Mass Communication Law

CASES AND COMMENT

Fifth Edition

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Preface

This fifth edition of *Mass Communication Law* adds two new coauthors: Professor Todd Simon of the School of Journalism at Michigan State University and Professor Herbert Terry of the Department of Telecommunications at Indiana University at Bloomington.

In this edition, as in previous ones, we continue to let the courts and administrative agencies speak for themselves. We tried, in our editing, to select those excerpts from court decisions which are most relevant to problems of law and mass communication.

In our comments and background notes we explain the evolving course of the law of the mass media in language as free from legalese as we could make it without forfeiting accuracy. In cases where portions of decisions have been omitted, we generally indicate the omission through the use of ellipses; but for space considerations and other reasons we have not always been able to do this.

We have striven, however, to ensure that all case material is in chronological order. Each sentence or paragraph of a case is reported in its original sequence. Similarly, when we have reprinted footnotes from the decisions, the same numbers as were found in the original decisions are retained. The footnotes of the authors are numbered separately and consecutively in each chapter.

This area of the law continues to be dynamic, fundamental, and unnerving. This is emphasized by the fact that, virtually on the eve of publication, the Supreme Court handed down two bitterly controversial decisions–the dial-a-porn case, *Sable Communications, Inc. v. FCC*, and the now famous flag desecration case, *Texas v. Johnson*. As a result, we have created two special Appendices at the end of the book in order to include these two cases.

The fifth edition, like its predecessors, contains an up-to-date diagram of state and federal court systems, a revised glossary of legal terms, an outline on legal research, and the text of the Constitution of the United States.

A short preface cannot set forth in detail all the new developments chronicled in this book. But we shall mention some highlights. The introductory chapter on the First Amendment–Chapter One–provides a streamlined but comprehensive look at the complexities of the Supreme Court's work on the theory of free press and free speech. We know it has one virtue over the previous chapter in the fourth edition–it is ten pages shorter.

The libel chapter–Chapter Two–confronts the student and the teacher with some of the baffling issues now dominating that field: Can (will) the *New York Times v. Sullivan* doctrine survive? If it does not, with what will it be replaced? Will jury awards of excessive damages in libel cases continue to terrify the media defendant? Or will alternatives to the damage suit as the exclusive remedy for defamation be developed?

The privacy chapter–Chapter Three–shows in concise and clear fashion how beleaguered that tort has become. The chapter also contains a new and valuable section on the emerging right of publicity. The journalist's privilege chapter–Chapter Four–surveys the common law, statutory, and constitutional sources of the concept of journalist's privilege. It also focuses on important specialized issues such as the scope of state shield laws and the role of journalist's privilege in libel litigation.

Chapter Five, on access to the judicial process, inquires into the ancient and perplexing problem of reconciling a free press with a fair trial. It also ad-

dresses more modern developments such as the arrival of the TV camera in the courtroom and the struggle to open up the courtroom to journalists for coverage of pre-trial and preliminary hearings and the selection of jurors.

Chapter Six, on access to executive and legislative information, sets forth short, clear summaries of each of the exemptions to the federal Freedom of Information Act. It also provides a useful guide to the law on open records and meetings in the states.

The chapter on public access to the media–Chapter Seven–chronicles the pros and cons of the celebrated *Tornillo* case: Does freedom of the press, as A.J. Liebling caustically suggested, belong to the man who owns one? This chapter also contains new sections on access dimensions of antitrust laws, access to the press, and new developments in public access to cable television.

Chapter Eight comprises ten short but comprehensive sections on selected problems of media laws. This chapter covers discrete areas where law intersects with journalism: (1) advertising; (2) antitrust law; (3) labor law; (4) taxation; (5) postal law; (6) lotteries; (7) lobbying law; (8) copyright and unfair competition in both print and electronic media; (9) students and the First Amendment; and finally, (10) the regulation of obscenity. These sections capture the key issues in the fields covered. For example, the obscenity section examines the new dimension that feminist criticism has brought to the problem of regulating obscenity. This section also focuses on the increasingly important role assumed by zoning and other political means of coping with the problem of obscenity.

Chapter Nine, on regulation of the electronic media, begins with an introductory section on the various theories justifying broadcast regulation. This, we think, is a necessary inquiry in view of the critical scrutiny now being given to the once dominant scarcity theory. Besides the scarcity rationale, theories of viewers' and listeners' rights, market-based theories, and the social impact rationale are given new attention.

Chapter Nine gives special emphasis to cable, with its attendant problems of "must carry" and exclusive franchising. The future impact of telephony as a player in the communications marketplace of ideas is also considered. Chapter Nine reflects the impact that the philosophy of deregulation has had on the traditional system of broadcast regulation.

In summary, this book remains primarily intended for use in journalism and mass communication programs. It is designed for both beginning and advanced media law courses. The book is also used in advanced undergraduate freedom of speech and press theory courses. It has been widely used in graduate seminars in both print and broadcast journalism. The book is also used in second and third year law school courses and seminars on communication law.

As we have said in previous editions, we have been mindful that in a textbook one can become too attached to old furniture which, although attractive, is no longer useful. In such cases, we have tried hard to discard the old and replace it with newer, more valuable material.

Finally, we would like to thank two people at West Publishing Company—Susan Tubb, Acquisitions Editor and Jayne Lindesmith, Production Assistant—for their work in the planning, editing, and production of this book. With patience and skill they have labored with four separate authors to bring this book accuracy, clarity, and uniformity of style. We thank them for all of their help.

Professor Simon thanks Michigan State University Ph.D. students Catherine Cassara, Mary Cronin, and Rob Ducoffe, M.A. student Diane Kightlinger, and B.A. student Stephen Dravis for their research assistance, and Ph.D. student Rosemarie Alexander for research help, copyediting and comments, and classroom assistance during work on this book.

We say now–as we have said before–our goal is not to write an encyclopedia of mass media law, but to create a teaching tool, a tool which will be informative and interesting at the same time. We shall hear from you, our students and colleagues, as to whether or not we have succeeded.

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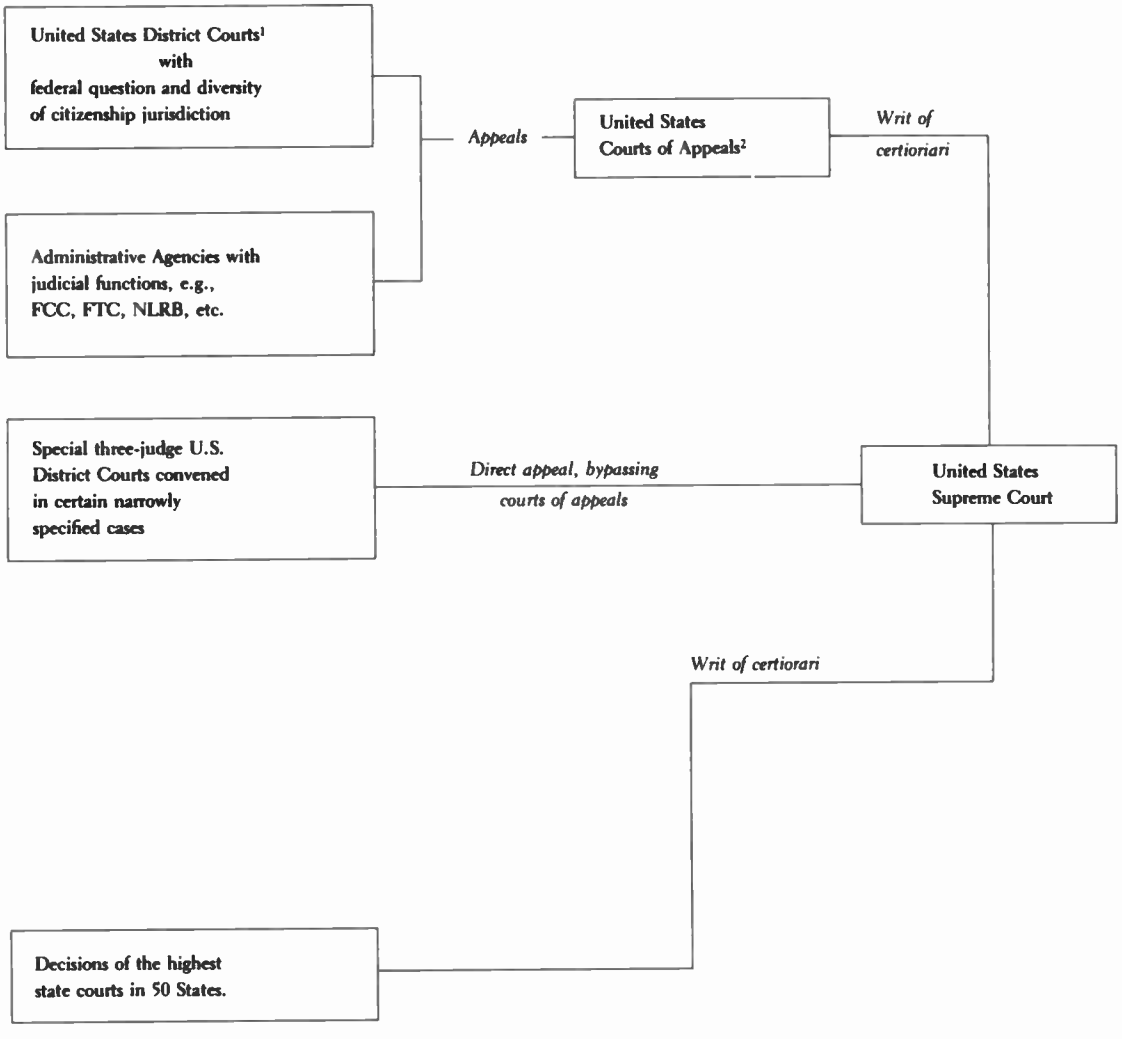
June 30, 1989

The Federal Court System

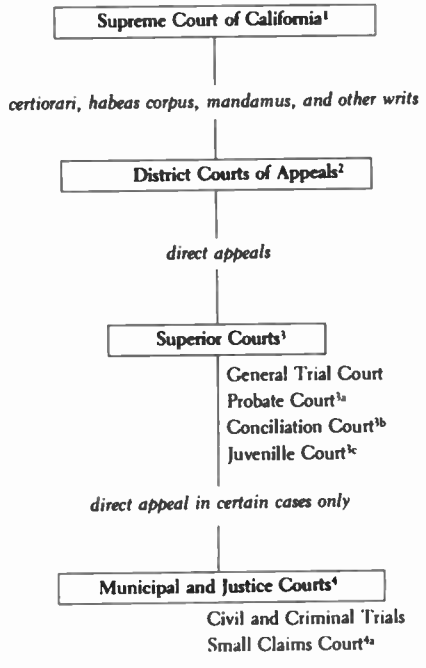


1. There is at least one federal district court in every state.

2. The United States is divided into eleven numbered federal judicial circuits, plus the United States Court of Appeals for the District of Columbia. In addition, there is the United States Courts of Appeals for the Federal Circuit which was established by the Congress in 1982. This court succeeded to the appellate jurisdiction of the United States Court of Claims and the United States Court of Customs and Patent Appeals, both of which were abolished.

A State Court System

The state court system outlined below is one example of a state court system. It is intended to provide a guide to the state judicial process for the student who is unfamiliar with the organization of state courts. There is substantial variation from state to state. The following figure illustrates the California Court system.



1. Has no obligatory appellate jurisdiction; that is, it reviews cases by granting petitions for writs of certiorari and thus retains complete discretionary control of its jurisdiction.

2. Consequently the great bulk of cases reach final decision in these five District Courts of Appeals.

3. Superior Court, the trial court of general jurisdiction, also has three special divisions: the General Trial Court, Probate Court, Conciliation Court and Juvenile Court.

3a. This court has jurisdiction over the administration of estates, wills, and related matters.

3b. The conciliation court is a rather unique institution that takes jurisdiction over family disputes that could lead to the dissolution of a marriage to the detriment of a minor child.

3c. The juvenile court considers certain types of cases involving persons under 18 years of age.

4. There is one Superior Court in each county. The Municipal and Justice Courts represent subdivisions of each county by population. These courts are trial courts with limited jurisdiction. Their civil jurisdiction is in cases involving generally less than $25,000 in controversy. They also have original and exclusive criminal jurisdiction for violations of local ordinances within their districts.

4a. The small claims court is the familiar forum used to settle small disputes, here generally less than $2,000, using informal procedure and prohibiting lawyers for the disputing parties.

Note: Superior Court is usually the last state court to which a decision of these lowest courts can be appealed. It is possible that a case from one of these courts could be ineligible for further state review and could have further review only in the U.S. Supreme Court.

A "BRIEF" ON LEGAL RESEARCH FOR JOURNALISTS

Cases, statutes, and constitutions are the primary stuff of the law. If you cannot retrieve and read them, you are forever doomed to secondary sources—someone else will have read and interpreted them for you.

Many campuses will not have law school libraries. There are alternatives. Metropolitan counties often have substantial law libraries in their courthouses or government centers. State capitols usually house law libraries. In addition, general public libraries, political science departments, and private law firms may be able to assist you.

An invaluable resource for college, school, or department is the Bureau of National Affairs *Media Law Reporter* (Med.L.Rptr.). On a weekly basis it reports almost all court cases having a bearing on journalism and communication law. Issues include news notes, occasional bibliographies, Supreme Court schedules or dockets, and special reports (for example, a 1977 report on the federal Freedom of Information Act). The heart of its content is the presentation of complete decisions or substantial case excerpts covering the broadest spectrum of mass communication law. The service is a must for schools and departments of journalism.

A more general publication is *United States Law Week* (U.S.L.W.). It comes in two parts, one providing Supreme Court opinions shortly after they are rendered, the other federal statutes, administrative agency rulings, and significant lower court decisions.

If you have access to a law library, you have at your fingertips an ingenious information retrieval system, much of which is now, or soon will be, computerized and thereby accessible in less laborious ways.

On-line data bases include the *Legal Resource Index* (law and other academic journals, legal newspapers, and selected material from general newspapers and magazines, on microfilm, WESTLAW and LEXIS, from 1980); *WESTLAW* (federal and state court opinions, statutes, regulations, and topical materials including First Amendment, Communications, and Administrative Law); *LEXIS* (a similar service); *Legi-Slate* (follows congressional bills, from 1978, and federal regulations, from 1981); *Congressional Information Service* (CIS) (congressional hearings and reports from 1970); *Government Printing Office* (GPO) *Monthly Catalog* (documents issued by federal agencies, congressional reports, conferences and statistics, from 1976).

The computer greatly speeds up the traditional processes of legal research and performs some tasks that would be prohibitively time-consuming. Among myriad uses, the computer permits the organizing of cases by judges, time frames, classes of plaintiffs and defendants; the surveying of footnotes; and the updating of any source.

In addition, there are a number of "general purpose" database vendors, such as *DIALOG NEXIS, Wilsonline, State Net, Electronic Legislative Search System* (ELSS), and *InfoMaster*, which contain hundreds of databases not specifically linked to the law but are nonetheless valuable for legal research. A scholar looking into the impact of a judge's political involvement in his or her voting habits might want to do some work with a database called "PACs and Lobbies," available on *InfoMaster*, which "reports on actions of the Federal Election Commission, Internal Revenue Service, and other federal agencies which influence campaign financing and lobbying and lists recent PAC, lobby, and foreign agent registrations."

There are a number of lesser-known legal databases available such as "Child Abuse and Neglect," "Healthlawyer," "LaborLaw" and the "National Criminal Justice Reference Service" (all available on *InfoMaster)* which contain information some databases may not have. WESTLAW, however, does include much material useful to media law students such as law reviews, texts, bar journals, Practicing Law Institute materials, Bureau of National Affairs

materials, Commerce Clearing House materials, Dow Jones, Dialog, VU/TEXT, PHINet, and Information America.

It's easy to draw incorrect conclusions from information that is voluminous and unrelated. Use data bases cautiously and thoughtfully.

Abbreviations used in the following section are part of a *Uniform System of Citation* 14th ed. (Cambridge, Mass.: Harvard Law Review Ass'n., 1986), frequently used in legal writing and reporting and designed for precise communication and for brevity.

Remember that constitutions, legislative enactments, and court decisions of the jurisdiction involved are primary authorities. Treatises, law reviews, the Restatements of the American Law Institute, for example, are secondary sources. These sources, however, are frequently cited and accepted as persuasive authority by all levels of courts in various jurisdictions and at the federal level throughout the country. Annotations, encyclopediae, loose-leaf services, and dictionaries are primarily used to find references to primary materials such as court reporters, statutes, or constitutional provisions. The primary materials may, after thorough examination, then be cited as actual authority for a legal proposition or definition. Digests, citators, and indexes are used principally to lead a researcher to primary materials.

A first step in legal research might be to find the words, the legal vocabulary of your problem. Any one of a number of law dictionaries would serve this purpose (*Black's, Ballentine's, Gifis'*, or *Oran's Law Dictionary for Non-Lawyers)*. Assuming you have some legal knowledge of your topic, you might prefer to begin with a resource that demonstrates how state and federal courts have construed your concept. Such a work is *Words and Phrases*, an alphabetical list of words and phrases followed by abstracts of judicial decisions using them. Pocket parts or supplements inside the back cover keep this and many other legal publications up-to-date. Don't overlook them.

Legal encyclopediae—notably *Corpus Juris Secundum* (CJS) and *American Jurisprudence 2d* (Am.Jur.2d)—provide yet wider sweeps of legal issues and principles. Use their general index volumes and, again, don't forget the updating pocket supplements. *American Jurisprudence 2d* will refer you to *American Law Reports* (ALR, ALR 2d, ALR 3d, ALR 4th, and ALR Fed.) which contains brief essays or annctations on significant legal topics suggested by the approximately 10 percent of state and federal appellate court decisions this service considers leading cases. A good annotation may discuss all previously reported decisions on your topic. There are topical *Digests* and *Word Indexes* to the first two series and a Quick Index to all five ALRs. ALR and ALR 2d are updated by a *Blue Book* and a *Later Case Service* respectively, ALR 3d, ALR 4th, and ALR Fed. by pocket supplements. There is now a six-volume *Index to Annotations* for all but ALR. ALRs are cross-referenced to *American Jurisprudence 2d*, and you may find it easier to begin there.

By now you have encountered a good many case citations and, in West Publishing Company's *Words and Phrases* and *Corpus Juris Secundum*, Key Numbers.

All reported cases can be found in West's National Reporter System, a description of which follows.

National Reporter System

West Publishing Company's National Reporter System reprints decisions of all of the highest state courts, many state appellate courts, the U.S. Supreme Court, U.S. Courts of Appeals, The United States Claims Court, and selected decisions of U.S. District Courts and Bankruptcy Courts, as well as military courts.

Decisions of the Federal Court System

Decisions of the United States Supreme Court are found in the *Supreme Court Reporter* (S.Ct.). A second major unofficial publication of United States Supreme Court decisions is *United States Supreme Court Reports* (Lawyer's Edition—L.Ed. and L.Ed.2d), which annotates leading cases. The official publication of Supreme Court decisions is *United States Reports* (U.S.). Thus a complete (sometimes called parallel) citation for a United States Supreme Court decision will include both official and unofficial publications and appear as: *New York Times v. Sullivan*, 376 U.S. 245, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The first number in a citation refers to a volume number, the second to a page number.

Secondary unofficial publications of Supreme Court decisions are *United States Law Week* and the Commerce Clearing House (CCH) *United States Supreme Court Bulletin*, the first publications to print the full text of Supreme Court decisions, normally within a few days, and the newer *Media Law*

Reporter. Begun in 1978, *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* (Kurland & Casper, eds.) presents oral arguments and written briefs of landmark Supreme Court cases going back to 1793. The publisher is University Publications of America, Inc., Frederick, Maryland.

Summaries of lawyers' written briefs are found in *L.Ed.2d*. Complete briefs can sometimes be obtained from the law firms on either side of a case. Their addresses can be found in a legal directory called *Martindale Hubbell*. Most large law libraries maintain microforms or microfiche of U.S. Supreme Court records, oral arguments, and written briefs.

The *Federal Reporter* (F. and F.2d) currently prints decisions of the U.S. Courts of Appeals and Temporary Emergency Court of Appeals.

The *Federal Supplement* (F.Supp.) contains selected decisions of U.S. District Courts and of the U.S. Court of International Trade plus rulings of the Judicial Panel on Multidistrict Litigation.

Federal Rules Decisions (F.R.D.) prints U.S. District Court Decisions primarily involving the Federal Rules of Criminal and Civil Procedure, and also contains miscellaneous reports and articles.

West's *Bankruptcy Reporter* prints bankruptcy cases from Bankruptcy Courts, District Courts, and in a special section, U.S. Courts of Appeals and the U.S. Supreme Court. West's *Military Justice Reporter* includes cases decided in the United States Court of Military Appeals and selected decisions of the Courts of Military Review.

Decisions of State Courts

Official reports of each state's highest court and some intermediate courts are usually published by the state. Some states have discontinued their own reporters and have designated West's publication as official. West publishes seven regional reporters that contain decisions of the highest state court and selected intermediate appellate court decisions. The *New York Supplement* (N.Y.S.) contains decisions of all New York state courts including its highest court, the New York Court of Appeals, whose opinions are also published in the *North Eastern Reporter*. The *California Reporter* (Cal.Rptr.) contains decisions of the California Supreme Court, Courts of Appeal, and Appellate Department of Superior Court. Decisions of the California Supreme Court are also reprinted in the *Pacific Reporter*. The map below indicates states included in each regional reporter.

Cases, of course, can be cited as persuasive authority. But in reading cases it is important to learn how to distinguish between what a court rules and

what it says in passing (*dicta*) and in concurring and dissenting opinions. *Dicta*, of course, can influence future decisions.

The next task is to find aids that will lead quickly to all the cases in point. For this purpose we use *Digests*, *Indexes*, and *Citators*. A Digest is a case finder or an index to the law. The best known Digests are units of all reported state and federal cases in ten-year segments or decennials, the most recent being the *Ninth Decennial Digest*, Part I, 1976–1986, cumulating ten years of cases. Current cases are found in the monthly *General Digest* and organized around the Key Number System. Cases decided between 1658 and 1896 are found in the *Century Digest*.

Key Numbers represent principles or points of law organized under topics and subtopics. Once having found one or more *Key Numbers* relating to your problem, you should be able to find all the relevant cases in the *American Digest System*. Digests have been prepared for most individual states (e.g. the Minnesota Digest), groups of neighboring states in a regional digest (e.g. the Pacific Digest), single courts (e.g. the United States Supreme Court Digest), or for an entire court system (e.g. West's Federal Practice Digest, 3d), which covers decisions of all federal courts including the U.S. Supreme Court. Each digest has a *Descriptive Word Index* to help you get started. A *Cumulative Table of Key Numbers* in the General Digest *Descriptive Word Index* will tell you which volumes of the set have digest material relating to the *Key Numbers* you have found.

Citators trace the life history of a case, a statute, or an administrative ruling. Has it been modified, reversed, affirmed, superseded, criticized, distinguished, explained, limited, overruled or questioned? What have attorneys general and law review writers said about a case? Is it still good authority? Has a statute been amended, appealed, or declared unconstitutional? How has it been treated by courts and periodical commentators? There are *Shepard's Citations* for every state, for each region of West's National Reporter System, for lower federal courts and the U.S. Supreme Court, for federal administrative agencies, for the Code of Federal Regulations, for state and federal constitutions, the U.S. and various state codes, municipal ordinances, labor law, and for the law reviews. *Shepard's Citations* are updated by white, yellow, and red pamphlets or advance sheets.

If you know approximately when a federal statute or an amendment to a statute was passed, it can often be located in *U.S. Code, Congressional and Administrative News*. From it you can construct the legislative histories of federal statutes and review congressional committee reports. *United States Code Annotated* (U.S.C.A.) and *United States Code Service* (U.S.C.S.) are the best places to go for federal law. Both are updated by pocket parts and intervening pamphlets. Annotations include summaries of court decisions interpreting the laws, texts of the Constitution and their interpretation, opinions of attorneys general, and, occasionally, citations to law reviews or other secondary sources. There are also indexed, annotated codes for most states. Each compilation has a multivolume index.

The *Congressional Record* provides an edited transcript of congressional debates. It has a *Daily Digest*. The Commerce Clearing House (CCH) *Congressional Index* provides a weekly update of bills introduced in Congress. The *Congressional Information Service* monthly Index and CIS *Annual Abstracts* provide much of the raw material of the legislative process. Full text of hearings and debates is available on microfiche.

Rules and regulations of the federal administrative agencies, indexed by subject matter, are found in the *Code of Federal Regulations* supplemented by the daily *Federal Register*. The latter includes official notices of each rulemaking and other proceedings to be conducted by agencies such as the Federal Communications Commission (FCC). In the rulemaking process, FCC dockets or files, unfortunately located in Washington, D.C., often contain primary evidence in support of one regulatory position or another.[1]

One of the many loose-leaf services necessary to the study of administrative law is *Pike and Fischer Radio Regulation* (R.R. and R.R.2d). This is the most comprehensive source of FCC decisions and

1. Erwin G. Krasnow and G. Gail Crotts, *Inside the FCC: An Information Searcher's Guide*, Public Telecommunications Review 5:49–56 (July/August 1975).

regulations and it includes statutes and court decisions pertaining to broadcasting and cable television.[2] The key to using *Pike and Fischer* expeditiously is to begin with the volume titled *Finding Aids*, which includes a "Master Index" to the Federal Communications Act paragraph numbers by which all materials are ordered. The *Current Service* volumes—presently six of them—contain up-to-date versions of law and regulations and any pending proposals for change. The four *Digest* volumes contain subject matter digests of FCC and court actions and decisions, while the *Cases* volumes (currently in Vol. 63) contain full texts. Index paragraphs in *Pike and Fischer* are referenced to sections of the amended Federal Communications Act of 1934 and to the *Code of Federal Regulations*.

If you do not find what you want in the *Federal Register*, the official *FCC Annual Reports*, *Broadcasting Cablecasting Yearbook*, *Television Factbook*, or *Pike and Fischer*, call the FCC's public information officer and specify what you are looking for.

After you have a *Pike and Fischer* or official *FCC Reports* citation, you can use Shepard's *United States Administrative Citations* to find all subsequent citations to that FCC action. *Broadcasting* magazine will keep you posted on pending FCC actions. *Trade Regulation Reporter* (CCH) provides a like service for advertising communication and the work of the Federal Trade Commission (FTC). *Advertising Age* is the most useful counterpart trade publication. *Broadcasting* and *Advertising Age* are indexed in *Business Periodicals Index* and in *Topicater*. *Editor & Publisher* is the newspaper industry's leading trade journal.

There is a monthly *U.S. Catalog of Government Publications* and a *State Checklist of Government Documents*. The U.S. Catalog is a monthly compilation of all federal executive, legislative, and administrative documents open to the public. It has cumulative annual indexes and some cumulative multiyear indexes.

When primary research is completed, it is time to survey the *Index to Legal Periodicals* to see what others have written about your topic. Some advise beginning legal research with the *Index* in order to survey the boundaries of a topic. It is tempting, however, to rely too heavily on these secondary sources at too early a stage. There is also an *Index to Foreign Legal Periodicals* and a new (Jan. 1, 1980) more comprehensive *Legal Resource Index* on microfilm with paper edition counterpart, *Current Law Index*. LRI is much broader in coverage than the older *Index to Legal Periodicals* and includes the *New York Times*, *Wall Street Journal*, and *Christian Science Monitor*.

Books or textbooks on legal topics are called *treatises* and a library's holdings are indexed in its card catalogue or on-line data base. A *Horn Book* is a single volume summary of a field of law. A *Nutshell* is an even more drastic summary. There are a number of legal bibliographies, among them *Law Books in Print*, edited by Nicholas Triffin.

The American Law Institute's *Restatements of the Law* are attempts to reorganize, simplify, and move case law toward comprehensible codes. Begin searching with the *General Index to the Restatement of the Law*.

For legal style and citation forms see *A Uniform System of Citation* published by the Harvard Law Review Association, and sometimes referred to as the Harvard Blue Book. There is also the University of Chicago *Manual of Legal Citation*, known as the Maroon Book. Any standard text on legal research and writing will provide similar information.[3]

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2. Don R. LeDuc, *Broadcast Legal Documentation: A Fourth-Dimensional Guide*, 17 Journal of Broadcasting 131–45 (Spring 1973); Joseph M. Foley, *Broadcast Regulation Research: A Primer for Non-Lawyers*, 17 Journal of Broadcasting 147–57 (Spring 1973). See also, Henry Fischer, *Uses of Pike & Fischer*, Broadcast Monographs No. 1, Issues in Broadcast Regulation 134–38 (1974); Russell Eagen, *How a Broadcast Attorney Researches Law*, Broadcast Monographs No. 1, Issues in Broadcast Regulation, 139–43 (1974).

3. Cohen and Berring, How to Find the Law, 7th ed. (St. Paul: West Publishing Co., 1983); Cohen, Legal Research in a Nutshell, 4th ed. (St. Paul: West Publishing Co., 1985); Jacobstein and Mersky, Fundamentals of Legal Research 2d ed. (Mineola: Foundation Press, 1981); Price, Bitner and Bysiewicz, Effective Legal Research, 4th ed. (Boston: Little, Brown, 1979); Wren and Wren, The Legal Research Manual, 2d ed. (Madison: A-R Editions, Inc., 1986); Sprowl, Manual for Computer-Assisted Legal Research (Chicago: American Bar Foundation, 1976). The above are intended for lawyers and law students. You may also find it useful to consult textbooks for paralegals, for example, e.g., Statsky, Introduction to Paralegalism: Perspectives, Problems and Skills, 3rd ed. (St. Paul: West Publishing Co., 1986). Especially useful for journalists in Denniston, The Reporter and the Law (New York: Hastings House, 1980), a book written by the Supreme Court reporter for the *Baltimore Sun*.

Mass Communication Law

Cases and Comment

Fifth Edition

ONE

The First Amendment Impact on Mass Communication: The Theory, the Practice, and the Problems

AN INTRODUCTION TO THE STUDY OF THE FIRST AMENDMENT

Historical Background

In 1791, the First Amendment to the United States Constitution was enacted:

> 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.

The First Amendment wisely guarantees, but does not define, freedom of speech and press. It should be noted that the specific addressee of First Amendment protection is Congress. Nothing in the original Constitution which was ratified by the states imposed any limitations on state legislatures with regard to freedom of speech or press. Whether postrevolutionary America would follow the darker pages in colonial history and hold newspaper editors guilty of legislative contempt and whether the new state governors would follow the precedent set by the royal colonial governors and seek to have newspaper editors indicted for seditious libel were matters that the First Amendment was basically helpless to resolve. All such issues were governed by state rather than federal constitutions.

There the matter stood until 1925 when, in an otherwise insignificant case involving a now forgotten and ultimately repentant Communist, Benjamin Gitlow, the Supreme Court in *Gitlow v. New York*, 268 U.S. 652, 666 (1925), in a casual statement not necessary to the decision said:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the states.

The textual justification in the Constitution for guaranteeing constitutional protection to freedom of speech and press under the federal constitution was achieved by interpretation of the due process clause of the Fourteenth Amendment enacted in 1868 by the Reconstruction Congress to assure legal equality to the recently emancipated slaves. The second sentence of Section 1 of the Fourteenth Amendment stated:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws. [Emphasis added.]

The consequence of saying that freedom of speech and of the press were protected by the due process

clause of the Fourteenth Amendment from infringement by the states was an important advance in securing liberty of the press. Although the state constitutions have provisions protecting freedom of expression, often their language offers more comfort to state regulation of the press than is the case with the more protective and encompassing language of the First Amendment. To be sure, it is possible to argue that since freedom of the press on the state level is based on the due process clause of the Fourteenth Amendment rather than on explicit language in the First Amendment, the latitude for state regulation of the press is greater than that allowed the federal government. This two-tiered First Amendment theory was advanced by Justice John Marshall Harlan in a special concurring opinion he wrote in *Roth v. United States*, 354 U.S. 476 (1957), the case in which the Court held that obscenity was not constitutionally protected speech.

The use of the Fourteenth Amendment to make constitutional limitations such as the guarantee of free speech and press binding on the states as well as the federal government has given that amendment an enormous role in the development of constitutional liberty in the United States. The extension of the constitutional guarantee of freedom of speech and press to the states has been of great significance. For a view that state constitutions themselves gave early nurture to freedom of speech and press and greatly influenced the federal courts, see Blanchard, "Filling in the Void: Speech and Press in State Courts Prior to Gitlow," in Chamberlin and Brown (eds.), *The First Amendment Reconsidered* (1982).

The First Amendment has rarely been used to invalidate federal legislation on the ground that the legislation is impermissibly restrictive of freedom of speech and press. Indeed when the most dangerous federal legislation limiting freedom of expression ever to come before the Supreme Court in peacetime, the anti-Communist Smith Act case, *Dennis v. United States*, 341 U.S. 494 (1951) was reviewed, the Court held the challenged law valid, even though it undoubtedly restricted First Amendment values in the interest of governmental self-preservation.

But as the cases and comment on free speech and freedom of the press in this chapter illustrate, numerous state statutes have been declared invalid as violative of the First Amendment, since that Amendment is now binding on the states through the due process clause of the Fourteenth Amendment.

The determination on the part of the Framers of the American Constitution to assure protection for freedom of speech and press did not arise in a vacuum. English and American history prior to the American Revolution had persuaded the drafters of the First Amendment of the need for such assurance. Basic to an understanding of the First Amendment, both in terms of its origins and development, is John Milton's great essay in defense of a free press, *The Areopagitica*.

John Milton (1608–1674) was one of the great English poets. A republican in a monarchical age, the power of Milton's language and thought in his *Areopagitica* has made the essay a formidable obstacle to licensing and restraint of the press through the centuries. *The Areopagitica* was written as a protest to government licensing and censorship of the press, although Milton later was himself to serve as a censor for Oliver Cromwell.

In the middle of the seventeenth century, the Parliament of England passed a law licensing the press. The Order of the Lords and Commons, June 14, 1643, forbade the publication of any book, pamphlet, or paper which was published or imported without registration by the Stationers' Company. The Stationers' Company, formed in 1557, has been described as follows:

> The exclusive privilege of printing and publishing in the English dominions was given to 97 London stationers and their successors by regular apprenticeship. All printing was thus centralised in London under the immediate inspection of the Government. No one could legally print, without special license, who did not belong to the Stationers' Company. The Company had power to search for and to seize publications which infringed their privilege. Jebb, ed., Introduction, Milton, *Areopagitica*, xxiii (Cambridge University, 1918).

Later the licensing authority was divided between various royal and ecclesiastical authorities. The 1643 law, against which Milton directed his famous 1644 pamphlet in defense of freedom of the press, authorized official searches for unlicensed presses and prohibited the publication of anything unlicensed. The 1643 statute was designed to prevent the "defamation of Religion and Government." In Milton's view, truth in both the spheres of religion and government was more likely to emerge from free discussion than from repression. What follows is the most famous and widely quoted passage from *The Areopagitica*:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt

> her strength. Let her and Falsehood grapple; who ever knew truth put to the worse, in a free and open encounter? Jebb at 58.

This passage marked the beginnings of what has become an underlying theme of First Amendment theory. This is the marketplace of ideas theory which was given fresh life by Justice Oliver Wendell Holmes in a famous dissent after World War I in *Abrams v. United States*, 250 U.S. 616 (1919). In this view, truth is best secured in the open marketplace of ideas. Therefore, any government restraint which tends to distort or chill the free play of ideas, and thus the quest for truth, should not be permitted. The challenge that the idea of liberty of expression makes to the infirmity of the human condition should not be underestimated. Also we should remember that even Milton was not an absolutist with regard to freedom of expression. He did not believe in religious freedom for Roman Catholics. But Milton's hostility to the licensing of the press by government and his evident passion for a higher plateau of freedom of expression has been a powerful influence in the development of freedom of the press in the United States. See Siebert, *Freedom of the Press in England, 1476–1766* (1952).

The licensing system ended in England in 1695, but licensing continued in the American colonies several decades thereafter. Gradually, prosecution for criminal or seditious libel supplanted licensing as the instrument for governmental restraint of the press in America in the period prior to the advent of the American Revolution. The common law crime of seditious libel made criticism of government a matter for criminal prosecution. While such prosecutions were not frequent in colonial America, they did occur.

The most famous such prosecution involved a New York printer, John Peter Zenger, editor of the *New York Weekly Journal*. Zenger's paper was used by politicians as a relentless forum for criticism of the colonial governor of New York, William Cosby. Zenger was arrested in 1734 on a charge of publishing seditious libels and jailed for eight months before trial. In August 1735, a jury, ignoring a judge's instructions, determined that Zenger was not guilty. The case thus became the most celebrated victory for freedom of the press in the pre-Revolutionary period.

It was no mean achievement for Zenger's attorney, Andrew Hamilton, to win the case, since, under the common law of seditious libel, the truth of the utterance was irrelevant.

In a recent book on the early history of freedom of the press in eighteenth-century America, Professor Norman Rosenberg points out that Zenger's lawyer, Andrew Hamilton, sought help from the jury for his editor: "Hamilton extolled the superior nature and wisdom of local juries." Hamilton "seldom mentioned the rights of a free press." Instead, he emphasized the right to resist an oppressive ruler and the right of "ordinary New Yorkers" to "complain about a bad administration." In short, instead of talking about the right of a free press, Hamilton talked about the free speech rights of a free people. See Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel*, 38–39 (1986).

In colonial seditious libel cases, the judge rather than the jury had the responsibility of deciding whether the publication complained of constituted seditious libel. The role of the jury was simply to ascertain whether the defendant had published the offending article. These features of the law of seditious libel gave freedom of expression little breathing space. In England it wasn't until 1792 that Fox's Libel Act finally altered the law of seditious libel to make truth a defense and to give the jury rather than the judge the power to determine whether the publication was or was not seditious libel. See Emerson, *The System of Freedom of Expression*, 99 (1970).

Unfortunately, seditious libel had proponents in the newly independent United States.

Congress in 1798, at the behest of the Federalist Party, enacted four acts directed against the subversive activities of foreigners in the United States. These became known as the Alien and Sedition Acts. The Federalist fear of radical sympathizers with France, French agents, and hostility toward Republican journalist critics of the Federalist administration led to the passage of the laws. These Acts were the Naturalization Act, the Act Concerning Aliens, the Act Respecting Enemies, and the Act for the Punishment of Crimes. The last mentioned, known as the Sedition Act, has been of great interest to First Amendment historians. Unlike the common law crime of seditious libel, the new law permitted truth as a defense, proof of malice was required, and the jury was permitted to pass on both questions of law and fact. Punishment was set by the statute. Specifically the Act provided that the publishing or printing of any false, scandalous, or malicious writings to bring the government, Congress, or the president into contempt or disrepute, excite popular hostility to them, incite resistance to the law of the United States, or encourage hostile designs against

the United States was a misdemeanor. Republicans led by Jefferson and Madison held the law to be a violation of the First Amendment, and among those convicted of violating the law were some of the leading Republican editors. The Republicans contended that the law was being interpreted to punish and silence Republican critics of the Federalist Administration.

Federalists defended the statute as necessary to the right of government to self-preservation. The question of the constitutionality of the Act was never brought before the Supreme Court, although constitutional historians contend that it would have been upheld by the justices who sat on the Court during John Adams's presidency.

For those who viewed the First Amendment as a rejection of the English law of seditious libel, the enactment of the Sedition Act was obviously unconstitutional. For those who viewed the First Amendment as not promising an absolute protection of speech, the passing of the Act so soon after the Revolution and ratification of the constitution was proof that not all governmental restraint of expression was prohibited by the First Amendment.

The question of whether the Sedition Act could be consistent with the First Amendment was not directly resolved because the issue of its validity never came to the Court. The Sedition Act expired on March 3, 1801.

One noted American constitutional scholar, Leonard Levy, has argued that the First Amendment was designed to prohibit only prior restraint of the press (administrative censorship, such as licensing), not punishment for seditious libel. See Levy, *The Legacy Of Suppression*, 247–48 (1960).

Professor Levy has greatly moderated his views since the publication of *The Legacy of Suppression*. In a later book, Professor Levy says he erred when he said that "freedom of the press meant to the Framers merely the absence of prior restraints." Levy says he now considers that "freedom of the press merely began with its immunity from previous restraints." See Levy, *Emergence of a Free Press*, xi (1985).

Professor Levy has also altered his view that the eighteenth-century American understanding of freedom of the press did not include freedom from seditious libel:

> Some states gave written constitutional protection to freedom of the press after Independence; others did not. Whether they did or not, their presses operated as if the law of seditious libel did not exist. Id. at x.

The question of the constitutional status of the Alien and Sedition Acts was finally put to rest in the famous case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), in which the Supreme Court narrowly contracted the scope of libel law. In *Sullivan*, Justice William Brennan, speaking for the Court, declared: "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." 376 U.S. 254 at 276.

For one commentator, the *New York Times v. Sullivan* statement on seditious libel was a crucial step in the continuous reinterpretation the First Amendment receives from the Supreme Court. The distinguished First Amendment scholar Professor Harry Kalven considered the crime of seditious libel incompatible with freedom of expression:

> The concept of seditious libel strikes at the very heart of democracy. Political freedom ends when government can use its powers and its courts to silence the critics. See Kalven, *The New York Times Case: A Note On 'The Central Meaning of the First Amendment'*, Supreme Court Review 191 at 205 (1964).

Professor Kalven believed the repudiation of seditous libel had furnished a new key to understanding the meaning of First Amendment protection:

> The Court did not simply, in the face of an awkward history, definitively put to rest the status of the Sedition Act. More important, it found in the controversy over seditious libel the clue "to the central meaning of the First Amendment." The choice of language was unusually apt.
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> * * *
>
> The central meaning of the Amendment is that seditious libel cannot be made the subject of government sanction. * * * It is now not only the citizen's privilege to criticize his government, it is his duty. At this point in its rhetoric and sweep, the opinion almost literally incorporated the citizen as ruler, Alexander Meiklejohn's thesis that in a democracy the citizen as ruler is our most important public official. Kalven, *supra*, 208–209.

In *New York Times v. Sullivan*, the Court cited John Stuart Mill as well as Milton for its view that even a false statement, so long as it is not calculated falsehood, merits First Amendment protection when the communication at issue involves criticism of elected government officials.

One of the great influences on modern First Amendment law was this English political philosopher and economist who lived long after the en-

actment of the First Amendment. Mill (1806–1873), wrote widely on philosophy and economics, but it has been justly said that his essay, *On Liberty Of Thought And Discussion* (1859), was his "most lasting contribution to political thought." For Mill, "freedom of thought and investigation, freedom of discussion, and the freedom of self-controlled moral judgment were goods in their own right."

Actually, it is not surprising that Mill, like Milton, should be cited frequently in the vast literature that has arisen interpreting the meaning of freedom of speech and press, much of it in the form of the decisions of the justices of the United States Supreme Court. Modern First Amendment law did not get any extended or serious attention from the Supreme Court until cases involving a clash between governmental censorship and freedom of expression came about in the period after American involvement in World War I.

Constitutional scholars have more or less agreed with Professor Zechariah Chafee's observation that the Framers of the Constitution had no very clear idea of what they intended the guarantee of freedom of speech and press to mean. Chafee, *Free Speech in the United States* (1954). For thoughtful justices, like Justice Holmes, it became important to try to develop a rationale for constitutional protection of freedom of speech and press.

Marketplace of Ideas Theory

In cases like *Abrams v. United States*, 250 U.S. 616, (1919), Holmes used the marketplace of ideas metaphor to give theoretical underpinning to the First Amendment. The similarity between the Holmesian marketplace of ideas concept of freedom of expression and Mill's rationale for liberty of thought and discussion is striking. It should be noted also that even when justices serving after Holmes returned to the marketplace of ideas theory, words used to describe the theory are very close to the language of Mill.

Thus, Justice William O. Douglas wrote, dissenting in the Supreme Court decision validating the anti-Communist prosecutions of the fifties, *Dennis v. United States*, 341 U.S. 494 at 584 (1951):

> When ideas compete in the market for acceptance, full and free discussion [exposes] the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

Mill had defended freedom of expression for very similar reasons nearly a century before in *On Liberty Of Thought And Discussion:*

> But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error. See Lindsay, ed., *Mill, Utilitarianism, Liberty and Representative Government*, 104 (1951).

The marketplace of ideas theory of freedom of speech, with its traditional aversion to governmental intervention, has been crucially and controversially altered in the case of the electronic media. But even in that area of First Amendment concern, the continuing impact and resiliency of Mill's thought is demonstrated by the Supreme Court's citation of Mill in 1969 when the Court sustained the FCC's fairness doctrine and personal attack rules against a claim of invalidity under the First Amendment. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). In *Red Lion*, Mill was cited by the Court in support of the governmental regulatory doctrines as follows:

> The expression of views opposing those which broadcasters permit to be aired in the first place need not be confined solely to the broadcasters themselves as proxies. "Nor is it enough that he should hear the arguments of his own adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them." J. S. Mill, *On Liberty*, 32 (R. McCallum ed. 1947).

For some, the citation of Mill to support any kind of governmental interference with the press will seem heretical. For others, it will be seen as entirely consistent with Mill's passion for liberty of discussion and hostility to censorship, whether that censorship is public or private.

Despite the emphasis which the foregoing discussion has given the principle of unfettered free discussion as advocated by thinkers such as Mill and

Milton, it should not be thought there is any unanimity with regard to the principle of free discussion as an ultimate value.

Thus, the New Left political philosopher, Herbert Marcuse, believed Mill's writings assumed that rational beings participate in free discussion, while in reality most of contemporary humanity are not rational but are manipulated beings, manipulated by media for commercial purposes and by government for political ones. Thus, the glorious concept of tolerance for all ideas, advocated by Milton and Mill, is for Marcuse a repressive tolerance. Marcuse was hostile to the marketplace of ideas. He thought traditional tools for elaborating the proper claims of freedom of expression against the claims of the state for curtailment of expression in the interest of security, such as the clear and present danger doctrine, were unusable. Marcuse wanted to substitute "precensorship" for "the more or less hidden censorship that permeates the free media." See Marcuse, *Repressive Tolerance in Wolff, Moore, and Marcuse, a Critique of Pure Tolerance* (1965).

For still others, the wisest course for the future would be to cleave to the following distillation of First Amendment experience as described by Justice Douglas:

> What kind of First Amendment would best serve our needs as we approach the 21st century may be an open question. But the old fashioned First Amendment that we have is the Court's only guideline; and one hard and fast principle has served us through days of calm and eras of strife and I would abide by it until a new First Amendment is adopted. That means, as I view it, that TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of "press" as used in the First Amendment and therefore are entitled to live under the laissez faire regime which the First Amendment sanctions. *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973).

For a view that a First Amendment model which posits a self-correcting marketplace of ideas is a romantic and unrealistic description of the opinion process in late twentieth-century America, see Barron, *Access to the Press—A New First Amendment Right*, 80 Harv.L.Rev. 1641 (1967):

> There is inequality in the power to communicate ideas just as there is inequality in economic bargaining power; to recognize the latter and deny the former is quixotic. The "marketplace of ideas" has rested on the assumption that protecting the right of expression is equivalent to providing for it. But changes in the communications industry have destroyed the equilibrium in that marketplace. * * * A realistic view of the first amendment requires recognition that a right of expression is somewhat thin if it can be exercised only at the sufferance of the managers of mass communications.

In classic marketplace of ideas theory the role of government is nonintervention. The marketplace of ideas functions on a basis similar to the Darwinian theory of evolution. The assumption is that the best ideas will emerge, after combat, triumphant. But the unstated assumption from the quotation from Professor Barron is that if the marketplace of ideas is to be something more than a metaphor, some government intervention is required. See *Red Lion v. FCC*, text p. 795.

Marcuse submitted the traditional marketplace of ideas concept of freedom of expression to the following Marxist critique:

> The tolerance which was the great achievement of the liberal era is still professed and (with strong qualifications) practiced, while the economic and political process is subjected to an ubiquitous and effective administration in accordance with predominant interests. The result is an objective contradiction between the economic and political structure on the one side, and the theory and practice of toleration on the other. See Marcuse, *Repressive Tolerance in Wolff, Moore, and Marcuse, A Critique Of Pure Tolerance* 110 (1965).

Marcuse's evident wish to have an intellectual elite direct the media for predetermined social ends will not seem to many an improvement over the present situation. Yet there is disquiet as to whether a marketplace of ideas theory is meaningful when the marketplace is increasingly characterized by concentration of ownership and similarity of viewpoint.

Professor Edwin Baker rejects both the classic marketplace of ideas theory and what he calls the market failure model of the First Amendment. Advocates of the latter theory seek governmental intervention in the opinion process in order to correct the actual deficiencies or imbalances which they perceive in the actual workings of the communications marketplace (marketplace of ideas). Professor Baker argues: "If provision of adequate access is the goal, the lack of criteria for 'adequacy' undermines the legitimacy of government regulation. For the government to determine what access is adequate involves the government implicitly judging what is the correct resolution of the marketplace debates."

See Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L.Rev. 964 at 986 (1978).

Professor Baker calls for adoption of a liberty model as the appropriate First Amendment model: "On the liberty theory, the purpose of the First Amendment is not to guarantee adequate information. * * * Speech is protected because without disrespecting the autonomy of other persons, it promotes both the speaker's self-fulfillment and the speaker's ability to participate in change."

In an essay which goes against the contemporary First Amendment current, Professor Owen Fiss makes a plea for a role for the state in First Amendment theory. He recognizes that free speech is "the one plea for limited government that appears to be embraced by all." Well, not quite all. Professor Fiss argues that we should begin "with the fact of state intervention in economic matters, and then use that historical experience to understand why the state may have a role to play in furthering free speech values." See Fiss, *Why the State?* 100 Harv.L.Rev. 781 at 782–783 (1987). He distinguishes those who see the First Amendment as a limit on government or state action. Such people tend to regard the First Amendment as a protection of autonomy, with the understanding that autonomy includes individuals, groups, and corporations.

Professor Fiss argues that "[p]rotecting autonomy by placing a zone of noninterference around the individual or certain institutions is likely to produce a public debate that is dominated, and thus constrained, by the same forces that dominate social structure, not a debate that is 'uninhibited, robust and wide open.' " Fiss contrasts the autonomy principle with the public debate principle: "But now action is judged by its impact on public debate, a social state of affairs, rather than by whether it constrains or otherwise interferes with the autonomy of some individual or institution." The focus, says Fiss, is not on the "frustration of would-be speakers" but with the "quality of public discourse." Id. at 786 Professor Fiss concludes: "The aim is not to free the various agencies of the state from the forces that dominate social structure (surely an impossible task), but only to make it more likely that they will exert a countervailing force. This goal might be achieved by creating within state agencies certain processes or mechanisms that would enhance the power of the weaker elements of society." Id. at 792. Is this a Marxist view of public debate? Would Marcuse be sympathetic to it? See text, p. 6. When Fiss talks about the development of new mechanisms to counter market forces, what mechanisms would you suggest? See Barron, text, p. 489.

Professor Scott Powe distinguishes Fiss from Barron: "For Barron, access was a way to add voices and ideas to the marketplace." Both marketplace and individual would thereby be promoted. "Fiss makes no such claim. His proposals are designed to abridge some speech so that what is thereafter allowed in the marketplace will be capable of proper evaluation by listeners." For Fiss, autonomy is subordinated to a more important value: the quality of public discourse. See Powe, *Scholarship And Markets*, 56 Geo.Wash.L.Rev. 172 at 181 (1987). Professor Powe is extremely critical of Fiss's view that the public discourse value served by the First Amendment justifies state intervention to facilitate that value: "What Fiss leaves unexplained—because it is unexplainable—is how the First Amendment ceased being a bar to government action and instead became the vehicle to justify government regulation. Quite simply, Fiss is asking for an amendment to the Constitution rather than the interpretation of the Constitution. Implicitly Fiss's position is a testament to the premise of much modern constitutional discourse: everything is up for grabs." Id. at 184.

Interpreting the First Amendment

The Supreme Court like most of the American bar, as the subsequent cases in this chapter will illustrate, has engaged in a long-standing practice of making interchangeable use of free speech cases in freedom of the press cases and vice versa.

Although the interchangeable use of the freedom of speech and freedom of the press clauses may have characterized constitutional adjudication in the past, new attention has now been directed to the question of whether the free speech and free press clauses have distinct missions. In 1975, Justice Potter Stewart declared that alone among constitutional guarantees "the Free Press Clause extends protection to an institution." Justice Stewart observed: "The publishing business is, in short, the only organized private business that is given explicit constitutional protection." See Stewart, "*Or of the Press*," 26 Hastings L.J. 631, 633–34 (1975).

In the Stewart thesis, the freedom of the press clause is designed to protect the press *qua* press. In a sense, it is the antithesis of Justice Felix Frank-

furter's conception of freedom of the press as reflected in his concurring opinion in *Pennekamp v. Florida*, 328 U.S. 331 (1946): "Freedom of the press, however, is not an end in itself but a means to the end of a free society." In the Stewart thesis, direct protection of the press is the function of the press clause. Justice Stewart interpreted the freedom of the press clause as follows: "[The] primary purpose of the constitutional guarantee of a free press was * * * to create a fourth institution outside the Government as an additional check on the three official branches."

Reactions to the ramifications of the Stewart conception of the press clause permeate recent First Amendment litigation. In *Herbert v. Lando*, 441 U.S. 153 (1979), text, p. 219. Stewart's contention that the free press clause extends special First Amendment protection to editorial decision making to the point that journalists and editors may be deemed excused from some of the customary demands of civil discovery was rejected in the decision by six of the nine justices who passed on the issue.

The issue of whether the free press clause gave a special status to the press arose again to some extent in the so-called corporate speech case, *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). In what was possibly an oblique slap at the thesis that the press clause accords the press a special First Amendment status, Justice Lewis Powell observed for the Court that the inherent value of speech is not affected by the status of the speaker. Chief Justice Warren Burger, in a concurring opinion, appeared to enter the lists against a view of the press clause of First Amendment protection which would accord the press a uniquely privileged status: "In short, the First Amendment does not 'belong' to any definable category of persons or entities: it belongs to all who exercise its freedoms." See text, p. 158.

What the student of the law of mass communications must recognize at the outset, however, is that the constitutional protection given to freedom of speech and press covers the whole spectrum of the means of communication. The First Amendment has been extended from its specific eighteenth-century addressees mentioned in the constitution itself—free speech and free press—to new media of communication undreamed of in the eighteenth century, such as the sound truck, radio, television, cable television, and the movies. Occasionally, the Supreme Court has tried to deal with each medium in terms of its own problems. For example, Justice Tom Clark in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), observed that "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. * * * Each method [of expression] tends to present its own peculiar problems." 343 U.S. 495 at 502–503 (1952). Justice Robert Jackson in *Kovacs v. Cooper*, 336 U.S. 77 (1949), urged that each medium be considered a law unto itself. Justice Hugo Black rejected this kind of "favoritism." Justice Brennan has urged an approach which would recognize that there are two distinct First Amendment models—the "structural" model and the "speech" model—which do not and need not receive the same degree of protection.

In October 1979, Brennan gave a provocative speech in which he identified two First Amendment models conveying differing degrees of constitutional protection. In this view, the "structural" model grants less constitutional protection to the press than does the "speech" model:

> Under one model—which I call the "speech" model—the press requires and is accorded the absolute protection of the First Amendment. In the other model—I call it the "structural" model—the press' interests may conflict with other societal interests and adjustment of the conflict on occasion favors the competing claim.
>
> The "speech" model is familiar. It is as comfortable as a pair of old shoes, and the press, in its present conflict with the Court, most often slips into the language and rhetorical stance with which this model is associated even when only the "structural" model is at issue. According to this traditional "speech" model, the primary purpose of the First Amendment is more or less absolutely to prohibit any interference with freedom of expression. The "speech" model thus readily lends itself to the heady rhetoric of absolutism.
>
> The "speech" model, however, has its limitations. It is a mistake to suppose that the First Amendment protects *only* self-expression, only the right to speak out. I believe that the First Amendment in addition fosters the values of democratic self-government.
>
> Another way of saying this is that the First Amendment protects the structure of communications necessary for the existence of our democracy. This insight suggests the second model to describe the role of the press in our society. This second model is structural in nature. It focuses on the relationship of the press to the communicative functions required by our dem-

ocratic beliefs. To the extent the press makes these functions possible, this model requires that it receive the protection of the First Amendment. A good example is the press' role in providing and circulating the information necessary for informed public discussion. To the extent the press, or, for that matter, to the extent that any institution uniquely performs this role, it should receive unique First Amendment protection.

This "structural" model of the press has several important implications. It significantly extends the umbrella of the press' constitutional protections. The press is not only shielded when it speaks out, but when it performs all the myriad tasks necessary for it to gather and disseminate the news. As you can easily see, the stretch of this protection is theoretically endless. Any imposition of any kind on the press will in some measure affect its ability to perform protected functions. Therefore this model requires a Court to weigh the effects of the imposition against the social interests which are served by the imposition. This inquiry is impersonal, almost sociological in nature. But it does not fit comfortably with the absolutist rhetoric associated with the first model of the press I have discussed. For here, I repeat, the Court must weigh the effects of the imposition inhibiting press access against the social interests served by the imposition.

On the whole, the Supreme Court and lesser courts in the American judicial system have approached problems of free speech and press rather broadly in terms of the conflicting social values working for and against a governmental restraint on a means of communication in a particular case.

In this First Amendment chapter, as well as in other chapters, one confronts a continuous philosophical debate on the meaning of freedom of speech and press. Through concepts like "clear and present danger," "balancing," "strict scrutiny," "symbolic speech," and "freedom from prior restraint," one begins to learn the constitutional law vocabulary of freedom of speech and press. Sometimes these doctrines disguise the sources of decision rather than illuminate them. It is also true that sometimes a Supreme Court decision owes more to the death or retirement of an old justice and the appointment of a new one than it does to the demands of any particular doctrine.

Nevertheless, the free speech and press doctrines collected in this chapter, in all their variety and contradiction, do reflect the considerable travail of Supreme Court justices in trying to discern the meaning of the First Amendment.

FIRST AMENDMENT DOCTRINE IN THE SUPREME COURT; A RATIONALE FOR LIMITING THE REGULATION OF SPEECH CONTENT

The Rise of the Clear and Present Danger Doctrine

The First Amendment to the U.S. Constitution must be the necessary starting point for any discussion of the extent and content of legal control of the press. The language of the amendment which has spawned innumerable cases, laws, books, and articles is remarkably stark, direct, and concise. See text, p. 1.

The words which attract our attention are the phrases "freedom of speech, or of the press." Because of the dynamic way in which this constitutional language has been interpreted by the courts, particularly the United States Supreme Court, the press has been held to mean all media of mass communication and not just newspapers. Whether this means that the First Amendment must be applied to all the media in exactly the same way is a question which will particularly concern us in the materials on legal control of broadcasting. But the basic point is that in American law the means of communication enjoy a protected status. A study of the assumptions on which such protection is based and a critical examination of their functional validity is our dual task. We must understand the fundamental role played in the American communications process by the political, legal, and communications theories that have been spun around the First Amendment.

The American law of freedom of speech and press, as enunciated by the opinions of the United States Supreme Court, is in the main a post-World War I phenomenon. The introduction of conscription in the United States in World War I for the first time since the Civil War, the opposition of radical groups to participation in that struggle, and the anti-radical "red scare" of the early 1920s combined to produce a collision between authority and libertarian values. That collision provoked the first significant efforts to develop some guidelines for the problem of reconciling majoritarian impatience, as expressed in an assortment of repressive laws, with constitutional guarantees. The purpose, of course, of a constitution is in a sense to confound a legislative majority. What a constitution does is to remove certain matters from the reach of legislation.

The following case arose out of socialist hostility to the draft and to American participation in World War I. The clash of a federal anti-espionage statute with the political protest of the socialists provided a vehicle for an opinion by Justice Oliver Wendell Holmes.

Holmes became one of the early architects of American free speech and free press theory. In *Schenck v. United States*, 249 U.S. 47 (1919). Holmes launched a famous doctrine, the clear and present danger doctrine. As you read the opinion, ask yourself: what function did Holmes expect his clear and present danger doctrine to serve?

SCHENCK v. UNITED STATES

249 U.S. 47, 39 S.CT. 247, 63 L.ED. 470 (1919).

Justice HOLMES delivered the opinion of the Court.

This is an indictment in three counts. The first charges a conspiracy to violate the espionage act of June 15, 1917, by causing and attempting to cause insubordination, &c., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendant wilfully conspired to have printed and circulated to men who had been called and accepted for military service under the Act of May 18, 1917, a document set forth and alleged to be calculated to cause such insubordination and obstruction. The count alleges overt acts in pursuance of the conspiracy, ending in the distribution of the document set forth. The second count alleges a conspiracy to commit an offense against the United States, to-wit, to use the mails for the transmission of matter declared to be nonmailable by title 12, § 2, of the act of June 15, 1917, to-wit the above mentioned document, with an averment of the same overt acts. The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above. The defendants were found guilty on all the counts. They set up the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press, and bringing the case here on that ground have argued some other points also of which we must dispose.

It is argued that the evidence, if admissible, was not sufficient to prove that the defendant Schenck was concerned in sending the documents. According to the testimony Schenck said he was general secretary of the Socialist party and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the Executive committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed on the other side of one of them in use, to be mailed to men who had passed exemption boards, and for distribution. Schenck personally attended to the printing. On August 20 the general secretary's report said "Obtained new leaflets from printer and started work addressing envelopes" &c.; and there was a resolve that Comrade Schenck be allowed $125 for sending leaflets through the mail. He said that he had about fifteen or sixteen thousand printed. There were files of the circular in question in the inner office which he said were printed on the other side of the one sided circular and were there for distribution. Other copies were proved to have been sent through the mails to drafted men. Without going into confirmatory details that were proved, no reasonable man could doubt that the defendant Schenck was largely instrumental in sending the circulars about. * * *

* * *

The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the conscription act and that a conscript is little better than a convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said, "Do not submit to intimidation," but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that any one violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on, "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands,

and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., &c., winding up, "You must do your share to maintain, support and uphold the rights of the people of this country." Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well-known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*, 205 U.S. 454, 462. We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.* [Emphasis added.] It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 * * * punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. * * *

Judgments affirmed.

