned a California court order that barred the media from jury selection in a rape case. "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is

²⁸ 100 S. Ct. 2814 (1980).

²⁹ Giglio, *supra* note 5, at 349.

³⁰ *Richmond Newspapers, Inc., v. Virginia*, 100 S. Ct. 2814, 2821-2827 (1980).

³¹ *Id.* at 2817.

³² 102 S. Ct. 2613 (1982).

³³ *Globe Newspaper Co. v. Superior Court*, 102 S.Ct. 2613, 2620-21 (1982).

³⁴ 104 S. Ct. 819 (1984).

narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."³⁵ Chief Justice Warren Burger's majority opinion noted that the judge in the case closed jury selection for an "incredible *six* weeks" without considering alternatives and then refused to release transcripts of the proceedings.³⁶ Portions of voir dire may, at times, need to be closed, the court said, but this needs to be balanced against the historic values of openness.³⁷

In another case involving the same Riverside, California, newspaper -- *Press Enterprise Company v. Superior Court of California (Press Enterprise II)*³⁸ -- the Supreme Court ruled that the first amendment bars courts from closing preliminary hearings unless "there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent" and "reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."³⁹ The sixth amendment right to a public trial is a shared right, the court ruled: "Plainly the defendant has a right to a fair trial but, as we have repeatedly recognized, one of the important means of assuring a fair trial is that the process be open to neutral observers. The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness."⁴⁰

³⁵ *Press-Enterprise v. Superior Court of California*, 104 S. Ct. 819, 824 (1984).

³⁶ *Id.* at 825 (emphasis in original).

³⁷ *Id.*

³⁸ 106 S. Ct. 2735 (1986).

³⁹ *Press-Enterprise Co. v. Superior Court of California*, 106 S.Ct. 2735, 2743 (1986).

⁴⁰ *Id.* at 2739.

Press-Enterprise II applied a two-part standard for determining whether a first amendment right of access to a proceeding exists: "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question."⁴¹ Justice William Brennan had used a similar approach in his concurrence in *Richmond Newspapers*⁴² and in his majority opinion in *Globe Newspaper Co.*⁴³

Many journalists try to tie the constitutional right the Supreme Court has found for access to court proceedings to the right to copy evidentiary materials. The common law right for members of the public to inspect and copy judicial and other governmental documents originated in England, possibly as early as 1372. Everyone had this right, although only those with a sufficient interest in the records could enforce the right. American courts have been more liberal than the English courts in providing for this right of access. Since the late nineteenth century, courts in the United States have recognized the right for the public to inspect judicial records as a means of providing open government.⁴⁴ American courts have "viewed the right to copy the records as the necessary corollary to the right to inspect, on the theory that the right to inspect would be of little value without the more meaningful perusal which results from the right to copy the records."⁴⁵ With the increased use of modern technology, government information began to be stored in non-paper forms such as computer tape.

⁴¹ *Id.* at 2740.

⁴² *Richmond Newspapers, Inc., v. Virginia*, 100 S. Ct. at 2834 (1980).

⁴³ *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. at 2619 (1982).

⁴⁴ In Defense, *supra* note 9, at 650-51 (citations omitted). See Notes, *The Common Law Right to Inspect and Copy Judicial Records: In Camera Or On Camera*, 16 Ga. L. Rev. 659, 660-72 (1982).

⁴⁵ *Id.* at 652 (citation omitted).

Courts generally have upheld the common law right of access as applying to non-paper records, and this led to the Supreme Court's recognition of this right in *Nixon v. Warner Communications*⁴⁶. A constitutional basis for copying audio and video tapes has not been recognized by most courts, however.

IV. *NIXON V. WARNER COMMUNICATIONS, INC.*

In 1976, the U.S. Court of Appeals for the District of Columbia ruled in *U.S. v. Mitchell*⁴⁷ that a federal district court had abused its discretion in denying the television networks' requests to inspect and copy audio tapes that had been submitted as evidence during the Watergate trials of White House aides. Although President Nixon was not one of the defendants in *Mitchell*, he objected to the release of the tapes and appealed the matter to the Supreme Court on the basis that the tapes contained his conversations and invaded his privacy.⁴⁸

In *Nixon v. Warner Communications, Inc.*,⁴⁹ the U.S. Supreme Court rejected the media's claims of first and sixth amendment rights to copy Nixon's tapes. The court noted that Congress had created a procedure in the Presidential Recordings and Materials Preservation Act for processing and releasing presidential materials. "The presence of an alternative means of public access [to the presidential materials] tips the scales in favor of denying release," the court said.⁵⁰ Reporters and the public were allowed

⁴⁶ *Id.* at 653-54 (citations omitted).

⁴⁷ 2 Med. L. Rptr. 1097 (D.C. Cir. 1976).

⁴⁸ *Nixon v. Warner Communications, Inc.*, 98 S.Ct. 1306, 1313 (1978).

⁴⁹ 98 S. Ct. 1306 (1978).

⁵⁰ *Id.* at 1315-16.

only to hear the tapes in court, read their contents in a transcript, or listen to them where they were stored.⁵¹

The *Nixon* court did, however, recognize a common law right to inspect and copy judicial records.⁵² The right is not absolute, and decisions about whether to allow access are "best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case," the court said.⁵³

V. LOWER COURT RULINGS

In the ABSCAM⁵⁴ federal prosecutions, videotapes of government officials discussing or taking bribes were presented as evidence. Three federal appeals courts upheld the right of television networks to copy the tapes.⁵⁵ All of them found strong common law arguments for the right to copy tapes introduced as evidence, but they did not recognize a constitutional right to copy. The Fifth Circuit took a different approach in *Belo Broadcasting Corp. v. Clark*⁵⁶ when it applied a narrow interpretation of *Nixon* and upheld a trial judge's denial of access to tapes.

In the first ABSCAM decision in 1980, *U.S. v. Myers*,⁵⁷ the Second Circuit Court of Appeals ruled that the common law access right included a right to copy materials admitted into evidence during the trial of Congressman Michael O. Myers. The court noted that the Supreme Court had

⁵¹ *Id.* at 1318.

⁵² *Id.* at 1312.

⁵³ *Id.* at 1312-13.

⁵⁴ ABSCAM involved government agents posing as representatives of wealthy Arab interests who offered large amounts of money to public officials, ostensibly in return for political favors. The term "ABSCAM" comes from combining the first two letters of "Abdul Enterprises, Ltd.," a fictitious business entity used in the investigation, and the word "scam."

⁵⁵ S. Barber, *News Cameras in the Courtroom: A Free Press-Fair Trial Debate* 46 (1987).

⁵⁶ 7 *Med. L. Rptr.* 1841 (5th Cir. 1981).

⁵⁷ 6 *Med. L. Rptr.* 1961 (2d Cir. 1980).

recognized this common law right of access in *Nixon*, even though it ultimately used a federal law to deny the media's request to copy the tapes.⁵⁸ In discussing the fair trial issue in the case, the court said:

We do not doubt the premise of this claim that televising the tapes will greatly increase the number of people with knowledge of their content. . . . We disagree, however, that the likelihood of such enhanced awareness of the tapes poses the kind of risk to fair trials for ABSCAM defendants that justifies curtailing the public's right of access to courtroom evidence. Defendants, as well as the news media, frequently overestimate the extent of the public's awareness of news.⁵⁹

In 1981, the Third Circuit reversed a district court's ruling that denied broadcasters the right to copy tapes introduced during the trial of other ABSCAM defendants.⁶⁰ Although the circuit court did not recognize a constitutional right of access to the tapes, it said that "some of the same policy considerations identified as supporting open trials may be considered when the issue involves the common law right of access to trial materials."⁶¹ The media's right of access to the tapes was enhanced because the defendants were public officials accused of taking bribes; the allegations about bribery had "provoked public concern and comment about the morality of public officers."⁶²

In a third ABSCAM case in 1981 -- *In re Application of NBC (Jenrette)*⁶³ -- the District of Columbia Circuit reversed a lower court ruling and granted broadcasters access to tapes introduced as evidence during the trial of Congressman John Jenrette. In court's opinion expressed

⁵⁸ U.S. v. Myers, 6 Med. L. Rptr. 1961, 1963 (2d Cir. 1980).

⁵⁹ *Id.* at 1966.

⁶⁰ *In re Application of NBC (Criden)*, 7 Med. L. Rptr 1153 (3d Cir. 1981)

⁶¹ *Id.* at 1157.

⁶² *Id.* at 1159.

⁶³ 7 Med. L. Rptr. 1193 (D.C. Cir. 1981)

doubt that the "risk of potential prejudice at a hypothetical second trial could ever justify infringing upon the common law right of access to judicial records."⁶⁴

In the latter two ABSCAM cases, both circuit courts recognized the need to protect innocent third parties mentioned in the tapes and ordered the trial courts to excise portions of the tapes that could injure these people. After the Third Circuit had issued this order, the trial court judge deleted all references to third parties from the tapes, which resulted in a reduction of 20 percent of the taped conversations. Broadcasters appealed, and the Third Circuit decided to make its own decisions about what material to delete from the tapes. The court said that few references to third parties in the tape rose "to the level of 'intensified pain' [to the parties], as distinguished from mere embarrassment, which would warrant deletion from the tape themselves."⁶⁵

A circuit court's first denial of media access to tapes presented as evidence occurred in the 1981 *Belo Broadcasting*⁶⁶ decision. The Fifth Circuit denied broadcasters the right to copy tapes played in open court during the trial of three men indicted in connection with BRILAB,⁶⁷ another FBI investigation. The court expressed concern about the impact of tape broadcasts on the upcoming trial of another BRILAB defendant.⁶⁸ The *Belo* court granted broad deference to lower court judges in weighing the facts of cases because "appellate courts are far removed in time and space from the

⁶⁴ In re Application of NBC (Jenrette), 7 Med. L. Rptr. 1193, 1197 (D.C. Cir. 1981)

⁶⁵ In re Application of NBC (Criden), 8 Med. L. Rptr. 2062, 2064-65 (3d Cir. 1982).

⁶⁶ *Belo Broadcasting v. Clark*, 7 Med. L. Rptr. 1841 (5th Cir. 1981).

⁶⁷ BRILAB involved an FBI "sting" operation in which Texas state officials and others were indicted for bribery in connection with the awarding of state employee insurance contracts.

⁶⁸ *Belo Broadcasting v. Clark*, 7 Med. L. Rptr. at 1841.

events in the course of criminal trials. And while distance may allow us to escape the smoke and heat generated in those proceedings, our distance from the flame robs us as well of the light cast thereby."⁶⁹

In the 1982 *U.S. v. Edwards*⁷⁰ decision, the Seventh Circuit also denied broadcasters' requests to copy audio tapes played during the trial of an Indiana legislator who was accused of accepting unlawful payments. The appeals court said that the trial judge had not abused his discretion in denying the application to copy the tapes, because their release could injure the defendant's fair trial rights during the trial and prejudice the defendant's upcoming trial on tax evasion charges.⁷¹ The threat to a fair trial was actual, and not hypothetical, the court said: "The trial judge properly recognized that adverse publicity arising from broadcast of the tapes, which clearly implicated [defendant] Edwards in the extortion scheme, posed a threat to drawing a fair and impartial second jury."⁷²

One commentator, Benjamin L. Sells, sees the *Edwards* decision as a compromise between the ABSCAM cases that recognized a broad right of access to evidentiary recordings and the *Belo* decision that said the presumption of an access right was only one factor to be considered. The *Edwards* decision recognized a "common law right to copy court records for broadcast in the face of hypothetical challenges on fair trial grounds, while keeping intact the discretionary authority needed for lower courts to respond to contingencies presented at the trial level."⁷³

⁶⁹ *Id.* at 1846-47.

⁷⁰ 8 Med. L. Rptr. 1145 (7th Cir. 1982).

⁷¹ *U.S. v. Edwards*, 8 Med. L. Rptr. 1145, 1145 (1982).

⁷² *Id.* at 1150.

⁷³ Sells, *The Right of Access to Judicial Records: When May the Electronic Media Copy Audio and Videotape Evidence?*, 60 Chi.-Kent L. Rev. 755, 757 (1984).

Also in 1982, the Seventh Circuit in *U.S. v. Dorfman*⁷⁴ upheld broadcasters' access to audio tape evidence in a case similar to *Edwards*, in which access had been denied. The case involved wiretap tapes introduced as evidence during a bribery and fraud trial. Here, however, a lower court had granted access to the tapes, and the Seventh Circuit upheld the trial judge's ruling. The court said, "Prejudice during the pendency of this, and any future, trial can be minimized by firm management of the proceedings by the district court."⁷⁵

In 1986, three U.S. Courts of Appeals decided their first cases on whether the media have a right to copy tapes admitted as evidence at criminal trials.⁷⁶ In one of these cases -- *U.S. v. Beckham*⁷⁷ -- the Sixth Circuit denied the media access to tapes. The court distinguished between the right of access to courtrooms, and the right of access to tapes and transcripts that are admitted as evidence.⁷⁸ Citing applicable U.S. Supreme Court cases, the court said, "The Constitution requires that members of the public and the media have the opportunity to attend criminal trials and to report what they have observed." That opportunity had existed in this case. "[But] [i]f a right to copy the tapes and transcripts in this case exists, it must come from a source other than the Constitution."⁷⁹ The court said, "We do not believe a fundamental right [of physical access to the tapes

⁷⁴ 8 Med. L. Rptr. 2372 (7th Cir. 1982).

⁷⁵ *U.S. v. Dorfman*, 8 Med. L. Rptr. 2372, 2372-2374 (7th Cir. 1982).

⁷⁶ Constitutional Law, *Assessing the Media's Right: Copying Audio and Video Tapes Played As Evidence in Criminal Trials*, 10 W. New England L. Rev. 99, 99 (1988) [hereinafter cited as *Assessing the Media's Right*].

⁷⁷ 789 F.2d 401 (6th Cir. 1986).

⁷⁸ *U.S. v. Beckham*, 789 F.2d 401, 409 (6th Cir. 1986).

⁷⁹ *Id.*

themselves] is implicated so long as there is full access to the information and full freedom to publish."⁸⁰

In another 1986 case -- *U.S. v. Webbe*⁸¹ -- the Eighth Circuit reached a conclusion similar to that in *Beckham*. The court said, "We think the common law requires access to information on judicial proceedings and all evidence of record (unless ordered sealed), but this right does not necessarily embrace copying of tapes."⁸² The *Webbe* court advocated the approach, used by the Fifth Circuit in *Belo Broadcasting*, of giving deference to the trial court in deciding such access issues.⁸³

The third 1986 case of *Valley Broadcasting Co. v. U.S. District Court*⁸⁴ had a more favorable result for the media. The Ninth Circuit overturned a lower court decision denying the right to copy evidentiary tapes. The court said, "While we recognize that the added danger of jury taint arising from the transmission of the tapes themselves may vary from case to case, we re-emphasize that the district court must articulate the factual basis for the danger without relying on hypothesis or conjecture."⁸⁵

Legal commentator James K. Foster argues that the *Valley Broadcasting* decision, rather than the supposed compromise in *Edwards*, represents the "true middle ground approach between the ABSCAM cases and *Belo Broadcasting*"⁸⁶ Foster concludes that the strength of the media's

⁸⁰ *Id.* at 415.

⁸¹ 12 *Med. L. Rptr.* 2193 (8th Cir. 1985).

⁸² *U.S. v. Webbe*, 12 *Med. L. Rptr.* 2193, 2195 (8th Cir. 1985).

⁸³ *Id.* at 2195.

⁸⁴ 13 *Med. L. Rptr.* 1347 (9th Cir. 1986).

⁸⁵ *Valley Broadcasting v. U.S. District Court*, 13 *Med. L. Rptr.* 1347, 1352 (9th Cir. 1986).

⁸⁶ *Assessing the Media's Right*, *supra* note 76, at 128.

right to copy evidentiary recordings will not be decided definitely until the Supreme Court considers another case dealing with the issue.⁸⁷

The situation is not any more clear in 1993 than it was in 1988 when Foster wrote his comments. The opinions rendered by American courts continue to lack consistency. Two March 1993 decisions by the U.S. District Court for the Southern District of Florida illustrate this point. In the first case, *U.S. v. Abegg*,⁸⁸ the court granted Turner Broadcasting System access to audio and video tapes that had been introduced as evidence even though the defendant objected to the release of the tapes. The defendant faced other charges in Pennsylvania and feared "that the national broadcast of the tapes could taint their [prospective jurors'] view of his pending Pennsylvania case."⁸⁹ In granting the media's request, the judge wrote, "Roman Abegg has not overcome the presumption of access attaching to his case. He has been unable to demonstrate that the tapes' broadcast would inevitably jeopardize his fair trial rights. The defense fear . . . is simply too speculative."⁹⁰ Judge Barry S. Seltzer did not mention the first amendment in his decision, but he did mention Turner Broadcasting's argument that it had a common law right of access and said release of the tapes "would promote the public's understanding of the proceedings."⁹¹

In the second Florida case, *U.S. v. Shenberg*,⁹² a judge granted television stations access to audio and video tapes played in open court, but only after the jury had completed deliberations in the case. In justifying

⁸⁷ *Id.* at 131.

⁸⁸ 21 Med. L. Rptr. 1442 (S.D. Fla. 1993).

⁸⁹ *U.S. v. Abegg*, 21 Med. L. Rptr. 1442, 1443 (S.D. Fla. 1993).

⁹⁰ *Id.*

⁹¹ *Id.* at 1442-1443.

⁹² 21 Med. L. Rptr. 1444 (S.D. Fla. 1993).

the delayed release, the judge wrote, "Immediate release of the tapes could taint the deliberative process if, notwithstanding the court's instructions, a juror or jurors accidentally viewed these tapes on television. As pointed out by defense counsel, this might result in a juror considering the evidence alone and not with all other jurors present as the law requires."⁹³ Because another defendant was awaiting trial in the same case, the judge required that any references in the tapes to that defendant be redacted. The same court had previously denied the television stations access to the tapes, but changed the decision because "the concerns it [the court] previously expressed have diminished in light of the expected conclusion of the trial."⁹⁴ In an emphatic statement apparently directed at the media, the judge wrote, "In plain English, there is no -- repeat NO -- constitutional right of access to the tapes by the press. Though some refuse to believe it, the Constitution of the United States does contain more than the first amendment."⁹⁵

As these two Florida decisions demonstrate, decisions on media access to tapes lack consistency. In both cases, the court considered arguments that release of the tapes would jeopardize sixth amendment rights in both the trial going on at the time and in future trials. In the first case, however, greater weight was given to the media's common law right of access to the tapes than in the second case. The *Shenberg* judge initially denied access to the tapes and then permitted access only after the conclusion of jury deliberations. Recognition of a first amendment right of access to these evidentiary materials would have aided the media's cause in these cases. Although a first amendment right would not necessarily mean

⁹³ U.S. v. *Shenberg*, 21 Med. L. Rptr. 1444, 1445 (S.D. Fla. 1993).

⁹⁴ *Id.*

⁹⁵ *Id.* (emphasis in original).

the media would always gain access to taped materials, at least the media's rights would have equal constitutional footing with the sixth amendment rights of defendants. Clearly, a more definite standard than *Nixon* is needed to clarify the media's right to copy and broadcast audio and video tapes.

VI. ANALYSIS AND CONCLUSIONS

The failure of American courts to recognize a constitutional basis for media access to evidentiary tapes has led to confusion, both for journalists and the judicial system. The circuit court rulings on access to tapes have been inconsistent. When the copying of evidentiary tapes is considered only a common law right, the interests of the media in gaining access to them often are not weighed as heavily as defendants' fair trial rights, which have a constitutional basis.

This is of particular concern for journalists because judges and attorneys sometimes exaggerate the impact of media coverage. In cases involving audio and video tapes introduced as evidence, judges express concerns about the effect broadcasts could have for trials in progress and for future trials in the same case. In a 1988 article, Ralph Frasca combines research results from several areas to estimate the occurrence of trials prejudiced by media coverage. He finds that media reporting of felonies and arrests rarely hurts a defendant's right to a fair trial, partly because so many cases are plea bargained and never reach the trial stage.⁹⁶

Frasca concludes that three conditions are necessary for press coverage to prejudice jurors:⁹⁷

⁹⁶ Frasca, *Estimating the Occurrence of Trials Prejudiced by Press Coverage*, 72 *Judicature* 164, 169 (Oct.-Nov. 1988).

⁹⁷ *Id.* at 169.

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1. There must be a jury trial, which occurs with only 10 percent of the felony arrests in large metropolitan areas.

2. The case must be covered prejudicially by the press, which occurs in about 5 percent of the felony arrests in large metropolitan areas. He defined prejudicial information as that which normally would not be available to jurors during a trial.⁹⁸

3. The people who become jurors must acquire a prejudice from the press coverage and retain it until the time of jury deliberations, which occurs about 2 percent of the time.⁹⁹

Frasca writes that, if all variables are assumed to be randomly distributed, press-induced bias would occur in only about one case in ten thousand.¹⁰⁰ While some scholars may disagree with the assumptions Frasca makes in arriving at these statistics, his article does point out the relative infrequency with which prejudicial publicity occurs.

Another factor in the free press-fair trial debate is, as Joseph F. Kobyłka and David M. Dehnel point out, that no causal relationship has been established between "supposedly 'prejudicial' news reporting and impairment of 'fair' trials." They write that publicity may help a defendant's case as well as harm it, but courts seldom consider any positive functions of media coverage.¹⁰¹

⁹⁸ *Id.* at 165.

⁹⁹ *Id.* at 168-69. Frasca determined this figure by starting with statistics that U.S. Circuit Judge William J. Bauer provided the American Society of Newspaper Editors in 1976. Bauer found that, even in highly publicized cases, 94 percent of prospective jurors said during voir dire that they could not remember news stories about the case. That leaves about 6 percent of potential jurors who remember news stories about a case. Frasca then estimated that figure would be reduced to 2 percent because careful voir dire helps to weed out potentially biased jurors, and admonitions from judges to juries further help to reduce the potential for bias.

¹⁰⁰ *Id.* at 169.

¹⁰¹ Kobyłka & Dehnel, *Toward a Structuralist Understanding of First and Sixth Amendment Guarantees*, 21 Wake Forest L. Rev. 363, 364 (1986).

Despite the prevalence of social science research on the impact of pretrial publicity on jurors in recent years, the evidence is inconclusive: Sometimes an influence seems to exist, but in other cases it does not. In a 1986 summary of the empirical literature pertaining to the free press-fair trial debate, a group of researchers concludes that "given the breadth of attention" the effects of news coverage on jury verdicts has received, "it is surprising that so little is known."¹⁰²

Pretrial publicity may have some impact on potential jurors, but research has not demonstrated the precise nature of that impact. Because of this, courts should not just assume that heavy media coverage means potential jurors have prejudice. Knowledge about a case does not necessarily imply bias on the part of potential jurors.

Newton N. Minow and Fred H. Cate argue that some courts mistakenly assume that "impartial" jurors are those who are "unaware" and, therefore, search for jurors who know nothing about a case. "This process, particularly in notorious cases, is often time consuming and expensive. If the defendant is unusually well-known, it may be impossible to impanel a jury wholly ignorant of his or her activities. Such a quest may exclude qualified citizens from the jury, resulting in panels composed of citizens who are less knowledgeable about their surrounding community."¹⁰³

Minow and Cate suggest that the central problem with the current remedies for trying to assure fair trials -- such as a careful voir dire, a

¹⁰² Carroll, Kerr, Alfini, Weaver, MacCoun & Feldman, *Free Press and Fair Trial: The Role of Behavioral Research*, 10 *Law & Human Behavior* 187, 189-90 (1986).

¹⁰³ Minow & Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 *Am. U.L. Rev.* 631, 633 (1991). See also Chaney, *The Jury's Right to Know*, 9 *Mass Com Rev.* 2 (Spring-Fall 1982); Hassett, *A Jury's Pre-Trial Knowledge in Historical Perspective: The Distinction Between Pre-Trial Information and 'Prejudicial' Publicity*, 43 *Law & Contemp. Prob.* 155, 155 (1980).

change of venue, sequestration of the jurors, and careful instructions from the judge¹⁰⁴ -- is that "there appears to be little consensus on what an impartial jury really is."¹⁰⁵ Social science research and the experience of judges and attorneys indicate that these remedies do not adequately ensure the selection of an impartial jury. Minow and Cate suggest that if "an impartial juror is one who can apply the law irrespective of his or her views, then voir dire must be targeted at identifying those people and testing whether their opinions will obstruct fair deliberation, rather than focusing on possible exposure to media coverage about the case."¹⁰⁶

These arguments about pretrial publicity may at first seem irrelevant to a discussion about releasing audio and video tape evidence presented during trials. Judges have, however, denied media access to these materials to protect sixth amendment rights of defendants whose trials are in progress and those who may be tried later on related charges. In such situations, questions about the impact of media coverage both before and during trials become relevant. When a trial is in progress, judges typically tell jurors not to expose themselves to news coverage about the trial. While jurors may at times violate such orders, it is difficult to see how exposure to audio or video tape evidence would be any more damaging than exposure to media coverage in general. The solution to this problem lies in carefully instructing and monitoring jurors, not in denying media access to the tapes. When a defendant faces another trial on related charges or other people face related charges, judges may legitimately be concerned about the impact of media coverage on potential jurors. As Minow and Cate point out,

¹⁰⁴ Fahringer, *Charting a Course from the Free Press to a Fair Trial*, 12 Suffolk U.L. Rev. 1, 9.(1978).

¹⁰⁵ Minow and Cate, *supra* note 103, at 646.

¹⁰⁶ *Id.* at 654.

however, the best way to seat an impartial jury often lies in a careful voir dire that weeds out potential jurors that could not decide the case fairly. Again, denying media access to the tapes is not the answer, except perhaps as a last resort in extreme cases.

The primary reason for providing a constitutional basis for media access to evidentiary tapes lies in the enhanced opportunities it offers the public to observe the court system. "Allowing the public and press to have access to judicial proceedings enables them to determine whether justice is being administered fairly, thus keeping a check on the government."¹⁰⁷

The roots of a constitutional right to copy tapes can be found in Justice Brennan's concurring opinion in *Richmond*, the Supreme Court decision granting media and public access to trials under the first amendment. In the opinion, he discussed a "structural model"¹⁰⁸ of the first amendment that many journalists see as recognizing broad news-gathering rights.¹⁰⁹ Brennan wrote:

[T]he first amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government. ... The structural model links the first amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.¹¹⁰

¹⁰⁷ Watson, *The Supreme Court's Development of the First Amendment Right of Access to Criminal Proceedings and the Ninth Circuit's Expansion of that Right*, 25 *Williamette L. Rev.* 379, 404, (1989).

¹⁰⁸ *Richmond Newspapers, Inc., v. Virginia* 100 S. Ct. 2814, 2833 (1980) (concurring opinion by J. Brennan, in which J. Marshall joined).

¹⁰⁹ McLeen, *supra* note 12, at 786.

¹¹⁰ 100 S. Ct. at 2833 (emphasis in original).

Kobylka and Dehnel support a structural approach to free press-fair trial concerns. This goes beyond a functionalist approach emphasizing the utility of media coverage of trials. With a structuralist perspective, "all other values assume and depend upon an unfettered communication process grounded on individual rights of expression."¹¹¹ Their approach does not represent a "neutral analytical tool," but, instead, "implies a commitment to the active judicial protection of free speech interests."¹¹²

In an article arguing for a constitutional basis for the media's right of access to evidentiary recordings, Rasmussen writes that the courts address the topic from an access perspective because the first amendment prohibits them from controlling the broadcasts once the media have copies of the recordings. This would constitute a prior restraint. Rasmussen calls the access approach a "false starting-point" for legal analysis because it fails to recognize "the scope of the constitutional rights" to which the common law access right is related.¹¹³

In other words, the courts should pose access issues in terms of the media's right to disseminate information, which is protected by the first amendment. Courts should not play the roles of editors or news directors, Rasmussen suggests:

[J]udicial selection of information that is acceptable for broadcast directly interferes with the interest of the news media to gather and disseminate information, to make editorial judgments about the public presentation of information, and to choose the form in which information will be communicated.¹¹⁴

¹¹¹ Kobylka & Dehnel, *supra* note 101, at 365-66.

¹¹² *Id.* at 380-81.

¹¹³ Rasmussen, *supra* note 15, at 127. See generally Frey, *The Clash of Free Press and Fair Trial Rights in the ABSCAM Cases*, 7 Crim. Just. J. 203, 228 (1984).

¹¹⁴ *Id.* at 128 (citations omitted).

Rasmussen further suggests that the same "basic social interests requiring the recognition of a constitutional right of public access to criminal trials," should lead to constitutional protection of media access to evidentiary recordings. Those social interests include "safeguarding the integrity of the judicial process by encouraging public scrutiny and protecting the informed participation of citizens in the government."¹¹⁵

The current confusion over the strength of the media's right to copy evidentiary tapes requires that the right be grounded in the first amendment. A structuralist understanding of the Supreme Court's decisions in *Richmond*, and subsequent cases that recognized a constitutional right of access to court proceedings, provides the basis for a first amendment right of access to evidentiary recordings.

This would not automatically allow journalists to copy and broadcast tapes introduced as evidence at *all* trials, but it would place journalists on an equal constitutional footing with those opposing the copying. A first amendment right would be balanced against a sixth amendment right to a fair trial. When courts recognize only a common law right to copy audio and video tapes, sixth amendment rights tend to receive a higher level of consideration from judges. Recognition of a first amendment right of access to these materials would go a long way toward ending the imbalance now used in weighing a *common law* right of access to copy against a *constitutional* right to a fair trial.

¹¹⁵ *Id.* at 129 (citation omitted).



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A RUPTURE IN COPYRIGHT

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August 1993
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A RUPTURE IN COPYRIGHT

This is a paper applying aspects of communication theory to concept of copyright. Copyright law was developed in response to the creation of the publishing industry and is not a seamless continuum with the common law of property. It is a new thing under the sun since it is the first law of property that is not grounded on chattel or real estate but on the written word. Its organization of communication has been remarkable and its concepts have gradually been extended to all forms of symbolic expression. I wish to reexamine this extension to argue that the logic of copyright originated in the linguistic sphere and has been extended to the plastic arts of painting, sculpture, architecture etc. with disruptive results.

The law is not a result of seamless logic and starts from utilitarian concerns that with some luck can be raised to the level of consistent rules with pretensions to a coherent philosophy. Therefore this essay is not a legal argument but belongs entirely in the realm of communication theory. The following discussion is not about reformation of the law, or even the reshaping of the process of information commodification but is an exercise in using the real world disputes over ownership of the image to show how we have gotten into the habit of using linguistic metaphors in thinking about images and how these metaphors are wrongheaded and has led to visible absurdities in copyright cases.

A quick quote might illustrate the absurdity; Six years ago Art News reported that Giancarlo Impiglia sued Larry Bishop and Rhonda Bloomston for painting figures that resembled his own paintings. His lawyer summarized the case as "simple"...we are both

allowed to paint bowls of fruit, but you can't paint my bowl of fruit." (Decker: 22) The lawyer's assertion of "My bowl of fruit" is a classic confusion of the referent for the representation.

Copyright law makes a strong distinction between the idea (not protectible) and the specific expression of the idea (protectible). A proper understanding of this distinction would have eliminated the above confusion. Ideas cannot be owned in a democratic society. Everyone should be free to think what they will and to express themselves accordingly. Thought is common and available. However its expression in the infinitude of language is specific enough to be subject to assertions of ownership. Some may argue that we have patents law that extend property rights to ideas but there are severe tests that make sure these ideas are specific to and strongly linked with useful and novel processes or inventions. It is an overinterpretation to say that patents protect ideas since these tests eliminate the possibility of general ideas becoming private property.

Copyright, on the other hand, is based on originality and not on novelty. Therefore there is a very real possibility that ideas that should be commonly available can be protected. In order to forestall this there has to be a very strong test that separates the idea from the expression. But it is unworkable outside a system that supports increasing levels of abstraction. The written language is such a system. The plastic arts are not. Every piece of plastic art is as immediate as another. Simply consider facts about the plastic arts such as there are no pronouns, there are no predicates. We may use both pronouns and predicates when talking about a painting but they are not within the object. A portrait may be said to represent everyman or it may be said to represent George Washington but it is always a particular facial representation.

There is a nominalism of the fine arts that cannot be reconciled with the series of abstractions Judge Learned Hand refers to in his seminal summation of the idea/expression test in his famous quote from *Nichols v Universal Pictures Corp.*:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they could be no longer protected, since otherwise the playwright could prevent the use of his 'ideas', to which, apart from their expression, his property is never extended.(Frow 7)

Copyright works within a medium that has ever finer points of signification. We can accept that the story of a father dividing his inheritance between three daughters cannot be owned while the specific story of King Lear dividing his British kingdom between Goneril, Regan and Cordelia can be owned.

Before we go further to consider these remarks, I want to present a case as the study that will serve as a focus for these concerns. In a similar but higher profile case than the above mentioned fruit bowl, Art Rogers sued Jeff Koons for copyright infringement. If you remember the case Art Rogers took a photograph of a couple holding in their laps eight little puppies. He then sold this image as a postcard. Koons saw the postcard and sent it on to his sculpting workshop asking them to render the image of the photograph into a new work of art, a plaster sculpture of the couple holding the eight puppies. He sold three casts of these sculptures for a total of \$367,000 dollars (New York Times Sept 19, 1992:B2) and was promptly sued by the photographer. The US District Court ruled against Koons and for Rogers. The Federal Appeal Court has reaffirmed the original decision a year ago in April.

It is hard to have much sympathy for as manipulative and jaded a celebrity artist such as Koons. But I think that he is a victim of a confusion about genius, originality and art that we, as a society, have. He is one of a group of artists who have reacted to the current commodification of art objects by going even further to intentionally and perhaps sarcastically commodify their own creations by depriving their art of any claim to originality.

These artists do not originate images so much as they "appropriate" the images from already existing images. But we should not be confused that such appropriated images lack original status. Though we may deplore the lack of imagination that goes into such appropriations we must conclude that as expressions the appropriations are completely new. Benedetto Croce once stated "...particular works of art are infinite: all are original, each one incapable of being translated into the other (since to translate, to translate with artistic skill, is to create a new work of art);..." (Croce 1921:57)

The whole point of the appropriating act is to place the image in a new context that deprives of its original function and therefore of its original meaning. Koons' lawyers used this argument in the case stating that the use of Rogers' image was a parody and therefore falls under the "fair use" exemption of the 1976 copyright law. The court rejected this argument noting that one test of parody is that it only uses as much of the object of parody as is necessary to conjure up the original image. (1992 Copyright Law Decisions ¶26,893:25,191). The court found that Koons had completely copied Rogers' photograph. We, as a society, are able to make such a dramatic oversight of the basic fact that a sculpture cannot be a copy of a photograph in any material way. This is a prime indication of how much we are trapped within the linguistic model for all means of expression. Just as a meaning of a sentence is understood to be the same in different editions of the same book, we seem to think that an image is the same even as it is transformed from a two dimensional kodacolor photograph to a three dimension painted piece of porcelain. It is not.

The question is why do we think that they are the same. It is because we have been influenced by the Platonic philosophy of meaning to think that there is a metaphysical system which possesses the common image of which both the photograph and the sculpture are copies of. When I state it in this fashion it seems to be an extreme belief but if we apply this Platonic logic to the structure of language it seems perfectly intuitive.

We believe that there is a meaning that can be equally summoned up by two different sentences.