COMMENT

The most striking observation about the American law of freedom of speech and press is that the abridgment of these freedoms by Congress is not quite as unrestricted as a literal reading of the First Amendment might lead one to suppose. The *Schenck* case is an illustration of congressional power over political freedom. After all, Schenck was convicted for disseminating a pamphlet urging resistance to the draft, and the Supreme Court, in an opinion by one of its most libertarian judges, affirmed. In a companion case to *Schenck*, Justice Holmes remarked that "the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language." *Frohwerk v. United States*, 249 U.S. 204 at 206 (1919). Holmes made a similar observation in *Schenck* when he said that "free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." In other words, there is no absolute freedom of expression, but rather the scope of protection for such freedom is a question of degree. Holmes authored the clear and present danger doctrine as a guide to indicate the boundaries of protection and nonprotection. Under the rubric of the clear and present danger doctrine, political expression can be punished if circumstances exist to "create a clear and present danger" that the communication in controversy would "bring about the substantive evils that Congress has a right to prevent."

Does Holmes indicate in *Schenck* whether the determination of circumstances which would present a "clear and present" danger is a legislative or a judicial responsibility?

Since the pamphlet issued by a minor group of socialists was found sufficiently objectionable to place its distributors in jail, should we conclude that the clear and present danger doctrine operates to give relatively little protection to unpopular communications? Or is there a special feature of the *Schenck* case which makes its holding of somewhat limited application?

ABRAMS v. UNITED STATES

250 U.S. 616, 40 S.CT. 17, 63 L.ED. 1173 (1919).

[EDITORIAL NOTE Abrams and others were accused of publishing and disseminating pamphlets

attacking the American expeditionary force sent to Russia by President Woodrow Wilson to defeat the Bolsheviks. The pamphlets also called for a general strike of munitions workers. The majority of the Supreme Court, per Justice John Clarke, held that the publishing and distribution of the pamphlets during the war were not protected expression within the meaning of the First Amendment. Justice Clarke's opinion for the majority failed to make much impact on the law. But the dissent of Justice Holmes, in which he was joined by Justice Louis Brandeis, became one of the significant documents in the literature of the law of free expression.]

Justice HOLMES, dissenting.

This indictment is founded wholly upon the publication of two leaflets. * * * The first count charges a conspiracy pending the war with Germany to publish abusive language about the form of government of the United States, laying the preparation and publishing of the first leaflet as overt acts. The second count charges a conspiracy pending the war to publish language intended to bring the form of government into contempt, laying the preparation and publishing of the two leaflets as overt acts. The third count alleges a conspiracy to encourage resistance to the United States in the same war and to attempt to effectuate the purpose by publishing the same leaflets. The fourth count lays a conspiracy to incite curtailment of production of things necessary to the prosecution of the war and to attempt to accomplish it by publishing the second leaflet to which I have referred.

The first of these leaflets says that the President's cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington. * * *

The other leaflet, headed "Workers—Wake Up," with abusive language says that America together with the Allies will march for Russia to help the Czecko-Slovaks [sic] in their struggle against the Bolsheviki, and that this time the hypocrites shall not fool the Russian emigrants and friends of Russia in America. It tells the Russian emigrants that they now must spit in the face of the false military propaganda by which their sympathy and help to the prosecution of the war have been called forth and says that with the money they have lent or are going to lend "they will make bullets not only for the Germans but also for the Workers Soviets of Russia," and further, "Workers in the ammunition factories, you are producing bullets, bayonets, cannon to murder not only the Germans, but also your dearest, best, who are in Russia fighting for freedom." It then appeals to the same Russian emigrants at some length not to consent to the "inquisitionary expedition in Russia," and says that the destruction of the Russian revolution is "the politics of the march on Russia," The leaflet winds up by saying "Workers, our reply to this barbaric intervention has to be a general strike!" and after a few words on the spirit of revolution, exhortations not to be afraid, and some usual tall talk ends "Woe unto those who will be in the way of progress. Let solidarity live! The Rebels."

No argument seems to be necessary to show that these pronunciamentos in no way attack the form of government of the United States, or that they do not support either of the first two counts. What little I have to say about the third count may be postponed until I have considered the fourth. With regard to that it seems too plain to be denied that the suggestion to workers in the ammunition factories that they are producing bullets to murder their dearest, and the further advocacy of a general strike, both in the second leaflet, do urge curtailment of production of things necessary to the prosecution of the war within the meaning of the act of May 16, 1918, amending section 3 of the earlier act of 1917. But to make the conduct criminal that statute requires that it should be "within intent by such curtailment to cripple or hinder the United States in the prosecution of the war." It seems to me that no such intent is proved.

* * *

I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of Schenck, Frohwerk and Debs were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. *It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.*

[Emphasis added.] Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.

* * *

In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, even if what I think the necessary intent were shown; the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow—a creed that I believe to be the creed of ignorance and immaturity when honestly held, as I see no reason to doubt that it was held here but which, although made the subject of examination at that trial, no one has a right even to consider in dealing with the charges before the Court.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 (act July 14, 1798, c. 73, 1 Stat. 596), by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law abridging the freedom of speech." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States. Justice Brandeis concurs with the foregoing opinion.

COMMENT

The reader should note that Holmes's theory of freedom of expression is basically a laissez-faire idea. The clash of political ideas is in this view a self-correcting and self-sustaining process. Under the marketplace of ideas theory the responsibility of government is neither to suppress nor to influence the process. This approach is reconciled with the clear and present danger test on the assumption that in a less than ideal world the application of the clear and present danger test permits only a minimum of governmental intervention into the opinion-making process. Holmes's *Abrams* dissent is a classic statement of the "marketplace of ideas" approach to First Amendment theory. In view of the rise of the electronic media, the information explosion, and the concentration of ownership in the mass media, what difficulties are presented in trying to make contemporary applications of statements such as "the best test of truth is the power of the thought to get itself accepted in the competition of the market"? The "market" Holmes is talking about is basically what we call today the mass media and their mass audi-

ences. Is "free trade in ideas" the distinguishing characteristic of these media? If it is not, what deficiencies do you see in the "marketplace of ideas" theory?

Professor Thomas M. Scanlon, Jr., advocates a positive role for government in the effort to achieve freedom of expression. Professor Scanlon says there may be reasonable disagreement on how best to "refine the right" of freedom of expression. See Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. of Pittsburgh L.Rev. 519 (1979). What is this disagreement about?

> But as new threats arise—from, for example, changes in the form of ownership of dominant means of communication—it may be unclear and a matter subject to reasonable disagreement, how best to refine the right in order to provide the relevant kinds of protection at a tolerable cost. This disagreement is partly empirical—a disagreement about what is likely to happen if certain powers are or are not granted to governments. It is also in part a disagreement at the foundational level over the nature and importance of audience and participant interests and, especially, over what constitutes a sufficiently equal distribution of the means to their satisfaction. The main role of a philosophical theory of freedom of expression, in addition to clarifying what it is we are arguing about, is to attempt to resolve these foundational issues.

GITLOW v. PEOPLE OF STATE OF NEW YORK

268 U.S. 652, 45 S.CT. 625, 69 L.ED. 1138 (1925).

[EDITORIAL NOTE Benjamin Gitlow, a member of the left-wing section of the Socialist Party, the revolutionary segment of the party, was indicted for the publication of a radical "manifesto" under the criminal anarchy statute of New York. Sixteen thousand copies of THE REVOLUTIONARY AGE, the house organ of the revolutionary section of the party which published the Manifesto, were printed. Some were sold; some were mailed. The New York Criminal Anarchy statute forbade the publication or distribution of material advocating, advising, or "teaching the duty, necessity or propriety of overthrowing or overturning organized government by force or violence." The Manifesto had urged mass strikes by the proletariat and repudiated the policy of the proletariat and repudiated the policy of the moderate Socialists of "introducing Socialism by means of legislative measures on the basis of the bourgeois state." The New York trial court convicted Gitlow under the Criminal Anarchy statute, and the state appellate courts affirmed. The United States Supreme Court also affirmed. The Court utilized as the measure of constitutionality the question of whether there was a reasonable basis for the legislature to have enacted the statute.]

The Court said, per Justice SANFORD:

* * *

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States. [Emphasis added.] We do not regard the incidental statement in *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543, that the Fourteenth Amendment imposes no restrictions on the State concerning freedom of speech, as determinative of this question.

* * *

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

This being so it may be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. * * * In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to

the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such case it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. *Schenck v. United States* 249 U.S. 47; *Debs v. United States* 249 U.S. 211. And the general statement in the *Schenck* case, 249 U.S. 47 that the "question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,"—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.

* * *

And finding, for the reasons stated that the statute is not in itself unconstitutional, and that it has not been applied in the present case in derogation of any constitutional right, the judgment of the Court of Appeals is affirmed.

Justice HOLMES (dissenting).

Justice Brandeis and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right then I think that the criterion sanctioned by the full Court in *Schenck v. United States*, applies:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent."

It is true that in my opinion that criterion was departed from in *Abrams v. United States*, but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it * * * has settled the law. If what I think the correct test is applied it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. *Every idea is an incitement.* It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in a proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more. * * *

COMMENT

The Court, it should be observed, refused to apply the clear and present danger doctrine to the facts of the *Gitlow* case. The opinion apparently distinguishes the use of the clear and present danger doctrine in cases like *Schenck* and *Abrams* as espionage act cases. The Court asserts that a test of "reasonableness" of the legislative judgment will be used when the legislature itself has determined that certain utterances create a danger of a substantive evil. Such a circumstance, the Court says, differs from the situation in which the legislature has not specified certain utterances as forbidden. In the absence

of such legislative specificity, the clear and present danger doctrine may be applied. Justice Brandeis's subsequent definition of the clear and present danger doctrine in his famous concurrence in *Whitney v. California*, 274 U.S. 357 (1927), text, p. 18, stated a formulation of the clear and present danger doctrine which yields a far greater protection for freedom of expression than that afforded by Sanford's narrower view of the doctrine in *Gitlow*.

Under Justice Sanford's interpretation of clear and present danger, how could a legislature, determined to suppress a particular political heresy, effectively avoid application of the clear and present danger doctrine?

If the best measure of the constitutional tests of statutes alleged to offend freedom of expression is the latitude a test yields for freedom of expression, how does the "reasonableness" test compare to (1) the clear and present danger doctrine as understood by Sanford, and (2) as understood by Holmes in his dissent in *Gitlow*?

As Holmes discusses the clear and present danger doctrine in *Gitlow*, what would you say appears to be the heart of the doctrine as far as he is concerned?

The portions of the *Gitlow* opinion concerning appropriate tests for legislation affecting freedom of expression are at this point no longer authoritative. It is Brandeis's subsequent formulation of the clear and present danger doctrine rather than Sanford's which has prevailed. What has proved durable in the opinion were some *dicta*, or statements not actually necessary to the result reached by the Court, where Justice Sanford offhandedly extended the limitations on legislation curtailing freedom of expression binding on the federal government by reason of the First Amendment to the states by reason of the due process clause of the Fourteenth Amendment.

Previous *dicta* had indicated that the states were not bound by a federal constitutional guarantee of freedom of speech and press. Justice Sanford's statement to the contrary in *Gitlow* was, therefore, of great importance. As a constitutional matter it is not an exaggeration to say that freedom of speech and press in regard to the states is a judicial creation just sixty-five years old.

Were it not for his *Gitlow dictum*, Justice Sanford would be largely unremembered. However, the substance of his *Gitlow* opinion has found a champion. Robert Bork argues that the opinion which should be praised in *Gitlow* is not the one authored by Justice Holmes, but the one authored by Justice Sanford. Why?

Bork responds:

> Speech advocating violent overthrow is * * * not "political speech." It is not political speech because it violates constitutional truths about processes and because it is not aimed at a new definition of political truth by a legislative majority. Violent overthrow of government breaks the premises of our system concerning the ways in which truth is defined, and yet those premises are the only reasons for protecting political speech. It follows that there is no constitutional reason to protect speech advocating forcible overthrow. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 20 (1971).

For many, there will be concern whenever political freedom is limited to those who believe in "constitutional truth." The fear is that those not in control of government may make too narrow a definition of what constitutes "constitutional truth." Compare the views of Herbert Marcuse, text, p. 6, with those of Robert Bork. Are there any points of similarity? Any differences?

The Meiklejohn Theory of The First Amendment

The political philosopher, Alexander Meiklejohn, was a severe critic of the views articulated by Justice Holmes. Holmes's clear and present danger test sometimes permitted that which, in Meiklejohn's judgment, the First Amendment prohibited: congressional legislation abridging freedom of expression. See A. Meiklejohn, *Free Speech and Its Relation to Self-Government*, 29 (1948). For Meiklejohn, the clear and present danger test was merely a verbal dodge for permitting restriction of free speech and press whenever the Congress was disposed to do so.

Did Professor Meiklejohn believe then that no manner of expression could be restricted by government—even "counselling to murder" or falsely shouting fire in a crowded theatre? Meiklejohn did not go this far either. What he urged was that it is necessary to distinguish between two kinds of expression, one of which has absolute protection and one of which does not. Expression with regard to issues

which concern political self-government was in Meiklejohn's judgment absolutely protected by the language of the First Amendment, i.e., "Congress shall make no law abridging * * * freedom of speech, or of the press." But private discussion, discussion which is nonpolitical in character, i.e., falsely shouting fire in a crowded theatre, was not within the ambit of the First Amendment at all but rather within the ambit of the more flexible, and less restrictive, due process clause of the Fifth Amendment, i.e., " * * * nor shall any person * * * be deprived of life, liberty or property, without due process of law."

The rationale of the absolute protection for freedom of speech in Meiklejohn's judgment was to assure that the general citizenry would have the necessary information to make the informed judgments on which a self-governing society is dependent. Speech unrelated to that end was therefore not public speech, and not within the scope of the First Amendment, and so within the regulatory power of legislatures.

Did Meiklejohn underestimate the influence of nonpolitical forms of speech on the process of self-government?

Meiklejohn and the Blasi Critique: The "Checking Value"

The heart of the Meiklejohn thesis was that the First Amendment should be interpreted to safeguard and protect individual self-governance in a free and democratic society. It is precisely this thesis which has recently been exposed to a comprehensive critique. See Blasi, *The Checking Value in First Amendment Theory*, American Bar Foundation Research Journal 523 at 561 (1977). Professor Vincent Blasi believes that the view that the First Amendment is designed essentially to protect individual democratic decision making is outmoded.

"[T]he Meiklejohn thesis vision of active, continued involvement by citizens fails to describe not only the reality but also the shared ideal of American politics."

Blasi instead suggests that the First Amendment should be viewed as a kind of counterpoise to government. The function of the press is to serve as the watchdog of government, and the purpose of the First Amendment is to provide the press with protection in its role of keeping government responsive and accountable. This checking function value in the First Amendment is described by Professor Blasi as follows:

> The central premise of the checking value is that abuse of government is an especially serious evil—more serious than the abuse of private power, even by institutions such as large corporations which can affect the lives of millions of people.

The shift in emphasis on the ultimate purpose of First Amendment protection reflected between Meiklejohn's analysis as compared with that of Blasi is very clear. Protection of the media, rather than protection of the citizenry for purposes of self-expression and democratic decision making, becomes the fundamental First Amendment objective. The press becomes the focal point of First Amendment theory because the press and not the citizenry is seen as the essential "check" on government excess. The Blasi theory makes enduring constitutional interpretation out of the press role in Watergate.

The "checking value" sees the function of citizens in a regime ordered by the First Amendment in a very different light than Professor Meiklejohn perceived it. Professor Blasi acknowledges this difference in perspective and defends it:

> The checking value is premised upon a different vision—one in which the government is structured in such a way that built-in counterforces make it possible for citizens in most, but not all, periods to have the luxury to concern themselves almost exclusively with private pursuits.

In the Meiklejohn theory, the individual is at the heart of First Amendment theory. In the Blasi theory, the media occupy that role. But is this a required substitution? First Amendment theory should be rich enough to give the media adequate protection and yet to continue to grant the citizen the pivotal role which Meiklejohn assigned him. The "checking value" theory quite properly recognizes the almost quasi-constitutional checking role the press plays vis-à-vis government. Yet the theory is perhaps somewhat defeatist since it posits the individual citizen as remote and helpless, at least when compared to the two major protagonists, government and the media.

Meiklejohn and Holmes: The Chafee View

Meiklejohn's theory had the advantage of attempting to deal textually with the perplexing latitude of the

First Amendment. The dilemma of First Amendment interpretation is that the more generously its language is interpreted, oddly enough, the less protection it renders. This is due to the fact that as a practical and a political matter, legislative majorities are too often unwilling to tolerate unlimited expression. Both Meiklejohn and Holmes, then, were attempting to provide a guide for indicating that which is protected expression and that which is not. Meiklejohn criticized Holmes because Holmes did not segregate the most important aspect of expression from a political view and immunize it from legislative assault.

Professor Zechariah Chafee subsequently criticized Meiklejohn on the ground that his attempt to immunize political speech—quite beyond the fact that separating that which is public and that which is private speech is no easy matter—was hopelessly unrealistic from a pragmatic point of view, and historically invalid as well.

Professor Chafee's basic point was that the question is not, ideally, how much speech ought to be protected but rather, politically and practically, how much expression can be protected by a court which is asked to defy "legislators and prosecutors." For Chafee, the merit of the clear and present danger doctrine was that it allowed the Congress some room to legislate in the area of public discussion but in such a way that the scope for such legislation was very restricted. For Chafee, the alternative to the Holmesian interpretation of the First Amendment was not Meiklejohn's absolute immunity for public discussion but rather no "immunity at all in the face of legislation." See Chafee, Book Review, 62 Harv.L.Rev. 891 at 898 (1949). It was obvious to Chafee that some concessions must be made to popular intolerance in periods of stress in the form of legislation. It was apparently very clear to him that, if some concessions were not made, the consequences for free expression in any time of turmoil and anxiety would necessarily be worse than if some relaxation of the absolute language of the First Amendment was not permitted.

For Professor Meiklejohn it was a matter of great significance that the First Amendment prohibited the abridgment of "freedom of speech" rather than "speech itself." This for him was the clue that the Framers intended to give absolute protection to public or political speech. That the historical background of the First Amendment by no means implies that the Framers contemplated that absolute freedom of expression championed by Professor Meiklejohn is suggested in Levy, *Legacy of Suppression* (1960). For a different opinion by Levy, see *Emergence of a Free Press* (1985). Should we be bound by the Framers' understanding of the document which they authored? A response was voiced by the distinguished political scientist Professor Harold Lasswell:

> Suppose that historical research does succeed in disclosing the perspectives that prevailed in the eighteenth century, and which have been greatly modified since. What of it? * * * In the perspective of a comprehensive value oriented jurisprudence * * * the historical facts about the perspectives of the founding fathers, so briefly adhered to, are not binding on us.

See Lasswell's review of Crosskey, *Politics and The Constitution in the History of The United States*, 22 Geo.Wash.L.Rev. 383 (1953).

What are the comparative advantages and disadvantages for society and for those who work in the mass media of (1) the historical approach to the First Amendment, (2) the Meiklejohn approach, and (3) the Lasswellian approach?

The Clear and Present Danger Test Refined: The Authorized Brandeis Version

WHITNEY v. CALIFORNIA

274 U.S. 357, 47 S.CT. 641, 71 L.ED. 1095 (1927).

*[EDITORIAL NOTE Ms. Anita Whitney participated in the convention which set up the Communist Labor Party of California and was elected an alternate member of its state executive committee. Ms. Whitney was convicted under the California Criminal Syndicalism Act on the ground that the Communist Labor Party was formed to teach criminal syndicalism and, as a member of the party, she participated in the crime. The state Criminal Syndicalism Act defined criminal syndicalism "as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage * * * or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."*

Ms. Whitney insisted, on review to the U.S. Supreme Court, that she had not intended to have the Communist Labor Party of California serve as an instrument of terrorism or violence. Ms. Whitney argued that, as the convention progressed, it developed that the majority of the delegates entertained opinions about violence which she did not share. She asserted she should not be required to

have foreseen that development and that her mere presence at the convention should not be considered to constitute a crime under the statute. The court, per Justice Sanford, said that what Ms. Whitney was really doing was asking the Supreme Court to review questions of fact that had already been determined against her in the courts below and that questions of fact were not open to review in the Supreme Court. The Supreme Court upheld Whitney's conviction on the ground that concerted action involved a greater threat to the public order than isolated utterances and acts of individuals.

But it was the concurrence of Justice Brandeis, joined by Justice Holmes, rather than Justice Sanford's opinion for the majority, which shaped the future development of the constitutional law of freedom of expression. Brandeis attempted to do two things in his concurrence in Whitney. *First, he sought to clarify the clear and present danger doctrine in a sufficiently meaningful way so that the responsibilities of the judiciary and the legislature would be clearly outlined at the same time that the greatest possible protection was provided for freedom of expression. Second, Brandeis sought to analyze the rationale of constitutional protection for freedom of expression.*

The student should read the Brandeis opinion in Whitney *in an effort to state and analyze the conclusions Brandeis reached in trying to serve these two goals.]*

Justice BRANDEIS (concurring).

Ms. Whitney was convicted of the felony of assisting in organizing, in the year 1919, the Communist Labor Party of California, of being a member of it, and of assembling with it. These acts are held to constitute a crime, because the party was formed to teach criminal syndicalism. The statute which made these acts a crime restricted the right of free speech and of assembly theretofore existing. The claim is that the statute, as applied, denied to Ms. Whitney the liberty guaranteed by the Fourteenth Amendment.

The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or assembling with others for that purpose is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate promulgation of the doctrine. Thus the accused is to be punished, not for attempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.

Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled. See *Schenck v. United States*, 249 U.S. 47, 52.

It is said to be the function of the Legislature to determine whether at a particular time and under the particular circumstances the formation of, or assembly with, a society organized to advocate criminal syndicalism constitutes a clear and present danger of substantive evil; and that by enacting the law here in question the Legislature of California determined that question in the affirmative. Compare *Gitlow v. New York*, 268 U.S. 652, 668, 671. The Legislature must obviously decide, in the first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity. Prohibitory legislation has repeatedly been held invalid, because unnecessary, where the denial of liberty involved was that of engaging in a particular business. The powers of the courts to strike down an offending law are no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly.

This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment

of free speech and assembly as the means of protection. To reach sound conclusions on these matters, we must bear in mind why a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of lawbreaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. [Emphasis added.] Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a state might, in the exercise of its police power, make any trespass upon the land of another a crime regardless of the results

or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross uninclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.

* * * Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger, whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the Legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied.

Whether in 1919, when Ms. Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute as applied to her violated the federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed. I am unable to assent to the suggestion in the opinion of the court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society of which Ms. Whitney was a member. Under these circumstances the judgment of the State court cannot be disturbed.

* * *

Justice Holmes joins in this opinion.

COMMENT

It should be noted that Justice Brandeis only reluctantly agreed that the due process clause of the Fourteenth Amendment applied to matters of substantive law, i.e., imposed a freedom of speech and press limitation on state power. Law and journalism students should observe how the modern American law of speech and press rests on judicial interpretation and creativity and how relatively small a role is played by the formal text, the actual language of the constitutional document.

In his discussion of the clear and present danger doctrine, Brandeis stressed that the crucial factor is the immediacy of the danger legislated against. As he puts it, "Only an emergency can justify repression." The corrective for communications objectionable to the state is expression to the contrary. It is only when the "evil apprehended is so imminent that it may befall before there is opportunity for full discussion" that the legislature may act. Brandeis makes it very clear, however, that a legislative judgment that the danger is too immediate and too grave to justify reliance on corrective discussion is not conclusive. As he says, the "enactment of the statute alone cannot alone establish the facts which are essential to its validity." There must be a reasonable basis for the legislative conclusion or for the state's conclusion that a particular repressive statute should be applied because of the imminent danger of the occurrence of a prohibited substantive evil.

This insistence that the courts have the last word in analyzing whether the clear and present danger doctrine should be applied is of the utmost importance. Otherwise, all the legislature would have to do to comply formally with the clear and present danger doctrine would be to merely recite, as the California legislature did in its Criminal Syndicalism Act, that it is concerned with the "immediate

preservation of the public peace and safety." By such a formalism, the supposed protection of a constitutional guarantee of freedom of speech and press would be effectively destroyed.

The Brandeis opinion in *Whitney*, as we have seen, was the charter for a revised clear and present danger doctrine. Yet, in the end, and despite the eloquence of Brandeis, the conviction of Anita Whitney was affirmed, a result which, it should be noted, was joined in by Justice Holmes.[1]

Functionally, how useful has the clear and present danger doctrine actually proven to be? Dean Robert McKay, in a study of the First Amendment, answered the question very pragmatically. Counting cases from 1919 to 1937, Professor McKay concluded: "In its first eighteen years the clear and present danger test amounted only to this: one majority opinion (upholding the conviction claimed to abridge the freedom of speech), one concurrence, and five dissents." See McKay, *The Preference for Freedom*, 34 N.Y.U.L.Rev. 1182 at 1207 (1959).

The Preferred Position Theory

Courts have often declared that they grant a presumption of constitutionality to challenged legislation. In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), in which the issue was a federal statute concerning economic regulation, Chief Justice Harlan Stone, writing for the Court, voiced the familiar view that the legislative judgment should be accorded a presumption of constitutionality. But in a famous footnote Stone stated that he would exempt a certain class of legislation from the scope of such a presumption. 304 U.S. 144 at 152–153, fn. 4:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon v. Condon*, 286 U.S. 73; on restraints upon the dissemination of information, see *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713–714, 718–720, 722; *Grosjean v. American Press Co.*, 297 U.S. 233; on interferences with political organizations, see *Whitney v. California*, 274 U.S. 357, 373–378; and see Holmes, J., in *Gitlow v. New York*, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see *De Jonge v. Oregon*, 299 U.S. 353, 365.
>
> Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 368 U.S. 510, or national, *Meyer v. Nebraska*, 262 U.S. 390, or racial minorities; *Nixon v. Condon*, *supra:* whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

The essence of the preferred position theory stated in *Carolene Products* is that legislation restricting the political freedoms should be exposed to a more searching and exacting judicial review than other legislative challenges. Stone said there is a judicial responsibility to protect political freedom particularly. Restriction of political freedom, unlike other legislative restrictions, endangers the health of the political process. One of the reasons for affording considerable latitude to legislation in constitutional questions is because broad participation in decision making is a value of high dimension in a democratic society. Generally, the legislative process rather than the judicial process is considered more capable of demonstrating and providing such participation. But, if the legislature disenfranchises a segment of the electorate, or restrains freedom of expression so that the electorate is not sufficiently informed to be able to engage rationally in decision making, then the reason for extending the benefit of the doubt to contested legislation is removed. This theory, the "preferred position" or "preferred freedoms" theory of the First Amendment, declares that legislation concerning the political freedoms protected by the First Amendment shall not be able to claim the normal

1. A very similar criminal syndicalism Ohio statute was invalidated by the Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *Brandenburg* also reversed the decision of the Court in *Whitney*: "The contrary teaching of *Whitney v. California*, cannot be supported, and that decision is therefore overruled." See *Brandenburg v. Ohio*, this text, p. 29.

presumption of constitutionality afforded to legislation in general.

In appraising the preferred position along with the other First Amendment doctrines explored in this chapter, it should be noted that the clear and present danger doctrine and the preferred position theory have been thought to be "clearly related." Both theories, it has been said, give judges an active role in First Amendment interpretation and, though they do not provide the certainty of the absolutist approach, they do "in contrast to the pseudo-standards of the reasonableness and balancing doctrines" offer "positive and workable standards to guide judicial judgment." See Pritchett, *The American Constitution*, 429 (2d ed. 1968).

Professor C. H. Pritchett's preference for the clear and present danger and preferred position over balancing and reasonableness is that the latter tests offer no definition or presumption to make them applicable or meaningful. If competing interests are to be balanced, how do we know which interest is to be given what weight?

Professor Thomas Emerson accurately referred to what he called the Burger Court's "neglect of the preferred position doctrine." However, his criticism is directed to the fact that the Court has not yet applied the preferred position theory in a principled across-the-board fashion: "[W]here it feels inclined to defer to legislative judgment, or when it prefers another social interest, it does not feel bound by the preferred position doctrine." See Emerson, *First Amendment Doctrine and the Burger Court*, 68 Calif.L.Rev. 422 at 443 (1980). Although the preferred position doctrine was not to be found by name in the opinions of the Burger court, its legacy was occasionally visible when the Court applied a more searching standard of review in a First Amendment case than it would otherwise. See discussion of balancing and standards of review, text, p. 74.

Preservation of the State: Decline, Death, and Revival of the Clear and Present Danger Doctrine

DENNIS v. UNITED STATES

341 U.S. 494, 71 S.CT. 857, 95 L.ED. 1137 (1951).

Chief Justice Fred VINSON announced the judgment of the Court and an opinion in which Justice Reed, Justice Burton and Justice Minton join.

Petitioners were indicted in July, 1948, for violation of the conspiracy provisions of the Smith Act, 54 Stat. 671, 18 U.S.C.A. § 11, during the period of April, 1945, to July, 1948. * * * A verdict of guilty as to all the petitioners was returned by the jury on October 14, 1949. The Court of Appeals affirmed the convictions. 183 F.2d 201. We granted certiorari, 340 U.S. 863, limited to the following two questions: (1) Whether either § 2 or § 3 of the Smith Act, inherently or as construed and applied in the instant case, violates the First Amendment and other provisions of the Bill of Rights; (2) whether either § 2 or § 3 of the act, inherently or as construed and applied in the instant case, violates the First and Fifth Amendments because of indefiniteness.

Sections 2 and 3 of the Smith Act, 54 Stat. 671, 18 U.S.C.A. §§ 10, 11 (see present 18 U.S.C.A. § 2385), provide as follows:

"Sec. 2.

"(a) It shall be unlawful for any person—

"(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government; * * *

"(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

* * *

"Sec. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of * * * this title."

The indictment charged the petitioners with wilfully and knowingly conspiring (1) to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. The indictment further alleged that § 2 of the Smith Act proscribes these acts and that any conspiracy to take such action is a violation of § 3 of the act.

* * *

Our limited grant of the writ of certiorari has removed from our consideration any question as to the sufficiency of the evidence to support the jury's determination that petitioners are guilty of the offense charged. Whether on this record petitioners did in fact advocate the overthrow of the Government by force and violence is not before us, and we must base any discussion of this point upon the conclusions stated in the opinion of the Court of Appeals, which treated the issue in great detail. That court held that the record amply supports the necessary finding of the jury that petitioners, the leaders of the Communist Party in this country, * * * intended to initiate a violent revolution whenever the propitious occasion appeared.

* * *

The obvious purpose of the statute is to protect existing government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism. That it is within the *power* of the Congress to protect the government of the United States from armed rebellion is a proposition which requires little discussion. Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy. No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the government by force and violence. The question with which we are concerned here is not whether Congress has such *power*, but whether the *means* which it has employed conflict with the First and Fifth Amendments to the Constitution.

One of the bases for the contention that the means which Congress has employed are invalid takes the form of an attack on the face of the statute on the grounds that by its terms it prohibits academic discussion of the merits of Marxism-Leninism, that it stifles ideas and is contrary to all concepts of a free speech and a free press. * * *

The very language of the Smith Act negates the interpretation which petitioners would have us impose on that act. It is directed at advocacy, not discussion. Thus, the trial judge properly charged the jury that they could not convict if they found that petitioners did "no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas." He further charged that it was not unlawful "to conduct in an American college and university a course explaining the philosophical theories set forth in the books which have been placed in evidence." Such a charge is in strict accord with the statutory language, and illustrates the meaning to be placed on those words. Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged.

But although the statute is not directed at the hypothetical cases which petitioners have conjured, its application in this case has resulted in convictions for the teaching and advocacy of the overthrow of the government by force and violence, which, even though coupled with the intent to accomplish that overthrow, contains an element of speech. For this reason, we must pay special heed to the demands of the First Amendment marking out the boundaries of speech. * * *

[T]his Court has recognized the inherent value of free discourse. An analysis of the leading cases in this Court which have involved direct limitations on speech, however, will demonstrate that both the majority of the Court and the dissenters in particular cases have recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations.

* * *

The rule we deduce from these cases [following Schenck] is that where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a "clear and present danger" of attempting or accomplishing the prohibited crime, e.g., interference with enlistment. The dissents, * * * in emphasizing the value of speech, were addressed to the argument of the sufficiency of the evidence. Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction. * * *

* * *

In this case we are squarely presented with the application of the "clear and present danger" test, and must decide what that phrase imports. We first note that many of the cases in which this Court has reversed convictions by use of this or similar tests have been based on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech. * * * Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase "clear and present danger" of the utterances bringing about the evil within the power of Congress to punish.

Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. * * * Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. In the instant case the trial judge charged the jury that they could not convict unless they found that petitioners intended to overthrow the Government "as speedily as circumstances would permit." This does not mean, and could not properly mean, that they would not strike until there was certainty of success. What was meant was that the revolutionists would strike when they thought the time was ripe. We must therefore reject the contention that success or probability of success is the criterion.

The situation with which Justices Holmes and Brandeis were concerned in Gitlow was a comparatively isolated event, bearing little relation in their minds to any substantial threat to the safety of the community. * * * They were not confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis.

Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: "*In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.*" 183 F.2d at 212. *We adopt this statement of the rule.* [Emphasis added.] As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words.

* * *

We hold that §§ 2(a)(1), 2(a)(3) and 3 of the Smith Act, do not inherently, or as construed or applied in the instant case, violate the First Amendment and other provisions of the Bill of Rights, or the First and Fifth Amendments because of indefiniteness. Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a "clear and present danger" of an attempt to overthrow the Government by force and violence. They were properly and constitutionally convicted for violation of the Smith Act. The judgments of conviction are affirmed.

Affirmed.

Justice Clark took no part in the consideration or decision of this case.

Justice FRANKFURTER, concurring:

* * *

But even the all-embracing power and duty of self-preservation are not absolute. Like the war power, which is indeed an aspect of the power of self-preservation, it is subject to applicable constitutional limitations. See *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 156. Our Constitution has no provision lifting restrictions upon governmental authority during periods of emergency, although the scope of a restriction may depend on the circumstances in which it is invoked.

The First Amendment is such a restriction. It exacts obedience even during periods of war; it is applicable when war clouds are not figments of the imagination no less than when they are. * * * The right of a man to think what he pleases, to write what he thinks, and to have his thoughts made available for others to hear or read has an engaging ring of universality. The Smith Act and this conviction under it no doubt restrict the exercise of free speech and assembly. Does that, without more, dispose of the matter?

* * *

Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. The nature of the power to be exercised by this Court has been delineated in decisions not charged with the emotional appeal of situations such as that now before us. We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it. We are to determine whether a statute is sufficiently definite to meet the constitutional requirements of due process, and whether it respects the safeguards against undue concentration of authority secured by separation of power. We must assure fairness of procedure, allowing full scope to governmental discretion but mindful of its impact on individuals in the context of the problem involved. And, of course, the proceedings in a particular case before us must have the warrant of substantial proof. Beyond these powers we must not go; we must scrupulously observe the narrow limits of judicial authority even though self-restraint is alone set over us. Above all we must remember that this Court's power of judicial review is not "an exercise of the powers of a super-Legislature."

* * *

In all fairness, the argument cannot be met by reinterpreting the Court's frequent use of "clear" and "present" to mean an entertainable "probability." In giving this meaning to the phrase "clear and present danger," the Court of Appeals was fastidiously confining the rhetoric of opinions to the exact scope of what was decided by them. We have greater responsibility for having given constitutional support, over repeated protests, to uncritical libertarian generalities. * * *

Justice Black, dissenting.

* * *

Justice DOUGLAS, dissenting.

* * *

The vice of treating speech as the equivalent of overt acts of a treasonable or seditious character is emphasized by a concurring opinion, [Justice Jackson], which by invoking the law of conspiracy makes speech do service for deeds which are dangerous to society. The doctrine of conspiracy has served diverse and oppressive purposes and in its broad reach can be made to do great evil. But never until today has anyone seriously thought that the ancient law of conspiracy could constitutionally be used to turn speech into seditious conduct. Yet that is precisely what is suggested. I repeat that we deal here with speech alone, not with speech *plus* acts of sabotage or unlawful conduct. Not a single seditious act is charged in the indictment. To make a lawful speech unlawful because two men conceive it is to raise the law of conspiracy to appalling proportions. That course is to make a radical break with the past and to violate one of the cardinal principles of our constitutional scheme.

Free speech has occupied an exalted position because of the high service it has given our society.

Its protection is essential to the very existence of a democracy. The airing of ideas releases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

Full and free discussion has indeed been the first article of our faith. We have founded our political system on it. It has been the safeguard of every religious, political, philosophical, economic, and racial group amongst us. We have counted on it to keep us from embracing what is cheap and false; we have trusted the common sense of our people to choose the doctrine true to our genius and to reject the rest. This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor. We have wanted a land where our people can be exposed to all the diverse creeds and cultures of the world.

There comes a time when even speech loses its constitutional immunity. Speech innocuous one year may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic. That is the meaning of the clear and present danger test. When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt. Otherwise, free speech which is the strength of the Nation will be the cause of its destruction.

* * *

COMMENT

Functionally speaking, Vinson really follows the old "reasonableness" test of Justice Sanford in *Gitlow*. Vinson's formulation of the clear and present danger doctrine is hardly the same as that articulated by Brandeis in his concurrence in *Whitney*. Vinson said he endorsed the test employed by Judge Learned Hand which was "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." Vinson said that the clear and present danger test, thus understood, could not mean that the government action is prohibited "until the *putsch* is about to be executed." Reasoning that "success or probability of success is not the criterion," Vinson disregarded the factor of time in applying the clear and present danger test.

For Brandeis, time was the key factor in determining whether legislation designed to protect the security of the state was constitutional. See Pritchett, *The American Constitution* (2d ed. 1968). In the Brandeis view, the integrity of the public order was strengthened by free discussion. As Brandeis put it in *Whitney*: "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."

The crucial inquiry, according to Brandeis, was whether the "evil apprehended is so imminent that it may befall before there is opportunity for discussion." But inquiry into the imminence of the danger—the factor of time—is precisely what Vinson excluded from his reformulation of clear and present danger. In *Dennis*, Chief Justice Vinson professedly used the clear and present danger doctrine to assess the constitutionality of the Smith Act, but, in truth, he completely revised it so that it provided far less protection to freedom of expression than the Brandeis conception of clear and present danger. If the imminence of a danger is quite remote, then in the weighing process which constitutional adjudication involves, the value of freedom of expression should not be subordinated to the value of national security. Arguably, under such an approach the Smith Act should be held unconstitutional since the Smith Act had been interpreted by the Justice Department to proscribe "advocacy." But surely advocacy should be protected from federal legislative restriction under the First Amendment in the absence of an imminent danger under the clear and present danger formulation. Vinson changed the clear and present danger doctrine to the "clear danger" or "clear and probable danger" doctrine. Vinson's "clear danger" rationale, however, merely asked whether a grave threat was posed to the state in the future if not now. Obviously, under such a weighing process the likelihood of a statute's being held violative of the First Amendment was far less likely.

Frankfurter's long concurrence in *Dennis* argued for a balancing approach for cases where the values of freedom of expression and national security are

in conflict. But Frankfurter intended the balancing to be done by the Congress rather than by the Court. What difference does it make? It is Congress which has passed the law which is under attack as violative of the First Amendment. If the congressional determination is to be upheld on the theory that the congressional balancing decision should be respected, there is no place for judicial review.

Did Frankfurter's opinion in *Dennis* overlook the point that majoritarianism and constitutionalism are not necessarily synonymous? The idea of constitutional limitation, after all, is to protect certain values from legislative repression, to limit the majority. Therefore, it is somewhat anomalous to make majoritarianism the dominant value in a consideration of the meaning of a constitutional limitation.

Contrast Chief Justice Stone's differing view on the impermissibility of democratic repression (limitation on basic freedoms enacted by freely elected legislatures) in the famous footnote in *United States v. Carolene Products*, 304 U.S. 144 at 152, n. 4 (1938). In that opinion, Stone raised but deferred consideration of the question "whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." According special judicial scrutiny to legislation restricting freedom of expression has been called the "preferred position" theory of freedom of expression. How does this theory differ from Frankfurter's balancing approach in *Dennis*? Frankfurter appeared to be saying that a presumption of validity should be given to the preference of the majority as reflected in an enacted statute, while Stone appeared to be saying that in freedom of expression cases the presumption should be against the legislative judgment.

Of the law of conspiracy Justice Jackson, in a concurring opinion, said that "Congress may make it a crime to conspire with others to do what an individual may lawfully do on his own."

What does this statement mean for the law of freedom of expression? Assume that an editor of a radical newspaper had published an editorial stating that the war in Vietnam was unconstitutional and illegal and that draft resisters merited the approval of the people. Such a statement is presumably not unlawful but rather reflects that criticism of government which it is the purpose of the First Amendment to protect. Suppose, however, that the editor had published the editorial as a member of a group united to frustrate the efforts of the government to conduct the war in Vietnam. Arguably it now becomes a conspiracy and what on an individual basis was lawful becomes transformed into unlawful activity.

"The law of conspiracy," Jackson concluded, "has been the chief means at the Government's disposal to deal with the growing problems created by such organizations. I happen to think it is an awkward and inept remedy, but I find no constitutional authority for taking this weapon from the Government. There is no constitutional right to 'gang up' on the Government."

Chief Justice Vinson reformulated the clear and present danger doctrine in such a way as to make it an entirely new test. He said that the government can act before the *putsch* is executed, and the Court rejected the "contention that success or probability of success is the criterion." What this approach does is to remove the factor of time from the clear and present danger formula. The danger must be grave (serious), but apparently, under the *Dennis* case, it is no longer necessary that it be immediate (present). However, the function of time or imminence in the clear and present danger doctrine was to justify legislation restricting freedom of expression where there is reason to believe that there was not enough time for normal debate to counteract the dangers feared by the legislature. By removing time from the clear and present danger equation, Vinson removed the most significant protection the doctrine provided for freedom of expression.

Vinson adopted Learned Hand's formulation in the Court of Appeals: "whether the gravity of the evil discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger." 183 F.2d at 212. Substituting a test of probability for a test of imminence greatly broadened the scope of governmental power over freedom of expression. Such an approach focuses attention on the gravity of the problem (the "evil") with which the legislature is concerned. The Court said the Smith Act, under which the Communist party leaders were prosecuted, was concerned with the "ultimate value of our society." The nature of this ultimate value? The governmental interest in self-preservation.

The Vinson view as to what is the ultimate societal value contrasted sharply with that of Justice Black, who in his dissent argued that free speech and press

are the preferred values, the ultimate values, in the American constitutional system.

As a result of the *Dennis* decision, the government brought many prosecutions under the Smith Act against minor Communist party leaders. The Supreme Court refused to review any of these cases until 1955 when it finally granted *certiorari* in *Yates v. United States*, 354 U.S. 298 (1957). The Court's decision, per Justice Harlan, two years later ostensibly clarified the *Dennis* holding. Actually, it contracted the scope of the *Dennis* case, revived the constitutional law of freedom of expression from its low point in *Dennis* six years before, and made it far more difficult for the government to obtain convictions under the Smith Act. Of the fourteen defendants whose convictions were before the Supreme Court in *Yates*, five convictions were reversed, and new trials were ordered for the rest.

The most authoritative portion of the *Yates* case is certainly Justice Harlan's statement that the "essence of the *Dennis* holding" only sanctioned the restriction of "advocacy found to be directed to 'action for the accomplishment of forcible overthrow.' " In his dissent, Justice Tom Clark said, as he read Chief Justice Vinson's opinion in *Dennis*, that he saw no basis for the distinction between advocacy of unlawful action and advocacy of abstract doctrine which Harlan said was the heart of the *Dennis* case. For Justice Clark's point of view at least this much can be said: the two lower federal courts in *Yates* also joined him in "misconceiving" the *Dennis* case. Justice Harlan's "reading" of *Dennis* in *Yates* may have been merely an indirect way of reversing *Dennis*.

How does the distinction between advocacy of abstract doctrine and advocacy of unlawful action expand the area of expression the government may not restrict?

The *Dennis* case was decided in 1951 during the beginning of the red-baiting years that have since been called the "McCarthy" era after Senator Joseph McCarthy of Wisconsin. By 1957, the reaction against "McCarthyism" had set in. What explanation could be used to place *Dennis* and *Yates* in a political perspective? What does such a perspective contribute to the discussion in *Dennis* about whether it is more appropriate for the judiciary or the legislature to make ultimate political choices?

In his dissent Justice Black said that the "First Amendment provides the only kind of security system which can preserve a free government." This remark was designed to rebut Vinson's contention in *Dennis* that self-preservation is the ultimate value of a society and Frankfurter's contention that self-preservation is an independent constitutional value which competes with freedom of expression. What is the nature of Justice Black's argument here?

What was the status of the "clear and present" danger doctrine after *Dennis* and *Yates*? No clear answer to this question was provided by the Supreme Court until 1969 when the Court quietly resurrected the "clear and present danger" doctrine in *Brandenburg v. Ohio*.

BRANDENBURG v. OHIO

395 U.S. 444, 89 S.CT. 1827, 23 L.ED.2D 430 (1969).

PER CURIAM.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] * * * the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Ohio Rev.Code Ann. § 2923.13. He was fined $1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal, *sua sponte*, "for the reason that no substantial constitutional question exists herein." It did not file an opinion or explain its conclusions. Appeal was taken to this Court, and we noted probable jurisdiction. 393 U.S. 948 (1968). We reverse.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person

who communicated with the reporter and who spoke at the rally. The state also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews.[1] Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

"This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio *Dispatch*, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.

"We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omitted, and one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. E. Dowell, A *History of Criminal Syndi-*

* * * [L]ater decisions have fashioned the principle

calism Legislation in the United States 21 (1939).

that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions. * * * A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. * * *

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. * * *

Reversed.

BRANDENBURG *AND THE REVIVAL OF THE DANGER DOCTRINE*

In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court held the Ohio criminal syndicalism statute void on its face for failing to distinguish between mere advocacy of ideas and incitement to unlawful conduct. Nearly half a century earlier, a California criminal anarchy statute suffering an identical weakness had been upheld by the Court

1. The significant portions that could be understood were:

"How far is the nigger going to—yeah."; "This is what we are going to do to the niggers."; "A dirty nigger."; "Send the Jews back to Israel."; "Let's give them back to the dark garden."; "Save America."; "Let's go back to constitutional betterment."; "Bury the niggers."; "We intend to do our part."; "Give us our state rights."; "Freedom for the whites."; "Nigger will have to fight for every inch he gets from now on."

in the case of *Whitney v. California*, 274 U.S. 357 (1927). In *Brandenburg*, the Supreme Court turned a corner in its approach to the legislative suppression of politically unpopular speech. *Brandenburg* expressly overruled *Whitney*.

Yet the Court's approach to the *Brandenburg* decision was perfunctory. The Supreme Court issued its *Brandenburg* decision as an anonymous *per curiam* opinion. Further, in purporting to summarize and clarify fifty years of free speech doctrine, the Court in *Brandenburg* issued a relatively short opinion.

Consider the following summary of the holding in *Brandenburg:*

> The *per curiam* opinion summarized past decisions by saying that legislative proscription of advocacy is not constitutional *except:* where such advocacy (1) is directed to inciting or producing imminent lawless action, *and* (2) is likely to incite or produce such action. The Court thus established a two-part test: one, the subjection of the speaker; the other, the objective likelihood that the speaker will succeed in carrying out that intent before time for further dialogue, i.e., imminently.

See Barron and Dienes, *Constitutional Law: Principles and Policy*, 734–35 (2d Ed. 1982).

Is the *Brandenburg per curiam* decision an attempt to abandon or revise the clear and present danger doctrine? Does the *Brandenburg* decision even mention the clear and present danger doctrine by name?

Professor Be Vier appears to argue that the *Brandenburg* test is a different test than the clear and present danger test.

> [The *Brandenburg*] rule avoids the institutional limitations of the clear and present danger test by both limiting the range of external circumstances and providing some criteria for judging those circumstances. Subversive speech is protected unless it is likely to produce imminent lawless action. Implicitly irrelevant, now, is the question of the gravity of the threatened evil; implicitly inappropriate is any effort to discount the gravity of the evil by its improbability; implicitly settled is the issue of whether a "remote" danger can every be "clear"; implicitly dictated is a relatively confined factual finding of the likelihood that the speech would incite imminent lawless action.

See Be Vier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 Stan.L.Rev. 299 at 341 (1978).

Oregon Supreme Court Justice Hans Linde perceives in the *Brandenburg* test several new and disturbing elements. Linde, *"Clear and Present Danger" Re-examined: Dissonance in the Brandenburg Concerto*, 22 Stan.L.Rev. 1163 (1970). If proscription of free speech is to be judged, as *Brandenburg* suggests, by the actual danger posed by the advocacy, does this not render useless an examination of the statute on its face? Under such a standard of review, Professor Linde is concerned that a criminal anarchy statute "might well be unconstitutional now but might be constitutional in the light of diverse events in 1945, in 1951, in 1957, and in 1961, perhaps not in 1966, but again in 1968." But is such a result necessarily objectionable? If the American system of judicial review amounts to a continuous constitutional convention, isn't the situation Linde describes inevitable?

Note that Brandenburg, a Ku Klux Klan organizer, was tried and convicted under a criminal syndicalism statute which was enacted in the early 1900s to guard against nihilists, anarchists, and wobblies. Ohio was one of many states which passed such laws to meet a particular threat perceived at the time but long since lost in oblivion. Yet the Ohio statute remained on the books, to be resurrected in *Brandenburg* to meet a situation far afield from the subject of its origins. Would a standard of review which required constitutional judgment of a statute on its face improve this situation?

Justices Black and Douglas concurred in *Brandenburg*, joining in the decision to overrule *Whitney* and strike down the Ohio criminal syndicalism statute. But they added separate opinions urging abandonment of the "clear and present danger" test for review of laws proscribing speech (as opposed to conduct). They also stressed their long-held belief that *Dennis* was not good law.

Justice Douglas objected to the "clear and present danger" test because he felt the test had, in the crunch, failed to provide sufficient protection to First Amendment interests.

Professor Blasi has advanced the thesis that courts should bring a pathological perspective to the resolution of First Amendment issues. The objective of First Amendment theory in this view "should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically. The First Amendment, in other words, should be targeted for the worst of times." See Blasi, *The Pathological Perspective And The First Amendment*, 85 Col.L.Rev. 449 (1985).

Blasi's goal is to target the First Amendment to protect expression in the "worst of times." This is identical to Chafee's goal in his critique of Meiklejohn. But unlike Chafee, Blasi doesn't think the clear and present danger doctrine is up to the task. He thinks it is too responsive to what he calls the legitimation phenomenon:

> When other social dynamics generate demands for repression, a judicial green light can intensify those demands. Even abstract ideas or concessions that add balance to a libertarian tradition in normal times—the idea for instance, that speech can be regulated when the danger is great enough, (*Brandenburg v. Ohio*), or that reckless falsehoods are not within the ambit of protected expression—may have adverse consequences by virtue of their legitimizing function in pathological times. Blasi at 483.

For Blasi, the particular vice of the clear and present danger doctrine, from the point of view of the pathological perspective, is that it "directs courts to focus on the quality or quantity of danger generated by dissenting speech." This focus tends to promote "the view that the nature of the danger generated by certain forms of speech constitutes the dominant, indeed sole, determinant of first amendment protection. Such a legitimation of risk aversion can only lend support to the forces of repression in times of widespread worry about internal or external threats to the society." Blasi at 483. What defense can be made for the clear and present danger doctrine against this attack? Doesn't it overlook the speech that is saved? *Brandenburg v. Ohio* is not exclusively focused on the "quantity or quality of danger." Does that redeem *Brandenburg's* approach from Blasi's attack?

Professor Martin Redish has challenged Blasi's pathological perspective: "An emphasis in first amendment analysis on the concrete danger of the advocacy sought to be suppressed is quite probably the best possible form of judicial self-defense against the excesses of pathology." See Redish, *the Role of Pathology In First Amendment Theory: A Skeptical Examination*, 38 Case Western L.Rev. 618 at 629 (1988).

Redish argues that a "judicial focus on the danger of speech" has two important benefits: "the protection of basic speech values in judicial decision making" and aiding in "the public acceptance of speech-protective judicial decisions, during pathological times." Id. at 631. Redish particularly takes issue with Blasi's idea "that the stress placed on so-called First Amendment 'core' values during pathological periods will be ameliorated by adoption of a narrow reach of First Amendment protection during less pressured times." Id. at 622. He denies that there is any such linkage and furthermore contends that the pathological perspective "may even result in a form of *reverse* dilution: refusal to extend the first amendment's scope may logically imply reduced protection in more traditional areas of coverage." Id. at 626. Do you agree? How does the debate here between Redish and Blasi differ from the debate in an earlier generation between Chafee and Meiklejohn?

Present Uses of the Clear and Present Danger Doctrine

The clear and present danger doctrine has been relied on in the Supreme Court to resolve a variety of First Amendment issues which arise out of press reporting of judicial proceedings.

In *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), the Supreme Court, per Chief Justice Burger, invalidated a "gag order" prohibiting reporting or commentary on judicial proceedings held in public. See text, p. 413. The Court held that although there was not an absolute prohibition against "gag orders" under the First Amendment, the general presumption against prior restraints, which would include "gag orders," remained intact. An interesting feature of the case is that the Court indicated that the clear and present danger doctrine should be applied to determine whether "gag orders" are warranted in particular situations. Barrett Prettyman, press counsel in the *Nebraska Press Association* case, expressed some misgivings about the use of the clear and present danger doctrine in the case. He argued that although the Court used the danger doctrine to enforce the freedom of the press, lower courts may use the clear and present danger doctrine, particularly in its *Dennis* formulation, to validate "gag orders." It may also be argued that if the clear and present danger doctrine is applied to the dramatic facts of the *Nebraska Press Association* case, the "gag order" should have been upheld—rather than invalidated—a consequence which may merely illustrate the unsuitability of the clear and present danger doctrine as a means to resolve free press-fair trial problems.

The "Fighting Words" Doctrine

Despite the popularity of the phrase "clear and present danger," it has never served as the exclusive

judicial method by which to adjudicate First Amendment problems. First Amendment doctrine is rich and various. The abundance of First Amendment approaches is due primarily to the different contexts in which First Amendment problems arise. Thus, the "fighting words" doctrine is really a common sense response to one of the most fundamental of free speech problems: the situation where the exercise of free speech so endangers the public order as to transform protected speech into the illegal action of a riot.

CHAPLINSKY v. NEW HAMPSHIRE

315 U.S. 568, 62 S.CT. 766, 86 L.ED. 1031 (1942).

[EDITORIAL NOTE The "fighting words" doctrine was born in that frequent spawning ground of First Amendment litigation, the activities of the Jehovah's Witnesses.]

Justice Frank MURPHY stated the facts of the case for a unanimous court as follows: "Chaplinsky was distributing the literature of his sect on the streets of Rochester [New Hampshire] on a busy afternoon. Members of the local citizenry complained to the City Marshal * * * that Chaplinsky was denouncing all religion as a 'racket'. The Marshal told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless."

The complaint charged that Chaplinsky made the following remarks to the Marshal outside City Hall: "You are a Goddamned racketeer and a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."

Chaplinsky for his part said that he asked the Marshal to arrest those responsible for the disturbance. But the Marshal, according to Chaplinsky, instead cursed him and told Chaplinsky to come along with him. Chaplinsky was prosecuted under a New Hampshire statute, part of which forbade "addressing any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place." The statute also forbade calling such a person "by any offensive or derisive name. * * * "

The state supreme court put a gloss on the statute saying no words were forbidden except such as had a "direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed," and that launched the "fighting words" concept as a First Amendment doctrine. The United States Supreme Court quoted the New Hampshire Supreme Court with approval: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. * * * The test is what men of common intelligence would understand to be words likely to cause an average addressee to fight. * * * The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. * * * Such words, as ordinary men know, are likely to cause a fight. * * *

"The statute, as construed, does no more than prohibit the *face-to-face words* plainly likely to cause a breach of the peace by the speaker—including 'classical fighting words', words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats." [Emphasis added.]

The Supreme Court said that as limited the New Hampshire statute did not violate the constitutional right of free expression. The Court said "[a] statute punishing *verbal acts*, carefully drawn so as not unlikely to impair liberty of expression is not too vague for a criminal law." And it added: "Argument is unnecessary to demonstrate that the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace." [Emphasis added.]

COMMENT

The "fighting words" doctrine is very close to the "speech plus" doctrine. Speech plus is the phrase used in First Amendment law to describe the situation where speech or expression is intertwined with action as in the case of picketing, demonstrating, and parading. The admixture of action with expression renders reasonable state regulation permissible; where pure speech alone is involved, the First Amendment intervenes. Of course, the language Chaplinsky spoke to the Marshal was "pure" speech. But it was speech, in the Court's analysis, that was bound to provoke a physical reaction. In other words, "fighting words" are words which are on the verge of action. Speech plus is expression combined with action.

On the other hand, it is not clear that Chaplinsky himself was at a cross-over point to action when he

made the controversial utterance to the Marshal. The anticipated reaction to so-called "fighting words" is that of the listener and the audience. Why should the audience be exempted from obeying the law, i.e., refraining from violence, when pure speech is engaged in by someone like Chaplinsky? By punishing Chaplinsky, doesn't the law sanction civil disobedience by arresting Chaplinsky rather than those whom the law assumes, because of their short tempers, will resort to violence? The *Chaplinsky* case is an unusual context for the birth of the "fighting words" doctrine. After all, the law should not presume that a police officer like the Marshal could ever be provoked to violence by mere words.

Overbreadth problems can arise in "fighting words" cases. Some prosecutions for "fighting words" have been struck down when the ordinance or statute is overbroad and punishes both "fighting words" as well as words which do not by their very utterance inflict damage or tend to incite an immediate breach of the peace. Thus a Georgia statute and a New Orleans ordinance punishing the use of "opprobrious language" were respectively invalidated by the Supreme Court on the ground that such language is, unless limited, unconstitutionally overbroad. *Gooding v. Wilson*, 405 U.S. 518 (1972); *Lewis v. City of New Orleans*, 408 U.S. 913 (1972) *(Lewis I)*; *Lewis v. City of New Orleans*, 415 U.S. 130 (1974), *(Lewis II)*.

In summary, although the "fighting words" exception to First Amendment protection is still paid formal homage in the Supreme Court, rigorous use of the overbreadth doctrine has diminished the importance of this exception. Indeed, in *Lewis II*, Justice Harry Blackmun, joined by Chief Justice Burger and Justice William Rehnquist, dissented and objected to the use of the overbreadth doctrine as a means of limiting the application of the "fighting words" doctrine:

> Overbreadth and vagueness in the field of speech, as the present case and *Gooding* indicate, have become result-oriented rubber stamps attuned to the easy and imagined self-assurance that "one man's vulgarity is another's lyric." * * * The speech uttered by Mrs. Lewis to the arresting officer "plainly" was profane, "plainly" it was insulting, and "plainly" it was fighting. It therefore is within the reach of the ordinance, as narrowed by Louisiana's highest court. * * * The suggestion that the ordinance is open to selective enforcement is no reason to strike it down. Courts are capable of stemming abusive application of statutes.

Houston v. Hill: Fighting Words and the Overbreadth Doctrine

The vital role that the overbreadth doctrine plays in fighting words cases was highlighted in *Houston v. Hill*, 107 S.Ct. 2502 (1987). For a discussion of the related doctrine of vagueness, see text, p. 67. Raymond Hill, a gay rights activist, observed a friend intentionally stopping traffic in order to enable a vehicle to enter traffic. Two police officers approached the friend and started talking to him. Hill shouted to one of the officers: "Why don't you pick on somebody your own size?" The police officer responded: "Are you interrupting me in my official capacity as a Houston police officer?" Hill then shouted: "Yes, why don't you pick on somebody my size?" Hill was arrested under Houston municipal ordinance section 34-11(a) for "willfully or intentionally interrupting a city policeman * * * by verbal challenge during an investigation." Hill was then acquitted after a nonjury trial in municipal court.

Houston Municipal Code section 34-11(a) reads:

> Sec. 34-11 assaulting or interfering with policemen. (a) it shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to in making an arrest.

After his acquittal, Hill brought suit in federal district court seeking a declaratory judgment that section 34-11(a) was unconstitutional both on its face and as it had been applied to him. The federal district court upheld the ordinance. The Court of Appeals held the ordinance was unconstitutionally overbroad. The Supreme Court, per Justice Brennan, held that a municipal ordinance making it unlawful to interrupt a police officer in performance of his duties was unconstitutionally overbroad under the First Amendment. The Court also held that it was not necessary for federal courts to abstain from decision until state courts could give a narrowing interpretation to the ordinance in question—possibly limiting it to "fighting words" or dangerous situations. This was because the ordinance in question was "not susceptible to a limiting construction because its language is plain and its meaning unambiguous."

On the overbreadth point, Justice Brennan said:

> Since the ordinance is "content-neutral," and since there is no evidence that the City has applied the ordinance to chill particular speakers or ideas, the City

concludes that the ordinance is not substantially overbroad.

We disagree with the City's characterization for several reasons. First, the enforceable portion of the ordinance deals not with core criminal conduct, but with speech. As the City has conceded, the language in the ordinance making it unlawful for any person to "assault" or "strike" a police officer is pre-empted by the Texas Penal Code. Accordingly, the enforceable portion of the ordinance makes it "unlawful for any person to * * * in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty," and thereby prohibits verbal interruptions of police officers.