Vincent Porter is analyzing this same problem within a semiotic framework when he writes that the new media (sound/image recordings) have presented problems for the law in that they are speech acts without a language system; "A *series of paroles* without a *langue*." (Porter 1989:12). *Langue* is language stripped of its diachronic aspects and left with only its systems as they exist in the same moment. It is the structure that allows the empty words to come together to form meaningful sentences. But something that already exists in the world, that has presence has no need for such structures. It may nonetheless exist in a structure but its existence is not because of the structure. It can be said to be doubly articulated; as its form changes, its expression necessarily changes.¹

The structural nature of language depletes the written word of physical presence. It exists on paper in a form that is accidental to its expression. The only other physicality it might have is as a record of the event of speech. But Paul Ricoeur has noted that this

¹Another culturalist works with this argument within the Platonic categories. Plato, in order to ground the reality of categories, postulated an existence of Ideas (unchanging Forms) independent of any given determination of that idea. In recent times, John Frow noticed that US law presupposes that an idea is always at a different structural level in the Platonic sense than its expression. But the continuum between the idea and the determination is language. The unchanging form of a chair participates in both the painting of a chair and an actual chair by virtue of the word "chair". Without language, working strictly within the plastic arts the mental gymnastics of copyright becomes apparent in trying to find a different level for the idea. He tries to work with separating the original from the mental act of conceiving a work. But he has to postulate this work as not existing prior to its material creation since the prior existence of this work would unite it with the idea of the work. 'Work' exists somewhere between the idea and plastic execution.

record is utterly different than the spoken text; "With writing, the verbal meaning of the text no longer coincides with the mental meaning or intention of the text. This intention is both fulfilled and abolished by the text, which is no longer the voice of someone present. The text is mute. An asymmetric relation obtains between text and reader, in which only one of the partners speaks for the two." (Ricoeur 75)

My hypothesis is that copyright law exists to protect the written word because of its immaterial nature. But the first task of the law is limit its own extension of property. It must support the conflicting claims of the freedom of speech and intellectual property rights at the same time.

An explanation of this creative tension in copyright is its Anglo-American history. The original 16th century royal granting of patents to publishers was for ordinary purposes of creating economic monopolies to encourage the investment in the presses and to facilitate the printers' own attempts to regulate the book trade. But the political content of books grew in importance as religious divisions multiplied in the Tudor-Stuart era. It was a natural extension to use the law to not only create printing monopolies but also to maintain control and suppress publications of tracts considered to be heretical. The established printers connived at such censorship uses as furthering safeguarding their own protected positions in the nascent industry.(Patterson) The new literate class that was coming to power after 1688 felt abused by this system where publishers owned all their registered titles in perpetuity resulted in slipshod productions of classical literature. Also the atmosphere had changed regarding censorship in the new semi-tolerance of the era. The most important development, Bettig argues, is that the ideology of the rising capitalist class wished to rewrite the copyright laws to reflect their own beliefs in man's natural ownership of his own labor, the sweat of one's own brow. Therefore John Locke and other opinion leaders persuaded the government to relocate the ownership of "copy" in the author not in the publisher. (Bettig 1992)

This British legacy was quickly acknowledged in the colonies. James Madison briefly argued for language in the constitution safeguarding the works of writers and inventors in order to encourage the proliferation of their works for the public good, and it was done so without controversy. These same political leaders inserted the first amendment clause guaranteeing free speech. Copyright was to be totally divorced from its English associations with censorship. Locke and his followers had linked the public good of more and uncensored information with the natural good of authorial ownership of creative works.

The mix of the two goods were somewhat reversed in subsequent developments in revolutionary France. There copyright was to make absolute the author's privilege over his/her creative work. Though France recognized that works "made for hire" were owned by the employer it vested certain inalienable moral privileges in the real person of the artist (*droit d'auteur*). The French emphasis on the personality of the creator gave authorial privileges in all media including the fine arts, not just writing (Ginsburg).

The conflict between ownership and freedom was not apparent since the technology of mass reproduction was overwhelmingly centered on language. The technology of the printing press lent itself to these seemingly natural views of ownership since it easily maintained a three way distinction between the sign (the printed page), the signifier (linguistic expression of the idea) and the signified (the meaning). It was relatively easy for the law to isolate ownership in the middle category and not to confuse the expression with either the idea or the artifact. But both the logic of artistic personality and the idea/expression dichotomy were compromised in their original premises when photography became a big business in the later half of the nineteenth century. Photography also triggered a crisis in fine art representation that can be traced in the course of the following century down to the very appropriation strategies that Jeff Koons got into so much trouble with.

Bernard Edelman's work on the confrontation between French law and photography

is of great influence in this discussion. His basic conceit is that the photograph surprises the previous justification of intellectual property. The immediate reaction of French Law, to the invention of photography in the 1830s and through its early cottage industry phase, was to deny it proprietary statute since the labor involved in photography was 'soulless', a mere mechanical reproduction, an "*analogon*" (Barthes). The *analogon* aspect collapsed the signifier into the signified. The expression of the photograph was the same as its meaning. The French minister and poet, Alphonse Lamartine warned at the time not to dignify the act of exposing film as a creative craft. The March 7th, 1861 decree of the Seine Tribunal de Commerce stated "the art of the photo does not consist in the creation of subjects as its own creation but in the getting of negatives and subsequently in the making of prints which reproduce the images of objects by mechanical means and in a servile way." (Porter 1979:142)

Photography and subsequently cinema developed into industries by the end of the last century and the concurrent economic pressure forced the French courts to take a second look at the status of image as property.

This time the Court discovered that there was a personality stamped on the mechanically reproduced image and therefore it was capable of being owned the same as the manual arts (painting, drawing, et. al.) This was the over-appropriation of the reproduction of the Real that inadvertently opens the way eventually to claim actual possession of the Real; "The subject makes 'his' a Real which also belongs to the 'other'. In the very moment they invest the Real with their personality, the photographer and the film-maker apprehend the property of the other - his image, his movement, and sometimes 'his private life' - in their 'object glass', in their lens." (Edelman 1979:39) The court tried to deal with this over appropriation by elaborating a public domain regarding photography, reassuring the right to photograph street scenes, that no ownership of either the photographic image (other than physical possession of the plate) or the scene in front

of the camera could be implied. But this is inadequate to the whole breakdown in the distinction between sign and referent that is at the heart of Rogers v. Koons and other infringement cases.

Across the ocean, the American system was not reluctant to extend copyright to photography since our code did not have hierarchical conceits about who is an artist and "writing with light" was an easy though false metaphor to adopt. The 1884 case of *Burrow-Giles v. Sarony* confirmed the 1865 Copyright act amendment that included photography (Gaines 51).

But on both sides of the Atlantic, the original intent of copyright had been confused because a new relation had to be constructed between representation and reference in order for the image to be copyrighted. The image had to be drained of its own physical presence to become as depleted as the written word in order to claim the same protection.

Artists connived at this depletion too. Faced with the representational challenge of the photograph the fine arts turned from a mimetic to a semiotic function. The mimetic postulates an absolute difference between the image and the world and that the image to represent the world. Through this act of representing, the image acquires its own being as representation. On the other hand, the semiotic aesthetic is centered on the image as its own sign independent of its reference.

The (Post)Modern art's interest in the semiotics of the image has played itself out constructing signs that are meant to oscillate in the viewer's mind with the signified. The easiest way to accomplish this is to appropriate already known representations and to set these representations in a new context that reverses the relative position of the signified aspect of the representation. The first practitioner of this strategy is Marcel Duchamp who may have ushered in the hypermodern era in the first decade of the twentieth

century, when he hung an urinal in a gallery and named it "R. Mutt" or when he took a photograph of the Mona Lisa and penciled in "L.H.O.O.Q.". His presentation of the urinal transformed its quotidian utilitarian meaning into one that was reinvested in its physical presence as an art object. The more recent example of Andy Warhol constructing a wooden replica of a Brillo cardboard carton is another clear example of the strategy of transforming the physical packing box into a social meaning. It is a culminating moment. The batch of New York artists who are currently practicing appropriation of images are still motivated by Duchamp's strategy of remystifying art.

Jeff Koons is undoubtedly fully committed to the commodity salesman status of the fine artist. He came to New York to become an artist and took a job as a publicist/salesperson for the Museum of Modern Art. Later he became a commodities future broker on Wall Street, claiming that making money itself was an art form. His first successful show was based on piece that consisted of a store bought vacuum cleaner placed in a clear plastic box. He is an overly successful example of what the New York scene has thrown up as an artist in the absence of a genuine program of art. However his work has the philosophical interest of at least pushing the envelope of art in lieu of actually doing it.

This is a direct challenge to romantic notions of the artist as an original genius and irritated contemporary critics such as Rosalind Krauss who tried to deny Koons' links with Duchamp's dadaism by labelling him a self advertiser and the Dadaists as true parodists (New York Times Oct. 27 1991 p.35). Such outbursts may have denied Koons the mantle of an avant gardist in the eyes of the court but it is unfair to not recognize that dadaist parody was also self-advertising. The artist as society's huckster merges with the speculations of Michel Foucault's about the disappearance of the subject and with Roland Barthes et al. privileging of the reader over the author in giving meaning to the text.

But this merging signals transformations in literary theory and aesthetics, it does not

constitute a change in the logic of art objects. The physical presence of such objects guarantees their original status. There is the same sweat equity of fabricating them that legitimates their own status as property.

John Carlin's essay on the problems of copyright law and art appropriation discusses the contradiction between a twentieth century aesthetic that holds that "all concrete expression is in fact a copy of a copy; and that a direct, unmediated relation to nature is impossible" and the classic test of copyright stated by Oliver Wendell Holmes; "They are not free to copy the copy." (Carlin 120). He notes that the court solutions are becoming more and more ad hoc:

"The difference between Rauschenberg's and Warhol's inability to avoid copyright problems and the ability of some of their peers ... to avoid these issues, often boils down to a rather simple formula. Artists are generally allowed to use copyrighted material in unique and original works of art, such as painting, sculpture or drawing, but not in multiples like prints and reproductions where Appropriation often is attacked successfully. The logic behind this line of demarcation is not entirely clear, nor has it reached the level of judicial or legislative decree." (Carlin 129)

Koons was not treated according to this formula, despite the limited number of sculptures he sold. The court did not care for his obvious "artist-huckster" stance. Ronald Sullivan of the New York Times characterized Judge Richard J. Cardamone's ruling as "highly subjective in criticizing Mr. Koons and his art" (NYT April 3rd 1992 Sec. B p.3). The problem is not whether the court was right in characterizing Koons but that the court should not be ruling in these matters of art politics. Judge Richard Posner of the Seventh Circuit of the Federal Court has also been more prone to make creative critiques of representation and originality (Frow 10, *Jorie Gracen v The Bradford Exchange*) and to thereby display the law's inclination for the understood categories of mimesis. But this is falling behind the challenges of an art world that is moving beyond mimesis.

I have made the argument that copyright cannot be extended to ideas and that ideas

can only be separated from expression in a written language that has no physical status. But I must acknowledge my own intuition that particularly in the age of reproduction there are needs for protection of the image. Melville Nimmer writes in a careful manner about the collapse of the idea and expression distinction in news photography (Nimmer §1.10[C-D]). I have not used his argument closely since his concerns are not about different aesthetic media. But I feel, in conclusion, sympathy with his attempts to devise a new test for public access to the images that shape our history such as the Zapruder film of the Kennedy assassination. I wish to extend that thought to say that the art object needs a different form of protection than literary copyright, though his test of newsworthiness is obviously beside the point. In many cases it already has forms of protection such as fraud in matters of forgery or trademark or unfair trade practices etc. Perhaps others need to be devised along the lines of patents with its test of novelty as opposed to originality

The image is heavily commoditized. Indeed billion dollar industries are based on copyright protection. But the image is also a fundamental shaper of our culture. A new balance should be struck that gives artists the freedom to see and hear and to use all what they see and hear. Legally created monopolies should not enforce private censorship of artistic expression (Carlin 135). Some feel the problem can be solved by opening up the "fair use" exemption. But I think that there has to also be a acknowledgement that visual thought is logically different from linguistic thought and that modifications of a copyright law that is based on literary property will always be trying to catch up with ruptures created in the other media.

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**EXPANSION OF COMMUNICATIONS
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By ROBERT L. SPELLMAN

**This paper was prepared for presentation to the Mass
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**The author is associate professor and head, news-
editorial sequence, in the School of Journalism at Southern
Illinois University-Carbondale.**

ABSTRACT

Globalization is producing international mass media legal systems. The leading institution in the globalization is the European Court of Human Rights, which is expanding freedom of speech and of the press in the 22 Western European nations that are signatories to the European Convention on Human Rights. The treaty contains a qualified guarantee of freedom of expression. Court decisions have had their greatest impact in curbing sanctions that political elites and institutions may apply against challenges to their status. The record is mixed and disappointing in the area of press coverage of consumer-oriented business news.

ABSTRACT

Globalization is producing international mass media legal systems. The leading institution in internationalizing mass media law is the European Court of Human Rights. This institution is expanding freedom of speech and of the press in the 22 Western European nations that are signatories to the European Convention on Human Rights. Article 10 of the treaty contains a qualified guarantee of freedom of expression. The guarantee is not as liberal as the First Amendment, but it does require that curbs on freedom of speech and of the press be necessary in a democratic society. The court has loosened the restrictions in civil law countries by the creation of a right to criticize public officials similar to the common law privilege of fair comment. It has required a liberalization of contempt by publication law to permit greater criticism of the judiciary and expanded reporting and comment on controversies before the courts. It has held that citizens of a country have the right to hear television programs originating outside national borders. The court's record is mixed and disappointing in the area of consumer-oriented business reporting.

Much of the mass media are becoming international institutions. Such is part of the globalization of national economies. The globalization is forging international legal institutions. Part of the emerging global legal order is the internationalization of human rights, including rights of free speech and press. This phenomenon is restraining the ability of nations to use their legal systems to curtail the speech and press rights of their citizens. It is changing national mass communication systems by expanding both the ability of citizens and the press to speak more freely and the rights of citizens to receive more diverse messages, including information that crosses national borders. The internationalization of freedom of speech and of the press is most marked among Western European nations which have signed the European Convention on Human Rights.

When P.M. Lingens, the publisher of the Vienna magazine *Profil*, condemned in 1975 the political rehabilitation of former Nazis by Bruno Kreisky, the chancellor of Austria, a court convicted Lingens of criminal libel. It levied a fine of 20,000 schillings and ordered the confiscation of copies of *Profil* because Lingens, who wrote the articles about Kreisky's political alliances with the ex-Nazis, failed to prove that his description of Kreisky's behavior as undignified and immoral was true. Holding that press freedom "affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders" and "political debate is at the very core of a democratic society," the conviction was overturned by the European Court of Human Rights.¹ The conviction of the journalist is an example of the often egregious protection against press comment that is accorded political leaders in

¹ Lingens v. Austria, 8 E.H.R.R. 407, particularly 418-419 (1986). Decisions of the court are found in the European Human Rights Reporter.

governmental organization or group of individuals claiming to be a victim of a (treaty) violation."⁸

Article 10 of the human rights treaty guarantees freedom of expression and is the foundation of decisions by the European Court of Human Rights on press freedom. The article reads:

1. Everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁹

The article falls short of the protection afforded freedom of speech and of the press in the by the First Amendment to the United States Constitution in such areas as prior restraint,¹⁰ libel,¹¹ and access.¹²

⁸ *European Convention*, Article 25.

⁹ *European Convention*, Article 10.

¹⁰ *Near v. Minnesota*, 283 U.S. 697 (1931) (criticism of governmental corruption); *New York Times v. United States*, 403 U.S. 713 (1971) (national security); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976) (reporting on justice system); *Miami Herald Publishing Co. v. Tomillo*, 418 U.S. 241 (1974) (indirect prior restraint). *But compare* *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (requirement to broadcast diverse views constitutional).

¹¹ *New York Times v. Sullivan*, 376 U.S. 254 (1964) (public officials and public figures); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (private figures); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (opinion protection); *Milkovich v. Lorain Journal Co.*, 497 U.S. ___, 110 S.Ct. 2695 (1990) (opinion protection).

¹² *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

Nevertheless, it provides more freedom than most of the law of the European nations.

Once a nation has accepted jurisdiction of the Court of Human Rights, the court's decisions are binding on the state in international law. The impact on a nation's domestic law depends on whether a system of automatic incorporation exists. In some nations, such as Austria, Switzerland and Italy,¹³ the human rights treaty is incorporated into those countries' constitutional law and a decision of the human rights tribunal becomes part of domestic law. In other countries, such as Belgium, France, Greece, Netherlands, Portugal and Spain, the convention and Court of Human Rights decisions are treated as statutory law.¹⁴ For other nations, such as the Scandinavian states and the common law countries of Great Britain, Ireland and Malta, a decision of the Court of Human Rights becomes domestic law only after passage of incorporation legislation.¹⁵ Until the passage of such legislation the decisions are persuasive authority only.¹⁶

In deciding whether there has been a violation of freedom of expression, the multi-national court allows states some discretion in interpreting the human rights treaty. The doctrine of discretion, labeled the margin of appreciation, was set forth in *Handyside v. United Kingdom*.¹⁷ In *Handyside* the court upheld the conviction of a British publisher for possession of obscene books for financial gain. The court conceded the obscenity statute interfered with free expression, but it said the necessity of the law as a protection of public morals could be judged best by Great Britain. The court found that Article 10 leaves to member nations "a margin of appreciation. The margin is given both to the domestic legislator. . . and to the bodies, judicial amongst others, that are called upon to apply and interpret the laws in force."¹⁸ The court described the margin of

¹³ Drzemczemski, Andrew Z., *European Human Rights Convention in Domestic Law* (Oxford: Clarendon Press, 1983), 189.

¹⁴ *Id.*, 189-190.

¹⁵ *Id.*, 190.

¹⁶ *Id.*, 178-179.

¹⁷ *Handyside v. United Kingdom*, 1 E.H.R.R. 737 (1976).

¹⁸ *Id.*, 754.

appreciation as a flexible concept and said any restrictions on freedom of expression "must be proportionate to the legitimate aim pursued."¹⁹

THE KREISKY CASE

The dispute over the alleged criminal libel of Bruno Kreisky, the Austrian chancellor, arose after Simon Wiesenthal, an internationally known Nazi hunter, disclosed that Friedrich Peter had served in an SS brigade during World War II. Peter, president of the Austrian Liberal Party, and Kreisky, also head of the Austrian Socialist Party, had been considering the formation of a government in which Peter would play a prominent role. Wiesenthal revealed that the SS brigade had massacred civilians behind German lines, but he did not allege that Peter participated in the slaughters. In television and newspaper comments, Kreisky condemned Wiesenthal's activities as "mafia methods" and called the Jewish Documentation Center that Wiesenthal headed a "political mafia."²⁰

In two articles in *Profil*, Lingens wrote that "the time has passed when for electoral reasons one had to take account not only of Nazis but also of their victims. . .the former have outlived the latter."²¹ While a policy of accommodating former Nazis could not be faulted on *realpolitik*, he asserted, "it is immoral and undignified."²² A distinction was drawn between those who served in the regular German army, where service was compulsory, and those who joined the all-volunteer SS units. Lingens maintained Austria could reconcile with its past without, as Kreisky did, seeking the favors of ex-Nazis, minimizing the horrors of concentration camps or maligning

¹⁹ *Id.*

²⁰ *Lingens*, 409.

²¹ *Id.*, 410. Austria has treated former SS officers with higher honors than it has bestowed on victims of Nazis. In the 1980s Kurt Waldheim, former United Nations secretary general, served as president of Austria despite lying about his service in a SS unit that massacred civilians in Yugoslavia. As a result of his background, Waldheim was barred from entering the United States on a nondiplomatic passport.

²² *Id.*

Wiesenthal by exploiting anti-Semitism. Kreisky had Lingens prosecuted under a provision of Austrian law that makes it a crime to accuse a person---without sufficient reason to believe the accusation to be true---of "possessing a contemptible character or attitude or of behavior contrary to honor or morality."²³ A court held that Kreisky was convinced that Wiesenthal had engaged in "mafia methods"²⁴ and therefor convicted Lingens of libeling Kreisky by using the words "basest opportunism," "immoral" and "undignified."²⁵

While noting that a state was entitled to a margin of appreciation, the Court of Human Rights ruled that Austria had overstepped it and rejected an Austrian notion that "the task of the press was to impart information, the interpretation of which had to be left to the reader."²⁶ Further, it held that press freedom is "the best means of discovering and forming an opinion of the ideas and attitudes of political leaders" and the "limits of acceptable criticism are accordingly wider as regards a politician."²⁷ The tribunal refused to accept Austrian law that required Lingens to prove the truth of his assertions. It said:

(A) careful distinction needs to be made between facts and value judgements. The existence of facts can be demonstrated, whereas the truth of value judgements is not susceptible to proof. The Court notes in this connection that the facts on which Mr. Lingens founded his value judgements were undisputed, as was also his good faith.²⁸

The court held that the restrictions of Austrian libel law exceeded those necessary in a democratic society for the protection of reputation and thus violated the human rights treaty.²⁹ It awarded Lingens 284,539 schillings in damages.³⁰

²³ *Id.*, 411.

²⁴ *Id.*, 415.

²⁵ *Id.*, 411.

²⁶ *Id.*, 418.

²⁷ *Id.*, 418-419.

²⁸ *Id.*, 420-421.

²⁹ *Id.*, 421.

³⁰ *Id.*, 423.

The court commented favorably on Lingens' contention that he was a "political journalist in a pluralistic society; as such he had a duty to express his views on Mr. Kreisky's condemnations of Mr. Wiesenthal."³¹ Moreover, the court said that Kreisky as a "politician who was himself accustomed to attacking his opponents had to expect fiercer criticisms than other people."³² The court also noted that the context of the articles included the rise of ex-Nazis in public life and the negotiations among political parties over a coalition government. Lingens' articles were part of the debate over such issues and "freedom of political debate is at the very core of the concept of a democratic society."³³

What the Court of Human Rights did in *Lingens* was adopted as a human right the privilege, imbedded in the common law, of fair comment.³⁴ The privilege permits comment, even if defamatory, on public figures and issues if it is based on true facts.³⁵ The privilege fails if a journalist is publishing in bad faith or if the comments are such that an honest man could not make them given the underlying facts.³⁶ The privilege is foreign to much of Europe where a legal doctrine exists that public officials should be given greater protection than private figures "on account of the burdens their public duties impose on them."³⁷ As a result of *Lingens*, public figures are forced to accept more of the bruises of political combat.

However, due to the decisions of the European Commission on Human Rights that Article 10 was not violated, there are other areas of seditious speech that remain unprotected. In one case the

³¹ *Id.*, 417.

³² *Id.*

³³ *Id.*, 419.

³⁴ The privilege was adopted in *Sir John Carr, Knt. v. Hood and Another*, 170 Eng. Rpts. 983 (1808).

³⁵ Supperstone, Michael, "Press Law in the United Kingdom," in Lahav, Pnina, *Press Law in Modern Democracies* (New York: Longman, 1985), 37.

³⁶ *Id.* In the United States, the test as to whether the comments could be fairly drawn from the facts applies only if the comments represented a personal attack.

³⁷ Errera, Roger, "Press Law in France," in *Press Law in Modern Democracies*, *supra*, 159. See also Kohl, Helmut, "Press Law in the Federal Republic of Germany," in *Press Law in Modern Democracies*, *supra*, 202.

commission ruled the treaty did not protect pamphlets promoting racial hatred.³⁸ In another case it found that prosecution and conviction of a magazine editor for blasphemous libel did not violate freedom of expression.³⁹ The commission also has ruled that it is not a human rights violation to convict an editor of criminal libel for publishing a poem, entitled "Letter to the Pope about Auschwitz," that denied that Nazis killed six million people in concentration camps and committed other atrocities.⁴⁰ While in theory these areas of speech remain open for adjudication later by the Court of Human Rights, the decisions of the commission effectively place such speech outside treaty protection.

THE SUNDAY TIMES CASE

In the early 1960s thousands of women worldwide gave birth to deformed babies as a result of taking thalidomide to alleviate morning sickness during pregnancy. The drug was marketed in Great Britain by Distillers Company (Biochemicals) Ltd. Despite evidence from its own pharmacologists that the drug was poisonous, Distillers started selling a liquid dosage of the drug in July, 1961, but withdrew it about four months later. About 450 children were born with severe deformities in Great Britain as a result of their mothers taking thalidomide during the four-month period. More than 450 negligence claims were filed against Distillers as a result of injuries to babies and mothers. Only 65 claims had been settled by 1972. Under British contempt by publication law, because the claims were being adjudicated, nothing could be published about them except what occurred in open court. Through negotiations for settlement and other tactics, Distillers kept the cases out of open court. The heart-wrenching tales of families forced to raise deformed children without payments from Distillers generally had been shielded from being

³⁸ Glimmerveen and Hagenbeek v. The Netherlands, E.H.R.R. 260 (1979).

³⁹ Gay News Ltd. and Lemon v. United Kingdom, 5 E.H.R.R. 123 (1982).

⁴⁰ App. No. 9777 v. Belgium, 6 E.H.R.R. 534 (1982).

aired in the mass media.⁴¹ When Distillers did make offers, they were only about 20 percent of what could have been expected in personal injury cases.⁴²

In September, 1972, the *Sunday Times* published an article, entitled "Our Thalidomide Children: A Cause for National Shame," that voiced moral outrage over what the newspaper considered the small size of the settlements Distiller had offered. The *Times* complained of the delay in compensating victims and described Distillers' offers as "grotesquely out of proportion to the injuries suffered."⁴³ British law that was unclear as to whether a person could recover damages for injuries done before birth and the cost of proving negligence by Distillers had been exploited by the pharmaceutical company to delay settlements of the remaining 389 claims. The newspaper criticized English personal injury law that permitted such delays. The article also said:

(T)he thalidomide children shame Distillers. . . There are times when to insist on the letter of the law is as exposed to criticism as infringement of another's legal rights. The figure in the proposed settlement is 3.25 million pounds, spread over 10 years. This does not shine as a beacon against pre-tax profits last year of 64.8 million pounds and company assets worth 421 million pounds. . . Distillers could and should think again.⁴⁴

The article also said a future story would trace how the thalidomide tragedy happened.

The second article did not appear because the British attorney general obtained a court order banning its publication. Although it was not published, court documents disclosed the article stated that Distillers had relied on German tests and had not completed trials of its own before selling the drug; failed to uncover in scientific

⁴¹ Details of the events that resulted in the claims are found in *The Sunday Times v. United Kingdom*, 2 E.H.R.R. 245, 249-251 (1979) and in *Attorney-General v. Times Newspapers Ltd.* 1974 A.C.273, 292 (House of Lords).

⁴² Evans, Harold, "British Law of Contempt Thwarts Speech and Justice," 52:6 *Florida Bar Journal* 462, 466 (June, 1978). Evans was editor of the *Sunday Times*.

⁴³ *The Sunday Times*, Sept. 24, 1972; *Sunday Times, supra*, 251.

⁴⁴ *Id.*

literature the fact that a drug related to thalidomide caused monster births; ignored warnings from its staff and speeded up marketing of the drug; ignored evidence that thalidomide could damage the nervous system, a clue that it could harm a fetus; and continued to advertise the drug as safe for pregnant women up to a month before it was withdrawn.⁴⁵ While the *Sunday Times* was fighting the court order, the *Daily Mail* printed two stories that contained the same information as in the banned article.

Eventually the prior restraint was upheld in the House of Lords.⁴⁶ To permit the publication, the law lords said, would prejudice the controversy before the judiciary and therefore interfere with the fair administration of justice. Moreover, the article would bring pressure on Distillers to settle by holding it up to public disparagement for exercising its constitutional right to seek judgment in the courts.⁴⁷ The decision followed traditional common law doctrine that has barred reporting or comment on cases before the judiciary and that often has been used to punish criticism of the courts.⁴⁸ American law was similar⁴⁹ until 1941 when the U.S. Supreme Court held that punishment of a newspaper for contempt for commentary on the judiciary or a case violated the First Amendment.⁵⁰

⁴⁵ *Id.*, 254.

⁴⁶ *Times Newspapers, Ltd., supra*. The high court of the United Kingdom is the law lords of the House of Lords.

⁴⁷ *Id.* See Wong, Wing-wah Mary, "The Sunday Times Case: *Freedom of Expression versus English Contempt-of-Court Law in the European Court of Human Rights*," 17 *New York University J. of International Law and Politics* 35, 48-55 (1984). Harold Evans, editor of the *Sunday Times*, found it "odd to make the reason for prior restraint the pressure on the drug company.. when the parents had been subject all these years to the pressure of hardship and nobody had done anything." Evans, *supra*, 466, paraphrasing an appellate court opinion.

⁴⁸ Supperstone, *supra*, pp. 23-24.

⁴⁹ *Patterson v. Colorado*, 205 U.S. 454 (1907) (constitution does not bar judiciary from punishing newspapers for contempt by publication); *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918) (federal judiciary act permits punishment of newspapers for contempt by publication).

⁵⁰ *Bridges v. California*, 314 U.S. 252 (1941). See also *Nyc v. United States*, 313 U.S. 33 (1941) (reverses *Toledo Newspaper Co.*).

The Court of Human Rights could not overturn British law on contempt by publication. Article 10 of the human rights convention permits interference with freedom of expression by "restrictions or penalties as are prescribed by law and are necessary. . .for maintaining the authority and impartiality of the judiciary."⁵¹ That provision was included in the treaty to protect the common law of contempt by publication, which is not followed by most of the nations adhering to the human rights convention.⁵² What the Court of Human Rights did was to hold that contempt law as applied in *Sunday Times* must not override other rights. The court ruled, 11-to-9, that the suppression of the thalidomide article violated a "right of the public to be properly informed."⁵³ Although states have a margin of appreciation in shaping their law, the court said, the legal decisions must be *necessary* to maintain the authority and impartiality of the judiciary in a democratic society. The court held the actions of the British courts in *Sunday Times* failed this test.⁵⁴

Essentially the court balanced the government's interest in protecting the judiciary against the "public interest aspect of the case"⁵⁵ and noted:

(W)hilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has the right to receive them.⁵⁶

The court said the public interest demanded that families of the victims be permitted to break the legal cocoon that had surrounded the case and receive information on the facts underlying the

⁵¹ *European Convention*, Article 10(2).

⁵² *Sunday Times*, *supra*, 277.

⁵³ *Id.*, 281.

⁵⁴ *Id.*, 277.

⁵⁵ *Id.*, 280.

⁵⁶ *Id.*

controversy and possible solutions.⁵⁷ It ruled that the "restraint proves not to be proportionate to the legitimate aim pursued; it was not necessary in a democratic society for maintaining the authority of the judiciary."⁵⁸

While it broadened the freedom of the press to report on events and issues of public significance, the use of a balancing test is troubling. The decision set only vague standards by which an article could be judged to be important enough to protect against the threat of punishment for contempt. It forced the court to examine the *Sunday Times* article and the significance of its content to the thalidomide controversy. Then, acting as *ex post facto* editors, the judges decided whether the information was important enough to protect. Such a frail reed leaves so much uncertainty that substantial self-censorship is a likely result. Of course, that is a better result than the complete silence required by the common law of contempt by publication. Society will be better off because there will be more exposes about large corporations that use the justice system to delay and reduce compensation to victims of national tragedies.

Subsequently, the court ordered the British government to pay 22,627 pounds to the *Sunday Times* to reimburse it for expenses,⁵⁹ and the government did so.⁶⁰

AMBIGUITY IN CONTEMPT LAW

Parliament passed the Contempt of Court Act of 1981 primarily in response to the *Sunday Times* decision. Whether the act liberalized the British contempt by publication law has been debated by commentators.⁶¹ The act codified contempt by publication as conduct that "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or

⁵⁷ *Id.*, 281.

⁵⁸ *Id.*, 282.

⁵⁹ *The Sunday Times v. United Kingdom*, 3 E.H.R.R. 317 (1980).

⁶⁰ *The Sunday Times v. United Kingdom*, 3 E.H.R.R. 615 (1980).

⁶¹ Wong, *supra*, 72 and commentators cited therein.

prejudiced."⁶² The offense is one of strict liability as to active cases.⁶³ The act allows "a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith."⁶⁴ However, such reports can be outlawed by court order.⁶⁵ Excluded from the offense were publications "in good faith of public affairs or other matters of general public interest" if the "risk of impediment or prejudice to particular proceedings is merely incidental."⁶⁶ The offense applies to mere questioning of jurors about their deliberations⁶⁷ and to appellate proceedings, rules that would be particularly repugnant to American constitutional law.

How liberal the new contempt law would be was tested in the English courts when the *Daily Mail* in October, 1981, published an article about an anti-abortion candidate for Parliament. The story asserted that babies born with handicaps often were allowed to die by starvation. It appeared during the trial of a doctor who was charged with murder for starving a handicapped baby. After the doctor was acquitted, the *Daily Mail* was found in contempt, but the conviction was reversed by the House of Lords.⁶⁸ The law lords held that the article had only an incidental effect on the trial and said:

Such gagging of *bona fide* public discussion in the press of controversial matters of general public interest, merely because there are in existence contemporaneous legal proceedings in which some particular instance of those controversial matters may be in issue, is what section 5 of the Contempt of Court Act 1981 was . . .intended to prevent.⁶⁹

However, Lord Diplock wrote that the *Daily Mail* story was the antithesis of the suppressed *Sunday Times* thalidomide article. His

⁶² Contempt of Court Act of 1981, Section 2(2).

⁶³ *Id.*, Section 2(3). Some British Commonwealth states require *mens rea*. See *State v. Van Nieckirk*, 1970:1 South Africa L. Rpts. 655.

⁶⁴ Contempt of Court Act of 1981, Section 4(1).

⁶⁵ *Id.*, Section 4(2).

⁶⁶ *Id.*, Section 5.

⁶⁷ *Id.*, Section 8(1).

⁶⁸ *Attorney-General v. English*, 3 W.L.R. 278 (1982).

⁶⁹ *Id.*, 287-288 (Lord Diplock).

opinion said that the "whole purpose of it (the thalidomide story) was to put pressure upon that company, in the lawful conduct of their defence in those actions."⁷⁰ His *dicta* appeared to interpret the Contempt of Court Act as not incorporating the Court of Human Rights decision in *Sunday Times* into British domestic law.

The *Sunday Times* petitioned the Court of Human Rights to find that the *Daily Mail* decision, in so far as it interpreted the relationship of the contempt act to the *Sunday Times* decision, to violate the human rights treaty.⁷¹ The *Sunday Times* claimed Lord Diplock's opinion exerted a chilling effect on publication of stories about powerful institutions that were using delay in the courts to avoid paying damages to victims of negligence. The newspaper cited a case of parents whose baby had been given an overdose of penicillin. A hospital had avoided payment for almost eight years. The *Sunday Times* wanted to print "information both on the medical and legal aspects of the case," but "the present law of contempt restrains them from writing and publishing an article on the penicillin story."⁷²

Acting in its role of screening which cases will be heard by the Court of Human Rights, the Commission on Human Rights found no violation by the United Kingdom of the treaty's freedom of expression provision. It noted that the *Sunday Times* decision required a balancing of the interests of fair administration of justice and of free expression and a "conclusion was drawn on the basis of the particular circumstances of the case."⁷³ The commission said the newspaper had not established a *prima facie* violation of the treaty because there was no showing that the article it intended to publish about the penicillin case would not comply with the Contempt of Court Act.⁷⁴ In effect, at least where a balancing test was required,

⁷⁰ *Id.*, 288.

⁷¹ *Times Newspapers Ltd. and Others v. United Kingdom*, 8 E.H.R.R. 54 (Commission on Human Rights, 1983).

⁷² *Id.*, 56.