Second, contrary to the City's contention, the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. "Speech is often provocative and challenging. * * * [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello v. Chicago*, 337 U.S. 1, (1949).

The Houston ordinance * * * is not limited to fighting words nor even to obscene or opprobrious language, but prohibits speech that "in any manner * * * interrupt[s]" an officer. The Constitution does not allow such speech to be made a crime. The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.

The City argues, however, that even if the ordinance encompasses some protected speech, its sweeping nature is both inevitable and essential to maintain public order. Although we appreciate the difficulties of drafting precise laws, we have repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them. * * *

Houston's ordinance criminalizes a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement. The ordinance's plain language is admittedly violated scores of times daily, yet only some individuals—those chosen by the police in their unguided discretion—are arrested. Far from providing the "breathing space" that "First Amendment freedoms need * * * to survive," *NAACP v. Button*, 371 U.S. 415 (1963), the ordinance is susceptible of regular application to protected expression. We conclude that the ordinance is substantially overbroad, and that the Court of Appeals did not err in holding it facially invalid.

Justice Powell, joined by Chief Justice Rehnquist and Justices Scalia and O'Connor, concurred in the judgment: * * *

[T]his may include verbal criticism, but I question the implication of the Court's opinion that the First Amendment generally protects verbal "challenge[s] directed at police officers." A "challenge" often takes the form of opposition or interruption of performance of duty. In many situations, speech of this type directed at police officers will be functionally indistinguishable from conduct that the First Amendment clearly does not protect. For example, I have no doubt that a municipality constitutionally may punish an individual who chooses to stand near a police officer and persistently attempt to engage the officer in conversation while the officer is directing traffic at a busy intersection. Similarly, an individual, by contentious and abusive speech, could interrupt an officer's investigation of possible criminal conduct. A person observing an officer pursuing a person suspected of a felony could run beside him in a public street shouting at the officer. Similar tactics could interrupt a policeman lawfully attempting to interrogate persons believed to be witnesses to a crime. * * * But the Court unfortunately seems to ignore this fine line and to extend First Amendment protection to any type of verbal molestation or interruption of an officer in the performance of this duty.

The Swastika in Skokie: "Fighting Words"?

In the considerable litigation which was spawned from a planned march of the American Nazi party through Skokie, Illinois, a suburb of Chicago with a substantial Jewish population, opponents of the march in one case attempted to take refuge in the "fighting words" doctrine. The Illinois Supreme Court held that the planned display of the swastika in a community containing thousands of concentration camp survivors did not constitute "fighting words." The Illinois Supreme Court overturned a lower court injunction against the display of the swastika on the ground that the display was protected symbolic political speech. *Village of Skokie v. National Socialist Party*, 373 N.E.2d 21 (Ill.1978). Enjoining such a display was deemed to be an unconstitutional prior restraint on the right to free speech of the American Nazi party:

> Plaintiff urges, and the appellate court has held, that the exhibition of the Nazi symbol, the swastika, addresses to ordinary citizens a message which is tantamount to fighting words. Plaintiff further asks this court to extend *Chaplinsky*, which upheld a statute punishing the use of such words, and hold that the fighting-words doctrine permits a prior restraint on defendants' symbolic speech. In our judgment we are precluded from doing so.

* * *

> The display of the swastika, as offensive to the principles of a free nation as the memories it recalls may be, is symbolic political speech intended to convey to the public the beliefs of those who display it. It does not, in our opinion, fall within the definition of "fighting words," and that doctrine cannot be used here to overcome the heavy presumption against the constitutional validity of a prior restraint.
>
> Nor can we find that the swastika, while not representing fighting words, is nevertheless so offensive and peace threatening to the public that its display can be enjoined. We do not doubt that the sight of this symbol is abhorrent to the Jewish citizens of Skokie, and that the survivors of the Nazi persecutions, tormented by their recollections, may have strong feelings regarding its display. Yet it is entirely clear that this factor does not justify enjoining defendants' speech.

* * *

> In summary, as we read the controlling Supreme Court opinions, use of the swastika is a symbolic form of free speech entitled to first amendment protections. Its display on uniforms or banners by those engaged in peaceful demonstrations cannot be totally precluded solely because that display may provoke a violent reaction by those who view it. Particularly is this true where, as here, there has been advance notice by the demonstrators of their plans so that they have become, as the complaint alleges, "common knowledge" and those to whom sight of the swastika banner or uniforms would be offensive are forewarned and need not view them. A speaker who gives prior notice of his message has not compelled a confrontation with those who voluntarily listen.

The whole "fighting words" approach has been attacked in a stimulating new book which takes the position that a goal for First Amendment theory should be the furtherance of tolerance within the society. See Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (1986). Professor Bollinger argues that the process of considering categories of speech such as "fighting words" as exceptions to First Amendment protection is misguided. The theory of cases like *Chaplinsky* is that such "speech possesses such small benefit for truth seeking" that withholding First Amendment protection theory is justified. But, Bollinger argues, it is not "the absence of social value that determines whether the principle of free speech is applicable; indeed, the perceived absence of value is, if anything, a major reason for protection, or more accurately, for toleration." This is so, Bollinger says, not because it grants more protection to speech we do value "but rather for the insights and lessons we obtain about ourselves and for the increase in our capacity for toleration generally." In Bollinger's view, the development of our capacity for toleration is a social interest that must be furthered. Why should this value be furthered? Does the First Amendment require it? Even if developing a capability for tolerance is used as a yardstick for First Amendment protection, isn't it too imprecise a yardstick to provide any real guidance to distinguish speech that is protected from speech that is unprotected? Finally, the emphasis on tolerance has to be weighed against the assault on human dignity and on individual autonomy in Skokie. Tormenting the concentration camp survivors in Skokie with the sight of hateful and unwanted Nazi demonstrators and swastika symbols surely presented such an assault. See Bollinger at 181–82.

The Hostile Audience Problem

In *Feiner v. New York*, 340 U.S. 315 (1951), a controversial speaker was interrupted in mid-sentence by a policeman who demanded that he step down from his soap box because the street corner audience appeared to be getting restless. When Feiner refused to step down, he was arrested for disturbing the peace. The Supreme Court per Chief Justice Fred Vinson upheld his conviction against a contention by Feiner that his arrest violated his First Amendment rights of free speech. Justice Felix Frankfurter, concurring in *Feiner*, thought that interruption of speech by the police was not unconstitutional when in the best judgment of the police the speech threatened to precipitate disorder:

> It is true that breach-of-peace statutes, like most tools of government, may be misused. Enforcement of these statutes calls for public tolerance and intelligent police administration. These, in the long run, must give substance to whatever this Court may say about free speech.

Feiner raises the so-called "hostile audience" problem. If the audience menaces the speaker to the point where the physical safety of the speaker is at stake or a general melee is threatened, are the police ever justified in arresting the speaker even though the speaker is not intentionally inciting to violence? One way of resolving the problem would be to compare the size of the audience with the number of police. Presumably, if the latter were far outnum-

bered by potentially dangerous audience members and there was a possibility some of them were armed, simple logistics would dictate carting away the speaker rather than the audience. Would such an analysis be a permissible use of the balancing test?

Whom should the police protect? The speaker or the hostile audience.[2] In dissent in *Feiner*, Justice Black's answer was clear: the speaker should be protected.

The case for arresting the speaker in a situation where the speaker is using "fighting words," i.e., words which can be expected to enrage the audience and lead it to physical violence, is stronger than the situation where the speaker's words, on a reasonable analysis, ought not to engender hostility leading to physical violence.

Justice Frankfurter's approach in *Feiner* was not unlike the logistics approach to the hostile audience problem discussed above. If speech threatens to precipitate disorder, then the police, acting on a nondiscriminatory basis, might be justified in stopping the speech.

Justice Frankfurter's views were directly challenged by Justice Jackson in a dissenting opinion in a companion case, *Kunz v. New York*, 340 U.S. 290 (1951). Kunz had obtained a street-speaking permit in New York City, but it was later revoked after many of his speeches aroused complaints and threats of violence from passers-by. His subsequent attempts to obtain a new permit were denied on the basis of the earlier revocation. The Supreme Court held that the denial of a new permit violated Kunz's First Amendment rights. In dissent, Justice Jackson pointed out the irony of the Court's position and especially that of Justice Frankfurter. Of what value, he said, is a rule against prior restraint if the Court is willing, as in *Feiner*, to sanction on-the-street arrests of volatile speakers while they are exercising their First Amendment rights? A fairly administered permit system, said Justice Jackson, "better protects freedom of speech than to let everyone speak without leave, but subject to surveillance and to being ordered to stop in the discretion of the police."

At least a permit system enables a potential speaker to present evidence on his own behalf and to appeal an administrative decision to a higher official. But in *Feiner*, the speaker's right to speak his mind was violated *ex parte* by a police officer who unilaterally decided that enough was enough. Which system, asked Justice Jackson, is more protective of First Amendment liberty?

Justice Frankfurter's analysis of free speech interests, prior restraint, and punishment after-the-fact was disputed by Justices Black, Douglas, and Sherman Minton, who dissented in *Feiner*. Even if Feiner's speech was arousing potential violence among the listening crowd, said Justice Black, the duty of the police was to protect Feiner's right to speak by arresting menacing hecklers, if necessary. In this view, silencing Feiner at the behest of the audience or because of the policeman's own personal prejudice against the speaker's views was not an appropriate alternative. Justice Black agreed with Justice Jackson's analysis of the effect of on-the-spot arrest upon the "freedom" guaranteed by rules against prior restraint. Feiner had criticized President Harry S. Truman.

The overbreadth doctrine has loomed large in hostile audience cases, as it has in "fighting words" cases. *Terminiello v. Chicago*, 337 U.S. 1 (1949), involved a speaker who by using racially discriminatory language angered a largely black crowd standing outside the hall where the speech took place. The speaker was convicted under a law prohibiting speech that "stirs the public to anger, invites dispute or brings about a condition of unrest." The Supreme Court overturned the conviction and declared that the statute was overbroad in that it punished expression which had not been shown to present a clear and present danger. In a famous sentence in his opinion for the Court, Justice Douglas observed: "[A] function of free speech under our system of government is to invite dispute." At least inferentially, *Terminiello* suggests that a hostile audience is no justification for taking away the agitator who arouses the audience—at least unless the exacting standards of the clear and present danger test can be met. Which speech situation seemed the more volatile, *Feiner* or *Terminiello*?

Cases of this kind raise the vexing question of the *hecklers' veto*, a dimension of the hostile audience problem. Heckling may indeed be a medium of desperation. Which is not to say that hecklers don't have First Amendment rights. But there are other First Amendment rights: the right of the speaker and the derivative First Amendment right of audience

2. See generally *Note, Hostile Audience Confrontations: Police Conduct and First Amendment Rights*, 75 Mich.L.Rev. 180 (1976).

members to hear. At what point may the state constitutionally intervene to assure that all of these First Amendment interests are served? You have a right to speak. I have a right to talk back. The audience has a right to hear. Is it when the speaker can no longer be heard and is completely lost to the audience? Or are the hecklers exercising the only opportunity they will ever have to talk back to a powerful government official who has access to mass media and with whom they earnestly disagree?

Suppose a prior restraint is based on the probability of a hostile and dangerous crowd reaction? When American Nazis proposed a professedly peaceful march through Skokie, the Village of Skokie enacted ordinances designed to block parades such as that contemplated by the Nazis. In the federal case which dramatically divided the membership of the American Civil Liberties Union, the ACLU provided legal counsel to the Nazis who brought suit to challenge the ordinances. Counsel for Skokie argued that the prospect of swastikas carried by marching Nazis were the equivalent of "fighting words" to a community many of whose members were former inmates of Nazi concentration camps. Furthermore, it was again argued that the specter of Nazi insignia being displayed in public in such a community was bound to provoke a hostile reaction. The federal district court declared the ordinances to be unconstitutional, and the federal court of appeals affirmed. *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

Speaking for the court of appeals, Judge Pell said:

> It would be grossly insensitive to deny, as we do not, that the proposed demonstration would seriously disturb, emotionally and mentally, at least some, and probably many of the Village's residents. The problem with engrafting an exception on the First Amendment for such situations is that they are indistinguishable in principle from speech that invite[s] dispute * * * induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, * * * Yet these are among the "high" purposes of the First Amendment.
>
> * * *
>
> This case does not involve intrusion into people's homes. There *need* be no captive audience, as Village residents may, if they wish, simply avoid the Village Hall for thirty minutes on a Sunday afternoon, which no doubt would be their normal course of conduct on a day when the Village Hall was not open in the regular course of business. Absent such intrusion or captivity, there is no justifiable substantial privacy interest to save [the ordinance under consideration] from constitutional infirmity, when it attempts, by fiat, to declare the entire Village, at all times, a privacy zone that may be sanitized from the offensiveness of Nazi ideology and symbols.

In short, the federal court of appeals held that protected First Amendment activity could not be proscribed because of an anticipated hostile audience reaction, particularly in circumstances where the audience involved could easily avoid the viewing of unwanted activity and where the audience was in no sense captive.[3] In such circumstances, the fact that a hostile audience reaction could be predicted as a result of the exercise of particular protected First Amendment activity could not authorize a prior restraint in the form of an ordinance prohibiting the parade in controversy: "Our decision that [the ordinance under consideration] cannot constitutionally be applied to the proposed march means that a permit for the march may not be denied on the basis of anticipated violations thereof." The decision of the federal court of appeals in the *Collin* case indicates that a heavy burden will have to be met by the state before a prior restraint on protected First Amendment expression is authorized out of fear that a hostile crowd will engage in disruptive activity as a result of permitting the expression in controversy.

The First Amendment and State Regulation of Pamphleteering, Solicitation, Parades, and Demonstrations

Alma Lovell, a Jehovah's Witness, was arrested in the town of Griffin, Georgia, for violation of a city ordinance which banned any pamphleteering or leafletting without prior written permission from the

3. Similarly, the Court of Appeals for the Seventh Circuit, in reversing the denial of defendant Collin's application for a permit to speak in Chicago's Marquette Park, noted that courts have consistently refused to ban speech because of the possibility of unlawful conduct by those opposed to the speaker's philosophy.

Starting with *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), and continuing to *Gregory v. City of Chicago*, 394 U.S. 111 (1969), it has become patent that a hostile audience is not a basis for restraining otherwise legal First Amendment activity. As with many of the cases cited herein, if the actual behavior is not sufficient to sustain a conviction under a statute, then certainly the anticipation of such events cannot sustain the burden necessary to justify a prior restraint. *Collin v. Chicago Park District*, 460 F.2d 746, 754 (7th Cir. 1972).

Griffin city manager. She never sought permission from the Griffin city manager. She appealed her conviction under this ordinance and urged that it violated the First Amendment.

In a unanimous decision in *Lovell v. Griffin*, 303 U.S. 444 (1938), delivered by Chief Justice Charles Evans Hughes, the United States Supreme Court found the Griffin ordinance invalid on its face as a violation of freedom of speech and freedom of the press.

The Chief Justice pointed out that the ordinance "prohibits the distribution of literature of any kind, at any time, at any place, and in any manner without a permit from the city manager." The Griffin ordinance made up no distinctions but covered all "literature" in all circumstances. Again this First Amendment infirmity is called overbreadth.

If the town was concerned about a particular problem, such as litter, or scurrilous libels, it ought to have drafted the ordinance to meet that problem rather than embracing all forms of pamphleteering. Secondly, the ordinance as drafted created a one-man censorship board in the person of the city manager with no guidelines to direct decisions prohibiting or permitting circulation of a particular leaflet. The city manager of Griffin had total unquestioned discretion to regulate the flow of printed communication in the town. Under the doctrine of *Lovell v. Griffin*, the officials who administer a permit system must have their authority specified and articulated in the legislation creating the system.

In *dictum* in *Lovell v. Griffin*, Chief Justice Hughes noted that the First Amendment is not confined to protection of newspapers and magazines, but includes pamphlets and leaflets as well. "The press," he wrote, "in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." Furthermore, freedom to distribute and circulate press materials is as protected under the First Amendment as freedom to publish in the first place.

In *Lovell*, the Court spoke in strong terms of the threat to a free press posed by a licensing scheme. If a statute or regulation is narrowly drawn and contains procedural safeguards (unlike the pamphleteering ordinance in *Lovell*), would it be upheld despite overtones of "licensing"? Would noncompliance with the statute then be justified if someone had doubts about the validity of the statute?

Since the ordinance in *Lovell* was found "void on its face," the Court held that it was not necessary for Alma Lovell "to seek a permit under it." The Court held that she was "entitled to contest its validity in answer to the charge against her."

Isn't the usual view that a court rather than an individual should decide the constitutionality of legislation? Why then didn't the Court insist that Alma Lovell first apply for a permit and show that she had been denied it before determining that the ordinance was invalid? See *Walker v. Birmingham*, text, p. 62.

Cantwell v. Connecticut, 310 U.S. 296 (1940), was yet another case involving the imposition of state criminal penalties on Jehovah's Witnesses. The Cantwells, a father and two sons, were arrested in New Haven, Connecticut, for conducting door-to-door religious solicitation in a predominantly Catholic neighborhood of the city. They were charged with violating a Connecticut statute which provided in part that: "No person shall solicit money * * * for any alleged religious * * * cause * * * unless * * * approved by the [county] secretary of * * * public welfare." Any person seeking to solicit for a religious cause was required under the statute to file an application with the welfare secretary, who was empowered to decide whether the cause was "a bona fide object of charity" and whether it conformed to "reasonable standards of efficiency and integrity." The penalty for violating the statute was a $100 fine or thirty days' imprisonment or both.

The Cantwells' convictions were affirmed by the state courts of Connecticut. But the United States Supreme Court unanimously, per Justice Owen Roberts, declared the statute unconstitutional as applied to the Cantwells and other Jehovah's Witnesses.

The Cantwells argued that the Connecticut state statute was not regulatory but prohibitory, since it allowed a state official to ban religious solicitation from the streets of Connecticut entirely. Once a certificate of approval was issued by the state welfare secretary, solicitation could proceed without any restriction at all under the Connecticut statute. And once a certificate was denied, solicitation was banned.

The Supreme Court ruled that the Connecticut statute in effect established a prior restraint on First Amendment freedoms which was not alleviated by the availability of judicial review after the fact.

The Supreme Court also pointed out that if the state wished to protect its citizens against door-to-door solicitation for fraudulent "religious" or "charity" causes, it had the constitutional power to enact a regulation aimed at that problem. The present law,

however, was not such a statute. The Court also noted that it is within the police power of the state to set regulatory limits on religious solicitation (as on other sorts of solicitation), such as the time of day or the right of a householder to terminate the solicitation by demanding that the visitor remove himself from the premises. The state may not, however, force people to submit to licensing of religious speech.

On the breach of the peace conviction, the Supreme Court held that the broad sweep of the common law offense was an infringement of First Amendment rights.

The state had argued that because the Cantwells' solicitation technique had been provocative, it tended to produce violence on the part of their listeners and, therefore, was an appropriate matter for sanction under the common law offense of disturbing the peace.

In the Court's view in *Cantwell*, if the state had defined what is considered to be a clear and present danger to the state in a precisely drawn breach of the peace statute, this might have presented a sufficiently substantial interest to make it appropriate to convict Cantwell under such a statute. But since the breach of the peace offense was an imprecise common law offense rather than an offense set forth in a tightly drawn statute, the Court set aside the breach of the peace conviction. Justice Roberts made the following observations in *Cantwell*:

> When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.

CITY OF LAKEWOOD v. PLAIN DEALER PUBLISHING CO.

108 S.CT. 2138, 100 L.ED.2D 771 (1988).

[EDITORIAL NOTE City of Lakewood v. Plain Dealer Publishing Co., *108 S.Ct. 2138 (1988), considered an ordinance which authorized the mayor to grant or deny applications for annual newsrack permits. If the application for a permit is denied, the mayor is required to state the reasons for such denial. Prior to the enactment of this ordinance, Lakewood absolutely prohibited the "private placement of any structure on public property." The Cleveland* Plain Dealer *accordingly had been denied permission to place its coin-operated newspaper vending machines on city sidewalks. The* Plain Dealer *challenged the constitutionality of the new ordinance.*

Although the district court upheld the ordinance, the Court of Appeals for the Sixth Circuit reversed and found the ordinance unconstitutional for three reasons: (1) The ordinance gives the mayor "unbounded discretion to grant or deny a permit application and to place unlimited additional terms and conditions on any permit that issues." (2) The ordinance conditioned approval of a newsrack permit on approval of the newsrack design by the city's Architectural Board of Review. Since no express standards governed newsrack design, the design approval requirement effectively gave the board unbridled discretion to deny applications." (3) Approval of a newsrack permit was also conditioned on an agreement by the newsrack owner to idemnify the city against any liability arising from the newsrack, "guaranteed by a $100,000 insurance policy to that effect." The court of appeals felt these indemnity and insurance requirements violated the First Amendment "because no similar burdens are placed on owners of the structures or public properties."

In a 4–3 decision, the Supreme Court, per Justice Brennan, affirmed the court of appeals decision in part and remanded. The Court held that the portions of the City of Lakewood ordinance giving the mayor discretion to deny a permit application and authorizing him to grant a permit on any terms he considers "necessary and reasonable" are unconstitutional.]

Justice BRENNAN delivered the opinion of the Court.

At the outset, we confront the issue whether the Newspaper may bring a facial challenge to the City's ordinance. We conclude that it may.

Recognizing the explicit protection accorded speech and the press in the text of the First Amendment, our cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license. *E.g., Freedman v. Maryland*, 380 U.S. 51, 56 (1965).

At the root of this long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. *E.g., Shuttlesworth, supra,; Cox v. Louisiana*, 379 U.S. 536 (1965); *Staub v. City of Baxley*, 355 U.S. 313, 321 322 (1958); *Kunz v. New York*,

340 U.S. 290, 294 (1951); *Niemotko v. Maryland*, 340 U.S. 268 (1951), *Saia v. New York*, 344 U.S. 558 (1948). And these evils engender identifiable risks to free expression that can be effectively alleviated only through a facial challenge. First, the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. * * *

Self-censorship is immune to an "as applied" challenge, for it derives from the individual's own actions, not an abuse of government power. It is not difficult to visualize a newspaper that relies to a substantial degree on single issue sales feeling significant pressure to endorse the incumbent Mayor in an upcoming election, or to refrain from criticizing him, in order to receive a favorable and speedy disposition on its permit application. Only standards limiting the licensor's discretion will eliminate this danger by adding an element of certainty fatal to self-censorship. And only a facial challenge can effectively test the statute for these standards.

Second, the absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression. Further, the difficulty and delay inherent in the "as applied" challenge can itself discourage litigation. A newspaper espousing an unpopular viewpoint on a shoestring budget may be the likely target for a retaliatory permit denial, but may not have the time or financial means to challenge the licensor's action. That paper might instead find it easier to capitulate to what it perceives to be the Mayor's preferred viewpoint, or simply to close up shop. Even if that struggling paper were willing and able to litigate the case successfully, the eventual relief may be "too little and too late." Until a judicial decree to the contrary, the licensor's prohibition stands. In the interim, opportunities for speech are irretrievably lost. In sum, without standards to fetter the licensor's discretion, the difficulties of proof and the case-by-case nature of "as applied" challenges render the licensor's action in large measure effectively unreviewable.

The foregoing concepts form the heart of our test to distinguish laws that are vulnerable to facial challenge from those that are not. As discussed above, we have previously identified two major First Amendment risks associated with unbridled licensing schemes: self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship "as applied" without standards by which to measure the licensor's action. It is when statutes threaten these risks to a significant degree that courts must entertain an immediate facial attack on the law. Therefore, a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers. This is not to say that the press or a speaker may challenge as censorship any law involving discretion to which it is subject. The law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.

The regulatory scheme in the present case contains two features which, at least in combination, justify the allowance of a facial challenge. First, Lakewood's ordinance requires that the Newspaper apply annually for newsrack licenses. Thus, it is the sort of system in which an individual must apply for multiple licenses over time, or periodically renew a license. When such a system is applied to speech, or to conduct commonly associated with speech, the licensor does not necessarily view the text of the words about to be spoken, but can measure their probable content or viewpoint by speech already uttered. A speaker in this position is under no illusion regarding the effect of the "licensed" speech on the ability to continue speaking in the future. Yet demonstrating the link between "licensed" expression and the denial of a later license might well prove impossible. While perhaps not as direct a threat to speech as a regulation allowing a licensor to view the actual content of the speech to be licensed or permitted, a multiple or periodic licensing requirement is sufficiently threatening to invite judicial concern.

A second feature of the licensing system at issue here is that it is directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers. Such a

framework creates an agency or establishes an official charged particularly with reviewing speech, or conduct commonly associated with it, breeding an "expertise" tending to favor censorship over speech. Indeed, a law requiring the licensing of printers has historically been declared the archetypal censorship statute. Here again, without standards to bound the licensor, speakers denied a license will have no way of proving that the decision was unconstitutionally motivated, and, faced with that prospect, they will be pressured to conform their speech to the licensor's unreviewable preference.

Because of these features in the regulatory system at issue here, we think that a facial challenge is appropriate, and that standards controlling the Mayor's discretion must be required. Of course, the City may require periodic licensing, and may even have special licensing procedures for conduct commonly associated with expression; but the Constitution requires that the City establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered.

In contrast to the type of law at issue in this case, laws of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken, carry with them little danger of censorship. For example, a law requiring building permits is rarely effective as a means of censorship. To be sure, on rare occasion an opportunity for censorship will exist, such as when an unpopular newspaper seeks to build a new plant. But such laws provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse. And if such charges are made, the general application of the statute to areas unrelated to expression will provide the courts a yardstick with which to measure the licensor's occasional speech-related decision.

The foregoing discussion explains why the dissent's analogy between newspapers and soda vendors is inapposite. Newspapers are in the business of expression, while soda vendors are in the business of selling soft drinks. Even if the soda vendor engages in speech, that speech is not related to the soda; therefore preventing it from installing its machines may penalize unrelated speech, but will not directly prevent that speech from occurring. In sum, a law giving the Mayor unbridled discretion to decide which soda vendors may place their machines on public property does not vest him with frequent opportunities to exercise substantial power over the content or viewpoint of the vendor's speech by suppressing the speech or directly controlling the vendor's ability to speak.

The proper analogy is between newspapers and leaflets. It is settled that leafletters may facially challenge licensing laws. See *e. g.*, *Talley v. California*, *Lovell v. Griffin*. This settled law is based on the accurate premise that peaceful pamphleteering "is not fundamentally different from the function of a newspaper." *Organization for a Better Austin v. Keefe*, [402 U.S. 415 (1971)]. The dissent's theory therefore would turn the law on its head. That result cannot be justified by relying on the meaningless distinction that here the newspapers are ultimately distributed by a machine rather than by hand. First, the ordinance held invalid in *Lovell* applied to distribution "by hand or otherwise." The Court did not even consider holding the law invalid only as to distribution by hand. Second, such a distinction makes no sense in logic or theory. The effectiveness of the newsrack as a means of distribution, especially for low-budget, controversial neighborhood newspapers, means that the twin threats of self-censorship and undetectable censorship are, if anything, greater for newsracks than for pamphleteers.

In an analysis divorced from a careful examination of the unique risks associated with censorship just discussed and their relation to the law before us, the dissent reasons that if a particular manner of speech may be prohibited entirely, then no "activity protected by the First Amendment" can be implicated by a law imposing less than a total prohibition. It then finds that a total ban on newsracks would be constitutional. Therefore, the dissent concludes, the actual ordinance at issue involves no "activity protected by the First Amendment," and thus is not subject to facial challenge. However, that reasoning is little more than a legal sleight-of-hand, misdirecting the focus of the inquiry from a law allegedly vesting unbridled censorship discretion in a government official toward one imposing a blanket prohibition.[7]

The key to the dissent's analysis is its "greater-includes-the-lesser" syllogism. But that syllogism is blind to the radically different constitutional harms

7. Because we reject the dissent's overall logical framework, we do not pass on its view that a city may constitutionally prohibit the placement of newsracks on public property.

inherent in the "greater" and "lesser" restrictions.[8] Presumably in the case of an ordinance that completely prohibits a particular manner of expression, the law on its face is both content and viewpoint neutral. In analyzing such a hypothetical ordinance, the Court would apply the well-settled time, place, and manner test. *Chicago v. Mosley*, 408 U.S. 98 (1972). The danger giving rise to the First Amendment inquiry is that the government is silencing or restraining a channel of speech; we ask whether some interest unrelated to speech justifies this silence. To put it another way, the question is whether "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. Rockford*, 408 U.S. 104 (1972).

In contrast, a law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official. As demonstrated above, we have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker. Therefore, even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not *condition* that speech on obtaining a license or permit from a government official in that official's boundless discretion. It bears repeating that "In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." *Freedman*, 380 U.S., at 56. Fundamentally, then, the dissent's proposal ignores the different concerns animating our test to determine whether an expressive activity may be banned entirely, and our test to determine whether it may be licensed in an official's unbridled discretion.

* * *

However, in a host of other First Amendment cases we have expressly or implicitly rejected that logic, and have considered on the merits facial challenges to statutes or policies that embodied discrimination based on the content or viewpoint of expression, or vested officials with open-ended discretion that threatened the same, even where it was assumed that a properly drawn law could have greatly restricted or prohibited the manner of expression or circulation at issue.

For instance, in *Mosley, supra*, we considered an ordinance banning all picketing near a school *except* labor picketing. The Court declared a law unconstitutional because the ordinance was sensitive to the content of the message. Whether or not the picket could have been prohibited entirely was not dispositive of the Court's inquiry. 408 U.S., at 96–99. * * * To counter this * * * line of authority, the dissent does not refer to a single case supporting its view that we cannot consider a facial challenge to an ordinance alleged to constitute censorship over constitutionally protected speech merely because the manner used to circulate that speech might be otherwise regulated or prohibited entirely.

Ultimately, then, the dissent's reasoning must fall of its own weight. As the preceding discussion demonstrates, this Court has long been sensitive to the special dangers inherent in a law placing unbridled discretion directly to license speech, or conduct commonly associated with speech, in the hands of a government official. In contrast, when the government is willing to prohibit a particular manner of speech entirely—the speech it favors along with the speech it disfavors—the risk of governmental censorship is simply not implicated. The "greater" power of outright prohibition raises other concerns, and we have developed tests to consider them. But we see no reason, and the dissent does not advance one, to ignore censorship dangers merely because other, unrelated concerns are satisfied.

The dissent compounds its error by defining an "activity protected by the First Amendment" by the time, place, or (in this case) manner by which the activity is exercised. The actual "activity" at issue here is the circulation of newspapers, which is con-

8. The dissent informs us that it abjures any reliance on a "greater-includes-the-lesser" theory. Yet in the very next sentence we are told that "where an activity * * * could be forbidden altogether (without running afoul of the First Amendment)," then for that reason alone, "the *Lovell-Freedman* doctrine does not apply, and our usual rules concerning the permissibility of discretionary local licensing laws (and facial challenges to those laws) must prevail." In other words, the greater power to prohibit a manner of speech entirely includes the lesser power to license it in an official's unbridled discretion. A clearer example of the discredited doctrine could not be imagined.

stitutionally protected. After all, "Liberty of circulating is as essential to [freedom of expression] as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex Parte Jackson*, 96 U.S. 727, 733 (1878); *Lovell*, 303 U.S., at 452.

The dissent's recharacterization of the issue is not merely semantic; substituting the time, place, or manner for the activity itself allows the dissent to define away a host of activities commonly considered to be protected. The right to demonstrate becomes the right to demonstrate at noise levels proscribed by law; the right to parade becomes the right to parade anywhere in the city 24 hours a day; and the right to circulate newspapers becomes the right to circulate newspapers by way of newsracks placed on public property. Under the dissent's analysis, ordinances giving the Mayor unbridled discretion over whether to permit loud demonstrations or evening parades would not be vulnerable to a facial challenge, since they would not "requir[e] a license to engage in activity protected by the First Amendment." * * *

Moreover, we have never countenanced such linguistic prestidigitation, even where a regulation or total prohibition of the "manner" of speech has been upheld. In determining whether expressive conduct is at issue in a censorship case, we do not look solely to the time, place, or manner of expression, but rather to whether the activity in question is commonly associated with expression. For example, in *Kovacs*, it was never doubted that the First Amendment's protection of expression was *implicated* by the ordinance prohibiting sound trucks. The Court simply concluded that the First Amendment was not *abridged*. So, here, the First Amendment is certainly implicated by the City's circulation restriction; the question we must resolve is whether the First Amendment is abridged.

Having concluded that the Newspaper may facially challenge the Lakewood ordinance, we turn to the merits. Section 901.181, Codified Ordinances, City of Lakewood, provides: "The Mayor shall either deny the application [for a permit], stating the reasons for such denial or grant said permit subject to the following terms * * * ." Section 901.181(c) sets out some of those terms, including: "(7) such other terms and conditions deemed necessary and reasonable by the Mayor." It is apparant that the face of the ordinance itself contains no explicit limits on the Mayor's discretion. Indeed, nothing in the law as written requires the Mayor to do more than make the statement "it is not in the public interest" when denying a permit application. Similarly, the Mayor could grant the application, but require the newsrack to be placed in an inaccessible location without providing any explanation whatever. To allow these illusory "constraints" to constitute the standards necessary to bound a licensor's discretion renders the guaranty against censorship little more than a high-sounding ideal.

The City asks us to presume that the Mayor will deny a permit application only for reasons related to the health, safety, or welfare of Lakewood citizens, and that additional terms and conditions will be imposed only for similar reasons. This presumes the Mayor will act in good faith and adhere to standards absent from the statute's face. But this is the very presumption that the doctrine forbidding unbridled discretion disallows. The doctrine requires that the limits the City claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice. *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Kunz v. New York*, 340 U.S. 290 (1951). This Court will not write nonbinding limits into a silent state statute.

Although the dissent disclaims a desire to pass upon the actual ordinance at issue, it apparently cannot resist making a few comments in this regard. First, it asserts that the ordinance's requirement that the Mayor state his reasons for denying a permit distinguishes this case from other licensing cases. However, the Mayor's statement need not be made with any degree of specificity, nor are there any limits as to what reasons he may give. Such a minimal requirement cannot provide the standards necessary to ensure constitutional decision-making, nor will it, of necessity, provide a solid foundation for eventual judicial review.

The dissent is also comforted by the availability of judicial review. However, that review comes only after the mayor and the City Council have denied the permit. Nowhere in the ordinance is either body required to act with reasonable dispatch. Rather, an application could languish indefinitely before the Council, with the Newspaper's only judicial remedy being a petition for mandamus. Even if judicial review were relatively speedy, such review cannot substitute for concrete standards to guide the decision-maker's discretion.

Finally, the dissent attempts to distinguish newsrack permits from parade permits in that the latter are often given for a particular event or time, whereas

the former supposedly have no urgency. This overstates the proposition. We agree that in some cases there is exceptional force to the argument that a permit delayed is a permit denied. However, we cannot agree that newspaper publishers can wait indefinitely for a permit only because there will always be news to report. News is not fungible. Some stories may be particularly well covered by certain publications, providing that newspaper with a unique opportunity to develop readership. In order to benefit from that event, a paper needs public access at a particular time; eventual access would come "too little and too late." *Freedman*, *supra*, at 57. The *Plain Dealer* has been willing to forgo this benefit for four years in order to bring and litigate this lawsuit. However, smaller publications may not be willing or able to make the same sacrifice.

We hold those portions of the Lakewood ordinance giving the Mayor unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms he deems "necessary and reasonable," to be unconstitutional. We need not resolve the remaining questions presented for review, as our conclusion regarding mayoral discretion will alone sustain the Court of Appeals' judgement if these portions of the ordinance are not severable from the remainder. Severability of a local ordinance is a question of state law, and is therefore best resolved below. Accordingly, we remand this cause to the Court of Appeals to decide whether the provisions of the ordinance we have declared unconstitutional are severable, and to take further action consistent with this opinion.

It is so ordered.

The Chief Justice and Justice Kennedy took no part in the consideration or decision of this case.

Justice WHITE, with whom Justice Stevens and Justice O'Connor join, dissenting.

Today the majority takes an extraordinary doctrine, developed cautiously by this Court over the past fifty years, and applies it to a circumstance, and in a manner, that is without precedent. Because of this unwarranted expansion of our previous cases, I dissent.

At the outset, it is important to set forth the general nature of the dispute.

The Court quite properly does *not* establish any constitutional right of newspaper publishers to place newsracks on municipal property. The Court expressly declines to "pass" on the question of the constitutionality [of] an outright municipal ban on newsracks. My approach to the specific question before us, which differs from that of the majority, requires me to consider this question; and, as discussed below, our precedents suggest that an outright ban on newsracks on city sidewalks would be constitutional, particularly where (as is true here) ample alternate means of 24-hour distribution of newspapers exist. In any event, the Court's ruling today cannot be read as any indication to the contrary: cities remain free after today's decision to enact such bans.

Moreover, the Court expressly rejects the view, heretofore adopted by some lower courts, that any local scheme that seeks to license the placement of newsracks on public property is *per se* unconstitutional. Cities "may require periodic licensing, and may even have special licensing procedures for conduct commonly associated with expression." It is only common sense that cities be allowed to exert some control over those who would permanently appropriate city property for the purpose of erecting a newspaper dispensing device.

My disagreement with the Court is not over the constitutional status of newsracks, or the more specific question of the propriety of the licensing of such newspaper vending devices. The dispute in this case is over a more "technical" question: What is the scope of the peculiar doctrine that governs facial challenges to local laws in the First Amendment area? The majority reads our cases as holding that local licensing laws which have "a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of [an] identified censorship ris[k]," will be considered invalid "whenever [such a law] gives a government official * * * substantial power to discriminate based on the content or viewpoint of speech." This is true, the majority believes, whether or not the speaker can prove that the official's power has been or will be used against him; indeed, it is true even if the government official indicates a willingness to abjure the use of such power (as is the case here).

It is true that certain licensing laws that "giv[e] a government official * * * substantial power to discriminate based on the content or viewpoint of speech" are unconstitutional on their face—without any showing of actual censorship or discrimination, or even without the potential licensee even making an application for a license. But the sweep of this potent

doctrine must be limited in a way that is principled; one that is rooted in our precedents and our history. The Court's statement that this doctrine applies *whenever* the license law has "a close * * * nexus to expression, or to conduct commonly associated with expression," is unduly broad. The doctrine, as I see it, applies only when the specific conduct which the locality seeks to license is protected by the First Amendment. Because the placement of newsracks on city property is not so protected (as opposed to the circulation of newspapers as a general matter), the exception to our usual facial challenge doctrine does not apply here.

Our prior cases, and an examination of the case before us, indicates that the Lakewood ordinance is not invalid because it vests "excessive discretion" in Lakewood's Mayor to grant or deny a newsrack permit.

The Court has historically been reluctant to entertain facial attacks on statutes, *i. e.*, claims that a statute is invalid in all of its applications. Our normal approach has been to determine whether a law is unconstitutional as applied in the particular case before the Court. This rule is also the usual approach we follow when reviewing laws that require licenses or permits to engage in business or other activities. * * * Thus, the usual rule is that a law requiring permits for specified activities is not unconstitutional because it vests discretion in administrative officials to grant or deny the permit. The Constitution does not require the Court to assume that such discretion will be illegally exercised.

There are, however, a few well-established contexts in which the Court has departed from its insistence on as-applied approach to constitutional adjudication. One of them is where a permit or license is required to engage in expressive activities protected by the First Amendment, and official discretion to grant or deny is not suitably confined. "In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." *Freedman v. Maryland*. It is this line of cases on which the majority draws to support its conclusion that the Lakewood ordinance is unconstitutional on its face.

The prevailing feature of these exceptional cases, however, is that each of them involved a law that required a license to engage in activity protected by the First Amendment. In each of the cases, the expressive conduct which a city sought to license was an activity which the locality could not prohibit altogether. Streets, sidewalks, and parks are traditional public fora; leafletting, pamphletting, and speaking in such places may be regulated, *Cox v. New Hampshire*, 312 U.S. 569, 574–575 (1941); *Cantwell v. Connecticut*, 310 U.S. 296, 306–307 (1940); but they may not be entirely forbidden, *Jamison v. Texas*, 318 U.S. 413 (1943); *Lovell v. Griffin*. Likewise, in *Freedman*, at issue was a license requirement that was a prerequisite for any exhibition of a film in the State of Maryland. In all of these cases, the scope of the local license requirement included expressive activity protected by the First Amendment.

This is how the cases themselves have defined the scope of *Lovell-Freedman* doctrine. Such license requirements are struck down only when they effect the "enjoyment of freedoms which the Constitution guarantees." It is laws "subjecting the exercise of First Amendment freedoms to" license requirements that we have found suspect, see *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150–151 (1969), not merely laws with some amorphous "nexus" to expression.

For example, the *Lovell-Freedman* line of cases would be applicable here if the City of Lakewood sought to license the distribution of all newspapers in the City, or if it required licenses for all stores which sold newspapers. These are obviously newspaper circulation activities which a municipality cannot prohibit and therefore, any licensing scheme of this scope would have to pass muster under the *Lovell-Freedman* doctrine. But—and this is critical—Lakewood has not cast so wide a net. Instead, it has sought to license only the placement of newsracks (and other like devices) on City property. As I read our precedents, the *Lovell-Freedman* line of cases is applicable here only if the *Plain Dealer* has a constitutional right to distribute its papers by means of dispensing devices or newsboxes, affixed to the public sidewalks. I am not convinced that this is the case.

Appellee has a right to distribute its newspapers on the City's streets, as others have a right to leaflet, solicit, speak, or proselytize in this same public forum area. But this "does not mean that [appellee] can * * * distribute [its newspapers] where, when and how [it] chooses." See *Breard v. Alexandria*, 341 U.S. 622, 642 (1951). More specifically, the *Plain*

Dealer's right to distribute its papers does not encompass the right to take city property—a part of the *public* forum, as appellee so vigorously argues—and appropriate it for its own exclusive use, on a semi-permanent basis, by means of the erection of a newsbox. [T]hese protected "rights of others" have always included the public-at-large's right to use the public forum for its chosen activities, including free passage of the streets. See *Schneider v. State*, 308 U.S. 147, 160 (1939).

From the outset of its contemporary public forum cases, this Court has recognized that city streets and sidewalks "have immemorially been held in trust for use of the public." *Hague v. CIO*, 307 U.S. 496, 515 (1939). This means *all* of the public, and does not create a First Amendment right in newspaper publishers to "cordon" off a portion of the sidewalk in an effort to increase the circulation of their papers. Cf. *Schneider, supra*, at 160. * * *

While there is a First Amendment right to publish newspapers, publishers have no right to force municipalities to turn over public property for the construction of a printing facility. There is a First Amendment right to sell books, but we would not accept an argument that a city must allow a book seller to construct a book shop—even a small one—on a city sidewalk. The right to leaflet does not create a right to build a booth on city streets from which leafletting can be conducted. Preventing the "taking" of public property for these purposes does not abridge First Amendment freedoms. Just as there is no First Amendment right to operate a bookstore or locate a movie theater however or wherever one chooses notwithstanding local laws to the contrary, see *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the First Amendment does not create a right of newspaper publishers to take city streets to erect structures to sell their papers.

It may be that newspaper distributors can sell more papers by placing their newsracks on city sidewalks. But those seeking to distribute materials protected by the First Amendment do not have a right to appropriate public property merely because it best facilitates their efforts. "We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.' " *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546 (1983) (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring). Consequently, a city need not subsidize news distribution activities by giving, selling, or leasing a portion of city property for the erection of newsracks. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida*, 385 U.S. 39, 47 (1966). Preserving public forum space for use by the public *generally*, as opposed to the exclusive use of one individual or corporation, is obviously one such "lawfully dedicated" use. * * *

To hold otherwise, and create a First Amendment right of publishers to take city property to erect newsboxes, would ignore the significant governmental interests of cities—like Lakewood—that are threatened by newsrack placements. One of these interests, discussed *supra*, is keeping the streets and sidewalks free for the use of all members of the public, and not just the exclusive use of any one entity. But this is not the only concern at issue here.

The Court has consistently recognized the important interest that localities have in insuring the safety of persons using city streets and public forums. In this case, testimony at trial detailed a variety of potential safety risks posed by newsboxes, running the gamut from the obvious to the unimaginable. * * *

A third concern is the protection of cities' recognized aesthetic interests. Lakewood and countless other American cities have invested substantial sums of money to renovate their urban centers and commercial districts. Increasingly, they find newsracks to be discordant with the surrounding area. A majority of this Court found that similar aesthetic considerations would be sufficient to justify a content-neutral ban on all outdoor advertising signs, notwithstanding the extent to which such signs convey First Amendment protected messages. See *Metromedia, Inc. v. San Diego*. * * *

We should be especially hesitant to recognize the right appellee claims where, as is the case here, there are "ample alternate channels" available for distributing newspapers. The District Court found that no person in Lakewood lives more than a quarter-mile from a 24-hour newspaper outlet: either a store open all-night or a newsbox located on private property. Home delivery, the means by which appellant distributes the vast majority of its newspapers, is an option as well. The First Amendment does not require Lakewood to make its property available to the *Plain Dealer* so that it may undertake the most effective possible means of selling newspapers.

In sum, I believe that the First Amendment does not create a right of newspaper publishers to take a portion of city property to erect a structure to distribute their papers. There is no constitutional right to place newsracks on city sidewalks over the objections of the city.

Because there is no such constitutional right, the predicate for applying the *Freedman v. Maryland* line of cases is not present in this case. Because the Lakewood Ordinance does not directly regulate an activity protected by the First Amendment, we should instead take the traditional, as-applied approach to adjudication. * * * Appellee's facial challenge to the Mayor's discretion under § 901.181(c)(7) should therefore be rejected.

[T]he Court incorrectly suggests that I rely on the now-discredited "greater-includes-the-lesser" formulation of Justice Holmes, as adopted by this Court in *Davis v. Massachusetts*, 167 U.S. 43 (1897). The majority then engages in a detailed analysis of cases having no applicability here whatsoever, to slay this straw man of its own creation.

As defined at its inception, "greater-includes-the-lesser" reasoning holds that where a State or municipality may ban an activity altogether, it is consequently free "to determine under what circumstances such [activity] may be availed of, as the greater power contains the lesser." But if, for example, a Lakewood ordinance provided for the issuance of newsrack licenses to only those newspapers owned by persons of a particular race, or only to members of a select political party, such a law would be clearly violative of the First Amendment (or some other provision of the Constitution), and would be facially invalid. And if the Mayor of Lakewood granted or refused license applications for similar improper reasons, his exercise of the power provided him under § 901.181(c)(7) would be susceptible to constitutional attack. Thus, I do not embrace the "greater-includes-the-lesser" syllogism—one that this Court abandoned long ago. Cf. *Hague v. CIO*, 307 U.S. 496, 515 (1939).

Instead, my view is simply this: where an activity that could be forbidden altogether (without running afoul of the First Amendment) is subjected to a local license requirement, the mere presence of administrative discretion in the licensing scheme will not render it invalid *per se*. In such a case—which does not involve the exercise of First Amendment protected freedoms—the *Lovell-Freedman* doctrine does not apply, and our usual rules concerning the permissibility of discretionary local licensing laws (and facial challenges to those laws) must prevail.

Finally, the Court asserts that I do not understand the nature of the conduct at issue here. It is asserted that "[t]he actual 'activity' at issue here is the circulation of newspapers, which is constitutionally protected." But of course, this is wrong. Lakewood does not, by its ordinance, seek to license the circulation of newspapers within the city. In fact, the Lakewood ordinance does not even require licenses of all newsracks within the jurisdiction—the many newsracks located within Lakewood on private property are *not* included within the scope of the city's ordinance. Thus, it is the majority—and not I—that is guilty of "recharacterizing" the activity that Lakewood licenses. The Lakewood ordinance must be considered for what it is: a license requirement for newsracks on city property.

This is why, notwithstanding the Court's intimations to the contrary, my approach would not change the outcome of our previous cases in this area. In those cases the local law at issue required licenses—not for a narrow category of expressive conduct that could be prohibited—but for a sweeping range of First Amendment protected activity. Thus, the law at issue in *Shuttlesworth v. Birmingham*, 394 U.S., at 149, required a license for "any parade"; the license scheme under attack in *Freedman v. Maryland*, 380 U.S., at 52–53, and n. 1, applied to all films shown in the State of Maryland; the law at issue in *Lovell v. Griffin*, 303 U.S., at 451, applied to any distribution of leaflets or pamphlets within the city limits. Surely, even at the extreme level of abstraction at which the Court operates in its opinion, the majority can recognize a difference between the scope and dangers of these laws, and Lakewood's more focused regulation.

I now address the rule of decision the majority offers.

Instead of the relatively clear rule that the Court's prior cases support, the majority today adopts a more amorphous measure of when the *Lovell-Freedman* doctrine should apply. As I see it, the Court's new "nexus to expression, or to conduct commonly associated with expression" test is peculiarly troublesome, because it is of uncertain scope and vague expanse.

The Court appears to stop short of saying that any statute that delegates discretionary administrative authority that has the *potential* to be used to suppress speech is unconstitutional. A great variety of dis-

cretionary power may be abused to limit freedom of expression; yet that does not mean that such delegations of power are facially invalid.

The new Lakewood ordinance enacted in tandem with § 901.181 illustrates this principle well. As discussed, when the District Court invalidated Lakewood's complete ban on all structures on city property, the City enacted two new ordinances. One provides for licensing newsracks on city property—the subject of this appeal. The second gives the City Council *unlimited* discretion to grant or deny applications for all other exclusive uses of city property. Someone who wishes to apply for permission to erect a soft-drink vending machine on city property may fear that his application will be denied because he has engaged in some First-Amendment protected activities which are not to the City Council's liking. These fears may even be substantial, and they may be based on facts eminently provable in a courtroom; *e. g.*, that the applicant opposed a city councilwoman in her last election campaign. Yet surely § 901.18 is not invalid on its face merely because it creates the *possibility* that the discretion accorded therein to the City Council could be abused in the way that the soft drink vending machine applicant fears.

Seeking a way to limit its own expansive ruling, the Court provides two concrete examples of instances in which its newly crafted "nexus to expression" rule will *not* strike down local ordinances that permit discretionary licensing decisions. First, we are told that a law granting unbridled discretion to a Mayor to grant licenses for soda machine placements passes constitutional muster because it does not give that official "frequent opportunities to exercise substantial power over the content or viewpoint of the vendor's speech." How the Court makes this empirical assessment, I do not know. It seems to me that the nature of a vendor's product—be it newspapers or soda pop—is not the measure of how potent a license law can be in the hands of local officials seeking to control or alter the vendor's speech. Of course, the newspaper vendor's speech is likely to be more public, more significant, and more widely known than the soda vendor's speech—and therefore more likely to incur the wrath of public officials. *But* in terms of the "usefulness" of the license power to exert control over a licensee's speech, there is no difference whatsoever between the situation of the soda vendor and the newspaper vendor.[11]

If the Court's treatment of the soda machine problem is not curious enough, it also "assures" us that its ruling does not invalidate local laws requiring, for example, building permits—even as they apply to the construction of newspaper printing facilities. These laws, we are told, provide "too blunt a censorship instrument to warrant judicial intervention." Thus, local "laws of general application that are not aimed at conduct commonly associated with expression" appear to survive the Court's decision today.

But what if Lakewood, following this decision, repeals local ordinance § 901.181 (the detailed newsrack permit law) and simply left § 901.18 (the general ordinance concerning "any * * * structure or device" on city property) on the books? That section vests absolute discretion (without any of the guidelines found in § 901.181) in the City Council to give or withhold permission for the erection of devices on city streets. Because this law is of "general application," it should survive scrutiny under the Court's opinion—even as applied to newsracks. If so, the Court's opinion takes on an odd "the-greater-but-not-the-lesser" quality: the more activities that are subjected to a discretionary licensing law, the more likely that law is to pass constitutional muster.

As noted above, our tradition has been to discourage facial challenges, and rather, to entertain constitutional attacks on local laws only as they are applied to the litigants. The facts of this case indicate why that policy is a prudent one.

Most importantly, there could be no allegation in this case that the Mayor's discretion to deny permits *actually* has been abused to the detriment of the newspaper, for the *Plain Dealer* has not applied for a permit for its newsracks * * *.

Indicative of the true nature of this litigation is the fact that the City of Lakewood has had on the books, since January of 1987, an interim ordinance that licenses the placement of newsracks on city property—an ordinance that is free of the constitutional defects challenged here. Eighteen months have passed since the interim ordinance was en-

11. Indeed, in practical terms, if two businesses contemplated the prospect of standing before Lakewood's officials to seek vending machine permits—a sole proprietorship seeking a license for a soda machine that is the only source of the owner's income, and the Plain Dealer Publishing Co., seeking licenses for newsracks—I have little doubt about which applicant would be more likely to feel constrained to alter its expressive conduct in anticipation of the encounter.

acted, and the *Plain Dealer* apparently still has not applied for a license to place its newsracks on city property. Thus, the Court, with a strange rhetorical flourish, belittles the usefulness of judicial review as a tool to control the Mayor's discretion in granting newsrack licenses, because newspaper publishers and their reading public cannot afford to await the results of the judicial process. "[N]ewspaper publishers cannot wait indefinitely for a permit" and "a paper needs public access at a particular time," we are remonstrated. Yet the *Plain Dealer* has the availability of a wholly constitutional permit for its newsracks for a year and a half.

The Court mentions the risk of censorship, the ever-present danger of self-censorship, and the power of prior restraint to justify the result. Yet these fears and concerns have little to do with this case, which involves the efforts of Ohio's largest newspaper to place a handful of newsboxes in a few locations in a small suburban community. Even if one accepts the testimony of appellee's own expert, it seems unlikely that the newsboxes at issue here would increase the *Plain Dealer's* circulation within Lakewood by more than a percent or two; the paper's overall circulation would be affected only by about one one-hundredth of one percent (0.01%).

It is hard to see how the Court's concerns have any applicability here. And it is harder still to see how the Court's image of the unbridled local censor, seeking to control and direct the content of speech, fits this case. In the case before us, the City of Lakewood declined to appeal an adverse ruling against its ban on newsracks, and instead amended its local laws to permit appellee to place its newsboxes on city property. When the nature of this Ordinance was not to the *Plain Dealer's* liking, Lakewood again amended its local laws to meet the newspaper's concerns. Finally, when the newspaper, still disgruntled, won a judgment against Lakewood from the Court of Appeals, the city once again amended its ordinance to address the constitutional issues. The Court's David and Goliath imagery concerning the balance of power between the regulated and the regulator in this case is wholly inept—except, possibly, in reverse.

For the foregoing reasons, I dissent from the Court's opinion and its judgment in this case. I would reverse the Court of Appeals' decision invalidating the Lakewood Ordinance.

COMMENT

For Justice White, cases such as *Lovell v. Griffin*, 303 U.S. 444 (1938) and *Cantwell v. Connecticut*, 310 U.S. 296 (1940), see text, p. 39, did not support the invalidation of the *City of Lakewood* ordinance. Those cases dealt with First Amendment activities which the locality could not prohibit altogether. The line of cases represented by *Lovell v. Griffin* would be applicable if a newspaper, like the Cleveland *Plain Dealer*, had a constitutional right to distribute its papers on newsracks on public property. But in Justice White's view—and in the Court's?—there was no such right. Since the activity in question, placing newspaper vending machines on public sidewalks, could be prohibited altogether, lesser regulations such as local licensing conditioned on administrative discretion, was *a fortiori* permissible.

Justice Brennan says that the concept that "the greater power to prohibit a manner of speech entirely included the lesser power to license it in an official's unbridled discretion" is a "discredited doctrine." However, in *Posadas De Puerto Rico Associates v. Tourism Company of Puerto Rico*, 106 S.Ct. 2968 (1986), Justice Rehnquist used exactly such a "greater-includes-the-lesser" theory. Since casino gambling could be prohibited altogether by Puerto Rico, Puerto Rico could clearly undertake a lesser regulation of casino gambling, i.e., prohibit advertising of casino gambling to residents of Puerto Rico. Interestingly, Justice Rehnquist took no part in the decision in *Lakewood*.

City of Lakewood sets forth new doctrine. While facial invalidity of ordinances striking at First Amendment expression had been upheld in the past, this doctrine was now extended to reach situations where the law being challenged had a close enough nexus to expression, or to conduct usually associated with expression, to pose a real and substantial risk of censorship. Since placing newsracks on publicly owned sidewalks, unlike parades and demonstrations on public property, had never been deemed First Amendment activity, Justice White and other dissenters thought *Lovell* and its progeny should not apply. Justice White, in short, repudiated the idea that laws having a close enough nexus to expression could be attacked without more, just on the basis of their facial invalidity.

Solicitation and the Overbreadth Doctrine

BOARD OF AIRPORT COMMISSIONERS OF LOS ANGELES v. JEWS FOR JESUS

482 U.S. 569, 107 S.CT. 2568, 96 L.ED.2D 500 (1987).

Justice O'CONNOR delivered the opinion of the Court.

The issue presented in this case is whether a resolution banning all "First Amendment activities" at Los Angeles International Airport (LAX) violates the First Amendment.

On July 13, 1983, the Board of Airport Commissioners (Board) adopted Resolution No. 13787, which provides in pertinent part:

"NOW, THEREFORE, BE IT RESOLVED by the Board of Airport Commissioners that the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity; * * *

"BE IT FURTHER RESOLVED that if any individual or entity engages in First Amendment activities within the Central Terminal Area at Los Angeles International Airport, the City Attorney is directed to institute appropriate litigation against such individual and/or entity to ensure compliance with this Policy statement of the Board of Airport Commissioners. * * * "

Respondent Jews for Jesus, Inc., is a nonprofit religious corporation. On July 6, 1984, Alan Howard Snyder, a minister of the Gospel for Jews for Jesus, was stopped by a Department of Airports peace officer while distributing free religious literature on a pedestrian walkway in the Central Terminal Area at LAX. The officer showed Snyder a copy of the resolution, explained that Snyder's activities violated the resolution, and requested that Snyder leave LAX. The officer warned Snyder that the City would take legal action against him if he refused to leave as requested. Snyder stopped distributing the leaflets and left the airport terminal. * * *

Jews for Jesus and Snyder then filed this action in the District Court for the Central District of California, challenging the constitutionality of the resolution under both the California and Federal Constitutions.

The District Court held that the Central Terminal Area was a traditional public forum under federal law, and held that the resolution was facially unconstitutional under the United States Constitution. * * * The requirement that the overbreadth be substantial arose from our recognition that application of the overbreadth doctrine is, "manifestly, strong medicine," *Broadrick v. Oklahoma*, 93 S.Ct., at 2916, and that "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds."

On its face, the resolution at issue in this case reaches the universe of expressive activity, and, by prohibiting *all* protected expression, purports to create a virtual "First Amendment Free Zone" at LAX. The resolution does not merely regulate expressive activity in the Central Terminal Area that might create problems such as congestion or the disruption of the activities of those who use LAX. Instead, the resolution expansively states that LAX "is not open for First Amendment activities by any individual and/or entity," and that "any individual and/or entity [who] seeks to engage in First Amendment activities within the Central Terminal Area * * * shall be deemed to be acting in contravention of the stated policy of the Board of Airport Commissioners." The resolution therefore does not merely reach the activity of respondents at LAX; it prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enters LAX may be found to violate the resolution by engaging in some "First Amendment activit[y]." We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech.

Additionally, we find no apparent saving construction of the resolution. The resolution expressly applies to all "First Amendment activities," and the words of the resolution simply leave no room for a narrowing construction. In the past the Court sometimes has used either abstention or certification when, as here, the state courts have not had the opportunity to give the statute under challenge a definite construction. Neither option, however, is appropriate in this case because California has no certification procedure, and the resolution is not "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." * * *

The petitioners suggest that the resolution is not substantially overbroad because it is intended to reach only expressive activity unrelated to airport-related purposes. * * *

In balancing the government's interest in limiting the use of its property against the interests of those who wish to use the property for expressive activity, the Court has identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45–46 (1983). The proper First Amendment analysis differs depending on whether the area in question falls in one category rather than another. In a traditional public forum or a public forum by government designation, we have held that First Amendment protections are subject to heightened scrutiny:

> "In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. * * * The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.*, at 45.

We have further held, however, that access to a nonpublic forum may be restricted by government regulation as long as the regulation "is reasonable and not an effort to suppress expression merely because officials oppose the speaker's view."

The petitioners contend that LAX is neither a traditional public forum nor a public forum by government designation, and accordingly argue that the latter standard governing access to a nonpublic forum is appropriate. The respondents, in turn, argue that LAX is a public forum subject only to reasonable time, place or manner restrictions. * * * Because we conclude that the resolution is facially unconstitutional under the First Amendment overbreadth doctrine regardless of the proper standard, we need not decide whether LAX is indeed a public forum, or whether the *Perry* standard is applicable when access to a nonpublic forum is not restricted.

Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491.(1985). A statute may be invalidated on its face, however, only if the overbreadth is "substantial." *Houston v. Hill*, 482 U.S. 451, 459, (1987). Such a limiting construction, however, is of little assistance in substantially reducing the overbreadth of the resolution. Much nondisruptive speech—such as the wearing of a T-Shirt or button that contains a political message—may not be "airport related," but is still protected speech even in a nonpublic forum. See *Cohen v. California* (1971). Moreover, the vagueness of this suggested construction itself presents serious constitutional difficulty. The line between airport-related speech and nonairport-related speech is, at best, murky. The petitioners, for example, suggest that an individual who reads a newspaper or converses with a neighbor at LAX is engaged in permitted "airport-related" activity because reading or conversing permits the traveling public to "pass the time." We presume, however, that petitioners would not so categorize the activities of a member of a religious or political organization who decides to "pass the time" by distributing leaflets to fellow travelers. In essence, the result of this vague limiting construction would be to give LAX officials alone the power to decide in the first instance whether a given activity is airport related. Such a law that "confers on police a virtually unrestrained power to arrest and charge persons with a violation" of the resolution is unconstitutional because "[t]he opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident." *Lewis v. City of New Orleans* (1974) (POWELL, J., concurring).

We conclude that the resolution is substantially overbroad, and is not fairly subject to a limiting construction. Accordingly, we hold that the resolution violates the First Amendment. The judgment of the Court of Appeals is

Affirmed.

Justice WHITE, with whom the Chief Justice joins, concurring.

I join the Court's opinion but suggest that it should not be taken as indicating that a majority of the Court considers the Los Angeles International Airport to be a traditional public forum. That issue was one of the questions on which we granted certiorari,

and we should not have postponed it for another day.

COMMENT

Rather than make nice discriminations among various groups about types of solicitation which will be permitted, the Commissioners of the Los Angeles Airport Authority, a public facility, announced a plague on all speakers and simply banished First Amendment activity from the airport terminal altogether. In the next section, the student is exposed to the considerable case law which deals with the question of whether a public facility should be considered a public forum. As Justice O'Connor pointed out in *Airport Commissioners*, this is an inquiry that makes a difference. If the facility is deemed a public forum, then content-based regulation must meet a heightened scrutiny standard. Even content-neutral regulation of the traditional public forum must be "narrowly tailored to serve a significant governmental interest" and must leave open alternative modes of communication. Regulation of the nonpublic forum has much less formidable obstacles to overcome.

Is the use of the overbreadth doctrine here based on an unwillingness to hold that the airport terminal is a traditional public forum? Why should the Court be reluctant to make such a determination? Notice that the overbreadth doctrine applied in *Airport Commissioners* is fatal to the regulation banning First Amendment activity in the terminal. How should a valid regulation in this context have been drafted?

Usually in First Amendment litigation, what is being challenged is the validity of a law as applied to a particular plaintiff. If the plaintiff is successful, then the challenged application of the law is rendered invalid, but the law may still be valid. Sometimes, however, the plaintiff may launch an attack on the law itself by contending that the law is facially unconstitutional. This means that the constitutional invalidity is apparent on its face. If, however, a court rules that a law on its face violates the First Amendment because of overbreadth, the law itself is rendered invalid.

The doctrine of overbreadth has been described as follows: "The doctrine of overbreadth is concerned with the precision of a law. A law may be facially clear but may sweep too broadly if it indiscriminately reaches both protected and unprotected expression. Protected expression can be chilled or suppressed by such a law. Herein lies the vice of overbreadth. Even though the litigant might be engaged in unprotected expression, the statute could be applied to protected speech." Barron and Dienes, *Constitutional Law in a Nutshell*, 227 (1986).

Public Facilities and the Public Forum

What about the exercise of First Amendment rights on public property? To what extent may a public facility be used as a public forum? In a decision which appeared to suggest an unwillingness by the Supreme Court to recognize a general right of nondiscriminatory access to publicly owned media facilities, the Court, 5–4, upheld a lower court decision, *Lehman v. City of Shaker Heights*, 296 N.E.2d 683 (Ohio 1973), approving a city's right to prohibit political advertising on city buses. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). In the *Lehman* case, the Court denied access to publicly owned media to a political candidate who wished to display his political messages along with commercial ads on city-owned buses in Shaker Heights, Ohio. Justice Blackmun wrote the Court's opinion in *Lehman*, joined by Justices Burger, White, and Rehnquist. These justices declared that a city had a right as the owner of a commercial venture like a public transportation system to accept ads only for "innocuous" commercial advertising and to prohibit political messages on buses.

The Court denied that the car cards in controversy constituted a "public forum" protected by the First Amendment. Similarly, the Court rejected the contention "that there is a guarantee of nondiscriminatory access to such publicly owned and controlled areas of communication regardless of the primary purpose for which the area is dedicated." Although the Court conceded that American constitutional law had been "jealous to preserve access to public places for purposes of free speech," what is dispositive in such cases is "the nature of the forum and the conflicting interests involved. * * *" Under the circumstances, the claim for the exercise of First Amendment expression in *Lehman* would be rejected:

> Here we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Indeed, the city is engaged in commerce. * * * [C]ar card space, although incidental to the provision of public

transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system had discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

* * *

No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of "favoritism" and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity.

By means of a separate concurring opinion, Justice Douglas supplied the critical fifth vote. He thought that a bus, from a public forum point of view, was more like a newspaper than a park. On the very day the Court decided *Lehman*, it had decided the *Miami Herald* case, text, p. 497. Relying on *Miami Herald*, Douglas appeared to suggest that the owner of a bus (even though it was a public owner) was equivalent to the owner of a private newspaper: "[The] newspaper owner cannot be forced to include in his offerings news or other items which outsiders may desire but which the owner abhors." If the bus or newspaper was turned into a park for purposes of the public forum concept, then public facilities such as publicly owned buses would be "transformed into forums for the dissemination of ideas upon [a] captive audience."

Four justices, Brennan, Stewart, Marshall, and Powell, dissented on the ground that the city's actions denying access violated equal protection in that the city had improperly preferred commercial advertising on its buses to the exclusion of political advertising. The dissenters said that Shaker Heights had opened up its advertising space on its buses as a "public forum." Having done so, the dissenters said the city could not exclude the category of political advertising:

Having opened a forum of communication, the city is barred by the First and Fourteenth Amendments from discriminating among forum users solely on the basis of message content.

* * *

Once a public forum for communication has been established, both free speech and equal protection principles prohibit discrimination based solely upon subject matter or content. * * * [D]iscrimination among entire classes of ideas, rather than among points of view within a particular class, does not render it any less odious. Subject matter or content censorship in any form is forbidden.

Is the *Lehman* case a severe defeat for the whole idea of public property as a public forum? Or is the case merely a holding that the car cards were not a public forum? Note that there is a major difference in the force of a claim for the exercise of free expression rights in public property as compared with such a claim with respect to private property. In the private property area, there is no state action problem. In such a public context, the mandate of First Amendment theory that the state act in an ideologically neutral manner combines with equal protection concepts to ensure that a public facility cannot favor one political viewpoint and banish another.

In *Lehman*, all political viewpoints in the form of political ads were banned. Therefore, arguably, there was no equal protection violation; Justice Brennan was of a contrary opinion, however, wasn't he? Why?

The necessity that the public facility which is sought to be used for public forum purposes be consistent with the primary purposes of the facility was emphasized once again by the Supreme Court in *Greer v. Spock*, 424 U.S. 828 (1976). The Court, per Justice Stewart, in *Greer* rejected an attack on military post regulations which prohibited partisan political activity as well as the dissemination of pamphlets without the prior approval of military authorities. The Court denied that "whenever members of the public are permitted freely to visit a place owned or operated by the Government then that place becomes a public forum for the purposes of the First Amendment." *Adderley v. Florida*, 385 U.S. 39 (1966), a 5–4 Supreme Court decision denying public forum treatment to jailhouse grounds, was relied on by the *Greer* Court for the idea that the First Amendment did not mean that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." The purpose of military reservations was to "train soldiers, not to provide a public forum." Justice Brennan, joined by Justice Marshall, dissented in *Greer* and expressed grave concern that a narrow approach to whether "the form of expression is compatible with the activities occurring at the locale" might lead to a "rigid characterization" that "a given locale is not a public

forum." The result would be that "certain forms of public speech at the locale" would be suppressed even though the expression involved was entirely compatible with the principal purposes of the public facility in question.

In *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981), the Court, per Justice Rehnquist, upheld a federal statute which prohibited mailboxes belonging to the government and used in the postal system from being used by civic associations without paying postage. Rehnquist rejected the idea "of a letter box as a public forum" and observed "that the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." Rehnquist appeared to suggest, said Professor Emerson, that no new public forums "would be recognized beyond those that had been considered traditionally to be such."

Despite the result in *Greenburgh Civic Associations*, Emerson believes that "the constitutional right to use public facilities [as a public forum] on a compatible basis seems well-established." What merit is there in generally viewing public facilities as broadly hospitable to public forum purposes? Professor Emerson offers this rationale: "It forces the relevant community to listen to the expression of grievances rather than allowing them to be swept under the rug." See Emerson, *The Affirmative Side of the First Amendment*, 15 Georgia L.Rev. 809 (1981).

Justice Rehnquist objected that applying the test for valid time, place, and manner controls to the question of whether a letter box was a public forum would impose a difficult and impractical task on the Postal Service: "[The] authority to impose regulations cannot be made to depend on all of the variations of climate, population, density, and other factors that may vary significantly within a distance of less than 100 miles."

The public forum concept received its classic expression in Kalven, *The Concept of the Public Forum*, 1965 Supreme Ct.Rev. 1. The public forum concept became a vehicle for providing First Amendment-based legitimacy to the civil rights protests of the sixties.

Grayned v. City of Rockford, 408 U.S. 104 (1972) provides a helpful guide to permissible *time, place, and manner* regulation:

> The nature of the place, "the pattern of its normal activities, dictates the kinds of regulations of time, place and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest. "Access to [public places] for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly." Free expression must not, in the guise of regulation, be abridged or denied.

The *Heffron* case which follows is an illustrative example of permissible time, place, or manner regulation.

HEFFRON v. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS

452 U.S. 640, 101 S.CT. 2559, 69 L.ED.2D 298 (1981).

[EDITORIAL NOTE The Minnesota Agricultural Society conducts an annual state fair on a 125-acre tract of state land which attracts about 115,000 persons on weekdays and 160,000 on weekends. Pursuant to state law, the Society issued rules, including Rule 6.05 which requires that all persons or groups seeking to sell, exhibit, or distribute materials at the fair must do so only from fixed locations on the fairgrounds. While the rules do not bar walking around and communicating, all sales, distributions, and fund solicitations must be conducted from a booth rented from the fair authorities on a first-come, first-served basis.

The International Society for Krishna Consciousness, Inc. (ISKCON) brought suit seeking to enjoin application of Rule 6.05 against the religion and its members. It was alleged that the Rule violated the First Amendment by suppressing ISKCON's religious practice of Sankirtan, a ritual requiring members to go into public places to distribute material and solicit donations for the Krishna religion.

The trial court upheld the constitutionality of Rule 6.05. The Minnesota Supreme Court reversed, holding Rule 6.05 unconstitutionally restricted the Krishnas' religious practice of Sankirtan.]

Justice WHITE delivered the opinion of the Court.

The State does not dispute that the oral and written dissemination of the Krishnas' religious views

and doctrines is protected by the First Amendment. Nor does it claim that this protection is lost because the written materials sought to be distributed are sold rather than given away or because contributions or gifts are solicited in the course of propagating the faith.

It is also common ground, however, that the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. *Adderley v. Florida*. As the Minnesota Supreme Court recognized, the activities of ISKCON, like those of others protected by the First Amendment, are subject to reasonable time, place, and manner restrictions. "We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*. The issue here, as it was below, is whether Rule 6.05 is a permissible restriction on the place and manner of communicating the views of the Krishna religion, more specifically, whether the Society may require the members of ISKCON who desire to practice Sankirtan at the State Fair to confine their distribution, sales, and solicitation activities to a fixed location.

A major criterion for a valid time, place, and manner restriction is that the restriction "may not be based upon either the content or subject matter of the speech." *Consolidated Edison Co. v. Public Service Commission* [p. 156]. Rule 6.05 qualifies in this respect, since, as the Supreme Court of Minnesota observed, the rule applies even-handedly to all who wish to distribute and sell written materials or to solicit funds. No person or organization, whether commercial or charitable, is permitted to engage in such activities except from a booth rented for those purposes.

Nor does Rule 6.05 suffer from the more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority. The method of allocating space is a straightforward first-come, first-served system. The rule is not open to the kind of arbitrary application that this Court has condemned as inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view. See *Shuttlesworth v. Birmingham*.

A valid time, place, and manner regulation must also "serve a significant governmental interest." Here, the principal justification asserted by the state in support of Rule 6.05 is the need to maintain the orderly movement of the crowd given the large number of exhibitors and persons attending the fair.

As a general matter, it is clear that a state's interest in protecting the "safety and convenience" of persons using a public forum is a valid governmental objective. Furthermore, consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved. This observation bears particular import in the present case since respondents make a number of analogies between the fairgrounds and city streets, which have "immemorially been held in trust for the use of the public and have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." But it is clear that there are significant differences between a street and the fairgrounds. A street is continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air of the company of friends and neighbors in a relaxed environment. The Minnesota Fair is a temporary event attracting great numbers of visitors who come to the event for a short period to see and experience the host of exhibits and attractions at the fair. The flow of the crowd and demands of safety are more pressing in the context of the fair. As such, any comparisons to public streets are necessarily inexact.

The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON. That organization and its ritual of Sankirtan have no special claim to First Amendment protection as compared to that of other religions who also distribute literature and solicit funds. None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize. The nonreligious organizations seeking sup-

port for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature.

ISKCON desires to proselytize at the fair because it believes it can successfully communicate and raise funds. In its view, this can be done only by intercepting fair patrons as they move about, and if success is achieved, stopping them momentarily or for longer periods as money is given or exchanged for literature. This consequence would be multiplied many times over if Rule 6.05 could not be applied to confine such transactions by ISKCON and others to fixed locations. Indeed, the court below agreed that without Rule 6.05 there would be widespread disorder at the fairgrounds. The court also recognized that some disorder would inevitably result from exempting the Krishnas from the rule. Obviously, there would be a much larger threat to the State's interest in crowd control if all other religious, nonreligious, and noncommercial organizations could likewise move freely about the fairgrounds distributing and selling literature and soliciting funds at will.

Given these considerations, we hold that the State's interest in confining distribution, selling, and fund solicitation activities to fixed locations is sufficient to satisfy the requirement that a place or manner restriction must serve a substantial state interest.

For similar reasons, we cannot agree with the Minnesota Supreme Court that Rule 6.05 is an unnecessary regulation because the State could avoid the threat to its interest posed by ISKCON by less restrictive means, such as penalizing disorder or disruption, limiting the number of solicitors, or putting more narrowly drawn restrictions on the location and movement of ISKCON's representatives. As we have indicated, the inquiry must involve not only ISKCON, but also all other organizations that would be entitled to distribute, sell or solicit if the booth rule may not be enforced with respect to ISKCON. Looked at in this way, it is quite improbable that the alternative means suggested by the Minnesota Supreme Court would deal adequately with the problems posed by the much larger number of distributors and solicitors that would be present on the fairgrounds if the judgment below were affirmed.

For Rule 6.05 to be valid as a place and manner restriction, it must also be sufficiently clear that alternative forums for the expression of respondents' protected speech exist despite the effects of the rule. Rule 6.05 is not vulnerable on this ground. First, the Rule does not prevent ISKCON from practicing Sankirtan anywhere outside the fairgrounds. More importantly, the rule has not been shown to deny access within the forum in question. Here, the rule does not exclude ISKCON from the fairgrounds, nor does it deny that organization the right to conduct any desired activity at some point within the forum. Its members may mingle with the crowd and orally propagate their views. The organization may also arrange for a booth and distribute and sell literature and solicit funds from that location on the fairgrounds itself. The Minnesota State Fair is a limited public forum in that it exists to provide a means for a great number of exhibitors temporarily to present their products or views, be they commercial, religious, or political, to a large number of people in an efficient fashion. Considering the limited functions of the fair and the combined area within which it operates, we are unwilling to say that Rule 6.05 does not provide ISKCON and other organizations with an adequate means to sell and solicit on the fairgrounds.

[Reversed.]

Justice BRENNAN, with whom Justice Marshall and Justice Stevens join, concurring in part and dissenting in part.

As the Court recognizes, the issue in this case is whether Minnesota State Fair Rule 6.05 constitutes a reasonable times, place, and manner restriction on respondents' exercise of protected First Amendment rights. In deciding this issue, the Court considers, *inter alia*, whether the regulation serves a significant governmental interest and whether that interest can be served by a less intrusive restriction. The Court errs, however, in failing to apply its analysis separately to each of the protected First Amendment activities restricted by Rule 6.05. Thus, the Court fails to recognize that some of the state's restrictions may be reasonable while others may not.

Rule 6.05 restricts three types of protected First Amendment activity: distribution of literature, sale of literature, and solicitation of funds.

I quite agree with the Court that the state has a significant interest in maintaining crowd control on its fairgrounds. I also have no doubt that the State has a significant interest in protecting its fairgoers from fraudulent or deceptive solicitation practices. Indeed, because I believe on this record that this latter interest is substantially furthered by a rule that restricts sales and solicitation activities to fixed booth locations, where the State will have the greatest op-

portunity to police and prevent possible deceptive practices, I would hold that Rule 6.05's restriction on those particular forms of First Amendment expression is justified as an antifraud measure. Accordingly, I join the judgment of the Court as far as it upholds rule 6.05's restriction on sales and solicitations. However, because I believe that the booth rule is an overly intrusive means of achieving the state's interest in crowd control, and because I cannot accept the validity of the state's third asserted justification [*i.e.*, protection of fairgoers from annoyance and harassment], I dissent from the Court's approval of Rule 6.05's restriction on the distribution of literature.

As our cases have long noted, once a governmental regulation is shown to impinge upon basic First Amendment rights, the burden falls on the government to show the validity of its asserted interest and the absence of less intrusive alternatives. The challenged "regulation must be narrowly tailored to further the State's legitimate interest." Minnesota's Rule 6.05 does not meet this test.

[E]ach and every fairgoer, whether political candidate, concerned citizen, or member of a religious group, is free to give speeches, engage in face-to-face advocacy, campaign, or proselytize. No restrictions are placed on any fairgoer's right to speak at any time, at any place, or to any person. Thus, if on a given day 5,000 members of ISKCON came to the fair and paid their admission fees, all 5,000 would be permitted to wander throughout the fairgrounds, delivering speeches to whomever they wanted, about whatever they wanted. Moreover, because this right does not rest on Sankirtan or any other religious principle, it can be exercised by every political candidate, partisan advocate, and common citizen who has paid the price of admission. All share the identical right to move peripatetically and speak freely throughout the fairgrounds.

Because of Rule 6.05, however, as soon as a proselytizing member of ISKCON hands out a free copy of the Bhagavad-Gita to an interested listener, or a political candidate distributes his campaign brochure to a potential voter, he becomes subject to arrest and removal from the fairgrounds. This constitutes a significant restriction on First Amendment rights. By prohibiting distribution of literature outside the booths, the fair officials sharply limit the number of fairgoers to whom the proselytizers and candidates can communicate their messages. Only if a fairgoer affirmatively seeks out such information by approaching a booth does Rule 6.05 fully permit potential communicators to exercise their First Amendment rights.

In support of its crowd control justification, the state contends that if fairgoers are permitted to distribute literature, large crowds will gather, blocking traffic lanes and causing safety problems. But the state has failed to provide any support for these assertions. It has made no showing that relaxation of its booth rule would create additional disorder in a fair that is already characterized by the robust and unrestrained participation of hundreds of thousands of wandering fairgoers. If fairgoers can make speeches, engage in face-to-face proselytizing, and buttonhole prospective supporters, they can surely distribute literature to members of their audience without significantly adding to the state's asserted crowd control problem. The record is devoid of any evidence that the 125-acre fairgrounds could not accommodate peripatetic distributors of literature just as easily as it now accommodates peripatetic speechmakers and proselytizers.

Relying on a general, speculative fear of disorder, the State of Minnesota has placed a significant restriction on respondents' ability to exercise core First Amendment rights. This restriction is not narrowly drawn to advance the state's interests, and for that reason is unconstitutional.

Justice Blackmun, concurring in part and dissenting in part.

COMMENT

Heffron held that the restriction by a state entity on distribution, sales, and solicitation activities to a fixed site was a permissible time, place, and manner regulation. What are the characteristics of a valid time, place, and manner regulation?

Justice White identifies four such characteristics: (1) the restriction cannot be based on either the content or subject matter of the speech. (2) A valid time, place, and manner regulation must serve a significant governmental interest. (What significant governmental interest was served by the regulation in *Heffron?*) (3) A time, place, and manner regulation is not valid if the state could accomplish its purpose by less drastic means. (Were less drastic means open to the Minnesota State Fair?) (4) A time, place, and manner regulation is valid if alternative forums exist for the purpose of communicating the expression

which is limited by the regulation in controversy. (Were such alternative forums present in the *Heffron* context?)

Might the Minnesota Supreme Court have prevailed had it depended on the rule of *Pruneyard*, see text, p. 152, rather than on the First Amendment? Why or why not?

CLARK v. COMMUNITY FOR CREATIVE NON-VIOLENCE

468 U.S. 288, 104 S.CT. 3065, 82 L.ED.2D 221 (1984).

[EDITORIAL NOTE The National Park Service sought to prohibit demonstrators from sleeping in Lafayette Park and the Mall in Washington, D.C. The demonstrators built a tent city and then, by sleeping in these places, sought to publicize the plight of the homeless. The National Park Service justified this decision by relying on its regulation prohibiting camping in certain parks. The regulation was upheld as a valid time-place-manner regulation.]

Justice WHITE delivered the opinion of the Court.

* * *

Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place and manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information. *City Council v. Taxpayers for Vincent*, 104 S.Ct. 2132 (1984); *Heffron v. International Society for Krishna Consciousness.*

It is also true that a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative. *Spence v. Washington*, 418 U.S. 405 (1974) *Tinker v. Des Moines School District* [text, p. 81]. Symbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech. *United States v. O'Brien* [text, p. 79].

The United States submits, as it did in the Court of Appeals, that the regulation forbidding sleeping is defensible either as a time, place, or manner restriction or as a regulation of symbolic conduct. We agree with that assessment.

That sleeping, like the symbolic tents themselves, may be expressive and part of the message delivered by the demonstration does not make the ban any less a limitation on the manner of demonstrating, for reasonable time, place, and manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid. *City Council v. Taxpayers for Vincent, supra; Heffron v. International Society for Krishna Consciousness, supra; Kovacs v. Cooper.* Neither does the fact that sleeping, *arguendo*, may be expressive conduct, rather than oral or written expression, render the sleeping prohibition any less a time, place, or manner regulation. * * * Considered as such, we have very little trouble concluding that the Park Service may prohibit overnight sleeping in the parks involved here.

The requirement that the regulation be content neutral is clearly satisfied. The courts below accepted that view, and it is not disputed here that the prohibition on camping, and on sleeping specifically, is content neutral and is not being applied because of disagreement with the message presented. Neither was the regulation faulted, nor could it be, on the ground that without overnight sleeping the plight of the homeless could not be communicated in other ways. The regulation otherwise left the demonstration intact, with its symbolic city, signs, and the presence of those who were willing to take their turns in a day-and-night vigil. Respondents do not suggest that there was, or is, any barrier to delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless.

It is also apparent to us that the regulation narrowly focuses on the Government's substantial interest in maintaining the parks in the heart of our capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence. It is urged by respondents that if the symbolic city of tents was to be permitted and if the demonstrators did not intend to cook, dig, or engage in aspects of camping other than sleeping, the incremental benefit to the parks could not justify the ban on sleeping, which was here an expressive activity said to enhance the message concerning the plight of the poor and homeless. We cannot agree. In the first place, we seriously

doubt that the First Amendment requires the Park Service to permit a demonstration in Lafayette Park and the Mall involving a 24-hour vigil and the erection of tents to accommodate 150 people. Furthermore, although we have assumed for present purposes that the sleeping banned in this case would have an expressive element, it is evident that its major value to this demonstration would be facilitative. Without a permit to sleep, it would be difficult to get the poor and homeless to participate or to be present at all. * * * The sleeping ban, if enforced, would thus effectively limit the nature, extent, and duration of the demonstration and to that extent ease the pressure on the Parks.

If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation on the manner in which a demonstration may be carried out. As in *City Council v. Taxpayers for Vincent*, the regulation "responds precisely to the substantive problems which legitimately concern the [Government]." 466 U.S., at 789, 104 S.Ct., at 2132.

We have difficulty, therefore, in understanding why the prohibition against camping, with its ban on sleeping overnight, is not a reasonable time, place, and manner regulation that withstands constitutional scrutiny. Surely the regulation is not unconstitutional on its face. None of its provisions appears unrelated to the ends that it was designed to serve. Nor is it any less valid when applied to prevent camping in Memorial-core parks by those who wish to demonstrate and deliver a message to the public and the central government. Damage to the parks as well as their partial inaccessibility to other members of the public can as easily result from camping by demonstrators as by non-demonstrators. In neither case must the Government tolerate it. * * * This is no more than a reaffirmation that reasonable time, place, and manner restrictions on expression are constitutionally acceptable.

Contrary to the conclusion of the Court of Appeals, the foregoing analysis demonstrates that the Park Service regulation is sustainable under the four-factor standard of *United States v. O'Brien*, *supra*, for validating a regulation of expressive conduct, which, in the last analysis is little, if any, different from the standard applied to time, place, and manner restrictions. No one contends that aside from its impact on speech a rule against camping or overnight sleeping in public parks is beyond the constitutional power of the Government to enforce. And for the reasons we have discussed above, there is a substantial government interest in conserving park property, an interest that is plainly served by, and requires for its implementation, measures such as the proscription of sleeping that are designed to limit the wear and tear on park properties. That interest is unrelated to suppression of expression.

We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the government interest in preserving park lands. * * * We do not believe, however, that either *United States v. O'Brien* or the time, place, and manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

Accordingly, the judgment of the Court of Appeals is

Reversed.

COMMENT

The application of a National Park no-camping regulation to prohibit demonstrators from sleeping in Lafayette Park and the Mall was deemed valid. Justice White concluded in *Clark* that the prohibition was valid under either the *O'Brien* standards, see text, p. 79, or under the standards appropriate for judging the reasonableness of time-place-manner regulation in the public forum. Justice White concluded that the *O'Brien* standards and the *Heffron* standards, see text, p. 55, were the same. Is there any problem with his conclusion?

Professor Keith Werhan believes that both *O'Brien* and *Clark* are "disturbingly insensitive to the facilitation of robust public debate." See Werhan, *The O'Briening of Free Speech Methodology*, 19 Ariz. State L.J. 635 at 649 (1987). Although he thinks the regulation upheld in both cases had "little impact on the degree of public debate," he sees dangers in the use of the *O'Brien* balancing test:

> *[O'Brien]* compromises the hard problems of free speech methodology by largely ignoring them. Using an op-

erational focus on the ends and means of government regulation, the Court decides cases without assessing the speech side of the controversy. Thus, in *[O'Brien]* the Court ruled for the government without deciding whether symbolic conduct was protected by the first amendment; in *[Clark]*, the Court ruled for the government without deciding whether sleep could constitute symbolic conduct. Werhan at 673.

By implication, the *Heffron* standards appear more sensitive to First Amendment values. Is this because O'*Brien* is too easily satisfied "by a legitimate governmental interest of whatever weight"? See Werhan at 651.

Boos v. Barry: Regulation of the Traditional Public Forum

Boos v. Barry, 108 S.Ct. 1157 (1988), illustrates the continuing attachment of the Court to a heightened scrutiny standard of review in the case of content-based regulation of a public forum when significantly less restrictive regulatory alternatives were available. The facts which gave rise to the case follow.

A District of Columbia law prohibited display of signs bringing foreign governments into "public odium" or "public disrepute" within 500 feet of foreign embassies. The statute also prohibited persons from congregating within 500 feet of an embassy and not dispersing when ordered to do so. Some individuals wished to carry signs critical of the governments of the Soviet Union and Nicaragua and also wished to congregate within 500 feet of those embassies. They brought a facial First Amendment challenge to these provisions. In *Boos*, the Court, per Justice O'Connor, held that the provision forbidding display of signs criticizing foreign governments violated the First Amendment. Justice O'Connor said the speech involved was political speech, was exercised in a traditional public forum, i.e., a public street, and, finally, that the display provision was content-based.

To the argument that the statute was not content-based because the government did not itself select between viewpoints, Justice O'Connor responded that she agreed that the provision was not viewpoint-based:

"The display clause determines which viewpoint is acceptable in a neutral fashion by looking to the policies of foreign governments." This would prevent the display clause from being "directly viewpoint-based," but it did not render the statute content-neutral. The government was enforcing a prohibition based on content against "an entire category of speech—signs and displays critical of foreign governments."

Justice O'Connor relied in this regard on *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). See text, p. 677. *Renton* upheld a city ordinance which prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple family dwelling, church, park, or school. The zoning ordinance in *Renton* was deemed to be a valid form of the place and manner regulation. *Renton* said the ordinance was not geared at the "content" of "adult" films but rather to the "secondary effects of such theaters on the surrounding community. Since the ordinance was not content-based, the standard appropriate for "content-neutral" time, place, and manner regulation was applicable. This standard inquired whether the ordinance served a substantial governmental interest and allowed for reasonable alternative avenues of communication. What were the secondary effects referred to in *Renton?* Justice O'Connor described then in *Boos v. Barry*. The content of the films in *Renton* was declared to be irrelevant to the result. The ordinance was aimed at the secondary effects of such theaters on the community: "effects that are almost unique to theaters featuring sexually explicit films, *i.e.*, prevention of crime, maintenance of property values, and protection of residential neighborhoods."

The city of Washington, D.C. tried to defend its display of signs law prohibiting criticism of foreign governments as also aimed at a "secondary effect": the "international law obligation to shield diplomats from speech that offends their dignity." Justice O'Connor disagreed that *Renton* was applicable:

> Regulation that focuses on the direct impact of speech on its audience presents a different situation. Listeners' reactions to speech are not the type of "secondary effects" we referred to in *Renton*. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.

Justice O'Connor concluded that the "display clause is content-based." She pointed out that the city did not point to the secondary effects of picket signs in front of embassies such as congestion, interference

with ingress or egress, visual clutter, or embassy security. Instead, reliance was in protecting the dignity of foreign diplomatic personnel "by sheltering them from speech that is critical of their governments." Such a justification for the display provision was focused "only on the content of the speech and the direct impact that speech has on its listeners."

Justice O'Connor concluded that as a content-based restriction on political speech in a public forum, the display provision of the District of Columbia law "must be subjected to the most exacting scrutiny":

> Thus, we have requested the State to show that the "regulation is necessary to serve a compelling state interest and that it is normally drawn to achieve that end."

Even assuming that "international law recognized a dignity interest" to the point it should be considered "sufficiently 'compelling' to support a content-based restriction on speech," the display provision was still not narrowly tailored to serve that interest. A federal statute prohibiting intimidating or harassing foreign officials or obstructing them in the course of their duties illustrated the ready availability of a significantly less restrictive alternative. This demonstrated that the display clause was not sufficiently narrowly tailored to withstand the rigors of the strict scrutiny standard.

The congregation clause of the District of Columbia statute was upheld by the Court. The clause survived an overbreadth attack. Although the text of the clause might have presented overbreadth problems because it applied "to *any* congregation within 500 feet of an embassy for *any* reason" and because it appeared "to place no limits at all on the dispersal authority of the police," the court of appeals had provided a narrowing construction which alleviated these difficulties. The court of appeals read the statute to "permit dispersal only of congregations that are directed at an embassy." It did not give the police a right to disperse for reasons having nothing to do with the embassy. Also, police discretion was narrowed by the court of appeals' reading that the statute only permitted dispersal when a threat to the security of the embassy was presented.

The Court, per Justice O'Connor, concluded that the congregation clause was not overbroad:

> So narrowed, the congregation clause withstands First Amendment overbreadth scrutiny. It does not reach a substantial amount of constitutionally protected conduct; it merely regulates the place and manner of certain demonstrations.

What about vagueness? Petitioners focused on the word "place" in the statute which was not further defined or limited. The Court found that the court of appeals had given a narrowing interpretation sufficient to withstand a vagueness attack. The statute was intended to be enforced when "normal embassy activities have been or are about to be disrupted."

Justice Brennan, joined by Justice Marshall, concurred in part and concurred in the judgment but dissented from the proposition set forth in *Renton* that "an otherwise content-based restriction on speech can be recast as 'content-neutral' if the restriction 'aims' at 'secondary effects' of the speech." However, Justice Brennan did agree that the display clause constituted a "content-based restriction on speech that merits strict scrutiny." Justice Brennan was particularly disturbed that the reasoning of *Renton*, which had arisen out of a context dealing with businesses purveying sexually explicit materials, was now, at least in *dictum*, being applied to political speech.

Parades and Demonstrations and the Duty to Obey the Void Judicial Order

Walker v. City of Birmingham, 388 U.S. 307 (1967), an important First Amendment case, arose out of the black civil rights protest movement of the 1960s. Eight black ministers, including the late Dr. Martin Luther King, Jr., were arrested and held in contempt for leading civil rights marches in Birmingham on Easter 1963 in defiance of an *ex parte* injunction banning all marches, parades, sit-ins, or other demonstrations in violation of the Birmingham parade ordinance. The petitioners contended that the ordinance required a grant of permission from city administrators who had made it clear no permission would be granted. The state courts held that petitioners could not violate the injunction and later challenge its validity. The Supreme Court, per Justice Potter Stewart, affirmed the conviction, 5–4. Justices Warren, Douglas, Brennan, and Abe Fortas dissented. All but Fortas wrote a separate dissent.

The heart of the holding in *Walker* is that even if both the ordinance and the injunction raised substantial constitutional issues, petitioners could only successfully raise those issues by moving to modify or dissolve the injunction, not by disobeying it and then defending against contempt charges on constitutional grounds.

Justice Stewart pointed out that "this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity." While the

language of the Birmingham ordinance might present substantial First Amendment questions, it could not be held invalid on its face. If petitioners, instead of proceeding without a permit, had sought a judicial decree from the state courts interpreting the parade ordinance, the Court might have offered a narrow, "saving" construction, as had the state courts in *Poulos v. New Hampshire*, 345 U.S. 395 (1953).

A fundamental reason for the decision in *Walker* appears to be that initial obedience is required of even unconstitutional court decrees, like the injunction in *Walker*, even though the same is not required of an unconstitutional ordinance or statute. Chief Justice Warren observed in caustic dissent in *Walker* that petitioners are "convicted and sent to jail because the patently unconstitutional ordinance was copied into an injunction." Further, the injunction was *ex parte* and unlimited as to time.

We have seen cases where the Court has held that an unconstitutional statute need not be obeyed. This is so, even where an ordinance explicitly requires a permit to engage in some form of communication. See *Lovell v. Griffin*, 303 U.S. 444 (1938), text, p. 39.

Justice Douglas, in his dissenting opinion, directly confronted the civil disobedience issue in *Walker*. An unconstitutional court decree, he said, is no less invalid than an unconstitutional statute. "It can and should be flouted in the manner of the ordinance itself." The facts of the *Walker* case, most of which were excluded from evidence during the hearing on contempt charges, indicated that the city officials had no intention of ever granting a permit to petitioners, said Justice Douglas. Not only was the parade ordinance probably invalid on its face, but it was enforced in a discriminatory manner to prevent civil rights advocates from exercising their right, guaranteed by the First Amendment, to assemble peacefully and petition for redress of grievances. Affirmance of contempt convictions in such a case, he concluded, could only undermine respect for law, since "[t]he 'constitutional freedom' of which the Court speaks can be won only if judges honor the Constitution."

Justice Brennan filed the third dissenting opinion in *Walker*. In Justice Brennan's view, the Court was faced with the collision between Alabama's interest in enforcing judicial decrees and the petitioners' First Amendment rights of speech and peaceful assembly. In such a conflict, Brennan said, the Supremacy Clause of the United States Constitution demands that the First Amendment interests be given greater weight. Furthermore, in safeguarding First Amendment rights from invalid prior restraints, the Court ought to be even more suspicious of prior restraints contained in *ex parte* injunctions than in "presumably carefully considered, even if hopelessly invalid," statutes. Instead, he said, the Court in *Walker* abandoned its protective function in the First Amendment area and threw its support to the Alabama court decree, a "devastatingly destructive weapon for suppression of cherished freedoms. * * *"

Justice Brennan also pointed to several weaknesses in the Court's argument. The Alabama decree contained no time limitation whatsoever. It was not really "temporary" at all. Secondly, the Court's insistence that petitioners challenge the injunction in court first and march later was in head-on conflict with the Court's own First Amendment doctrine that where an invalid prior restraint is imposed, freedom of speech can not be served if exercise of that freedom is forcibly deferred pending the outcome of lengthy judicial review. Brennan emphasized the factual context of the *Walker* case: a civil rights campaign was planned which was intended to have its climax in a series of marches on Easter weekend. To require petitioners to drop their organizing efforts and spend weeks, months, or years in state and federal courts was to blink at the realities of their situation.

Notice that despite the strong protests by the dissenting justices, the *Walker* majority refused to consider the parade ordinance invalid on its face. The Court's reliance on *Howat v. Kansas*, 258 U.S. 181 (1922), seems to indicate that even an injunction invalid on its face must be obeyed pending judicial review. If this is so, how does (or might) the Court answer the claim by the dissenting justices that such a ruling opens the door for local officials to impose prior restraint simply by incorporating unconstitutional ordinances into binding judicial decrees?

The *Walker* decision was 5–4. Justice Black cast a deciding vote in *Walker* to sustain contempt convictions in the face of the vague, overbroad, limitless injunction. Black may have considered the integrity of the judicial process, even when, as in *Walker*, it may have been greatly abused, to be of such a high importance that it outweighed even First Amendment interests. This point of view is in contrast with Justice Douglas's statement that judges, no less than legislators or administrators, must honor the Constitution.

Walker v. Birmingham raises, in a First Amendment context, the issue of whether an order of a

lower court which almost certainly will be reversed on appeal must be obeyed by the parties subject to it until the order is set aside by a higher court. This is an issue of great significance to the journalist. In *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972), cert. den. 414 U.S. 979 (1973), a federal court of appeals upheld a criminal contempt citation for violation of a "gag" rule imposed by a federal district judge despite the appeals court's view that the "gag" was a violation of the First Amendment. The court of appeals relied on *Walker* for its decision that even an unconstitutional court order must be obeyed until it is reversed. See discussion of the *Dickinson* case in this text, p. 409.

Some question now exists as to whether all the federal courts of appeal share the view espoused by the Fifth Circuit in *Dickinson*. The United States Court of Appeals for the First Circuit has taken a more reasonable view vis-à-vis press publication of invalid "gag" orders. *In re Providence Journal Co.*, 820 F.2d 1354 (1st Cir. 1987). In *Providence Journal*, the court suggested a publisher would not be punished for criminal contempt if he violated a lower court gag order, as long as he made a good faith effort to obtain emergency relief from the appellate court:

> If timely access to the appellate court is not available or if timely decision is not forthcoming, the publisher may then proceed to publish and challenge the constitutionality of the order in the contempt proceedings.

The Supreme Court granted certiorari in the case but dismissed the writ. *U.S. v. Providence Journal* Co., 108 S.Ct. 1502 (1988).

Two years after it decided *Walker v. City of Birmingham*, the Supreme Court considered a different case arising out of the identical facts. The case was *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). This time, the question was whether Rev. Walker and Rev. Shuttlesworth, *et al.*, could be convicted of violating Birmingham's parade ordinance, a part of the city's general code. Petitioners had knowingly violated the ordinance, but they claimed, as they had in *Walker*, that their action was not punishable because the ordinance itself was invalid on its face and discriminatorily applied to deny First Amendment rights. Nevertheless, they were found guilty of violating the parade ordinance and received stiff jail sentences (Rev. Shuttlesworth, for instance, was sentenced to 138 days at hard labor.)

A state appeals court reversed, holding that the parade ordinance was an unconstitutional prior restraint upon First Amendment rights since it granted city officials unlimited discretion to grant or deny parade permits. However, the Alabama Supreme Court reinstated the convictions by providing a curative gloss to the parade ordinance. The parade ordinance, said the state supreme court, did not confer discretionary powers upon local officials to withhold parade permits on a discriminatory basis. Rather, it directed them merely to regulate use of the public streets consistent with the goal of insuring public access to public throughways.

This, despite the fact that the parade ordinance provided that the city commission could deny a permit whenever it determined that "the public welfare, peace, safety, health, decency, good order, morals or convenience require." The process by which this language was narrowed by the Supreme Court of Alabama to make the parade ordinance a traffic measure received a backhanded compliment from Justice Stewart in his opinion for the Court: "It is true that in affirming the petitioner's conviction in the present case, the Supreme Court of Alabama performed a remarkable job of plastic surgery upon the face of the ordinance."

By transforming the parade ordinance into a traffic-management ordinance, the Alabama court attempted to avert constitutional problems in much the same way that the New Hampshire court had done in Poulos v. New Hampshire, 345 U.S. 395 (1953). The Alabama court also acted on the suggestion of the Court in *Walker v. City of Birmingham* that a narrow interpretation of the parade ordinance might save it from First Amendment attack. However, even the strenuous effort of the Alabama court to rescue the Birmingham ordinance from constitutional infirmity failed to persuade the Supreme Court to uphold the convictions when *Shuttlesworth* came up for review.

Justice Stewart speaking for the Court, in an interesting twist from his opinion in *Walker*, first pointed out that the parade ordinance was, as written, invalid on its face. This was precisely the contention which he had rejected in *Walker*. Now, however, Justice Stewart held:

> There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the city commission virtually unbridled and absolute power [to control the issuance of permits for marches or demonstrations in the city]. * * * This ordinance * * * fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms

> to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.

Justice Stewart next dealt with the state's argument that that standard is not applicable where the regulation under challenge deals with speech plus, i.e., the use of public streets. Although recognizing the state interest in regulating the use of its public ways, the Court ruled that a licensing system implementing that interest must adhere to constitutional standards. An *overbroad, vague* licensing scheme, vesting local officials with limitless discretion over the use of city streets, does not square with those standards even though speech plus is involved.

The real question, said Stewart, was whether the parade ordinance was to be obeyed in 1963, notwithstanding the gloss which was put upon the ordinance by the state court four years later.

The Court concluded that Birmingham's parade ordinance, as it was implemented and enforced by Birmingham officials in 1963, was invalid and a denial of First Amendment rights. Petitioners were, therefore, entitled to ignore the parade ordinance and could not be criminally prosecuted for that decision. Justice Stewart described the ministers' unsuccessful efforts to obtain a parade permit from adamant city officials.

> The petitioner was clearly given to understand that under no circumstance would he and his group be permitted to demonstrate in Birmingham, not that a demonstration would be approved if a time and place were selected that would minimize traffic problems. * * * [I]t is evident that the ordinance was administered so as * * * "to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought * * * immemorially associated with resort to public places."

Because Birmingham city officials interpreted and implemented the parade ordinance in a fashion consistent with its broad discretionary language, Rev. Shuttlesworth was justified in taking them at their word and acting accordingly. Notwithstanding the state supreme court's effort to save the parade ordinance, it was unconstitutional in 1963, and petitioners could not be punished for violating it under those circumstances.

Justice John Marshall Harlan's concurring opinion took issue with what he called the "seeds of mischief" contained in the opinion of the Court.

The important point, said Harlan, was whether the petitioners could have had a prompt judicial remedy under the special circumstances of their civil rights protest. Hearkening back to Justice Frankfurter's concurring opinion in *Poulos*, Justice Harlan noted that here, as contrasted with *Poulos*, a timely remedy to force issuance of the parade permit was probably out of the question. Had petitioners sought a writ of mandamus to require the Birmingham City Commission to issue a parade permit, they could not have succeeded in time for the Easter demonstrations, and under Alabama law there is no provision for expeditious review of such a petition.

It was not enough, Justice Harlan argued, that petitioner should rely merely upon the attitude of a local official and *his* interpretation of the parade ordinance. If a speedy and effective remedy had been available, petitioners would have been obligated to pursue that remedy before breaking the law, Harlan said. But in this case, on these facts, such a course would have blocked the exercise of First Amendment rights with no promise of effective relief. It was therefore excused, and the convictions could not stand.

Unlike Justice Stewart and the rest of the Court, Justice Harlan was not prepared to concede that the principle of cases such as *Lovell v. Griffin*, text, p. 39, involving licensing of pure speech, should be extended to cover ordinances such as the Birmingham parade statute, which regulated speech plus conduct. Regulation of the use of city streets was "a particularly important state interest." Even if such a regulation were deemed invalid on its face or as applied, perhaps citizens should be less free to ignore that regulation entirely than they would be to ignore an ordinance regulating pure speech.

In *Shuttlesworth*, the Supreme Court vindicated at least some of the points advanced by the four dissenters in *Walker*. The Birmingham parade ordinance was unconstitutional on its face and as applied—a decision the Court had refused to make in *Walker* just two years earlier. In reversing the petitioners' convictions for violating the parade ordinance, the Court did precisely what Chief Justice Warren had envisioned: it ruled that punishment for violating the ordinance could not stand, but (because of *Walker*) disobedience to the command of an identical prohibition, in a court decree, could be punished as contempt. In *Shuttlesworth*, Justice Stewart contended in a brief footnote that "[t]he legal and constitutional issues involved in the *Walker* case were quite different from those involved here." How would you support or take issue with that assertion?

In *Walker*, Chief Justice Warren dissented, pointing out that the Birmingham ordinance on its face

directed local officials to refuse parade permits on any number of broad, discretionary, vague grounds. Thus, a state court could "save" the Birmingham ordinance only "by repealing some of its language." Is this in fact what the Alabama Supreme Court did in *Shuttlesworth?*

Picketing, Handbilling, and State Action: The Collision Points Between Freedom of Expression and Property Rights

THORNHILL v. ALABAMA

310 U.S. 88, 60 S.CT. 736, 84 L.ED. 1093 (1940).

[EDITORIAL NOTE Thornhill *was a First Amendment case which arose out of a local labor dispute at an Alabama factory. Thornhill, a union organizer, was arrested and convicted of a misdemeanor for violating a state antipicketing law which made it a crime for:*

> ** * * any person or persons * * * without a just cause or legal excuse therefore, [to] go near to or loiter about the * * * place of business of any other person, firm, corporation, [etc.] * * * for the purpose, or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with or be employed by [that business] * * * State Code of 1923, § 3448.*

The same section also prohibited picketing under the same circumstances.

Thornhill's conviction was upheld by the Alabama courts. The United States Supreme Court reversed his conviction and held the right to picket protected by the First Amendment. Justice James McReynolds was the lone dissenter.

Thornhill was arrested when, as part of a small picket line, he peacefully advised would-be strikebreakers to go home and not to cross the picket line. The plant where this took place was part of a company town in which most plant employees lived. The picket line was on private property, as was most of the town.]

Justice MURPHY delivered the opinion of the Court.

* * *

* * * The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. It is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship. An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him.

* * *

The vague contours of the term "picket" are nowhere delineated. Employees or others, accordingly, may be found to be within the purview of the term and convicted for engaging in activities identical with those proscribed by the first offense. In sum, whatever the means used to publicize the facts of a labor dispute, whether by printed sign, by pamphlet, by word of mouth or otherwise, all such activity without exception is within the inclusive prohibition of the statute so long as it occurs in the vicinity of the scene of the dispute.

* * * We think that Section 3448 is invalid on its face.

* * *

In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. * * * Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. * * *

The range of activities proscribed by Section 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group

in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448.

* * *

COMMENT

If Alabama desired to guard against violent picketing or harassment of potential customers by union threats, the state could under the First Amendment draft a statute designed to meet such situations. The Alabama antipicketing law made no attempt to consider factors which would distinguish the *Thornhill* picket line from other, more dangerous situations, nor did it consider the number of people gathered at the picket line, the potentiality of violence and harm to passersby, the accuracy of the information which the union was imparting to the public, and the nature of the union dispute.

The statute covered all situations indiscriminately. Since some activities covered by the statute were unquestionably examples of peaceful expression, the statute in its broad sweep could not stand. Enforcement of the statute only in special cases could not repair the fatal defect which the statute bore on its face. And selective enforcement with its potential for discrimination poses a special threat to First Amendment freedom.

It is a principle of due process adjudication that criminal statutes should be drawn so that the class affected by them is sufficiently apprised of the conduct expected of it in order that it may comply with the statute and avoid its sanction. This principle is sometimes called the "vagueness" doctrine. See generally, Amsterdam, *The Void for Vagueness Doctrine*, 109 U.Pa.L.Rev. 67 (1960).

Thornhill demonstrates the use of a related constitutional principle: the doctrine of overbreadth. A statute is defectively *overbroad* when it reaches and proscribes activities which are constitutionally protected as well as activities which are not. See text, p. 51. The statute in *Thornhill* is also defectively *vague*. Note that the Court observed that the term "picket" was inadequately defined. Vagueness is a major First Amendment doctrine, but it has its roots in the notice requirements of procedural due process. If people do not know what is expected of them, it is not fair to punish them. Furthermore, if they do not know what is expected of them, they may fear to engage in the vigorous exercise of First Amendment rights. In a sense, the First Amendment concern to prevent restraints which inhibit freedom of expression and the concern for fairness which is implemented by the constitutional doctrine of *procedural due process* coalesce in the vagueness doctrine. A Roman law maxim was "Nulla poena sine lege" (no penalty without a law). Does this ancient legal concept help explain the vagueness doctrine? Is it possible for a statute to be defectively overbroad but not overly vague?

The thrust of *Thornhill* was that the antipicketing section of the Alabama Code was overly broad but that a more narrowly drawn statute might pass constitutional muster under the First Amendment:

> We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger to state interests in preventing breaches of the peace * * * as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.

But the Alabama antipicketing law made no attempt to balance the First Amendment against any state interest. The valuable contribution of *Thornhill* to First Amendment law was that it made clear, by extending First Amendment protection to picketing, that nonverbal communication merited First Amendment protection, albeit in a nonabsolute form.

Picketing, Private Property, and the Public Forum: The State Action Problem

In *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Supreme Court refused, per Justice Thurgood Marshall, to enjoin informational picketing in a private shopping center. *Logan Valley*, therefore, subjected privately owned property to First Amendment ob-

ligation as the Supreme Court had done only once before in *Marsh v. Alabama*, 326 U.S. 501 (1946). In *Marsh*, the exercise of First Amendment rights had been recognized in a company-owned town where alternative means of communication for the matter to be communicated were not available. Speaking for the Court in *Logan Valley*, Justice Marshall said:

> All we decide here is that because the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through," Marsh v. State of Alabama, 326 U.S., at 508, the state may not delegate the power through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.

The classic idea of American constitutionalism is the view that the constitution runs against *government*. If one relies on the Bill of Rights directly, one encounters the language, for example, of the First Amendment ("Congress shall make no law * * * abridging the freedom of speech, or of the press * * * "). If, on the other hand, one relies on the due process clause of the Fourteenth Amendment, one meets the following language: " * * * nor shall any *State* deprive any person of life, liberty, or property, without due process of law." This introduces the need for "State action" if a Fourteenth Amendment violation is to be found. This also explains the effort of the Supreme Court in both *Marsh* and *Amalgamated* to view the company-town street and the shopping center parking lot as "quasi-public." (Why is the Court reluctant to come right out and say that First Amendment considerations apply to *private* property?)

Private concentrations of power, such as the nationwide chains of daily newspapers (most papers are located in one newspaper towns), and the networks which supply the programming for much of radio and television broadcasting throughout the country are, therefore, in the classic view, immune from constitutional obligation altogether. This idea, as applied to the privately owned media, was given renewed life in *CBS v. Democratic National Committee*, 412 U.S. 94 (1973). See text, p. 511.

But decisions like *Marsh* and *Amalgamated* suggest that the capacity of "private governments" to elude constitutional obligation to provide freedom of expression is not infinite after all. The *Marsh* case in 1946 was a surprising breakthrough, but, in a sense, it was ahead of its time. It never blossomed forth into an important or pioneering constitutional doctrine in any meaningful way until the decision of the *Amalgamated Food Employees* case in 1968.

For Justice Black, the First Amendment is meant to state what government cannot do, not what a private individual or corporation must do. As a matter of history this view is probably accurate. As a matter of making the goals of freedom of expression and community enlightenment a reality, the question is: does such an approach any longer have contemporary relevance? See Justice Douglas's concurring opinion in *CBS v. Democratic National Committee*, 412 U.S. 94 (1973). See this text, p. 511.

In Justice Marshall's opinion for the Court in *Amalgamated*, the following observations appear:

> The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put.

Did the distinction Justice Marshall attempted to draw between protest picketing where the site of the protest is related to the object of the protest and where the site is unrelated to the object of the protest make sense? Note that the Supreme Court in *Amalgamated Food Employees* did not rule on the constitutional significance of this distinction.

Lloyd Corp., Limited v. Tanner, 407 U.S. 551 (1972), answered the question which Justice Marshall raised but did not answer in *Amalgamated Food Employees:* Could the owner of a private shopping center prohibit protest in the form of distribution of handbills on his premises when the object of the protest (hostility to the Vietnam War) did not have a direct relationship to the shopping center? The Supreme Court in *Lloyd Corp.* held that there must be a relationship between the object of the protest and the site of the protest before there can be any right to use private property for purposes of free expression.

In *Lloyd Corp.*, the four Nixon appointees to the Supreme Court, Powell, Blackmun, Rehnquist, and Burger, joined with Kennedy appointee, White, to hold that there must be a relationship between object and site of the protest. The *Lloyd Corp.* case marks a retreat from what had previously been a steady

extension by the courts of the state action concept to the exercise of First Amendment rights on private property.

In *Amalgamated Food Employees*, Justice Marshall, speaking for the Court, had made a fairly radical statement: "[P]roperty that is privately owned may at least, for First Amendment purposes, be treated as though it were publicly held." The *Lloyd Corp.* case took much of the force out of this statement. It is true that *Logan Valley* was not reversed in *Lloyd Corp.*, and that the Court professed allegiance to the doctrine of *Amalgamated Food Employees* insofar as, under its facts, it authorized the exercise of First Amendment rights on private property, so long as the exercise of those rights related to the site of the protest. Nevertheless, the concept that First Amendment obligations only run to governmental institutions received new vigor as a result of the *Lloyd Corp.* case. Consider the following analysis of the *Lloyd Corp.* case:

> * * * [F]ree expression is now likely to be considered less important than whether the site chosen (for its exercise) is private or public property. The majority of the Court denied that the property of a large shopping center is "open to the public" in the same way as is the "business district" of a city, and that a member of the public could exercise the same rights of free expression in a shopping mall that he could in "similar public facilities in the streets of a city or town." Barron, *Freedom Of The Press For Whom?* 106 (1973).

The *Lloyd* case left the *Logan Valley* case just barely alive. However, in *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Supreme Court overruled *Logan Valley*.

The *Hudgens* Court buried Justice Marshall's attempted distinction in *Logan Valley* between situations where the object of the protest was related to the site and situations where the object of the protest was unrelated to the site. The key to understanding the decision of the Court in *Hudgens* appears to be that First Amendment obligation does not run to private property. As the *Hudgens* Court conceived it, if the fact that a particular protest was related to the site of protest imposed First Amendment obligations on the owner of the site, then First Amendment determinations were being made on the basis of analyzing the content of the protest. The Court proclaimed that First Amendment adjudication had to be content-neutral.

In *Hudgens*, the Court, in order to maintain a content-neutral approach to the First Amendment, approved a prohibition by the owner of a shopping center against labor union picketing on its premises Professor Redish has observed that "the equality principle and the values of free expression conflict." Why? Consider the following:

> Those with greater resources and more power will invariably possess greater access to the media, and therefore to the public, than will those less well situated. These factors may be cited as reasons why a seemingly neutral restriction on picketing should in reality be found to discriminate (and, therefore, constitute a violation of the equality principle). Those with greater resources and power do not need to picket to express their views; those lacking such advantages do. But it would be absurd to think that allowing individuals to picket produces anything approaching equality.

See Redish, *The Content Distinction in First Amendment Analysis*, 34 Harv.L.Rev. 113 at 138 (1981).

Do you think *Marsh v. Alabama*, text, p. 68, survives *Hudgens*? Probably *Marsh* does survive *Hudgens* since the *Hudgens* Court relied on Justice Black's dissent in *Logan Valley*. In *Logan Valley*, Justice Black distinguished *Marsh*, a decision which he had authored, on the ground that in *Marsh*, unlike the shopping center situations, the private property involved was truly quasi-public in that there the company town had "taken all the attributes of a town."

In a conflict between property rights and the exercise of First Amendment rights, shouldn't the edge be given to the exercise of First Amendment rights? Does the *Hudgens* decision reflect the new deference shown to property values as against free expression values on the part of the Burger Court—at least as compared to the Warren Court?

A *Logan Valley*-type response to whether private property can be used as a public response still endures in California on the basis of the state constitutional guarantee of freedom of expression. See *PruneYard Shopping Center v. Robins*, text, p. 152.

CAREY v. BROWN

447 U.S. 455, 100 S.CT. 2286, 65 L.ED.2D 263 (1980).

Justice BRENNAN delivered the opinion of the Court.

At issue in this case is the constitutionality under the First and Fourteenth Amendments of a state statute that bars all picketing of residences or dwell-

ings, but exempts from its prohibition "the peaceful picketing of a place of employment involved in a labor dispute."

On September 7, 1977, several of the appellees, all of whom are members of a civil rights organization entitled the Committee Against Racism, participated in a peaceful demonstration on the public sidewalk in front of the home of Michael Bilandic, then Mayor of Chicago, protesting his alleged failure to support the busing of school children to achieve racial integration. They were arrested and charged with Unlawful Residential Picketing in violation of Ill.Rev.Stat., ch. 38, § 21.1–2, which provides:

> It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest.

Appellees pleaded guilty to the charge and were sentenced to periods of supervision ranging from 6 months to a year.

In April 1978, appellees commenced this lawsuit in the United States District Court for the Northern District of Illinois, seeking a declaratory judgment that the Illinois Residential Picketing Statute is unconstitutional on its face and as applied, and an injunction prohibiting appellants—various state, county, and city officials—from enforcing the statute.

* * * [T]his Court has had occasion to consider the constitutionality of an enactment selectively proscribing peaceful picketing on the basis of the placard's message. *Police Department of Chicago v. Mosley* [408 U.S. 92 (1972)], arose out of a challenge to a Chicago ordinance that prohibited picketing in front of any school other than one "involved in a labor dispute." We held that the ordinance violated the Equal Protection Clause because it impermissibly distinguished between labor picketing and all other peaceful picketing without any showing that the latter was "clearly more disruptive" than the former. [W]e find the Illinois Residential Picketing Statute at issue in the present case constitutionally indistinguishable from the ordinance invalidated in *Mosley*.

There can be no doubt that in prohibiting peaceful picketing on the public streets and sidewalks in residential neighborhoods, the Illinois statute regulates expressive conduct that falls within the First Amendment's preserve.

Nor can it be seriously disputed that in exempting from its general prohibition only the "peaceful picketing of a place of employment involved in a labor dispute," the Illinois statute discriminates between lawful and unlawful conduct based upon the content of the demonstrator's communications. On its face, the act accords preferential treatment to the expression of views on one particular subject; information about labor disputes may be freely disseminated, but discussion of all other issues is restricted. The permissibility of residential picketing under the Illinois statute is thus dependent solely on the nature of the message being conveyed.

In these critical respects, then, the Illinois statute is identical to the ordinance in *Mosley*, and it suffers from the same constitutional infirmities. When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized. Yet here, under the guise of preserving residential privacy, Illinois has flatly prohibited all nonlabor picketing even though it permits labor picketing that is equally likely to intrude on the tranquility of the home.

Moreover, it is the content of the speech that determines whether it is within or without the statute's blunt prohibition. What we said in *Mosley* has equal force in the present case:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Appellants nonetheless contend that this case is distinguishable from *Mosley*. They argue that the state interests here are especially compelling and particularly well-served by a statute that accords differential treatment to labor and nonlabor picketing.

We explore in turn each of these interests, and the manner in which they are said to be furthered by this statute.

Appellants explain that whereas the Chicago ordinance sought to prevent disruption of the schools, concededly a "substantial" and "legitimate" governmental concern, the Illinois statute was enacted to ensure privacy in the home, a right which appellants view as paramount in our constitutional scheme. For this reason, they contend that the same content-based distinctions held invalid in the *Mosley* context may be upheld in the present case.

We find it unnecessary, however, to consider whether the state's interest in residential privacy outranks its interest in quiet schools in the hierarchy of societal values. For even the most legitimate goal may not be advanced in a constitutionally impermissible manner. And though we might agree that certain state interests may be so compelling that where no adequate alternatives exist a content-based distinction—if narrowly drawn—would be a permissible way of furthering those objectives, this is not such a case.

First, the generalized classification which the statute draws suggests that Illinois itself has determined that residential privacy is not a transcendent objective: While broadly permitting all peaceful labor picketing notwithstanding the disturbances it would undoubtedly engender, the statute makes no attempt to distinguish among various sorts of nonlabor picketing on the basis of the harms they would inflict on the privacy interest. The apparent over- and under-inclusiveness of the statute's restriction would seem largely to undermine appellants' claim that the prohibition of all nonlabor picketing can be justified by reference to the state's interest in maintaining domestic tranquility.

More fundamentally, the exclusion for labor picketing cannot be upheld as a means of protecting residential privacy for the simple reason that nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy. Appellants can point to nothing inherent in the nature of peaceful labor picketing that would make it any less disruptive of residential privacy than peaceful picketing on issues of broader social concern. Standing alone, then, the state's asserted interest in promoting the privacy of the home is not sufficient to save the statute.

The second important objective advanced by appellants in support of the statute is the state's interest in providing special protection for labor protests. The central difficulty with this argument is that it forthrightly presupposes that labor picketing is more deserving of First Amendment protection than are public protests over other issues, particularly the important economic, social, and political subjects which these appellees wish to demonstrate. We reject that proposition.

Appellants' final contention is that the statute can be justified by some combination of the preceding objectives. This argument is fashioned on two different levels. In its elemental formulation, it posits simply that a distinction between labor and nonlabor picketing is uniquely suited to furthering the legislative judgment that residential privacy should be preserved to the greatest extent possible without also compromising the special protection owing to labor picketing. In short, the statute is viewed as a reasonable attempt to accommodate the competing rights of the homeowner to enjoy his privacy and the employee to demonstrate over labor disputes. But this attempt to justify the statute hinges on the validity of both of these goals, and we have already concluded that the latter—the desire to favor one form of speech over all others—is illegitimate.