⁷³ *Id.*, 59.

⁷⁴ *Id.*

the commission held that only a real---rather than abstract--- suppression of the press could be adjudicated.

The commission also found no violation of freedom of expression when an English judge ordered a television network not to reenact scenes from a trial until a jury had rendered its verdict.⁷⁵ The trial involved the criminal prosecution of a civil servant who had leaked information to a member of Parliament on the sinking of the Argentine warship *General Belgrano* during the Falklands War. The station intended to have actors read from the official transcript of the trial. The judge said the "danger is that they (jurors) will recall the most important parts of the day's evidence, not as the witnesses said them but as the actors say them, not the demeanour of the witnesses but the demeanour of actors."⁷⁶ The court order permitted normal newscasts of the trial and as a result "Channel Four altered the format of the programme and replaced the actors with newsreaders of wide experience."⁷⁷

The television network claimed the order violated the human rights treaty because it "constitutes an unjustified interference with their right to impart information."⁷⁸ In balancing the right to a fair trial against the "freedom of the press to impart information and ideas and right of the public to receive them,"⁷⁹ the Commission on Human Rights attached great weight to the judge's "on-the-spot assessment of the dangers of prejudicing the jury and thereby harming the fairness of the trial."⁸⁰ The commission rejected Channel Four's claim that the judge could have taken measures---such as instructing jurors not to watch the program---less destructive of

⁷⁵ Hodgson, Woolf Productions, National Union of Journalists and Channel Four Television v. United Kingdom. 10 E.H.R.R. 503 (1987). The judge's order would be unconstitutional under American law. See *CBS v. Superior Court*, 729 F.2d 1174 (9th Cir. 1983) (network may broadcast videotapes of prominent auto executive arrested in cocaine buying sting. *Goldblum v. National Broadcasting Corp.*, 583 F.2d 904 (9th Cir. 1979) (Kennedy, J.) (network may broadcast docudrama of swindle while request for new trial pending).

⁷⁶ *Id.*, 505.

⁷⁷ *Id.*

⁷⁸ *Id.*, 506.

⁷⁹ *Id.*, 507.

⁸⁰ *Id.*, 509.

freedom of the press.⁸¹ In finding no violation of Article 10, the commission said the prior restraint was within the margin of appreciation granted the United Kingdom and "the interference with the right to impart information can reasonably be considered necessary in a democratic society for maintaining the authority and impartiality of the judiciary."⁸²

Case law on contempt by publication is destined to be ambiguous as long as the Court of Human Rights is constrained by the treaty provision that permits sanctions on the press "for maintaining the authority and impartiality of the judiciary."⁸³ The British Parliament and law lords have demonstrated their determination, under the guise of preventing trial by newspaper, to use sanctions to curb criticism of the courts. The Court of Human Rights has loosened the curbs, but the chill on the press and its ability to champion the causes of those wronged by the judicial system remain strong. The British press is still subject to editing by jurists and strict liability for guessing wrong on whether an article will violate contempt law.

THE BROADCAST SATELLITE CASE

International transmission of radio and television programming is creating huge difficulties for governments that want to control what their citizens may hear or view. As one analyst wrote:

Television now transcends all classes and borders. By creating an instantaneous transborder imagery difficult to assess and impossible to control, it has added to the complexity of international relations. Not only factual but also fictional television is creating the world's shared icons and common imagery and providing the broad cultural context in which

⁸¹ That would be required under American law. *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

⁸² *Id.*, 509.

⁸³ *European Convention*, Article 10(2).

complicated political messages are correctly and incorrectly decoded.⁸⁴

While governments may license broadcasters,⁸⁵ the European Court of Human Rights has upheld a right of listeners and viewers to receive programs over national boundaries. In *Autronic v. Switzerland*, the court overturned the refusal by Switzerland to allow a commercial satellite dish company to receive programs broadcast over a telecommunications satellite owned by the former Soviet Union.⁸⁶ Autronic wanted to televise the programs, which were being broadcast to the general public in the Soviet Union, at a trade fair in Basle. Swiss authorities refused to license reception unless the Soviet Union granted permission, which it declined to do. Claiming the human rights treaty protected "not only the substance but the process of communication,"⁸⁷ Autronic appealed to the multi-national tribunal.

The court noted that the treaty granted the freedom "to receive and impart information and ideas without interference by public authorities and *regardless of frontiers*."⁸⁸ The court said the "reception of television programmes by means of a dish or other aerial" comes within the treaty provision "without its being necessary to ascertain the reason and purpose for which the right is being exercised."⁸⁹ Further, the court held, receipt of information or ideas from public programming⁹⁰ under the treaty was not conditioned on obtaining the permission of the state that owned the

⁸⁴ Webster, David, "New Communications Technology and the International Political Process," in Serfaty, Simon (ed.), *The Media and Foreign Policy* (New York: St. Martin's Press, 1991), 221.

⁸⁵ *European Convention*, Article 10(1).

⁸⁶ *Autronic AG v. Switzerland*, 12 E.H.R.R. 485 (1990).

⁸⁷ *Id.*, 498.

⁸⁸ *European Convention*, Article 10(1).

⁸⁹ *Autronic, supra*, 499.

⁹⁰ The court distinguished public programming carried via satellite from private messages sent via satellite. The court analysis was based on the substance of the communications rather than whether they originated from a telecommunications satellite or a satellite wholly dedicated to public programming.

satellite or the programming.⁹¹ The court concluded Switzerland's action was not necessary in a democratic society and thus a violation of Article 10.⁹²

The decision in *Autronic* is a strong affirmation of the right to receive information and ideas, but it also is an example of the court's case-by-case adjudication. In the future, when issues such as copyright or pay programming are present, the court may reach different conclusions. Nevertheless, it does fetter the power of government to curb the transnational flow of ideas. Combined with the proliferation in Europe of private television networks, the decision should undermine the capacity of governments to suppress knowledge by their citizens of political intelligence.⁹³ Those who want to communicate the intelligence will have outlets in neighboring states.

The Court of Human Rights also has curbed a practice of the Swiss judiciary of arbitrarily cutting off reporting of information on public issues.⁹⁴ Franz Weber, a journalist, had become involved in a defamation suit and had produced records of an environmental foundation which he headed. Weber complained of the conduct of a judge and a confidential investigation of the jurist was launched. At a press conference Weber revealed the existence of the investigation and reported on events being probed and some of the information investigators had received about the foundation. While Weber put his spin on the events and information, all of information except the fact of the probe of the judge already had been disclosed publicly. The journalist was convicted of violating the secrecy of a judicial investigation and fined 300 Swiss francs. The Swiss court said it was "of little importance that the matter which was to be kept

⁹¹ *Autronic, supra*, 501.

⁹² *Id.*, 504.

⁹³ Great Britain, with its Official Secrets Act, has been particularly aggressive in trying to suppress political information. See Supperstone, *supra*, 13-17, 21-23; Attorney-General v. Guardian Newspapers Ltd., 1 W.L.R. 1248 (1987) (House of Lords) (newspapers restrained from publishing the book *Spycatcher*).

⁹⁴ Weber v. Switzerland, 12 E.H.R.R. 508 (1990).

confidential was known to a limited or indefinite number of people because confidentiality had already been breached."⁹⁵

The multi-national tribunal said Weber had a legitimate interest in discussing his views on judicial proceedings that mainly concerned him and that interest coincided with the interest of the public in being informed about the courts. The court said the Swiss judiciary could have no legitimate interest in punishing Weber for disclosing that which already was public.⁹⁶ It was a violation of Weber's right of free expression to punish him for exploiting a genuine public interest in his environmental activities. Moreover, the court held, there was no necessity in a democratic society to suppress Weber's effort "to bring the discussion out into the open in order to secure a trial which conformed to his own ideas of fairness."⁹⁷

COMMERCIAL SPEECH ISSUES

European governments have restrictions on commercial speech that are more severe than those in the United States. The effect of the restrictions---often embodied in trade codes---is to reduce the flow of information to consumers. Decisions of the Court of Human Rights potentially can enhance the right of consumers to receive information about products and services. So far the court has handed down two major decisions that cover commercial information reported in a news format. One decision enhances the flow of information to consumers. The other is a setback for the trade press. The court has not extended protection to advertising. Its decision in *Market Intern*⁹⁸ suggests it will not do so in the foreseeable future.

Dr. Sigund Barthold, a Hamburg veterinary surgeon, believed veterinarians ought to be required to provide night service. The professional guild of veterinarians was empowered to impose and enforce practice requirements in Hamburg. It had refused to adopt a plan whereby veterinarians would be assigned night duty on a

⁹⁵ *Id.*, 511-512.

⁹⁶ *Id.*, 524.

⁹⁷ *Id.*, 525.

⁹⁸ *Market Intern and Beerman v. Germany*, 12 E.H.R.R. 161 (1989).

rotating basis. The guild did permit clinics to stay open at night on a voluntary basis, but few did so. In August, 1978, the *Hamburg Abenblatt* published a story of a woman's difficulties one night in finding a veterinarian to treat her cat. After calling numerous veterinarians who refused to provide night service, the woman reached Barthold, who treated the pet. The article quoted Barthold as saying, "It was high time. . . (the cat) would not have survived the night."⁹⁹ The veterinarian made other comments critical of the refusal of his colleagues to provide adequate night service.¹⁰⁰ Barthold was prosecuted under the German professional competition code that forbade veterinarians from advertising or tolerating publicity about themselves. The courts found Barthold guilty of unfair competition and issued an order forbidding him from mentioning his night service in comments to the press.¹⁰¹

The Court of Human Rights said Germany could regulate the commercial speech of professionals, but it must use means that do not keep the public from receiving information about a topic of general interest. Hindering Barthold from using examples from his own experience, the court said, "risks discouraging members of the liberal professions from contributing to public debate on topics affecting the life of the community."¹⁰² While letting Barthold comment freely might have a secondary effect "of giving publicity to Dr. Barthold's own clinic," to suppress his speech "is liable to hamper the press in its task of purveyor of information and public watchdog."¹⁰³ The court ruled that such an outcome was disproportionate to any regulatory benefit and an unnecessary restriction on freedom of expression.¹⁰⁴

Market Intern is a German journal that editorially defends the interests of small and medium-sized retailers against competition

⁹⁹ Barthold v. Germany, 7 E.H.R.R. 383, 386 (1985).

¹⁰⁰ *Id.* The article was accompanied by an emotion-provoking picture of the cat. The picture caption said, "They fought for the life of little Shalen---and won."

¹⁰¹ *Id.*, 387-392.

¹⁰² *Id.*, 404.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

from large-scale firms such as supermarket chains and mail order firms. In November, 1975, the journal, in an article by editor-in-chief Klaus Beerman, printed a complaint about cosmetics a consumer had purchased from Cosmetic Club International, a mail order house. The consumer called the cosmetics unsatisfactory and said Cosmetic Club had refused to honor a money-back guarantee. It was the fourth time *Market Intern* had published complaints about Cosmetic Club, and the journal advised retailers and manufacturers to be cautious in dealing with the firm. The journal urged readers to inform it of other complaints about Cosmetic Club.¹⁰⁵ Upon the complaint of Cosmetic Club, a German court ordered *Market Intern* to cease publishing articles about the club's business practices. Because *Market Intern* editorially defended the interests of small and medium-sized retailers, it was not an independent journal and therefor was subject to prosecution for unfair competition.¹⁰⁶

The Court of Human Rights said the trade press is covered by the human rights treaty's guarantee of freedom of expression. It commented:

In a market economy an undertaking which seeks to set up a business inevitably exposes itself to close scrutiny of its practices by its competitors. Its commercial strategy and the manner in which it honours its commitments may give rise to criticism on the part of consumers and the specialised press. In order to carry out this task, the specialised press must be able to disclose facts which could be of interest to its readers and thereby contribute to the openness of business activities.¹⁰⁷

However, that was not enough. The *Market Intern* article, while factually accurate, contained value judgments that could "legitimately contribute to the assessment of statements made in a commercial context, and it is primarily for the national courts to decide which statements are permissible and which are not."¹⁰⁸

¹⁰⁵ *Market Intern, supra*, 164.

¹⁰⁶ *Id.*, 164-170.

¹⁰⁷ *Id.*, 174-175.

¹⁰⁸ *Id.*, 175.

The court suggested the prior restraint on *Market Intern* was not appropriate,¹⁰⁹ but it held that the restraint was within the margin of appreciation and it would "not substitute its own evaluation. . . where those (national) courts, on reasonable grounds, had considered the restrictions to be necessary."¹¹⁰ Thus, the court found no violation of Article 10.¹¹¹

The record of the Court of Human Rights is mixed in the area of upholding freedom of the press to report on business activities. *Barthold* avoids the closing off to the mainstream press of news sources on business activities. *Market Intern* is inconsistent with the court's decisions in *Lingens* and *Sunday Times* and imposes an unwarranted burden on the trade press. Often the public considers consumer news more important than political or cultural intelligence.¹¹² Many times the flow of consumer news starts with trade journals and works its way into the mainstream press. *Market Intern* permits governments, which often are most responsive to business lobbies, to curb the flow of information on products and services. Moreover, the conservative posture of the court on commercial speech is an omen that restrictions on consumer information accomplished through advertising regulation will remain.

CONCLUSIONS

The Court of Human Rights has not transplanted the First Amendment to Western Europe. That would be an unrealistic expectation because the freedom of expression guarantee of the human rights treaty is a qualified one. Nevertheless, by focusing on what restrictions are necessary in a democratic society, the court has expanded press freedom. This is particularly evident in its decisions that provide safeguards for the reporting of political events and commentary. *Lingens* and *Sunday Times* show a tilt toward curbing

¹⁰⁹ *Id.*, 175-176.

¹¹⁰ *Id.*, 176.

¹¹¹ *Id.*

¹¹² *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

the use of the law by political elites and institutions to suppress challenges to their positions. The court's record on protecting reporting and commentary on commerce is mixed and disappointing. In its case-by-case approach---relying on adversarial litigation---the court is imposing international behavioral norms on national mass media systems. The European Court of Human Rights is the first international court to have its law on freedom of expression extensively incorporated into the domestic law of treaty signatories. As such and as globalization of the mass media continues, the court's freedom of speech and press law and the legal system it creates are likely to be emulated.



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**The "Opinion Defense" Is Not Dead: A Survey of Libel
Cases Decided Under the *Milkovich* Test**

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convention, Kansas City, Aug. 13, 1993**

In 1990 the Supreme Court of the United States, in *Milkovich v. Lorain Journal Co.*,¹ ruled that the First Amendment did not contain "separate constitutional protection for opinion." The decision sent shock waves through the ranks of defamation lawyers and journalists. A number of articles in legal journals and media trade publications² quickly proclaimed the death of the "opinion defense" against libel actions, as if henceforth it would be legally risky to publish or broadcast *any* opinions that a jury might deem defamatory. These authors predicted more lawsuits, with improved chances of victory for plaintiffs, as well as increased journalistic self-censorship. According to this initial speculation, both phenomena would tend to chill discourse on public affairs.

Other authors³ argued that *Milkovich* did not kill the "opinion defense" but reformulated it. According to these analyses, the "new" *Milkovich* test for determining when a statement is actionable is essentially the same as that used by lower courts to distinguish between fact and opinion.

¹17 Media L. Rep. 2009 (1990).

² See, for example, Debra Gersh, "Opinion No Exception," *Editor & Publisher*, June 30, 1990, pp. 12, 43; Janna Custer, "Supreme Court Levels Libel Defense," *Active Voice* (San Francisco Chapter, Society for Technical Communication), September 1990, pp. 1, 11; Lisa K. West, "Demise of the Opinion Privilege in Defamation," 36 *Villanova L. Rev.* 647 (April 1991); Wan-ee Chelsea Chen, "Pinning Opinion to the First Amendment Mat," 11 *Loyola Entertainment Law Journal* 567 (Spring 1991); T. R. Hager, "Lost Breathing Space--Supreme Court Stifles Freedom of Expression by Eliminating First Amendment Opinion Privilege," 65 *Tulane L. Rev.* 944 (1991); Anthony D'Amato, "Harmful Speech and the Culture of Indeterminacy," 32 *Wm. & Mary L. Rev.* 329 (1991).

³ See, for example, "The Supreme Court, 1989 Term, Leading Cases, 104 *Harvard L. Rev.* 219, 223 (1990); Edward M. Sussman, "*Milkovich* Revisited: 'Saving' the Opinion Privilege," 41 *Duke Law Journal* 414 (1991); Benjamin D. Scheibe, "The Constitutional Defense of Opinion," *Los Angeles Lawyer*, April 1991, p. 36; Cynthia Fox, "How Scary Is *Milkovich*? A Matter of Opinion," *Columbia Journalism Review*, May-June 1992, p. 19.

The Supreme Court insisted on an inquiry into the implied factual content of a defamatory opinion and rejected the "artificial dichotomy"⁴ between fact and opinion that courts had applied since *Gertz v. Robert Welch* stated, in *dictum*, "There is no such thing as a false idea."⁵ The *Milkovich* test in fact is based on longstanding constitutional doctrines that the Supreme Court said would continue to protect statements of opinion. First, statements on matters of public concern must be provably false before there can be liability under state defamation law.⁶ Thus, the threshold question is not whether a statement could be considered an "opinion" but whether a reasonable fact-finder could conclude that the statement implied an assertion of an objective, verifiable fact.⁷ Whether a statement is "sufficiently factual to be susceptible to being proved true or false"⁸ is not a question of fact, but a question of law, for the court to objectively determine.

Additionally, the Supreme Court held that *Greenbelt Cooperative Publishing Ass'n v. Bresler*,⁹ *Old Dominion Branch No 496, National Association of Letter Carriers v. Austin*¹⁰ and *Hustler Magazine, Inc. v. Falwell*¹¹ provide protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual."¹² A court should determine whether the challenged

⁴ *Milkovich*, p. 2017.

⁵ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, at 339-340.

⁶ *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, at 777.

⁷ *Milkovich*, p. 2018.

⁸ *Ibid.*

⁹ 398 U.S. 6 (1970).

¹⁰ 418 U.S. 264 (1974).

¹¹ 485 U.S. 46 (1988).

¹² *Milkovich*, p. 2018, quoting *Falwell*, 485 U.S. at 50.

statements contain "the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining" the alleged factual assertion.¹³ Then the court must ask whether "the general tenor of the article negate[s] this impression."¹⁴

In sum, the *Milkovich* standards seek to determine whether language, context and provability indicate that a statement has asserted a "fact." These are essentially the same factors as the "totality of the circumstances" test developed by the U. S. Court of Appeals for the District of Columbia in *Ollman v. Evans*.¹⁵ The first *Ollman* factor--examining the specific language of a challenged statement--is equivalent in meaning to *Milkovich*'s "loose, figurative or hyperbolic language." The third and fourth *Ollman* factors are explicitly concerned with context or "tenor." The second *Ollman* factor--verifiability--is the same as provability.¹⁶

¹³ *Milkovich*, p. 2018.

¹⁴ *Ibid*.

¹⁵ 750 F.2d 970 (D.C. Cir. 1984). "First, we will analyze the *common usage or meaning of the specific language* of the challenged statement itself. Our analysis of the specific language under scrutiny will be aimed at determining whether the statement has a precise core of meaning for which a consensus of understanding exists, or, conversely, whether the statement is indefinite and ambiguous....Second, we will consider the statement's *verifiability*--is the statement capable of objectively being characterized as true or false? Insofar as a statement lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content....Third, moving from the challenged statement itself, we will consider the *full context of the statement--the entire article or column, for example*--inasmuch as other, unchallenged language surrounding the allegedly defamatory statement will influence the average reader's readiness to infer that a particular statement has factual context. Finally, we will consider the *broader context or setting in which the statement appears*." (Emphasis added)

¹⁶ Sussman, p. 427.

The *Ollman* test, never reviewed by the Supreme Court,¹⁷ was the most ambitious attempt to establish a constitutionally based test for determining whether a challenged statement is one of protected opinion or of actionable fact. This test was adopted or followed by various other courts, although its acceptance was by no means universal. In the 1980s opinion proved to be a "sterling defense" in libel cases.¹⁸ Indeed, many courts and attorneys concluded that "the opinion defense" had become a "well settled" area of the law.¹⁹ In their survey of media-related libel cases between 1982 and 1988, Gillmor and Grant found that defendants won 97 percent of the 133 cases in which the alleged libel took the form of an opinion. The authors noted that their finding suggested either "that the common-law defense of 'fair comment and criticism' still governs this area of the law or that the more newly defined 'opinion' defense was beginning to take effect in the period of the study."²⁰

Initially, *Milkovich* was widely perceived as having disposed of the "opinion defense" or as signalling an "ominous" tilting toward the finding of actionable statements.²¹ Gillmor and Grant speculated that "[p]erhaps now only the wildest and most hyperbolic statements will qualify as 'pure' opinion."²²

¹⁷ *Cert. denied*, 471 U.S. 1127 (1985).

¹⁸ Donald M. Gillmor and Melanie C. Grant, *Sedition Redux: The Abuse of Libel Law in U.S. Courts* (New York: Freedom Forum Media Studies Center, 1991), p. 12.

¹⁹ Scheibe, p. 36. In 1984 the U.S. 9th Circuit Court of Appeals went so far as to assert that defamation actions cannot be based on statements of opinion. *Church of Scientology of California v. Flynn*, 744 F.2d 694 (9th Cir. 1984).

²⁰ Gillmor and Grant, p. 12.

²¹ Sussman, p. 418.

²² Gillmor and Grant, p. 13.

The present study sought to determine whether these concerns were warranted. It is a study of how state and federal courts have applied the Supreme Court's three-part *Milkovich* test for opinion.

The Study

The author examined 42 libel decisions that were published between July 13, 1990 and April 8, 1993. The majority of these cases is contained in Volumes 18-21 of *Media Law Reporter*; the author found the remaining cases as citations in the *MLR* decisions. The Bureau of National Affairs' Cynthia Bolbach, managing editor of *MLR*, has estimated that at least 95 percent of cases that reach even the earliest stages of a court proceeding appear in that publication, if not also in official and other unofficial case reports.²³ Court opinions are available in *MLR* much sooner than in *United States Reports*.²⁴

The present study does not purport to be a comprehensive survey of all libel actions filed during the period. One limitation is that state trial courts generally do not issue written opinions for publication. Second, there is no record of settled cases equivalent to the record of case dispositions in *MLR*. Third, the number of appeals from cases analyzed in this study is unknown; thus, it is likely that some of these cases are still in progress. Nevertheless, because *MLR* is the leading reporter in this area of law, the author is confident that the findings reported in this study are representative of what has happened in the courts.

²³ Quoted in *Ibid.*, p. 6.

²⁴ Kent R. Middleton and Bill F. Chamberlin, *The Law of Public Communication*, 2d ed. (New York: Longman, 1991), p. 20.

Of the 42 cases analyzed, 30 were state court decisions and 12 were federal court decisions. Mass media (newspapers, magazines, television, books or financial network data base) were defendants in 35 of the decisions. Table 1 shows the disposition of the cases. The author counted as a "win" for a defendant the granting or affirmation of summary judgment, the affirmation of a motion to dismiss, the reversal of a jury judgment for plaintiff, the affirmation of a judgment for defendant and a remand with order to enter summary judgment for defendant.

TABLE 1: Disposition of cases in state and federal courts.

SJ=summary judgment MTD=motion to dismiss Aff'd=affirmed
*Represents a "win" for defendant.

<u>Trial courts</u>	<u>State</u>	<u>Federal</u>
SJ granted*	3	5
SJ denied	0	3
MTD denied	0	1
TOTAL	3	9
<u>Appellate courts</u>	<u>State</u>	<u>Federal</u>
SJ affirmed*	10	3
SJ reversed	5	0
MTD affirmed*	3	0
MTD reversed	2	0
Jury judgment for plaintiff affirmed	2	0
Jury judgment for plaintiff reversed*	2	0
Judge's judgment for defendant aff'd*	2	0
Remand w/order to enter SJ for defendant*	1	0
TOTAL	27	3
GRAND TOTAL	30	12
Percent of all cases	71.4	28.6

Table 2 summarizes "wins" for plaintiffs and defendants in the cases. Plaintiffs were successful in state courts 30 percent of the time while defendants prevailed in 70 percent of the decisions; also, plaintiffs won 33.3 percent of the time in federal courts while defendants won 66.7 percent of the decisions. Overall, plaintiffs won 31 percent of the 42 cases and defendants won 69 percent. Defendants prevailed in only two of the six cases in which a trial had been conducted.

TABLE 2: FARING OF PLAINTIFFS AND DEFENDANTS IN STATE AND FEDERAL COURTS

	State	Federal
Plaintiff wins	9 (30.0%)	4 (33.3%)
Defendant wins	21 (70.0%)	8 (66.7%)
N=42		

The following sections of this paper demonstrate how state and federal court decisions have applied the "new" *Milkovich* factors in libel actions: specific language, context (surrounding language, type of communication and/or broader social context of the communication) and provability or verifiability. (Note that not all courts applied all factors in reaching a decision: for example, in *Dodson v. Dicker*²⁵ the Arkansas Supreme Court examined only context in holding that a private letter of complaint to a state agency was protected opinion.) This study discusses parts one and two of the test as the "rhetorical hyperbole defense." In many cases decided before *Milkovich*, courts had employed this doctrine, focusing on

²⁵ 19 Med.LRep. 1124, at 1125 (Ark. 1991).

whether, in view of the language used and the surrounding circumstances, a reasonable reader or listener would believe that the statements were actually being asserted as facts.²⁶

Language and context: the rhetorical hyperbole defense

The *Milkovich* court referred to "the *Bresler-Letter Carriers-Falwell* line of cases" as protecting the "loose, figurative or hyperbolic"²⁷ use of normally defamatory terms such as "blackmail," "treason" and "drunk"²⁸ if the "general tenor" of the communication conveys to the audience that such terms are not to be taken literally.

Among the cases examined here, courts have specifically referred to the following as rhetorical hyperbole:

* A newspaper article that said sending gift packs containing dates to troops in Operation Desert Storm was like "sending coals to Newcastle." The comment occurred in the context of a discussion of "problems" with the project.²⁹

²⁶ Among the cases in which defendants successfully employed the rhetorical hyperbole defense are *Moriarity v. Lippe*, 294 A.2d 326 (1972), *Raymer v. Doubleday & Co.*, 615 F.2d 241 (1980), *Martin v. Municipal Publications*, 510 F.Supp. 255 (1981), *Stevens v. Tillman*, 661 F.Supp. 702 (1986), *Evarts v. Downey*, 16 Med. L. Rep. 2450 (N.Y. 1989), *Stanley Sall v. Paul Barber*, 16 Med. L. Rep. 1700 (Colo. 1989) and *Savitsky v. Shenandoah Valley Publishing Corp.*, 17 Med.L. Rep. 1219 (Pa. 1989).

²⁷ *Milkovich*, p. 2010.

²⁸ In *Bresler*, a newspaper's use of the term "blackmail" was "clearly rhetorical hyperbole used to characterize a [real estate] developer's negotiating position and did not in any way indicate that developer had been charged with criminal offense of blackmail." 398 U.S. 6 (1970). In *Letter Carriers*, a union newsletter's use of the word "traitor" was "figurative" expression to describe the union's "strong disagreement with the views of workers opposing unionization." 418 U.S. 264, at 265 (1974). In *Falwell*, *Hustler* magazine's clearly marked parody of a liqueur ad, depicting the Rev. Jerry Falwell as having had drunken sex with his mother, was protected as "speech [that] could not reasonably have been interpreted as stating actual 'facts' about Falwell, 485 U.S. 46, at 50 (1988).

²⁹ *Chapin v. Greve*, 19 Med. L. Rep. 2161, at 2163 (E.D. Va. 1992).

* A private letter (later reprinted in a university newspaper) that called a university administrator a "racist" after he cancelled an Asian students' celebration scheduled on the anniversary of the attack on Pearl Harbor. The court said the accusation was likely to be understood in a university community as an "expression of anger, resentment and possibly political opinion" about a perennially controversial topic on campus.³⁰

* A newspaper article that quoted a source as calling a convicted murderer a "bastard." The mother of the convicted man had sued for libel, contending the word imputed to her a lack of chastity at the time of her marriage.³¹

* A corporate memo that named an employee during a discussion of "favoritism," "brown nose(s)" and "shit heads." The court held that the terms lacked "precision and specificity" and they did not necessarily refer to the plaintiff exclusively.³²

* A high school newspaper headline that said pranksters had "terrorized" a teacher, whom the accompanying article called a "babbler" and the "worst teacher in the school." Such "exaggerated expression," according to the court, conveyed not fact but "the student-speaker's disapproval of plaintiff's teaching or speaking style."³³

³⁰ *Kimura v. Santa Cruz Superior Court*, 19 Med.L. Rep. 1777, at 1783 (Cal. App. 6th 1991).

³¹ *Weinberg v. Pollock*, 19 Med. L. Rep. 1442, at 1443 (Conn. 1991).

³² *Lund v. Chicago and Northwestern Transportation Company*, 467 N.W. 2d 366, at 369 (Minn. App. 1991).

³³ *Moyer v. Amador Valley Joint Union High School District*, 18 Med. L. Rep. 1602, at 1604-5 (Cal. App. 1st 1990).

* A series of articles in the *New York Times*. that included quotations alleging "whitewash" and "weaseling" on the part of the chief medical examiner of New York City. The court wrote that in the overall context of a series of articles examining Dr. Elliot Gross' close working relationship with the police, these words could not be reasonably construed as accusing Gross of criminal offenses.³⁴

*A campaign flyer distributed by a candidate in a union election, who referred to his opponent as a member of the "Dalton gang." Plaintiff, whose first name was Dalton, argued that the flyer accused him of criminal activity by associating him with a notorious criminal group of the early 1900s, but the court dismissed the claim as the kind of "exaggeration"³⁵ and "politically motivated hyperbole"³⁶ that a reasonable person would expect in a hotly contested election.

* A television editorial that accused a city councilman of using a "legal maneuver" to "slither back into office." The councilman had been defeated for re-election but convinced the council to appoint him to the unexpired term of another member. Rather than "an accusation of bestiality," the language was "satirical commentary concerning the dubious actions of a local political figure."³⁷

* A magazine article that characterized a business executive's private life as "sordid" and "sure to shock millions."³⁸

³⁴ *Gross v. The New York Times Co.*, 20 Med. L. Rep. 1274, at 1279 (N.Y. App. 1st, 1992).

³⁵ *Wellman v. Fox*, 19 Med.L. Rep. 2028, at 2031 (Nev. 1992).

³⁶ *Ibid.*, at 2029.

³⁷ *Maholick v. WNEP TV*, 20 Med. L. Rep. 1022, at 1023 (M.D. Pa. 1992).

³⁸ *Ward v. News Group Newspapers Inc.*, 18 Med. L. Rep. 1140 (C.D. Cal. 1990).

* A newspaper theater review that described a production of *The Phantom of the Opera* as a "rip-off, a fraud, a scandal, a snake-oil job." The critic implied dishonest marketing of the production but also provided facts underlying the view and provided information from which readers could have drawn contrary conclusions.³⁹

However, five decisions in this study specifically rejected the rhetorical hyperbole defense due to the context in which the allegedly defamatory language appeared.

The Wyoming Supreme Court rejected *Hustler's* rhetorical hyperbole defense in a libel action brought by an attorney whom the magazine had called a "shameless shithole," "hemorrhoidal type" "parasitic scum-sucker," "vermin-infested turd dispenser." Disregarding a quarter-century of U. S. Supreme Court precedents, the court held that the statements were actionable because they were made without good intentions.⁴⁰

³⁹ *Phantom Touring Inc. v. Affiliated Publications*, 19 Med. L. Rep. 1786 (1st Cir. 1992).

⁴⁰ *Spence v. Flynt*, 19 Med. L. Rep. 1129 (Wyo. 1991). The plurality in *Spence* "pulled an obscure rule out of context from the historical notes of *Milkovich*" and "[b]y using this outdated rule, the court reinstat[e]d the necessity of good motives in criticizing public figures." Todd H. Hambrick, "You Better Smile When You Call Me an Asshole! Freedom of Speech in Wyoming After *Milkovich*," *Land and Water Law Review*, Vol. XXVII (1991), p.576. *Milkovich*, p. 2015, quotes *Restatement of Torts*, Sect. 606 (1)(c) (1938): "Criticism of so much of another's activities as are matters of public concern is privileged if the criticism, although defamatory,...is not made solely for the purpose of causing harm to another." (Emphasis added)

However, in 1992, the majority of the Wyoming Supreme Court refused to apply this "good intentions" test to a libel action brought by feminist writer Andrea Dworkin against *Hustler*. The magazine had published an article that called Dworkin "a shit-squeezing sphincter in her own right," "one of the most foul-mouthed, abrasive man-haters on Earth," "a repulsive presence," "a crybaby who can dish it out but can't take it" and a "censor." The court said that those phrases were rhetorical hyperbole and wrote that "the phrase 'when published with good intent and [for] justifiable ends' of the Wyoming Constitution, article 1, section 1, is repugnant to the guarantees of the First Amendment of the United States Constitution...." *Dworkin v. L.F.P. Inc.*, 20 Med L. Rep. 2001, at 2015 (Wyo. 1992).

A California appeals court, in a suit filed against talk-show host Arsenio Hall, ruled that the full context of a newspaper article made it clear that Hall was asserting fact, not opinion, when he called an NAACP official an "extortionist."⁴¹ (The plaintiff did not sue the newspaper that printed Hall's comments.)

Similarly, a federal trial court in California refused to dismiss a libel suit against the National Audubon Society's magazine *Audubon*, which referred to plaintiff as an "eel." The court held that the term could reasonably be understood as an assertion of fact in view of the article's other disparaging references to persons who had been convicted of or pleaded guilty to violations of the Endangered Species Act.⁴²

The Colorado Court of Appeals reversed a trial court's summary judgment for KCNC-TV, which had broadcast two reports that called a plaintiff's products a "scam" and said plaintiff's customers were being "taken." The Living Will Center had advertised a package of information, forms and services that KCNC stated were not worth paying anything for, because everything in the package could be obtained at little or no cost elsewhere or is unnecessary to meet the needs of those interested in a living will. The broadcasts did not mention everything in the package, but they implied that they had discussed everything that might have value. The trial court had referred to "scam" and "taken" as protected hyperbole, but the appeals court ruled that a reasonable juror might view some of the omitted items as worth paying for; thus, by implication KCNC had

⁴¹ *Edwards v. Hall*, 19 Med.L. Rep. 1969 (Cal. App. 2d 1991).

⁴² *Snider v. National Audubon Society Inc.*, 20 Med.L. Rep. 1218 (E.D. Cal. 1992).

made statements about plaintiff that were capable of being proved false.⁴³

Finally, an Illinois appeals court ruled that a jury trial would be necessary to determine whether the state's "innocent construction" defense protected two radio talk-show hosts who had accused a businessman of "scamming" and being "not for real." At the same time, the court clearly rejected the defendants' rhetorical hyperbole defense.⁴⁴

Although *Milkovich* rejected the notion that communications are no longer automatically protected because they are clearly labelled as opinion, some courts continue to take the type of print or broadcast communication into account as a contextual factor in the determination of fact or opinion.

In eight decisions in this study, courts held that the type of communication negated the impression that the defendant was conveying facts. They included:

*A *Forbes* article asserting that the purchase of Walt Disney stock is a better investment than buying limited partnerships in Disney productions managed by an investment company. (The court wrote that readers would understand the article as "responsible financial criticism.")⁴⁵

*A private letter to a tenure review committee that accused a university professor of being homophobic, intimidating and

⁴³ *Living Will Center v. KCNC-TV*, 21 Med. L. Rep. 1209 at 1213 (Colo. App. 1993).