The second and more complex formulation of appellants' position characterizes the statute as a carefully drafted attempt to prohibit that picketing which would impinge on residential privacy while permitting that picketing which would not. In essence, appellants assert that the exception for labor picketing does not contravene the State's interest in preserving residential tranquility because of the unique character of a residence that is a "place of employment." By "inviting" a worker into his home and converting that dwelling into a place of employment, the argument goes, the resident has diluted his entitlement to total privacy.

The flaw in this argument is that it proves too little. Numerous types of peaceful picketing other than labor picketing would have but a negligible impact on privacy interests, and numerous other actions of a homeowner might constitute "nonresidential" uses of his property and would thus serve to vitiate the right to residential privacy.

We therefore conclude the appellants have not successfully distinguished *Mosley*. We are not to be understood to imply, however, that residential picketing is beyond the reach of uniform and nondiscriminatory regulation. For the right to communicate is not limitless.

Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely

an important value. Our decisions reflect no lack of solicitude for the right of an individual "to be let alone" in the privacy of the home, "sometimes the last citadel of the tired, the weary, and the sick." The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.

" 'The crucial question, however, is whether [Illinois' statute] advances that objective in a manner consistent with the command of the Equal Protection Clause.' *Reed v. Reed*, 404 U.S. [71], 76 (1971)." And because the statute discriminates among pickets based on the subject matter of their expression, the answer must be "No."

Justice REHNQUIST, with whom the Chief Justice and Justice Blackmun join, dissenting.

* * *

The complete language of the statute, set out accurately in the text of the Court's opinion, reveals a legislative scheme quite different from that described by the Court in its narrative paraphrasing of the enactment.

The statute provides that residential picketing is prohibited, but goes on to exempt four categories of residences from this general ban. *First*, if the residence is used as a "place of business" all peaceful picketing is allowed. *Second*, if the residence is being used to "hold[] a meeting or assembly on premises commonly used to discuss subjects of general public interest" *all* peaceful picketing is allowed. *Third*, if the residence is also used as a "place of employment" which is involved in a labor dispute, labor-related picketing is allowed. *Finally*, the statute provides that a resident is entitled to picket his own home. Thus it is clear that information about labor disputes may *not* be "freely disseminated" since labor picketing is restricted to a narrow category of residences. And Illinois has *not* "flatly prohibited all nonlabor picketing" since it allows nonlabor picketing at residences used as a place of business, residences used as public meeting places, and at an individual's own residence.

Only through this mischaracterization of the Illinois statute may the Court attempt to fit this case into the *Mosley* rule prohibiting regulation on the basis of "*content alone.*" In contrast, the principal determinant of a person's right to picket a residence in Illinois is not content, as the Court suggests, but rather the character of the residence sought to be picketed. Content is relevant only in one of the categories established by the legislature.

The cases appropriate to the analysis therefore are those establishing the limits on a state's authority to impose time, place, and manner restrictions on speech activities. Under this rubric, even taking into account the limited content distinction made by the statute, Illinois has readily satisfied its constitutional obligation to draft statutes in conformity with First Amendment and equal protection principles. In fact, the very statute which the Court today cavalierly invalidates has been hailed by commentators as "an excellent model" of legislation achieving a delicate balance among rights to privacy, free expression, and equal protection. See Kamin, Residential Picketing and the First Amendment, 61 Nw.U.L.Rev. 177, 207 (1966); Comment, 34 U.Chi.L.Rev. 106, 139 (1966). The state legislators of the nation will undoubtedly greet today's decision with nothing less than exasperation and befuddlement. Time after time, the states have been assured that they may properly promote residential privacy even though free expression must be reduced. To be sure, our decisions have adopted a virtual laundry list of "Don'ts" that must be adhered to in the process. Heading up that list of course is the rule that legislatures must curtail free expression through the "least restrictive means" consistent with the the accomplishment of their purpose, and they must avoid standards which are either vague or capable of discretionary application. But somewhere, the Court says in these cases (with a reassuring pat on the head of the legislature) there *is* the constitutional pot of gold at the end of the rainbow of litigation.

Here, whether Illinois has drafted such a statute, avoiding an outright ban on all residential picketing, avoiding reliance on any vague or discretionary standards, and permitting categories of permissible picketing activity at residences where the state has determined the resident's own action have substantially reduced his interest in privacy, the Court in response confronts the state with the Catch-22 that the less-restrictive categories are constitutionally infirm under principles of equal protection. Under the Court's approach today, the state would fare better by adopting *more* restrictive means, a judicial incentive I had thought this Court would hesitate to afford. Either that, or uniform restrictions will be found invalid under the First Amendment and categorical exceptions found invalid under the Equal Protection Clause, with the result that speech and only speech

will be entitled to protection. This can only mean that the hymns of praise in prior opinions celebrating carefully drawn statutes are no more than sympathetic clucking, and in fact the state is damned if it does and damned if it doesn't.

COMMENT

Is the statute in *Carey* invalid because residential picketing infringes on constitutionally protected privacy values? The statute is invalid, according to the Court, because it exempts from its general ban the peaceful picketing of a place of employment involved in a labor dispute. The Court criticized the preferential treatment by the legislature of a particular subject. Justice Rehnquist in dissent says this is not a content regulation. Why? Is it a subject category regulation?

Should a private residence ever be viewed as a public forum when picketing is the mode of expression chosen by the "speakers"?

In *Frisby v. Schultz*, 108 S.Ct. 2495 (1988), the Court upheld an ordinance which, as construed, completely prohibited picketing in front of a particular residence. Because of persistent picketing of a physician who performed abortions by citizens who opposed abortions, the town of Brookfield, Wisconsin enacted an ordinance that "completely bans picketing 'before or about' any residence." A facial First Amendment challenge was brought against the ordinance. The court, per Justice O'Connor, quickly held that under *Carey v. Brown* public streets in a residential neighborhood, even though narrow and not regularly used for public communication, constituted a traditional public forum. The antipicketing ordinance would, therefore, have to be evaluated "against the stringent standards we have established for restrictions on speech in traditional public fora."

The Supreme Court accepted the conclusion of the lower federal courts that the Brookfield ordinance was content-neutral. The relevant question then became whether the ordinance was narrowly tailored to serve a significant governmental interest and whether it left open ample alternative avenues of communication. The Court said the ordinance was capable of a narrow reading:

> General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this ordinance. Accordingly, we construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited.

Justice O'Connor reasoned that, so construed, the ordinance permitted the "more general dissemination of a message." Alternative avenues of communication remained: groups or individuals still enter neighborhoods. Proselytization on a door-to-door basis was still possible. The next question was: Did the ordinance serve a significant governmental interest? The answer to this question was clearly in the affirmative: "We find that such an ordinance is identified within the text of the ordinance itself: the protection of residential privacy." Unwilling listeners were entitled to protection within their own homes. "There simply is no right to force speech into the home of an unwilling listener."

Was the Brookfield ordinance narrowly tailored "to protect only unwilling recipients of the communications"? It was concluded that the type of focused picketing banned by the ordinance was different than a ban on handbilling. "Here, in contrast, the picketing is narrowly directed at the household not the public." Justice O'Connor explained:

> [T]he "evil" of targeted residential picketing, "the very presence of an unwelcome visitor at the home," is "created by the medium of expression itself." Accordingly, the Brookfield ordinance's complete ban of that particular medium of expression is narrowly tailored.

Justice O'Connor concluded that since the ordinance prohibited picketing, or speech, "directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it."

Justice Brennan, joined by Justice Marshall, dissented. Although agreeing that the Court had applied the "appropriate legal tests and standards governing the question presented," Justice Brennan complained that the Court had approved an ordinance "banning significantly more speech than is necessary to achieve the government's substantial and legitimate goal." Justice Brennan explained:

> But to say that picketing may be substantially regulated is not to say that it may be prohibited in its entirety. Once size, time, volume, and the like have been controlled to ensure that the picket is no longer intrusive or coercive only speech itself remains, conveyed perhaps by a lone, silent individual, walking back and forth with a sign. Such speech, which no longer implicates the heightened governmental interest in residential privacy, is nevertheless banned by the Brook-

field law. Therefore, the ordinance is not narrowly tailored.

Justice Stevens began his dissent by observing that under the ordinance, as construed, a fifth grader carrying a sign outside a Brookfield house saying "Get Well Charlie—Our Team Needs You" would be violating the ordinance. Justice Stevens contended that the ordinance was unquestionably overbroad because it banned some communication that was protected under the First Amendment. How could the overbreadth be cured? Justice Stevens responded as follows: "[I]t is a simple matter for the town to amend its ordinance and to limit the ban to conduct that unreasonably interferes with the privacy of the home and does not serve a reasonable communicative purpose."

Standards of Review and the Eclipse of "Balancing"

A year after the decision in *Yates*, Justice Harlan wrote the decision for the Court in *Barenblatt v. United States*, 360 U.S. 109 (1959). The United States House of Representatives Committee on Un-American Activities was investigating Communist infiltration in education. Lloyd Barenblatt, who had been a graduate student at the University of Michigan, refused to answer questions as to whether he was or ever had been a member of the Communist party. He refused to answer any inquiry into his political beliefs on the ground of reliance on the First Amendment. For such refusal he was convicted of violation of a federal statute which makes it a misdemeanor for a witness before a congressional committee to refuse to answer any questions pertinent to the matter under inquiry. See 2 U.S.C.A. § 192. On review to the Supreme Court of the United States, Justice Harlan sustained the conviction using the "balancing" test:

> Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown. 360 U.S. 109 at 126.

Relying on the need of Congress to inform itself in order to enact legislation and on the point that for purposes of national security, the Communist party could not be viewed as an ordinary political party, Harlan concluded for the Court that "the balance must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended." 360 U.S. 109 at 134 (1959). See *Watkins v. United States*, 354 U.S. 178 (1957).

Justice Black dissented in *Barenblatt* on the ground he had asserted before that speech is absolutely protected by the express words of the First Amendment. But, in the course of his dissent, Justice Black, 360 U.S. 109 at 144–145, made a critique of the "balancing" test:

* * *

> But even assuming what I cannot assume, that some balancing is proper in this case, I feel that the Court after stating the test ignores it completely. At most it balances the right of the government to preserve itself, against Barenblatt's right to refrain from revealing Communist affiliations. Such a balance, however, mistakes the factors to be weighed. In the first place, it completely leaves out the real interest in Barenblatt's silence, the interest of the people as a whole in being able to join organizations, advocate causes and make political "mistakes" without later being subjected to governmental penalties for having dared to think for themselves. * * * It is these interests of society, rather than Barenblatt's own right to silence, which I think the Court should put on the balance against the demands of the government, if any balancing process is to be tolerated. Instead they are not mentioned, while on the other side the demands of the Government are vastly overstated and called "self preservation." * * *

* * *

Justice Black criticized Harlan's use of the "balancing" test on the ground that the wrong things were balanced. This is another way of saying that the result one gets from the "balancing" test will be determined by how one weights the scale. How useful and how objective is such a test? Assuming that *Barenblatt* follows any of the First Amendment approaches outlined in the various opinions in *Dennis*, one would suppose that Harlan's rationale bears the closest possible relationship to Justice Frankfurter's concurrence in *Dennis*. But Frankfurter's "balancing" test and Harlan's were really not quite the same. Harlan said the *courts* must balance "the competing private and public interests at stake." But Frankfurter insisted that the legislature carried the primary responsibility for such "balancing."

Is balancing still a significant doctrine in First Amendment law? Increasingly, the Supreme Court appears to be saying that legislation implicating First

Amendment interests must meet a more exacting standard of review than legislation does generally. There are three standards of review now being applied by the Supreme Court today in constitutional litigation. (1) First is the traditional standard of review where legislation under constitutional attack is examined for the purpose of determining whether there is any rational basis to justify the legislation. If there is such a basis, the legislation stands. (2) Second is the intermediate standard of review whereby legislation will survive constitutional attack only if the legislation serves important governmental objectives and is substantially related to the achievement of these objectives. (3) Third is the strict scrutiny standard of review whereby legislation will survive constitutional attack only if the state can show a compelling state interest for the legislation under review. The highest type of judicial scrutiny is the strict standard of review.

For recent First Amendment cases using a heightened standard of review, see *Boos v. Barry*, text, p. 61 and *Arkansas Writers' Project v. Ragland*, text, p. 128.

The Speech-Action Dichotomy and the Problem of "Symbolic" Speech

A distinction which has been advocated as essential to an understanding of the scope of First Amendment protection is the distinction between speech and action. Out of this speech-action dichotomy has arisen the so-called "absolutist" interpretation of the First Amendment. Justice Black was the foremost judicial exponent of the "absolutist" test, although his definitions of protected speech and press were sometimes narrow, and Professor Thomas I. Emerson has been its foremost academic exponent. Professor Emerson has described the test as follows:

> The so-called "absolute" test is somewhat more unsettled in meaning than the other tests proposed, in part because its opponents have seemingly misunderstood it and in part because its supporters are not in full agreement among themselves. * * * The Test is not that all words, writing and other communications are, at all times and under all circumstances, protected from all forms of government restraint.
>
> * * *
>
> Actually, the absolute test involves two components:
>
> 1. The command of the first amendment is "absolute" in the sense that "no law" which "abridges" "the freedom of speech" is constitutionally valid. * * * [T]he point being stressed is by no means inconsequential. For it insists on focusing the inquiry upon the definition of "abridge," "the freedom of speech," and if necessary "law," rather than on a general de novo balancing of interests in each case. * * *
> 2. The absolute test includes another component. It is intended to bring a broader area of expression within the First Amendment than the other tests do.

See Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L.J. 877 at 914–915 (1963). See generally, Emerson, *The System of Freedom of Expression* (1970).

Some scholars have attacked the usefulness of the speech-action dichotomy. Professor Baker has written: "Unfortunately, neither identifying protected 'expression' by determining the conduct's contribution to the purposes of the system nor by using common sense to distinguish between expression and action works." See Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L.Rev. 964 at 1010 (1978). Professor Emerson has responded in defense as follows:

> The principal objection to the expression-action dichotomy has been that, since the conduct to be protected almost always consists of both speech and action—the category to be protected cannot be defined in terms of one or the other. * * * The criticism might be justified if the attempt being made were to frame a definition in strictly literal terms of "verbal" as opposed to "nonverbal" conduct, or simply in a loose sense of "expressing" rather than "doing." The expression-action dichotomy is, of course, not that simple. It attempts to formulate a definition of the kind of conduct that merits special protection under the first amendment.

See Emerson, *First Amendment Doctrine and the Burger Court*, 68 Calif. L.Rev. 422 at 478 (1980).

Judicial Reaction to the Speech-Action Distinction

COHEN v. CALIFORNIA

403 U.S. 15, 91 S.CT. 1780, 29 L.ED.2D 284 (1971).

Justice HARLAN delivered the opinion of the Court.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Appellant Paul Robert Cohen was convicted in Los Angeles Municipal Court of violating that part of California Penal Code § 415 which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person, * * * by * * * offensive conduct. * * * " He was given 30 days' imprisonment. The facts upon which his conviction rests are detailed in the opinion of the Court of Appeal of California, Second Appellate District, as follows:

"On April 26, 1968 the defendant was observed in the Los Angeles County Courthouse in the corridor outside of Division 20 of the Municipal Court wearing a jacket bearing the words "Fuck the Draft" which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.

"The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest."

In affirming the conviction the Court of Appeal held that "offensive conduct" means "behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace," and that the State had proved this element because, on the facts of this case, "[i]t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket." 1 Cal.App.3d, at 99–100, 81 Cal.Reptr., at 506. The California Supreme Court declined review by a divided vote. * * * We now reverse.

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does *not* present.

The conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public. The only "conduct" which the state sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon "speech." * * *

Further, the state certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.

Appellant's conviction, then, rests squarely upon his exercise of the "freedom of speech" protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. * * *

In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

In the first place, Cohen was tried under a statute applicable throughout the entire state. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. * * *

In the second place, as it comes to us, this case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. *Roth v. United States*, 354 U.S. 476 (1957). It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly

not "directed to the person of the hearer." *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940). No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. *Cf. Feiner v. New York*, 340 U.S. 315 (1951); Terminiello v. Chicago, 337 U.S. 1 (1949). There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

Finally, in arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, e.g., *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970), we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home. Given the subtlety and complexity of the factors involved, if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all "offensive conduct" that disturbs "any neighborhood or person."

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the states, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable. At most it reflects an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969). We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the states may more appropriately effectuate that censorship themselves.

* * *

Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the states from punishing public utterance of this

unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic. We think, however, that examination and reflection will reveal the shortcomings of a contrary viewpoint.

At the outset, we cannot overemphasize that, in our judgment, most situations where the state has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression. Equally important to our conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

* * *

Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the state seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated. * * *

* * *

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the state may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be reversed.

Reversed.

Justice BLACKMUN, with whom the Chief Justice and Justice Black join.

I dissent, and I do so for two reasons:

Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. * * * Further, the case appears to me to be well within the sphere of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), where Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court's agonizing over First Amendment values seem misplaced and unnecessary.

COMMENT

For the civil libertarian, an annoying feature of *Cohen v. California* is that its result is entirely consistent with the view that there should be absolute First Amendment protection for pure speech. Yet the Court deliberately eschewed taking such a view. The slogan Cohen wore on his jacket was treated by the

Court as pure speech. The basis of Cohen's conviction was that the wearing of the jacket bearing the slogan in controversy constituted "offensive conduct" prohibited by the California Penal Code. Although the conviction was reversed, it was not reversed on the view endorsed by Justice Black and Professor Emerson that pure speech must receive absolute protection under the First Amendment. Justice Harlan for the Court very carefully rejected any such approach by pointing out that "the First and Fourteenth Amendments have never been thought to give absolute protection."

Symbolic Speech

The speech-action test proceeds on the assumption that speech or communication is entitled to full First Amendment protection. But sometimes action has a communicative or expressive element. In such circumstances, should function or form control? If a particular kind of activity is essentially communicative in character, then perhaps it should be viewed for what it is—symbolic speech. As symbolic speech, such activity is entitled to full First Amendment protection fully as much as if it were as communicative in substance as it is in form.

Embryonic recognition by the Supreme Court that some modes of activity should be treated as symbolic expression is found as early as *Stromberg v. California*, 283 U.S. 359 (1931), where the Supreme Court struck down on First Amendment grounds a state statute that prohibited "the display of a red flag as a symbol of opposition by peaceful and legal means to organized government." A fuller and more famous statement which contained the roots of the symbolic speech idea may be found in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), where Justice Jackson said:

> There is no doubt that * * * the [compulsory] flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short cut from mind to mind.

If action is "symbolic," shouldn't it really be treated as "speech" for First Amendment purposes?

Is a speech-action dichotomy too mechanical an approach, or is it a useful way of thinking about and resolving First Amendment problems?

The following case, which arose out of the "draft card" burnings which occurred in different parts of the country during the controversy about the Vietnam war, shows how the symbolic speech doctrine fared before the Supreme Court when its advocates tried to use it literally under fire.

UNITED STATES v. O'BRIEN

391 U.S. 367, 88 S.CT. 1673, 20 L.ED.2D 672 (1968).

Chief Justice WARREN delivered the opinion of the Court.

On the morning of March 31, 1966, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. * * *

For this act, O'Brien was indicted, tried, convicted, and sentenced in the United States District Court for the District of Massachusetts. He did not contest the fact that he had burned the certificate. He stated in argument to the jury that he burned the certificate publicly to influence others to adopt his antiwar beliefs, as he put it, "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position."

The indictment upon which he was tried charged that he "wilfully and knowingly did mutilate, destroy, and change by burning * * * [his] Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App., United States Code, Section 462(b)." Section 462(b) is part of the Universal Military Training and Service Act of 1948. Section 462(b)(3), one of six numbered subdivisions of § 462(b), was amended by Congress in 1965, 79 Stat. 586 (adding the words italicized below), so that at the time O'Brien burned his certificate an offense was committed by any person, "who forges, alters, *knowingly destroys, knowingly mutilates*, or in any manner changes any such certificate. * * *" [Italics supplied.]

* * *

By the 1965 Amendment, Congress added to § 12(b)(3) of the 1948 act the provision here at issue, subjecting to criminal liability not only one who "forges, alters, or in any manner changes" but also one who "knowingly destroys [or] knowingly mutilates" a certificate. We note at the outset that the 1965 Amendment plainly does not abridge free speech

on its face, and we do not understand O'Brien to argue otherwise. Amended § 12(b)(3) on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views. A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records.

O'Brien nonetheless argues that the 1965 Amendment is unconstitutional in its application to him, and is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We consider these arguments separately.

O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft."

We cannot accept the view that an apparently limitless variety of conduct can be labelled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. *This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.* To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to § 462(b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it. [Emphasis added.]

* * *

The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them.

* * *

We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

It is equally clear that the 1965 Amendment specifically protects this substantial governmental interest. We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction. * * * The 1965 Amendment prohibits such conduct and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing a harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this

noncommunicative impact of his conduct, and for nothing else, he was convicted.

* * *

O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional.

* * *

Since the 1965 Amendment to § 12(b)(3) of the Universal Military Training and Service Act is constitutional as enacted and as applied, the Court of Appeals should have affirmed the judgment of conviction entered by the District Court. Accordingly, we vacate the judgment of the Court of Appeals, and reinstate the judgment and sentence of the District Court. This disposition makes unnecessary consideration of O'Brien's claim that the Court of Appeals erred in affirming his conviction on the basis of the nonpossession regulation.

It is so ordered.

Justice Marshall took no part in the consideration or decision of these cases.

Justice Harlan, concurred.

[Justice Douglas dissented on the ground that the basic but undecided constitutional issue in the case was whether conscription was unconstitutional in the absence of a declaration of war.]

COMMENT

Perhaps *O'Brien* can be viewed as a failure for the speech-action approach to First Amendment problems—a failure because the definition of "speech" employed is too rigid and formalistic.

Did Chief Justice Earl Warren reject the whole symbolic speech concept in *O'Brien*? It appears that Warren's test in *O'Brien* was just another form of the balancing test frequently used in speech plus cases. Warren pointed out that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitation on First Amendment freedoms." This test, of course, implicitly rejects the symbolic speech defense because the whole point of that defense is to have conduct for purposes of constitutional litigation conceived as speech and, therefore, immune from governmental restriction under the First Amendment.

Note Warren's formulation of the balancing test he used in *O'Brien*:

> We think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is the furtherance of that interest.

Is this "balancing" test particularly weighted in favor of the government? Professor Emerson would say that it is.

Wearing Armbands: Pure Speech?

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Supreme Court reviewed the controversy which ensued when public school children wore black armbands to school to protest the Vietnam war. The Des Moines school system had prohibited the wearing of armbands in advance. The Court held that wearing the armband was a "symbolic act" protected under the free speech provision of the First Amendment. Since only seven out of 18,000 students actually wore armbands to school, Justice Fortas held that a more positive showing of interference with normal school operations would have to be shown before the prohibition on wearing armbands could be sustained.

TINKER v. DES MOINES INDEPENDENT SCHOOL DISTRICT

393 U.S. 503, 89 S.CT. 733,
21 L.ED.2D 731 (1969).

Justice FORTAS delivered the opinion of the Court.

* * *

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. * * *

As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech" which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.

* * *

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.

* * *

In *West Virginia State Board of Education v. Barnette*, this Court held that under the First Amendment, the student in public school may not be compelled to salute the flag.

* * *

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the states and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance.

* * *

In order for the state in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption.

On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam. It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded.)

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. * * *

* * *

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the states) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. * * * In the circumstances of the present case, the prohibition of the silent, passive "witness of the armbands," as one of the children called it, is no less offensive to the constitution's guarantees.

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation constituted only in wearing on their sleeve, a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the state to deny their form of expression.

We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Justice Stewart, concurring.

* * *

Justice White, concurring.

* * *

Justice BLACK, dissenting.

* * *

* * * The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a

constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite. * * *

COMMENT

Is *Tinker* a symbolic speech case because its facts reveal no disruptive conduct? In *Street v. New York*, 394 U.S. 576 (1969), a case involving the burning of an American flag on a street corner, there appeared to be no disruptive conduct in the sense that no one in Street's immediate audience was offended by his action. If anyone was offended, it was presumably the police officer who arrested him.

In *O'Brien*, on the other hand, members of the crowd at the South Boston courthouse attacked O'Brien and his cohorts after O'Brien burned the flag. Under this approach all the cases are in line. *Street* is consistent with *Tinker* at least in result. *Tinker* is consistent with *O'Brien* in that the draft card burning provoked disruptive conduct, making the symbolic act less pure speech than was the case in *Tinker*.

Whether conduct will be adjudicated a punishable criminal act or protected symbolic speech depends in *Tinker* on whether the conduct involved will materially interfere with the operation of the school.

How material is it that flag and draft card burning were both illegal under preexisting statutes, but armband wearing was not illegal until school officials became aware of the plan to protest the war? Only then did school officials issue a regulation prohibiting armband wearing.

The Court in the *Tinker* case did not cite or discuss *O'Brien*. Is this defensible? Explicable?

The majority went to great lengths in *Street* to avoid confronting the question whether flag burning is speech. Harlan found Street to have been punished for engaging in speech, i.e., he was punished for his words. Yet Harlan applied a balancing test even to pure speech.

Justice Black believed that flag burning was not constitutionally protected. Does this show the limitation of the speech-action distinction at least as mechanically applied? Flag burning is an act. Therefore, the state may regulate it. But the flag was burned to express and communicate disrespect for the state. Isn't punishing flag burning in these circumstances a form of seditious libel?

Professor Emerson believes that expression was the basic element in Street's flag burning and O'Brien's draft card burning. Moreover, it was precisely the element of expression which the law sought to punish. Therefore, as expression (utilizing the speech-action distinction), Emerson argues that the flag burning in *Street* should not be punished but should be defined as expression under the First Amendment. *The System of Freedom of Expression*, 88 (1970).

The rationale of the Court in *Cohen v. California* appears to be very close to that taken in *Tinker*, i.e., "absent a more particularized and compelling reason for its actions," the state may not proscribe the wearing of the jacket bearing a "single four-letter expletive."

Why is *Cohen* close to *Tinker*? *Tinker* makes the key to whether symbolic protest is constitutionally protected depend on whether the protest unduly interferes with other legitimate activity. The wearing of the jacket bearing the crude slogan was even less of an obstacle to the activities of the courthouse, the forum of the protest in *Cohen*, than was the wearing of the black armbands to the activities of the school, the forum of the protest in *Tinker*. If the Court concludes that symbolic protest is no obstacle to the normal activities of school or courthouse, is this equivalent in a balancing approach to a conclusion that the state has provided no "particularized and compelling reason" for proscribing the particular symbolic protest in controversy? See the last paragraph of Justice Harlan's opinion for the Court in *Cohen*.

Taking *Street* and *Cohen* together, don't the deficiencies of the speech-action theory become vividly clear? *Street*, which seemed to involve the *act* of flag burning, was viewed by the majority of the Supreme Court as a prosecution for the utterance of words, i.e., speech. *Cohen*, on the other hand, which appeared to the majority to involve pure speech, was seen by Justice Blackmun, Chief Justice Burger, and, of all people, Justice Black as "mainly conduct and little speech."

Is the abiding difficulty with the speech-action distinction that in the crunch there is too little agreement on what constitutes "speech" and what constitutes "action"? Or is it the most sensible First Amendment "theory" so far proposed?

In *Spence v. Washington*, 418 U.S. 405 (1974), the Court, *per curiam*, overturned a conviction under a flag misuse statute. In *Spence*, the accused had affixed a peace symbol to an American flag and then displayed the flag upside down from his window.

On the basis of the factual context of this protest activity, the Court concluded that the accused had "engaged in a form of protected expression." In *Spence*, the Court evidenced a willingness to consider action in certain circumstances the equivalent of communication. For the Court to treat action or conduct in such a fashion, however, it is necessary that there be intent on the part of the speaker to make a particular communication. It is likewise necessary that the context of the protest makes it likely that it would be received and comprehended as a message by those to whom it was addressed. Context may be a key point in distinguishing speech and action.

Is there an operational symbolic speech doctrine which is operative in contemporary First Amendment law? If one analyzes *O'Brien*, *Tinker*, and *Spence* on an overall basis, the outlines of a functional symbolic speech doctrine are discernible. Once the Court has determined that a particular mode of activity is in fact communicative, i.e., constitutes symbolic speech, full First Amendment protection should be extended to the activity.[4] If the state regulation in controversy is directed at the message being communicated, then the state interest, absent a clear and present danger, should not be sufficient to withstand the First Amendment interest favoring protection of the communicative activity. If the regulation is designed to effectuate a substantial governmental interest, is not directed toward repressing of the content of the communicative activity involved, and if the governmental interest would be significantly thwarted by the continuance of the activity at issue, then the regulation should be upheld despite the incidental burden on First Amendment interests.

In *Texas v. Johnson*, 109 S.Ct. ___ (1989), a flag desecration conviction was held, 5–4, to be inconsistent with the First Amendment. See Appendix A.

BETHEL SCHOOL DISTRICT NO. 403 v. FRASER

478 U.S 675, 106 S.CT. 3159, 92 L.ED.2D 549 (1986).

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.

On April 26, 1983, respondent Matthew N. Fraser, a student at Bethel High School in Bethel, Washington, delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students, many of whom were 14-year-olds, attended the assembly. Students were required to attend the assembly or to report to the study hall. The assembly was part of a school-sponsored educational program in self-government. Students who elected not to attend the assembly were required to report to study hall. During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.

Two of Fraser's teachers, with whom he discussed the contents of his speech in advance, informed him that the speech was "inappropriate and that he probably should not deliver it," and that his delivery of the speech might have "severe consequences." During Fraser's delivery of the speech, a school counselor observed the reaction of students to the speech. Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class.

A Bethel High School disciplinary rule prohibiting the use of obscene language in the school provides:

> Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.

The morning after the assembly, the Assistant Principal called Fraser into her office and notified him that the school considered his speech to have been a violation of this rule. Fraser was presented with copies of five letters submitted by teachers, describing his conduct at the assembly; he was given a chance to explain his conduct, and he admitted to having given the speech described and that he deliberately used sexual innuendo in the speech. Fraser was then informed that he would be sus-

4. For an example of a case recognizing the symbolic speech concept, see *Village of Skokie v. National Socialist Party*, 373 N.E.2d 21 (Ill.1978), text, p. 35, where the planned display of the swastika by a group of American Nazis was upheld as protected symbolic speech.

pended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises.

Fraser sought review of this disciplinary action through the School District's grievance procedures. The hearing officer determined that the speech given by respondent was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly." The examiner determined that the speech fell within the ordinary meaning of "obscene," as used in the disruptive-conduct rule, and affirmed the discipline in its entirety. Fraser served two days of his suspension, and was allowed to return to school on the third day.

Respondent, by his father as guardian *ad litem*, then brought this action in the [district court]. Respondent alleged a violation of his First Amendment right to freedom of speech and sought both injunctive relief and monetary damages under 42 U. S. C. § 1983. The District Court held that the school's sanctions violated respondent's right to freedom of speech under the First Amendment to the United States Constitution. * * *

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, holding that respondent's speech was indistinguishable from the protest armband in *Tinker v. Des Moines Independent Community School Dist.* We reverse.

This Court acknowledged in *Tinker v. Des Moines Independent Community School Dist.*, that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court of Appeals read that case as precluding any discipline of Fraser for indecent speech and lewd conduct in the school assembly. The marked distinction between the political "message" of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in *Tinker*, this Court was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students." It is against this background that we turn to consider the level of First Amendment protection accorded to Fraser's utterances and actions before an official high school assembly attended by 600 students.

The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behaviour. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences. In our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate. Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?

The First Amendment guarantees wide freedom in matters of adult public discourse. A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens. See *Cohen v. California*. It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, that the same latitude must be permitted to children in a public school. In *New Jersey v. T. L. O.*, 469 U. S. 325 (1985), we reaffirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. As cogently expressed by Judge Newman, "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Thomas v. Board of Education*, Grandville Central School Dist., 607 F.2d 1043, 1057 (CA2 1979) (opinion, concurring in result).

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." *Tinker*. The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the

older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as bewildered by the speech and the reaction of mimicry it provoked. This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children.

We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education. * * *

Respondent contends that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech in question would subject him to disciplinary sanctions. This argument is wholly without merit. We have recognized that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions. Two days' suspension from school does not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution. The school disciplinary rule proscribing "obscene" language and the prespeech admonitions of teachers gave adequate warning to Fraser that his lewd speech could subject him to sanctions.

The judgment of the Court of Appeals for the Ninth Circuit is

Reversed.

Justice BRENNAN, concurring in the judgment.

Respondent gave the following speech at a high school assembly in support of a candidate for student government office:

> "I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most * * * of all, his believe in you, the students of Bethel, is firm.
>
> "Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
>
> "Jeff is a man who will go to the very end—even the climax, for each and every one of you.
>
> "So vote for Jeff for A. S. B. vice-president—he'll never come between you and the best our high school can be."

The Court, referring to these remarks as "obscene," "vulgar," "lewd," and "offensively lewd," concludes that school officials properly punished respondent for uttering the speech. Having read the full text of respondent's remarks, I find it difficult to believe that it is the same speech the Court describes. To my mind, the most that can be said about respondent's speech—and all that need be said—is that in light of the discretion school officials have to teach high school students how to conduct civil and effective public discourse, and to prevent disruption of school educational activities, it was not unconstitutional for school officials to conclude, under the circumstances of this case, that respondent's remarks exceeded permissible limits. Thus, while I concur in the Court's judgment, I write separately to express my understanding of the breadth of the Court's holding.

If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate, see *Cohen v. California;* the Court's opinion does not suggest otherwise. Moreover, despite the Court's characterizations, the language respondent used is far removed from the very narrow class of "obscene" speech which the Court has held is not protected by the First Amendment. It is true, however, that the State has interests in teaching high school students how to conduct civil and effective public discourse and in avoiding disruption of educational school activities. Thus, the Court holds that under certain circumstances, high school students may properly be reprimanded for giving a speech at a high school assembly which school officials conclude disrupted the school's educational mission. Respondent's speech may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty.

In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate respondent's speech because they disagree with the views he sought to express. Cf. *Tinker.* Nor does this case involve an attempt by school officials to ban written materials they consider "inappropriate" for high school students, cf. *Board of Education v. Pico,* or to limit what students should hear, read, or learn about. Thus, the Court's holding concerns only the authority that school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly.

Justice MARSHALL dissenting.

I agree with the principles that Justice Brennan set out in his opinion concurring in the judgment. I dissent from the Court's decision, however, because in my view the school district failed to demonstrate that respondent's remarks were indeed disruptive.

Justice STEVENS, dissenting.

"Frankly, my dear, I don't give a damn."

When I was a high school student, the use of those words in a public forum shocked the Nation. Today Clark Gable's four-letter expletive is less offensive than it was then. Nevertheless, I assume that high school administrators may prohibit the use of that word in classroom discussion and even in extracurricular activities that are sponsored by the school and held on school premises. For I believe a school faculty must regulate the content as well as the style of student speech in carrying out its educational mission. It does seem to me, however, that if a student is to be punished for using offensive speech, he is entitled to fair notice of the scope of the prohibition and the consequences of its violation. The interest in free speech protected by the First Amendment and the interest in fair procedure protected by the Due Process Clause of the Fourteenth Amendment combine to require this conclusion.

This respondent was an outstanding young man with a fine academic record. The fact that he was chosen by the student body to speak at the school's commencement exercises demonstrates that he was respected by his peers. This fact is relevant for two reasons. It confirms the conclusion that the discipline imposed on him—a three-day suspension and ineligibility to speak at the school's graduation exercises—was sufficiently serious to justify invocation of the School District's grievance procedures. See *Goss v. Lopez,* 419 U.S. 565 (1975). More importantly, it indicates that he was probably in a better position to determine whether an audience composed of 600 of his contemporaries would be offended by the use of a four-letter word—or a sexual metaphor—than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime.

It seems fairly obvious that respondent's speech would be inappropriate in certain classroom and formal social settings. On the other hand, in a locker room or perhaps in a school corridor the metaphor in the speech might be regarded as rather routine comment. If this be true, and if respondent's audience consisted almost entirely of young people with whom he conversed on a daily basis, can we—at this distance—confidently assert that he must have known that the school administration would punish him for delivering it?

For three reasons, I think not. First, it seems highly unlikely that he would have decided to deliver the speech if he had known that it would result in his suspension and disqualification from delivering the school commencement address. Second, I believe a strong presumption in favor of free expression should apply whenever an issue of this kind is arguable. Third, because the Court has adopted the policy of applying contemporary community standards in evaluating expression with sexual connotations, this Court should defer to the views of the district and circuit judges who are in a much better position to evaluate this speech than we are.

COMMENT

Chief Justice Burger's opinion for the Court in *Bethel School District* narrows the scope of *Tinker* and appears to limit its reach to political messages. Sexually oriented messages apparently cannot claim protection under the *Tinker* rule. Is the regulation of speech at issue in *Bethel School District* upheld because the sexually oriented speech used by the speaker was so offensive as not to merit First Amendment protection? See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), text, p. 828. This would mean that content-based regulation would only be permissible under the *Tinker* test if political discourse were involved. Content-based restriction limited to sexual innuendo would be permissible.

Or is the thrust of the majority opinion in *Bethel School District* that speech by students who are minors in a public school setting is subject to greater regulation than usual? The rationale for this is the state interest in "educating our youth for citizenship in public schools."

Bethel School District is based on three factors: (1) the state interest in educating its youth, (2) the attenuated First Amendment rights of minors, and (3) the nonpolitical and offensively sex-oriented nature of the message in controversy. Is the reason for Justice Brennan's separate concurrence his objection to the third factor? How would Justice Brennan apply *Tinker* to the *Bethel School District* facts?

A case that continued the erosion of the *Tinker* principle is *Hazelwood School District v. Kuhlmeier*, 108 S.Ct. 562 (1988). See text, p. 839.

THE LEGAL AND CONSTITUTIONAL MEANING OF FREEDOM OF THE PRESS

The Doctrine of Prior Restraint

NEAR v. MINNESOTA

283 U.S. 697, 51 S.CT. 625, 75 L.ED. 1357 (1931).

[EDITORIAL NOTE The previous cases we have examined in studying the constitutional development of freedom of expression as a concept have dealt with what might be called subsequent punishment, i.e., punishing the speaker or the publisher after *the act of communication because of state objection to the contents of the communication. This kind of legal sanction over communication obviously performs a certain censorship function. But press censorship, in the sense of being required by law to submit copy to a state official before publication is allowed, is another very significant and even more direct method by which freedom of expression can be restricted. At common law this kind of censorship was known as prior restraint. In* Near v. Minnesota, *the Supreme Court of the United States produced a very valuable precedent for the law of the press because the Court dealt with the constitutionality of press censorship and specifically with prior restraint.*

As you read the opinion of the Court in Near, *be careful to note that the Court did not say prior restraints were absolutely forbidden by the constitutional guarantee of freedom of the press, but rather that they were prohibited except in certain areas. According to Chief Justice Hughes, what are the areas of exception where apparently prior restraints are permitted? Do these exceptions merely repeat the law of the "subsequent punishment" cases previously considered in earlier cases in this chapter.*

The factual setting of the Near *case was as follows. A Minnesota statute provided for the abating as a public nuisance of "malicious, scandalous, and defamatory" newspapers or periodicals. The statute provided that all persons guilty of such a nuisance could be enjoined. Mason's Minnesota Statutes, 1927, §§ 10123–1 to 10123–3.*

The county attorney of Hennepin County (Minneapolis), later Populist Governor Floyd Olson, brought an action under the statute to enjoin the publication of a "malicious, scandalous, and defamatory newspaper, magazine, or other periodical" known as The Saturday Press. *The complaint filed by the county attorney asserted that* The Saturday Press *had accused the law enforcement agencies and officials of Minneapolis with failing to expose and punish gambling, bootlegging, and racketeering, which activities,* The Saturday Press *alleged, were in control of a "Jewish gangster."*

The state trial court found that the editors of The Saturday Press *had violated the statute, and the court "perpetually enjoined" the defendants from conducting "said nuisance under the title of* The Saturday Press *or any other name or title." The state supreme court affirmed, and the defendant Near appealed to the Supreme Court of the United States. For an interesting and lively account of the background of the case, See Friendly,* Minnesota Rag *(1981)].*

Chief Justice HUGHES delivered the opinion of the Court: * * *

This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if

not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. * * * In maintaining this guaranty, the authority of the state to enact laws to promote the health, safety, morals, and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. * * * Liberty of speech and of the press is also not an absolute right, and the state may punish its abuse. Liberty, in each of its phases, has its history and connotation, and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty.

* * *

First. The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. The statute, said the state court (174 Minn. 457, 219 N.W. 770, 772, 58 A.L.R. 607), "is not directed at threatened libel but at an existing business which, generally speaking, involves more than libel." It is aimed at the distribution of scandalous matter as "detrimental to public morals and to the general welfare," tending "to disturb the peace of the community" and "to provoke assaults and the commission of crime." In order to obtain an injunction to suppress the future publication of the newspaper or periodical, it is not necessary to prove the falsity of the charges that have been made in the publication condemned. In the present action there was no allegation that the matter published was not true. It is alleged, and the statute requires the allegation that the publication was "malicious." But, as in prosecutions for libel, there is no requirement of proof by the state of malice in fact as distinguished from malice inferred from the mere publication of the defamatory matter. The judgment in this case proceeded upon the mere proof of publication. The statute permits the defense, not of the truth alone, but only that the truth was published with good motives and for justifiable ends. * * *

* * *

Second. The statute is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued publication by newspapers and periodicals of charges against public officers of corruption, malfeasance in office, or serious neglect of duty. Such charges by their very nature create a public scandal. They are scandalous and defamatory within the meaning of the statute, which has its normal operation in relation to publications dealing prominently and chiefly with the alleged derelictions of public officers.

Third. The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression of the evils of scandal." Describing the business of publication as a public nuisance does not obscure the substance of the proceeding which the statute authorizes. It is the continued publication of scandalous and defamatory matter that constitutes the business and the declared nuisance. In the case of public officers, it is the reiteration of charges of official misconduct, and the fact that the newspaper or periodical is principally devoted to that purpose, that exposes it to suppression. * * *

* * *

This suppression is accomplished by enjoining publication, and that restraint is the object and effect of the statute.

Fourth. The statute not only operates to suppress the offending newspaper or periodical, but to put the publisher under an effective censorship. When a newspaper or periodical is found to be "malicious, scandalous and defamatory," and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. Thus, where a newspaper or periodical has been suppressed because of the circulation of charges against public officers of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt, and that the judgment would lay a permanent restraint upon the

publisher, to escape which he must satisfy the court as to the character of a new publication. Whether he would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the court's ruling. In the present instance the judgment restrained the defendants from "publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law." The law gives no definition except that covered by the words "scandalous and defamatory," and publications charging official misconduct are of that class. While the court, answering the objection that the judgment was too broad, saw no reason for construing it as restraining the defendants "from operating a newspaper in harmony with the public welfare to which all must yield," and said that the defendants had not indicated "any desire to conduct their business in the usual and legitimate manner," the manifest inference is that, at least with respect to a new publication directed against official misconduct, the defendant would be held, under penalty of punishment for contempt as provided in the statute, to a manner of publication which the court considered to be "usual and legitimate" and consistent with the public welfare.

If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." 4 Bl.Com. 151, 152. See Story on the Constitution, §§ 1884, 1889. The distinction was early pointed out between the extent of the freedom with respect to censorship under our constitutional system and that enjoyed in England. Here, as Madison said, "the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also." Report on the Virginia Resolutions, Madison's Works, vol. IV, p. 543. This Court said, in *Patterson v. Colorado*, 205 U.S. 454, 462: "In the first place, the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. *Commonwealth v. Blanding*, 3 Pick. (Mass.) 304, 313, 314 (15 Am.Dec. 214); *Respublica v. Oswald*, 1 Dall. 319, 325. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. *Commonwealth v. Blanding, ubi supra;* 4 Bl.Com. 150."

The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by state and federal Constitutions. The point of criticism has been "that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions," and that "the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if,

while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications." 2 Cooley, Const. Lim. (8th Ed.) p. 885. But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common-law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our Constitutions. Id. pp. 883, 884. The law of criminal libel rests upon that secure foundation. There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions. * * * We have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction—that is, for restraint upon publication.

The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. * * * No one would question but that a government might prevent actual obstruction to its recruiting service or the *publication of the sailing dates of transports or the number and location of troops*. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. * * * These limitations are not applicable here. Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity. [Emphasis added.]

The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship. The conception of the liberty of the press in this country had broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration. That liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct.

* * *

The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under * * * state constitutions.

The importance of this immunity has not lessened. While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.

In attempted justification of the statute, it is said that it deals not with publication per se, but with the "business" of publishing defamation. If, how-

ever, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be "largely" or "chiefly" devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made.

Nor can it be said that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes. With the multiplying provisions of penal codes, and of municipal charters and ordinances carrying penal sanctions, the conduct of public officers is very largely within the purview of criminal statutes. The freedom of the press from previous restraint has never been regarded as limited to such animadversions as lay outside the range of penal enactments. Historically, there is no such limitation; it is inconsistent with the reason which underlies the privilege, as the privilege so limited would be of slight value for the purposes for which it came to be established.

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the Legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details), and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined. If this can be done, the Legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this court has said, on proof of truth.

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication. "To prohibit the intent to excite those unfavorable sentiments against those who administer the Government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which again, is equivalent to a protection of those who administer the Government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct." There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. * * *

For these reasons we hold the statute, so far as it authorized the proceedings in this action * * * to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.

Judgment reversed.

Justice BUTLER (dissenting).

* * *

The Minnesota statute does not operate as a *previous* restraint on publication within the proper meaning of that phrase. It does not authorize administrative control in advance such as was formerly exercised by the licensers and censors, but prescribes a remedy to be enforced by a suit in equity. In this case there was previous publication made in the course of the business of regularly producing malicious, scandalous, and defamatory periodicals. The business and publications unquestionably constitute an abuse of the right of free press. The statute denounces the things done as a nuisance on the ground, as stated by the State Supreme Court, that they threaten morals, peace, and good order. There is no question of the power of the state to denounce such transgressions. The restraint authorized is only in respect of continuing to do what has been duly adjudged to constitute a nuisance. * * * There is nothing in the statute purporting to prohibit publications that have not been adjudged to constitute a nuisance. It is fanciful to suggest similarity between the granting or enforcement of the decree authorized by this statute to prevent *further* publication of malicious, scandalous, and defamatory articles and the *previous restraint* upon the press by licensers as referred to by Blackstone and described in the history of the times to which he alludes.

* * *

It is well known, as found by the state Supreme Court, that existing libel laws are inadequate effectively to suppress evils resulting from the kind of business and publications that are shown in this case. The doctrine that measures such as the one before us are invalid because they operate as previous restraints to infringe freedom of press exposes the peace and good order of every community and the business and private affairs of every individual to the constant and protracted false and malicious assaults of any insolvent publisher who may have purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail or extortion.

The judgment should be affirmed.

Justice Van Devanter, Justice McReynolds, and Justice Sutherland concur in this opinion.

COMMENT

Chief Justice Hughes said in *Near* that freedom from prior restraint was the general principle. But he also made it clear that it was not an absolute principle. The areas of exception were apparently three: (1) cases where national security was involved in time of war; (2) cases where the "primary requirements of decency" were involved, i.e., the problem of obscene publications; (3) cases where the public order was endangered by the incitement to violence and overthrow by force of orderly government.

The *Near* case produced a sharp 5–4 division in the Court. The narrow majority supporting the opinion of Chief Justice Hughes was accused by Justice Pierce Butler, a Minnesotan, of reaching out to decide the constitutional status of prior restraints which were not involved in the case at bar. Technically, Justice Butler was right. The prior restraint known at common law empowered administrative officials rather than judges to review in the first instance the material to be published. In *Near, The Saturday Press* had been able to publish what it chose in the first instance. Moreover, no requirement of submitting future copy to a court as a prerequisite to publication was asked of the editors. Yet, more broadly viewed, the court order probably did create a prior restraint.

Prior restraint had not entirely vanished from the American legal scene. However, prior restraints today appear to be more common in the obscenity field than they are in the area of political freedom. An example is *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963). In that case the Rhode Island legislature established a state-supported commission to "advise" magazine and book distributors when a publication was obscene. The advisory letter informed the distributor that if a publication was designated by the commission as obscene and was not removed from circulation, the matter would be turned over to law enforcement authorities for criminal prosecution. The commission itself had no law enforcement powers, and it could not require the regular law enforcement authorities to take action. In what ways did this procedure conform to and differ from the prior restraint known to English common law and described in the opinions in the *Near* case? Could it be fairly said of the Rhode Island procedure litigated in *Bantam Books* that its effect might be even more restrictive of press freedom than the classic form of prior restraint? Why?

With regard to this question, it should be noted that the Supreme Court described the Rhode Island procedure as a "form of regulation that creates hazards to press freedom markedly greater than those

that attend reliance upon the criminal law." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

In the landmark case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court sharply limited the ability of public officials to successfully sue newspapers for libel. For an extended discussion of the impact of the *Times* case on the law of libel, see Chapter 2, text, p. 195. In the *Times* case, the Court cited the statements in *Near* and other cases that the "Constitution does not protect libelous utterances." But the Court pointed out that neither *Near* nor any other case cited for this proposition actually involved use of the libel laws to restrain expression "critical of the official conduct of public officials." 376 U.S. 254 at 268. In a decision of far-reaching scope, the Court proclaimed the latter kind of expression to be protected by the First Amendment. Justice Brennan said for the Court in *New York Times* that the case of a public official suing a newspaper for libel must be considered "against the background of a profound national 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." 376 U.S. 254 at 270.

If *The Saturday Press* were to publish in Minneapolis today an attack on the members of the municipal govemment of that city—an attack, which, let us assume, until the *New York Times* case would have been actionably libelous—would an injunction now be available to restrain further publications of the attack?

Has the *New York Times* case further restricted the already limited range of prior restraints?

From the point of view of freedom of the press, the legal concept of prior restraint is of the greatest importance. If, as a constitutional matter, freedom of the press included nothing else than prior restraint, considerable protection would still have been afforded the printed word. This is because freedom from prior restraint allows the material to be disseminated in the first place. Ideas, no matter how disturbing to established authority, are thus given legal protection in their emergent state. This freedom from prior restraint against the printed word contrasts with the legal concept of subsequent punishment which refers to the imposition of legal sanctions on those who authored the offending words. Punishing Gitlow *after* the publication of his revolutionary newspaper is an example of subsequent punishment. Under what set of facts would *Gitlow* have been a prior restraint case?

It is the contribution of Chief Justice Hughes's opinion in *Near v. Minnesota* that it enriched in a formative case the constitutional interpretation of freedom of the press to include *both* freedom from prior restraint and freedom from subsequent punishment. However, as between the two forms of repression of the press, prior restraint and subsequent punishment, which is the more dangerous in damaging the values for which freedom of press exists as a constitutional guarantee? Why?

For an excellent discussion of prior restraint, see generally Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp.Prob. 648 (1955); Symposium, *Near v. Minnesota, 50th Anniversary*, 66 Minn.L.Rev. 1–208 (November 1981). See generally, Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va.L.Rev. 53 (1984).

The Pentagon Papers Case

The Pentagon Papers or the *New York Times* case of the summer of 1971 brought forth suddenly and with no particular warning one of the great First Amendment and one of the most dramatic prior restraint cases in American constitutional history. For students of the law of mass communication the case can be approached under at least three familiar categories: (1) prior restraint, (2) journalists' privilege to protect their sources, and (3) the public's right to know. All the judges who considered the case had to weigh claims of freedom from prior restraint and freedom of information against claims of government interest and security advanced by the Justice Department lawyers. Was Dr. Daniel Ellsberg, one of the thirty-six authors of the Papers, justified, legally or ethically, in taking classified papers to which he had access and turning them over to the *New York Times?*

The sequence of events which created the Pentagon Papers case came about as follows: In June 1971, the *New York Times*, after much soul-searching, decided to publish a secret, classified Pentagon Report outlining the process by which America went to war in Vietnam. At the request of the United States government, a temporary restraining order was issued against the *New York Times* by a newly

appointed federal judge, Murray Gurfein, of the Federal District Court for the Southern District of New York. A few days later Judge Gurfein in a stirring decision refused to grant the United States government a permanent injunction to restrain the *New York Times* from publishing the Pentagon Papers:

"A cantankerous press, an obstinate press, a ubiquitous press," said the judge, "must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know."

But the United States Court of Appeals for the Second Circuit reversed this decision, holding that the issue of whether the materials should be published should be decided in further hearings where the government could develop and support its position that the publication of the papers presented a threat to the security of the United States. In the interim, the United States Court of Appeals for the Second Circuit ruled that the restraints on publication be continued. Meanwhile, the *Washington Post* entered the fray. The government requested an injunction against the *Post* in the United States District Court in the District of Columbia, but Judge Gerhard Gesell denied the government's attempt to restrain publication of the Pentagon papers by the *Post*. The government appealed, and the United States Court of Appeals for the District of Columbia came down on the side of the press.

The *Washington Post* and *New York Times* were not the only papers to publish the Pentagon Papers. The *Boston Globe* and the *St. Louis Post Dispatch* had each published one article on the Papers. The government sought and obtained a restraining order against the papers in Boston and St. Louis. The *Chicago Sun Times* and the *Los Angeles Times* published stories based on the Pentagon Papers, but these papers were never the subject of lawsuits by the government. Because of the inconsistent actions with regard to the Pentagon Papers in the federal courts of appeals in New York and Washington, the *Washington Post* was free to publish papers, but the *New York Times* was not.

The federal courts of appeals had given judgment on the matter on June 23, 1971. The *New York Times* filed a petition for a writ of certiorari along with a motion for accelerated consideration of the petition on June 24. On June 30, 1971, the great case, a historic confrontation between government and the press, was decided by the Supreme Court. The result was clear—every newspaper in the land was free to publish the Pentagon Papers. The excitement of victory for the press, however, clouded appreciation by the press of the fact that the bitter struggle between freedom of information and national security had hardly been given a clear resolution by the Supreme Court. The Court's actual order merely held that the government had not met the heavy burden which must be met to justify any government prior restraint on the press. As for the myriad issues raised by the momentous case, nine separate opinions (it would have been impossible to have more) reflected the ambiguities, contradictions, and fundamental disagreements among the justices on basic issues concerning the role of the press in American society.

For a detailed account of the events leading to the Supreme Court's action, see Ungar, *The Papers & The Papers* (1973).

NEW YORK TIMES v. UNITED STATES

403 U.S. 713, 91 S.CT. 2140, 29 L.ED.2D 822 (1971).

Per Curiam.

We granted certiorari in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." * * *

"*Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.*" *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); see also *Near v. Minnesota*, 283 U.S. 697 (1931). The government "thus carries a heavy burden of showing justification for the enforcement of such a restraint." *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). The District Court for the Southern District of New York in the *New York Times* case and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit in the *Washington Post* case held that the government had not met that burden. We agree. [Emphasis added.]

Justice BLACK, with whom Justice Douglas joins, concurring.

* * * I believe that every moment's continuance of the injunctions against these newspapers amounts

to a flagrant, indefensible, and continuing violation of the First Amendment. * * * In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

Our government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including the First Amendment, followed in 1791. Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the government can halt the publication of current news of vital importance to the people of this country.

In seeking injunctions against these newspapers and in its presentation to the Court, the executive branch seems to have forgotten the essential purpose and history of the First Amendment. When the Constitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms. They especially feared that the new powers granted to a central government might be interpreted to permit the government to curtail freedom of religion, press, assembly, and speech. In response to an overwhelming public clamor, James Madison offered a series of amendments to satisfy citizens that these great liberties would remain safe and beyond the power of government to abridge. Madison proposed what later became the First Amendment in three parts, two of which are set out below, and one of which proclaimed: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; *and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.*" The amendments were offered to *curtail* and *restrict* the general powers granted to the executive, legislative, and judicial Branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly. Yet the solicitor general argues and some members of the Court appear to agree that the general powers of the government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history. Madison and the other Framers of the First Amendment, able men that they were, wrote in language they earnestly believed could never be misunderstood: "Congress shall make no law * * * abridging the freedom of the press. * * * *" Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The government's power to censor the press was abolished so that the press would remain forever free to censure the government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Viet Nam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

The government's case here is based on premises entirely different from those that guided the Framers of the First Amendment. The solicitor general has carefully and emphatically stated:

"Now, Mr. Justice [Black], your construction of * * * [the First Amendment] is well known, and I certainly respect it. You say that no law means no law, and that should be obvious. I can only say, Mr. Justice that to me it is equally obvious that 'no law' does not mean 'no law', and I would seek to persuade the Court that that is true. * * * [T]here are other parts of the Constitution that grant power and responsibilities to the Executive and * * * the First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States."

And the government argues in its brief that in spite of the First Amendment, "[t]he authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two in-

terrelated sources: the constitutional power of the president over the conduct of foreign affairs and his authority as Commander-in-Chief."

In other words, we are asked to hold that despite the First Amendment's emphatic command, the executive branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of "national security." The government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to "make" a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law. See concurring opinion of Justice Douglas. * * * To find that the president has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the government hopes to make "secure." No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time.

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged.

Justice DOUGLAS, with whom Justice Black joins, concurring.

While I join the opinion of the Court I believe it necessary to express my views more fully.

It should be noted at the outset that the First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech or of the press." That leaves, in my view, no room for governmental restraint on the press.

There is, moreover, no statute barring the publication by the press of the material which the *Times* and *Post* seek to use. 18 U.S.C.A. § 793(e) provides that "whoever having unauthorized possession of, access to, or control over any document, writing, * * * or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, wilfully communicates * * * the same to any person not entitled to receive it * * * shall be fined not more than $10,000 or imprisoned not more than ten years or both."

The government suggests that the word "communicates" is broad enough to encompass publication.

There are eight sections in the chapter on espionage and censorship, §§ 792–799. In three of those eight "publish" is specifically mentioned: § 794(b) provides "Whoever in time of war, with the intent that the same shall be communicated to the enemy, collects records, *publishes*, or communicates * * * [the disposition of armed forces]."

Section 797 prohibits "reproduces, *publishes*, sells, or gives away" photos of defense installations.

Section 798 relating to cryptography prohibits: "communicates, furnishes, transmits, or otherwise makes available * * * or *publishes*."

Thus it is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act.

The other evidence that § 793 does not apply to the press is a rejected version of § 793. That version read: "During any national emergency resulting from a war to which the U.S. is a party or from threat of such a war, the president may, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense, which in his judgment is of such character that it is or might be useful to the enemy." During the debates in the Senate the First Amendment was specifically cited and that provision was defeated. 55 Cong.Rec. 2166.

Judge Gurfein's holding in the *Times* case that this act does not apply to this case was therefore preeminently sound. Moreover, the Act of September 23, 1950, in amending 18 U.S.C.A. § 793 states in § 1(b) that:

"Nothing in this act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect."

64 Stat. 987. Thus Congress has been faithful to the command of the First Amendment in this area.

So any power that the government possesses must come from its "inherent power."

The power to wage war is "the power to wage war successfully." See *Hirabayashi v. United States*, 320 U.S. 81, 93. But the war power stems from a declaration of war. The Constitution of Article I, § 8, gives Congress, not the president, power "to declare war." Nowhere are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have.

These disclosures may have a serious impact. But that is no basis for sanctioning a previous restraint on the press.

As we stated only the other day in Organization for a *Better Austin v. Keefe*, 402 U.S. 415, "any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."

The government says that it has inherent powers to go into court and obtain an injunction to protect that national interest, which in this case is alleged to be national security.

Near v. Minnesota, 283 U.S. 697, repudiated that expansive doctrine in no uncertain terms.

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. See Emerson, *The System of Freedom of Expression*, c. V (1970); Chafee, *Free Speech in the United States*, c. XIII (1941). The present cases will, I think, go down in history as the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.

Secrecy in government is fundamentally antidemocratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be "open and robust debate." *New York Times, Inc. v. Sullivan*, 376 U.S. 254, 269–270.

I would affirm the judgment of the court of appeals in the *Post* case, vacate the stay of the court of appeals in the *Times* case and direct that it affirm the district court.

The stays in these cases that have been in effect for more than a week constitute a flouting of the principles of the First Amendment as interpreted in *Near v. Minnesota*.

Justice BRENNAN, concurring.

I write separately in these cases only to emphasize what should be apparent: that our judgment in the present cases may not be taken to indicate the propriety in the future, of issuing temporary stays and restraining orders to block the publication of material sought to be suppressed by the government. So far as I can determine, never before has the United States sought to enjoin a newspaper from publishing information in its possession. The relative novelty of the questions presented, the necessary haste with which decisions were reached, the magnitude of the interests asserted, and the fact that all the parties have concentrated their arguments upon the question whether permanent restraints were proper may have justified at least some of the restraints heretofore imposed in these cases. Certainly it is difficult to fault the several courts below for seeking to assure that the issues here involved were preserved for ultimate review by this Court. But even if it be assumed that some of the interim restraints were proper in the two cases before us, that assumption has no bearing upon the propriety of similar judicial action in the future. To begin with, there has now been ample time for reflection and judgment; whatever values there may be in the preservation of novel questions for appellate review may not support any restraints in the future. More important, the First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases.

The error which has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result. Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," *Schenck v. United States*, 249 U.S. 47, 52 (1919), during which times "no one would question

but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near v. Minnesota*, 283 U.S. 697, 716 (1931). Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature. "The chief purpose of [the First Amendment's] guarantee [is] to prevent previous restraints upon publication." *Near v. Minnesota, supra*, at 713. Thus, only governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the executive branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And therefore, every restraint issued in this case, whatever its form, has violated the First Amendment—and none the less so because that restraint was justified as necessary to afford the court an opportunity to examine the claim more thoroughly. Unless and until the government has clearly made out its case, the First Amendment commands that no injunction may issue.