⁴⁴ *Kolengas v. Heftel Broadcasting Corp.*, 19 Med. L. Rep. 2020 at 2021 (Ill. App. 2d 1991).

⁴⁵ *Silver Screen Management Services Inc. v. Forbes Inc.*, 19 Med. L. Rep. 1744 (N.Y. 1991).

insensitive. (Comments solicited during a tenure review are expected to be opinion, the court held.)⁴⁶

*A letter to the editor of a scientific journal, alleging that researchers planned to infect chimpanzees with hepatitis and then release them into the wild, thereby spreading the disease. (According to the court, the journal's highly sophisticated readers expect opinions to be expressed in letters; moreover, to dispel any reader doubts that the letter expressed opinion, the journal's editors attached a prefatory note stating that they did not necessarily agree with the opinions expressed in the letter.)⁴⁷

*Statements made on the *Phil Donahue Show*, accusing a furniture company of poor service. The court noted that Donahue's audiences understand the show is "unscripted and unrehearsed" and that guests are merely offering their perspectives on current affairs.⁴⁸

*A series of Dick Tracy comic strips that concerned a record company called Flipside, Inc., that supposedly was involved in organized crime, payola and murder. The court ruled the series did not reasonably imply any facts about plaintiff, a real-life record company, Flip Side, Inc.⁴⁹

*Letters published in a newspaper that accused a judge and a medical doctor of being "sick pillars" of the community and of having engaged in "white collar crime." The writer referred to a highly

⁴⁶ *Lester v. Powers*, 596 A. 2d 65, at 71 (Me. 1991).

⁴⁷ *Immuno A.G. v. Moor-Jankowski*, 18 Med. L. Rep. 1625, at 1633 (N. Y. App. 1991).

⁴⁸ *Behr v. Weber*, 18 Med.L. Rep. 2237, at 2238 (N.Y. App. 1st 1991).

⁴⁹ *Flip Side Inc. v. Chicago Tribune*, 564 N.E. 2d 1244 (Ill. 1990).

publicized trial in which the doctor, charged with sexual assault of a patient, had been found not guilty. The letters' placement in the opinion section, together with their "metaphoric choice of words and vituperative tone," would not allow a reasonable reader to interpret the allegations as factual assertions, the Colorado Court of Appeals wrote in reversing a trial judge's decision that the challenged words were actionable.⁵⁰

However, in four other decisions courts rejected defendants' contention that the type of communication would alert audiences that opinions rather than facts were being asserted. In these cases *Milkovich* clearly limited the power of journalistic context to transform apparently factual statements into protected opinion. These decisions were:

*A nationally distributed data base "advisory" that stated that the Church of Scientology had a "vendetta to discredit" the manufacturer of the antidepressant drug Prozac. ("The general tenor of the advisory was partisan," but its context was like a "memo...its tone business-like and solemn.")⁵¹

*A remark by Andy Rooney on CBS's *60 Minutes* that a cleaning solution "didn't work." (Although the tenor of the Rooney broadcast was "humorous and satirical," he still had made a provably false factual assertion.)⁵²

*A newspaper article that said a hospital performed and charged for "unnecessary" laboratory tests. (Because the article was

⁵⁰ *Keohane v. Wilkerson*, 21 Med.L. Rep. 1417, at 1422 (Colo.App.1993).

⁵¹ *Church of Scientology International v. Eli Lilli & Co.*, 19 Med.L. Rep. 1593, at 1598 (S.D. N.Y. 1991).

⁵² *Unelko Corp. v. Rooney*, 17 Med. L. Rep. 2317, at 2320 (9th Cir. 1990).

"situated above" other news articles, not on the editorial page, a reasonable reader would assume that the writer was asserting facts.)⁵³

*A local television broadcast that suggested that an antique dealer had defrauded a museum. ("The speculative format of an ongoing investigative report" did not negate the impression that the journalist was asserting facts about the dealer, and the "use of interrogative language" in the broadcast did not automatically protect allegedly defamatory statements if audiences understood them as factual.)⁵⁴

In sum, this evidence suggests that defendants no longer will be able to avoid responsibility for statements of fact merely by the talismanic invocation of context. But it is also clear that courts considering language claimed to be defamatory cannot focus solely on the challenged words, but must at least consider the setting in which they were uttered.⁵⁵

The provability or verifiability test

The *Hepps* decision made falsity part of a libel plaintiff's burden of proof where the challenged language is on "a matter of public concern." In *Milkovich* the Supreme Court reiterated that a statement must be considered protected if it is not objectively verifiable.⁵⁶ That is, if a statement is not objectively verifiable, by

⁵³ *Florida Medical Center Inc. v. New York Post Inc.*, 18 Med. L.Rep. 1224, at 1228 (Fla. App. 4th 1990).

⁵⁴ *Weller v. American Broadcasting Companies Inc.*, 19 Med.L. Rep. 1161 (Cal. App. 3d 1991).

⁵⁵ Scheibe, p. 63.

⁵⁶ *Milkovich*, p. 2009.

definition it cannot be proven false and the plaintiff cannot establish the publication of a false statement.

Although *Milkovich* had not altered this key aspect of defamation law, journalists and media lawyers worried that in the absence of "near absolute protection" for opinion, courts would be less willing to grant summary judgment for defendants who asserted that their allegedly defamatory statements were privileged as opinion. The president of the American Society of Newspaper Editors predicted: "If the impact of [*Milkovich*] is exaggerated [by courts] or if it is twisted to punish opinions which may be caustic and strong, the case will cause problems for everyone."⁵⁷

In the present study seven appellate courts and five trial courts ruled as part of their decision that challenged language could be understood as fact rather than opinion; thus, a full trial would be necessary to determine whether a defamatory meaning had been conveyed. They included a press release that said an antiabortion protester had "aided and abetted" the commission of illegal acts;⁵⁸ a newspaper article stating that a mayor had adopted a politically popular view in order to get elected;⁵⁹ a letter by a police officers' organization that said an officer had used illegal drugs and engaged in illegal acts to obtain a promotion;⁶⁰ a magazine article that accused an attorney of "selling out his values" for a "chance to fatten his wallet";⁶¹ a private letter accusing a social worker of

⁵⁷ David Lawrence, quoted in Fox, p. 21.

⁵⁸ *Scheidler v. National Organization for Women Inc.*, 751 F. Supp. 743 (N.D. Ill. 1990).

⁵⁹ *West v. Thomson Newspapers*, 20 Med. L.Rep. 1329 (Ut. App. 1992).

⁶⁰ *White v. Fraternal Order of Police*, 17 Med. L.Rep. 2137 (D.C. Cir. 1990).

⁶¹ *Spence*, p. 1132.

"incompetence" and "hostil[ity] to children";⁶² and a newspaper article asserting that doctors had "conspired to rob an insurance company" by ordering unnecessary lab tests.⁶³

Two other courts held that challenged statements were factual, but plaintiffs lost because they failed to prove the statements were false. The decisions were the previously mentioned *Andy Rooney* case, in which the Unelko Corp. failed to prove the falsity of Rooney's statement that its Rain-X windshield cleaner "didn't work";⁶⁴ and *Wellman v. Fox*, in which a candidate in a union election did not prove the falsity of a flyer alleging that he had been "thrown off the union board" for fraud and that his political "gang" had engaged in "nepotism" and "strikebreaking."⁶⁵

In 14 decisions in this study, courts either granted or affirmed summary judgment or defendants' motion to dismiss because challenged statements were not provably false.

Among the cases were a magazine article asserting that a husband had "taken too long" to notify police after finding his wife's corpse;⁶⁶ letters to the editor complaining that city-licensed carriage horses were being housed under "unsafe, unhealthy and inhumane conditions";⁶⁷ a private letter that called the husband of a government official a "sneaky bully" and suggested he may have rewritten a state licensing exam for profit;⁶⁸ a newspaper article,

⁶² *Kahn v. Bower*, 19 Med. L. Rep. 1236 (Cal. App. 1st 1991).

⁶³ *Florida Medical Center*, p. 1224.

⁶⁴ *Unelko*, p. 2317.

⁶⁵ *Wellman*, p. 2028.

⁶⁶ *Miyata v. Bungei Shunju Ltd.*, 19 Med. L. Rep. 1400 (Cal. App. 2d 1991).

⁶⁷ *McGill v. Parker*, 19 Med. L. Rep. 2170 (N. Y. App. 1992).

⁶⁸ *Dodson*, p. 1124.

reporting on a proposal to convert a hospital to a skilled nursing facility, that said "dissenters" in the community were "hurting the hospital's chances of survival";⁶⁹ a private letter to a local Planning Board that expressed "grave concerns" about the management of a homeless shelter;⁷⁰ an ABC 20-20 broadcast that accused a plaintiff of being in the "low," "repulsive" and "rotten" business of buying and selling stolen pets (a charge the court found to be true);⁷¹ a newspaper review that contended a book contained "too much sloppy journalism to trust the bulk of the book's 512 pages";⁷² and a radio interview during which a baseball team owner referred to a broadcaster as a "liar" but "with no specific facts at the root of...[the] statement...capable of being objectively verified as true or false."⁷³

Discussion

While this study has not analyzed all court decisions that have employed a *Milkovich* analysis, the author believes that the evidence herein suggests that it is too early to proclaim that the "opinion defense" is dead, although *Milkovich* may well have limited it.

All nine justices in *Milkovich* agreed on the basic methodology to be employed in deciding opinion cases. It was only in application of that methodology that the dissenters, Justices Brennan and Marshall diverged from the majority. As Scheibe points out,

⁶⁹ *Lesyk v. Putnam County News and Recorder*, 18 Med. L.Rep. 1618 (N.Y. App. 2d 1990).

⁷⁰ *Lightfoot v. Matthews*, 18 Med. L. Rep. 1855, at 1857 (Me. 1991).

⁷¹ *Hickey v. Capital Cities/ABC Inc.*, 19 Med L. Rep. 1980 (D.C. Ore. 1992).

⁷² *Moldea v. New York Times*, 19 Med. L. Rep. 1931 (D.C. Cir. 1992).

⁷³ *Piersall v. Sportsvision of Chicago*, 20 Med. L. Rep. 1223, at 1227 (Ill. App. 1st 1992).

The fact that the two opinions can come to diametrically opposed conclusions when applying the same test to the same statements suggests that those courts previously inclined to invoke the opinion privilege on a liberal basis can continue to find constitutional protection for such statements even after *Milkovich*, whereas those courts that were stricter in dispensing opinion protection may continue in this vein after *Milkovich*.⁷⁴

Interesting, though not statistically reliable, comparisons may be made between the trends reported in the present study of 42 *Milkovich*-analysis cases, not all of which have reached final disposition, with trends reported in the Gillmor-Grant seven-year study of 614 widely divergent libel cases, most of them finally decided.

First, as in all types of libel cases, defendants in opinion cases continued to win a majority of cases at the trial court level on motions to dismiss (MTD) or summary judgment (SJ). Gillmor and Grant reported that between 1982-88, 90.8 percent of all libel defendants won on MTD or SJ.⁷⁵ In the present study 71.4 percent (30 of 42) of the cases involved an initial defense victory by means of MTD or SJ. Thus, while MTD and SJ remain powerful means for defeating libel actions, more judges appear willing to construe challenged language as fact rather than opinion and to allow a jury to determine whether defamatory meaning was conveyed.

Second--although the finding here is extremely tentative--where a trial has been conducted, defendants lose most of the time. Gillmor and Grant found that libel plaintiffs won 73.8 percent of trial

⁷⁴ Scheibe, p. 63.

⁷⁵ Gillmor and Grant, pp. 8-9.

decisions,⁷⁶ whereas in the present study plaintiffs won 33.3 percent (two of six trials). The author does not know whether trial judgments will result from 11 "losses" for this study's defendants: denial of SJ and MTD or reversal of SJ and MTD. Because libel actions take from one to 13 years to reach final disposition,⁷⁷ it is too early to determine whether the trend in "opinion" cases approximates that of another important Gillmor and Grant finding: that defendants obtained reversals in 64 percent of appeals to the next level of courts.⁷⁸ (Overall, media defendants won 81.3 percent of libel cases brought against them.)⁷⁹ In the present study 50 percent (two of four) of plaintiffs' trial-court victories have been reversed by an appellate court.

As the "opinion" cases travel through the courts system, the future researcher also should be on the lookout for a possibly significant determinative factor: whether state courts will look to their own constitutions and common law to provide more protection for opinion than the Supreme Court of the United States provided in *Milkovich*. The "new federalism," as Parramore has labelled this factor,⁸⁰ has been most evident in decisions by New York courts. In *Immuno A.G. v. Moor-Jankowski* (1991) the state's highest court, the Court of Appeals, specifically stated that it was not "compelled" to decide opinion cases by the *Milkovich* standard.⁸¹ (In the case,

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, p. 13.

⁷⁸ *Ibid.*, p. 9.

⁷⁹ *Ibid.*, p. 16.

⁸⁰ James R. Parramore, "State Constitutions and the Press: Historical Context and Resurgence of a Libertarian Tradition," *Journalism Quarterly* 69, No. 1 (Spring 1992), p. 123.

⁸¹ *Immuno*, p. 1632.

involving a letter to the editor of a scientific journal, the court nevertheless applied *Milkovich* "for the purpose of guidance only"⁸² and reaffirmed its earlier decision that the letter was nonactionable opinion.) The court asserted its right to apply the state's own "totality of the circumstances" test⁸³ to protect "the core values...of free press and speech" of the New York Constitution, to a greater degree "than the minimum required by" the U.S. Constitution.⁸⁴ Since *Immuno*, one trial court⁸⁵ and two appellate courts⁸⁶ cited in this study have applied the state's "independent analysis" in ruling against libel plaintiffs.

In California, on the other hand, two different appellate courts⁸⁷ have ruled that the state and federal constitutions provide the same degree of protection for speech; hence, these courts applied the *Milkovich* test, resulting in two "wins" for plaintiffs.

Finally, two other courts in this study--a trial court in Connecticut⁸⁸ and the U.S. 1st Circuit Court of Appeals⁸⁹ --refused to rule on defendants' assertion that state law is generally more protective of statements of opinion than the First Amendment. Because it is likely that other defendants will also ask state courts to provide this greater protection, future research should track how the courts answer the request.

⁸² *Ibid.*

⁸³ *Steinhilber v. Alphonse*, 68 N.Y. 2d 283.

⁸⁴ *Immuno*, p. 1630.

⁸⁵ *Silver Screen*, 19 Med. L. Rep. 1744.

⁸⁶ *Behr*, 18 Med. L. Rep. 2237, and *Gross*, 20 Med. L. Rep. 1274.

⁸⁷ *Weller*, 19 Med. L. Rep. 1161, and *Edwards*, 19 Med. L. Rep. 1969.

⁸⁸ *Weinberg*, p. 1446.

⁸⁹ *Phantom*, p. 1786.

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- Church of Scientology International v. Eli Lilly & Co. et al*, 19 Med. L Rep. 1593 (S.D. N. Y. 1991).
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Abstract

The "Opinion Defense" Is Not Dead: A Survey of Libel Cases Decided Under the *Milkovich* Test

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In the aftermath of the Supreme Court's June 1990 decision in *Milkovich v. Lorain Journal Co.*, many defamation lawyers and journalists proclaimed the death of the "opinion defense." This study sought to determine whether their concern was warranted. The author examined 42 state and federal court decisions that applied a *Milkovich* analysis between July 1990 and April 1993. The evidence suggests that defendants continue to win a majority of "opinion" cases on motions to dismiss or summary judgment, although since *Milkovich* more judges appear willing to construe challenged language as fact rather than opinion and to allow a jury to determine whether the language conveyed a defamatory meaning. Thus it is too early to proclaim that the "opinion defense" is dead, although *Milkovich* --which reformulated the "totality of the circumstances" test previously used by many courts to distinguish fact from opinion--may well be limiting the defense.



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EDITORIAL COVERAGE OF *RUST V. SULLIVAN*

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ABSTRACT

Editorial Coverage of *Rust v. Sullivan*

This study examined newspaper editorial coverage of *Rust v. Sullivan*, a landmark 1991 Supreme Court case widely regarded as a threat to the First Amendment rights of government employees and grant recipients. The ruling upheld a gag order forbidding health care workers from dispensing abortion advice at federally funded clinics. Past studies have shown scant, distorted, superficial, and/or declining media coverage of Supreme Court rulings. Critics have also charged the media with championing free expression only when it directly affects media interests. The purpose of this research was to discover how the media responded to *Rust v. Sullivan*--a First Amendment case that did not directly impact press freedoms. The study analyzed newspaper editorial coverage of *Rust* to determine: (1) whether editorials expressed support, neutrality, or opposition to the decision; (2) to what extent editorials addressed the First Amendment issues *Rust* raises, and (3) what arguments editors used to support their positions. Although 80 percent of the 35 newspaper editorials in the sample opposed the ruling, fewer than half reacted to *Rust v. Sullivan* as a free-speech issue. Most editors framed the decision in terms of the abortion debate, and about 63 percent attacked it as a violation of the doctor-patient relationship. The most disturbing result involved the editors' failure to inform readers of *Rust*'s potentially chilling effect on the free expression of all government grantees--including libraries, museums, and arts and research institutions. Only three editorials--less than 10 percent of the total--addressed these broader implications.

Few U.S. Supreme Court cases have proved more incendiary than the Court's 5-4 decision in *Rust v. Sullivan*, delivered on May 24, 1991.¹ The ruling--which upheld a gag order forbidding health-care workers from dispensing abortion advice in federally funded clinics--not only outraged First-Amendment scholars, feminists, and medical professionals, but sent a shudder of fear through government-supported artistic, scientific, humanitarian, and educational organizations.² More than 50 professional health-care associations--including the American Medical Association, the American Public Health Association, and the American College of Physicians--went on record in Congress as opposed to the new restrictions.³ Calling the ruling "a reversal of long-standing constitutional principles protecting freedom of speech" and a "direct violation of the First and Fifth Amendment rights of doctors, health care providers and poor pregnant women," one constitutional-law expert even suggested impeachment of the five-justice majority who decided the case.⁴

Given the widespread perception of *Rust* as an unprecedented and grave threat to free expression, what was the press' response to the ruling? Numerous studies have shown scant, distorted, superficial and/or declining media coverage of Supreme Court rulings.⁵ One study found newspapers seriously remiss in educating the public on First-Amendment values.⁶ Still others have concluded that the press champions free-expression only when it directly involves media interests.⁷ Accusing the press of "tunnel vision" where the First Amendment is concerned, law professor Lucas A. Powe stated that this affliction

causes the major media sources to focus on their own cases to the virtual exclusion of others. Furthermore, possibly because 'press' is explicitly mentioned in the First Amendment, the press takes a hometown approach that causes it to systematically undervalue the civil liberties protected elsewhere, even elsewhere in the First.⁸

As Tocqueville observed more than a century ago, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."⁹ In

view of the enormous impact of Supreme Court decisions on every aspect of American life, the notion of how the mass media cover the Court's rulings is extremely important. To the extent that the press fails to address First Amendment decisions or only responds to them when they impact the media industry directly, it abdicates one of its key responsibilities-- that of warning the public of impending threats to its freedoms.

Among the media outlets available to the public, newspaper editorials represent an ideal venue for disseminating information about Supreme Court judgments. Because they present opinion, editorials provide newspaper editors with a rare opportunity to *interpret*, as well as discuss, the sometimes arcane decisions of the nation's highest court. Studies have shown that editorials are read by 85 percent of all newspaper readers, that they impact public opinion, and continue to play a vital role in national debate.¹⁰

This study focuses on newspaper editorial coverage of *Rust v. Sullivan*--a landmark free-expression case that did not directly affect media interests. After a background review, case analysis, and discussion of *Rust's* First-Amendment implications, the research examines editorial coverage of *Rust* in order to answer three questions:

- (1) Did editorials express support, opposition, or neutrality toward *Rust v. Sullivan*?
- (2) In editorials that supported *Rust*, what reasoning was presented? Did the editors address the First-Amendment issues *Rust* raises, and if so, how?
- (3) In editorials that opposed *Rust*, what arguments were advanced? To what extent did the editors react to the ruling as a First-Amendment issue?

Background: Unconstitutional Conditions

Until roughly a decade ago, the Supreme Court ruled with some consistency against the relinquishment of constitutional rights in exchange for federal funding.¹¹ The Court articulated this "unconstitutional conditions" doctrine most clearly in *Perry v. Sinderman*:

For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or association, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'¹²

Beginning with two cases handed down in 1977 and 1980, however, the Court began to veer sharply away from the "coercion analysis" doctrine.¹³ Instead of its traditionally narrow view of allocative schemes that attempt to place constitutional burdens on recipients, the Court began to decide subsidy cases, even those involving fundamental rights, from a "deference" perspective--the view that federal agencies should be given broad latitude in administering statutes under their control.¹⁴ Under the deference paradigm, the Court limits its scrutiny of subsidy cases "to those settings in which government displays the illegitimate purpose of 'aim[ing] at the suppression of dangerous ideas.'"¹⁵ Not coincidentally, both of the cases signaling the Court's shift to deference involved abortion rights.

In the first case, *Maher v. Roe*,¹⁶ the Court upheld a Connecticut regulation that allowed Medicaid funding for prenatal and childbirth services but not for abortions. In the second case, *Harris v. McRae*,¹⁷ the Court ruled in favor of the Hyde Amendment, which outlawed federal funding of even medically necessary abortions. While admitting in both cases that some inducement existed for women to give up abortion rights recognized in *Roe v. Wade*,¹⁸ the Court found no attempt on the part of the government to penalize or coerce a Medicaid recipient into bearing a child, but rather a "rational relationship between...the government's interest in protecting the potential life of the fetus."¹⁹

Since *Maher* and *Harris*, the deference rationale has gained increased stature in the Rehnquist Court, which granted broad authority to federal and state agencies in a spate of

1990-Term cases.²⁰ Of these, *Rust v. Sullivan*--which has been interpreted by some as giving the government unprecedented and unfettered power to "buy up" First-Amendment rights with federal funds--created the most heated opposition.

Analysis of *Rust v. Sullivan*

Rust grew out of an altered interpretation in 1988 of Title X of the Public Health Service Act of 1970.²¹ Title X, adopted by Congress in 1971, provides federal funds for family-planning services to some five million low-income women²² in roughly 4,000 clinics nationwide.²³ About one-third of the clinics' clients are teenagers with limited access to medical information.²⁴ During the nearly 18 years of Title X funding--a period spanning the Nixon, Ford, and Carter administrations and most of Reagan's two terms--the statute was interpreted in roughly the same way: Although funds could never be used to subsidize or to perform abortions, Title X monies were initially allowed--and for a period were even required--to provide "non-directive" abortion counseling or referral to pregnant patients.²⁵

This interpretation was given a different twist on February 2, 1988, when, in the last months of Reagan's presidency, Secretary Louis Sullivan of Health and Human Services (HHS) promulgated new regulations that banned all discussion of the abortion option in Title X-funded clinics. Among other requirements,²⁶ the new regulations stated that if a pregnant client asked for abortion information, clinic employees were to respond that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion."²⁷ Clinic employees were then instructed to refer the pregnant patient to "providers that promote the welfare of mother and unborn child."²⁸ In addition to these restrictions, the regulations prohibited physicians and other health-care workers from even providing telephone Yellow Pages to clients requesting abortion information.

Before the new regulations could go into effect, Dr. Irving Rust, the head of a Planned Parenthood clinic in New York City, joined forces with a number of other family-planning clinics that receive Title X funds, the American Civil Liberties Union, and the state and city of New York and filed a lawsuit challenging the regulations' constitutionality. When the case came before the U.S. Supreme Court, most legal experts expected the Court to invalidate the new regulations on the grounds that Congress had "passed and refunded the Title X program six times under the old regulations" and had repeatedly voted down all attempts to restrict abortion counseling or referral.²⁹

Instead, Chief Justice William Rehnquist, writing for the majority, found Congress' original intent and language to be ambiguous. This opened the door for application of the *Chevron* test--which holds that when a Congressional statute is ambiguous or silent on a specific issue, the courts must defer to the administrative agency's interpretation of the statute.³⁰ In defense of Secretary Sullivan's break with previous interpretation of the statute, Rehnquist argued that "an agency must be given ample latitude to adapt to changing circumstances."³¹ Along with Justices Byron White, Anthony Kennedy, David Souter, and Antonin Scalia, he held that because the reinterpretation was "supported by a shift in [the public's] attitude against the 'elimination of unborn children by abortion,'" the Court "must defer to the Secretary's permissible construction of the statute."³²

To the charge that the regulations constitute viewpoint-based suppression of speech, Rehnquist responded that encouraging pregnant women to carry their babies to term while discouraging abortion did not represent a violation of free-expression:

The Government can, without violating the Constitution, selectively fund a program to encourage certain *activities* it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one *activity* to the exclusion of the other '[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.' [italics added] ³³

Another controversial aspect of *Rust* hinges on Rehnquist's suggestion that because the performance of abortions is prohibited in Title-X projects and is therefore "outside the scope" of these clinics, abortion *speech* also lies outside the clinic's scope and therefore may be conditioned by the government.³⁴ Again, note the Chief Justice's substitution of the word "activities" for "speech":

A doctor who wished to offer prenatal care to a project patient who became pregnant could properly be prohibited from doing so because such a service is outside the scope of the federally funded program. The regulations prohibiting abortion counseling and referral are of the same ilk....This is not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in *activities* outside of its scope [italics added].³⁵

In addressing the First-Amendment rights of clinic employees, the Court majority agreed that individuals working at Title-X projects must accept the limitations that come with employment. "Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral," Rehnquist wrote.³⁶ The Court, noting that the regulations restrict employee speech only "during the time that they actually work for the project," found no abridgment of free-speech rights.³⁷

The Court also dismissed the idea that the new regulations "significantly impinge upon the doctor-patient relationship":

Nothing in them requires a doctor to represent as his own any opinion that he does not in fact hold. Nor is the doctor-patient relationship established by the Title X program sufficiently all-encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice. The program does not provide post-conception medical care, and therefore a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate decision for her.³⁸

Rehnquist added that where physicians' speech is concerned, the general rule is that "the Government may choose not to subsidize [it]."³⁹

The final constitutional hurdle that the Court faced in *Rust* was the petitioners' contention "that the regulations violate a woman's Fifth Amendment right to choose to terminate her pregnancy."⁴⁰ Rehnquist rejected this argument, concluding that, "The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected."⁴¹

Implications of *Rust* on First Amendment Freedoms and on Federally Subsidized Organizations and Institutions

Justice Harry Blackmun's stinging dissent in *Rust*, supported at least in part by Justices Thurgood Marshall, Sandra Day O'Connor, and John Paul Stevens,⁴² provides an excellent overview of the ruling's First-Amendment implications. "Until today," Blackmun pronounced, "the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds."⁴³ Citing *Speiser* and a number of other cases, he added:

Whatever may be the Government's power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech.⁴⁴

Scoffing at the majority's conclusion that "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another,"⁴⁵ he maintained that the regulations clearly represent viewpoint-based restriction of speech. "While suppressing speech favorable to abortion with one hand, the Secretary compels anti-abortion speech with the other," he wrote.⁴⁶ For example, the regulations *require* Title X clinics to promote childbirth and adoption, while *prohibiting* abortion referral.⁴⁷ A gag targeting only abortion-related speech offers evidence, he wrote, that, "These are clearly restrictions aimed at the suppression of 'dangerous ideas.'"⁴⁸

Blackmun expressed particular concern about the effect of *Rust* on the future speech rights of public employees:

Under the majority's reasoning, the First Amendment could be read to tolerate *any* governmental restriction upon an employee's speech so long as that restriction is limited to the funded workplace. This is a dangerous proposition, and one the Court has rightly rejected in the past.⁴⁹

Citing *Abood*⁵⁰ and *Raakin*,⁵¹ he argued that the Court has long considered speech restrictions in the workplace equally as offensive as speech restrictions on the street. "At the least," he wrote, "such conditions require courts to balance the speaker's interest in the message against those of government in preventing its dissemination."⁵² Applying this test to the new Title X regulations, he found that the government's interest "falls far short of that necessary to justify the suppression of truthful information and professional medical opinion regarding constitutionally protected conduct."⁵³

He launched his most vigorous attack against the majority's contention that the new regulations do not interfere with the doctor-patient relationship: "In its haste further to restrict the right of every woman to control her reproductive freedom and bodily integrity," he wrote:

[T]he majority disregard established principles of law and contorts this Court's decided cases to arrive at its preordained result. The majority professes to leave undisturbed the free speech protections upon which our society has come to rely, but one must wonder what force the First Amendment retains if it is read to countenance the deliberate manipulation by the Government of the dialogue between a woman and her physician.⁵⁴

If, as Blackmun charges, the majority in *Rust* turned its back on its Constitutional mandate to protect the speech rights of government employees and failed to safeguard the doctor-patient relationship from federal intrusion, the decision may indeed represent a dangerous precedent. But the implications of *Rust* do not stop at family planning clinics.

The federal government, granted increasing latitude over the years "to manipulate economic and social arrangements,"⁵⁵ has assumed the role in American society of "subsidizer, landlord, employer and patron of the arts."⁵⁶ In the shadow of *Rust*, the spectre of widespread governmental control of expression through funding looms large. With the Supreme Court's blessings, the government could conceivably refuse funding for politically incorrect art, dance, and music sponsored by the National Endowment for the Arts.⁵⁷ Or it could deny funds to public broadcasting stations, schools, and museums that dared to promote other than "traditional family values."⁵⁸ Under *Rust*, the government could decide to "dictate what advice a public defense lawyer may give a client."⁵⁹ And *Rust* could even require "public libraries that receive federal funds to remove from their shelves all books discussing an abortion option."⁶⁰

First-Amendment scholar, Stephen F. Rohde, voiced alarm at the door *Rust* leaves open for governmental abuse. "Given the sweep of *Rust*'s language," he wrote,

the Bill of Rights as we have known it could disappear. So long as the Rehnquist majority can find government funds somehow implicated in a program or activity, *Rust* would permit the government not only to prohibit the free expression of ideas at variance with the orthodox view promulgated by the government, but *Rust* goes much further and allows the government to literally dictate and compel that certain scripted statements be made, regardless of whether the speaker agrees with them or not.⁶¹

Government suppression of speech represents a menace that threatens the personal autonomy and liberty of all Americans. But more than freedom of speech is at stake in the aftermath of *Rust*. Open discussion and exchange of ideas form the foundation of American democracy. A Supreme Court that sanctions "intrusive, ideologically based regulation of speech" invites the collapse of the entire spectrum of freedoms guaranteed in the Bill of Rights.⁶² As Janet Benshoof, director of the ACLU's Reproductive Freedom Project, has stated, "[F]reedom of thought and speech 'is the matrix, the indispensable condition, of nearly every other form of freedom.'"⁶³

Method

The purpose of this research was to determine how newspaper editorials reacted to the Supreme Court's precedent-setting ruling in *Rust v. Sullivan*. To accomplish this goal, 35 newspaper editorials--26 from *Editorials on File*,⁶⁴ two from the microfilm library at the University of Tennessee, and seven from the Dialog data-base service--were obtained and coded.⁶⁵ To measure intercoder reliability, a second person read half of the editorials, coding for 11 specific items. Using Holsti's formula, intercoder reliability was 84.4 percent.⁶⁶ Syndicated columns and letters to the editor were not included in the research.

Each of the 35 editorials was coded as "supportive of," "opposed to," or "neutral toward" *Rust*, and a content analysis was conducted to determine the reasoning editors used to defend their positions. An editorial was deemed "neutral" if it presented either only the simple facts of the case or a balanced view of both its negative and positive ramifications.

Because this research is particularly interested in whether newspaper editors focused on the First Amendment implications of *Rust v. Sullivan*, editorials opposed to *Rust* were coded according to whether they stated that the ruling: (1) violates the First Amendment rights of public employees or clinic patients; (2) sanctions government intrusion into the doctor-patient relationship; (3) negatively impacts women's (Fifth Amendment) abortion rights; and/or (4) threatens the independence of all government-funded arts, science, education, and research institutions and organizations. An "other arguments" category was also included. Editorials that supported *Rust* were not coded with specific arguments in mind; instead *all* reasoning used by editors was recorded. In addition, these editorials were coded according to two additional categories: (1) Did the supportive editorial frame *Rust* simply as an abortion decision? and (2) Did the editor mention the First Amendment, and if so, in what context?

Results

Of the 35 newspaper editorials in the sample, 28 opposed *Rust v. Sullivan*. This means that 80 percent of the editors criticized the high court's decision. Six of the 35 newspapers--about 17 percent--came out in favor of *Rust*, and only one editorial presented the case in a neutral light. Except for this neutral editorial--which described *Rust* as "an uneasy compromise between a woman's right to obtain abortion counseling...and [the right of the public] not to be required to have their taxes promote a service they find repugnant," all of the editors in the sample took strong stands either for or against *Rust*.

TABLE I
Reasons Cited by Editorials for Support or Opposition
to *Rust v. Sullivan*

Arguments	No. of Pro- <i>Rust</i> Editorials Citing	% of Total	No. of Anti- <i>Rust</i> Editorials Cited	% of Total
First Amendment	4	11.4	16	45.7
Abortion Rights	6	17.1	19	54.3
Doctor/Patient Relationship	1	2.9	22	62.9
Independence of Govt.- Funded Institutions	6	17.1	0	0

Editorials Opposing Rust. Twenty-eight out of a total of 35 editorials were coded as opposing *Rust*. A primary focus of this study was to determine how often editors framed the Court's decision in terms of its First Amendment implications. Of the 28 editorials in this classification, only 16--about 57 percent--attacked *Rust v. Sullivan* as a violation of the First Amendment rights of public employees or clinic patients. This represents only about 46 percent of the total number of newspaper editorials in the sample (see Table I, above).

Far more (almost 80 percent) of the editorials that opposed the ruling criticized it for sanctioning government interference in the doctor-patient relationship. Close to three-quarters of the editors who spoke out against *Rust* attacked it as discriminatory against poor women. The decision, many of them stated, sets up a "two-tiered" approach to women's reproductive health--one system for women who can afford private doctors and another for uninsured, poor women who depend on federally funded clinics for medical advice. Nineteen of the 28 editorials (67.9 percent) opposing *Rust* argued that the decision inhibits a woman's legal right to an abortion. Six editorials in this category maintained that *Rust* represents further erosion of *Roe v. Wade*. And one editor, writing for *The Atlanta Journal-Constitution*, concluded that one effect of the ruling will be an increase in teenage mothers, low-weight births, and single-parent households.

One of the most disturbing findings in the study involved the impact of *Rust* on all arts, science, education, and research institutions and organizations that receive federal funding. Only three newspaper editorials--fewer than 9 percent of the total--objected to the Court's acceptance of governmental suppression of speech in exchange for funding. The three newspapers that published editorials warning the public of *Rust's* wider implications were *The Courier-Journal* in Louisville, Kentucky, *The Lincoln Star*, in Lincoln, Nebraska, and *The Sacramento Bee*, in Sacramento, California.

Editorials Supporting Rust. Once editorials were coded as "supportive of" the decision, all reasoning used by editors was recorded and compiled. A total of six different arguments were advanced by the six newspapers that supported *Rust*--*The* (Phoenix) *Arizona Republic*, *Richmond Times*, *Las Vegas Review-Journal*, *The Washington* (D.C.) *Times*, (Salt Lake City) *Deseret News*, and *Chicago Tribune*. The two arguments most often cited were: (1) the government has the right to define the limits of the programs it funds; and (2) taxpayers should not have to foot the bill for abortion counseling and referral. Two-thirds of the editorials that supported *Rust* relied on these two arguments.

Two editorials--those published by *The Arizona Republic* and *Deseret News*--argued that pregnant patients can easily obtain abortion information outside of Title X clinics. One editorial (*Deseret News*) contended that poor women who are deterred by the regulations from seeking abortions have the option of putting their babies up for adoption. The same editorial also reasoned that if *Rust* results in fewer abortions, "so much the better." And finally, one editorial supporting the decision (*Chicago Tribune*) did so on the grounds that it represents a shift of power from the Supreme Court (which made abortion a constitutionally protected right in *Roe v. Wade*) back to the political branches of government and the American people, "in whose hands it rightfully belongs."

An analysis was also made of how editorials supporting *Rust* conceptualized the ruling. Did editors present it primarily as an abortion decision? Additionally, did they address the First-Amendment issues *Rust* raises, and if so, how? Three editorials (*Las Vegas Review -Journal*, *Deseret News*, and *The Washington Times*) out of the six expressing approval of *Rust* framed the decision entirely in terms of abortion. Two editorials (*Richmond Times* and *The Arizona Republic*) saw the ruling as both an abortion issue and as a decision affecting taxpayer dollars. Finally, one editorial (*Chicago Tribune*) placed almost total emphasis on *Rust* as a government-funding issue.

Of the six editorials in this category, four (*The Washington Times*, *The Arizona Republic*, *Richmond Times-Dispatch*, and the *Las Vegas Review -Journal*) mentioned either suppression of speech or the First Amendment, but only in order to refute the notion that *Rust* violates freedom of speech. The remaining two editorials--*Chicago Tribune* and the *Deseret News*) ignored the ruling's First Amendment implications altogether.

Editorials Neutral Toward Rust. As mentioned earlier, only one newspaper (*The Phoenix Gazette*) presented a neutral editorial on the decision. This editorial, apparently designed to steer clear of controversy, summarized the ruling and provided alternating positive and negative aspects of it. On the one hand, the editor wrote, "[This newspaper] is

not comfortable with regulatory intrusion into the relationship between health care providers and patients.... However, the decision is consistent with the legislative intent of Title X" and consistent with past Court rulings.

Conclusions

If the results of this study are any indication, newspaper editors remain all too reluctant to inform their readers on, much less wage battle against, First Amendment violations occurring outside media parameters. The fact that 80 percent of the editors criticized the Supreme Court's decision is encouraging--particularly given the conservative predisposition of a number of newspapers examined in the study (e.g. *The Washington Times*, the *Deseret News*, and *The Arizona Republic*).

Yet fewer than half of the editors in the study reacted to *Rust v. Sullivan*--a ruling that allows unprecedented suppression of speech in exchange for government funding--as a free-speech issue. More editorials--about 63 percent of the total--attacked the decision's impact on the doctor-patient relationship. But in view of the esteem that this relationship has long held in the eyes of the law, and considering that the governmental intrusion into this relationship involved suppression of speech, this evidence of news-media concern may be interpreted as weak.

The most alarming aspect of editorial response to *Rust*, however, involved the failure of newspaper editors to educate and warn readers of the ruling's potentially chilling effect on all government grantees. *Rust* clearly allows the government to attach "ideological strings" to federal funding.⁶⁷ This being so, libraries, arts and humanities foundations, science research institutes, and a myriad of other government grantees face the prospect of either losing free-speech rights or losing their primary source of income. Although the Clinton administration canceled the abortion regulations in question and appears

uninterested in abridging the free speech rights of government-funded organizations and their employees, the Supreme Court's ruling in *Rust* has provided the means for *any* administration to do so with impunity.

In general, most editors--even those who opposed the ruling--simply failed to look beyond its effect on poor women's health or beyond the abortion issue in general. Although these issues hold considerable weight in American society, freedom from government control of speech lies at the heart of all other privileges made possible in a democracy. The press is better equipped to advocate First Amendment values and to warn Americans of potential threats to free speech than any other institution in society. To the extent that it abdicates its responsibility in this area, it imperils the Bill of Rights and subverts the vitality of our entire democratic system.

Notes

¹ 111 S.Ct. 1759 (1991).

² See, Susanne Skubik, "Global 'Gag Rule' Challenged," *Ms. Magazine*, 2: 16 (Sept.-Oct. 1991); Anna Quindlen, "*Rust v. Sullivan*," *Columbia Journalism Review*, 30: 52 (Nov.-Dec. 1991); James F. Fitzpatrick, "The Spread of *Rust*," *Columbia Journalism Review*, 30: 53 (Nov.-Dec. 1991); Nat Hentoff, "Abortion Gag Rule," *The Progressive*, 55: 16-17 (Feb. 1991); Gary A. Winters, "Unconstitutional Conditions as 'Nonsubsidies': When Is Deference Inappropriate?" *Georgetown Law Review*, 55: 132 (Oct. 1991); Philip Elmer-Dewitt, "The Doctors Take on Bush: Once Loyal, the Medical Establishment is Fuming Over Issues Ranging from the Abortion Gag Rule to Fetal Research," *Time*, 138: 52 (Aug 5, 1991); Janice Somerville, "Gag Rule' Hit as Intrusion into Practice," *American Medical News* 111: 3 (July 1, 1991); Walter Dellinger, "Gag Me With a Rule," *The New Republic*, 205: 14 (Jan. 6-13, 1992); Stuart Taylor Jr., "Power to the People. What People?" *Legal Times* 14: 17 (July 22, 1991).

³ Scott E. Johnson, "The Supreme Court Upholds the Title X Abortion-Counseling Gag Rule," *West Virginia Law Review*, 94: 229 (Fall 1991).

⁴ Stephen F. Rohde, "*Rust v. Sullivan*: Subverting the Constitution and Abusing Judicial Power?" *Beverly Hills Bar Journal*, 25: 155-169 (Summer 1991).

⁵ Dorothy A. Bowles and Rebekah V. Bromley, "News Magazine Coverage of the Supreme Court During the Reagan Administrations," *Journalism Quarterly*, 69:948-970 (Winter 1992).

⁶ Dorothy Bowles, "Missed Opportunity: Educating Newspaper Readers About First Amendment Values," *Newspaper Research Journal*, 10: 49 (Winter 1989); see also notes 6, 7, and 8 of this article.

⁷ *Ibid* at 50, note 6 and at 51, note 14.

⁸ Lucas A. Powe, Jr., *The Fourth Estate and the Constitution: Freedom of the Press in America* (Berkeley: University of California Press, 1991), p. 259.

⁹ Alexis de Tocqueville, *Democracy in America* (New York: New American Library, 1956), pp. 72-75.

¹⁰ See, among others, Ernest C. Hynds, "Editors Expect Editorial Pages to Remain Vital in the Year 2000," *Journalism Quarterly*, 66: 441 (Summer 1989); Kenneth Rystrom, "The Impact of Newspaper Endorsements," *Newspaper Research Journal*, 7: 19-28 (Winter 1986); Ernest C. Hynds, "Editorials, Opinion Pages Still Have Vital Roles at Most Newspapers," *Journalism Quarterly*, 61: 634-9 (Autumn 1984); Mark Fitzgerald, "Editorials Still Have Impact," *Editor & Publisher*, April 19, 1986, pp. 21, 98, 100; Robert E. Hurd and Michael W. Singletary, "Newspaper Endorsement Influence on the 1980 Presidential Election Vote," *Journalism Quarterly*, 61: 332-8 (1984).

¹¹ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidated a law forcing students to recite the pledge of allegiance); *Speiser v. Randall*, 357 U.S. 513, 518-519, 529 (1958) (invalidated requirement that veterans take a loyalty oath in exchange for tax exemption); *Pickering v. Board of Education*, 88 S.Ct. 1731 (1968) (invalidated firing of a public-school teacher for criticizing school administrators); *Perry v. Sindermann*, 92 S.Ct. 2697 (1972) (invalidated government's denial of employment based on relinquishment of free-speech right); *Abood v. Detroit Board of Education*, 97 S.Ct. 1782 (1977) (invalidated state-controlled speech as a condition of government employment).

The Supreme Court also prohibited the conditioning of federal funds on the relinquishment of First Amendment rights in the following 1980's decisions: (1) *Connick v. Myers*, 461 U.S. 138 (1983) (invalidated the mandatory transfer of a public employee who questioned department policies); (2) *FCC v. League of Women Voters*, 104 S.Ct. 3106 (1984), (invalidated withholding of federal funds from public television and radio stations that used private funds to editorialize); and (3) *Rankin v. McPherson*, 107 S.Ct. 2891 (1987) (invalidated dismissal of a government employee for political speech during work hours).

Two more recent cases that struck a blow against government funding in exchange for Constitutional rights are: (1) *Rutan v. Republican Party*, 110 S.Ct. 2729 (1990) (invalidated patronage-based hiring practices on grounds that they burden speech); and (2) *Student Press Law Center v. Alexander*, 778 F.Supp. 1227 (1991) (a U.S. district judge enjoined the Education Department from withdrawing or threatening to withdraw federal support from colleges that publish student names obtained from campus-police files).

¹² *Perry v. Sindermann*, 408 U.S., at 593, 597 (1973) quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1957).

¹³ *Winters, op. cit.*, p. 132.

¹⁴ Stanley Ingber, "Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts," *Texas Law Review*, 69: 4 (Nov. 1990).

¹⁵ *Winters, op. cit.*, p. 151 (quoting from *Regan v. Taxation With Representation*, 461 U.S. 540, 548, [1983]).

¹⁶ 432 U.S. 464 (1977).

¹⁷ 448 U.S. 297 (1980).

¹⁸ 410 U.S. 113 (1973).

¹⁹ Susan Gluck Mezey, *In Pursuit of Equality: Women, Public Policy, and the Federal Courts* (New York: St. Martin's Press, 1992), p. 249.

²⁰ See, e.g. *Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Cos.*, 111 S. Ct. 615 (1991); *American Hospital Association v. NLRB*, 111 S. Ct. 1539 (1991); *Martin v. Occupational Safety and Health Regulatory Commission*, 111 S. Ct. 1171 (1991); *Touby v. United States*, 111 S. Ct. 1752 (1991); *Board of Education v. Dowell*, 111 S. Ct. 630 (1991); *Leathers v. Medlock*, 111 S. Ct. 1438 (1991).

²¹42 C.F.R. §59 (1972).

²²Scott E. Johnson, *op. cit.*, p. 225. Nearly 90 percent of the women that Title X clinics serve are 150 percent below the poverty line. "Most of these targeted women also lack the education to read beyond the fifth grade level."

²³Stephen F. Rohde, *op. cit.*, p. 166, (quoting) 53 Fed. Reg. 2922, 2926-27 (1988). Title X projects must raise at least 10 percent of their total revenues from sources other than the federal government: Medicaid, client sliding-scale fees, and private donations. About half of the funds Title X clinics receive come from the government. In addition to "general reproductive health care," Title X clinics conduct "physical examinations, screening for breast cancer [and] treatment for gynecological problems."

²⁴*Ibid.*

²⁵*Ibid* at 157.

²⁶42 C.F.R. §59.9. The revised regulations also require Title X clinics to remain "physically and financially separate" from prohibited activities. In addition, the regulations prohibit Title X participation in any activities that "encourage, promote or advocate abortion as a method of family planning" (42 C.F.R. §59.10). These activities include: (1) lobbying for abortion-rights laws; (2) featuring pro-choice speakers; (3) paying dues to pro-abortion organizations; or (4) taking legal action to increase abortion availability.

²⁷42 C.F.R. §59.8(b)(5).

²⁸42 C.F.R. §59.8(a).

²⁹Scott E. Johnson, *op. cit.*, pp. 219, 231. After the Supreme Court delivered its opinion in *Rust*, the U.S. Congress immediately took action to overturn the ruling by passing a bill "that would codify the pre-1988 regulations' interpretation of Title X." President Bush vetoed the bill on November 19, 1991, and the House failed to obtain the two-thirds majority necessary to override the veto.

³⁰The *Chevron* test, developed in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), was created to give the Environmental Protection Agency--which oversees complex scientific and economic regulations--authority to interpret the highly technical Clean Air Act. Legal scholars have questioned its use in *Rust*--which involves a non-technical statute that had been interpreted in roughly the same way for almost two decades. (Donald Ayer, "The Rehnquist Court Unbound," *Legal Times*, July 22, 1991, p. S36; see also Walter Dellinger, "Gag Me with a Rule," p. 15.)

³¹111 S.Ct. 1762.

³²*Ibid.*

³³111 S.Ct. 1773. Note Rehnquist's use of the word "activity" rather than "speech." By framing the issue in this way, some critics suggest, the Court attempted to side-step "the pivotal constitutional distinction between 'speech' and 'conduct.'" (Stephen F. Rohde, *op. cit.*, p. 159; see also Cooper, Phillip J., "Rusty Pipes: The *Rust* Decision and the Supreme Court's

Free Flow Theory of the First Amendment," *Notre Dame Journal of Law, Ethics & Public Policy*, 6: 383-385; and Dellinger, Walter, "What Doctors Can't Tell Patients," *Sacramento Bee*, May 29, 1991, p. B7.) The Court's reliance on *Maher, McRae, and Webster*--all non-speech cases--to support its reasoning, has also attracted controversy. (Stephen F. Rohde, *op. cit.*, p. 159.)

³⁴111 S.Ct. 1772.

³⁵*Ibid.*

³⁶*Ibid.* at 1775.

³⁷*Ibid.* As several critics of *Rust* have pointed out, Rehnquist made no attempt to support or explain this departure from the Court's well-established record of protecting public-employee speech. [See Janet Benshoof, "The Chastity Act: Government Manipulation of Abortion Information and the First Amendment," *Harvard Law Review*, 101: 1916-1937 (June, 1988); Stephen F. Rohde, *op. cit.*, p. 163; Gary A. Winters, *op. cit.*, pp. 131-161; Scott E. Johnson, *op. cit.*, p. 233; and Justice Blackmun's dissent (111 S.Ct. 1778), in which he accused the majority of side-stepping its "established canon of construction."

³⁸*Ibid.* at 1776.

³⁹*Ibid.* It should be noted here that on March 31, 1992, the Bush administration announced that it had created a special exemption effective July 1, 1992 in the new Title X regulations for physicians. As of that date, doctors were allowed to discuss abortions "even in situations in which the life of the mother is not at risk" and make abortion referrals to other facilities, as long as the referrals were based on medical rather than "social concerns." ("Clinics' 'Gag' on Abortion is Loosened," *The Knoxville News-Sentinel*, March 21, 1992, p. A1.)

These details became moot when, on January 22, 1993--the 10th anniversary of *Roe v. Wade*--President Clinton nullified the "gag-rule" regulations by executive order. Two months later, on March 25, 1993, the House of Representatives passed (and sent to the Senate) a bill designed to dispose of the "gag rule" permanently.

⁴⁰111 S.Ct. 1776

⁴¹*Ibid.*

⁴²Justice Marshall joined in all of Justice Blackmun's dissent. Justice Stevens, who joined in Parts II and III of Blackmun's opinion, argued in a separate dissent that a close examination of Title X's language and history reveals "the importance of educating the public about family planning services" and does not prohibit speech about abortion or other legal options available to women (111 S.Ct. 1786-1788). Justice O'Connor, who joined in Part I of Blackmun's dissent, objected to the "serious First Amendment concerns" raised by the Secretary's interpretation of the regulations. "This Court acts at the limits of its power when it invalidates a law on constitutional grounds....In this case we need only tell the Secretary that his regulations are not a reasonable interpretation of the statute...." (111 S.Ct. 1789).

⁴³111 S.Ct. 1780.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* at 1763.

⁴⁶ *Ibid.* at 1781.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* (quoting *Speiser*, 78 S.Ct. 1338).

⁴⁹ *Ibid.* at 1783.

⁵⁰97 S.Ct. 1782 (1977).

⁵¹107 S.Ct. 2891 (1987).

⁵²111 S.Ct. 1783.

⁵³ *Ibid.*

⁵⁴ *Ibid.* at 1786.

⁵⁵Gary A. Winters, *op. cit.*, p. 136.

⁵⁶Ruth Marcus, "A Larger Issue in Abortion Decision," *The Washington Post*, May 26, 1991, pC1 (quoting Walter Dellinger).

⁵⁷In fact, the government recently attempted to do just this. See *Finley v. National Endowment for the Arts*, 795 F.Supp. 1457 (June 9, 1992).

⁵⁸James F. Fitzpatrick, *op. cit.*, p. 53.

⁵⁹Scott E. Johnson, *op. cit.*, p. 234.

⁶⁰James F. Fitzpatrick, *op. cit.*, p. 53.

⁶¹Stephen F. Rohde, *op. cit.*, p. 169.

⁶²111 S.Ct. 1782.

⁶³Janet Benshoof, *op. cit.*, p. 1937 (quoting *Palco v. Connecticut*, 302 U.S. 319, 327 (1937)).

⁶⁴ *Editorials on File*, available through Facts on File, New York, NY, (800) 322-8755, publishes editorials from 150 newspapers throughout North America. In a telephone interview with Oliver Trager, editor of *Editorials on File*, he stated that he attempts to balance the editorials he selects each month by region and political orientation.

⁶⁵ The 26 editorials included in the sample from *Editorials on File* were: *Tulsa* (OK) *World*, *Las Vegas Review-Journal*, *The* (Newark, NJ) *Star-Ledger*, *The Honolulu Advertiser*, *The* (Phoenix) *Arizona Republic*, *The* (Spokane, WA) *Spokesman-Review*, *Minneapolis Star and Tribune*, *Detroit Free Press*, *The Seattle Times*, *The Washington* (DC) *Times*, *The* (Louisville, KY) *Courier-Journal*, *Salt Lake City Desert News*, *The Hartford* (CT) *Courant*, *Little Rock Arkansas Gazette*, *The* (Portland) *Oregonian*, *The* (Hackensack, NJ) *Record*, *Richmond Times-Dispatch*, *The* (Raleigh) *News and Observer*, *The Phoenix Gazette*, *The Washington Post*, *The* (Nashville) *Tennessean*, *Los Angeles Times*, *The Boston Globe*, *The New York Times*, *The Lincoln* (NE) *Star*, and *The Denver Post*. Two additional newspaper editorials obtained from microfilm were: *Chicago Tribune* and *Atlanta Constitution*. Finally, the following seven editorials were obtained from the Dialog data-base service: *San Jose Mercury News*, *Philadelphia Inquirer*, (Fort Lauderdale, FL) *Sun-Sentinel*, *Sacramento Bee*, *Charlotte Observer*, *Baltimore Sun*, and *San Francisco Chronicle*.

A number of newspapers available to the researcher did not publish editorials on *Rust v. Sullivan*. These included: (New Orleans) *Times-Picayune*, *USA Today*, *Memphis Commercial Appeal*, *St. Louis Post-Dispatch*, *Columbus Dispatch*, *Newsday*, *Houston Post*, *Rocky Mountain News*, *St. Paul Pioneer Press Dispatch*, *Miami Herald*, and the *Orlando Sentinel*.

⁶⁶ Reliability = $2M/N_1 + N_2$ where M = total items in agreement and N_1 and N_2 = total number coded by each coder.

⁶⁷ James F. Fitzpatrick, *op. cit.*, p. 53.



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**"Access to Discovery Records In Florida Criminal Trials:
Public Justice and Public Records"**

**A Research Paper Submitted for Presentation
Law Division, AEJMC
at the
AEJMC National Conference
Kansas City, MO**

by

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Introduction

On October 27, 1992, journalists lined up early at the Alachua County Courthouse in Gainesville, Fla., to await the release of more than 100 investigative files in the Gainesville student murder case of State v. Danny Rolling.¹ Using laptop computers to download hundreds of pages of law enforcement records, the reporters participated in the first stage of what Assistant State Attorney Don Royston described as "probably the nation's first computerized dissemination of pretrial discovery records in a criminal case."² The disclosure followed an unprecedented ruling by Florida Circuit Court Judge Stan Morris ordering the release of some 4,330 police reports, physical evidence and other information in the case against Rolling, a 38-year old Louisiana drifter already serving multiple life sentences for several unrelated charges.³

To ensure Rolling's right to a fair trial, the judge refused to release photographs of the victims, autopsy reports, reports containing statements made by or attributed to Rolling, and 10 reports from technical experts.⁴ All other records were opened by the ruling, which stated that the public has a presumptive right of access to records produced in criminal discovery. Morris later ordered the release of another 2,800 records in the case already reviewed by Morris, the state

¹ Mary Shedden, "Battle to open remaining files continues," The Gainesville Sun, October 28, 1992, 8A.

² Interview with Don Royston, Alachua County State Attorney's Office, Nov. 16, 1992, Gainesville, Fla.

³ Order of Disclosure, Case No. 91-3832 CF A, State v. Danny Harold Rolling, 6-14 (Fla. 8th Cir. 1992) (order on disclosure of pretrial discovery materials).

⁴ *Id.* at 7-12.

attorney's office and defense attorneys.⁵

The Rolling case presents but the most recent example of an oft-repeated legal battle in Florida. Every criminal trial is initiated by a discovery process, in which both parties seek to learn as much as they can about the evidence and witnesses available before the trial begins.⁶ During discovery in criminal cases, the state must provide the defendant with any materials relevant to the pending action.⁷ Consequently, criminal discovery proceedings are a rich source for news stories. Criminal discovery materials often include depositions, or transcripts of statements from the suspect and potential witnesses, police reports, crime scene photographs and videotapes, and physical evidence.⁸ Aware of the news value of such information, the news media frequently seek access to discovery records. Florida courts have found at least two legal origins for the right of access to discovery records: the Florida Public Records Law and the Florida Rules of Criminal Procedure. The two provisions work in tandem to provide the public's statutory right of access to pretrial discovery materials. The Florida Public Records Law is the only open records law in the nation that specifically opens discovery records.⁹ Because the Rules of Criminal Procedure mandate the release of any information "reasonably calculated to lead to the discovery of admissible evidence,"¹⁰ much of the pretrial materials generated in a

⁵ Mary Shedden, "More Rollings files set to be opened," The Gainesville Sun, October 29, 1992, 1B.

⁶ Roger S. Haydock, David F. Herr, & Jeffrey W. Stempel, Fundamentals of Pretrial Litigation 124 (2d ed. 1989).

⁷ Haydock, Herr & Stempel, 123.

⁸ Id.

⁹ Fla. Stat. § 119.011(3)(c)5 (1991).

¹⁰ Fla. R. Civ. P. 1.280(b)(1).

criminal investigation attain the status of public records through the discovery process.

This paper will discuss the development of the right of access to discovery records in Florida. Such an examination requires review of both the Florida Public Records Act and the Florida Rules of Criminal Procedure, which provide a framework of the arguments for and against access to discovery records. Finally, the paper will address the factors that the courts use to base their decisions on access to discovery records.

I. The Law Regarding Access to Discovery Records: The Public Records Law

For more than 25 years, Florida's government has earned recognition as one of the states most proactive in opening its processes to public examination. The Florida Public Records Law states that all government records, with particular exemptions, shall be open for public inspection.¹¹ "Records" are defined broadly to include documents or other material, including photographs, tapes or even sound recordings made in connection with the transaction of official business by any agency.¹² Public documents may be examined by any person desiring to do so, at any reasonable time.¹³ The list of exemptions to disclosure begins by declaring that all records which are presently provided by law to be confidential or which are prohibited from being inspected by the public are exempt from disclosure.¹⁴ Another subsection provides an exemption for criminal investigative information, which is defined as materials gathered for the

¹¹ Fla. Stat. § 119.01(1) (1991).

¹² Id. § 119.011(1).

¹³ Id. § 119.07(1)(a).

¹⁴ Id. § 119.07(3)(a).

prosecution of a criminal defendant.¹⁵ Pursuant to the statute, however, such information becomes accessible to the public when the information is given or required by law to be given to the person arrested. Another subsection states that the exemption for criminal investigative records shall not be construed to exempt records "made part of a court file and not specifically closed by order of court..."¹⁶ Finally, another provision states that the Public Records Act "is not intended to expand or limit the provisions of Rule 3.220, Florida Rules of Criminal Procedure, regarding the right and extent of discovery by the state and a defendant in a criminal prosecution."¹⁷ These sections combine to provide a general statutory right of public access to records given to a criminal defendant, unless the records are sealed by the trial court. An analysis of all 50 state open records laws finds no comparable statutory right of access to criminal discovery records.¹⁸

Florida's longstanding statutory right of access to government records and meetings recently became part of the state's constitution. In November 1992, Florida voters approved the creation of two sections of the State Constitution, granting public access to records of the executive, judicial and legislative branches of state government.¹⁹ Under the amendments, all

¹⁵ Id. § 119.011(3)(c)5.

¹⁶ Id. § 119.07(4).

¹⁷ Id. § 119.07(5).

¹⁸ The open records laws of all 50 states were reviewed through Lexis. None contained a similar provision for discovery records. Also see Judicial Records: A Guide to Access in State & Federal Courts, Vol. 13, No. 2, News Media & The Law 1A (Summer 1990).

¹⁹ The constitutional amendments created Section 24 of Article I and Section 20 of Article XII of the State Constitution. See Florida Congressional Supplement, Joint Resolution Nos. 1727, 863 & 2035 (1992).

three branches of government will have to obtain exemptions by legislative action that allows for public input and debate.²⁰ New exemptions to the access laws face increased scrutiny because the law requires consideration of all exemptions in single-subject bills that must state the public necessity justifying the amendment.²¹ The amendment essentially places the Florida access statutes under the rubric of state constitutional law, fortifying the public's right of access to records and meetings.

II. The Florida Rules of Criminal Procedure and Judicial Procedure in Access Cases

The authority of the judicial branch to control the release of discovery records in criminal trials is enumerated by the Florida Rules of Criminal Procedure.²² The criminal rules place discovery proceedings under the Florida Rules of Civil Procedure, with a few narrow exceptions.²³ Similar in content to the Federal Rules of Civil Procedure, the Florida Rules of Civil Procedure allow parties to obtain relevant information that is "reasonably calculated to lead to the discovery of admissible evidence."²⁴ The rules also allow the judge to "make any order, to protect a party or person from annoyance, embarrassment, oppression, or undue burden or

²⁰ Section 24, Article I, Florida Constitution.

²¹ *Id.* at Section 24(c).

²² Fla. R. Crim. P. 3.220 (1992).

²³ *Id.* § 3.220(d).

²⁴ Fla. R. Civ. P. 1.280(b)(1).

expense that justice requires."²⁵ Neither of the rules encompassing discovery in Florida authorizes or limits public access to depositions or access to discovery records. The rules state only that once the clerk of court receives the record, it is open for inspection unless a protective order has been entered sealing certain records.²⁶ A motion for a protective order is not always motivated solely to prevent prejudicial publicity. In a criminal trial, depositions are used only to impeach the testimony of witnesses or to introduce testimony when a witness is unable to appear at trial.²⁷ Because discovery records are not automatically entered as evidence, they may contain information later declared inadmissible by the court.

In a recent opinion, the Florida Supreme Court clarified the Florida Rules of Judicial Administration, a set of court rules designed to augment the Rules of Criminal Procedure, by providing greater detail for the rules on public access to the records of the judicial branch and its agencies.²⁸ While leaving the majority of the rules regarding access to judicial records intact, the court's decision is significant because it acknowledges, for the first time, that the judiciary is subject to the same standards of openness that govern similar records in other branches of government.²⁹ In addition, the court deleted a proposed exemption for "preliminary

²⁵ Fla. R. Civ. P. 1.280(c) (1992).

²⁶ "Unless otherwise noted by the court, (1) any deposition may be opened and examined by any person under the supervision of the clerk or (2) the clerk may unseal the deposition and file it with the other papers in the court file. *Fla. R. Civ. P. 1.400* (1992).

²⁷ Fla. R. Crim. P. § 1.330 (1992).

²⁸ In re: Amendments to the Florida Rules of Judicial Administration - Public Access to Judicial Records, Case Nos. 80,419, 80,432, Supreme Court of Florida, October 29, 1992; 17 Fla. Law Weekly S675.

²⁹ Report of the Florida Society of Newspaper Editors and First Amendment Foundation, "Public Access to Judicial Records and Florida Bar Records," November 9, 1992.

drafts, notes, or other written materials which reflect the tentative thought processes of court committees and judicial conferences..." and also opened advisory opinions, memoranda and complaints alleging misconduct against judges and other court officials.³⁰ Finally, the court stated that the rules adopted by the court are intended not to close any judicial records currently open, but to open many judicial records formerly closed.³¹ Thus, the Florida Rules of Criminal Procedure and the Florida Rules of Judicial Administration provide a strong presumption of public access to judicial records.

When conflicts arise between the judiciary and those seeking access to discovery records, the trial court judge must incorporate the rules of discovery and the provisions of the Florida Public Records Law pertaining to discovery records. As stated earlier, the discovery rules require the state to disclose to the defendant, upon request, any papers or objects which were obtained during the investigation of the defendant.³² The Florida Public Records Law states that once such information is given or required to be given to the defendant, the discovery records are opened to public inspection.³³ The conflict does not end at this point however, because under Florida discovery rules, any person is permitted to show cause for denial of disclosure.³⁴ In addition, the rules allow the court to restrict disclosure to protect a witness from "harassment,

³⁰ 17 Fla. Law Weekly S765 at S676.

³¹ Id. at S768.

³² Id. § 3.220.

³³ Fla. Stat. § 119.011 (3)(c).

³⁴ Fla. R. Crim. P. § 3.220(m).

unnecessary inconvenience or invasion of privacy."³⁵ The public's right of access to discovery materials must be balanced against the defendant's constitutional rights of a fair trial and due process.³⁶ The broad right of access illustrated by the release of discovery materials in the Rolling case is the product of the Florida court's interpretation of the open records law's unique statutory provision.

III. The Common Law Right of Access to Discovery Records In Florida

The statutory right of access to discovery records is but a more recent pronouncement of an old idea: "the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.'"³⁷ The common law right of access in Florida has been reinforced largely by legislative enactments in the last quarter-century. Before 1967, however, Florida courts used the general exemption to the Act, which states in pertinent part that "all public records which presently are deemed by law to be confidential... shall be exempt from the provisions of this section," to create public policy exemptions for judicial records.³⁸ Not until

³⁵ Id. § 3.220(1).

³⁶ *Florida Freedom Newspapers v. McCrary*, 520 So.2d 32, 36 (Fla. 1985).

³⁷ *Davis* at 173, *citing* Levine v. United States, 362 U.S. 610, 616 (1960).

³⁸ Id., *citing* Ch. 67-125, § 7, 1967 Fla. Laws 254 (current version at Fla. Stat. § 119.07(3)(a) (1991)). In Wisher v. News-Press Publishing Co., the Second District Court of Appeal created an exemption for the personnel files of a Lee County employee. Initially, the court recognized that employee records were not exempted by any particular provision. The court interpreted the Act as empowering the judicial branch to create exemptions when "deemed by law." After analyzing the potential harm in disclosing personnel files, the court concluded that it was in the public interest to deny access to personnel files, thus creating a judicial exemption to the Florida Public Records Act. The Florida Supreme Court later quashed the *Wisher* decision, but did not restrict

1979 in Wait v. Florida Power & Light Co.³⁹ did the Supreme Court restrict the judiciary's power to restrict access to discovery records by creating exemptions to the Public Records Law. The case arose out of litigation before the United States Nuclear Regulatory Commission between Florida Power & Light Company (FPL) and the City of New Smyrna Beach (New Smyrna). The case concerned the construction and maintenance of FPL's nuclear power plants.

During pretrial discovery, FPL sought to inspect records regarding the planning and maintenance of New Smyrna's new electrical operations.⁴⁰ New Smyrna denied the request, claiming that the records contained confidential material. FPL filed suit in the circuit court seeking the documents. The circuit court granted access to the documents; the First District Court of Appeal affirmed.⁴¹ New Smyrna appealed to the Florida Supreme Court, which held that FPL had the right to inspect the documents. The First District court had held that the general exemption to the Act prohibited "any common law privilege of confidentiality which includes attorney-client communications."⁴² In affirming the district court's findings, the Florida Supreme Court reviewed the history of the Public Records Act and its exemptions. The court noted that the Act originally exempted records "deemed by law" to be confidential, allowing the

the judiciary's power to create exemptions until *Wait v. Florida Power Co.*, 372 So.2d 420 (Fla. 1979).

³⁹ 372 So. 2d 420 (Fla. 1979), *quashing in part and approving in part* 353 So. 2d 1265 (Fla. 1st DCA 1978).

⁴⁰ 353 So. 2d at 1266-68.

⁴¹ *Id.* at 424.

⁴² *Id.* at 1267.

judiciary to create exemptions for discovery records.⁴³ In 1975, however, the legislature amended the statute to restrict the exemptions to only those "provided by law."⁴⁴ Given the change in the statute's wording, the court held that "[i]t seems obvious...that the very purpose of the statutory amendment was specifically to...preclude judicially created exceptions to the Act in question."⁴⁵ The court added that it would not "equate the acquisition of public documents under the Public Records Law with the rights of discovery afforded a litigant by judicially-created rules of procedure."⁴⁶ Thus, the Florida Supreme Court held that exemptions to the Public Records Act could only be made by statute. Judges could no longer create exemptions through discovery rules.

The Florida Supreme Court first recognized this restriction in Miami Herald Publishing Co. v. McIntosh.⁴⁷ McIntosh arose from a pretrial "gag order" on the press and all participants attending the securities fraud trial of three brokers and their respective firms. At the request of the defendants, the trial court judge entered an order prohibiting "any extrajudicial statement or interview relating to the trial of this cause."⁴⁸ Striking down the gag order, the Florida Supreme Court held that "the public and the press have a fundamental right of access to all judicial

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id. at 425.

⁴⁷ 340 So. 2d 904 (Fla. 1977).

⁴⁸ Id. at 906.

proceedings."⁴⁹ However, the Court qualified this right by ruling that the right of access is not absolute:

Since no criminal trials are exactly alike, each trial judge must balance the rights of free press and fair trial to assure that justice and fairness prevail in each trial. To attain true justice the written law must be seasoned with a proper amount of common sense.⁵⁰

Unfortunately, the court did not elaborate on its recipe for "common sense," leaving the formulation of a balancing formula to the lower courts. That standard developed through a series of district court decisions, including News-Press Publishing Co. v. State⁵¹ and Miami Herald Publishing Co. v. State,⁵² that relied on McIntosh to conclude that trial courts may not summarily deny media access to discovery records. In News-Press, the Second District Court of Appeal ruled in 1977 that because depositions constitutes a pretrial judicial proceeding, the public must be granted access to transcripts unless "compelling reasons" are shown.⁵³ News-Press arose from a court order sealing depositions in a first-degree murder case. The *News-Press* filed suit after the judge refused to lift the order even after the defendant pled guilty to a lesser charge. In remanding the judge's order for reconsideration, the district court outlined the compelling reasons that must be specifically set forth before judicial records may be sealed:

As applied to the instant case, a showing that the opening of the depositions might

⁴⁹ Id. at 908.

⁵⁰ Id. at 910.

⁵¹ 345 So. 2d 865 (Fla 2d DCA 1977).

⁵² 363 So. 2d 603 (Fla. 4th DCA 1978).