Justice STEWART, with whom Justice White joins, concurring.

In the governmental structure created by our Constitution, the executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the legislative and judicial branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that a president of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say a prime minister of a country with a parliamentary form of government.

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. * * *

I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. If the Constitution gives the executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. *For when everything is classified, then nothing is classified,* and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. But be that as it may, it is clear to me that it is the constitutional duty of the executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense. [Emphasis added.]

This is not to say that Congress and the courts have no role to play. Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is instituted, it will be the re-

sponsibility of the courts to decide the applicability of the criminal law under which the charge is brought. Moreover, if Congress should pass a specific law authorizing civil proceedings in this field, the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved.

But in the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the executive, not the judiciary. We are asked, quite simply, to prevent the publication by two newspapers of material that the executive branch insists should not, in the national interest, be published. I am convinced that the executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.

Justice WHITE, with whom Justice Stewart joins, concurring.

I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations. Nor, after examining the materials the government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden which it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these.

The government's position is simply stated: The responsibility of the executive for the conduct of the foreign affairs and for the security of the Nation is so basic that the president is entitled to an injunction against publication of a newspaper story whenever he can convince a court that the information to be revealed threatens "grave and irreparable" injury to the public interest; and the injunction should issue whether or not the material to be published is classified, whether or not publication would be lawful under relevant criminal statutes enacted by Congress and regardless of the circumstances by which the newspaper came into possession of the information.

At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press. Much of the difficulty inheres in the "grave and irreparable danger" standard suggested by the United States. If the United States were to have judgment under such a standard in these cases, our decision would be of little guidance to other courts in other cases, for the material at issue here would not be available from the Court's opinion or from public records, nor would it be published by the press. Indeed, even today where we hold that the United States has not met its burden, the material remains sealed in court records and it is properly not discussed in today's opinions. Moreover, because the material poses substantial dangers to national interests and because of the hazards of criminal sanctions, a responsible press may choose never to publish the more sensitive materials. To sustain the government in these cases would start the courts down a long and hazardous road that I am not willing to travel at least without congressional guidance and direction.

It is not easy to reject the proposition urged by the United States and to deny relief on its good-faith claims in these cases that publication will work serious damage to the country. But that discomfiture is considerably dispelled by the infrequency of prior restraint cases. Normally, publication will occur and the damage be done before the government has either opportunity or grounds for suppression. So here, publication has already begun and a substantial part of the threatened damage has already occurred. The fact of a massive breakdown in security is known, access to the documents by many unauthorized people is undeniable and the efficacy of equitable relief against these or other newspapers to avert anticipated damage is doubtful at best.

What is more, terminating the ban on publication of the relatively few sensitive documents the government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do. Prior restraints require an unusually heavy justification under the First

Amendment; but failure by the government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.

When the Espionage Act was under consideration in 1917, Congress eliminated from the bill a provision that would have given the president broad powers in time of war to proscribe, under threat of criminal penalty, the publication of various categories of information related to the national defense. Congress at that time was unwilling to clothe the president with such far-reaching powers to monitor the press, and those opposed to this part of the legislation assumed that a necessary concomitant of such power was the power to "filter out the news to the people through some man." 55 Cong.Rec. 2008 (1917) [remarks of Senator Ashurst]. However, these same members of Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed. Senator Ashurst, for example, was quite sure that the editor of such a newspaper "should be punished if he did publish information as to the movements of the fleet, the troops, the aircraft, the location of powder factories, the location of defense works, and all that sort of thing." 55 Cong.Rec. 1009 (1917).

The criminal code contains numerous provisions potentially relevant to these cases. Section 797 makes it a crime to publish certain photographs or drawings of military installations. Section 798, also in precise language, proscribes knowing and willful publications of any classified information concerning the cryptographic systems or communication intelligence activities of the United States as well as any information obtained from communication intelligence operations. If any of the material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.

The same would be true under those sections of the criminal code casting a wider net to protect the national defense. Section 793(e) makes it a criminal act for any unauthorized possessor of a document "relating to national defense" either (1) willfully to communicate or cause to be communicated that document to any person not entitled to receive it or (2) willfully to retain the document and fail to deliver it to an officer of the United States entitled to receive it. The subsection was added in 1950 because pre-existing law provided no penalty for the unauthorized possessor unless demand for the documents was made. "The dangers surrounding the unauthorized possession of such items are self-evident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand." S.Rep.No.2369, 81st Cong., 2d Sess., 9 (1950). Of course, in the cases before us, the unpublished documents have been demanded by the United States and their import has been made known at least to counsel for the newspapers involved. In *Gorin v. United States*, 312 U.S. 19, 28 (1941), the words "national defense" as used in a predecessor of § 793 were held by a unanimous court to have "a well understood connotation"—a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness"—and to be "sufficiently definite to apprise the public of prohibited activities" and to be consonant with due process. 312 U.S., at 28. Also, as construed by the Court in Gorin, information "connected with the national defense" is obviously not limited to that threatening "grave and irreparable" injury to the United States.

It is thus clear that Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. Cf. *Youngstown Sheet & Tube* Co. *v. Sawyer*, 343 U.S. 579, 585–586 (1952); see also id., at 593–628 (Frankfurter, J., concurring). It has not, however, authorized the injunctive remedy against threatened publication. It has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press. I am not, of course, saying that either of these newspapers has yet committed a crime or that either would commit a crime if they published all the material now in their possession. That matter must await resolution in the context of a criminal proceeding if one is instituted by the United States. In that event, the issue of guilt or innocence would be determined by procedures and standards quite dif-

ferent from those that have purported to govern these injunctive proceedings.

Justice MARSHALL, concurring.

The government contends that the only issue in this case is whether in a suit by the United States, "the First Amendment bars a court from prohibiting a newspaper from publishing material whose disclosure would pose a grave and immediate danger to the security of the United States." Brief of the government, at 6. With all due respect, I believe the ultimate issue in this case is even more basic than the one posed by the solicitor general. The issue is whether this Court or the Congress has the power to make law.

In this case there is no problem concerning the president's power to classify information as "secret" or "top secret." Congress has specifically recognized presidential authority, which has been formally exercised in Executive Order 10501, to classify documents and information. See, eg., 18 U.S.C.A. § 798; 50 U.S.C.A. § 783. Nor is there any issue here regarding the president's power as chief executive and commander in chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks.

The problem here is whether in this particular case the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest. See *In re Debs*, 158 U.S. 564, 584 (1895). The government argues that in addition to the inherent power of any government to protect itself, the president's power to conduct foreign affairs and his position as commander in chief give him authority to impose censorship on the press to protect his ability to deal effectively with foreign nations and to conduct the military affairs of the country. Of course, it is beyond cavil that the president has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as commander in chief. * * * And in some situations it may be that under whatever inherent powers the government may have, as well as the implicit authority derived from the president's mandate to conduct foreign affairs and to act as commander in chief, there is a basis for the invocation of the equity jurisdiction of this Court as an aid to prevent the publication of material damaging to "national security," however that term may be defined.

It would, however, be utterly inconsistent with the concept of separation of power for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these coequal branches of government if when the executive has adequate authority granted by Congress to protect "national security" it can choose instead to invoke the contempt power of a court to enjoin the threatened conduct. The Constitution provides that Congress shall make laws, the president execute laws, and courts interpret law. *Youngstown Sheet & Tube* Co. *v. Sawyer*, 343 U.S. 579 (1952). It did not provide for government by injunction in which the courts and the Executive can "make law" without regard to the action of Congress. It may be more convenient for the executive if it need only convince a judge to prohibit conduct rather than to ask the Congress to pass a law and it may be more convenient to enforce a contempt order than seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the executive has probable cause to believe are violating the law. But convenience and political considerations of the moment do not justify a basic departure from the principles of our system of government.

In this case we are not faced with a situation where Congress has failed to provide the executive with broad power to protect the Nation from disclosure of damaging state secrets. Congress has on several occasions given extensive consideration to the problem of protecting the military and strategic secrets of the United States. This consideration has resulted in the enactment of statutes making it a crime to receive, disclose, communicate, withhold, and publish certain documents, photographs, instruments, appliances, and information. The bulk of these statutes are found in chapter 37 of U.S.C.A. Title 18, entitled Espionage and Censorship. In that chapter, Congress has provided penalties ranging from a $10,000 fine to death for violating the various statutes.

Thus it would seem that in order for this Court to issue an injunction it would require a showing that such an injunction would enhance the already existing power of the government tract. See *Bennett v. Laman*, 277 N.Y. 368, 14 N.E.2d 439 (1938). It is a traditional axiom of equity that a court of equity will not do a useless thing just as it is a traditional axiom that equity will not enjoin the commission of a crime. Here there has been no attempt to make such a showing. The solicitor general does not even mention in his brief whether the

government considers there to be probable cause to believe a crime has been committed or whether there is a conspiracy to commit future crimes.

If the government had attempted to show that there was no effective remedy under traditional criminal law, it would have had to show that there is no arguably applicable statute. Of course, at this stage this Court could not and cannot determine whether there has been a violation of a particular statute nor decide the constitutionality of any statute. Whether a good-faith prosecution could have been instituted under any statute could, however, be determined. * * *

It is true that Judge Gurfein found that Congress had not made it a crime to publish the items and material specified in § 793(e): He found that the words "communicates, delivers, transmits * * * " did not refer to publication of newspaper stories. And that view has some support in the legislative history and conforms with the past practice of using the statute only to prosecute those charged with ordinary espionage. But see 103 Cong.Rec. 10449 [remarks of Sen. Humphrey]. Judge Gurfein's view of the statute is not, however, the only plausible construction that could be given. See my Brother White's concurring opinion.

Even if it is determined that the government could not in good faith bring criminal prosecutions against the *New York Times* and the *Washington Post*, it is clear that Congress has specifically rejected passing legislation that would have clearly given the president the power he seeks here and made the current activity of the newspapers unlawful. When Congress specifically declines to make conduct unlawful it is not for this Court to redecide those issues—to overrule Congress. See *Youngstown Sheet & Tube v. Sawyer*, 345 U.S. 579 (1952).

On at least two occasions Congress has refused to enact legislation that would have made the conduct engaged in here unlawful and given the president the power that he seeks in this case. In 1917 during the debate over the original Espionage Act, still the basic provisions of § 793, Congress rejected a proposal to give the president in time of war or threat of war authority to directly prohibit by proclamation the publication of information relating to national defense that might be useful to the enemy. * * *

Congress rejected this proposal after war against Germany had been declared even though many believed that there was a grave national emergency and that the threat of security leaks and espionage were serious. The Executive has not gone to Congress and requested that the decision to provide such power be reconsidered. Instead, the executive comes to this Court and asks that it be granted the power Congress refused to give.

* * * Senator Cotton, proposed that "Congress enact legislation making it a crime for any person willfully to disclose without proper authorization, for any purpose whatever, information classified 'secret' or 'top secret,' knowing, or having reasonable grounds to believe, such information to have been so classified." Report of Commission on Governmental Security 619–620 (1957). After substantial floor discussion on the proposal, it was rejected. See 103 Cong.Rec. 10447–10450. If the proposal that Senator Cotton championed on the floor had been enacted, the publication of the documents involved here would certainly have been a crime. Congress refused, however, to make it a crime. * * *

Either the government has the power under statutory grant to use traditional criminal law to protect the country or, if there is no basis for arguing that Congress has made the activity a crime, it is plain that Congress has specifically refused to grant the authority the government seeks from this Court. In either case this Court does not have authority to grant the requested relief. It is not for this Court to fling itself into every breach perceived by some government official nor is it for this Court to take on itself the burden of enacting law, especially law that Congress has refused to pass.

I believe that the judgment of the United States Court of Appeals for the District of Columbia should be affirmed and the judgment of the United States court of Appeals for the Second Circuit should be reversed insofar as it remands the case for further hearings.

Chief Justice BURGER, dissenting.

So clear are the constitutional limitations on prior restraint against expression, that from the time of *Near v. Minnesota*, 283 U.S. 697 (1931), until recently in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior restraints against publication. Adherence to this basic constitutional principle, however, does not make

this case a simple one. In this case, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the executive. Only those who view the First Amendment as an absolute in all circumstances—a view I respect, but reject—can find such a case as this to be simple or easy.

This case is not simple for another and more immediate reason. We do not know the facts of the case. No district judge knew all the facts. No court of appeals judge knew all the facts. No member of this Court knows all the facts.

Why are we in this posture, in which only those judges to whom the First Amendment is absolute and permits of no restraint in any circumstances or for any reason, are really in a position to act?

I suggest we are in this posture because these cases have been conducted in unseemly haste. Justice Harlan covers the chronology of events demonstrating the hectic pressures under which these cases have been processed and I need not restate them. The prompt setting of these cases reflects our universal abhorrence of prior restraint. But prompt judicial action does not mean unjudicial haste.

Here, moreover, the frenetic haste is due in large part to the manner in which the *Times* proceeded from the date it obtained the purloined documents. It seems reasonably clear now that the haste precluded reasonable and deliberate judicial treatment of these cases and was not warranted. The precipitous action of this Court aborting a trial not yet completed is not the kind of judicial conduct which ought to attend the disposition of a great issue.

The newspapers make a derivative claim under the First Amendment; they denominate this right as the public right-to-know; by implication, the *Times* asserts a sole trusteeship of that right by virtue of its journalist "scoop." The right is asserted as an absolute. Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout of fire in a crowded theater. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in *Near v. Minnesota*. There are no doubt other exceptions no one has had occasion to describe or discuss. Conceivably such exceptions may be lurking in these cases and would have been flushed had they been properly considered in the trial courts, free from unwarranted deadlines and frenetic pressures. A great issue of this kind should be tried in a judicial atmosphere conducive to thoughtful, reflective deliberation, especially when haste, in terms of hours, is unwarranted in light of the long period the *Times*, by its own choice, deferred publication.

It is not disputed that the *Times* has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the *Times*, presumably in its capacity as trustee of the public's "right to know," has held up publication for purposes it considered proper and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged right-to-know has somehow and suddenly become a right that must be vindicated instanter.

Would it have been unreasonable, since the newspaper could anticipate the government's objections to release of secret material, to give the government an opportunity to review the entire collection and determine whether agreement could be reached on publication? Stolen or not, if security was not in fact jeopardized, much of the material could no doubt have been declassified, since it spans a period ending in 1968. With such an approach—one that great newspapers have in the past practiced and stated editorially to be the duty of an honorable press—the newspapers and government might well have narrowed the area of disagreement as to what was and was not publishable, leaving the remainder to be resolved in orderly litigation if necessary. To me it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret government documents. That duty, I had thought—perhaps naively—was to report forthwith, to responsible public officers. This duty rests on taxi drivers, Justices and the New York

Times. The course followed by the *Times* whether so calculated or not, removed any possibility of orderly litigation of the issues. If the action of the judges up to now has been correct, that result is sheer happenstance.

Our grant of the writ before final judgment in the *Times* case aborted the trial in the District Court before it had made a complete record pursuant to the mandate of the Court of Appeals, Second Circuit.

The consequence of all this melancholy series of events is that we literally do not know what we are acting on. As I see it we have been forced to deal with litigation concerning rights of great magnitude without an adequate record, and surely without time for adequate treatment either in the prior proceedings or in this Court. It is interesting to note that counsel in oral argument before this Court were frequently unable to respond to questions on factual points. Not surprisingly they pointed out that they had been working literally "around the clock" and simply were unable to review the documents that give rise to these cases and were not familiar with them. This Court is in no better posture. I agree with Justice Harlan and Justice Blackmun but I am not prepared to reach the merits.[3]

I would affirm the Court of Appeals for the Second Circuit and allow the district court to complete the trial aborted by our grant of certiorari meanwhile preserving the *status quo* in the *Post* case. I would direct that the district court on remand give priority to the *Times* case to the exclusion of all other business of that court but I would not set arbitrary deadlines.

I should add that I am in general agreement with much of what Justice White has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.

We all crave speedier judicial processes but when judges are pressured as in these cases the result is a parody of the judicial process.

Justice HARLAN, with whom the Chief Justice and Justice Blackmun join, dissenting.

* * *

With all respect, I consider that the Court has been almost irresponsibly feverish in dealing with these cases.

Both the Circuit of Appeals for the Second Circuit and the Court of Appeals for the District of Columbia Circuit rendered judgment on June 23. The New York Times' petition for certiorari, its motion for accelerated consideration thereof, and its application for interim relief were filed in this Court on June 24 at about 11 a.m. The application of the United States for interim relief in the *Post* case was also filed here on June 24, at about 7:15 p.m. This Court's order setting a hearing before us on June 26 at 11 a.m., a course which I joined only to avoid the possibility of even more peremptory action by the Court, was issued less than 24 hours before. The record in the *Post* case was filed with the Clerk shortly before 1 p.m. on June 25; the record in the *Times* case did not arrive until 7 or 8 o'clock that same night. The briefs of the parties were received less than two hours before argument on June 23.

This frenzied train of events took place in the name of the presumption against prior restraints created by the First Amendment. Due regard for the extraordinarily important and difficult questions involved in these litigations should have led the Court to shun such a precipitate timetable. In order to decide the merits of these cases properly, some or all of the following questions should have been faced:

1. Whether the attorney general is authorized to bring these suits in the name of the United States. Compare *In re Debs*, 158 U.S. 564 (1895), with *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). This question involves as well the construction and validity of a singularly opaque statute—the Espionage Act, 18 U.S.C.A. § 793(e).
2. Whether the First Amendment permits the federal courts to enjoin publication of stories which would present a serious threat to national security. See *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (dictum).
3. Whether the threat to publish highly secret documents is of itself a sufficient implication of national security to justify an injunction on the theory that

3. With respect to the question of inherent power of the executive to classify papers, records and documents as secret, or otherwise unavailable for public exposure, and to secure aid of the courts for enforcement, there may be an analogy with respect to this Court. No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.

regardless of the contents of the documents harm enough results simply from the demonstration of such a breach of secrecy.

4. Whether the unauthorized disclosure of any of these particular documents would seriously impair the national security.

5. What weight should be given to the opinion of high officers in the executive branch of the government with respect to questions 3 and 4.

6. Whether the newspapers are entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the government's possession and that the newspapers received them with knowledge that they had been feloniously acquired. Cf. *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489 (C.A.D.C. 1968).

7. Whether the threatened harm to the national security or the government's possessory interest in the documents justifies the issuance of an injunction against publication in light of—

a. The strong First Amendment policy against prior restraints on publication;

b. The doctrine against enjoining conduct in violation of criminal statutes; and

c. The extent to which the materials at issue have apparently already been otherwise disseminated.

These are difficult questions of fact, of law, and of judgment; the potential consequences of erroneous decision are enormous. The time which has been available to us, to the lower courts, and to the parties has been wholly inadequate for giving these cases the kind of consideration they deserve. It is a reflection on the stability of the judicial process that these great issues—as important as any that have arisen during my time on the Court—should have been decided under the pressures engendered by the torrent of publicity that has attended these litigations from their inception.

Forced as I am to reach the merits of these cases, I dissent from the opinion and judgments of the Court. Within the severe limitations imposed by the time constraints under which I have been required to operate, I can only state my reasons in telescoped form, even though in different circumstances I would have felt constrained to deal with the cases in the fuller sweep indicated above.

It is a sufficient basis for affirming the Court of Appeals for the Second Circuit in the *Times* litigation to observe that its order must rest on the conclusion that because of the time elements the government had not been given an adequate opportunity to present its case to the district court. At the least this conclusion was not an abuse of discretion.

In the *Post* litigation the government had more time to prepare; this was apparently the basis for the refusal of the Court of Appeals for the District of Columbia Circuit on rehearing to conform its judgment to that of the second circuit. But I think there is another and more fundamental reason why this judgment cannot stand—a reason which also furnishes an additional ground for not reinstating the judgment of the district court in the *Times* litigation, set aside by the court of appeals. It is plain to me that the scope of the judicial function in passing upon the activities of the executive branch of the government in the field of foreign affairs is very narrowly restricted. This view is, I think, dictated by the concept of separation of powers upon which our constitutional system rests.

In a speech on the floor of the House of Representatives, Chief Justice John Marshall, then a member of that body, stated:

> The president is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Annals, 6th Cong., col. 613 (1800).

* * * From that time, shortly after the founding of the Nation, to this, there has been no substantial challenge to this description of the scope of executive power. * * *

* * *

The power to evaluate the "pernicious influence" of premature disclosure is not, however, lodged in the executive alone. I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the president's foreign relations power. Constitutional considerations forbid "a complete abandonment of judicial control." Cf. *United States v. Reynolds*, 345 U.S. 1, 8 (1953). Moreover, the judiciary may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the executive department concerned—here the secretary of state or

the secretary of defense—after actual personal consideration by that officer. This safeguard is required in the analogous area of executive claims of privilege for secrets of state. See *United States v. Reynolds*, at 8 and n. 20; *Duncan v. Cammell, Laird & Co.*, (1942) A.C. 624, 638 (House of Lords).

But in my judgment the judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security.

* * *

Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow. I can see no indication in the opinions of either the district court or the court of appeals in the *Post* litigation that the conclusions of the executive were given even the deference owing to an administrative agency, much less that owing to a coequal branch of the government operating within the field of its constitutional prerogative.

Accordingly, I would vacate the judgment of the Court of Appeals for the District of Columbia Circuit on this ground and remand the case for further proceedings in the district court. Before the commencement of such further proceedings, due opportunity should be afforded the government for procuring from the secretary of state or the secretary of defense or both an expression of their views on the issue of national security. The ensuing review by the district court should be in accordance with the views expressed in this opinion. And for the reasons stated above I would affirm the judgment of the Court of Appeals for the Second Circuit.

Pending further hearings in each case conducted under the appropriate ground rules, I would continue the restraints on publication. I cannot believe that the doctrine prohibiting prior restraints reaches to the point of preventing courts from maintaining the *status quo* long enough to act responsibly in matters of such national importance as those involved here.

Justice BLACKMUN, dissenting.

I join Justice Harlan in his dissent. I also am in substantial accord with much that Justice White says, by way of admonition, in the latter part of his opinion.

At this point the focus is on *only* the comparatively few documents specified by the government as critical. So far as the other material—vast in amount—is concerned, let it be published and published forthwith if the newspapers, once the strain is gone and the sensationalism is eased, still feel the urge so to do.

But we are concerned here with the few documents specified from the 47 volumes. * * *

The *New York Times* clandestinely devoted a period of three months examining the 47 volumes that came into its unauthorized possession. Once it had begun publication of material from those volumes, the New York case now before us emerged. It immediately assumed, and ever since has maintained, a frenetic pace and character. Seemingly, once publication started, the material could not be made public fast enough. Seemingly, from then on, every deferral or delay, by restraint or otherwise, was abhorrent and was to be deemed violative of the First Amendment and of the public's "right immediately to know." Yet that newspaper stood before us at oral argument and professed criticism of the government for not lodging its protest earlier than by a Monday telegram following the initial Sunday publication.

The District of Columbia case is much the same.

Two federal district courts, two United States courts of appeals, and this Court—within a period of less than three weeks from inception until today—have been pressed into hurried decision of profound constitutional issues on inadequately developed and largely assumed facts without the careful deliberation that hopefully, should characterize the American judicial process. There has been much writing about the law and little knowledge and less digestion of the facts. In the New York case the judges, both trial and appellate, had not yet examined the basic material when the case was brought here. In the District of Columbia case, little more was done, and what was accomplished in this respect was only on required remand, with the *Washington Post*, on the excuse that it was trying to protect its source of information, initially refusing to reveal what material it actually possessed, and with the district court forced to make assumptions as to that possession.

With such respect as may be due to the contrary view, this, in my opinion, is not the way to try a lawsuit of this magnitude and asserted importance. It is not the way for federal courts to adjudicate, and to be required to adjudicate, issues that allegedly concern the Nation's vital welfare. The country would

be none the worse off were the cases tried quickly, to be sure, but in the customary and properly deliberative manner. The most recent of the material, it is said, dates no later than 1968, already about three years ago, and the *Times* itself took three months to formulate its plan of procedure and, thus, deprived its public for that period.

The First Amendment, after all, is only one part of an entire Constitution. Article II of the great document vests in the executive branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety. Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court. See, for example, *Near v. Minnesota*, 283 U.S. 697, 708 (1931), and *Schenck v. United States*, 249 U.S. 47, 52 (1919). What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent,. Such standards are not yet developed. The parties here are in disagreement as to what those standards should be. But even the newspapers conceded that there are situations where restraint is in order and is constitutional. Justice Holmes gave us a suggestion when he said in *Schenck*,

"It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." 249 U.S., at 52.

I therefore would remand these cases to be developed expeditiously, of course, but on a schedule permitting the orderly presentation of evidence from both sides, with the use of discovery, if necessary, as authorized by the rules, and with the preparation of briefs, oral argument and court opinions of a quality better than has been seen to this point. In making this last statement, I criticize no lawyer or judge. I know from past personal experience the agony of time pressure in the preparation of litigation. But these cases and the issues involved and the courts, including this one, deserve better than has been produced thus far.

It may well be that if these cases were allowed to develop as they should be developed, and to be tried as lawyers should try them and as courts should hear them, free of pressure and panic and sensationalism, other light would be shed on the situation and contrary considerations, for me, might prevail. But that is not the present posture of the litigation.

The Court, however, decides the cases today the other way. I therefore add one final comment.

I strongly urge, and sincerely hope, that these two newspapers will be fully aware of their ultimate responsibilities to the United States of America. Judge Wilkey, dissenting in the District of Columbia case, after a review of only the affidavits before his court (the basic papers had not then been made available by either party), concluded that there were a number of examples of documents that if in the possession of the *Post*, and if published, "could clearly result in great harm to the nation," and he defined "harm" to mean "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiations with our enemies, the inability of our diplomats to negotiate * * *." I, for one, have now been able to give at least some cursory study not only to the affidavits, but to the material itself. I regret to say that from this examination I fear that Judge Wilkey's statements have possible foundation. I therefore share his concern. I hope that damage already has not been done. If, however, damage has been done, and if, with the Court's action today, these newspapers proceed to publish the critical documents and there results therefrom "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate," to which list I might add the factors of prolongation of the war and of further delay in the freeing of United States prisoners, then the Nation's people will know where the responsibility for these sad consequences rests.

The judgment of the Court of Appeals for the District of Columbia Circuit is therefore affirmed. The order of the Court of Appeals for the Second Circuit is reversed and the case is remanded with directions to enter a judgment affirming the judgment of the District Court for the Southern District of New York. The stays entered June 25, 1971, by the Court are vacated. The judgments shall issue forthwith.

So ordered.

COMMENT

The doctrine urged by the government was that the president has the right to enjoin publication of a news story when the context of the story threatens "grave and irreparable" injury to the public interest. Justice White denied both the existence and the validity of this doctrine at least in the absence of legislation authorizing the courts to grant injunctions in such circumstances.

Freedom of the press can be viewed as providing two modes of protection. One is freedom from prior restraint. The second is freedom from subsequent punishment. Criminal prosecution of Sulzberger or Graham, publishers respectively of the *New York Times* and the *Washington Post, after* publication of the Pentagon papers would be an example of subsequent punishment. Apparently Justice White was of the opinion that the "extraordinary protection" granted the press by the First Amendment against prior restraints is to be distinguished from the protection afforded the press by the First Amendment in the case of subsequent punishments. The greater protection from prior restraint presumably is based on the premise that a restraint on publication *prior* to publication deprives society of the benefit of the idea. The punishment of the writer or publisher *subsequent* to publication still has not hindered the dissemination of the idea. Is this a persuasive distinction?

If the publishers of newspapers are free from prior restraint *prior* to publication but know that *after* publication they may go to jail, doesn't this effectively restrain publication in the first place? The lesser protection against subsequent punishment itself may act as a prior restraint. In effect, the lesser freedom from subsequent punishment forces publishers and journalists to become martyrs when they want to publish information the government desires to suppress.

For Justice White, as for Justice Stewart, the case for criminal convictions against those publishing the Pentagon Papers was much stronger than the case for preventing by injunction the publication of the papers: "I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint." Why? Apparently because, in White's view, Congress had authorized criminal prosecutions, but it had not authorized the "injunctive remedy against threatened publication." The journalist and the civil libertarian at this point might wonder whether the 1971 *New York Times* case is a victory or a trap for freedom of information and freedom from prior restraint. Newspersons are being told that they may publish but will have to put their bodies on the line if they do. Four of the nine justices would seem to condone criminal penalties if indeed United States interests have been gravely injured.

Congress had not by statute authorized the injunctions against the press to prevent publication of material posing a danger to the security interests of the nation, even though it had been asked to do so in two world wars. This single fact was determinative for Justice Marshall, as it had been for Justices White and Stewart. The issue, said Justice Marshall, was whether the Court or the Congress should make law. But the Supreme Court has not hesitated to make law before.

Perhaps more squarely than any of the other opinions, Burger's dissent raises the issue of accountability: who should make the ultimate decisions about how far the reach of a free press can extend and to what extent should the demands of government for confidentiality in its dealings be honored? Chief Justice Burger was greatly disturbed by the fact that in the haste of decision the Court had neither time to study the documents themselves nor to consider soberly the great issues presented.

Describing the public right to know as a derivative First Amendment claim, Burger protested the *Times'* apparent position that it was the absolute trustee of the public right to know. He argued that the First Amendment itself was not an absolute, much less were any radiations the Amendment might throw off such as the public's right to know.

Burger's reactions to the issues of the *Times* case are at once protective of the information process and sympathetic to the need of government for confidentiality. The Chief Justice says that the government should have been given an opportunity to review the papers in possession of the *Times* in the hope that agreement about publication could have been reached. On the other hand, the fact that the papers were stolen was in Burger's view no bar to declassification of some of them.

Burger thought it was anomalous that the *Times* would not allow the government to examine the Pentagon Papers in the *Times'* possession for fear this might jeopardize the paper's sources. Yet, said Burger, the *Times* denies the government the right to keep the papers secret. But is the government really interested in protecting sources in the same way the *New York Times* was interested in protecting

its sources? Certainly, there was a respectable body of opinion in the country which believed that the government was anxious to protect the identities of participants in decisions on the Vietnam involvement as well as the nature of some of the decisions themselves. The *Times*, however, was anxious to protect the sources which made it possible to learn the identities of participants in vital national decisions. In other words, the interest of the *Times* in protecting its sources was procedural in nature. From whom the newspapers receive information is, informationally speaking, much less significant than the information obtained. Secrecy over such sources is designed to protect the *future* of the information flow. The government, on the other hand, was interested in protecting confidentiality to shield *prior* decisions of the highest substantive character. As a First Amendment matter, doesn't this distinction support the *Times* and not the government?

Chief Justice Burger is truly astonished that the *Times* did not report to the government that papers stolen from the government were in its possession. But the responsibilities to government in this regard were surely overshadowed in the *Times'* judgment by its obligations to the information process, a duty which it believed had First Amendment significance. In the last analysis, the question presented was a choice between a newspaper's determination of the legitimate demands of the public's right to know and the executive's conception of what must remain secret. Which determination should prevail?

Is a consequence of Justice Black's absolute view of the First Amendment that there is no recourse if the newspapers are not aware of their responsibilities? It is argued that at least the executive is subject to popular election and may be turned out of office if it is faithless to its responsibilities, but the press is not similarly accountable to the people.

A majority of the Court appeared to agree with Justice Brennan's observation that the basic error in the entire proceeding was Judge Gurfein's issuance of the temporary restraining order against the *New York Times*. Why then were there so many opinions in the case? In an interview, Chief Justice Burger answered this question by saying that it was decided that if each justice wrote his own opinion, that would make it easier to get an expedited decision of the case.

Justice Black emphasized the unprecedented character of the judicial restraint on the press. The *Pentagon Papers* case was the first time an American newspaper had been restrained by a court order from publishing articles and documents the content of which could only be surmised by the government and whose damaging properties therefore could only be assumed. Viewed from that perspective, the 6–3 Supreme Court determination that the issuance of a restraining order in such circumstances was unconstitutional was a victory for freedom of information and freedom of the press. In this regard, the victory was more than an abstract vindication of constitutional theory. The decision unquestionably would deprive the whole government classification program of its legitimacy and its mystery, developments which are in the long-term interest of opening up the information process.

See the material on the Freedom of Information Act set forth in the text at p. 457. How could the Freedom of Information Act have been used to declassify the Pentagon Papers?

The *Times* agonized for three months over whether to publish the Pentagon Papers. They chose to publish and thereby invited a bitter conflict with government. Why? Perhaps the *Times* was still feeling the burn it got when it "cooperated" with the Administration prior to the Bay of Pigs fiasco and, therefore, decided never to get caught in that situation again. Five years after the abortive invasion it was disclosed that the *New York Times* had prior knowledge of the project but had declined to publish it, at the request of President John F. Kennedy, because of national security considerations. Clifton Daniel, then managing editor of the paper, combined this disclosure with his conclusion that the Bay of Pigs operation "might well have been canceled, and the country would have been saved enormous embarrassment, if the *New York Times* and other newspapers had been more diligent in the performance of their duty."

Finally, there is a minor but important theme in the whole *Pentagon Papers* case—the issue of whether government ought to be able to imprison history.

In the bizarre *Progressive* case, the federal government sought to prevent *The Progressive* magazine from publishing an article on how to make a hydrogen bomb. The article was based on material that was publicly available. At first, the federal district court granted the government's request for a temporary injunction, restraining publication of the article by *The Progressive* on the ground that the article fell "within the narrow area recognized by the court in *Near v. Minnesota* in which a prior restraint on publication is appropriate." Which *Near* exception was the court relying on? The federal dis-

trict court also cited Justice Stewart's opinion in the *Pentagon Papers* case as support for its view that a temporary injunction should be issued. The Atomic Energy Act contained a provision authorizing the issuance of injunctive relief to prevent disclosure of particular types of information. Assuming that that provision applied to *The Progressive* article, would the existence of such a statutory provision distinguish *The Progressive* case from the *Pentagon Papers* case? Arguably, it would, because the fact that there was no statutory basis for the granting of injunctive relief in the *Pentagon Papers* case was relied on by a number of justices as ground for not granting relief for the government.

Assuming that the statutory provision did apply to the article in *The Progressive* case, would the statutory provision be valid under the First Amendment? This is a matter of speculation since other newspapers began to publish material similar to that contained in *The Progressive* article, and the government decided not to go forward in its effort to secure permanent injunctive relief concerning *The Progressive* article. See *United States v. Progressive, Inc.*, 467 F.Supp. 990 (W.D.Wis.1979), appeal dismissed 610 F.2d 819 (7th Cir.).

Progressive editor Erwin Knoll is on record as saying that the greatest moral error of his life was *not* to have published the original article. Disobey a court injunction, Columbia University law professor Vincent Blasi argued in rebuttal, and you escalate the totalitarian dynamic. The government, as has been noted, based its arguments primarily on provisions of the Atomic Energy Act prohibiting communication, transmission, and disclosure of certain categories of information which, the government contended, were either "classified at birth" or of a technical nature not protected by the First Amendment.

Judge Warren in his opinion for the federal district court saw the issue as one between freedom of speech and press and the freedom to live. If our right to live is extinguished, he said, the right to publish becomes moot. His test would have been that of Justices White and Stewart in their *Pentagon Papers* opinions—"immediate, direct, irreparable harm to the interests of the United States * * * to our nation and its people."

Abandonment of the case by the government was another lost opportunity for appellate courts to face the ultimate and still unresolved question of what is to be the constitutional relationship between prior restraints and national security. In answering that question, the courts will eventually have to define both prior restraints and national security, two complex concepts in precarious balance.

Nebraska Press and the Future of Prior Restraint

A major case involving the issue of the constitutional validity of prior restraints against the press is the so-called "gag order" case, *Nebraska Press Ass'n v. Stuart*, text, p. 113. Although the case is discussed primarily in the free press–fair trial materials, text, Chapter 5, it has authoritative significance on the present status of prior restraints against the press.

The decision of the Court in *Nebraska Press Ass'n* stretched the thesis advanced in earlier cases that there is a presumption against prior restraints and that the state must meet a heavy burden before such a restraint can issue. In result, the *Nebraska Press* case reached the same conclusion as had its predecessors—*Near* and the *Pentagon Papers* case. In each case, the Supreme Court refused to issue a prior restraint against the press.

And yet, although the press was victorious on each occasion, the Court appeared determined to keep alive the possibility that in some undescribed circumstances a prior restraint against the press might be permissible. In short, although the Court has erected the strongest possible obstacles to the issuance of a prior restraint in the context of a "gag order" case, it still appeared resolved to reject "the proposition that a prior restraint can never be employed." Justice White, in a concurring opinion, suggested that if the consequence of the Court's *Nebraska Press* decision is to refuse to issue "gag orders" against the press in case after case on the ground that they are invalid prior restraints, then "we should at some point announce a more general rule and avoid the interminable litigation that our failure to do so would necessarily entail."

Justice Brennan's passionate distaste for prior restraints against the press is made vividly clear in his concurring opinion in *Nebraska Press*. He comments proudly on "the rarity of prior restraint cases of any type in this Court's jurisprudence." Analyzing the prior case law, he finds only one occasion where the exception to the presumption against prior restraints against the press might be deemed sufficient

to authorize suppression before publication, i.e., the so-called military security exception in *Near*. This would be the situation where a newspaper plans to publish the sailing date of a troop ship in war, or its modern counterpart. The "overriding countervailing" interests that justify such suppression in wartime were, in his view, hardly comparable to the case for a prior restraint against the press in the interests of a fair trial.

Does the following state the essence of the Brennan concurrence? Although prior restraints are not always invalid, prior restraints in the form of "gag orders" against the press in the free press–fair trial context are always invalid. Perhaps the difference between Chief Justice Burger and Justice Brennan on this point is that the Burger opinion kept open the possibility, no matter how remote, that some "gag orders" against the press were yet conceivable while the Brennan view would remove that possibility. Brennan would adhere to the military security exception, despite the general freedom he would accord the press from prior restraint, but would not grant a new exception in the interest of fair trial. Yet the latter is a constitutional value, enshrined in the Sixth Amendment, while secrecy in wartime, although it may be a societal value of great importance, is not mentioned in the constitution.

On balance, if one compares *Near* and *New York Times* with the decision in *Nebraska Press*, the conclusion appears clear that never in American constitutional history has the barrier posed by the First Amendment to the issuance of prior restraints against the press been higher and more difficult to surmount. See *City of Lakewood v. Plain Dealer Publishing Co.*, text, p. 40.

Freedom of Circulation and Distribution

UNITED STATES, ex rel., MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING CO. v. BURLESON

255 U.S. 407, 41 S.CT. 352, 65 L.ED. 704 (1921).

Justice CLARKE delivered the opinion of the Court.

[A]n order was entered, revoking the second-class mail privilege granted to the *Milwaukee Leader*. * * *

[The Milwaukee Social Democratic Publishing Company then instituted suit asking for mandamus to command the postmaster general to restore the newspaper's second-class mailing privilege.]

* * *

The grounds upon which the relator relies are, in substance, that to the extent that the Espionage Act confers power upon the postmaster general to make the order entered against it, that act is unconstitutional, because it does not afford relator a trial in a court of competent jurisdiction; that the order deprives relator of the right of free speech, is destructive of the rights of a free press, and deprives it of its property without due process of law.

* * *

One entire title of this act (title 12) is devoted to "Use of the Mails," and in the exercise of its practically plenary power over the mails, Congress therein provided that any newspaper published in violation of any of the provisions of the act should be "nonmailable" and should not be "conveyed in the mails or delivered from any post office or by any letter carrier."

* * *

Without further discussion of the articles, we cannot doubt that they conveyed to readers of them false reports and false statements, with intent to promote the success of the enemies of the United States, and that they constituted a willful attempt to cause disloyalty and refusal of duty in the military and naval forces, and to obstruct the recruiting and enlistment service of the United States, in violation of the Espionage Law (*Schenck v. United States*), and that therefore their publication brought the paper containing them within the express terms of title 12 of that law, declaring that such a publication shall be "nonmailable" and "shall not be conveyed in the mails or delivered from any post office or by any letter carrier."

* * * The order of the postmaster general not only finds reasonable support in this record, but is amply justified by it.

* * *

Government is a practical institution, adapted to the practical conduct of public affairs. It would not be possible for the United States to maintain a reader in every newspaper office of the country, to approve in advance each issue before it should be allowed to enter the mails, and when, for more than five months, a paper had contained, almost daily, arti-

cles which, under the express terms of the statute, rendered it "nonmailable," it was reasonable to conclude that it would continue its disloyal publications, and it was therefore clearly within the power given to the postmaster general by R.S. § 396, "to execute all laws relating to the postal service," to enter, as was done in this case, an order suspending the privilege until a proper application and showing should be made for its renewal. The order simply withdrew from the relator the second-class privilege, but did not exclude its paper from other classes, as it might have done, and there was nothing in it to prevent reinstatement at any time. It was open to the relator to mend its ways, to publish a paper conforming to the law, and then to apply anew for the second-class mailing privilege. This it did not do, but for reasons not difficult to imagine, it preferred this futile litigation, undertaken upon the theory that a government competent to wage war against its foreign enemies was powerless against its insidious foes at home. Whatever injury the relator suffered was the result of its own choice and the judgment of the court of appeals is affirmed.

Justice BRANDEIS, dissenting. This case arose during the World War; but it presents no legal question peculiar to war. It is important, because what we decide may determine in large measure whether in times of peace our press shall be free.

* * *

It thus appears that the Postmaster General, in the exercise of a supposed discretion, refused to carry at second-class mail rates all future issues of the *Milwaukee Leader*, solely because he believed it had systematically violated the Espionage Act in the past. It further appears that this belief rested partly upon the contents of past issues of the paper filed with the return and partly upon "representations and complaints from sundry good and loyal citizens", whose statements are not incorporated in this record and which do not appear to have been called to the attention of the publisher of the *Milwaukee Leader* at the hearing or otherwise. It is this general refusal thereafter to accept the paper for transmission at the second-class mail rates which is challenged as being without warrant in law.

In discussing whether Congress conferred upon the postmaster general the authority which he undertook to exercise in this case, I shall consider, first, whether he would have had the power to exclude the paper altogether from all future mail service on the ground alleged; and, second, whether he had power to deny the publisher the second-class rate.

Power to exclude from the mails has never been conferred in terms upon the postmaster general. * * *

Until recently, at least, this appears never to have been questioned and the Post Office Department has been authoritatively advised that the power of excluding matter from the mail was limited to such specific matter as upon examination was found to be unmailable and that the postmaster general could not make an exclusion order operative upon future issues of a newspaper.

* * *

If such power were possessed by the postmaster general he would, in view of the practical finality of his decisions, become the universal censor of publications. For a denial of the use of the mail would be for most of them, tantamount to a denial of the right of circulation. * * *

The postmaster general does not claim here the power to issue an order directly denying a newspaper all mail service for the future. Indeed, he asserts that the mail is still open to the *Milwaukee Leader* upon payment of first, third, or fourth class rates. He contends, however, that in regard to second-class rates special provisions of law apply under which he may deny that particular rate at his discretion. This contention will now be considered. * * *

* * *

It is insisted that a citizen uses the mail at second-class rates, not as of right, but by virtue of a privilege or permission, the granting of which rests in the discretion of the postmaster general. * * * The certificate evidencing such freedom is spoken of as a permit. But, in fact, the right to the lawful postal rates is a right independent of the discretion of the postmaster general. The right and conditions of its existence are defined and rest wholly upon mandatory legislation of Congress. It is the duty of the postmaster general to determine whether the conditions prescribed for any rate exist. * * * And it is not a function which either involves or permits the exercise of discretionary power.

* * *

It clearly appears that there was no express grant of power to the postmaster general to deny second-class mail rates to future issues of a newspaper because in his opinion it had systematically violated

the Espionage Act in the past, and it seems equally clear that there is no basis for the contention that such power is to be implied. * * *

HANNEGAN v. ESQUIRE, INC.

327 U.S. 146, 66 S.CT. 456, 90 L.ED. 586 (1946).

Justice DOUGLAS delivered the opinion of the Court.

Congress has made obscene material nonmailable, 35 Stat. 1129, 18 U.S.C.A. § 334, and has applied criminal sanctions for the enforcement of that policy. It has divided mailable matter into four classes, periodical publications constituting the second-class. And it has specified four conditions upon which a publication shall be admitted to the second-class. The Fourth condition, which is the only one relevant here,[2] provides:

"Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows * * * Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

Respondent is the publisher of Esquire Magazine, a monthly periodical which was granted a second-class permit in 1933. In 1943, * * * a citation was issued to respondent by the then Postmaster General (for whom the present Postmaster General has now been substituted as petitioner) to show cause why that permit should not be suspended or revoked. * * * The gist of [this] holding is contained in the following excerpt from his opinion:

"The plain language of this statute does not assume that a publication must in fact be 'obscene' within the intendment of the postal obscenity statutes before it can be found not to be 'originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry.'

* * *

"A publication to enjoy these unique mail privileges and special preferences is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare."

* * *

The issues of Esquire Magazine under attack are those for January to November inclusive of 1943. The material complained of embraces in bulk only a small percentage of those issues. But the objectionable items, though a small percentage of the total bulk, were regular recurrent features which gave the magazine its dominant tone or characteristic. These include jokes, cartoons, pictures, articles, and poems. They were said to reflect the smoking-room type of humor, featuring, in the main, sex. * * *

An examination of the items makes plain, we think, that the controversy is not whether the magazine publishes "information of a public character" or is devoted to "literature" or to the "arts." It is whether the contents are "good" or "bad." To uphold the order of revocation would, therefore, grant the postmaster general a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred.

The second-class privilege is a form of subsidy. From the beginning Congress has allowed special rates to certain classes of publications. * * *

* * *

The policy of Congress has been clear. It has been to encourage the distribution of periodicals which disseminated "information of a public character" or which were devoted to "literature, the sciences, arts, or some special industry," because it was thought that those publications as a class contributed to the public good. The standards prescribed in the Fourth condition have been criticized, but not on the ground that they provide for censorship. * * *

* * *

2. The first three conditions are:

"First. It must regularly be issued at stated intervals as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications: Provided, That publications produced by the stencil, mimeograph, or hectograph process or in imitation of typewriting shall not be regarded as printed within the meaning of this clause."

We may assume that Congress has a broad power of classification and need not open second-class mail to publications of all types. The categories of publications entitled to that classification have indeed varied through the years. And the Court held in Ex parte Jackson, 96 U.S. 727, that Congress could constitutionally make it a crime to send fraudulent or obscene material through the mails. But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Justice Brandeis and Justice Holmes in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson.* Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. The provisions of the fourth condition would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country. * * *

Affirmed.

COMMENT

The Court in *Hannegan* does not reverse the majority opinion in the *Milwaukee Social Democratic Publishing* Co. case, although the cases are profoundly inconsistent.

In a dissenting opinion in the famous obscenity case, *Roth v. United States*, 354 U.S. 476 (1957), Justice Harlan made the following observation on conditioning the use of the mails:

> The hoary dogma of *Ex Parte Jackson*, 96 U.S. 726, and *Public Clearing House of Coyne*, 194 U.S. 497, that the use of the mails is a privilege on which the government may impose such conditions as it chooses, has long since evaporated. See Brandeis, J., dissenting in *Milwaukee Social Democratic Publishing Co. v. Burleson*.

On the other hand, *Milwaukee Pub.* Co. arose in the context of war and First Amendment rights. During wartime, First Amendment liberties, like other constitutionally protected civil liberties, have sometimes been subordinated to other governmental interests. It should be remembered that in *Schenck* Justice Holmes, writing the opinion for the Court, used the clear and present danger doctrine and still affirmed a conviction under the Espionage Act for the distribution of a pamphlet, during wartime, which advocated to drafted soldiers opposition to the war and the draft.

A more recent example of an attempt to use the mails for censorship purposes was the *Lamont* case which follows. In *Lamont*, the Supreme Court invalidated a federal statute which permitted the mail delivery of "communist political propaganda" which originated in a foreign country only if the addressee specifically requested such delivery. The Court unanimously invalidated the statute. But the Court was not unanimous in the rationalization offered for this conclusion.

LAMONT v. POSTMASTER GENERAL

381 U.S. 301, 85 S.CT. 1493, 14 L.ED.2D 398 (1965).

Justice DOUGLAS delivered the opinion of the Court.

These appeals present the same question: is § 305(a) of the Postal Service and Federal Employees Salary Act of 1962, 76 Stat. 840, constitutional as construed and applied? The statute provides in part:

"Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the secretary of the treasury pursuant to rules and regulations to be promulgated by him to be 'communist political propaganda,' shall be detained by the postmaster general upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the postmaster general to be desired by the addressee."

The statute defines "communist political propaganda" as political propaganda (as that term is defined in § 1(j) of the Foreign Agents Registration Act of 1938) which is issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions or from which foreign assistance is withheld pursuant to certain specified statutes. The statute contains an exemption from its provisions for mail addressed to government agencies and educational institutions,

or officials thereof, and for mail sent pursuant to a reciprocal cultural international agreement.

To implement the statute the Post Office maintains 10 or 11 screening points through which is routed all unsealed mail from the designated foreign countries. At these points the nonexempt mail is examined by customs authorities. When it is determined that a piece of mail is "communist political propaganda," the addressee is mailed a notice identifying the mail being detained and advising that it will be destroyed unless the addressee requests delivery by returning an attached reply card within 20 days.

Prior to March 1, 1965, the reply card contained a space in which the addressee could request delivery of any "similar publication" in the future. A list of the persons thus manifesting a desire to receive "communist political propaganda" was maintained by the Post Office. The government in its brief informs us that the keeping of this list was terminated, effective March 15, 1965. Thus, under the new practice, a notice is sent and must be returned for each individual piece of mail desired. The only standing instruction which it is now possible to leave with the Post Office is *not* to deliver any "communist political propaganda." And the solicitor general advises us that the Post Office Department "intends to retain its assumption that those who do not return the card want neither the identified publication nor any similar one arriving subsequently."

[This case] arose out of the Post Office's detention in 1963 of a copy of the *Peking Review #12* addressed to appellant, Dr. Corliss Lamont, who is engaged in the publishing and distributing of pamphlets. Lamont did not respond to the notice of detention which was sent to him but instead instituted this suit to enjoin enforcement of the statute, alleging that it infringed his rights under the First and Fifth Amendments. The Post Office thereupon notified Lamont that it considered his institution of the suit to be an expression of his desire to receive "communist political propaganda" and therefore none of his mail would be detained. Lamont amended his complaint to challenge on constitutional grounds the placement of his name on the list of those desiring to receive "communist political propaganda." * * *

Under the new system, we are told, there can be no list of persons who have manifested a desire to receive "communist political propaganda" and whose mail will therefore go through relatively unimpeded. The government concedes that the changed procedure entirely precludes any claim of mootness and leaves for our consideration the sole question of the constitutionality of the statute.

We conclude that the act as construed and applied is unconstitutional because it requires an official act (*viz.*, returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights. * * *

We struck down in *Murdock v. Pennsylvania*, 319 U.S. 105, a flat license tax on the exercise of First Amendment rights. A registration requirement imposed on a labor union organizer before making a speech met the same fate in *Thomas v. Collins*, 323 U.S. 516. A municipal licensing system for those distributing literature was held invalid in *Lovell v. Griffin*, 303 U S. 444. * * *

* * *

Here the congress—expressly restrained by the First Amendment from "abridging" freedom of speech and of press—is the actor. The act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. Just as the licensing or taxing authorities in the *Lovell*, *Thomas*, and *Murdock* cases sought to control the flow of ideas to the public, so here federal agencies regulate the flow of mail. We do not have here, any more than we had in *Hannegan v. Esquire, Inc.*, 327 U.S. 146, any question concerning the extent to which Congress may classify the mail and fix the charges for its carriage. Nor do we reach the question whether the standard here applied could pass constitutional muster. Nor do we deal with the right of Customs to inspect material from abroad for contraband. We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the federal government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for lit-

erature which federal officials have condemned as "communist political propaganda." The regime of this act is at war with the "uninhibited, robust, and wideopen" debate and discussion that are contemplated by the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270. * * *

COMMENT

Justice Douglas used the so-called absolutist or plain meaning approach to First Amendment interpretation: The statute is a direct restraint by official act of the government on freedom of expression; the First Amendment protects freedom of expression, *ergo*, the statute is invalid.

The absolutist First Amendment rationale employed by the Court in *Lamont* demonstrates the lively existence of alternative theories of First Amendment protection. Often, as in *Lamont*, the Court uses competing First Amendment theories concurrently, using one First Amendment theory to resolve one set of problems and another for a different set of problems. The student will also note that the Court ignored the clear and present danger doctrine as a rationalization in *Lamont*. If *Lamont* were decided today, do you think the Court would have used the strict scrutiny theory?

Insofar as there are two lines of cases with regard to the power of Congress to censor the mails, the later liberal *Hannegan* approach was expressly endorsed in *Lamont* in 1965. Perhaps it can be argued that *Milwaukee Pub. Co. v. Burleson* has, at least implicitly, been overruled.

MEESE v. KEENE

481 U.S. 465, 107 S.CT. 1862, 95 L.ED.2D 415 (1987).

Justice STEVENS delivered the opinion of the Court.

The Foreign Agents Registration Act of 1938 uses the term "political propaganda," as defined in the Act, to identify those expressive materials that must comply with the Act's registration, filing, and disclosure requirements. Appellee, an attorney and a member of the California State Senate, does not want the Department of Justice and the public to regard him as the disseminator of foreign political propaganda, but wishes to exhibit three Canadian motion picture films that have been so identified. The films, distributed by the National Film Board of Canada, deal with the subjects of nuclear war and acid rain.

The Act requires all agents of foreign principals to file detailed registration statements, describing the nature of their business and their political activities. The registration requirement is comprehensive, applying equally to agents of friendly, neutral, and unfriendly governments. Thus, the New York office of the NFBC has been registered as a foreign agent since 1947 because it is an agency of the Canadian Government. The statute classifies the three films produced by the Film Board as "political propaganda" because they contain political material intended to influence the foreign policies of the United States, or may reasonably be adapted to be so used.

The statutory definition of that term reads as follows:

> "(j) The term 'political propaganda' includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government or a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence."

We begin our examination of the District Court's ruling on the First Amendment issue by noting that the term "political propaganda" has two meanings. In popular parlance many people assume that propaganda is a form of slanted, misleading speech that does not merit serious attention and that proceeds from a concern for advancing the narrow interests of the speaker rather than from a devotion to the truth. Casualty reports of enemy belligerents, for example, are often dismissed as nothing more than "propaganda." As defined in the Act, the term political propaganda includes misleading advocacy of that kind. But it also includes advocacy materials that are completely accurate and merit the closest attention and the highest respect. Standard reference

works include both broad, neutral definitions of the word "propaganda" that are consistent with the way the word is defined in this statute, and also the narrower, pejorative definition.

Appellee argues that the statute would be unconstitutional even if the broad neutral definition of propaganda were the only recognized meaning of the term because the Act is "a Classic Example of Content-Based Government Regulation of Core-Value Protected Speech." As appellee notes, the Act's reporting and disclosure requirements are expressly conditioned upon a finding that speech on behalf of a foreign principal has political or public-policy content.

The District Court did not accept this broad argument. It found that the basic purpose of the statute as a whole was "to inform recipients of advocacy materials produced by or under the aegis of a foreign government of the source of such materials," and that it could not be gainsaid that this kind of disclosure serves rather than disserves the First Amendment. The statute itself neither prohibits nor censors the dissemination of advocacy materials by agents of foreign principals.

The argument that the District Court accepted rests not on what the statute actually says, requires, or prohibits, but rather upon a potential misunderstanding of its effect. Simply because the term "political propaganda" is used in the text of the statute to define the regulated materials, the Court assumed that the public will attach an "unsavory connotation" to the term and thus believe that the materials have been "officially censured by the Government." The Court further assumed that this denigration makes this material unavailable to people like appellee, who would otherwise distribute such material, because of the risk of being seen in an unfavorable light by the members of the public who misunderstand the statutory scheme. According to the District Court, the denigration of speech to which the label "political propaganda" has been attached constitutes "a conscious attempt to place a whole category of materials beyond the pale of legitimate discourse," and is therefore an unconstitutional abridgement of that speech. We find this argument unpersuasive, indeed, untenable, for three reasons.

First, the term "political propaganda" does nothing to place regulated expressive materials "beyond the pale of legitimate discourse." Unlike the scheme in *Lamont v. Postmaster General*, the Act places no burden on protected expression. We invalidated the statute in *Lamont* as interfering with the addressee's First Amendment rights because it required "an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights." The physical detention of the materials, not their mere designation as "communist political propaganda," was the offending element of the statutory scheme. The Act "se[t] administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail." The Act in this case, on the other hand, does not pose any obstacle to appellee's access to the materials he wishes to exhibit. Congress did not prohibit, edit, or restrain the distribution of advocacy materials in an ostensible effort to protect the public from conversion, confusion, or deceit.

To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda. The statute does not prohibit appellee from advising his audience that the films have not been officially censured in any way. Disseminators of propaganda may go beyond the disclosures required by statute and add any further information they think germane to the public's viewing of the materials. By compelling some disclosure of information and permitting more, the Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech. See generally *Whitney v. California*, 274 U.S. 357, 377 (1927) (concurring opinion of Brandeis, J.) * * * The prospective viewers of the three films at issue may harbor an unreasoning prejudice against arguments that have been identified as the "political propaganda" of foreign principals and their agents, but the Act allows appellee to combat any such bias simply by explaining—before, during, or after the film, or in a wholly separate context—that Canada's interest in the consequences of nuclear war and acid rain does not necessarily undermine the integrity or the persuasiveness of its advocacy.

Ironically, it is the injunction entered by the District Court that withholds information from the public. The suppressed information is the fact that the films fall within the category of materials that Congress has judged to be "political propaganda".

Second, the reasoning of the District Court is contradicted by history. The statutory definition of

"political propaganda" has been on the books for over four decades. We should presume that the people who have a sufficient understanding of the law to know that the term "political propaganda" is used to describe the regulated category also know that the definition is a broad, neutral one rather than a pejorative one. Given this long history, it seems obvious that if the fear of misunderstanding had actually interfered with the exhibition of a significant number of foreign-made films, that effect would be disclosed in the record. There is a risk that a partially informed audience might believe that a film that must be registered with the Department of Justice is suspect, but there is no evidence that this suspicion—to the degree it exists—has had the effect of Government censorship.

Third, Congress' use of the term "political propaganda" does not lead us to suspend the respect we normally owe to the Legislature's power to define the terms that it uses in legislation. We have no occasion here to decide the permissible scope of Congress' "right to speak"; we simply view this particular choice of language, statutorily defined in a neutral and evenhanded manner, as one that no constitutional provision prohibits the Congress from making. Nor do we agree with the District Court's assertion that Congress' use of the term "political propaganda" was "a wholly gratuitous step designed to express the suspicion with which Congress regarded the materials." It is axiomatic that the statutory definition of the term excludes unstated meanings of that term. Congress' use of the term "propaganda" in this statute, as indeed in other legislation, has no pejorative connotation. As judges it is our duty to construe legislation as it is written, not as it might be read by a layman, or as it might be understood by someone who has not even read it. If the term "political propaganda" is construed consistently with the neutral definition contained in the text of the statute itself, the constitutional concerns voiced by the District Court completely disappear.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

Justice Scalia took no part in the consideration or decision of this case.

Justice BLACKMUN, with whom Justice Brennan and Justice Marshall join, dissenting in part.

* * * The Court's decision rests upon its conclusion that the term "political propaganda" is neutral and without negative connotation. It reaches this conclusion by limiting its examination to the statutory definition of the term and by ignoring the realities of public reaction to the designation. But even given that confined view of its inquiry, it is difficult to understand how a statutory categorization which includes communication that "instigates * * * civil riot * * * or the overthrow of * * * government * * * by any means involving the use of force or violence" can be regarded as wholly neutral. Indeed, the legislative history of the Act indicates that Congress fully intended to discourage communications by foreign agents.

The Act grew out of the investigations of the House Un-American Activities Committee, formed in 1934 to investigate Nazi propaganda activities in the United States and the dissemination of subversive propaganda controlled by foreign countries attacking the American form of government. The Act mandated disclosure, not direct censorship, but the underlying goal was to control the spread of propaganda by foreign agents. This goal was stated unambiguously by the House Committee on the Judiciary: "We believe that the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda."

In 1942, Congress revised the Act at the request of the Department of Justice in order to strengthen the Government's "chief instrument * * * for controlling foreign agent activity in the theater of political propaganda." The amendments included the definition of propaganda in addition to labeling and reporting requirements virtually identical to those imposed under the current version of the Act. The Department of Justice explained that it sought to counter secret propaganda efforts "[i]n view of the increased attempts by foreign agents at the systematic manipulation of mass attitudes on national and international questions, by adding requirements to keep our Government and people informed of the nature, source, and extent of political propaganda distributed in the United States." And, as in the original Act, the amended version furthered Congress' desire to disable certain types of speech by the use of disclosure requirements designed to bring about that result.

The meaning of "political propaganda" has not changed in the 45 years since Congress selected those two words. While the Act is currently applied primarily to foreign policy advocacy, the designation it employs continues to reflect the original purposes

of the Act and continues to carry its original connotations. For example, a Department of Justice representative recently recognized:

> "[I]t is fair to say that the original act reflected a perceived close connection between political propaganda and subversion. It is this original focus * * * and therefore the pejorative connotations of the phrases 'foreign agent' and 'political propaganda' which has caused such misunderstanding over the years."

In *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the "communist political propaganda" that was detained by the Postmaster and delivered only upon the addressee's request was defined by reference to the same "neutral" definition of "political propaganda" in the Act that is at issue here. Yet the Court examined the effects of the statutory requirements and had no trouble concluding that the need to request delivery of mail classified as "communist political propaganda" was "almost certain to have a deterrent effect" upon debate. The reason was certainly the disapprobation conveyed by the classification:

> Public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as "communist political propaganda."