⁵³ 345 So. 2d 865, at 867.

endanger a person's life could well justify the order entered below. On the other hand, an understandable desire to protect the victim's family from exposure of the details of what was apparently a heinous crime would not warrant an order which would preclude public access to official court records in the form of these depositions. The press must be counted on to report such facts in a responsible manner.⁵⁴

In 1978, a balancing test for judicial closure orders was created in Miami Herald v. State, in which the Fourth District Court of Appeal held that a judicial proceeding could be closed only if the party seeking closure could prove that:

(1) closure is necessary to prevent a serious and imminent threat to the administration of justice, (2) that no less restrictive alternative measures are available, and (3) that closure will in fact achieve the Court's purpose.⁵⁵

Florida district courts of appeal used the three-part test promulgated in Miami Herald v. State to open a wide variety of judicial proceedings and records. The first mention of the test with regard to discovery proceedings appears in Sentinel Star Co. v. Booth,⁵⁶ in which the Second District Court of Appeals remanded a closure order sealing all defense discovery depositions in a murder trial. In Booth, the trial court judge sealed the depositions after a brief hearing with criminal counsel.⁵⁷ The reporters present at earlier hearings asked the judge when he would hold a hearing on the motion to seal depositions, but no specific notice was given before the motions were heard. The trial judge did not offer any member of the media an opportunity to be heard prior to ruling on the motion.

⁵⁴ Id. at 867.

⁵⁵ 363 So. 2d 603, at 606 (Fla. 4th DCA 1978).

⁵⁶ 372 So. 2d 100 (Fla. 2d DCA 1979).

⁵⁷ Id. at 101.

In remanding the trial court's order for "a more thorough inquiry," the court of appeals instructed the trial judge to apply the three-part test set forth in Miami Herald v. State.⁵⁸ Further, the court adopted the language of McIntosh, further raising the standard for closure: "...expression by the press must constitute 'an immediate, not merely likely, threat to the administration of justice. The danger must not be remote, or even probable, it must immediately imperil.'"⁵⁹ The court concluded that the trial court's brief inquiry did not demonstrate such a compelling reason for closure.

In quashing a court order closing discovery records in a first-degree murder trial in 1980, the Fifth District Court of Appeal not only adopted the three-pronged test from Miami Herald v. State, but found little difference between the chilling effect inherent in prior restraint and the chilling effect created by limitation to judicial records.⁶⁰ In Ocala Star Banner v. Sturgis, the court held that an order limiting public access to pretrial discovery proceedings and records failed to meet the three-part test.⁶¹ The court stated that although there may have been compelling reasons for sealing some of the records, the trial court failed to specifically set forth the reasons for closure in the order.⁶² The court rejected the trial judge's argument that setting forth the reasons for closure would divulge the information in question, ruling that if necessary, the judge conduct an in camera inspection to see if the reasons given by the defendant are sufficient.

⁵⁸ Id.

⁵⁹ Id., citing Miami Herald Publishing v. McIntosh, 340 So.2d 904, 908 (Fla. 1977).

⁶⁰ Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367 (Fla. 5th DCA 1980).

⁶¹ 388 So. 2d 1267, 1371 (Fla. 5th DCA 1980).

⁶² Id.

In 1979, the First District Court of Appeal in Tallahassee Democrat v. Willis established the filing of discovery records as the "trigger" for public and press access. In ruling that a trial judge erred in issuing an administrative order instructing court officers to seal depositions (statements given during the discovery process), even after they are filed with the clerk of court, the First District relied upon the Florida Rules of Judicial Administration.⁶³ The court of appeals held that under the Florida Rules, depositions and other discovery records are open for inspection by the public and the press when filed by the clerk of court.⁶⁴ After reviewing the applicable discovery rules, the court concluded that the protection of the defendant's right to a fair trial could still be accomplished under the discovery rules. Records still could be closed by order of the court, but on a case-by-case basis, rather than by blanket administrative orders. Absent a protective order, however, records attain the status of public records upon filing with the clerk of court.⁶⁵

In Willis, however, the court stopped short of opening the records in question. Clearly troubled by the competing interests of access and the administration of justice, the court certified the matter to the Supreme Court of Florida for review of the administrative order.⁶⁶ In its dicta,

⁶³ The court cited the Florida Rules of Court, 1979, Rule 1.310(f)(1), which provides as follows:

If transcribed, the officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope... and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk for filing. 370 So.2d 867, 868 (Fla. 1st DCA 1979).

⁶⁴ Id. at 867, *citing* Fla. R. Civ. P. 1.280(c) (1979).

⁶⁵ Id. at 870.

⁶⁶ Id. at 872.

the First District court stated that its opinion addressed only the narrow issue of blanket administrative orders, adding that "we find no basis for argument that First Amendment rights entitle petitioners to require the opening of court records properly sealed by the trial judge."⁶⁷ The court said that the appropriate forum for that issue would be the Florida Supreme Court.

Florida courts continued to adopt the three-part test from Miami Herald v. State to open a variety of discovery records.⁶⁸ Trial courts even opened records in the widely publicized trial of mass murderer Theodore Bundy⁶⁹ and in the trial of a Miami policeman resulting from the death of black motorcyclist Arthur McDuffie -- the subject of the infamous Homestead riots during the 1980 Super Bowl.⁷⁰ The lower courts uniformly applied the three-part test in disputes over access to judicial records, but the Florida Supreme Court had yet to render an opinion regarding the test's viability.

In its 1982 decision in Miami Herald v. Lewis⁷¹, the Florida Supreme Court affirmed the common law presumption of public access to pretrial suppression hearings. More importantly, the court held that the common-law right of access to pretrial hearings and records in Florida extends beyond the First Amendment parameters established by the United States Supreme Court. By modifying the common-law test for judicial closures, the Florida Supreme Court retained the

⁶⁷ Id. at 871.

⁶⁸ See Satz v. Blankenship, 407 So.2d 396 (Fla. 4th DCA 1981); State v. Sanchez, 7 Med.L.Reptr. 2338 (Fla. 11th Cir., Dade County, Case No. 79-21601, March 4, 1980); Palm Beach Newspapers v. Nourse, 413 So.2d 467 (Fla. 4th DCA 1982).

⁶⁹ Bundy v. State, 455 So.2d 330, stay granted 475 U.S. 1041, certiorari denied 476 U.S. 1109 (Fla 2d Cir., Leon County, Case No. 78-670, April 26, 1979).

⁷⁰ State v. Diggs, 5 Med.L.Reptr. 2596 (Fla. 11th Cir. Ct. 1980).

⁷¹ 426 So.2d 1 (Fla. 1982).

broad right of access to judicial proceedings and records, including discovery records. Lewis was typical of the cases troubling the lower courts in the light of Miami Herald v. State.⁷² Fourteen-year-old Brooks John Bellay was the key suspect in the murder investigation of four-year-old Angel Halstead. Halstead, who had mysteriously disappeared, became the subject of extensive coverage by local news media. Bellay was interviewed and quoted widely, partly because of his seemingly intimate knowledge of the crime and the location of the body. Bellay later gave confessed to the police, which the media promptly reported. As a result of this publicity, the court noted that "the public had been made aware, by the news media, that Bellay had confessed to the crime."⁷³ Faced with an avalanche of publicity, the trial court judge entered an order closing the suppression hearing regarding Bellay's statements and furthered ordered that all records of the suppression hearing be closed. The Fourth District Court of Appeal held that the judge properly closed the hearing, but concluded that the order closing the records did not meet the three-part test.⁷⁴

The Florida Supreme Court opened its opinion by recognizing the three dimensions of the issue: the authority of the court; the rights of the defendant; and the rights of the public and press.⁷⁵ The court acknowledged that each of three interests enjoys independent powers and freedoms, but concluded that all three collide where access to pretrial judicial proceedings are concerned. The court next turned to the United States Supreme Court in hopes that one of two

⁷² 426 So.2d 1 (Fla. 1982).

⁷³ Id. at 2.

⁷⁴ Id.

⁷⁵ Id. at 3.

recent decisions, Gannett Co. v. DePasquale⁷⁶ or Richmond Newspapers v. Virginia⁷⁷ would offer guidance. Richmond Newspapers was not analyzed because it concerned the closure of an entire trial. A lengthy discussion of Gannett led the Florida Supreme Court to conclude that the United States Supreme Court had yet to issue any definitive statement regarding the application of the First and Fourteenth amendments to pretrial proceedings.⁷⁸ Thus, the Florida court found that the United States Supreme Court left "considerable leeway in determining how we will resolve this problem in the state of Florida."⁷⁹ Finding that Gannett did not require the abandonment of the three-part test in Miami Herald v. State, the court decided to modify the common-law test to compensate for each of the three conflicting interests in judicial access disputes. The modified rule stated that closure would be allowed where:

1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;
2. No alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and
3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.⁸⁰

The Lewis test added two new wrinkles to the Miami Herald v. State test. First, the court eliminated change of venue as an alternative to closure in the second arm of the test. The court justified this change by ruling that because there is no first amendment right of access to pretrial hearings, the courts should not subjugate the defendant's constitutional right to be tried in the

⁷⁶ 443 U.S. 368 (1979).

⁷⁷ 448 U.S. 555 (1980).

⁷⁸ 426 So.2d 1,4.

⁷⁹ Id. at 5.

⁸⁰ Id.

county where the crime was committed.⁸¹ Second, the third arm of the test was expanded to require the courts to demonstrate that there is a substantial probability that closure will be effective in protecting against the perceived harm.

After outlining the modified test, the court then outlined the procedures for determining courtroom closures. First, the court held that as agents for the public on the issue of courtroom closure, the news media must be given an opportunity to be heard on the question of closure prior to the court's decision.⁸² Those seeking closure should provide an adequate basis of fact to support closure, including such factors as the extent of prior hostile publicity, the probability that the issues involved at the hearing will further aggravate the adverse publicity, and whether traditional alternatives (continuance, severance, change of venire, etc.) will solve the problem. Having discussed the administrative procedure for courtroom closure, the court then required trial courts to begin with an assumption that a pretrial hearing be conducted in open court "unless those seeking closure carry their burden to demonstrate a strict and inescapable necessity for closure."⁸³ Finally, the court noted that the news media have no first amendment right to attend the pretrial hearing as long as the transcript is made available at some specified future time.⁸⁴

With its decision in Lewis, the court accomplished far more than modifying the three-part test for courtroom closure. The court rejected the argument that pretrial hearings and records should be closed because they often contain unfounded allegations and evidence later found to

⁸¹ Id.

⁸² Id.

⁸³ Id.

⁸⁴ Id. at 8.

be inadmissible at trial. Instead, the court ruled that because the searches and interrogations that such hearings evaluate do not take place in public, the hearings are of great public importance. Indeed, the court based its support of public access on the argument that the pretrial hearing is often the public's only opportunity to learn about police and prosecutorial conduct. By requiring that a transcript be made available in the event of pretrial closure, the court added yet another hurdle for parties seeking closure of discovery records. In sum, the court's decision in Lewis validated the common law right of access to pretrial proceedings, and thus to discovery records, developed through lower court decisions.

V. Seattle Times v. Rhinehart: The Limited Effect of Federal Precedent

In 1984, the United States Supreme Court held in Seattle Times v. Rhinehart that "pretrial depositions and interrogatories are not public components of a civil trial."⁸⁵ Although the decision pertained only to civil litigation and involved a narrow factual scenario, Florida courts have invoked its holding in a number of cases limiting access to civil -- *and criminal* -- discovery records. Rhinehart is important to this discussion not for its holding, but for the court's analysis of a Washington state discovery rule similar to the rules in Florida. The litigation in Rhinehart arose from discovery proceedings in a libel suit brought by the spiritual leader of the Aquarian Foundation against the *Seattle Times*. During discovery, the newspaper requested lists of the foundation's donors and members.⁸⁶ Rhinehart refused, claiming that disclosure would harm

⁸⁵ 467 U.S. 20, 32 (1984).

⁸⁶ Id. at 22.

both the foundation and its membership and asking the trial court for a protective order sealing the names and donations. Pursuant to state discovery rules modeled on the Federal Rules of Civil Procedure, the trial court issued an order compelling respondents to identify all donors who made contributions during the five years preceding the complaint, along with the amounts donated.⁸⁷ Undaunted, Rhinehart filed a motion for reconsideration, renewing his request for closure and supplying affidavits claiming that release of the records would adversely affect foundation income and subject its members to harassment and reprisals. Persuaded by these affidavits, the trial court issued a protective order covering all information obtained through the discovery process that pertained to the names or financial affairs of the foundation. The trial judge based the order on Rule 26(c) of the Washington discovery rules, which states that "upon good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."⁸⁸ The order prohibited the *Seattle Times* from using discovery information in any way except for trial preparation. The newspaper appealed the protective order to the Supreme Court of Washington, which held that the trial court had not abused its discretion in issuing the protective order. The United States Supreme Court ostensibly agreed, ruling that the trial court judge must retain the power to oversee the discovery process.⁸⁹

Instead of limiting access to all discovery records, the Supreme Court fashioned a two-part test. First, the trial court judge must consider "whether the practice in question [furthers] an

⁸⁷ Id. at 25.

⁸⁸ Id., citing Wash. R. Civ. P. 26(c) (1984).

⁸⁹ Id. at 27.

important or substantial governmental interest unrelated to the suppression of expression."⁹⁰ Also, the judge must determine whether "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular government interest involved."⁹¹ Applying the test to Rhinehart, the court held that since discovery historically was not a public event, it is not a component of a public trial. Further, the court distinguished the closure of discovery records from instances of "classic prior restraint" because the party is free to disseminate the same information closed by the protective order, so long as they employ other means to gather the information.⁹² The Court found that the Washington discovery rules further a substantial governmental interest in helping litigants prepare for trial. More importantly, the Court found that by leaving authority with the trial judge to determine "good cause," the judiciary would protect against unnecessary closures. Thus, in Rhinehart, a unanimous Supreme Court ruled that the *Seattle Times* had no first amendment right to publish records given to them in the discovery process.

The Supreme Court's opinion in Rhinehart had an immediate effect on lower courts across the country,⁹³ but its holding can be distinguished from the Florida cases dealing with access to discovery records on several levels. Rhinehart involved civil, not criminal litigation. Also, the factual scenario in Rhinehart certainly was not a typical instance of the news media trying to gain access to discovery records as a neutral third party; the case involved a newspaper

⁹⁰ Id. at 31, citing Procurier v. Martinez, 416 U.S. 396, 413 (1974).

⁹¹ Id., citing Brown v. Glines, 444 U.S. 348, 354-355 (1980).

⁹² Id. at 32.

⁹³ Katherine Pownell, "The First Amendment and Pretrial Discovery Hearings: When Should the Press Have Access?," 36 U.C.L.A. L.Rev. 609, 610-12 (1989).

admittedly trying to publish information gained through its status as a litigant involved in discovery proceedings. None of the cases which developed Florida's common law right of access to discovery records can be compared factually with Rhinehart. More crucial, however, is the lack of a controlling public records statute in Rhinehart. The Washington Freedom of Information Act does not contain a provision concerning access to discovery records.⁹⁴ As stated earlier, the Florida Public Records Act is the only open records statute in the nation that expressly opens discovery records. This statutory difference cannot be overstated. In Rhinehart, the court concluded that in Washington, "the rules authorizing discovery were adopted by the state legislature," so "the processes thereunder are a matter of legislative grace."⁹⁵ Any federal judicial analysis of access to discovery records in Florida would require greater deference to the right of public access, because the open records law limits the judiciary's power to seal records.

In Florida, the majority of the decisions immediately following Rhinehart supported the right of access to discovery records. In Short v. Tampa Television, the Second District Court of Appeal affirmed trial court application of the Lewis three-part test opening discovery depositions and records.⁹⁶ The Third District also continued to recognize the Lewis test, reversing a closure order and granting the media access to the videotaped discovery testimony of a minor alleged to be the victim of a sexual assault.⁹⁷

Likewise, in 1985 the Fourth District Court of Appeal granted access to all information furnished

⁹⁴ Wash. Rev. Code § 42.17.010-.954 (1991).

⁹⁵ 467 U.S. 20, 31.

⁹⁶ 462 So.2d 591 (Fla. 2d DCA 1985).

⁹⁷ Miami Herald v. Morphonios, 467 So.2d 1026 (Fla. 3d DCA 1985).

defense counsel in the widely publicized investigation of the fatal overdose of David Kennedy.⁹⁸

Bludworth v. Palm Beach Newspapers arose from State Attorney Bludworth's refusal to furnish the press with information during the first day after Kennedy's body was discovered in a Palm Beach hotel room.⁹⁹

Two days later, Palm Beach Newspapers filed an emergency complaint to enforce the public records law, demanding release of the medical examiner's report and of information specifically excluded from the criminal intelligence and criminal investigation exemptions of the Public Records Act.¹⁰⁰ The trial court ordered release of the medical examiner's report and information regarding the time, date and location of the crime; the name, sex and age of the suspect; and the crime charged.¹⁰¹ Bludworth refused to release the records, even after two arrests were made in connection with Kennedy's death and the state attorney's office admitted that records already had been given to the defendants pursuant to discovery. After several more motions from both parties, the matter was appealed. The Fourth District Court of Appeal stated that the question presented was the scope of the provision of the open records law granting public

⁹⁸ Bludworth v. Palm Beach Newspapers, 476 So.2d 775 (Fla. 4th DCA 1985).

⁹⁹ 476 So.2d 775, 776.

¹⁰⁰ Id. Fla. Stat. § 119.011(3)(c)(1)-(6) excludes from the definitions of "criminal intelligence information" and "criminal investigation information," such general information as the time, place and nature of a reported crime, the identity of person(s) arrested, the crime charged and documents given or required by law or agency rule to be given to the arrested person.

¹⁰¹ Id. at 777. Fla. Stat. § 119.011(3)(c) (1)-(5) states that "'criminal intelligence information' and 'criminal investigative information' shall not include: 1. The time, date, location and nature of a reported crime. 2. The name, sex, age, and address of a person arrested or of the victim of a crime except as provided in s. 119.07(3)(h) [pertaining to victims of sexual battery]. 3. The time, date, and location of the incident and of the arrest. 4. The crime charged. 5. Documents given or required by law to be given to the person arrested.

access to discovery materials.¹⁰² The newspaper argued that the section encompasses all information shared by the state with the criminal defendant. Bludworth argued that the section refers only to information showing a person's arrest.

The court reviewed the legislative intent behind the section and concluded that had the legislature intended to exclude discovery materials, it had every opportunity to do so. The Fourth District court found that given the underlying policy of the Public Records Act -- open government to the extent possible without undermining significant government functions such as crime detection -- it seemed more likely that the legislature meant that once documents are released, the legislature intended an end to secrecy about those documents.¹⁰³ Furthermore, the court found that because the Public Records Act states "all-inclusively" that records should be open before listing exemptions. "the rules of statutory interpretation include the principle that when the legislature has enumerated exceptions it has shown that it intends to leave all unmentioned items subject to the law."¹⁰⁴ Thus, the court ruled that under the open records law, all discovery records are presumed open for public inspection.

The Supreme Court of Florida, however, relied primarily on Rhinehart in a 1987 case to rule that the press and public have no right of access to unfiled depositions. In Palm Beach v. Burk, the Supreme Court of Florida denied media requests to obtain copies of court reporter notes and deposition transcripts prior to their transcription and filing.¹⁰⁵ The Supreme Court of

¹⁰² Id. at 778.

¹⁰³ Id.

¹⁰⁴ Id. at 779.

¹⁰⁵ 504 So.2d 378 (Fla. 1987).

Florida, citing the United States Supreme Court's opinion in Rhinehart, ruled that discovery depositions are not judicial proceedings, and that there is no First Amendment right of access to depositions prior to their being filed with the court.¹⁰⁶ The court found that access must yield in this instance to the orderly administration of justice, but only until the records are filed with the clerk of court. Burk created a loophole for unfiled discovery records, because many discovery documents never are filed with the clerk of court. For example, one commentator, in explaining the "informal" discovery process, observed that much of the information collected in the pretrial stage is gathered by investigation conducted by or for counsel rather than through formal discovery.¹⁰⁷ Likewise, when settlement agreements are reached, opposing parties can agree not to file discovery records. The only "record" in such cases is a private conversation between the attorneys agreeing not to file the documents.¹⁰⁸

Florida courts have successfully closed discovery records in more recent cases, but only after satisfying the three-part test for closure. In 1988, the Florida Supreme Court ruled in Florida Freedom Newspapers v. McCrary¹⁰⁹ that where public access to discovery records collides with the defendant's constitutional rights of fair trial and due process, public access must yield. In McCrary, newspaper reports of prisoners being mistreated in a county jail led to charges against two sheriff's deputies. The deputies filed motions to seal discovery records, claiming that their

¹⁰⁶ 504 So.2d 378, 383.

¹⁰⁷ Marcus, "Myth and Reality," 11-12.

¹⁰⁸ Davis at 164.

¹⁰⁹ 520 So.2d 32 (Fla. 1988)

right to a fair trial was at stake.¹¹⁰ Florida Freedom Newspapers opposed the motions, arguing that the discovery records were public records. Without formally applying the three-part test from Lewis,¹¹¹ the trial court granted both the motion to seal the discovery material and the motion prohibiting certain officials from commenting on the case.¹¹² The district court affirmed the ruling.¹¹³

On review, the Florida Supreme Court ruled that while the lower court did not formally apply the Lewis test, it satisfied the test through consideration of its own criteria.¹¹⁴ The court turned to the separation of powers doctrine to reject the newspaper's argument that the judiciary was creating new exemptions to the law.¹¹⁵ The court stated that because access to discovery records is not a constitutional right, the constitutional rights of the defendant take priority. Under the separation of powers doctrine, it is the judiciary's responsibility to ensure that parties receive a fair trial. Because the judiciary is responsible for the protection of these constitutional rights, the court found that "there is no conflict between the statute and the constitutional authority of the judicial branch to take such measures as are necessary to obtain orderly proceedings and a fair trial."¹¹⁶ The separation of powers doctrine has been raised in subsequent cases,¹¹⁷ but

¹¹⁰ 520 So.2d 32, 33.

¹¹¹ Id. at 32.

¹¹² Id. at 33.

¹¹³ Florida Freedom Newspapers v. McCrary, 497 So.2d 652 (Fla 1st DCA 1986).

¹¹⁴ 520 So.2d. 32, 32.

¹¹⁵ Id.

¹¹⁶ Id.

will apply only after the trial court satisfies the three-part test for closure.

In a 1992 decision, the Florida Supreme Court ruled that a list of "John Does" taken from the client lists of a convicted prostitute is not exempted from the open records law under the state constitution's privacy amendment. The court's ruling in Post-Newsweek v. John Doe¹¹⁸ made public the "client list" of alleged prostitute Kathy Willets. Willets and her husband, Jeffrey Willets, a Broward County sheriff's deputy, were arrested in 1991 and charged with more prostitution-related offenses. Pursuant to a search warrant, deputies seized the Willets' Rolodex and other lists containing the names of her clients, amounts paid and other sexually related notations about the clients.¹¹⁹ All of these records were included in discovery requests by the Willets. Several John Does then filed motions as interested parties to deny access to pretrial discovery materials. The trial court denied the Does' motion and declared that once the state attorney provided the discovery documents to the Willets, the documents became public records.¹²⁰ When the state announced that it was prepared to release the documents, the Does moved for a stay of release of the records. The trial judge ordered the release of the names, concluding that people named on the client list of a prostitute have no reasonable expectation of privacy.¹²¹ On review, the district court stayed the trial judge's order and certified the case to the Florida Supreme Court.

¹¹⁷ See Wolfinger v. Sentinel Communications, 538 So.2d 1276 (Fla. 5th DCA 1989).

¹¹⁸ 1992 Fla. Lexis 1956.

¹¹⁹ John Doe v. State, 587 So.2d 526, 527 (Fla. 4th DCA 1991).

¹²⁰ 1992 Fla. Lexis 1956 at 2.

¹²¹ *Id.*

The Florida Supreme Court recognized the need to balance the public's statutory right of access against the Does' constitutional right to privacy, but held that the three-pronged test articulated in Lewis test was not applicable to the balancing of interests in John Doe. Instead, the court applied the six-part test devised in Barron v. Florida Freedom Newspapers¹²², a case involving the common law right of access to civil proceedings and records. The court chose the Barron standard because the Lewis test does not address the impact of public disclosure on a third party's right of privacy and because Lewis dealt with the closure of a pretrial hearings and not with the closure of discovery documents.¹²³ Then, turning to an examination of the Does' privacy claims under Barron, the court rejected the Does' argument that Florida's constitutional right to privacy protects them from having their names and addresses released to the public.¹²⁴ The court held that the Does' privacy rights were not implicated because the Does had their names and addresses associated with criminal activities. Relying upon Rhinehart, the court emphasized that the public does not always have a right to discovery materials: "depending upon the circumstances and the subject matter, discovery may 'seriously implicate privacy interests of

¹²² 531 So.2d 113 (Fla. 1988). The Barron test states that closure of court proceedings or records should occur only when necessary a) to comply with the established policy set forth in the constitution, statutes, rules, or case law; b) to protect trade secrets; c) to protect a compelling governmental interest; d) to obtain evidence to properly determine legal issues in a case; e) to avoid substantial injury to innocent third parties; or f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed. 531 So.2d at 118.

¹²³ 1992 Fla. Lexis 1956, 8-9.

¹²⁴ Id. at 12. Art. I, @ 23, Fla. Constitution, states that: Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

litigants and third parties."¹²⁵ However, the court recognized that under Florida's open records policy, records are open unless they fit under a legislatively created exemption. Because the court found that the Does had no privacy interest at stake, their names and addresses became public records when they were furnished by the state to the defendants during discovery.¹²⁶

VI. Conclusion

In Florida, discovery proceedings in criminal trials are a rich source of records for journalists. During discovery, both parties seek to learn as much as they can about the evidence and witnesses available before the trial begins. In criminal prosecutions, the state must provide the defense with any matter which is relevant to the pending action. In Florida, the press and public enjoy broad access to the records produced through discovery in criminal trials. The origins of the right of access lie not in the federal or state constitution, but in the Florida Public Records Act. The act exempts criminal intelligence information, but qualifies the provision by stating that the exemption does not include "documents given or required by law or agency rule to be given to the person arrested."¹²⁷ No other state shares a similar provision in its open records law.¹²⁸ Courts have interpreted the provision as providing a statutory right of access once discovery materials are filed and assume the status of public records. This statutory right

¹²⁵ Id. at 14, citing Seattle Times v. Rhinehart, 467 U.S. 20, 35 (1984).

¹²⁶ Id. at 16.

¹²⁷ Fla. Stat. § 119.011(3)(c)5 (1991).

¹²⁸ Ibid., note 19.

must be balanced against the constitutional rights of fair trial and due process. A court may prohibit disclosure of discovery records, but only after meeting a three-part test. First, the closure must be necessary to prevent a serious and imminent threat to the administration of justice. Second, there must be no alternatives available, other than change of venue, which would protect a defendant's right to a fair trial. Finally, closure must be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.¹²⁹ Before sealing discovery records, the trial court judge must give notice to the media and hear arguments from parties seeking access. Finally, the trial court judge must set forth in writing the reasons for closure.¹³⁰

Florida courts have applied this three-part test to open discovery records in a wide variety of criminal trials. From the disclosure of discovery records in the Theodore "Ted" Bundy murder trials in 1980 to the recent decision to release discovery records relating to the Gainesville student murders trial of Danny Rolling, Florida courts have routinely ruled that the press and public have a right to know the contents of records generated during discovery before a public trial. That right is not written in stone, however. Discovery records can produce highly inflammatory media coverage, and the courts must protect the defendant from prejudicial pretrial publicity. Every high-profile criminal trial offers the potential for collision between the constitutional rights of the defendant to receive a fair trial with an impartial jury, and the rights of the public and the media under the Florida Public Records Act.

¹²⁹ *Miami Herald v. Lewis*, 426 So.2d 1 (Fla. 1982).

¹³⁰ *Id.*



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The Use of Search Warrants in Canada and the U.S.
to Obtain Photographic Evidence from Journalists
by Cindy M. Brown

Law enforcement agents in the United States and Canada have sought unpublished photographs and unaired videotapes from media outlets to help them identify lawbreakers involved in protests following the Rodney King verdict. In the U.S., law enforcement authorities in several cities, including Los Angeles, San Francisco and Atlanta, **subpoenaed** media outlets for photographs and videotapes of the rioting and looting that followed the verdict.¹ In Canada, nine **search warrants** to obtain photographs and videotapes of individuals and groups involved in a rampage following the King verdict were executed on eight Toronto news organizations.²

These situations seem very similar -- both involved media organizations with photographic evidence from disturbances following the King verdict. But the approaches to obtaining that evidence were very different -- subpoenas (court orders summoning the evidence before a court) were issued in the U.S., search warrants (court orders allowing the search of private property) in Canada.

In cases such as these, involving the use of searches and subpoenas on media outlets believed to have photographic evidence of a crime, two public interests go head to head -- the public interest in the right of the press to gather and disseminate news free of state interference and the public interest in seeing that citizens guilty of crimes are charged and convicted.³ In

addition to free press rights, the privacy rights of all people come into play when search warrants are at issue.

Canadian and U.S. laws regarding the way law enforcement is able to obtain evidence from journalists differ in several ways. I will explore those differences, focusing mainly on the way the state can use a search warrant to obtain photographic evidence from news organizations in the two countries.

Before beginning the comparison of the legal climate in the two countries, the competing interests that come into play when a member of the news media has evidence of the commission of a crime will be explored. Also, included in this opening section will be a discussion of the role of the photojournalist in a democratic society. Following this comparison of basic rights, is an examination of the legal history of the use of search warrants in the United States and Canada. This comparison concentrates on contrasts between decisions from two cases decided one year apart in the late 1970s, *Stanford Daily v. Zurcher*⁴ in the U.S. and *Pacific Press v. The Queen*⁵ in Canada. Next comes a comparison of current legislation and case law relating to the use of search warrants to obtain evidence from media premises in the U.S. and Canada. The final section contains suggestions of ways search warrants as used to search newsrooms in Canada have come to resemble subpoenas for evidence in the United States.

SECTION I: COMPETING INTERESTS

Justices in both the U.S. and Canada have written about the importance of a free press. In the U.S.: "We do not question the significance of free speech, press, or assembly to the country's welfare."⁶ In Canada: "...I take it as a given that freedom of the press and other media is vital to a free society. There can be no doubt that it comprises the right to disseminate news, information and beliefs."⁷

In the United States the public interest in press rights is protected by the First Amendment, which states that "Congress shall make no law ... abridging the freedom of speech, or of the press..."⁸ In Canada this public interest is protected by section 2(b) of the *Canadian Charter of Rights and Freedoms* which similarly states "Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication..."⁹ The basic difference between the U.S. protection of the freedom of the press and the Canadian protection is that in Canada the exercise of all rights and freedoms set forth in the *Charter* are subject through Section 1 to "...such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Competing with the public interest in a free press is the public interest in justice. Everyone who is part of a community has an interest in seeing that crimes are investigated and criminals prosecuted.¹⁰ It is a longstanding legal principle

that "the public ... has a right to every man's evidence."¹¹ The Fourth Amendment of the United States, while protecting people from unreasonable searches and seizures, allows searches "...upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." In Canada section 8 of the *Charter* guarantees "Everyone has the right to be secure against unreasonable search or seizure," while section 487 of the *Criminal Code* says that a justice may issue a search warrant when satisfied that there are reasonable grounds to believe that there is in a building any evidence about the commission of a crime.

After the recent rash of subpoenas in the U.S. surrounding the L.A. riots, Michael Morse, an American photojournalist and president of the National Press Photographers Association, said that although he understands the government's desire to gather evidence for use in these investigations, "it is extremely important that we in the news industry realize the greater philosophical implication of the subpoenas and resist turning over unaired tapes and unpublished photos."¹² Morse makes the point that turning over unpublished material places a photojournalist in the untenable position of becoming an arm of the law. Morse, like many journalists, believes that it is important that all journalists maintain a clear separation from law enforcement. "The public's trust in us as independent and neutral reporters is an essential ingredient in our ability to effectively gather the news," he said.¹³

Bill Kendrick, executive producer of news and current affairs for CBLT-TV, a CBC affiliate in Toronto and one of the stations from which videotapes of the rampage following the King verdict were seized, expressed opinions much like Michael Morse's. Kendrick expressed concern about the shopkeepers whose stores were vandalized and recognized their right to have the vandals brought to justice, but claimed bringing criminals to justice is the police department's responsibility. The CBC does not provide law enforcement with videotapes unless ordered by a court.

Often, particularly when we're involved in investigative journalism, we require the complete trust of people with whom we are dealing. ... If we turn over tapes without a fight, if we are seen to be giving police anything they want, anytime they want it, we send a signal that we can't be trusted. We send a signal that we aren't as independent as we want people to believe we are.¹⁴

Not all journalists agree with Morse and Kendrick, however. Those in Canada seem more willing to disagree in a public forum, perhaps because of what appears to be a less adversarial press in Canada. Stephen Hurlbut, director of news programming for City-TV, one of the Toronto media outlets searched following the King rampage that did not contest the warrants in court, said that he felt a need to distinguish the world view at his station "from those who predictably demand a blanket of special status for journalists."¹⁵ While agreeing that City-TV is not comfortable with the idea of police intruding into its newsroom, and that routine access to its videotapes is contrary to its perceived role of a free and democratic press, Hurlbut added that the

credibility of the station was not shaken by complying with the warrant in this particular instance. "The process by which we practice our craft fundamentally rests on our embrace of those we serve. By placing the newsroom within the community, we acknowledge that we are not above the law," Hurlbut said.¹⁶

SECTION II: HISTORICAL PERSPECTIVE

In the late 1970s fairly similar cases involving search and seizure in newsrooms were decided in the U.S. (*Stanford Daily v. Zurcher*) and Canada (*Pacific Press v. The Queen*). In the U.S. case the final decision was made by the Supreme Court, in the Canadian case by the British Columbia Supreme Court.

The Canadian decision was made in 1977 five years before *The Canadian Charter of Rights and Freedoms* was annexed to the Canadian Constitution. *The Charter* was designed to create a basis for judicial intervention to protect individual rights and civil liberties apart from the *British North America Act*, which had been adopted in 1867.¹⁷ Despite First Amendment protection in the U.S. and despite the fact that the Canadian decision was made before passage of the *Charter*, the decision in the *Pacific Press* case was more pro-media than the *Stanford Daily* decision. The *Pacific Press* decision provided some comfort to those in the media in Canada, but the court decision in the *Stanford Daily* case created a furor among the media in the U.S. Press outrage and lobbying helped lead to the enactment of The Privacy Protection Act of 1980, which is discussed in the following section.

In the U.S.

Law enforcement search teams began to appear in newsrooms in disturbing numbers during the era of political activism surrounding the Vietnam War. In most instances, the objects being sought in these searches were unpublished photographs or unaired videos. The most notable of these searches occurred in the newsroom of a student newspaper.¹⁸

Zurcher v. Stanford Daily

On April 11, 1971, the *Stanford Daily*, a student newspaper at Stanford University, published articles and photographs covering a clash between police and demonstrators. The day after articles and photographs from the demonstration were published, the Santa Clara County District Attorney's Office obtained a warrant to search the *Daily's* offices for photographic evidence of the clash. During a search of the *Daily's* offices, officers rummaged through file cabinets, desks and wastepaper baskets but only found previously published photographs.¹⁹

One month after the search, the *Daily* brought a civil action against the police officers who conducted the search and the other government officials involved. The *Daily* claimed the search had violated rights guaranteed to the staff by the First, Fourth and Fourteenth Amendments. The District Court granted declaratory relief and articulated what is referred to as a "subpoena first" rule. It held that the issuance of warrants to search parties not suspected of a crime (third parties) is forbidden by the Fourth and Fourteenth Amendments unless there is

probable cause to believe the person will not respond to a subpoena.

The District Court went on to declare that the First Amendment interests present when a news organization is the subject of a third-party search require that searches of media premises be permitted only when it can be shown that the evidence will be destroyed or removed and a restraining order would be ineffective. The Court of Appeals affirmed the decision, but the U.S. Supreme Court reversed.²⁰

Justice Byron White, writing for the majority of five in the *Stanford Daily* case,²¹ held that "under existing law, valid warrants may be issued to search any property, whether or not occupied by a third party," on which it is believed evidence or fruits of a crime will be found.²² "The Fourth Amendment has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the Amendment and strike a new balance," he wrote.²³

As for any additional factors that should be considered when issuing search warrants for the premises of news organizations, the majority opinion was that the Framers of the Constitution "did not forbid warrants where the press was involved," nor "require special showings that subpoenas would be impractical..."²⁴

In Canada

At almost the same time as the U.S. Supreme Court was deciding the *Stanford Daily* case, the British Columbia Supreme

Court was deciding a case involving the use of search warrants to obtain evidence from two newsrooms in Canada. This case was considered and decided in 1977 before the passage of the *Canadian Charter of Rights and Freedoms*.

Pacific Press v. The Queen

On January 10, 1977 search warrants were issued to search the offices of *The Vancouver Sun* and *The Vancouver Province*, two newspapers printed by Pacific Press, Ltd. Officers who had been present during demonstrations against a private hearing of the Restrictive Trade Practices Commission, which took place December 6, 7 and 8, 1976, sought warrants to search the offices of the *Sun* and *Province*. The officers had seen journalists from those papers conducting interviews with and taking photographs of the protesters. They wanted photographs, tape recordings and written notes from journalists so they could use the evidence to prosecute the demonstrators. These warrants were sought after the editor of *The Vancouver Sun* refused to give any information other than what had already been published in the paper.²⁵ The warrants were granted the same day they were requested. The searches took place the next day. Officers seized 77 pieces of paper and 69 frames of negatives. They also seized a contact book that belonged to a staff reporter. Unlike recent Canadian cases in which evidence when seized has been sealed until a court can rule on the constitutionality of the search, nothing in the court record indicates this evidence was sealed.²⁶

On June 28, 1977 the British Columbia Supreme Court responded to an application to quash the search warrant. Petitioners for the newspapers claimed that the justice of the peace had insufficient information before him upon which to base a judicial decision.²⁷ The British Columbia Supreme Court quashed the search warrants. It was the court's opinion that bringing an application for a search warrant of a newspaper without material to show "...1. whether a reasonable alternative source of obtaining the information was or was not available; and 2. if available, that reasonable steps had been taken to obtain it from that alternative source..." was "...an abuse of the process of the court."²⁸

The strength of the pro-media *Pacific Press* decision was a bit of a surprise to legal scholars since no pre-conditions for granting a warrant to search the premises of news organizations had ever been imposed under any law in the United States or Canada.²⁹ Alan Grant, an authority on Canadian media law, wrote that it was "somewhat strange that such a limitation on law enforcement was so vigorously advocated in the *Pacific Press* case..."³⁰

A basic distinction between the ways law enforcement officers in Canada and the U.S. can obtain evidence may explain what seemed to be a surprising decision. The British Columbia Supreme Court, in laying out guidelines for the use of search warrants on media premises, focused on alternative sources of information unlike the District Court in the *Stanford Daily* case,

which in its "subpoena first" rule focused upon an alternative (less intrusive) means of obtaining the information. This is because in Canada an alternative -- less intrusive -- means for obtaining the information does not exist. In Canada a subpoena cannot be issued for purely investigatory purposes.³¹ One may only be issued after someone has been charged with a crime. In instances when evidence that may lead to the identification of criminals is sought, a search warrant is the only means available to obtain that evidence.³² So the members of the Canadian court, unlike the members of the District Court in the *Stanford Daily* case, could not suggest that a subpoena would be a preferable way to obtain evidence from the media.

The Canadian decision actually resembles decisions in the U.S. concerning the use of subpoenas requiring journalists to testify about confidential sources before grand juries. In fact the British Columbia court cited a U.S. case dealing with this issue -- *Democratic National Committee v. McCord*.³³ It was held in *McCord* that a reporter could not be compelled by subpoena to testify unless a justice of the peace had been satisfied that alternative sources had been exhausted and that the administration of justice outweighed the freedom of the press.³⁴ This case involved the use of subpoenas requiring journalists to testify before a grand jury. *McCord* was one of several lower court decisions that followed the Supreme Court decision in *Branzburg v. Hayes* in which subpoenas for journalists to testify were quashed.³⁵ Even though the U.S. Supreme Court in *Branzburg*

v. *Hayes* ruled that journalists, like every person, had to honor subpoenas ordering them to testify, because the justices were so divided in their opinions most courts read this decision as establishing a limited First Amendment privilege for journalists.³⁶

Because the court in Canada did not have the option of requiring law enforcement to try a subpoena before issuing a search warrant, its ruling in a search warrant case had to rely on reasoning more like the reasoning in U.S. subpoena cases. The issue of confidentiality, discussed in the U.S. subpoena cases, was also present in the *Pacific Press* case. A reporter's private contact book was seized. The two most recent Canadian cases dealing with the issue of search warrants in newsrooms did not directly involve the issue of confidentiality. This issue is addressed in the final section of the paper.

SECTION III: CURRENT LEGISLATION AND CASE LAW

Immediately following the *Stanford Daily* decision allowing the use of search warrants on media premises, journalists in the U.S. media expressed outrage. Congress soon passed The Privacy Protection Act of 1980, which protects those involved in First Amendment activities from search and seizure operations except under special circumstances. This Act is still law and is the main reason why news photographers working in the U.S. have been served subpoenas for their photos and videotapes of the King-verdict riots rather than search warrants. Canadian journalists have no special legislation protecting them from search and

seizure operations. And in two cases considered in November of 1991 the Canadian Supreme Court upheld the state's right to use a search warrant to seize articles in newsrooms.³⁷

U.S.

While the court in *Stanford Daily* had not advocated a limitation on law enforcement's use of search warrants on media premises, the legislature in The Privacy Protection Act of 1980 did. In the majority opinion in *Zurcher v. Stanford Daily*, Justice White noted that, "the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish non-constitutional protections against possible abuses of the search warrant procedure..."³⁸ The Congress took Justice White's note as a call to action.

In response to the Supreme Court decision in the *Stanford Daily* case, and spurred on by media concern,³⁹ Congress quickly introduced several bills. The bills introduced fell into two categories: 1) "third party" bills⁴⁰ that would have prohibited searches of all innocent third parties without first trying alternatives; and 2) First Amendment or work product bills that would have prohibited searches of those engaged in First Amendment activities. All of the bills generally adopted the "subpoena first" rule that District Court Judge Peckham had articulated in the lower court decision.⁴¹

The Privacy Protection Act as passed consists of two subchapters -- subchapter 1 set forth First Amendment privacy protection, subchapter 2 gave the Attorney General six months to

come up with guidelines for the use of warrants by Federal employees to seize materials from third parties.⁴² So the final product protects "... a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication..." from search and seizure at both the state and federal levels except under certain circumstances⁴³ and mandates that the Attorney General come up with guidelines to protect all innocent third parties from search and seizure at the federal level.⁴⁴

The lower court's "subpoena first" rule, discussed earlier, was an important influence in the drafting of the Privacy Protection Act of 1980. Basically the act requires, with a few exceptions, that a law enforcement officer use a subpoena first, rather than a search warrant, to obtain evidence from any person planning to publicly communicate information. The evidence to be obtained is divided into two categories by the Act -- "work product materials" and "documentary materials." Photographs and videotapes, along with other materials upon which information is recorded, are considered "documentary materials" under this Act. The four exceptions under which "documentary materials" may be seized by search warrant are: 1) if the person who has the materials is a suspect in the crime to which the materials relate; 2) if seizure of the materials is required to prevent death or serious bodily injury; 3) if giving notice pursuant to a subpoena would likely result in the destruction, alteration, or concealment of the materials; or 4) if the materials have not

been produced in response to a subpoena and (a) all appeals have been exhausted; or (b) it is believed that a continued reliance on the subpoena process would delay the investigation or trial to the point of threatening the interests of justice.⁴⁵

In Canada

Unlike journalists in the U.S. media, those in the Canadian media planning to communicate information have no special legislative protection. They have to rely upon Supreme Court decisions for precedent. In two cases considered in November of 1991, the Canadian Supreme Court upheld the state's right to use a search warrant to seize articles in newsrooms. The guidelines set forth in *The Pacific Press* case fell by the wayside in these two decisions.

The two 1991 Canadian cases challenging the use of search warrants to obtain evidence from media premises are apparently the first since the passage of *The Charter*.⁴⁶ Alan Grant, Canadian media law scholar, had a handle on the outcome of these cases before they were even brought before the court. In the book, *The Courts The Media and The Charter*, Grant wrote:

Since the provisions of section 2(b) of the Charter are no less like the First Amendment than section 8 is like the Fourth, I predict that in due course the Supreme Court of Canada will embrace the approach in *Stanford Daily* as its watchword in balancing search and seizure powers against media freedoms. ... (I)t0 '

^U

*t be surprising to find that no special safeguards for the media emerge beyond exhortation to justices of the peace to be cautious in approving searches of media premises for evidence of offences by others.⁴⁷

The Supreme Court of Canada, confronted with contradictory rulings in similar cases involving the use of search warrants on media premises from two provincial Court of Appeals ruled on November 14, 1991, that the search warrants should have been allowed in both cases.

CBC v. Lessard

CBC reporters videotaped the destruction of a guardhouse during a demonstration held September 10, 1988. Only a handful of police were present when the guardhouse was destroyed. An officer of the Royal Canadian Mounted Police (RCMP) sought a search warrant to seize the videotapes, including "out-takes" shot by CBC reporters. The information in support of the application for the warrant included an explanation by a RCMP officer that while other sources of information existed, for various reasons they were not sufficient or were unavailable. The information did not reveal that police identification experts were on the scene when the guardhouse was ignited.⁴⁸

CBC v. New Brunswick

On June 17, 1987 a CBC crew videotaped a group of people damaging a post office building. The day after portions of the videotape were broadcast, police sought an authorization to search for them. No information was included in the affidavit that would have permitted the justice of the peace issuing the

warrant to determine if any alternative sources of information existed, or if steps had been taken to obtain such information.⁴⁹

In both cases search warrants were obtained and the videotapes, when seized, were placed in sealed envelopes to be held while the validity of the warrants was contested. In *CBC v. Lessard*, the Quebec Superior Court dismissed the application to quash the warrant, but the Court of Appeal allowed the CBC's appeal.⁵⁰ In *CBC v. New Brunswick* the Superior Court allowed the appeal but the Court of Appeal reversed ruling that the application to quash the warrant should be dismissed.⁵¹

Post-Charter Supreme Court Rules

Just as the U.S. Supreme Court refused to accept the argument that the use of a search warrant on the premises of press organizations would seriously threaten First Amendment rights to gather and disseminate news,⁵² the Canadian Supreme Court refused to accept the argument by the CBC that the newsroom searches had threatened press freedoms guaranteed in section 2(b) of the *Charter*.⁵³ Justice Gerard LaForest in *CBC v. Lessard* took his analysis one step further and noted that even if he had been inclined to hold that there had been a violation of s.2(b), "...the compelling requirements of law enforcement when weighed against the highly tenuous interference with the right, would lead me to view that the search in this case would be justifiable under s.1."⁵⁴

Both 6-1 rulings advocated an ad hoc balancing to vary according to the facts presented on each application.⁵⁵ "It is

essential that flexibility in the balancing process be preserved so that all the factors relevant to the individual case may be taken into consideration and properly weighed," the court concluded in *CBC v. New Brunswick*.⁵⁶ Justice Peter Cory summarized nine factors to be considered in the balancing process.⁵⁷ The alternative source guidelines set forth in *Pacific Press* were included in Justice Cory's list of factors to be considered when issuing a warrant, but a disclaimer stated the disclosure of the availability of alternative sources is **not a constitutional requirement**.⁵⁸

According to Justice Cory, the two factors set forth in *Pacific Press* are only two among many that should be considered when evaluating the reasonableness of a search. In Canada protection from unreasonable searches is constitutionally guaranteed by Section 8 of the Charter which says, "Everyone has the right to be secure against unreasonable search or seizure."⁵⁹ In *CBC v. New Brunswick* the court held that the protection afforded by s. 2(b) does not import any additional requirements for the issuance of a warrant on media premises.

SECTION IV: Search Warrants vs. Subpoenas

One law journal article used this analogy to describe the difference between a subpoena and a search warrant: "To a journalist, the difference between a subpoena and a search warrant is analogous to the difference between a rattlesnake and a cobra. One at least gives some warning."⁶⁰ This analogy points out one major difference between a search warrant and a

subpoena -- the surprise (or timing) factor. In addition to the surprise factor, a search warrant, unlike a subpoena, does not allow the victim to protest the intrusion in court before it occurs. Also, a search, unlike a subpoena, involves forceful entry into one's private domain.⁶¹

Similarities exist between the way search warrants have recently been used to search newsrooms in Canada and the way subpoenas for evidence are used in the United States. One way some searches in Canada resemble subpoenas is that media outlets are notified of the search in advance. In the latest use of search warrants on media premises, Dennis Robinson, picture editor at *The Globe and Mail*, says he was told weeks before the search that law enforcement would be coming for negatives from the rampage that followed the King verdict.⁶²

In addition to advance notice, media outlets in Canada are sometimes given the opportunity to request that information be sealed -- leading to a sort of due process. The search warrant issued to *The Toronto Star* for photos from the recent rampage following the King verdict allowed *The Star* 14 days to protest the search warrant. The film was sealed in envelopes and filed with the clerk of the Ontario court.⁶³

In *CBC v. Lessard* concern was shown for the manner in which a search of media premises should be carried out. Justice Claire L'Heureaux-Dube' cited a ruling in *Descoteaux v. Mierzwinski*, a case that concerned the use of search warrants to obtain evidence on the premises of a law firm. The ruling was that conditions as

to the manner in which a search will be executed can be imposed by a justice of the peace. In *CBC v. Lessard*, L'Heureaux-Dube' added that special considerations for the media are relevant.⁶⁴ If a media organization claims that confidential information is contained on films or videotapes, it is simple enough for a representative of that media organization to request that the film be sealed in an envelope until a hearing can be held to determine the validity of its claim.⁶⁵ By sealing the information until a hearing can be held, an after-the-fact due process is guaranteed.

In addition to a sort of due process and fair warning, when media outlets -- given warning and the knowledge they can request that seized items be sealed until a hearing -- cooperate and provide the sought for materials, the intrusive nature of a search is avoided.

The Law Reform Commission of Canada even set forth an ask-first recommendation similar to the subpoena-first rules in The Privacy Protection Act.⁶⁶

Our Recommendation 38 would oblige the police, at the outset of their search to request that the specified objects of seizure be produced; only if this request were met with a refusal, or if there were reasonable grounds to believe that the delay entailed in a request would result in the loss or destruction of objects of seizure, would the police be authorized to execute their warrant in the usual manner.⁶⁷

So even though search warrants seem to be a more intrusive means of obtaining information, in Canada an attempt is made to execute search warrants in a manner that makes them resemble the way subpoenas are used in the U.S.

CONCLUSION

Even though law enforcement agents in the United States sought to obtain photographs and videotapes of individuals and groups involved in incidents following the King verdict through the use of subpoenas, the four exceptions for obtaining "documentary materials"⁶⁸ in the Privacy Protection Act leave open the possibility that search warrants may be used to search media premises for photographic evidence. Soon after the passage of the Privacy Protection Act, critics questioned how much protection it would really provide.

The statute's failure to define the "probable cause" standard of the search warrant issuance procedure may reduce its effectiveness in preventing newsroom searches. Further, the vague and overly broad terms of the Act's exemptions allow sufficient latitude for law-enforcement officers and magistrates to subjectively construe them to permit third-party searches of news organizations.⁶⁹

A quick perusal of *The NEWS Media and the Law* shows that, despite the enactment of The Privacy Protection Act law enforcement officers have continued to seek to obtain evidence from journalists through the use of search warrants. However, in most cases, officials have been forced to return seized items.⁷⁰ Survey responses from photojournalists showing they are five times as likely to have received a subpoena as to have faced search warrants⁷¹ suggest that the "subpoena first" rule has carried some weight since the enactment of The Privacy Protection Act.

Three of the eight Toronto news organizations served search warrants for photographic evidence following the King verdict -- *The Toronto Globe and Mail*, the CBC and CTV -- contested their validity. On October 23, 1992 an Ontario judge ruled the warrants were valid.⁷²

According to Stuart Robertson, an attorney for the law firm that represented *The Globe and Mail*, there was nothing in the affidavit to show that evidence of crimes would be on any of the negatives or videotapes. But the judge ruled that since there were reasonable grounds to believe news photographers were in the area when the rampage occurred, there were reasonable grounds to believe that they might have taken photographs from which identification of criminals might be made. Robertson expressed a concern about the "Neanderthal logic" of a test that allows the use of a search warrant to seize photographic evidence from media outlets **whenever** the media is believed to have been at the scene of a crime.⁷³

Robertson said that the Canadian media have not made any move that he knows of to lobby for legislative relief⁷⁴ from the use of search warrants on media premises. The media lobbying infrastructure in Canada is not as strong as in the U.S. According to Robertson, Canadians "...are not as sanguine as you rowdy Americans." But he added that given the right set of facts members of the Canadian media may become concerned. Neither of the recent Supreme Court cases nor the recent searches of Toronto news organizations for negatives and videotapes involved

confidentiality. Robertson believes that given a case involving confidentiality, the media may be willing to fight.⁷⁵

Opinions written in the latest Canadian Supreme Court decisions leave open the possibility that a case involving confidentiality might be decided in favor of the media outlet seeking to quash the search warrant. Two concurring opinions suggest that had confidentiality been at issue in these cases they might have decided in favor of the media outlets seeking to quash the warrants. Justice LaForest writing a concurring opinion in *CBC v. Lessard* wrote that "The situation might be different if the press had made an undertaking to edit the film so that no identities would be revealed, or had promised confidentiality."⁷⁶ L'Heureaux-Dube' also writing a separate concurring opinion in *CBC v. Lessard* wrote:

I wish to make clear at the outset that my reasons address only the specific facts of this case since other sets of circumstances may warrant different considerations. Here, the material which was the object of the search warrant consisted of films and photographs of a particular event of which no notion of confidentiality was attached or implied.⁷⁷

In addition to direct concerns about the issue of confidentiality expressed in the two concurring opinions, the majority opinion, signed by four justices on the court, points out the "the crucial factor" in *CBC v. Lessard* "is that, prior to the application for the (search) warrant, the media had broadcast portions of the videotape depicting the commission of a crime..."⁷⁸ I would suggest that given a case in which confidentiality is an issue and the information being sought has

not been broadcast or published, the Canadian Supreme Court is likely to reassert guidelines similar to the alternative source guidelines in the *Pacific Press* case.⁷⁹

While my suggestion provides reason for hope that search warrant use on media premises will be limited by the Canadian Supreme Court in the future, it seems likely these limits will help Canadian journalists wishing to maintain confidentiality of sources but not those who wish to prevent the appearance of being an arm of the law. It provides little hope for journalists (photojournalists in particular) who have information about a crime but who have not promised confidentiality to a source. Unless Canadian law is changed to allow the use of subpoenas for purely investigatory purposes, the best photojournalists in Canada can hope for is that law enforcement agencies in Canada will continue to make the execution of search warrants resemble the use of subpoenas in the U.S.⁸⁰

Endnotes

1. "Prosecutors Subpoena Media for Riot Photos," *The News Media & The Law*, (Summer 1992):16.
2. Gay Abbate, "Globe Surrenders Pictures to Police," *The Toronto Globe and Mail*, 28 July 1992, p. A6, col. 1.
3. *Canadian Broadcasting Corporation v. Lessard* [1991] 3 S.C.R. 454.
4. *Zurcher v. Stanford Daily*, (1978) 436 U.S. 547.
5. *Pacific Press v. The Queen*, (1977), 38 C.R.N.S. 295 (B.C. S.C.) 295.
6. *Branzburg v. Hayes* (1972) 408 U.S. 681.
7. *CBC v. Lessard* [1991] 3 S.C.R. 429.
8. Full text of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
9. Section 2 of the Charter: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association."
10. *CBC v Lessard* [1991] 3 S.C.R. 423.
11. Ralph Holsinger, *Media Law* (New York: Random House, 1987), 256.
12. As quoted in "News Photographers Are Not Evidence-Gatherers," *News Photographer*, June 1992, 25.
13. *Ibid.*, 25.
14. Bill Kendrick, "No Easy Answers," *Bulletin*, Oct./Nov. 1991, 15.
15. Stephen Hurlbut, "No Easy Answers," *Bulletin*, Oct./Nov. 1991, 14.
16. *Ibid.*
17. Seymour Martin Lipset, *Continental Divide* (New York: Routledge, 1990):101.

18. Ralph Holsinger, *Media Law* (New York: Random House, 1987), 276.
19. *Zurcher v. Stanford Daily*, (1978) 436 U.S. 550-551.
20. *Ibid.*, 552-553.
21. The decision was five to three in favor of allowing the search warrant. Justice William Brennan did not participate in the decision.
22. 436 U.S. 554.
23. *Ibid.*, 559.
24. *Ibid.*, 565.
Two separate dissenting opinions were written in this case. Justice John Paul Stevens dissented on the grounds that all innocent third parties with evidence of a crime should be issued subpoenas rather than searched unless there was reason to believe they would destroy the evidence. (436 U.S. 551-552.) Justice Potter Stewart, joined by Justice Thurgood Marshall, expressed the opinion that newsroom searches, such as those in the *Stanford Daily* newsroom, infringed on the First Amendment guarantee of a free press. (436 U.S. 571.)
25. *Pacific Press v. The Queen*, (1977), 38 C.R.N.S. 295 (B.C. S.C.). 297.
26. *Ibid.*, 298.
27. *Ibid.*, 298.
28. *Ibid.*, 305.
29. Alan Grant, "Criminal Investigation," in *The Media the Courts and the Charter*, ed. by Philip Anisman and Allen M. Linden, (Carswell: Publisher, 1986):273.
30. *Ibid.*, 273.
31. *Canadian Broadcasting v. Lessard*, [1991] 3 S.C.R. 454.
32. Stuart Robertson, telephone conversation with author, 27 Nov. 1992. Robertson is an attorney with Paterson MacDougall -- the law firm that represented *The Toronto Globe and Mail* in the recent search warrant case arising from the rampage following the King verdict.
33. *Democratic National Committee v. McCord* (1973), F.Supp. 1394.
34. *Ibid.*, 304.

35. Don R. Pember, *Mass Media Law* (Dubuque, Iowa: University of Washington, 1977):299-300.

36. Ralph Holsinger, *Media Law* (New York: Random House, 1987):258. Justice Potter Stewart dissenting in *Branzburg v. Hayes* set forth a three-part test that generally comes into play when a court is asked to quash a subpoena. Stewart wrote on page 743 of the *Branzburg* decision that when a journalist is compelled to appear before a grand jury and reveal confidences, the government must show three things: (1) probable cause to believe the journalist has information relevant to some specific violation of the law; (2) the information cannot be obtained by alternative means and (3) a compelling and overriding interest in the information. The Canadian "alternative source" guideline also resembles one of the guidelines the U.S. Justice Department has established for issuing subpoenas to journalists. That Justice Department guideline states that a subpoena should be used to seek information that is generally not available from other sources.

37. *CBC v. Lessard*, [1991] 3 S.C.R. 421 and *CBC v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459.

38. 436 U.S. 567.

39. An editorial titled "The Right to Rummage" published on June 1, 1978 in *The Washington Post* read as follows:

The Supreme Court's decision upholding the power of government to search a newspaper office for documentary evidence of someone else's crime is a staggering blow to the freedom of the press. What is more, the impact will be almost as heavy on the rights of all citizens.

Editorials condemning the decision also appeared in *The New York Times*, *The Boston Globe* and the *Wall Street Journal*. Media representatives testified in Congressional hearings when the House and Senate were trying to pass legislative relief. (436 U.S., 484.)

40. According to Lynn K. Warren in an article titled "Legislative Response to *Zurcher v. Stanford Daily*," published in the *Pepperdine Law Review* 9 (1981):157, the first reaction of legislators was to introduce "third-party bills." But constitutional and policy questions about their authority to impose law enforcement procedures on the states and the support of the Justice Department for a First Amendment bill shifted their support to a bill with a less inclusive scope of direct protection. (Senate Conf. Rep. No. 874, 96th Cong., 2d Sess. (1980) p. 18.)

41. Dwight L. Teeter, Jr. and S. Griffin Singer, "Search Warrants in Newsrooms; Some Aspects of The Impact of *Zurcher v. The Stanford Daily*," *Kentucky Law Journal* 67 (1978-79):862.

42. The Privacy Protection Act of 1980, 42 U.S.C. 2000aa-11(a).

43. *Ibid.*, 2000aa(a).
44. *Ibid.*, 2000aa-11(a).
45. *Ibid.*, 2000aa(b)(1) to 2000aa(b)(4).
46. In 1986 Alan Grant noted that he knew of no cases regarding the use of search warrants on media premises that had come before a court since the Charter had become law. Alan Grant, "Criminal Investigation," in *The Media the Courts and the Charter*, ed. by Philip Anisman and Allen M. Linden (Carswell: Publisher, 1986): 278.
47. *Ibid.*, 281.
48. *CBC v. New Brunswick*, [1991] 3 S.C.R. 464-466.
49. *CBC v. Lessard*, [1991] 3 S.C.R. 421-422.
50. *CBC v Lessard* [1991] 3 S.C.R., 422.
51. *Canadian Broadcasting Corporation v. New Brunswick*, [1991] 3 S.C.R., 467-468.
52. 436 U.S. 563.
53. *Zurcher v. Stanford Daily* is cited in *Canadian Broadcasting Corporation v. New Brunswick*, [1991] 3 S.C.R., 479-480.
54. *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 S.C.R., 433.
55. *Canadian Broadcasting v. Lessard*, [1991] 3 S.C.R., 444 .
56. *Canadian Broadcasting v. New Brunswick*, [1991] 3 S.C.R., 478.
57. *Canadian Broadcasting Corporation v. News Brunswick*, [1991] 3 S.C.R. 481-482. Also referred to in the companion appeal *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 S.C.R. 445. These are the other eight factors Justice Cory says should be considered when issuing a warrant to search the premises of a news organization: 1) all requirements of s. 487(1)(b) of the *Criminal Code* must be met; 2) when trying to decide whether to issue a warrant a justice should consider all circumstances; 3) the justice should strive for a decision that balances the competing interests of the state in investigating and prosecuting crimes and the right to privacy of the news media in gathering and disseminating the news; 4) the affidavit supporting the application must have sufficient detail for the justice to be able to exercise proper discretion in issuing the warrant; ... 6) if all or even part of the information being sought has been disseminated by the media, this should be considered as favoring the issuance of a warrant; 7)

if a justice decides that a warrant should be issued to search on the premises of a news organization then consideration should be given to steps that can be taken to ensure that publication or dissemination of the news will not be impeded; 8) if, after a warrant has been issued, it is discovered that pertinent information was not included in the affidavit, the warrant may be declared invalid; 9) also, if the search is conducted in an unreasonable manner, the search may be rendered invalid.

58. *Canadian Broadcasting Corporation v. New Brunswick*, [1991] 3 S.C.R., 481. Factor number 5) "although it is not a constitutional requirement, the affidavit material should ordinarily disclose whether there are alternative sources from which information may reasonably be obtained and, if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted;"

59. This is similar to the Fourth Amendment constitutional protection provided in the U.S. Bill of Rights that says: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. Details concerning searches in Canada are set forth in *The Criminal Code* section 487.

60. Dwight L. Teeter Jr. and S. Griffin Singer, "Search Warrants in Newsrooms: Some Aspects of The Impact of *Zurcher v. The Stanford Daily*," *Kentucky Law Journal* 67 (1978-79):859-860.

61. David Morrison, "The Theory of Probable Cause and Searches of Innocent Persons: The Fourth Amendment and *Stanford Daily*", *UCLA Law Review* 25 (1978):1483.

62. Dennis Robinson, telephone conversation with author, 22 October 1992.

63. Michael Tenzen, "Police Seize Media Videos, Photos for Yonge St. Riot Investigation," *The Toronto Star*, 28 July 1992, A6.

64. *CBC v. Lessard*, [1991] 3 S.C.R. 438.

65. *Ibid.*, 432.

66. The Privacy Protection Act of 1980, 42 U.S.C. 2000 aa(b)4.

67. Law Reform Commission of Canada, Working Paper 30, Police Powers Search and Seizure in Criminal Law Enforcement, 1983.

68. The four exceptions under which "documentary materials" may be seized by search warrant are: 1) if the person who has the materials is a suspect in the crime to which the materials relate; 2) if seizure of the materials is required to prevent death or serious bodily injury; 3) if giving notice pursuant to a subpoena would likely result in the destruction, alteration, or concealment of the materials; or 4) if the materials have not been produced in response to a subpoena and (a) all appeals have been exhausted; or (b) it is believed that a continued reliance on the subpoena process would delay the investigation or trial to the point of threatening the interests of justice. - The Privacy Protection Act of 1980, 42 U.S.C. 2000aa (b) (1) to 2000aa (b) (4).

69. Tony Atwater, "Newsroom Searches: Is 'Probable Cause' Still in Effect Despite New Law?," *Journalism Quarterly* (Spring 1983):9.

70. "Broadcasters Fight Seizures, Subpoenas," *The NEWS Media & the LAW* (Fall 1989):36-37. "FBI, Police Invade Newsrooms," *The NEWS Media & the LAW* (Fall 1988):4-5. "Sheriff Raids KESQ, Seizes Videotape," *The NEWS Media & the LAW* (Summer 1988):50. A study of how effective The Privacy Protection Act has been able to protect journalists from search and seizure operations would make a significant contribution to media law knowledge. Such a study is beyond the scope of this paper, however.

71. Michael Sherer, "Photojournalists and Their Encounters with the Law," *Journalism Quarterly* 64 (1987):501.

72. "Search Warrants Ruled Valid," *The Globe and Mail*, 24 Oct. 1992, p. A6, col. 4.

73. Stuart Robertson, telephone conversation with author, 27 November 1992.

74. Similar to The Privacy Protection Act of 1980 in the U.S.

75. *Ibid.*

76. *CBC v. Lessard*, [1991] 3 S.C.R. 431.

77. *Ibid.*, 435.

78. *Ibid.*, p. 446.

79. Or the dissenting guidelines in *CBC v Lessard*, p. 455. "...the issuance of a warrant for search and seizure of press information may be justified provided the following conditions are met: (1) The search/seizure is necessary because there are no alternative sources for the information required; (2) The importance of the search/seizure outweighs the damage to be caused by the infringement of freedom of the press; and (3) The warrant ensures

that the search/seizure interferes with the press's freedom as little as possible."

80. Discussed above in Section 4.



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**Too Much Power in the Hands
Too Few: Congress, the FCC and
the Superpower Debate, 1939-1942**

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**Too Much Power In the Hands
of Too Few: Congress, the FCC
and the Superpower Debate, 1939-1942**

Some said that during the late 1930s in Cincinnati you did not even need a radio to pick up WLW's powerful 500,000 watt signal. Farmers near the station's transmitter in Mason, just northwest of Cincinnati, said they could hear WLW programs coming from their barbed wire fences. Various instances of the station's programs coming from other metal objects were reported, and it was said that if you put a wire on a light bulb and stuck it in the ground near WLW's 831-foot tower, the bulb would light. The station even re-wired several homes near the transmitter site after owners complained that their lights stayed on even when they were turned off.¹

Whether these stories are to be believed or not, the fact is that WLW had a powerful signal. The Federal Communications Commission had granted the station's owner, Powel Crosley, Jr., a special experimental license to use ten times as much power as the regular limit of 50,000 watts. From 1934 to 1939, WLW, which had already started calling itself "The Nation's Station," was without a doubt the country's most powerful station. As other stations began lining up for "Superpower," and as Crosley consistently pushed to make his 500,000 watt license regular rather than experimental, the FCC had to make a decision. Should it authorize a series of superpower stations to operate on clear

AM broadcast channels, or should Rule 117, limiting stations to 50,000 watts, remain intact?

The social and political context of the era played an important role in the ultimate decision which took away WLW's 500,000 watt license. Franklin D. Roosevelt's New Deal was focusing attention on -- if doing little about -- the problems of monopoly control of business. Ironically, the breakup of the NBC Red and Blue networks in 1943 would be one of the few substantive accomplishments of pre-war anti-monopoly efforts. Nonetheless, in the mid to late 1930s, the rhetoric against monopolies of all types had become an important aspect of the New Deal.²

The FCC, which had just grown out of the old Federal Radio Commission in 1934, was still trying to sort out its role in the face of Congressional and presidential pressure. The call went out in both houses of Congress for an investigation of the "radio monopoly," and the FCC's role in fostering it.³ The issue of monopoly control of radio was especially salient, for it encompassed two separate issues. Concern about the business aspects of broadcasting were accompanied by the additional aspect of information control. Government licenses for radio frequencies not only gave broadcasters the ability to make money using the "public" airwaves, they also allowed a relatively small number of people to have unprecedented power to reach a large audience. The debate over superpower would address both issues.

The superpower issue is perhaps the most cogent example of how the FCC was pressured by Congress and the president during its

early life. The attitude among politicians that the FCC was not doing an adequate job of controlling the radio industry would culminate years later in Representative Eugene Cox of Georgia's investigation of the commission, but the roots of that attitude can be found in the superpower era.⁴ While the commission's Report on Chain Broadcasting in 1941 has been seen as one result of Congressional and presidential influence on the FCC, this paper shows that the denial of superpower was an even earlier result. The tradition of Congressional and presidential maneuvering to exert pressure on the FCC, which reached its peak in the 1940s, began in the 1930s.⁵ Superpower was one of the first battlegrounds.

The Origins of Superpower

The term "superpower" is perhaps a misnomer, as it has meant different things at different times. Crosley pointed out that at various times during radio's development, 50,000, 25,000, and even 10,000 watts had been considered "superpower."⁶ However, once the Federal Radio Commission raised the maximum power for clear channel stations from 25,000 to 50,000 watts in 1930, the term "superpower" came to mean anything above that limit.⁷

As transmitter technology evolved throughout the 1920s and 1930s, increases in power became possible. The FCC welcomed these power increases to a point as they helped increase coverage area, reduce static, and improve rural coverage. The Institute of Radio Engineers in 1933 echoed the sentiments of other industry groups when it issued a report calling for higher

power to improve rural coverage. "There appears to be no reason why greatly increased power should not now be permitted to suitably equipped and appropriately located or relocated stations holding clear channel assignments," the report said.⁸ The Federal Radio Commission had already authorized KDKA in Pittsburgh to experiment with 400,000 watts during the early morning hours beginning in the fall of 1930, and WGY in Schenectady, New York had received an experimental license as W2XAG to use 500,000 watts on an intermittent basis.⁹

Superpower stations were operating in Europe in the early 1930s, and by 1933 the Mexican government had issued three 500,000-watt licenses, including one to John R. Brinkley, the infamous "Goat Gland Doctor," for station XER in Villa Acuna. Border stations such as XER and XENT caused interference for U.S. stations, and as the North American Radio Conference convened in Mexico City in the summer of 1933, doing something about the interference Mexican border stations were causing was high on the U.S. delegation's agenda. Some Latin American countries were said to be studying superpower as a way to beam advertisements for coffee, fruits and other exports into the United States, despite the contention of some U.S. engineers that the cost of building a 500,000-watt station would equal most Latin American countries' gross national product. The use of superpower by other countries, however, led many to assume that the FCC would soon approve regular superpower for U.S. stations as well.¹⁰

WLW had always been a pioneer in higher power broadcasting.