Because the Court believes that the term "political propaganda" is neutral, it concludes that "the Act places no burden on protected expression." The Court's error on neutrality leads it to ignore the practical effects of the classification, which create an indirect burden on expression. As a result, the Court takes an unjustifiably narrow view of the sort of government action that can violate First Amendment protections. Because Congress did "not pose any obstacle to appellee's access to the materials he wishes to exhibit" in that it "did not prohibit, edit, or restrain the distribution of advocacy material," the Court thinks that the propaganda classification does not burden speech. But there need not be a direct restriction of speech in order to have a First Amendment violation. The Court has recognized that indirect discouragements are fully capable of a coercive effect on speech, and that the First Amendment protections extend beyond the blatant censorship the Court finds lacking here.

COMMENT

Lamont may be a lesser restraint on the distribution of expressive materials than the situation in *Meese v. Keene*. In *Lamont*, the public at large is unaware that the material received has been characterized as propaganda. In *Keene*, the entire audience is informed of this governmental characterization of the films at issue. In *Keene*, the majority declares that the term "political propaganda" is a neutral term. However, those wishing to exhibit films marked "political propaganda" may be deterred from showing the films at all.

Does government have a right to speak—mark films with the label propaganda—if the consequence of the exercise of such a right is the deterrence of expression in the society?

City of Lakewood v. Plain Dealer Publishing Co., 108 S.Ct. 2138 (1988) invalidated a municipal ordinance which granted the mayor unfettered discretion to grant or deny an application for an annual permit for placement of newsracks on public property, city sidewalks. The ordinance authorized the mayor to make such grants or denials on any terms he considered to be "necessary and reasonable." *City of Lakewood* held that in such circumstances a facial challenge to the constitutionality of the city ordinance was permissible. The opinion is set forth in the text, p. 40.

Justice White, joined by Justices Stevens and O'Connor, wrote a strong dissent in *City of Lakewood*. Justice White first noted that the Court did "*not* establish any constitutional right of newspaper publishers to place newsracks on municipal property." Further, the Court declined to pass on the question of the constitutionality of an outright municipal ban on newsracks. (Could a city absolutely prohibit cable systems from using its public ways on which to lay cable? See *Los Angeles v. Preferred Communications, Inc.* 106 S.Ct. 2034 (1986).)

Justice White said that "our precedents suggest that an outright ban on newsracks on city sidewalks would be constitutional, particularly where (as is true here) ample alternate means of 24-hour distribution of newspapers exists." Justice White concluded that "cities remain free after today's decision to enact" bans on newsracks on public property. Justice White dissented from the doctrine set forth by the majority in *Lakewood* that licensing laws which give municipal officials "substantial power to dis-

criminate based on the content or viewpoint of speech" are unconstitutional on their face without any showing of actual censorship and without the need even to apply for a license.

Taxation of the Press and Censorship

GROSJEAN v. AMERICAN PRESS CO.

297 U.S. 233, 56 S.CT. 444, 80 L.ED. 660 (1936).

[EDITORIAL NOTE On July 12, 1934, the Louisiana legislature enacted a law which provided in essence that any newspaper selling advertisements, which had a circulation of more than 20,000 copies, would be required to pay a license tax of 2 percent on its gross receipts. The law was passed at the behest of Governor Huey Long and was aimed at the New Orleans Times-Picayune, *a New Orleans daily which had been critical of the Long regime. Nine newspaper publishers, publishing thirteen newspapers, brought suit to enjoin the enforcement of the statute.]*

Justice SUTHERLAND delivered the opinion of the Court.

* * *

The validity of the act is assailed as violating the * * * freedom of the press in contravention of the due process clause contained in section 1 of the Fourteenth Amendment. * * *

For more than a century prior to the adoption of the amendment—and, indeed, for many years thereafter—history discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the agencies and operations of the government. The struggle between the proponents of measures to that end and those who asserted the right of free expression was continuous and unceasing. As early as 1644, John Milton, in an "Appeal for the Liberty of Unlicensed Printing," assailed an act of Parliament which had just been passed providing for censorship of the press previous to publication. He vigorously defended the right of every man to make public his honest views "without previous censure"; and declared the impossibility of finding any man base enough to accept the office of censor and at the same time good enough to be allowed to perform its duties. Collett, *History of the Taxes on Knowledge*, vol. I, pp. 4–6. The act expired by its own terms in 1695. It was never renewed; and the liberty of the press thus became, as pointed out by Wickwar (*The Struggle for the Freedom of the Press*, p. 15), merely "a right or liberty to publish without a license what formerly could be published only with one." But mere exemption from previous censorship was soon recognized as too narrow a view of the liberty of the press.

In 1712, in response to a message from Queen Anne (*Hansard's Parliamentary History of England*, vol. 6, p. 1063), Parliament imposed a tax upon all newspapers and upon advertisements. Collett, vol. I, pp. 8–10. That the main purpose of these taxes was to suppress the publication of comments and criticisms objectionable to the Crown does not admit of doubt. Stewart, *Lennox and the Taxes on Knowledge*, 15 Scottish Historical Review, 322–327. There followed more than a century of resistance to, and evasion of, the taxes, and of agitation for their repeal. * * *

Citations of similar import might be multiplied many times; but the foregoing is enough to demonstrate beyond peradventure that in the adoption of the English newspaper stamp tax and the tax on advertisements, revenue was of subordinate concern; and that the dominant and controlling aim was to prevent, or curtain the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs. It is idle to suppose that so many of the best men of England would for a century of time have waged, as they did, stubborn and often precarious warfare against these taxes if a mere matter of taxation had been involved. The aim of the struggle was not to relieve taxpayers from a burden, but to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government. Upon the correctness of this conclusion the very characterization of the exactions as "taxes on knowledge" sheds a flood of corroborative light. In the ultimate, an informed and enlightened public opinion was the thing at stake; for, as Erskine, in his great speech in defense of Paine, has said, "The liberty of opinion keeps governments themselves in due subjection to their duties." Erskine's Speeches, High's Ed., vol. I, p. 525. See May's Constitutional History of England (7th Ed.) vol. 2, pp. 238–245.

In 1785, only four years before Congress had proposed the First Amendment, the Massachusetts Legislature, following the English example, imposed a stamp tax on all newspapers and magazines. The following year an advertisement tax was imposed.

Both taxes met with such violent opposition that the former was repealed in 1786, and the latter in 1788. Duniway, *Freedom of the Press in Massachusetts*, pp. 136, 137.

The framers of the First Amendment were familiar with the English struggle, which then had continued for nearly eighty years and was destined to go on for another sixty-five years, at the end of which time it culminated in a lasting abandonment of the obnoxious taxes. The framers were likewise familiar with the then recent Massachusetts episode; and while that occurrence did much to bring about the adoption of the amendment (see *Pennsylvania and the Federal Constitution*, 1888, p. 181), the predominant influence must have come from the English experience. It is impossible to concede that by the words "freedom of the press" the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship; for this abuse had then permanently disappeared from English practice. It is equally impossible to believe that it was not intended to bring within the reach of these words such modes of restraint as were embodied in the two forms of taxation already described. Such belief must be rejected in the face of the then well-known purpose of the exactions and the general adverse sentiment of the colonies in respect of them. Undoubtedly, the range of a constitutional provision phrased in terms of the common law sometimes may be fixed by recourse to the applicable rules of that law.

* * *

In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well-known and odious methods.

* * *

It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.

The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

In view of the persistent search for new subjects of taxation, it is not without significance that, with the single exception of the Louisiana statute, so far as we can discover, no state during the one hundred fifty years of our national existence has undertaken to impose a tax like that now in question.

The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers. [Emphasis added.]

Having reached the conclusion that the act imposing the tax in question is unconstitutional under the due process of law clause because it abridges the freedom of the press, we deem it unnecessary to consider the further ground assigned, that it also constitutes a denial of the equal protection of the laws.

Decree affirmed.

COMMENT

Grosjean makes clear that stamp taxes on newspapers and taxes on advertisements were similar practices

and as such abhorrent to the eighteenth-century American. *Grosjean* illustrates why a larger definition of freedom of the press than one limited merely to freedom from prior restraint was necessary if the objectives of freedom of the press, as outlined by Justice George Sutherland, were to be secured, i.e., "In the ultimate, an informed and enlightened public opinion was the thing at stake.". Discriminatory taxes, like licensing on the basis of content and prior restraints, were all forbidden by the constitutional guarantee of freedom of the press. But see *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407 (1921).

Which is more destructive of the purposes of freedom of the press: a prior restraint on printed matter itself or a tax on circulation of daily newspapers? How does Sutherland deal with the state defense that newspapers are a business and, as a business, the press, like other businesses, has no constitutional immunity from taxation?

Because of the constitutional guarantees of freedom of the press and freedom of speech, does engagement in such pursuits make governmental regulation unconstitutional? *When* freedom of expression is really at stake and when some other governmental interest, which is a matter of valid governmental concern, is at stake is a particularly perplexing problem in First Amendment cases.

MINNEAPOLIS STAR AND TRIBUNE CO. v. MINNESOTA COMMISSIONER OF REVENUE

460 U.S. 575, 103 S.CT. 1365, 75 L.ED.2D 295 (1983).

Justice O'CONNOR delivered the opinion of the Court.

This case presents the question of a state's power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers.

Since 1967, Minnesota has imposed a sales tax on most sales of goods for a price in excess of a nominal sum. * * * In general, the tax applies only to retail sales. * * * This use tax applies to any nonexempt tangible personal property unless the sales tax was paid on the sales price. * * * Like the classic use tax, this use tax protects the State's sales tax by eliminating the residents' incentive to travel to States with lower sales taxes to buy goods rather than buying them in Minnesota. * * *

The appellant, Minneapolis Star and Tribune Company "Star Tribune", is the publisher of a morning newspaper and an evening newspaper in Minneapolis. From 1967 until 1971, it enjoyed an exemption from the sales and use tax provided by Minnesota for periodic publications. * * * In 1971, however, while leaving the exemption from the sales tax in place, the legislature amended the scheme to impose a "use tax" on the cost of paper and ink products consumed in the production of a publication. * * * Ink and paper used in publications became the only items subject to the use tax that were components of goods to be sold at retail. In 1974, the legislature again amended the statute, this time to exempt the first $100,000 worth of ink and paper consumed by a publication in any calendar year, in effect giving each publication an annual tax credit of $4,000. * * * Publications remained exempt from the sales tax. * * *

After the enactment of the $100,000 exemption, 11 publishers, producing 14 of the 388 paid circulation newspapers in the state, incurred a tax liability in 1974. Star Tribune was one of the 11, and, of the $893,355 collected, it paid $608,634, or roughly two-thirds of the total revenue raised by the tax. See 314 N.W.2d 201, 203 and n. 4 (1981). In 1974, 13 publishers, producing 16 out of 374 paid circulation papers, paid a tax. That year, Star Tribune again bore roughly two-thirds of the total receipts from the use tax on ink and paper.

Star Tribune instituted this action to seek a refund of the use taxes it paid from January 1, 1974 to May 31, 1975. It challenged the imposition of the use tax on ink and paper used in publications as a violation of the guarantees of freedom of the press and equal protection in the First and Fourteenth Amendments. The Minnesota Supreme Court upheld the tax against the federal constitutional challenge. * * *

Star Tribune argues that we must strike this tax on the authority of *Grosjean v. American Press Co., Inc.* * * * Although there are similarities between the two cases, we agree with the State that *Grosjean* is not controlling. * * *

Commentators have generally viewed *Grosjean* as dependent on the improper censorial goals of the legislature. See T. Emerson, *The System of Freedom of Expression* 419 (1970); L. Tribe, *American Constitutional Law* 592 n. 8, 724 n. 10 (1978). We think that the result in *Grosjean* may have been attributable in part to the perception on the part of

the Court that the state imposed the tax with an intent to penalize a selected group of newspapers. In the case currently before us, however, there is no legislative history and no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature. We cannot resolve the case by simple citation to *Grosjean*. Instead, we must analyze the problem anew under the general principles of the First Amendment.

Clearly, the First Amendment does not prohibit all regulation of the press. It is beyond dispute that the states and the federal government can subject newspapers to generally applicable economic regulations without creating constitutional problems. [Citations omitted.] Minnesota, however, has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment. Although the state argues now that the tax on paper and ink is part of the general scheme of taxation, the use tax provision, * * * is facially discriminatory, singling out publications for treatment that is, to our knowledge, unique in Minnesota tax law.

By creating this special use tax, which, to our knowledge, is without parallel in the State's tax scheme, *Minnesota has singled out the press for special treatment*. We then must determine whether the First Amendment permits such special taxation. A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest. Any tax that the press must pay, of course, imposes some "burden." But, as we have observed, this Court has long upheld economic regulation of the press. The cases approving such economic regulation, however, emphasized the general applicability of the challenged regulation to all businesses, * * * suggesting that a regulation that singled out the press might place a heavier burden of justification on the state, and we now conclude that the special problems created by differential treatment do indeed impose such a burden. [Emphasis added.]

There is substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment. The role of the press in mobilizing sentiment in favor of independence was critical to the Revolution. When the Constitution was proposed without an explicit guarantee of freedom of the press, the Antifederalists objected. Proponents of the Constitution, relying on the principle granted Congress no power to control the press. The remarks of Richard Henry Lee are typical of the rejoinders of the Antifederalists:

> "I confess I do not see in what cases the congress can, with any pretense of right, make a law to suppress the freedom of the press; though I am not clear, that congress is restrained from laying any duties whatever on printing, and from laying duties particularly heavy on certain pieces printed." R. Lee, Observation Leading to a Fair Examination of the System of Government, Letter IV, reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 466, 474 (1971).

* * *

The fears of the Antifederalists were well-founded. A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the state imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. * * * When the state singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. * * *

Further, differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional. * * * Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the state asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation. * * *

Addressing the concern with differential treatment, Minnesota invites us to look beyond the form of the tax to its substance. The tax is, according to the state, merely a substitute for the sales tax, which, as a generally applicable tax, would be constitutional as applied to the press. There are two fatal flaws in this reasoning. First, the state has offered no explanation of why it chose to use a substitute for the sales tax rather than the sales tax itself. * * *

Further, even assuming that the legislature did have valid reasons for substituting another tax for the sales tax, we are not persuaded that this tax does serve as a substitute. The state asserts that this scheme actually *favors* the press over other businesses, because the same rate of tax is applied, but, for the press, the rate applies to the cost of components rather than to the sales price. We would be hesitant to fashion a rule that automatically allowed the state to single out the press for a different method of taxation as long as the effective burden was not different from that on other taxpayers or the burden on the press was lighter than that on other businesses. One reason for this reluctance is that the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but with the possibility of subsequent differentially *more burdensome* treatment. * * *

A second reason to avoid the proposed rule is that courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes. In sum, the possibility of error inherent in the proposed rule poses too great a threat to concerns at the heart of the First Amendment, and we cannot tolerate that possibility.[13] Minnesota, therefore, has offered no adequate justification for the special treatment of newspapers.

Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the $100,000 exemption enacted in 1974 is that only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax.[15] The state explains this exemption as part of a policy favoring an "equitable" tax system, although there are no comparable exemptions for small enterprises outside the press. * * * Whatever the motive of the legislature in this case, we think that recognizing a power in the state not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme. * * *

A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action. Since Minnesota has offered no satisfactory justification for its tax on the use of ink and paper, the tax violates the First Amendment, and the judgment below is Reversed.

Justice White, concurring in part and dissenting in part.

* * *

Justice REHNQUIST, dissenting:

Today we learn from the Court that a state runs afoul of the First Amendment proscription of laws "abridging the freedom of speech, or of the press" where the state structures its taxing system to the advantage of newspapers. This seems very much akin to protecting something so overzealously that in the end it is smothered. While the Court purports to rely on the intent of the "Framers of the First Amendment," I believe it safe to assume that in 1791 "abridge" meant the same thing it means today: to diminish or curtail. Not until the Court's decision in this case, nearly two centuries after adoption of the First Amendment has it been read to prohibit activities which in no way diminish or curtail the freedoms it protects. * * *

The Court recognizes in several parts of its opinion that the State of Minnesota could avoid constitutional problems by imposing on newspapers the 4% sales tax that it imposes on other retailers. Rather than impose such a tax however, the Minnesota legislature decided to provide newspapers with an exemption from the sales tax and impose a 4% use tax on ink and paper; thus, while both taxes are part of one "system of sales and use taxes," 314 N.W.2d 201, 203 (1981), newspapers are classified differently

13. If a state employed the same *method* of taxation but applied a lower *rate* to the press, so that there could be no doubt that the legislature was not singling out the press to bear a more burdensome tax, we would, of course, be in a position to evaluate the relative burdens. And, given the clarity of the relative burdens, as well as the rule that differential methods of taxation are not automatically permissible if less burdensome, a lower tax rate for the press would not raise the threat that the legislature might later impose an extra burden that would escape detection by the courts, * * *. Thus, our decision does not, as the dissent suggests, require Minnesota to impose a greater tax burden on publications.

15. In 1974, 11 publishers paid the tax. Three paid less than $1,000, and another three paid less than $8,000. Star Tribune, one of only two publishers paying more than $100,000 paid $608,634. In 1975, 13 publishers paid the tax. Again, three paid less than $1,000, and four more paid less than $3,000. For that year, Star Tribune paid $636,113 and was again one of only two publishers incurring a liability greater than $100,000. See 314 N.W.2d, at 203–204 and nn. 4, 5.

within that system. The problem the Court finds too difficult to deal with is whether this difference in treatment results in a significant burden on newspapers. * * *

Today the Court [refuses] to look at the record and determine whether the classifications in the Minnesota use and sales tax statutes significantly burden the First Amendment rights of petitioner and its fellow newspapers. * * *

Wisely not relying solely on inability to weigh the burdens of the Minnesota tax scheme, the Court also says that even if the resultant burden on the press is lighter than on others:

> "[T]he very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but with the possibility of subsequent differentially *more burdensome* treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for '[t]he threat of sanctions may deter [the] exercise of [First Amendment] rights almost as potently as the actual application of sanctions.' "

Surely the Court does not mean what it seems to say. The Court should be well aware from its discussion of *Grosjean v. American Press Co., Inc.*, 297 U.S. 233 (1936), that this Court is quite capable of dealing with changes in state taxing laws which are intended to penalize newspapers. * * *

* * * In summary, so long as the state can find another way to collect revenue from the newspapers, imposing a sales tax on newspapers would be to no one's advantage; not the newspaper and its distributors who would have to collect the tax, not the state who would have to enforce collection, and not the consumer who would have to pay for the paper in odd amounts. The reasonable alternative Minnesota chose was to impose the use tax on ink and paper. * * *

The court finds in very summary fashion that the exemption newspapers receive for the first $100,000 of ink and paper used also violates the First Amendment because the result is that only a few of the newspapers actually pay a use tax. I cannot agree. As explained by the Minnesota Supreme Court, the exemption is in effect a $4,000 credit which benefits all newspapers. 314 N.W.2d, at 203. Minneapolis Star & Tribune was benefited to the amount of $16,000 in the two years in question; $4,000 each year for its morning paper and $4,000 each year for its evening paper. *Ibid.* Absent any improper motive on the part of the Minnesota legislature in drawing the limits of this exemption, it cannot be construed as violating the First Amendment. * * * There is no reason to conclude that the State, in drafting the $4,000 credit, acted other than reasonably and rationally to fit its sales and use tax scheme to its own local needs and usages.

To collect from newspapers their fair share of taxes under the sales and use tax scheme and at the same time avoid abridging the freedoms of speech and press, the Court holds today that Minnesota must subject newspapers to millions of additional dollars in sales tax liability. Certainly this is a hollow victory for the newspapers and I seriously doubt the Court's conclusion that this result would have been intended by the "Framers of the First Amendment."

For the reasons set forth above, I would affirm the judgment of the Minnesota Supreme Court.

COMMENT

Does the rejection of special tax legislation for the press in *Minneapolis Star* constitute a rejection of the Stewart thesis that the freedom of the press clause warrants a special constitutional status for the press? See Stewart, text, p. 7. Perhaps the majority should have faced up to the implications of the *Grosjean* rationale—a rationale which they profess to accept: Legislation is unconstitutional if the motive of the legislation is to penalize the press. The Court in *Minneapolis Star* professes not to follow *Grosjean* even though its result led to the invalidation of the challenged legislation, as was the case in *Grosjean*.

It may be argued that in a sense the majority in *Minneapolis Star* does in fact follow *Grosjean* but just expands its approach. Thus, reading *Grosjean* and *Minneapolis Star* together, if the motive of legislation is either to hinder or to help the press, then the motive is impermissible. With respect to the press, the motive of the legislature must be neutral or indifferent. In response to this it may be argued that that was not what was held in *Minneapolis Star*. The test the Court referred to a number of times is that a legislative tax that treats the press differently cannot stand, unless the purpose of the legislation is designed to accomplish an overriding governmental interest. In other words, the strict scrutiny approach to legislation involving the press was used. In short, since Minnesota could not advance any overriding governmental reason for the tax in question, its differential aspect as far as the press was

concerned required its invalidation under the strict standard of judicial review now accorded to legislation challenged on First Amendment grounds.

Justice Rehnquist, in dissent, criticized a particular sentence in Justice O'Connor's opinion in *Minneapolis Star*: "The very selection of the press for special treatment threatens the press not only with the current differential treatment, but with the possibility of subsequent differentially *more burdensome* treatment." Does this approach have unwelcome ramifications for the First Amendment? The Newspaper Preservation Act exempts newspapers from the antitrust laws in significant respects. See text, p. 554. Newspapers and magazines are allowed to use the mails on a special and economically advantageous basis, at least compared to the mailing rates charged to ordinary individuals. Is the constitutionality of this kind of special favorable legislative treatment for the press now thrown into doubt as a result of *Minneapolis Star?*

ARKANSAS WRITERS' PROJECT, INC. v. RAGLAND

481 U.S. 221, 107 S.CT. 1722, 95 L.ED.2D 209 (1987).

Justice MARSHALL delivered the opinion of the Court.

The question presented in this case is whether a state sales tax scheme that taxes general interest magazines, but exempts newspapers and religious, professional, trade, and sports journals violates the First Amendment's guarantee of freedom of the press.

Since 1935, Arkansas has imposed a tax on receipts from sales of tangible personal property. * * * Numerous items are exempt from the state sales tax, however. These include "[g]ross receipts or gross proceeds derived from the sale of newspapers," (newspaper exemption), and "religious, professional, trade and sports journals and/or publications printed and published within this State * * * when sold through regular subscriptions." (magazine exemption).

Appellant *Arkansas Writers' Project, Inc.* publishes Arkansas Times, a general interest monthly magazine with a circulation of approximately 228,000. The magazine includes articles on a variety of subjects, including religion and sports. It is printed and published in Arkansas, and is sold through mail subscriptions, coin-operated stands, and over-the-counter sales. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, held unconstitutional a Minnesota tax on paper and ink used in the production of newspapers. In January 1984, relying on this authority, appellant sought a refund of sales tax paid since October 1982, asserting that the magazine exemption must be construed to include Arkansas Times. It maintained that subjecting Arkansas Times to the sales tax, while sales of newspapers and other magazines were exempt, violated the First and Fourteenth Amendments. The Commissioner denied appellant's claim for refund.

We now reverse. In contrast to *Minneapolis Star*, and *Grosjean*, the Arkansas Supreme Court concluded that the Arkansas sales tax was a permissible "ordinary form of taxation." * * *

Our cases clearly establish that a discriminatory tax on the press burdens rights protected by the First Amendment. See *Minneapolis Star* [and] *Grosjean*.

In *Minneapolis Star*, the discrimination took two distinct forms. First, in contrast to generally applicable economic regulations to which the press can legitimately be subject, the Minnesota use tax treated the press differently from other enterprises. Second, the tax targeted a small group of newspapers. This was due to the fact that the first $100,000 of paper and ink were exempt from the tax; thus "only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax."

Both types of discrimination can be established even where, as here, there is no evidence of an improper censorial motive. * * * This is because selective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State. * * *

Addressing only the first type of discrimination, the Commissioner defends the Arkansas sales tax as a generally applicable economic regulation. He acknowledges the numerous statutory exemptions to the sales tax, including those exempting newspapers and religious, trade, professional, and sports magazines. Nonetheless, apparently because the tax is nominally imposed on receipts from sales of *all* tangible personal property, he insists that the tax should be upheld.

On the facts of this case, the fundamental question is not whether the tax singles out the press as a whole, but whether it targets a small group within the press. While we indicated in *Minneapolis Star* that a genuinely nondiscriminatory tax on the re-

ceipts of newspapers would be constitutionally permissible, the Arkansas sales tax cannot be characterized as nondiscriminatory, because it is not evenly applied to all magazines. To the contrary, the magazine exemption means that only a few Arkansas magazines pay any sales tax; in that respect, it operates in much the same way as did the $100,000 exemption to the Minnesota use tax. Because the Arkansas sales tax scheme treats some magazines less favorably than others, it suffers from the second type of discrimination identified in *Minneapolis Star*.

Indeed, this case involves a more disturbing use of selective taxation than *Minneapolis Star*, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S., at 95. See also *Carey v. Brown* at 462–463, 100 S.Ct., at 2291. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648–649 (1984).

If articles in Arkansas Times were uniformly devoted to religion or sports, the magazine would be exempt from the sales tax. However, because the articles deal with a variety of subjects (sometimes including religion and sports), the Commissioner has determined that the magazine's sales may be taxed. In order to determine whether a magazine is subject to sales tax, Arkansas' "enforcement authorities must necessarily examine the content of the message that is conveyed. * * * " *FCC v. League of Women Voters of California*, 468 U.S. 364, 383 (1984). Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press.

Arkansas' system of selective taxation does not evade the strictures of the First Amendment merely because it does not burden the expression of particular *views* by specific magazines. We rejected a similar distinction between content and viewpoint restrictions in *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980). As we stated in that case, "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id.*, at 537, 100 S.Ct., at 2333. See *FCC v. League of Women Voters of California, supra; Metromedia, Inc. v. San Diego; Carey v. Brown*, 447 U.S., at 462, n. 6.

Nor are the requirements of the First Amendment avoided by the fact that Arkansas grants an exemption to other members of the media that might publish discussions of the various subjects contained in *Arkansas Times*. For example, exempting *newspapers* from the tax does not change the fact that the State discriminates in determining the tax status of *magazines* published in Arkansas. * * *

Arkansas faces a heavy burden in attempting to defend its content-based approach to taxation of magazines. In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. See *Minneapolis Star*.

The Commissioner has advanced several state interests.

The Commissioner suggests that the exemption of religious, professional, trade and sports journals was intended to encourage "fledgling" publishers, who have only limited audiences and therefore do not have access to the same volume of advertising revenues as general interest magazines such as *Arkansas Times*. Even assuming that an interest in encouraging fledgling publications might be a compelling one, we do not find the exemption of religious, professional, trade and sports journals narrowly tailored to achieve that end. To the contrary, the exemption is both overinclusive and underinclusive. The types of magazines enumerated are exempt, regardless of whether they are "fledgling;" even the most lucrative and well-established religious, professional, trade and sports journals do not pay sales tax. By contrast, struggling general interest magazines and struggling specialty magazines on subjects other than those specified are ineligible for favorable tax treatment.

Finally, the Commissioner asserted for the first time at oral argument a need to "foster communication" in the State. While this state interest might support a blanket exemption of the press from the sales tax, it cannot justify selective taxation of certain publishers. The Arkansas tax scheme only fosters communication on religion, sports, and professional and trade matters. It therefore does not serve its alleged purpose in any significant way.

Appellant argues that the Arkansas tax scheme violates the First Amendment because it exempts all newspapers from the tax, but only some magazines. Appellant contends that, under applicable state regulations, the critical distinction between newspapers and magazines is not format, but rather content: newspapers are distinguished from magazines because they contain reports of current events and articles of general interest. Just as content-based distinctions between magazines are impermissible under prior decisions of this Court, appellant claims that content-based distinctions between different members of the media are also impermissible, absent a compelling justification.

Because we hold today that the State's selective application of its sales tax to magazines is unconstitutional and therefore invalid, our ruling eliminates the differential treatment of newspapers and magazines. Accordingly, we need not decide whether a distinction between different types of periodicals presents an additional basis for invalidating the sales tax, as applied to the press.

We stated in *Minneapolis Star* that "[a] tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action." In this case, Arkansas has failed to meet this heavy burden. It has advanced no compelling justification for selective, content-based taxation of certain magazines, and the tax is therefore invalid under the First Amendment. Accordingly, we reverse the judgment of the Arkansas Supreme Court and remand for proceedings not inconsistent with this opinion.

It is so ordered.

Justice STEVENS, concurring in part and concurring in the judgment.

To the extent that the Court's opinion relies on the proposition " 'that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,' " I am unable to join it. * * * I do, however, agree that the State has the burden of justifying its content-based discrimination and has plainly failed to do so.

Justice SCALIA, with whom the Chief Justice joins, dissenting.

* * * I dissent from today's decision because it provides no rational basis for distinguishing the subsidy scheme here under challenge from many others that are common and unquestionably lawful.

Here, as in the Court's earlier decision in *Minneapolis Star*, application of the "strict scrutiny" test rests upon the premise that for First Amendment purposes denial of exemption from taxation is equivalent to regulation. That premise is demonstrably erroneous and cannot be consistently applied. Our opinions have long recognized—in First Amendment contexts as elsewhere—the reality that tax exemptions, credits, and deductions are "a form of subsidy that is administered through the tax system," and the general rule that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544, 549, 103 S.Ct. 1997, 2000, 2002, 76 L.Ed.2d 129 (1983) (upholding denial of tax exemption for organization engaged in lobbying even though veterans' organizations received exemption regardless of lobbying activities).

The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily "infringe" a fundamental right is that—unlike direct restriction or prohibition—such a denial does not, as a general rule, have any significant coercive effect. It may, of course, be manipulated so as to do so, in which case the courts will be available to provide relief. But that is not remotely the case here. It is implausible that the 4% sales tax, generally applicable to all sales in the State with the few enumerated exceptions, was meant to inhibit, or had the effect of inhibiting, this appellant's publication.

Perhaps a more stringent, prophylactic rule is appropriate, and can consistently be applied, when the subsidy pertains to the expression of a particular viewpoint on a matter of political concern—a tax exemption, for example, that is expressly available only to publications that take a particular point of view on a controversial issue of foreign policy. Political speech has been accorded special protection elsewhere.

There is no need, however, and it is realistically quite impossible, to extend to all speech the same degree of protection against exclusion from a subsidy that one might think appropriate for opposing shades of political expression.

By seeking to do so, the majority casts doubt upon a wide variety of tax preferences and subsidies that draw distinctions based upon subject-matter. The U.S. Postal Service, for example, grants a special bulk rate to written material disseminated by certain nonprofit organizations—religious, educational, scientific, philanthropic, agricultural, labor, veterans', and fraternal organizations. Must this preference be justified by a "compelling governmental

need" because a nonprofit organization devoted to some other purpose—dissemination of information about boxing, for example—does not receive the special rate? The Kennedy Center, which is subsidized by the Federal Government in the amount of up to $23 million per year, is authorized by statute to "present classical and contemporary music, opera, drama, dance, and poetry." Is this subsidy subject to strict scrutiny because other kinds of expressive activity, such as learned lectures and political speeches, are excluded? Are government research grant programs or the funding activities of the Corporation for Public Broadcasting subject to strict scrutiny because they provide money for the study or exposition of some subjects but not others?

Because there is no principled basis to distinguish the subsidization of speech in these areas—which we would surely uphold—from the subsidization that we strike down here, our decision today places the granting or denial of protection within our own idiosyncratic discretion. In my view, that threatens First Amendment rights infinitely more than the tax exemption at issue. I dissent.

COMMENT

The infirmity of the Arkansas sales tax scheme was that it treated "some magazines less favorably than others." Was the selective discrimination worse than in *Minneapolis Star?* Justice Marshall said it was. Why? Arkansas differentiated between the tax status of magazines on the basis of the *content* of the magazine.

In evaluating the First Amendment validity of the Arkansas sales tax as applied to newspapers and magazines, the Court applied the strictest standard of review, i.e., the so-called strict scrutiny standard: "[T]he state must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."

Arkansas Writers' Project illustrates that the strict scrutiny standard is increasingly being used in First Amendment cases. Usually, the standard is strict in theory but fatal in fact. In other words, the announcement of the use of the strict scrutiny standard transmits a message that the legislation under review is going to be invalidated. The choice of standard of review, therefore, becomes critical.

Justice Scalia in dissent in *Arkansas Writers' Project* believed that the "strict scrutiny" test should not have been used because such a test is designed to evaluate government regulation. In Scalia's review, denial of exemption from taxation is not "equivalent to regulation." In *Grosjean*, however, small circulation newspapers were exempt from the challenged tax which applied to large circulation newspapers who were also critics of Governor Huey Long. In *Grosjean*, this differentiation (which was, in a sense, a refusal to extend an exemption) was determined to have coercive effect.

Scalia says that if the state decision to tax or not to tax is manipulated for coercive purposes, "the courts will be available to provide relief." Like Rehnquist in *Minneapolis Star*, Scalia believes the legislation under review does not raise First Amendment problems because there is no evidence of improper censorial motive behind the legislation. A difficulty with this analysis is that it puts a premium on being able to identify the legislative motive.

It was suspected by the press that the *Minneapolis Star* tax was intended to be punitive, although it didn't turn out to be since the newspapers actually paid less in paper and ink taxes than they would have in sales taxes. It would have been difficult to demonstrate this legislative intent were it true, and no effort was ever made to do so.

Justice Stevens disagrees that content-based regulation of expression is always impermissible. In taking this view, he is consistent with the views he expressed in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), where he approved FCC regulation, in narrow circumstances, of a category of "indecent" speech. But is the decision of Arkansas to exempt general interest magazines really content-based? Justice Scalia argues in dissent that the federal government subsidizes opera and drama in the Kennedy Center; the federal statute providing for such subsidy does not mention "learned lectures." Is the omission of scholarly lectures content-based and, therefore, invalid?

CATEGORIES OF SPEECH

Anonymous Speech

TALLEY v. CALIFORNIA

362 U.S. 60, 80 S.CT. 536, 4 L.ED.2D 559 (1960).

Justice BLACK delivered the opinion of the Court.

The question presented here is whether the provisions of a Los Angeles City ordinance restricting the distribution of handbills "abridge the freedom

of speech and of the press secured against state invasion by the Fourteenth Amendment of the Constitution." The ordinance * * * provides:

"No person shall distribute any handbill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of the following:

"a. The person who printed, wrote, compiled or manufactured the same.
"b. The person who caused the same to be distributed; provided, however, that in the case of a fictitious person or club, in addition to such fictitious name, the true names and addresses of the owners, managers or agents of the person sponsoring said hand-bill shall also appear thereon."

The petitioner was arrested and tried in a Los Angeles Municipal Court for violating this ordinance. It was stipulated that the petitioner had distributed handbills in Los Angeles, and two of them were presented in evidence. Each had printed on it the following:

National Consumers Mobilization
Box 6533
Los Angeles 55, Calif.
Pleasant 9–1576.

The handbills urged readers to help the organization carry on a boycott against certain merchants and businessmen, whose names were given, on the ground that, as one set of handbills said, they carried products of "manufacturers who will not offer equal employment opportunities to Negroes, Mexicans, and Orientals." There also appeared a blank, which, if signed, would request enrollment of the signer as a "member of National Consumers Mobilization," and which was preceded by a statement that "I believe that every man should have an equal opportunity for employment no matter what his race, religion, or place of birth."

The Municipal Court held that the information printed on the handbills did not meet the requirements of the ordinance, found the petitioner guilty as charged, and fined him $10. The Appellate Department of the Superior Court of the County of Los Angeles affirmed the conviction, rejecting petitioner's contention, timely made in both state courts, that the ordinance invaded his freedom of speech and press in violation of the Fourteenth and First Amendments to the Federal Constitution. 172 Cal.App.2d Supp. 797, 332 P.2d 447. Since this was the highest state court available to petitioner, we granted certiorari to consider this constitutional contention. 360 U.S. 928.

The broad ordinance now before us, barring distribution of "any hand-bill in any place under any circumstances," falls precisely under the ban of our prior cases unless this ordinance is saved by the qualification that handbills can be distributed if they have printed on them the names and addresses of the persons who prepared, distributed or sponsored them. * * * [T]he ordinance here is not limited to handbills whose content is "obscene or offensive to public morals or that advocates unlawful conduct." Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose. Therefore we do not pass on the validity of an ordinance limited to prevent these or any other supposed evils. This ordinance simply bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires.

There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Lovell v. City of Griffin*, 303 U.S. at page 452.

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.

* * *

Even the *Federalist Papers*, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

We have recently had occasion to hold in two cases that there are times and circumstances when states may not compel members of groups engaged in the dissemination of ideas to be publicly identified. The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of impor-

tance. This broad Los Angeles ordinance is subject to the same infirmity. We hold that it, like the Griffin, Georgia, ordinance, is void on its face.

The judgment of the Appellate Department of the Superior Court of the State of California is reversed and the cause is remanded to it for further proceedings not inconsistent with this opinion.

It is so ordered.

* * *

Justice Clark, whom Justice Frankfurter and Justice Whittaker join, dissenting.

* * *

COMMENT

The *Talley* case reveals the dilemma of reconciling freedom of information (interpreting that term to mean that all information on an issue ought to be put before the public) with a right of privacy (interpreting that term to mean, among many other things, the right to enter the opinion process anonymously). Phrasing the dilemma in this way, does the decision in *Talley* appear less satisfactory to you?

Justice Clark in dissent discerned the problems presented by blanket constitutional protection for anonymous speech in view of the requirement of the Federal Regulation of Lobbying Act that lobbyists divulge their identities and in view of the many states which have enacted corrupt practices legislation prohibiting, among other matters, the distribution of anonymous printed matter concerning political candidates. How can some regulation of anonymous speech be permitted, and, at the same time, how can the political rights of those whom identification would endanger be protected? Justice Clark suggested a means to accomplish these two objectives. He referred to *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958). That was a case where the Court held that the N.A.A.C.P. could not constitutionally be required to divulge its membership lists to the state of Alabama because of the economic reprisal and physical jeopardy that such disclosure might mean for N.A.A.C.P. members. Clark argued that Talley made no showing that similar restraints would befall him. Did Justice Black respond to Clark's argument that anonymity can claim constitutional protection only when it is indispensable to the exercise of political rights? What counterarguments might be made to Clark's position?

Would a less broad statute than the one in *Talley* be constitutional? For a case which held that a New York statute making it a crime to distribute anonymous literature in connection with a political election campaign violated the First Amendment, see *Zwickler v. Koota*, 290 F.Supp. 244 (E.D.N.Y.1968), reversed on other grounds, *Golden v. Zwickler*, 394 U.S. 103 (1969).

Commercial Speech

VALENTINE v. CHRESTENSEN

316 U.S. 52, 62 S.CT. 920, 86 L.ED. 1262 (1942).

Justice ROBERTS delivered the opinion of the Court.

The respondent, a citizen of Florida, owns a former United States Navy submarine which he exhibits for profit. In 1940 he brought it to New York City and moored it at a state pier in the East River. He prepared and printed a handbill advertising the boat and soliciting visitors for a stated admission fee. On his attempting to distribute the bill in the city streets, he was advised by the petitioner, as police commissioner, that this activity would violate § 318 of the Sanitary Code which forbids distribution in the streets of commercial and business advertising matter, but was told that he might freely distribute handbills solely devoted to "information or a public protest."

Respondent thereupon prepared and showed to the petitioner, in proof form, a double-faced handbill. On one side was a revision of the original, altered by the removal of the statement as to admission fee but consisting only of commercial advertising. On the other side was a protest against the action of the City Dock Department in refusing the respondent wharfage facilities at a city pier for the exhibition of his submarine, but no commercial advertising. The Police Department advised that distribution of a bill containing only the protest would not violate § 318, and would not be restrained, but that distribution of the double-faced bill was prohibited. The respondent, nevertheless, proceeded with printing of his proposed bill and started to distribute it. He was restrained by the police.

* * *

The question is whether the application of the ordinance to the respondent's activity, was, in the

circumstances, an unconstitutional abridgement of the freedom of the press and of speech.

1. This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. *We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.* [Emphasis added.] Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated. If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct.

2. The respondent contends that, in truth, he was engaged in the dissemination of matter proper for public information, none the less so because there was inextricably attached to the medium of such dissemination commercial advertising matter. The court below appears to have taken this view since it adverts to the difficulty of apportioning, in a given case, the contents of the communication as between what is of public interest and what is for private profit. We need not indulge nice appraisal based upon subtle distinctions in the present instance nor assume possible cases not now presented. It is enough for the present purpose that the stipulated facts justify the conclusion that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance. If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command.

The decree is reversed.

Reversed.

COMMENT

In *Valentine v. Chrestensen*, the Supreme Court held that commercial speech was outside the ambit of First Amendment protection and therefore subject to regulation by government. The Court believed that Chrestensen printed his noncommercial message solely to evade the regulatory provision. Chrestensen's subjective intent, in other words, belied his claim for First Amendment protection because it was merely a ploy to escape a lawful regulation of the City of New York. If Chrestensen were permitted to distribute his flyers, so could every merchant, simply by affixing to his advertising copy some expression of opinion or protest. The streets of New York would be filled with litter, the sanitary code provision to the contrary notwithstanding.

There may be a Keystone Kops air about *Valentine v. Chrestensen*, but the case for a time sowed the seeds of a constitutional doctrine of significance: the theory that the First Amendment does not embrace what Justice Roberts referred to as "purely" commercial speech. This would come to be called the commercial speech doctrine.

Note that *Valentine v. Chrestensen* was a unanimous decision. Why do you think Justice Black, for instance, agreed with the decision?

Did the *Chrestensen* doctrine establish a hierarchy for expression, i.e., some communications merit a greater claim to constitutional protection than others? Was the core of the *Chrestensen* doctrine that, if there is a "preference" for speech, the speech "preferred" is political rather than commercial speech?

THE DECLINE OF THE COMMERCIAL SPEECH DOCTRINE. The first in a series of cases which dealt a body blow to the idea that commercial speech is beyond the pale of First Amendment protection occurred in 1975. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Court set aside the conviction of an editor of a weekly newspaper who had violated a Virginia state law by accepting an advertisement which announced placements in hospitals and clinics for low-cost abortions could be obtained in New York. The Virginia state law which forbade the circulation of publications encouraging the procuring of abortions was held unconstitutional.

Bigelow set forth a ground-breaking doctrine. The Court repudiated the idea that a category of commercial speech such as commercial advertising was

"stripped of First Amendment protection merely because it appears in that form." The significance of *Bigelow* has been analyzed as follows:

> [I]t was no longer adequate, in dealing with commercial speech, merely to say that any reasonable state regulation would be permissible. With the advent of a new First Amendment status for commercial speech, the interests of the publisher, the reader, and the consumer would be weighed against any arguments advanced in favor of the statute by the state. The statute proscribed activity [abortion] which was now clearly legal, and the state was held to have failed to justify the ban on publication in view of the overriding interests urged by the editor on behalf of the readers. Therefore, in upholding the right of the editor to publish the advertisement in controversy in *Bigelow*, the Court's approach to commercial speech followed a traditional First Amendment balancing test technique.

See Barron and Dienes, *Handbook of Free Speech and Free Press*, 168 (1979).

Bigelow was merely the first development in the waning of the commercial speech doctrine set forth in *Valentine v. Chrestensen*. The coup de grace to the traditional doctrine was dealt by the case reported below.

VIRGINIA STATE BOARD OF PHARMACY v. VIRGINIA CITIZENS CONSUMER COUNCIL, INC.

425 U.S. 748, 96 S.CT. 1817, 48 L.ED.2D 346 (1976).

Justice BLACKMUN delivered the opinion of the Court.

The plaintiff-appellees in this case attack, as violative of the First and Fourteenth Amendments, that portion of § 54–524.35 of Va. Code Ann. (1974), which provides that a pharmacist licensed in Virginia is guilty of unprofessional conduct if he "(3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for any drugs which may be dispensed only by prescription." The three-judge district court declared the quoted portion of the statute "void and of no effect," and enjoined the defendant-appellants, the Virginia State Board of Pharmacy and the individual members of that Board, from enforcing it.

The plaintiffs are an individual Virginia resident who suffers from diseases that require her to take prescription drugs on a daily basis, and two nonprofit organizations. Their claim is that the First Amendment entitles the user of prescription drugs to receive information, that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs.

Certainly that information may be of value. Drug prices in Virginia, for both prescription and nonprescription items, strikingly vary from outlet to outlet even within the same locality. It is stipulated, for example, that in Richmond "the cost of 40 Achromycin tablets ranges from $2.59 to $6.00, a difference of 140% *[sic]*," and that in the Newport News–Hampton area the cost of tetracycline ranges from $1.20 to $9.00, a difference of 650%.

The question first arises whether, even assuming that First Amendment protection attaches to the flow of drug price information, it is a protection enjoyed by the appellees as recipients of the information, and not solely, if at all, by the advertisers themselves who seek to disseminate that information.

Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees.

The appellants contend that the advertisement of prescription drug prices is outside the protection of the First Amendment because it is "commercial speech." There can be no question that in past decisions the Court has given some indication that commercial speech is unprotected.

Our question is whether speech which does "no more than propose a commercial transaction," *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), is so removed from any "exposition of ideas," *Chaplinsky v. New Hampshire*, and from " 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Govemment.' " *Roth v. United States*, that it lacks all protection. Our answer is that it is not.

Focusing first on the individual parties to the transaction that is proposed in the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him for protection under the First Amendment.

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Appellees'

case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent.

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Arrayed against these substantial individual and societal interests are a number of justifications for the advertising ban. These have to do principally with maintaining a high degree of professionalism on the part of licensed pharmacists. Indisputably, the state has a strong interest in maintaining that professionalism.

It appears to be feared that if the pharmacist who wishes to provide the low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the "professional" pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist–customer relationship. They will lose respect for the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what.

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reenforced our view that it is. We so hold.

In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible. We mention a few only to make clear that they are not before us and therefore are not foreclosed by this case.

There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. Whatever may be the proper bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by this Virginia statute, which singles out speech of a particular content and seeks to prevent its dissemination completely.

Nor is there any claim that prescription drug price advertisements are forbidden because they are false or misleading in any way. Untruthful speech, commercial or otherwise, has never been protected for its own sake. *Gertz v. Robert Welch, Inc.* Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading.

We foresee no obstacle to a State's dealing effectively with this problem.[24] The First Amendment, as we construe it today, does not prohibit the state from insuring that the stream of commercial information flows cleanly as well as freely.

Also, there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way. Cf. *Pittsburgh Press* Co. *v. Pittsburgh Comm'n on Human Relations*. Finally the special problems of the electronic broadcast media are likewise not in this case.

What is at issue is whether a state may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative.

The judgment of the district court is affirmed.

Justice Stevens took no part in the consideration or decision of this case.

Justice Stewart, concurring.

Justice REHNQUIST, dissenting.

* * *

In this case * * * the Court has unfortunately substituted for the wavering line previously thought to exist between commercial speech and protected speech a no more satisfactory line of its own—that between "truthful" commercial speech, on the one hand, and that which is "false and misleading" on the other. The difficulty with this line is not that it waivers, but on the contrary that it is simply too Procrustean to take into account the congeries of factors which I believe could, quite consistently with the First and Fourteenth Amendments, properly influence a legislative decision with respect to commercial advertising.

COMMENT

Professor Edwin Baker has argued, based on his individual liberty model of the First Amendment, that "a complete denial of First Amendment protection for commercial speech is not only consistent with, but is required by, First Amendment theory." See Baker, *Commercial Speech: A Problem In The Theory of Freedom*, 62 Iowa L.Rev. 1 at 3 (1976). Baker provides the following argument against a protected status for commercial speech:

> [I]n our present historical setting, commercial speech is not a manifestation of individual freedom or choice. * * * [P]rofit-motivated or commercial speech lacks the crucial connections with individual liberty and self-realization which exist for speech generally, and which are central to justifications for the constitutional protection of speech, justifications which in turn define the proper scope of protection under the first amendment.

What values emphasized in *Virginia Pharmacy* does this analysis omit? It could be argued, certainly, that an individual with little in the way of economic resources and dependent for life on an expensive prescription drug might well find information as to the price of these drugs central to "self-realization."

Although *Virginia Pharmacy* gave new constitutional protection to commercial speech, it was still, to steal a phrase from George Orwell, a little less equal than other kinds of speech. (See fn. 24.) Part of the Court's problem was presented by the perceived need to regulate false and misleading advertising. Professor Redish has challenged some of the Court's reasoning for continuing to validate some regulation of commercial advertising. See Redish, *The Value of Free Speech*, 130 U.Pa.L.Rev. 591 at 633 (1982). Professor Redish questioned whether commercial claims are more easily verified than political ones.

The distinction between commercial and political speech, according to Professor Redish, has another rationale:

> We presumably find such regulation in the political process so abhorrent not because we wish to condone misleading political claims, but rather because of the dangers inherent in allowing the government to reg-

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24. In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does "no more than purpose a commercial transaction," and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the state, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information in unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.

Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear in silencing the speaker. They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings and disclaimers, as are necessary to prevent it being deceptive.

> ulate on the basis of the misleading nature of assertions made in the political process. The fear is that those in power will use such authority as a weapon with which to intimidate or defeat the political opposition, a result that has been all too common in our political history. * * * In contrast, there is no reason to believe that much regulation of misleading advertising is similarly motivated.

Do you agree?

Another significant development in the line of cases according a higher degree of First Amendment protection to commercial speech is *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

The case arose out of the following facts. Two members of the Arizona bar were charged with violating a state supreme court disciplinary rule which prohibited lawyers from advertising in newspapers as well as other media. The two lawyers, John Bates and Van O'Steen, opened up a "legal clinic" to serve people of moderate means. The clinic limited itself to "routine" legal services. In order to obtain a sufficient volume of business to make low-cost legal services possible, the two lawyers decided to advertise. They took out an ad in the Phoenix daily newspaper, *Arizona Republic*, where they listed the types of services which they could provide and the fees which they would charge, e.g., uncontested divorces—$100, uncontested adoptions—$225 plus a $10 publications fee. The state bar concluded that the two lawyers had violated the disciplinary rule against lawyer advertising, and the Arizona Supreme Court upheld that determination. The United States Supreme Court affirmed in part and reversed in part.

In *Bates*, the Supreme Court, per Justice Blackmun, ruled that the state bar association prohibition on all lawyer advertising was unconstitutional: "Like the Virginia statutes, [involved in *Virginia Pharmacy*] the disciplinary role serves to inhibit the free flow of commercial information and to keep the public in ignorance." The issue presented was a narrow one. Problems associated with regulation of advertising claims relating to the quality of legal services were not addressed. Also left for later resolution were "the problems associated with in-person solicitation of clients—at the hospital room or the accident site, or in any other situation that breeds undue influence" by lawyers or their agents. Justice Blackmun described the issue before the Court as follows:

> The heart of the dispute before us today is whether lawyers also may constitutionally advertise the prices at which certain routine services will be performed. Numerous justifications are proffered for the restrictions of such price advertising.

The Court rejected the various justifications offered for restricting price advertising for routine services. Next the Court discussed the application of the overbreadth doctrine to the prohibition at issue. Justice Blackmun observed that under First Amendment law, attack on overly broad statutes had been permitted even though "the person making the attack" could not "demonstrate that in fact his specific conduct was protected." If it could be shown that the disciplinary rule interferes with protected expression, the person attacking the prohibition "ordinarily could expect to benefit regardless of the nature of [her] acts." The reason for this approach to overbreadth analysis in a First Amendment setting was powerful:

> The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted.

However, Justice Blackmun reasoned that overbreadth doctrine was strong medicine in the context of commercial speech:

> But the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. As was acknowledged in *Virginia Pharmacy Board v. Virginia Consumer Council*, there are "commonsense differences" between commercial speech and other varieties. Since advertising is linked to commercial well-being it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected.

The Court held that the advertising at issue was not misleading:

> In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way.

Some regulation on lawyer advertising was, of course, not precluded by the decision. False, deceptive, or misleading advertising was subject to re-

straint: "Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech." Advertising relating to the quality of services also might, in some circumstances, be subject to regulation since quality claims were "not susceptible to measurement or verification."

Suppression of advertising concerning illegal transactions was still permissible. Possibilities left open by the Court in *Bates* included "reasonable restrictions on the time, place, and manner of advertising." Resolution of the "special problems of advertising on the electronic broadcast media" were left for another day. The holding of the *Bates* case was a simple one: the state could not, consistent with the First Amendment, prohibit the truthful advertisement of the terms of routine legal services in a newspaper.

Justice Rehnquist dissented in *Bates*, arguing that the First Amendment was a "sanctuary for expressions of public importance or intellectual interest." Justice Rehnquist said that the First Amendment was "demeaned by invocation to protect advertisements of goods and services." Reflect on Professor Meiklejohn's view of the type of expression the First Amendment was designed to protect. See text, p. 16. Is it likely that Professor Meiklejohn would agree with Justice Blackmun or with Justice Rehnquist with respect to the issues raised in *Bates?*

Bates made a distinction between "routine" legal advertising which could not be validly prohibited and bans on "quality of service" advertising, the validity of which the Court postponed for resolution for another day. *Bates* left room for the state to regulate some kinds of professional advertising. Moreover, the Court limited its ruling to the type of advertising involved in *Bates*, e.g., print media advertising. *Bates* suggested that the case for regulation of professional advertising on the electronic media would be stronger than in the case of the print media. Why?

Another development in the general overhaul of the commercial speech doctrine which began with the *Bigelow* case was found in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). The town of Willingboro, New Jersey had issued an ordinance forbidding the posting of "For Sale" or "Sold" signs. The point of the ordinance was to prevent a so-called "white flight" from a community whose black population was rapidly increasing. The Supreme Court, per Justice Marshall, ruled that the ordinance was unconstitutional.

The *Linmark* case showed that the First Amendment interest in providing both the buyer and society with an unrestricted flow of commercial information was of high dimension. State concern that use of the "For Sale" sign might cause the community to act irrationally would not justify restricting the most effective option for communication of a particular kind of commercial information—the use of the "For Sale" sign in front of the house to communicate a homeowner's desire to sell his house.

Linmark suggests that the status of commercial speech is high. Although commercial speech may not yet have attained the status of noncommercial speech, a case like *Linmark* demonstrates that the voices of the marketplace are worthy of inclusion in a constitutionally protected marketplace of ideas.

As a First Amendment matter, even when expression is protected, *time, place, and manner* regulations are, in appropriate circumstances, nevertheless permissible. Was the restriction on "For Sale" signs merely a restriction on the manner of expression? After all, other opportunities for advertising the sale of houses were available such as the classified columns of the newspapers. The Court refused to view the ordinance prohibiting "For Sale" signs as manner restrictions. The ordinance in the Court's opinion was concerned with restricting the content of a particular mode of communication. Since the Willingboro ordinance was not content-neutral and was designed to restrict a class of expression, even though the expression involved was commercial in character, the ordinance violated the First Amendment.

The student should also consult the advertising section of this text where some of these cases are discussed from a regulation, instead of a First Amendment, point of view. See text, p. 523.

CENTRAL HUDSON GAS & ELECTRIC CORP. v. PUBLIC SERVICE COMMISSION

447 U.S. 557, 100 S.CT. 2343, 65 L.ED.2D 341 (1980).

Justice POWELL delivered the opinion of the Court.

This case presents the question whether a regulation of the Public Service Commission of the State of New York violates the First and Fourteenth

Amendments because it completely bans promotional advertising by an electrical utility.

In December 1973, the commission, appellee here, ordered electric utilities in New York State to cease all advertising that "promot[es] the use of electricity." The order was based on the commission's finding that "the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973–1974 winter."

Three years later, when the fuel shortage had eased, the commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Hudson Gas & Electric Corporation, the appellant in this case, opposed the ban on First Amendment grounds. After reviewing the public comments, the commission extended the prohibition in a policy statement issued on February 25, 1977.

The policy statement divided advertising expenses "into two broad categories: promotional—advertising intended to stimulate the purchase of utility services—and institutional and informational, a broad category inclusive of all advertising not clearly intended to promote sales." The commission declared all promotional advertising contrary to the national policy of conserving energy. It acknowledged that the ban is not a perfect vehicle for conserving energy. Still, the commission adopted the restriction because it was deemed likely to "result in some dampening of unnecessary growth" in energy consumption.

The commission's order explicitly permitted "informational" advertising designed to encourage "*shifts* of consumption" from peak demand times to periods of low electricity demand. [Emphasis in original.] Informational advertising would not seek to increase aggregate consumption, but would invite a leveling of demand throughout any given 24-hour period. The agency offered to review "specific proposals by the companies for specifically described [advertising] programs that meet these criteria."

Appellant challenged the order in state court, arguing that the commission had restrained commercial speech in violation of the First and Fourteenth Amendments. The commission's order was upheld by the trial court and at the intermediate appellate level. The New York Court of Appeals affirmed.

The commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

Nevertheless, our decisions have recognized "the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an era traditionally subject to government regulation, and other varieties of speech." The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communications more likely to deceive the public than to inform it.

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The state must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the state's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved: the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Under the first criterion, the court has declined to uphold regulations that only indirectly advance the state interest involved.

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." The regulatory technique may extend only as far as the interest it serves. The state cannot regulate speech that poses no danger to the

asserted state interest, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well.

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. [Emphasis added.]

We now apply this four-step analysis for commercial speech to the commission's arguments in support of its ban on promotional advertising.

The commission does not claim that the expression at issue either is inaccurate or relates to unlawful activity. Yet the New York Court of Appeals questioned whether Central Hudson's advertising is protected commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the state court suggested that the commission's order restricts no commercial speech of any worth. The court stated that advertising in a "noncompetitive market" could not improve the decision making of consumers. The court saw no constitutional problem with barring commercial speech that it viewed as conveying little useful information.

We come finally to the critical inquiry in this case: whether the commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the state's interest in energy conservation. The commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the state's interests.

The commission also had not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. To further its policy of conservation, the commission could attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future. In the absence of a showing that more limited speech regulations would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.

* * *

Justice REHNQUIST, dissenting.

The Court's analysis in my view is wrong in several respects. Initially, I disagree with the Court's conclusion that the speech of a state-created monopoly, which is the subject of a comprehensive regulatory scheme, is entitled to protection under the First Amendment. I also think that the Court errs here in failing to recognize that the state law is most accurately viewed as an economic regulation and that the speech involved (if it falls within the scope of the First Amendment at all) occupies a significantly more subordinate position in the hierarchy of First Amendment values than the Court gives it today. Finally, the Court in reaching its decision improperly substitutes its own judgment for that of the state in deciding how a proper ban on promotional advertising should be drafted. With regard to this latter point, the Court adopts as its final part of a four-part test a "no more extensive than necessary" analysis that will unduly impair a state legislature's ability to adopt legislation reasonably designed to promote interests that have always been rightly thought to be of great importance to the state.

I think New York's ban on such advertising falls within the scope of permissible state regulation of an economic activity by an entity that could not exist in corporate form, say nothing of enjoy monopoly status, were it not for the laws of New York.

This Court has previously recognized that although commercial speech may be entitled to First Amendment protection, that protection is not as extensive as that accorded to the advocacy of ideas.

The test adopted by the Court elevates the protection accorded commercial speech that falls within the scope of the First Amendment to a level that is virtually indistinguishable from that of noncommercial speech. I think the Court in so doing has effectively accomplished the "devitalization" of the First Amendment that it counseled against in *Ohralik*, 436 U.S. 447 (1978). I think it has also by

labeling economic regulation of business conduct as a restraint on "free speech" gone far to resurrect the discredited doctrine of cases such as *Lochner*. New York's order here is in my view more akin to an economic regulation to which virtually complete deference should be accorded by this Court.

[I]n a number of instances government may constitutionally decide that societal interests justify the imposition of restrictions on the free flow of information. When the question is whether a given commercial message is protected, I do not think this Court's determination that the information will "assist" consumers justifies judicial invalidation of a reasonably drafted state restriction on such speech when the restriction is designed to promote a concededly substantial state interest. I consequently disagree with the Court's conclusion that the societal interest in the dissemination of commercial information is sufficient to justify a restriction on the State's authority to regulate promotional advertising by utilities; indeed, in the case of a regulated monopoly, it is difficult for me to distinguish "society" from the state legislature and the Public Service Commission. Nor do I think there is any basis for concluding that individual citizens of the state will recognize the need for and act to promote energy conservation to the extent the government deems appropriate, if only the channels of communication are left open. Thus, even if I were to agree that commercial speech is entitled to some First Amendment protection, I would hold here that the state's decision to ban promotional advertising, in light of the substantial state interest at stake, is a constitutionally permissible exercise of its power to adopt regulations designed to promote the interests of its citizens.

The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy of one who was defrauded would be merely a statement, available upon request, reciting the Latin maxim "*caveat emptor*." But since "fraudulent speech" in this area is to be remediable under *Virginia Board*, the remedy of one defrauded is a lawsuit or an agency proceeding based on common law notions of fraud that are separated by a world of difference from the realm of politics and government. What time, legal decisions, and common sense have so widely severed, I declined to join in *Virginia Board*, and regret now to see the Court reaping the seeds that it there sowed. For in a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence.

It is [in] my view inappropriate for the Court to invalidate the state's ban on commercial advertising here based on its speculation that in some cases the advertising may result in a net savings in electrical energy use, and in the cases in which it is clear a net energy savings would result from utility advertising the Public Service Commission would apply its ban so as to proscribe such advertising. Even assuming that the Court's speculation is correct, I do not think it follows that facial invalidation of the ban is the appropriate course.