Crosley, who manufactured radios and other appliances in his Cincinnati plant, began his broadcasting career in April, 1921, with experimental station 8CR's 20-watt transmitter. As Crosley sat one night playing "Song of India" over and over on his station, he received a call from Troy, Ohio, about 75 miles away. Crosley's appetite for long-distance broadcasting had been whetted, and his station became WLW in 1922. He pioneered the use of 500 watts and 5,000 watts, and was probably the first station to use 50,000 watts on a regular basis.¹¹ On June 7, 1932, the FRC granted him a construction permit for experimental station W8XO, allowing nighttime operation at 100,000 to 500,000 watts on WLW's frequency of 700 kHz. The FRC granted the license to "permit development of more powerful transmitters for study of service area, fading, interference, and increased service to the public at increased powers."¹²

Crosley's interest in superpower was twofold. WLW's additional range would mean higher advertising revenues, and would also help sell Crosley radios. In the tradition of the "Harko," which he began manufacturing at about the same time he started broadcasting on 8CR, Crosley radios were of a low-cost, low-sensitivity design. In Crosley's eyes, even if owners of his radios could not pick up as many stations as owners of more expensive models, at least they would be able to pick up WLW. Clearly, having 500,000 watts would help make that possible. A man who had made his early fortune during World War I selling automobile radiator caps with flag-holders, Crosley was always

eager to grasp a business opportunity.¹³

Crosley commissioned RCA to build a new transmitter for the experimental station, and it was completed by February, 1934. For his investment of about \$400,000, Crosley got an advanced transmitter with 20 six-foot-high tubes and an 88,000 pound audio transformer. To keep the unit at a low enough operating temperature required circulating 1200 gallons of water a minute around the tubes. Crosley estimated that his coverage would grow 25 times, and bragged that the station "might be picked up anywhere in the world."¹⁴

Crosley tested the transmitter throughout the winter months of 1934, and sporadically broadcast during the daytime as well. On April 3, he applied to the FCC for special experimental authorization to operate WLW full-time using WSXO's 500 kilowatt transmitter. The FCC granted the authorization on April 17, 1934, allowing WLW to use 500 kilowatts until August of the same year.¹⁵ Crosley had successfully turned his experiments into full-time authorization to operate his radio station at a power ten times as high as any other in the country.

On Wednesday, May 2, Crosley formally dedicated the "new" WLW. He called the new 500,000-watt transmitter "the greatest static eliminator that we know of," and cited the station's ability to serve rural listeners:

It has been our ambition to increase WLW's power from time to time as rapidly as technical obstacles could be overcome in order to bring the voice of this station to those in remote parts of the country who might experience difficulty in getting good reception because of interference of static and other atmospheric conditions.¹⁶

President Roosevelt pressed a gold telegraph key on his desk, ostensibly to power up the new transmitter. In reality, however, the new power did not start until the tubes had taken a few minutes to warm up. Roosevelt joined others such as NBC's David Sarnoff, Guglielmo Marconi and Albert Einstein in congratulating Crosley:

I have just pressed the key to formally open Station WLW. . . . And may I take this opportunity to congratulate you and your staff upon the inauguration of this new radio service. I feel certain that WLW will give the people of our country and those of our neighbor nations a service managed and conducted for the greater good of all.¹⁷

Superpower at Issue

Crosley's experimental license was extended until February 1935, but when he reapplied for an extension at the beginning of 1935, the FCC informed him that there was a problem. Canadian officials had informed the State Department that WLW's signal was interfering with Toronto station CFRB's signal. The Canadian Legation in Washington wrote a letter describing the situation:

During the latter part of September [1934], with the return of normal fall and winter conditions, the interference (between WLW and CFRB) became very serious. . . . [W]ith station WLW operating with 500 kilowatts, the service area of the Toronto station was reduced to little more than the city of Toronto itself, and 50 miles out the signals from Toronto were completely obliterated.¹⁸

The commission said that Crosley would have to do something about the interference if the license was to be extended. At first Crosley balked, but eventually agreed to install a directional antenna. WOR in Newark also briefly protested in 1935 that WLW's signals were causing interference, but withdrew its complaint.¹⁹

By this time, superpower was but one of the issues being studied by the FCC as a way to improve the use of the AM broadcast band. Also at issue were the 40 clear channels, frequencies on which only one station in the entire country could operate, created by the Federal Radio Commission's 1928 allocations. It was known that the commission was studying the possibility of reducing the number of clear channels, or perhaps practicing "east-west duplication" by putting one station from each coast on a single clear channel. 13 clear channel stations petitioned the FCC to conduct a postcard survey of listening habits which the commission undertook during the first five months of 1935.²⁰ 116,000 questionnaires were sent out, asking respondents about their listening habits. "Name your favorite radio station by call letters in order of your preference," listeners were instructed.²¹ More than 32,000 of the questionnaires were returned, and the results showed that 76.3 percent of listeners relied primarily on a clear channel station for their radio entertainment. "The general conclusion," the report said, "was that the average rural listener is dependent upon secondary service from clear channel stations, frequently hundreds of miles away."²²

The survey also showed that WLW had particularly impressive coverage of the rural population. The station was the first choice of listeners in 13 states from Michigan to Florida and from Virginia to Arkansas. In six other states, among them Texas, WLW was the second overall choice. The survey

demonstrated, according to the commission, "the effectiveness of the use of high power in extending the coverage and rendering increased service to rural listeners."²³ The commission also reported that the WLW experiment was providing valuable information about the use of high power to improve rural coverage.²⁴

In June, 1936, the repeal of the so-called Davis Amendment opened up new options for the FCC in allocation and station power. Added to the Communications Act of 1927, which created the Federal Radio Commission, the amendment forced the FRC -- and later the FCC -- to distribute the number of stations, air time and power equally among five zones of the country. Originally intended to prevent a concentration of stations in the populous northeast, by 1936 the Davis Amendment had well outlived its usefulness. The repeal of the amendment allowed the FCC to have a freer hand in considering allocation matters.²⁵

The FCC decided to schedule a series of hearings before its Broadcast Division to collect information on issues such as clear channels and superpower. By the middle of 1936, 14 stations had applied for superpower licenses, and Crosley continued to push for approval of a permanent 500,000 watt license.²⁶ The notice of the hearing, scheduled to begin October 5, 1935, called for information with respect to allocation "not only in its engineering but also in its corollary social and economic phases."²⁷ In anticipation of the hearings, two groups of stations formed to present information to the FCC. The Clear

Channel Group brought together clear channel stations that favored continuation of the present allocation of clear channels and approval of superpower for its members, while the National Association of Regional Broadcasting Stations (NARBS) was in favor of granting power increases to regional stations (which had power limits well below 50 kilowatts) but opposed clear channels and superpower.²⁸

As the hearings began, most observers agreed that the focal point was superpower. Broadcasting magazine called it "the knottiest problem" before the commission.²⁹ In 13 days of hearings, the Broadcast Division heard testimony totalling over a half-million words from 45 witnesses.³⁰ As might be expected, a clear-cut consensus did not emerge, as various groups presented conflicting sets of data.

The most controversial portion of the hearings came when Powel Crosley himself testified. Commissioner George Henry Payne, a member of the Telegraph Division who had alerted newspaper men to the possibility of "hot news" with Crosley on the stand, proceeded to grill WLW's owner about his practices in operating the station. A progressive Republican and former Bull Mooser, Payne relished the chance to go head-to-head with a man asking for what seemed in Payne's eyes to be a government-sanctioned monopoly. Payne alleged that Crosley refused to accept advertising from rival products of those manufactured by Crosley concerns, that Crosley instructed the station's news department not to publicize labor disputes, and that he refused

to allow minority groups on the station.³¹ Some of the accusations (such as Crosley's order on labor disputes) were true,³² but Payne's militancy angered other commissioners and observers. Broadcasting magazine called Payne's action "the most brazen piece of political demagoguery we have ever seen perpetrated at a public hearing on radio."³³ Despite the outrage some felt at Payne's display, he expressed a concern that would ultimately lead to superpower's downfall: the concentration of power in the hands of a few owners who -- like Crosley -- may be reluctant to let other views be heard.

Payne continued his own investigation of Crosley's practices after the hearings concluded, and continued to seek as much publicity as possible in doing so. When Payne sent Crosley a letter requesting financial data on the station, he simultaneously released copies of the letter to the press. Crosley responded in kind, releasing his reply to the press as well. Payne charged that Crosley's use of 500,000 watts was not a scientific experiment, but rather "a means of earning unusual commercial profits." Others, too, began to take notice that Crosley, under the guise of experimentation, was using WLW's massive coverage area as a reason to raise prices charged for advertising on the station.³⁴

J. O. Maland of station WHO in Des Moines also testified for the Clear Channel Group, trying to assuage fears that superpower stations would be economically detrimental to regional and local outlets. He said that superpower stations would actually benefit

locals, as they would "drive" local businesses to advertise on local and regional stations. In effect, Maland said that superpower and local stations would be non-competitive; superpower stations would merely open up a new outlet for advertisers who wanted to reach an entire region or a vast rural audience. "[T]he advertiser who wants regional coverage in the sense of reaching rural and small town population will not use a regional or local station in any event," Maland said.³⁵

The regional broadcasters were principally represented by Paul D. P. Spearman, a former FCC general counsel hired by NARBS to present the group's case.³⁶ Spearman testified that if the FCC wished to improve rural coverage, local and regional stations should be granted power increases. Calling regional broadcasters the "backbone" of American broadcasting, Spearman said the FCC should ensure that their "indispensable service be safeguarded."³⁷ He also raised several questions about the validity of the commission's 1935 postcard survey, and said that 500-kilowatt stations, despite the detrimental effect they would have on regionals' ability to attract national spot advertising, would be economically impractical to operate. Hedging his bets, Spearman concluded by saying that if the FCC authorized superpower it should allow regional stations to have it too.³⁸

William S. Paley, president of CBS, urged caution on superpower, saying his network would be forced to drop "any stations which lay within the primary service area of each new superpower station." Paley, in effect, said his network would

not be able to compete for listeners with superpower outlets. Nonetheless, Paley vowed that if the FCC approved superpower, CBS would seek a full complement of superpower licenses for the stations owned by the network.³⁹ Lenox R. Lohr, president of NBC, testified that 500-kilowatt stations would be beneficial to the public, and doubted they would have any real effects on the networks. He, too, however, urged caution in granting 500-kilowatt licenses.⁴⁰ Representatives from the Radio Manufacturers Association and the Institute of Radio Engineers testified in favor of superpower, seeing it as merely a logical progression in the development of the radio art.⁴¹

While a consensus on superpower did not emerge from the hearings, most observers felt that a case had been made for at least a limited expansion of superpower stations. "All signs point to an eventual lifting on the limit of power," said Broadcasting; Business Week predicted that the Clear Channel Group was "virtually assured" of getting superpower.⁴²

The FCC's Engineering Department, given the job of analyzing the data presented at the hearings, released a preliminary report in January, 1937, and -- incredibly -- it addressed the issue of superpower very little. It did recommend a new station classification system and a reduction in clear channels from 40 to 25, but promised that a complete report on superpower would be forthcoming. Nonetheless, the report left the door for superpower approval open:

While we believe that powers in excess of 50 kw are technically sound and are in accord with scientific

progress, we recognize that social and economic factors involved in the use of 500 kw may outweigh in importance engineering considerations. . . . It is also clear to the Engineering Department that from a technical standpoint any power less than 50 kw on a clear channel is a wasteful use of such frequency on the North American continent.⁴³

The full report, released in July, 1937, was no more conclusive on superpower, but did raise doubts about a full implementation of 500,000 watt service. T. A. M. Craven, the retired Navy Lieutenant Commander who headed the Engineering Department, said that the report represented an attempt to examine radio policy from a new perspective. "Radio has developed in advance of complete understanding of its social significance," Craven said. "In considering the need for a station in any community, the paramount issue is social-economic rather than engineering."⁴⁴

"There may be a point at which competition [between superpower and regional and local stations] becomes destructive and results in impaired service to the public," the report warned, echoing Craven's remarks.⁴⁵ The Engineering Department spelled out four factors to determine superpower's feasibility: 1) The preservation of the right of station applicants to have their merits decided in relation to public interest, convenience and necessity; 2) Recognizing technical progress without fear when it can further public service; 3) Consideration of economic effects; and 4) "The necessity of determining the effect of licensing a few persons who, in combination, would have facilities capable of mass communication with the entire nation."⁴⁶

The report stressed that superpower should not be excluded

from consideration, but said that the hearings had not demonstrated a need for 500-kilowatt service. It also implied that if superpower licenses were granted, holders of such licenses would be subject to a higher level of regulation by the FCC:

Unless care were exercised in the regulation of these licensees, the possibility exists of having granted to a few people. . . the control of a system of mass communication having untold potentialities of being utilized to influence public opinion. . . . Therefore, if the Commission intends to grant any of the pending applications for superpower, it certainly should impose limitations on the use of such a facility so as to insure its operation in the interest of the public from the broadest standpoint.⁴⁷

At the end of 1937, WLW was still using 500,000 watts on an experimental license, 15 other stations were lined up waiting for superpower licenses, and the FCC seemed no closer to reaching a decision on the issue. The sixteen stations that wanted to become permanent superpower broadcasters were not alone in their growing frustration at the FCC's indecision.

Pressure From the Outside: Congress and the President

The same week the Engineering Department issued its preliminary report on the allocation hearings, President Roosevelt recommended to Congress that the FCC be absorbed by the Department of Commerce. Agencies such as the FCC, a presidential committee said, were "a headless 'fourth branch' of government," which could be controlled neither by Congress, the president nor the courts.⁴⁸

Such talk found an eager audience in Congress, as both the

House of Representatives and Senate had been looking at the FCC with a suspicious eye since the commission's inception. An almost continuous series of bills had been introduced in both Houses calling for investigations of the FCC, the "radio monopoly," or both. At one time in 1937, no less than four resolutions were pending to investigate the control of radio.⁴⁹ The press had picked up on the suspicions about the FCC as well. An article in Saturday Evening Post called it "one of the strangest, and, potentially, most dangerous of Washington's thriving bureaucracies." The Nation speculated that if even half the rumors about FCC malpractice were true, it was "one of the most corrupt federal agencies in history." Business Week predicted that an inquiry of the FCC would find "many a delicious tidbit of scandal to chew upon."⁵⁰

Several congressmen had become especially critical of the FCC, particularly in the area of criteria for granting and allowing the sale of radio licenses. Rep. Richard B. Wigglesworth of Massachusetts urged action:

[H]ere is a monopoly of the most dangerous kind under the complete control of the National Government. Here is a monopoly which may be fairly said to have been directly fostered by that Government. Surely the evils of this monopoly should be attacked and eliminated at the earliest possible moment.⁵¹

Rep. W. D. McFarlane of Texas was also attacking what he saw as an FCC-sanctioned radio monopoly. "We have dictatorships in America," he said, "when 300 or less people have an absolute monopoly in the molding of public opinion through undisputed control of radio stations, newspapers and motion pictures."⁵²

McFarlane particularly criticized FCC "experimental" licenses -- such as the one granted to WLW -- as "not worthy of the name."⁵³ He speculated that Crosley had secured a 500,000-watt license for WLW by "having a better knowledge of how to secure concessions apparently than some of his competitors":

I wonder sometimes whether men secure such unusual concessions because of their innate ability or because they are good-looking or because they have ways of getting things done. Just why, I think it fair to ask, has this unusual concession been handed out and continued in the hands of one of the some 700 radio licenses?⁵⁴

In the Senate, Burton K. Wheeler of Colorado was also citing the superpower situation as an example of FCC corruption. Speaking before the National Association of Broadcasters on Valentine's Day, 1938, Wheeler said superpower would not be in the public interest. "With high power," Wheeler told the audience, "a station immediately loses its local or statewide status. It has no community to serve. The nation becomes its oyster."⁵⁵

Roosevelt was able to stave off a formal investigation of the FCC -- at least temporarily -- by appointing Frank McNinch as chairman after the death of Anning S. Prall in October, 1937. McNinch, the former mayor of Charlotte and chairman of the Federal Power Commission, was instructed by Roosevelt to "clean house" at the FCC. Craven, head of the Engineering Department, was elevated to commissioner. Upon taking office, McNinch promptly did away with the commission's tripartite structure (telephone, telegraph and radio sections), and also guided the commission to a 5-1 decision against allowing the publicity-hungry Payne to participate in disbarment proceedings

against two FCC lawyers who claimed Payne was biased against them.⁵⁶

Meanwhile, plans were being studied to establish government-operated superpower stations. Hearings were held before the House Naval Affairs Committee in mid-1938 on establishing a government superpower station to fight fascist propaganda in South America, and some of Roosevelt's cabinet members were said to be studying the use of a series of superpower stations as well. The president, according to Craven, felt that if anyone should have superpower, it should be the federal government, and had asked Craven to come up with a plan whereby the government could run 6 to 8 high power stations. Craven told the president he thought that superpower licenses should be kept in the private sector.⁵⁷

The Death of Superpower

Although the FCC had resisted Crosley's overtures for a permanent superpower license, six-month extensions of the experimental license had been granted almost as a formality since 1934. However, things changed when Crosley re-applied on December 1, 1937 for an extension of the license scheduled to expire on February 1, 1938. When the application -- which had already been approved by an FCC lawyer -- crossed Payne's desk, he designated it for a hearing.⁵⁸ Crosley's old nemesis had struck again.

At about the same time Payne was setting WLW's renewal for a hearing, Crosley was dealt another blow by Commissioner Craven.

Although Craven's reports while head of the Engineering Department had been cautiously optimistic about superpower, his opinion seemed to change when he became a commissioner. "I personally believe that from an economic and social standpoint 500 kilowatts may be too much power under our scheme of broadcasting," he told the House Appropriations Subcommittee.⁵⁹ Two weeks later, Craven released a report on superpower which was equally pessimistic:

The evidence shows that while rural listeners undoubtedly would be benefitted by having broadcast service with sufficient signal intensity to override atmospheric noises . . . there is a question whether the smaller communities might, in the long run, lose their media for local self expression by radio by reason of the economic effect of super high power.⁶⁰

Craven recommended that the commission not grant any superpower licenses.

Nonetheless, the FCC scheduled two separate hearings before the newly-formed "Superpower Committee" consisting of McNinch, Craven, Payne and Norman S. Case. The first hearings would deal with superpower and clear channels in general (much like the 1936 hearings), while the second would be specifically devoted to WLW's experimental license.

Midway through the first series of hearings, however, the Senate stepped in. Senator Wheeler managed to secure adoption of a resolution recommending that broadcast stations be limited to 50,000 watts. While it did not carry the force of law, it did let the FCC know in no uncertain terms what the Senate's position was, and it was highly unlikely the commission would go against

it. The resolution noted that superpower "would tend to concentrate political, social and economic power and influence in the hands of a very small group," and therefore would be against the public interest.⁶¹

The issue of superpower for new stations had become essentially a moot point with Wheeler's resolution, but since it excluded existing superpower stations, WLW's hearing went on as scheduled. From July 18 through July 29, the FCC Superpower Committee heard testimony on whether WLW's 500,000 watt license should be renewed. Interestingly, Payne, whose decision to set WLW's application for a hearing had started the proceedings in the first place, did not ask a single question at the hearings. A week after the hearings concluded the FCC extended WLW's superpower license until February 1, 1939 on "express condition that it is subject to whatever action may be taken by the commission."⁶²

In October, the Superpower Committee had reached a decision. Crosley's application for an extension of WLW's 500,000 watt experimental license, the committee said, should be denied on three grounds. First, the committee said that WLW did not need 500,000 watts to do its proposed antenna experiments; second, the station was causing interference with WOR in Newark; and finally, WLW's massive coverage area was making it hard for rural and regional stations to secure ad revenue.⁶³ Despite oral testimony by Crosley counsel before the full commission in late December, the FCC -- minus Commissioner Payne, who did not sit in

on the decision -- went along with the Superpower committee's findings in February, 1939.⁶⁴ The commission's refusal to renew WLW's license, said Business Week magazine, was the only way the FCC could "avoid a horrid fate" at the hands of Congress.⁶⁵ Interestingly, the FCC's rejection did not echo the reasons given by the Superpower Committee. Rather, the commission merely said that the experiments WLW had been commissioned to carry out could be done without daytime superpower. The report reminded Crosley that their experimental agreement said that the license could "be terminated by the Commission at any time without advance notice." By rejecting the WLW license on these relatively simple grounds, the commission no longer had to face challenges from WLW on the economic or social data that had been gathered.⁶⁶

The FCC refused a WLW request for rehearing, noting that the station's request gave little reason for reopening the matter:

[T]he petition is wholly defective and in effect is no more than an expression of the petitioner's disagreement with the Commission's action, without suggesting to the Commission any grounds upon which it could reach any other conclusions.⁶⁷

Crosley also appealed to the United States Court of Appeals, which ruled against him as well. The Court's decision chided Crosley for insisting on "a continuation of rights in disregard of its obligations to surrender them whenever the commission declared they were no longer necessary for the purpose for which they were granted."⁶⁸ Crosley also tried to get the Supreme Court to hear the case, but it refused. WLW returned to 50,000 watts on March 1, 1939.

As expected in the face of Senate Resolution 294, the FCC also rejected the other pending superpower applications. In a report released in April, 1939, the commission said the possible benefits of superpower did not justify taking "speculative risks."⁶⁹

In defeat, Powel Crosley, Jr. had a different perspective on superpower. Although he had bragged in the past of WLW's ability to "cover the world," he now downplayed superpower:

The power output is only 680 horsepower. It is not as some would have us believe, a high-power trust, but it involves . . . less than the power produced in eight Ford, Chevrolet or Plymouth engines running wide open. The so-called "superpower" is a myth.⁷⁰

The Cincinnati station was allowed to continue using 500,000 watts at night under the experimental call sign W8XO, as the FCC had merely revoked the daytime superpower license for WLW. During World War II, W8XO continued high-power experiments, sometimes with as much as 750,000 watts. However, when Crosley requested permission to permanently increase W8XO's power to 750,000 watts in 1942, the commission refused, and, doubting that W8XO's 500,000 watt broadcasts were any longer in the public interest, suspended its license effective at the beginning of 1943.⁷¹

Conclusion

The quest for superpower did not end with the FCC's decision against granting superpower licenses in 1939. After World War II, the debate continued over whether a series of superpower stations would be the best way to bring radio to isolated rural

areas. In 1962, as the FCC was again studying superpower, the House of Representatives passed Resolution 714, which contradicted the Senate's 1939 resolution. The House Committee on Interstate Commerce said the FCC should have "unfettered discretion" in deciding the best way to provide maximum rural coverage, even if that meant granting licenses in excess of 50,000 watts. Four stations -- including WLW -- were already in line for superpower licenses.⁷²

Naturally, superpower stations could only operate on clear channels -- frequencies a station would have all to itself. But by the time the House passed Resolution 714, the trend toward breaking down clear channels which had begun in the 1930s was dominant. The FCC decided to cut the number of clear channels in half, leaving only 12. Rural coverage, the commission decided, could be best brought about by increasing the number of stations on each frequency, not by increasing the power of existing clear channel stations.

The superpower debate of the 1930s was important, though, not only because it foreshadowed the policy to come, but because of the way that policy came to be. Even with the FCC's 1939 decision, the door to superpower was left open for future implementation. However, the Senate's resolution against power over 50,000 watts meant that the commission risked further political upheaval if it approved superpower. The political climate of the late 1930s -- in which the rhetoric was thoroughly anti-monopoly and often anti-FCC -- gave the commission no other

choice. As a flood of bills in Congress threatened to investigate the FCC, or worse yet dismantle it, there was no way superpower could be approved. Despite Crosley's expressed aims to bring the magic of radio to listeners who could not currently enjoy it, superpower stations would have made men like him too powerful, at least in the eyes of Congress.

When WLW shut down its superpower transmitter for the last time, it brought to an end not only the high-water mark of AM broadcasting power, but in some ways the AM art as a whole. After the war, television and FM would take over. Powel Crosley's experimental W8XO license represented the last time that AM's technical accomplishments would not be overshadowed by other types of broadcasting. While the superpower debate continued, the Senate's 1939 resolution had already doomed its best chance for becoming policy. WLW is, and probably will remain, the only AM broadcast station which used such high power for such a long time. But in the end, experimental station W8XO turned out to be just that: an experiment.

NOTES

1. See "Radio Waves Played Tricks in WLW Super-Power Days," Cincinnati Enquirer, August 22, 1948, 10; Lawrence Wilson Lichty, The Nation's Station: A History of Radio Station WLW, (Ph.D. Diss., Ohio State University, 1964), 248; and "QRX," Time, 31 (May 23, 1938): 25.
2. Ellis W. Hawley, The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence (Princeton, NJ: Princeton University Press, 1966), 454.
3. Carl J. Friedrich and Evelyn Sternberg, "Congress and the Control of Radio Broadcasting, Part I," The American Political Science Review 37 (October 1943): 803-5.
4. Erik Barnouw, The Golden Web: A History of Broadcasting in the United States, Volume II -- 1933 to 1953 (New York: Oxford University Press, 1968), 174-9.
5. See Joon-Mann Kang, "Franklin D. Roosevelt and James L. Fly: The Politics of Broadcast Regulation, 1941-1944," Journal of American Culture 10 (Summer 1987): 23-33; Clement Imhoff, "Clifford J. Durr and the Loyalty Question," Journal of American Culture 12 (Fall 1989): 47-54; Robert W. McChesney, "The Battle for the U. S. Airwaves, 1928-1955," Journal of Communication 40 (Autumn 1990): 29-57; Christopher H. Sterling and John M. Kittross, Stay Tuned: A Concise History of American Broadcasting, 2nd ed. (Belmont, CA: Wadsworth Publishing Company, 1990), 190; and Barnouw, The Golden Web: A History of Broadcasting in the United States, Volume II -- 1933 to 1953, 174-181.
6. Lichty, The Nation's Station: A History of Radio Station WLW, 275.
7. Murray Edelman, The Licensing of Radio Services in the United States, 1927 to 1947 (Urbana, IL: University of Illinois Press, 1950), 42.
8. "Radio Engineers Favor Clear Channel Retention With Large Power Increases," Broadcasting, 4 (March 1, 1933): 30.
9. See Lichty, The Nation's Station: A History of Radio Station WLW, 240; and "WGY, KSL Apply for 500,000 Watts," Broadcasting, 11 (October 15, 1936), 64.
10. See "Fight Radio Station on Mexican Border," New York Times, December 28, 1931; Helen B. Branyan, "Medical Charlatanism: The Goat Gland Doctor of Milford, Kansas," Journal of Popular Culture

- 25 (Summer 1991): 36; "500 kw Station Granted on U.S.-Mexican Border," Broadcasting, 5 (July 1, 1933): 9; "Mexico's Demands Break Up Wave Parley," Broadcasting, 5 (August 15, 1933): 5; "Commission Reallocation Plan May BE Determined Shortly," Broadcasting, 5 (September 1, 1933): 14; and Paul M. Segal, "Mexican Conference -- An Evaluation," Broadcasting, 5 (August 15, 1933): 6.
11. See "Cincinnati Giant on the Air: WLW 20 Years Old This Week," Newsweek, 17 (April 14, 1941): 66; and Lichty, The Nation's Station: A History of Radio Station WLW, 239, 275.
12. Federal Communications Commission, In the Matter of the Application of the Crosley Corporation, 6 FCC 798 (1939).
13. Barnouw, The Golden Web: A History of Broadcasting in the United States, Volume II -- 1933 to 1953, 131.
14. See Sol Taishoff, "WLW 500 kw Ruling Unlikely this Year," Broadcasting, 15 (August 1, 1938), 3; "RCA-Victor Given WLW 500 kw Job," Broadcasting, 4 (February 15, 1933): 8; and "Largest Radio Transmitter on Air," Literary Digest 117 (April 28, 1934): 18.
15. Federal Communications Commission, In the Matter of the Application of the Crosley Corporation, 6 FCC 798 (1939).
16. "Notables at WLW Dedication," Broadcasting, 6 (May 15, 1934): 10.
17. Ibid.
18. Federal Communications Commission, In re Application of the Crosley Corporation, 1 FCC 205 (1935).
19. Lichty, The Nation's Station: A History of Radio Station WLW, 252.
20. Federal Communications Commission, FCC Reports (Washington, D.C.: U.S. Government Printing Office, 1935), 30-1.
21. "First Analysis of Rural Listening Habits," Broadcasting, 11 (September 15, 1936): 7.
22. Federal Communications Commission, FCC Reports (Washington, D.C.: U.S. Government Printing Office, 1937), 65.
23. Ibid., 65-6.
24. Federal Communications Commission, FCC Reports (Washington, D.C.: U.S. Government Printing Office, 1936), 61.

25. See U.S. Congress, House, Committee on Interstate and Foreign Commerce, Regulation of Broadcasting: Half a Century of Government Regulation of Broadcasting and the Need for Further Legislative Action, 85th Congress, 2d Session, 1958, 17-8; Federal Communications Commission, FCC Reports (Washington, D.C.: U.S. Government Printing Office, 1936), 58; and "Davis Amendment Repeal Lifts Quota Bar," Broadcasting 10 (June 15, 1936): 13.
26. "WGY, KSL Apply for 500,000 Watts," Broadcasting 11 (October 15, 1936): 64.
27. "Whys-Hows of Reallocation Hearings," Broadcasting, 11 (August 1, 1936): 11.
28. "Station Groups Getting Ready for FCC October Hearings," Broadcasting 11 (August 15, 1936): 20.
29. Sol Taishoff, "Policy Changes, Not Reallocation Foreseen," Broadcasting 11 (October 15, 1936), 9.
30. "Gradual Increases in Station Power Seen," Broadcasting 11 (November 1, 1936), 26.
31. "Superpower a Success, says Crosley; Tilts With Payne," Broadcasting 11 (October 15, 1936): 73-4. Also see Lawrence W. Lichty, "The Impact of FRC and FCC Commissioners' Backgrounds on the Regulation of Broadcasting," Journal of Broadcasting 6 (Winter 1961-2): 100-2 for information about other "personal crusades" carried out by FCC commissioners during this time.
32. In fact, the American Civil Liberties Union had provided the FCC with copies of a memo written by Crosley which directed station personnel not to mention strikes on the air. Barnouw, The Golden Web: A History of Broadcasting in the United States, Volume II -- 1933 to 1953, 132.
33. "Strange Interlude," Broadcasting 11 (October 15, 1936): 50. Payne sued Broadcasting magazine, but later dropped the suit.
34. See "Payne Resumes Personal Investigation of Crosley in Letter Asking WLW Data," Broadcasting 13 (August 15, 1937): 9; "Crosley Letter Views Demand of Payne for Data on WLW as a Personal Matter," Broadcasting 13 (September 1, 1937): 34; and Lichty, The Nation's Station: A History of Radio Station WLW, 293.
35. Federal Communications Commission, Report on Economic and Social Data Pursuant to the Informal Hearing on Broadcasting, Docket 4063, Beginning October 5, 1936 (Washington, D.C.: U.S. Government Printing Office, 1938), 88-9.
36. "Station Groups Getting Ready for FCC October Hearings,"

Broadcasting 11 (August 15, 1936): 20.

37. Federal Communications Commission, Report on Economic and Social Data Pursuant to the Informal Hearing on Broadcasting, Docket 4063, Beginning October 5, 1936, 92.

38. Ibid., 95-6.

39. See Ibid., 101-2; and "Paley Opposes Superpower," Broadcasting 11 (October 15, 1936): 12.

40. Ibid., 98-9.

41. See "RMA for Sponsorship on Short Waves," and "IRE Favors 500 kw on Clear Channels," both in Broadcasting 11 (October 15, 1936): 58.

42. See "Joint Hearing on Superpower May Result From 500 kw Pleas," Broadcasting 10 (May 15, 1936): 16; and "That Radio Channel Plan Is Here," Business Week, January 23, 1937, 38.

43. Federal Communications Commission, Preliminary Engineering Report on Allocations, reprinted in Broadcasting 12 (January 15, 1937).

44. "Free Speech Held Vital Radio Issue," New York Times, January 24, 1938, 5:2.

45. Federal Communications Commission, Report on Economic and Social Data Pursuant to the Informal Hearing on Broadcasting, Docket 4063, Beginning October 5, 1936, 43.

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48. "FCC would Be Absorbed by Department of Commerce Under President's Plan," Broadcasting 12 (January 15, 1937): 1.

49. Friedrich and Sternberg, "Congress and the Control of Radio-Broadcasting, Part I," 810.

50. See Stanley High, "Not-So-Free-Air," Saturday Evening Post 211 (February 11, 1939): 73; "Scandal in the Air," The Nation 144 (April 27, 1937): 455; and "Heading for Radio Investigation," Business Week, August 21, 1937, 17.

51. Congressional Record, 75th Congress 3rd Session (1937), 111.

52. Congressional Record, 75th Congress, 1st Session (1937), 7280.

53. Ibid., 7282.

54. Ibid.
55. "Avoid Monopoly, Improve Service: Wheeler," Broadcasting 14 (February 15, 1938): 19.
56. See Stanley High, "Not-So-Free-Air," Saturday Evening Post 211 (February 11, 1939): 73; Sol Taishoff, "New FCC Leadership to Start Cleanup," Broadcasting 13 (September 1, 1937): 5; and "Starts FCC Cleanup," Business Week, October 23, 1937, 53.
57. See "Pond Sings," Time 31 (May 23, 1938): 25; "Raking Radio Over the Coals," Business Week, May 21, 1938, 38; Martin Codel, "A System of Governmental Superpower Stations?," Broadcasting 14 (March 1, 1938): 5; Herbert M. Bratter, "Radio Power and Air-Channel Regulatory Headaches," Public Utilities Fortnightly 23 (May 25, 1939): 646; and United States Senate, Committee on Interstate and Foreign Commerce, To Limit Power of Radio Broadcast Stations (Washington, D.C.: U.S. Government Printing Office, 1948), 665.
58. See Federal Communications Commission, In the Matter of the Application of the Crosley Corporation, 797; and Lichty, The Nation's Station: A History of Radio Station WLW, 261.
59. "More Proof Needed to Justify Superpower, Declares Craven," Broadcasting 14 (January 15, 1938): 2.
60. "Revision of Basic Regulation Advocated," Broadcasting 14 (February 1, 1938): 18.
61. Congressional Record, 75th Congress, 3rd Session, (1938), 8585.
62. "Delay Seen In Decision on Super-Power in Inquiry," New York Times, August 7, 1938, IX 10:7.
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68. "Court Upholds Ruling to Cut WLW Power From 500,000 Watts," Cincinnati Enquirer, June 27, 1939, 12.

69. "Vast Array of Data Compiled by the FCC," Broadcasting 17 (April 15, 1939): 20.
70. Lichty, The Nation's Station: A History of Radio Station WLW, 275.
71. See Federal Communications Commission, In the Matter of the Crosley Corporation (W8XO), 9 FCC 204 (1942); and Dick Perry, Not Just a Sound: The Story of WLW (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1971), 75.
72. See Congressional Record, 108th Congress, 2nd Session, 12549 (1962); Federal Communications Commission, FCC Reports (Washington D.C.: U.S. Government Printing Office, 1963), 77; and Federal Communications Commission, In Re Application of WSM, Inc., 45 FCC 391 (1962).



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