COMMENT

Does *Central Hudson* take the commercial speech doctrine back to the *Valentine v. Chrestensen* era? This probably would be an unjustified conclusion. *Valentine* suggested that a rational basis asserted by the state to support regulation of commercial speech would be valid. The four-part test of *Central Hudson*, after all, does make it possible to regulate some commercial speech. On the other hand, the four-part test of *Central Hudson* limits the state's incursion into commercial speech.

Is *Central Hudson* a departure from the broad protection for commercial speech promised by *Virginia Pharmacy?* Isn't the teaching of *Central Hudson* that a "narrowly drawn" statute regulating commercial speech is valid against First Amendment attack? In short, if the criteria of the four-part test are met, the state may regulate.

In *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), a San Diego ordinance barring most types of billboard advertising was invalidated, but no common rationale attracted a majority of the Court. A plurality opinion for the court, written by Justice White and joined by three others, found the constitutional infirmity of the ordinance to be that while on-site commercial billboard advertising was permitted, other commercial billboard advertising, as well as noncommercial advertising (with some exceptions), was not permitted. The ban on noncommercial advertising was deemed impermissible by Justice White:

> With respect to noncommercial speech, the city may not choose the appropriate subjects for public dis-

course. Because some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones.

What of the distinction San Diego made between on-site commercial billboards which were permitted and off-site commercial advertising which was not? Was the distinction valid? Justice White said that it was:

> As we see it, the city could reasonably conclude that a commercial enterprise—as well as the interested public—has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. It does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising. Thus, off-site commercial billboards may be prohibited while on-site commercial billboards are permitted.
>
> The constitutional problem in this area requires resolution of the conflict between the city's land-use interests and the commercial interests of those seeking to purvey goods and services within the city. In light of the above analysis, we cannot conclude that the city has drawn an ordinance broader than is necessary to meet its interests, or that it fails directly to advance substantial government interests. In sum, insofar as it regulates commercial speech the San Diego ordinance meets the constitutional requirements of *Central Hudson*.

A majority of the justices did agree, however, that an ordinance which was drawn with sufficient precision to prohibit only commercial billboard advertising could be valid. In a concurring opinion, Justice Brennan disagreed with that conclusion:

> More importantly, I cannot agree with the plurality's view that an ordinance totally banning commercial billboards but allowing noncommercial billboards would be constitutional. For me, such an ordinance raises First Amendment problems at least as serious as those raised by a total ban, for it gives city officials the right—before approving a billboard—to determine whether the proposed message is "commercial" or "noncommercial." Of course the plurality is correct when it observes that "our cases have consistently distinguished between the constitutional protection afforded commercial as opposed to noncommercial speech," but it errs in assuming that a *governmental unit* may be put in the position in the first instance of deciding whether the proposed speech is commercial or noncommercial. In individual cases, this distinction is anything but clear. Because making such determinations would entail a substantial exercise of discretion by city's officials, it presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech.

In a recent article, Professor Martin Redish has characterized *Metromedia* as an example of a case where the Court confused subject matter categorizations with content regulation. See Redish, *The Content Distinction in First Amendment Analysis*, 34 Stan.L.Rev. 1 at 128 (1981):

> [I]t is significant that, in response to the Chief Justice's argument (in dissent) that the Court's function should be limited to assuring governmental neutrality in regulating speech (Burger, C.J., dissenting), the Court did not argue that even such content-neutral regulations could significantly impair first amendment interests. Rather, Justice White's plurality opinion merely noted that the traditional concern for neutrality "is applicable to the facts of this case" because "San Diego has chosen to favor certain kinds of messages—such as on-site commercial advertising and temporary political campaign advertisements—over others." The dissent failed to explain, Justice White said, "why San Diego should not be held to have violated this concept of First Amendment neutrality." The decision, then, appears to be nothing more than another instance—like *Mosley* [*Police Department v. Mosley*, 408 U.S. 92 (1972)]—in which the Court aberrationally decides to view subject matter categorization as a form of content regulation and therefore subject to a stricter form of scrutiny.

Why is subject matter categorization less dangerous from a First Amendment point of view than content regulation?

Zauderer and Illustrations in Advertising

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985), invalidated an Ohio Supreme Court disciplinary office reprimand against a lawyer from advertising in a newspaper to solicit legal business from those who suffered injuries as a result of using Dalkon Shields. Justice White explained this determination as follows:

> Because appellant's statements regarding the Dalkon Shield were not false or deceptive, our decisions im-

> pose on the State the burden of establishing that prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest. Although some sensitive souls may have found appellant's advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it. More significantly, appellant's advertisement—and print advertising generally—poses much less risk of over-reaching or undue influence. Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate.

Zauderer also invalidated a disciplinary restriction on the use of illustrations in lawyer advertising:

> The use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly. Accordingly, commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech: restrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test. Although the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights.
>
> We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forego that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations. Given the possibility of policing the use of illustrations in advertisements on a case-by-case basis, the prophylactic approach taken by Ohio cannot stand; hence, appellant may not be disciplined for his use of an accurate and nondeceptive illustration.

Shapero v. Kentucky Bar Association and Bans on Targeted Direct-mail Advertising

In *Shapero v. Kentucky Bar Association*, 108 S.Ct. 1916 (1988), the Court, per Justice Brennan, ruled that targeted direct-mail advertising by a lawyer to potential clients could not be prohibited by the state of Kentucky. *Zauderer* had held that newspaper advertisements by lawyers containing truthful and nondeceptive information or advice regarding specific legal problems could not be categorically banned under the First Amendment. Was *Shapero* distinguishable? Was the newspaper advertising by lawyers on specific legal problems different from targeted direct-mail advertising on specific legal problems? The Court declined to make such a distinction: "Our lawyer advertising cases have never distinguished among various modes of written advertising to the general public."

A case which both *Shapero* and *Zauderer* were at pains to distinguish was *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), which invalidated an Ohio rule prohibiting in-person solicitation by lawyers for pecuniary gain.

Was the lawyer letter targeted to a particular potential client with a particular legal problem just "*Ohralik* in writing"? Justice Brennan in *Shapero* answered this question in the negative:

> Like print advertising, petitioner's letter and targeted, direct-mail solicitation generally—"poses much less risk of overreaching or undue influence" than does in-person solicitation. Neither mode of written communication involves "the coercive force of the personal presence of a trained advocate" or the "pressure on the potential client for an immediate yes-or-no answer to the offer of representation." Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the "reader of an advertisement * * * can 'effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes.' " A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded. In short, both types of written solicitation "conve[y] information about legal services [by means] that [are] more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney."

Justice Brennan concluded that some targeted, direct-mail solicitation did present opportunities for "isolated abuse," but this did not justify "a total ban on that mode of protected commercial speech." The state had far less restrictive means available to deal with such problems: the state could require lawyers to file solicitation letters with a state agency. This would provide the state with "ample opportunity to supervise mailings and penalize actual abuses."

Justice Brennan concluded this portion of his opinion for the majority of the Court by relying on the statement from *Zauderer* that the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of

distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."

One portion of Justice Brennan's opinion for the Court was supported only by a plurality of the Court (Marshall, Blackmun, and Kennedy). This dealt with the contention of the state bar association that attorney Shapero's use in his letter of underscored uppercase letters and his inclusion of subjective predictions of client satisfaction constituted overreaching. Attorney Shapero's letter contained statements such as "Call NOW, don't wait" and "it is FREE, there is NO charge for calling." Justice Brennan addressed this contention since the First Amendment overbreadth doctrine does not apply to professional advertising. He quickly dismissed it: "[S]o long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient."

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, dissented. Although Justice O'Connor agreed that *Zauderer* supported the result in *Shapero*, Justice O'Connor felt that *Zauderer* was "itself the culmination of a line of cases built on defective premises and flawed reasoning." For Justice O'Connor, the reasoning of *Bates* was ill-considered. *Central Hudson* and its doctrine should have been applied to the advertising restriction in *Shapero*:

> Applying the *Central Hudson* test to the regulation at issue today, * * * I think it clear that Kentucky has a substantial interest in preventing the potentially misleading effects of targeted, direct-mail advertising as well as the corrosive effects that such advertising can have on appropriate professional standards. Soliciting business from strangers who appear to need particular legal services, when a significant motive for the offer is the lawyer's pecuniary gain, always has a tendency to corrupt the solicitor's professional judgment.
>
> The roots of the error in our attorney advertising cases are a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States' justification for their regulations.
>
> *Bates* was an early experiment with the doctrine of commercial speech, and it has proved to be problematic in its application. Rather than continuing to work out all the consequences of its approach, we should now return to the States the legislative function that has so inappropriately been taken from them in the context of attorney advertising. The *Central Hudson* test for commercial speech provides an adequate doctrinal basis for doing so, and today's decision confirms the need to reconsider *Bates* in the light of that doctrine.

POSADAS DE PUERTO RICO ASSOCIATES v. TOURISM COMPANY OF PUERTO RICO

478 U.S. 328, 106 S.CT. 2968, 92 L.ED.2D 266 (1986).

[EDITORIAL NOTE In order to encourage tourism Puerto Rico legalized casino gambling. Advertising of these casino and gambling parlors to the Puerto Rican public was prohibited under the Games of Chance Act but "restricted advertising" outside of Puerto Rico was permitted. Posadas de Puerto Rico Associates was fined twice for violating the advertising restrictions. Posadas protested, and the Tourism Company of Puerto Rico which had fined Posadas interpreted the advertising restrictions. The prohibition against advertising in Puerto Rico included "the use of the word 'casino' in matchbooks, lighters, envelopes" as well as napkins, brochures, menus, and on many other items from pencils to telephone directories.

More fines were assessed against Posadas. Posadas paid the fines since otherwise its gambling franchise would not be renewed. News of the fines reached the New Jersey Gambling Commission which considered denying a franchise to the parent company of Posadas to operate a casino in New Jersey.

Posadas sought a declaratory judgment against the Tourism Company in the Superior Court of Puerto Rico alleging that the Game of Chance Act and the regulations issued under it violated protected commercial speech. The Puerto Rico Government concluded that the legislature was concerned with preventing advertising of casino gambling directed at residents of Puerto Rico but not at such advertising when it was directed to tourists. The Court gave the statute a narrowing interpretation and concluded that it only prohibited advertising "which is contracted with an advertising agency, for consideration, to attract the resident to bet at the dice, card, roulette and bingo tables." The Superior Court of Puerto Rico also set forth a narrowing construction of the advertising restriction regulation:

> *We hereby allow, within the jurisdiction of Puerto Rico, advertising by the casinos addressed to tourists, provided they do not invite the residents of Puerto Rico to visit the casino, even though said announcements may incidentally reach the hands of a resident. We hereby authorize advertising in*

the mass communication media of the country, where the trade name of the hotel is used even though it may contain a reference to the casino provided that the word casino is never used alone nor specified. Since a clausus *enumeration of this regulation is unforeseeable, any other situation or incident relating to the legal restriction must be measured in light of the public policy of promoting tourism. If the object of the advertisement is the tourist, it passes legal scrutiny.*

The Superior Court of Puerto Rico declared that the constitutional rights of Posadas had been violated by the Tourism Company's past application of the advertising restrictions. The court ruled, however, that the restrictions were not facially unconstitutional and could be "sustained as modified by the guidelines issued by this court on this date." Posadas then sought review in the Puerto Rico Supreme Court which dismissed his appeal on the ground that it did "not present a substantial constitutional question." Appeal was then obtained before the United States Supreme Court.]

Justice REHNQUIST delivered the opinion of the Court.

Because this case involves the restriction of pure commercial speech which does "no more than propose a commercial transaction," *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, our First Amendment analysis is guided by the general principles identified in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.* Under *Central Hudson*, commercial speech receives a limited form of First Amendment protection so long as it concerns a lawful activity and is not misleading or fraudulent. Once it is determined that the First Amendment applies to the particular kind of commercial speech at issue, then the speech may be restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest.

The particular kind of commercial speech at issue here, namely, advertising of casino gambling aimed at the residents of Puerto Rico, concerns a lawful activity and is not misleading or fraudulent, at least at the abstract. We must therefore proceed to the three remaining steps of the *Central Hudson* analysis in order to determine whether Puerto Rico's advertising restrictions run afoul of the First Amendment. The first of these three steps involves an assessment of the strength of the government's interest in restricting the speech. The interest at stake in this case, as determined by the Superior Court, is the reduction of demand for casino gambling by the residents of Puerto Rico. These are some of the very same concerns, of course, that have motivated the vast majority of the 50 States to prohibit casino gambling. We have no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a "substantial" governmental interest. Cf. *Renton v. Playtime Theatres, Inc.* (city has substantial interest in "preserving the quality of life in the community at large").

The last two steps of the *Central Hudson* analysis basically involve a consideration of the "fit" between the legislature's ends and the means chosen to accomplish those ends. Step three asks the question whether the challenged restrictions on commercial speech "directly advance" the government's asserted interest. In the instant case, the answer to this question is clearly "yes. The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view. See *Central Hudson.*

Appellant argues, however, that the challenged advertising restrictions are underinclusive because other kinds of gambling such as horse racing, cockfighting, and the lottery may be advertised to the residents of Puerto Rico. Appellant's argument is misplaced for two reasons. First, whether other kinds of gambling are advertised in Puerto Rico or not, the restrictions on advertising of casino gambling "directly advance" the legislature's interest in reducing demand for games of chance. Second, the legislature's interest, as previously identified, is not necessarily to reduce demand for all games of chance but to reduce demand for casino gambling. According to the Superior Court, horse racing, cockfighting, "picas," or small games of chance at fiestas, and the lottery "have been traditionally part of the Puerto Rican's roots," so that "the legislator could have been more flexible in authorizing more sophisticated games which are not so widely sponsored by the people. In other words, the legislature felt that for Puerto Ricans the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling

in Puerto Rico. In our view, the legislature's separate classification of casino gambling, for purposes of the advertising ban, satisfies the third step of the *Central Hudson* analysis.

We also think it clear beyond peradventure that the challenged statute and regulations satisfy the fourth and last step of the *Central Hudson* analysis, namely, whether the restrictions on commercial speech are no more extensive than necessary to serve the government's interest. The narrowing constructions of the advertising restrictions announced by the Superior Court ensure that the restrictions will not affect advertising of casino gambling aimed at tourists, but will apply only to such advertising when aimed at the residents of Puerto Rico. Appellant contends, however, that the First Amendment requires the Puerto Rico Legislature to reduce demand for casino gambling among the residents of Puerto Rico not by suppressing commercial speech that might *encourage* such gambling, but by promulgating additional speech designed to *discourage* it. We reject this contention. We think it is up to the legislature to decide whether or not such a "counterspeech" policy would be as effective in reducing the demand for casino gambling as a restriction on advertising. The legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct.

In short, we conclude that the statute and regulations at issue in this case, as construed by the Superior Court, pass muster under each prong of the *Central Hudson* test. We therefore hold that the Supreme Court of Puerto Rico properly rejected appellant's First Amendment claim.

Appellant argues, however, that the challenged advertising restrictions are constitutionally defective under our decisions in *Carey v. Population Services Int'l*, and *Bigelow v. Virginia*. In *Carey*, this Court struck down a ban on any "advertisement or display" of contraceptives and in *Bigelow*, we reversed a criminal conviction based on the advertisement of an abortion clinic. We think appellant's argument ignores a crucial distinction between the *Carey* and *Bigelow* decisions and the instant case. In *Carey* and *Bigelow*, the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State. Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling, and *Carey* and *Bigelow* are hence inapposite.

Appellant also makes the related argument that, having chosen to legalize casino gambling for residents of Puerto Rico, the First Amendment prohibits the legislature from using restrictions on advertising to accomplish its goal of reducing demand for such gambling. We disagree. In our view, appellant has the argument backwards. As we noted in the preceding paragraph, it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising. It would surely be a Pyrrhic victory for casino owners such as appellant to gain recognition of a First Amendment right to advertise their casinos to the residents of Puerto Rico, only to thereby force the legislature into banning casino gambling by residents altogether. It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand. Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand, to legalization of the product or activity with restrictions on stimulation of its demand on the other hand. To rule out the latter, intermediate kind of response would require more than we find in the First Amendment.

Appellant's final argument in opposition to the advertising restrictions is that they are unconstitutionally vague. In particular, appellant argues that the statutory language, "to advertise or otherwise offer their facilities," and "the public of Puerto Rico," are not sufficiently defined to satisfy the requirements of due process. Appellant also claims that the term "anunciarse," which appears in the controlling Spanish version of the statute, is actually broader than the English term "to advertise," and could be construed to mean simply "to make known." Even assuming that appellant's argument has merit with respect to the bare statutory language, however, we have already noted that we are bound by the Superior

Court's narrowing construction of the statute. Viewed in light of that construction, and particularly with the interpretive assistance of the implementing regulations as modified by the Superior Court, we do not find the statute unconstitutionally vague.

For the foregoing reasons, the decision of the Supreme Court of Puerto Rico that, as construed by the Superior Court, § 8 of the Games of Chance Act of 1948 and the implementing regulations do not facially violate the First Amendment or the due process or equal protection guarantees of the Constitution, is affirmed.[11]

Justice BRENNAN, with whom Justice Marshall and Justice Blackmun join, dissenting.

I see no reason why commercial speech should be afforded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity. * * * However, no differences between commercial and other kinds of speech justify protecting commercial speech less extensively where, as here, the government seeks to manipulate private behavior by depriving citizens of truthful information concerning lawful activities. Accordingly, I believe that where the government seeks to suppress the dissemination of nonmisleading commercial speech relating to legal activities, for fear that recipients will act on the information provided, such regulation should be subject to strict judicial scrutiny.

The Court, rather than applying strict scrutiny, evaluates Puerto Rico's advertising ban under the relaxed standards normally used to test government regulation of commercial speech. Even under these standards, however, I do not believe that Puerto Rico constitutionally may suppress all casino advertising directed to its residents. * * *

The Court asserts that the Commonwealth has a legitimate and substantial interest in discouraging its residents from engaging in casino gambling. Neither the statute on its face nor the legislative history indicates that the Puerto Rico Legislature thought that serious harm would result if residents were allowed to engage in casino gambling; indeed, the available evidence suggests exactly the opposite. Puerto Rico has legalized gambling casinos, and permits its residents to patronize them. Thus, the Puerto Rico legislature has determined that permitting residents to engage in casino gambling will not produce the "serious harmful effects" that have led a majority of States to ban such activity.

The Court nevertheless sustains Puerto Rico's advertising ban because the legislature *could* have determined that casino gambling would seriously harm the health, safety, and welfare of the Puerto Rican citizens.[4] This reasoning is contrary to this Court's long established First Amendment jurisprudence. When the government seeks to place restrictions upon commercial speech, a court may not, as the Court implies today, simply speculate about valid reasons that the government might have for enacting such restrictions. Rather, the government ultimately bears the burden of justifying the challenged regulation, and it is incumbent upon the government to *prove* that the interests it seeks to further are real and substantial. In this case, appellee has not shown that "serious harmful effects" will result if Puerto Rico residents gamble in casinos, and the legislature's decision to legalize such activity suggests that it believed the opposite to be true. In short, appellees have failed to show that a substantial government interest supports Puerto Rico's ban on protected expression.

Even assuming that appellee could show that the challenged restrictions are supported by a substantial governmental interest, this would not end the inquiry into their constitutionality. Appellee must still demonstrate that the challenged advertising ban directly advances Puerto Rico's interest in controlling the harmful effects allegedly associated with casino gambling. However, even assuming that an advertising ban would effectively reduce residents' patronage of gambling casinos, it is not clear how it would directly advance Puerto Rico's interest in controlling the "serious harmful effects" the Court associates with casino gambling. In particular, it is

11. Justice Stevens claims that the Superior Court's narrowing construction creates an impermissible "prior restraint" on protected speech, because that court required the submission of certain casino advertising to appellee for its prior approval. This argument was not raised by appellant either below or in this Court, and we therefore express no view on the constitutionality of the particular portion of the Superior Court's narrowing construction cited by Justice Stevens.

4. I do not agree that a ban on casino advertising is "less intrusive" than an outright prohibition of such activity. A majority of States have chosen not to legalize casino gambling, and we have never suggested that this might be unconstitutional. However, having decided to legalize casino gambling, Puerto Rico's decision to ban truthful speech concerning entirely lawful activity raises serious First Amendment problems. Thus, the "constitutional doctrine" which bans Puerto Rico from banning advertisements concerning lawful casino gambling is not so strange a restraint—it is called the First Amendment.

unclear whether banning casino advertising aimed at residents would affect local crime, prostitution, the development of corruption, or the infiltration of organized crime. Because Puerto Rico actively promotes its casinos to tourists, these problems are likely to persist whether or not residents are also encouraged to gamble. Absent some showing that a ban on advertising aimed only at residents will directly advance Puerto Rico's interest in controlling the harmful effects allegedly associated with casino gambling, Puerto Rico may not constitutionally restrict protected expression in that way.

Finally, appellee has failed to show that Puerto Rico's interest in controlling the harmful effects allegedly associated with casino gambling "cannot be protected adequately by more limited regulation of appellant's commercial expression." *Central Hudson*. Rather than suppressing constitutionally protected expression, Puerto Rico could seek directly to address the specific harms thought to be associated with casino gambling. Thus, Puerto Rico could continue carefully to monitor casino operations to guard against "the development of corruption, and the infiltration of organized crime." It could vigorously enforce its criminal statutes to combat "the increase in local crime [and] the fostering of prostitution." It could establish limits on the level of permissible betting, or promulgate additional speech designed to discourage casino gambling among residents, in order to avoid the "disruption of moral and cultural patterns," that might result if residents were to engage in excessive casino gambling. Such measures would directly address the problems appellee associates with casino gambling, while avoiding the First Amendment problems raised where the government seeks to ban constitutionally protected speech. In this case, nothing suggests that the Puerto Rico Legislature ever considered the efficacy of measures other than suppressing protected expression. More importantly, there has been no showing that alternative measures would inadequately safeguard the Commonwealth's interest in controlling the harmful effects allegedly associated with casino gambling. Under these circumstances, Puerto Rico's ban on advertising clearly violates the First Amendment.

I would hold that Puerto Rico may not suppress the dissemination of truthful information about entirely lawful activity merely to keep its residents ignorant. The Court, however, would allow Puerto Rico to do just that, thus dramatically shrinking the scope of First Amendment protection available to commercial speech, and giving government officials unprecedented authority to eviscerate constitutionally protected expression. I respectfully dissent.

Justice STEVENS, with whom Justice Marshall and Justice Blackmun join, dissenting.

Puerto Rico does not simply "ban advertising of casino gambling." Rather, Puerto Rico blatantly discriminates in its punishment of speech depending on the publication, audience, and words employed. Moreover, the prohibitions, as now construed by the Puerto Rico courts, establish a regime of prior restraint and articulate a standard that is hopelessly vague and unpredictable.

With respect to the publisher, in stark, unabashed language, the Superior Court's construction favors certain identifiable publications and disfavors others. If the publication (or medium) is from outside Puerto Rico, it is very favored indeed. If the publication is native to Puerto Rico, however—the San Juan Star, for instance—it is subject to a far more rigid system of restraints and controls regarding the manner in which a certain form of speech (casino ads) may be carried in its pages. Unless the Court is prepared to uphold an Illinois regulation of speech that subjects The New York Times to one standard and The Chicago Tribune to another, I do not understand why it is willing to uphold a Puerto Rico regulation that applies one standard to The New York Times and another to the San Juan Star.

With respect to the audience, the newly construed regulations plainly discriminate in terms of the intended listener or reader. Casino advertising must be "addressed to tourists." It must not "invite the residents of Puerto Rico to visit the casino." The regulation thus poses what might be viewed as a reverse Privileges and Immunities problem: Puerto Rico's residents are singled out for disfavored treatment in comparison to all other Americans. But nothing so fancy is required to recognize the obvious First Amendment problem in this kind of audience discrimination. I cannot imagine that this Court would uphold an Illinois regulation that forbade advertising "addressed" to Illinois residents while allowing the same advertiser to communicate his message to visitors and commuters; we should be no more willing to uphold a Puerto Rico regulation that forbids advertising "addressed" to Puerto Rico residents.

With respect to the message, the regulations now take one word of the English language—"casino"—and give it a special opprobrium.

* * *

COMMENT

Justice Rehnquist reasoned that since a product could be totally banned, legislative prohibition of advertising of that product—being "a lesser power"—is necessarily permissible. Justice Brennan was not alone in his rejection of this reasoning. Professor Laurence Tribe observed that government has much less latitude to regulate the "marketplace of ideas—even ideas parlayed for profit" than it does to regulate "the marketplace of commerce." Professor Tribe concluded:

> [I]n the wake of the *Central Hudson* dictum that government may seek to discourage even truthful promotion for profit of a lawful product or service and the *Posada* holding that it may do so on an audience-specific basis, the Court's commercial speech doctrine seems poised on a makeshift—and unsteady foundation for the future. See Tribe, *American Constitutional Law* (2d Ed. 1988), 903–904.

Is the idea in *Posadas* that government may regulate speech on an audience-specific basis consistent with the Court's post-*Posadas* decision in *Shapero v. Kentucky Bar Association?* In *Shapero*, Justice O'Connor dissented on the ground that the Court had departed from *Central Hudson* and instead, incorrectly, used the approach set forth in *Bates*. Perhaps, however, *Bates* is the approach that should be adopted and *Central Hudson* the approach that should be abandoned.

As you consider the Court's commercial speech decisions from *Valentine* through *Virginia Pharmacy* to *Central Hudson* and *Posadas*, try to describe the present First Amendment status of commercial speech. Perhaps the difference is that after *Virginia Pharmacy* a whole category of commercial advertising—the prices of prescription drugs—may not be banned. Does *Posadas* change this? Arguably, it is distinguishable since *Posadas* involves a selective rather than a total ban.

Does *Posadas* authorize bans on commercial advertising? Arguably, *Posadas* might authorize a state ban on cigarette advertising. But it would not be authority for a congressionally imposed nationwide ban. However, even such a distinction may be vulnerable since the ban on casino gambling advertising in *Puerto Rico* was audience-specific: it applied to the local citizens; it was not total, i.e., tourists were exempted.

Compelled Speech

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), in an opinion by Justice Stewart, the Court cautioned that the state in a regime ordered by the First Amendment could not require an individual to express or support an ideology he did not share. The Court was not altogether consistent in its holding in *Abood*. The Court first held that a law imposing service charges, equivalent to union dues, assessed against nonmembers of the union "to finance expenditures by the union for the purposes of collective bargaining, contract administration, and grievance adjustment" was valid. The Court summarized its position on this point as follows:

> To be required to help finance the union as a collective-bargaining agent may well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment * * * is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. * * *

In a separate concurrence, Justice Powell, joined by Chief Justice Burger and Justice Blackmun, disagreed with the Court on the foregoing point. See *Buckley v. AFTRA*, 496 F.2d 305 (2d Cir. 1974), cert. den. 419 U.S. 1093 (1975), text, p. 574.

However, the Court took a different view in the case of compulsory service charges which were to be used for political or ideological purposes not related to the union's role as a collective bargaining representative.

ABOOD v. DETROIT BOARD OF EDUCATION

431 U.S. 209, 97 S.CT. 1782, 52 L.ED.2D 261 (1977).

Justice STEWART delivered the opinion of the Court.

* * * Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. The appellants argue that they fall within the protection of these cases because they have been prohibited not from actively

associating, but rather from refusing to associate. They specifically argue that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to the political candidates and to express political views unrelated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one.

One of the principles underlying the Court's decision in *Buckley v. Valeo*, 424 U.S. 1, was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because "[m]aking a contribution * * * enables like-minded persons to pool their resources in furtherance of common political goals," the Court reasoned that limitations upon the freedom to contribute "implicate fundamental First Amendment interests."

The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia Board of Education v. Barnette, 319 U.S. 624.

These principles prohibit a State from compelling any individual to affirm his belief in God, *Torcaso v. Watkins*, 367 U.S. 488, or to associate with a political party, *Elrod v. Burns*, 427 U.S. 1 at 363–364, n. 17, 95 S.Ct. at 2685, as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.

We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or towards the advancement of other ideological causes not germane to its duties as collective bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

There will, of course, be difficult problems in drawing lines between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited.

* * *

WOOLEY v. MAYNARD

430 U.S. 705, 97 S.CT. 1428, 51 L.ED.2D 752 (1977).

[EDITORIAL NOTE In Wooley, *the Court encountered the following fact pattern. A married couple, Jehovah's Witnesses, had covered up the state motto "Live Free or Die" on their New Hampshire automobile license plate. The couple had covered up the motto because it was contrary to their religious and moral beliefs. Could New Hampshire constitutionally enforce criminal sanctions against the couple for so doing? The Court held that New Hampshire could not.]*

Chief Justice BURGER delivered the opinion of the Court.

* * *

We are thus faced with the question of whether the state may constitutionally require an individual to participate in the dessemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the state may not do so.

We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, (1943). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."

This is illustrated by the recent case of *Miami Herald Publishing Co. v. Tornillo.* * * *

Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the state "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

New Hampshire's statute in effect requires that appellees use their private property as a "mobile billboard" for the state's ideological message—or suffer a penalty, as Maynard already has. As a condition to driving an automobile—a virtual necessity for most Americans—the Maynards must display "Live Free or Die" to hundreds of people each day. The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.

Identifying the Maynards' interests as implicating First Amendment protections does not end our inquiry however. We must also determine whether the state's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates. The two interests advanced by the state are that display of the motto (1) facilitates the identification of passenger vehicles, and (2) promotes appreciation of history, individualism and state pride.

The state first points out that only passenger vehicles, but not commercial, trailer, or other vehicles are required to display the state motto. Thus, the argument proceeds, officers of the law are more easily able to determine whether passenger vehicles are carrying the proper plates. However the record here reveals that New Hampshire passenger license plates normally consist of a specific configuration of letters and numbers, which makes them readily distinguishable from other types of plates, even without reference to state motto. Even were we to credit the state's reasons and "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479 (1960).

The state's second claimed interest is not ideologically neutral. The state is seeking to communicate to others an official view as to proper "appreciation of history, state price, [and] individualism." Of course, the state may legitimately pursue such interests in any number of ways. However, where the state's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.

We conclude that the State of New Hampshire may not require appellees to display the state motto upon their vehicle license plates, and accordingly, we affirm the judgment of the district court.

Affirmed.

COMMENT

Wooley sets forth an important principle—the right to refrain from speaking or the right not to be compelled to speak. This freedom from compelled speech derives from an assumption the Court makes about the impact of the First Amendment on government. An aspect of that impact is that the state cannot require its citizens to advertise against their will an official view of things. Where ideology is concerned, must the state be neutral?

Does the fact that government may not restrict freedom of belief mean that government cannot add its views to that of others? The view expressed in *Wooley v. Maynard* appeared to suggest that the state must be ideologically neutral.

In *Wooley v. Maynard*, the Court found in the First Amendment a source of protection for individuals compelled to speak by the state. In *Abood*, the Court found in the First Amendment a source of protection for individuals compelled unwillingly to make political contributions. The two cases may be seen as aspects of an important objective of First Amendment protection—freedom of belief.

PRUNEYARD SHOPPING CENTER v. ROBINS

447 U.S. 74, 100 S.CT. 2035, 64 L.ED.2D 741 (1980).

Justice REHNQUIST delivered the opinion of the Court.

We postponed jurisdiction of this appeal from the Supreme Court of California to decide the important federal constitutional questions it presented. Those are whether state constitutional provisions, which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, violate the shopping center owner's property rights under the Fifth and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments.

Appellant PruneYard is a privately owned shopping center in the city of Campbell, Cal. It covers approximately 21 acres—five devoted to parking and 16 occupied by walkways, plazas, sidewalks, and buildings that contain more than 65 specialty shops, 10 restaurants, and a movie theater. The PruneYard is open to the public for the purpose of encouraging the patronizing of its commercial establishments. It has a policy not to permit any visitor or tenant to engage in any publicly expressive activity, including the circulation of petitions, that is not directly related to its commercial purposes. This policy has been strictly enforced in a nondiscriminatory fashion. The PruneYard is owned by appellant Fred Sahadi.

Appellees are high school students who sought to solicit support for their opposition to a United Nations resolution against "Zionism." On a Saturday afternoon they set up a card table in a corner of PruneYard's central courtyard. They distributed pamphlets and asked passersby to sign petitions, which were to be sent to the president and members of Congress. Their activity was peaceful and orderly and so far as the record indicates was not objected to by PruneYard's patrons.

Soon after appellees had begun soliciting signatures, a security guard informed them that they would have to leave because their activity violated PruneYard regulations. The guard suggested that they move to the public sidewalk at the PruneYard's perimeter. Appellees immediately left the premises and later filed this lawsuit in the California Superior Court of Santa Clara County. They sought to enjoin appellants from denying them access to the PruneYard for the purpose of circulating their petitions.

The Superior Court held that appellees were not entitled under either the Federal or California Constitution to exercise their asserted rights on the shopping center property. [See *Hudgens v. NLRB*, 424 U.S. 507 (1976).] * * * The California Court of Appeal affirmed.

The California Supreme Court reversed, holding that the California Constitution protects "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." 23 Cal.3d 899, 910 (1979). It concluded that appellees are entitled to conduct their activity on PruneYard property. Before this Court, appellants contend that their "constitutionally established rights under the Fourteenth Amendment to exclude appellees from adverse use of appellants' property cannot be denied by invocation of a state constitutional provision or by judicial reconstruction of a state's law of private property."

Appellants first contend that *Lloyd v. Tanner* [407 U.S. 551 (1972)] prevents the state from requiring a private shopping center owner to provide access to persons exercising their state constitutional rights of free speech and petition when adequate alternative avenues of communication are available.

Our reasoning in *Lloyd*, however, does not *ex proprio vigore* limit *the authority of the state to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution*. [Emphasis added.] In *Lloyd*, there was no state constitutional or statutory provision that had been construed to create rights to the use of private property by strangers, comparable to those found to exist by the California Supreme Court here. It is, of course, well-established that a state in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision.

Appellants next contend that a right to exclude others underlies the Fifth Amendment guarantee against the taking of property without just compensation and the Fourteenth Amendment guarantee against the deprivation of property without due process of law.

Here the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the taking clause. There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center.

There is also little merit to appellants' argument that they have been denied their property without due process of law. *Nebbia v. New York*.

Appellants finally contend that a private property owner has a First Amendment right not to be forced by the state to use his property as a forum for the speech of others. They state that in *Wooley v. Maynard* this Court concluded that a state may not constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. This rationale applies here, they argue, because the message of *Wooley* is that the state may not force an individual to display any message at all.

Wooley, however, was a case in which the government itself prescribed the message, required it to be displayed openly on appellee's personal property that was used "as part of his daily life," and refused to permit him to take any measures to cover up the motto even though the Court found that the display of the motto served no important state interest. Here, by contrast, there are a number of distinguishing factors. More important, the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the state to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.

Appellants also argue that their First Amendment rights have been infringed in light of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) and *Miami Herald Publishing Co. v. Tornillo* [this text, p. 497]. *Barnette* is inapposite because it involved the compelled recitation of a message containing an affirmation of belief. * * * Appellants are not similarly being compelled to affirm their belief in any governmentally prescribed position or view, and they are free to publicly dissociate themselves from the views of the speakers or handbillers.

Tornillo * * * rests on the principle that the state cannot tell a newspaper what it must print. * * * There also was a danger in *Tornillo* that the statute would "dampen the vigor and limit the variety of public debate" by deterring editors from publishing controversial political statements that might trigger the application of the statute. Thus, the statute was found to be an "intrusion into the function of editors." These concerns obviously are not present here.

We conclude that neither appellants' federally recognized property rights nor their First Amendment rights have been infringed by the California Supreme Court's decision recognizing a right of appellees to exercise state protected rights of expression and petition on appellants' property. The judgment of the Supreme Court of California is therefore

Affirmed.

Justice Marshall, concurring.

Justice Powell with whom Justice White joins, concurring in part and in the judgment.

COMMENT

The shopping center owner in *PruneYard* sought refuge in the principle of *Wooley*. The state could not require the Jehovah's Witnesses to use their private property to publicize the ideas of the state. In the *Wooley* case, New Hampshire had mandated that motorists carry the state motto on their license plates. In *PruneYard*, the message in question was not being ordered by the state. Moreover, unlike the private automobile in *Wooley*, the shopping center in *PruneYard* was not used by the owners alone.

By definition, the shopping center's very existence constituted an invitation to the public to come and do business. Messages that are publicized by a shopping center are not necessarily to be identified with the owners of the shopping center. First Amendment law as now interpreted by the Supreme Court does not require a shopping center owner to permit the dissemination of news to which he is opposed on his property. See *Hudgens v. NLRB*, 424 U.S. 507 (1976). Justice Marshall, joined by Justice Brennan, dissented in *Hudgens*. The emphasis on property rights by the majority in *Hudgens* arose "from an overly formalistic view of the relationship between the institution of private ownership of property and the First Amendment's guarantee of freedom of expression."

In *Wooley*, protection of a right to be free from compelled speech protected the individual against the state. In *PruneYard*, was the First Amendment analysis equally consistent with maximizing individual self-expression? Protection of the individual property owner's right to be free from compelled speech in that context works to exclude other individuals seeking an audience for their ideas on premises which may be uniquely suitable for the exchange of ideas.

The rights of free speech and petition, if reasonably exercised, of the public who use privately owned shopping centers were also protected under the California state constitutional guarantee of freedom of expression. The California courts, therefore, did not grant absolute priority to the property owner's claim of self-expression as the Supreme Court has done in interpreting the First Amendment in similar circumstances. The *PruneYard* case illustrates that state and federal constitutional law may occasionally yield divergent results on free expression problems. *PruneYard* also illustrates that transposition of the principle of freedom from compelled speech to a corporate context involving modern patterns of land use may yield quite different results than flow from the less complex but classic conflict in *Wooley* between the state and the individual. It has also been suggested that *PruneYard*, consistent with the decentralist tendencies of the Burger Court, is rooted in federalism: a state court may, if it chooses, read its state constitution more expansively than the United States Supreme Court has read the federal Constitution.

Free Expression and Regulation of Corporate Speech: Can Government Equalize the Opinion Process?

In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Supreme Court invalidated a Massachusetts statute prohibiting corporations from attempting to influence the vote on referendum proposals on issues of public importance which materially affect the property, business, or assets of the corporation. The Massachusetts Supreme Judicial Court upheld the statute and accorded corporations seeking to influence elections on matters not directly concerning such corporations less than full First Amendment protection by validating the statute. The Supreme Court, however, reversed the Massachusetts court. See text, p. 8.

The case did not directly answer the question of whether the free speech rights of corporations are protected, but it did hold that speech should be protected without reference to the identity of the speaker. Since *Bellotti* involved the free expression rights of business corporations, the question of whether media corporations, i.e., the institutional press, could make a greater claim to First Amendment protection than ordinary business corporations also arose. Justice Stewart, it will be recalled, had advanced the idea in a 1974 lecture that the press clause of the First Amendment had accorded a special status to the institutional press. See text, p. 7.

Under this theory, it would be possible to argue that media corporations could make a claim for fuller First Amendment protection than could ordinary business corporations. Indeed, in Stewart's 1974 lecture he had observed: "If the free speech clause guarantee meant no more than freedom of expression, it would be a constitutional redundancy." Justice Powell, who wrote the opinion for the Court, agreed that the press had a special and constitutionally recognized role: "The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate." But Powell was, nonetheless, not disposed to take a hierarchical view of the First Amendment:

> If the speakers here were not corporations, no one would suggest that the state could validate silence of their proposed speech. It is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual.

Although Chief Justice Burger agreed with both the opinion and the result reached by the Court in *Bellotti*, he wrote a separate concurring opinion in order to pose some questions which he thought likely to arise in the future. The issue he particularly wished to discuss was "whether the press clause confers upon the 'institutional press' any freedom from governmental restraint not enjoyed by others."

FIRST NATIONAL BANK OF BOSTON v. BELLOTTI

435 U.S. 765, 98 S.CT. 1407, 55 L.ED.2D 707 (1978).

Chief Justice BURGER, concurring.

* * *

A disquieting aspect of Massachusetts' position is that it may carry the risk of impinging on the First Amendment rights of those who employ the corporate form—as most do—to carry on the business of mass communications, particularly the large media conglomerates. This is so because of the difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations from corporations such as the appellants in this case.

Making traditional use of the corporate form, some media enterprises have amassed vast wealth and power and conduct many activities, some directly related—and some not—to their publishing and broadcasting activities. See *Miami Herald Publishing Co. v. Tornillo*. Today, a corporation might own the dominant newspaper in one or more large metropolitan centers, television and radio stations in those same centers and others, a newspaper chain, news magazines with nationwide circulation, national or worldwide wire news services, and substantial interests in book publishing and distribution enterprises. Corporate ownership may extend, vertically, to pulp mills and pulp timber lands to insure an adequate, continuing supply of newsprint and to trucking and steamship lines for the purposes of transporting the newsprint to the presses. Such activities would be logical economic auxiliaries to a publishing conglomerate. Ownership also may extend beyond to business activities unrelated to the task of publishing newspapers and magazines or broadcasting radio and television programs. Obviously, such far-reaching ownership would not be possible without the state-provided corporate form and its "special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets. * * * "

In terms of "unfair advantage in the political process" and "corporate domination of the electoral process," it could be argued that such media conglomerates as I describe pose a much more realistic threat to valid interests than do appellants and similar entities not regularly concerned with shaping popular opinion on public issues. See *Miami Herald Publishing Co. v. Tornillo*. In Tornillo, for example, we noted the serious contentions advanced that a result of the growth of modern media empires "has been to place in a few hands the power to inform the American people and shape public opinion."

In terms of Massachusetts' other concern, the interests of minority shareholders, I perceive no basis for saying that the managers and directors of the media conglomerates are more or less sensitive to the views and desires of minority shareholders than are corporate officers generally.[1] Nor can it be said, even if relevant to First Amendment analysis—which it is not—that the former are more virtuous, wise or restrained in the exercise of corporate power than are the latter. Cf. *Columbia Broadcasting System v. Democratic National Committee*, 14 The Writings of Thomas Jefferson 46 (A. Libscomb ed. 1904) (letter to Walter Jones, Jan. 2, 1814). Thus, no factual distinction has been identified as yet that would justify government restraints on the right of appellants to express their views without, at the same time, opening the door to similar restraints on media conglomerates with their vastly greater influence.

Despite these factual similarities between media and nonmedia corporations, those who view the press clause as somehow conferring special and extraordinary privileges or status on the "institutional press"—which are not extended to those who wish to express ideas other than by publishing a newspaper—might perceive no danger to institutional media corporations flowing from the position asserted by Massachusetts. Under this narrow reading of the press clause, government could perhaps impose on nonmedia corporations restrictions not permissible with respect to "media" enterprises. Cf. Bezanson, *The New Free Press Guarantee*, 63 Va.L.Rev. 731, 767–770 (1977).[2] The Court has not yet squarely resolved

1. It may be that a nonmedia corporation, because of its nature, is subject to more limitations on political expression than a media corporation whose very existence is aimed at political expression. For example, the charter of a nonmedia corporation may be so framed as to tender such activity or expression *ultra vires*; or its shareholders may be much less inclined to permit expenditure for corporate speech. Moreover, a nonmedia corporation may find it more difficult to characterize its expenditures as ordinary and necessary business expenses for tax purposes.

2. It is open to question whether limitations can be placed on the free expression rights of some without undermining the guarantees of all. Experience with statutory limitations on campaign expenditures on behalf of candidates or parties may shed some light on this issue. Cf. *Buckley v. Valeo*.

whether the press clause confers upon the "institutional press" any freedom from government restraint not enjoyed by all others.[3]

I perceive two fundamental difficulties with a narrow reading of the press clause. First, although certainty on this point is not possible, the history of the clause does not suggest that the authors contemplated a "special" or "institutional" privilege. See Lange, the Speech and Press Clauses, 23 U.C.L.A. L. Rev. 77, 88–99 (1975). The common 18th century understanding of freedom of the press is suggested by Andrew Bradford, a colonial American newspaperman. In defining the nature of the liberty he did not limit it to a particular group:

> "But, by the Freedom of the Press, I mean a Liberty, within the Bounds of Law, for any Man to communicate to the Public, his sentiments on the Important Points of Religion and Government; of proposing any Laws, which he apprehends may be for the Good of his Country, and of applying for the Repeal of such, as he Judges pernicious. * * *
>
> "This is the Liberty of the Press, the great Palladium of all our other Liberties, which I hope the good People of this Province, will forever enjoy. * * * " A. Bradford, Sentiments on the Liberty of the Press, in L. Levy, *Freedom of the Press from Zenger to Jefferson* 41–42 (1966) [emphasis deleted] [first published in Bradford's The American Weekly Mercury, a Philadelphia newspaper, April 25, 1734].

Indeed most pre-First Amendment commentators "who employed the term 'freedom of speech' with great frequency, used it synonymously with freedom of the press." L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 174 (1963).

Those interpreting the press clause as extending protection only to, or creating a special role for, the "institutional press" must either (a) assert such an intention on the part of the Framers for which no supporting evidence is available, cf. Lange, supra, at 89–91; (b) argue that events after 1791 somehow operated to "constitutionalize" this interpretation, see Benzanson, *The New Free Press Guarantee*, 63 Va.L.Rev. 731, 788 (1977); or (c) candidly acknowledging the absence of historical support, suggest that the intent of the Framers is not important today. See Nimmer, *Is Freedom of the Press a Redundancy: What Does It Add To Freedom of Speech?*, 26 Hastings L.J. 639, 640–641 (1975).

To conclude that the Framers did not intend to limit the freedom of the press to one select group is not necessarily to suggest that the Press Clause is redundant. The speech clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs,[4] while the press clause focuses specifically on the liberty to disseminate expression broadly and "comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. Griffin*.[5] Yet there is no fundamental distinction between expression and dissemination. The liberty encompassed by the press clause, although complementary to and a natural extension of Speech Clause liberty, merited special mention simply because it had been more often the object of official restraints. Soon after the invention of the printing press, English and continental monarchs, fearful of the power implicit in its use and the threat to establishment thought and order—political and religious—devised restraints, such as licensing, censors, indices of prohibited books, and prosecutions

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3. Language in some cases perhaps may be read as assuming or suggesting no independent scope to the Press Clause, see *Pell v. Procunier*, or the contrary, see *Bigelow v. Virginia*. The Court, however, has not yet focused on the issue. See Lange, The Speech and Press Clauses, 23 U.C.L.A.L.Rev. 77 (1975); Nimmer, *Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 Hastings L.J. 639 (1975); cf. Bezanson, *The New Free Press Guarantee*, 63 Va.L.Rev. 731 (1977).

4. The simplest explanation of the speech and press clauses might be that the former protects oral communications; the latter, written. But the historical evidence does not strongly support this explanation. The first draft of what became the free expression provisions of the First Amendment, one proposed by Madison on May 5, 1789, as an addition to Art. 1, § 9, read:

> The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." 1 Annals of Cong. 451 (1789) (published as 1 Debates of Congress).

The language was changed to its current form, "freedom of speech, or of the press," by the Committee of Eleven to which Madison's amendments were referred. [There is no explanation for the change and the language was not altered thereafter.] It seems likely that the Committee shortened Madison's language preceding the semi-colon in his draft to "freedom of speech" without intending to diminish the scope of protection contemplated by Madison's phrase; in short, it was a stylistic change.

Cf. *Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1881); *Doe v. McMillan*, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973) [Speech or Debate Clause extends to both spoken and written expressions within the legislative function].

5. It is not strange that "press," the word for what was then the sole means of broad dissemination of ideas and news, would be used to describe the freedom to communicate with a large, unseen audience.

Changes wrought by 20th century technology, of course, have rendered the printing press as it existed in 1791 as obsolete as Watt's copying or letter press. It is the core meaning of "press" as used in the constitutional text which must govern.

for seditious libel, which generally were unknown in the pre-printing press era. Official restrictions were the official response to the new, disquieting idea that this invention would provide a means for mass communication.

The second fundamental difficulty with interpreting the press clause as conferring special status on a limited group is one of definition. See Lange, *supra*. The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country. *Lovell v. Griffin*. Further, the officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fervor of expression, or ownership of the technological means of dissemination. Yet nothing in this Court's opinions supports such a confining approach to the scope of press clause protection.[6] Indeed, the Court has plainly intimated the contrary view:

> "Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. * * * The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' * * * The information function asserted by representatives of the organized press * * * is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public. * * *" Branzburg v. Hayes, quoting Lovell v. Griffin.

The meaning of the press clause, as a provision separate and apart from the speech clause, is implicated only indirectly by this case. Yet Massachusetts' position poses serious questions. The evolution of traditional newspapers into modern corporate conglomerates in which the daily dissemination of news by print is no longer the major part of the whole enterprise suggests the need for caution in limiting the First Amendment rights of corporations as such. Thus, the tentative probings of this brief inquiry are wholly consistent, I think, with the Court's refusal to sustain § 8's serious and potentially dangerous restriction on the freedom of political speech.

Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination. "[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. '* * * [T]he liberty of the press is no greater and no less * * *' than the liberty of every citizen of the Republic." Pennekamp v. Florida (Frankfurter, J., concurring).

In short, the First Amendment does not "belong" to any definable category of persons or entities: it belongs to all who exercise its freedoms.

COMMENT

Did *Bellotti* really deal with whether corporate speech merits full First Amendment protection? That issue really was not considered. Powell, instead, said the issue was whether the corporate identity of the speech should affect its status under the First Amendment. What is Powell's attitude toward inequality in communicating power? From a First Amendment perspective, in Powell's view, all speakers have an equal claim to liberty of expression. In 1975, Professor Karst wrote: " 'Equality of status in the field of ideas' is not merely a first amendment value; it is the heart of the amendment." See Karst, *Equality as a Central Principle in the First Amendment*, 43 U.Chi.L.Rev. 20 at 43 (1975).

A Special Status For the Press?

In footnote 4 of his concurring opinion, Chief Justice Burger provides the historical background for his argument that the Framers, by making specific references to freedom of speech and press, did not intend to give a uniquely privileged constitutional

6. *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), which examined the meaning of freedom of the press, did not involve a traditional institutionalized newspaper but rather an occasional publication (nine issues) more nearly approximating the product of a pamphleteer than the traditional newspaper.

status to the press. On the other hand, the Chief Justice agreed that the explicit mention of freedom of speech followed by the explicit mention of freedom of the press has some significance. The press clause is not redundant. Burger described the matter as follows:

"To conclude that the Framers did not intend to limit the freedom of the press to one select group is not necessarily to suggest that the Press Clause is redundant." The fact that the press clause does not create a special First Amendment caste does not mean that the press clause, like the speech clause, cannot have separate purposes. The speech clause protects the freedom to express ideas, and the press clause protects the freedom to disseminate those ideas.

Burger wanted general business corporations to have First Amendment protection equivalent to that which would be accorded to media corporations alone under a "special status" theory. Was his purpose to provide a countervailing force to media power in the opinion process by arming business corporations with equivalent First Amendment protection?

CONSOLIDATED EDISON CO. v. PUBLIC SERVICE COMMISSION

447 U.S. 530, 100 S.CT. 2326, 65 L.ED.2D 319 (1980).

Justice POWELL delivered the opinion of the Court.

The question in this case is whether the First Amendment, as incorporated by the Fourteenth Amendment, is violated by an order of the Public Service Commission of the State of New York that prohibits the inclusion in monthly electric bills of inserts discussing controversial issues of public policy.

The Consolidated Edison Company of New York, appellant in this case, placed written material entitled "Independence Is Still a Goal, and Nuclear Power Is Needed To Win The Battle" in its January 1976 billing envelope. The bill insert stated Consolidated Edison's views on "the benefits of nuclear power," saying that they "far outweigh any potential risk" and that nuclear power plants are safe, economical, and clean. The utility also contended that increased use of nuclear energy would further this country's independence from foreign energy sources.

In March 1976, the Natural Resources Defense Council, Inc. (NRDC) requested Consolidated Edison to enclose a rebuttal prepared by NRDC in its next billing envelope. When Consolidated Edison refused, NRDC asked the Public Service Commission of the State of New York to open Consolidated Edison's billing envelopes to contrasting views on controversial issues of public importance.

On February 17, 1977, the commission, appellee here, denied NRDC's request but prohibited "utilities from using bill inserts to discuss political matters, including the desirability of future development of nuclear power." The commission explained its decision in a Statement of Policy on Advertising and Promotion Practices of Public Utilities issued on February 25, 1977. The commission concluded that Consolidated Edison customers who receive bills containing inserts are a captive audience of diverse views who should not be subjected to the utility's beliefs. Accordingly, the commission barred utility companies from including bill inserts that express "their opinions or viewpoints on controversial issues of public policy." The commission did not, however, bar utilities from sending bill inserts discussing topics that are not "controversial issues of public policy." The commission later denied petitions for rehearing filed by Consolidated Edison and other utilities.

The [New York] Court of Appeals held that the order did not violate the Constitution because it was a valid time, place, and manner regulation designed to protect the privacy of Consolidated Edison's customers. We noted probable jurisdiction. We reverse. The restriction on bill inserts cannot be upheld on the ground that Consolidated Edison is not entitled to freedom of speech. In *First National Bank of Boston v. Bellotti* we rejected the contention that a state may confine corporate speech to specified issues.

In the mailing that triggered the regulation at issue, Consolidated Edison advocated the use of nuclear power. The commission has limited the means by which Consolidated Edison may participate in the public debate on this question and other controversial issues of national interest and importance. Thus, the commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak.

The commission's ban on bill inserts is not, of course, invalid merely because it imposes a limitation upon speech. We must consider whether the state can demonstrate that its regulation is constitutionally permissible. The commission's arguments require us to consider three theories that might justify the state action. We must determine whether

the prohibition is (i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest.

A restriction that regulates only the time, place or manner of speech may impose so long as it's reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." As a consequence, we have emphasized that time, place, and manner regulations must be "applicable to all speech regardless of content."

The commission does not pretend that its action is unrelated to the content or subject matter of bill inserts. Indeed, it has undertaken to suppress certain bill inserts precisely because they address issues of public policy. The commission allows inserts that present information to consumers on certain subjects, such as energy conservation measures, but it forbids the use of inserts that discuss public controversies. The commission, with commendable candor, justifies its ban on the ground that consumers will benefit from receiving "useful" information, but not from the prohibited information. The commission's own rationale demonstrates that its action cannot be upheld as a content-neutral time, place, or manner regulation.

The commission next argues that its order is acceptable because it applies to all discussion of nuclear power, whether pro or con, in bill inserts. The prohibition, the commission contends, is related to subject matter rather than to the views of a particular speaker. Because the regulation does not favor either side of a political controversy, the commission asserts that it does not unconstitutionally suppress freedom of speech.

The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

Nevertheless, governmental regulation based on subject matter has been approved in narrow circumstances. The court below relied upon two cases in which this Court has recognized that the government may bar from its facilities certain speech that would disrupt the legitimate governmental purpose for which the property has been dedicated. In *Greer v. Spock* [p. 54], we held that the Federal Government could prohibit partisan political speech on a military base even though civilian speakers had been allowed to lecture on other subjects. In *Lehman v. Shaker Heights* [p. 53], a plurality of the Court similarly concluded that a city transit system that rented space in its vehicle for commercial advertising did not have to accept partisan political advertising.

Greer and *Lehman* properly are viewed as narrow exceptions to the general prohibition against subject-matter distinctions. In both cases, the Court was asked to decide whether a public facility was open to all speakers. The plurality in *Lehman* and the Court in *Greer* concluded that partisan political speech would disrupt the operation of governmental facilities even though other forms of speech posed no such danger.

The analysis of *Greer* and *Lehman* is not applicable to the Commission's regulation of bill inserts. In both cases, a private party asserted a right of access to public facilities. Consolidated Edison has not asked to use the offices of the commission as a forum from which to promulgate its views. Rather, it seeks merely to utilize its own billing envelopes to promulgate its views on controversial issues of public policy. The commission asserts that the billing envelope, as a necessary adjunct to the operations of a public utility, is subject to the state's plenary control. To be sure, the state has a legitimate regulatory interest in controlling Consolidated Edison's activities, just as local governments always have been able to use their police powers in the public interest to regulate private behavior. But the commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property.

Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest. The commission argues finally that its prohibition is necessary (1) to avoid forcing Consolidated Edison's views on a captive audience, (2) to allocate limited resources in the public interest, and (3) to ensure that rate-payers do not subsidize the cost of the bill inserts.

Even if a short exposure to Consolidated Edison's views may offend the sensibilities of some consumers, the ability of government "to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Where a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid objectionable speech.

But customers who encounter an objectionable billing insert may "effectively avoid further bombardment of their sensibilities simply by averting their eyes." The customer of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket.

The commission contends that because a billing envelope can accommodate only a limited amount of information, political messages should not be allowed to take the place of inserts that promote energy conservation or safety, or that remind customers of their legal rights. The commission relies upon *Red Lion Broadcasting v. Federal Communications Commission* [p. 795], in which the Court held that the regulation of radio and television broadcast frequencies permit the Federal Government to exercise unusual authority over speech. But billing envelopes differ from broadcast frequencies in two ways. First, a broadcaster communicates through use of a scarce, publicly owned resource. No person can broadcast without a license, whereas all persons are free to send correspondence to private homes through the mails. Thus, it cannot be said that billing envelopes are a limited resource comparable to the broadcast spectrum. Second, the commission has not shown on the record before us that the presence of the bill inserts at issue would preclude the inclusion of other inserts that Consolidated Edison might be ordered lawfully to include in the billing envelope. Unlike radio or television stations broadcasting on a single frequency, multiple bill inserts will not result in a "cacophony of competing voices."

Finally, the commission urges that its prohibition would prevent ratepayers from subsidizing the costs of policy-oriented bill inserts. But the commission did not base its order on an inability to allocate costs between the shareholders of Consolidated Edison and the ratepayers. Rather, the commission stated "that using bill inserts to proclaim a utility's viewpoint on controversial issues *(even when the stockholder pays for it in full)* is tantamount to taking advantage of a captive audience." Accordingly, there is no basis on this record to assume that the commission could not exclude the cost of these bill inserts from the utility's rate base. Mere speculation of harm does not constitute a compelling state interest.

Justice STEVENS, concurring in the judgment.

Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that a "time, place, or manner restriction may not be based upon either the content or subject matter of speech." And every lawyer who has read our rules, or our cases upholding various restrictions on speech with specific reference to subject matter must recognize the hyperbole in the dictum, "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." Indeed, if that were the law, there would be no need for the Court's detailed rejection of the justifications put forward by the state for the restriction involved in this case.

There are, in fact, many situations in which the subject matter, or, indeed, even the point of view of the speaker, may provide a justification for a time, place and manner regulation. Perhaps the most obvious example is the regulation of oral argument in this Court; the appellant's lawyer precedes his adversary solely because he seeks reversal of a judgment. As is true of many other aspects of liberty, some forms of orderly regulation actually promote freedom more than would a state of total anarchy.

The only justification for the regulation relied on by the New York Court of Appeals is that the utilities' bill inserts may be "offensive" to some of their customers. But a communication may be offensive in two different ways. Independently of the message the speaker intends to convey, the form of his communication may be offensive—perhaps because it is too loud or too ugly in a particular setting. Other speeches, even though elegantly phrased in dulcet tones, are offensive simply because the listener disagrees with the speaker's message. The fact that the offensive form of some communication may subject it to appropriate regulation surely does not support the conclusion that the offensive character of an idea can justify an attempt to censor its expression. Since

the Public Service Commission has candidly put forward this impermissible justification for its censorial regulation, it plainly violates the First Amendment.

Accordingly, I concur in the judgment of the Court.

Justice BLACKMUN, with whom Justice Rehnquist [in part] joins, dissenting.

I cannot agree with the Court that the New York Public Service Commission's ban on the utility bill insert somehow deprives the utility of its First and Fourteenth Amendment rights. Because of Consolidated Edison's monopoly status and its rate structure, the use of the insert amounts to an exaction from the utility's customers by way of forced aid for the utility's speech. And, contrary to the Court's suggestion, an allocation of the insert's cost between the utility's shareholders and the ratepayers would not eliminate this coerced subsidy.

[Justice Rehnquist did not join in the following portion of the dissent.]

I might observe, additionally, that I am hopeful that the Court's decision in this case has not completely tied a state's hands in preventing this type of abuse of monopoly power. The Court's opinion appears to turn on the particular facts of this case, and slight differences in approach might permit a state to achieve its proper goals.

First, it appears that New York and other States might use their power to define property rights so that the billing envelope is the property of the ratepayers and not of the utility's shareholders. If, under state law, the envelope belongs to the customers, I do not see how restricting the utility from using it could possibly be held to deprive the utility of its rights.

Second, the opinion leaves open the issue of cost allocation. The commission could charge the utility's shareholders all the costs of the envelopes and postage and of creating and maintaining the mailing list, and charge the consumers only the cost of printing and inserting the bill and the consumer service insert. Such an allocation would eliminate the most offensive aspects of the forced subsidization of the utility's speech.

Because I agree with the Appellate Division of the New York Supreme Court, that "[i]n the battle of ideas, the utilities are not entitled to require the consumers to help defray their expenses," I respectfully dissent.

COMMENT

Suppose the Public Utilities Commission had ordered Consolidated Edison to include a rebuttal prepared by an antinuclear energy group in its future billing envelopes. Suppose Consolidated Edison had challenged such an order on First Amendment grounds. Would the order be valid?

Professor Emerson has argued in favor of the validity, in the context of *Consolidated Edison*, of such an order. See Emerson, *The Affirmative Side of the First Amendment*, 15 Georgia L.Rev. 795 at 827–828 (1981):

> The Court did not have before it, and hence did not decide, the latent affirmative promotion issue involved in the case. * * *
>
> There is much to be said for the proposition that the first amendment rights of the third parties should be given recognition here. As a result of the monopoly granted by the government, the utility possessed a unique facility for communication, namely, a ready-made audience that was forced to open the billing envelope when it arrived in the home or office. Access to that facility, in a manner compatible with the primary function served by the billing apparatus, plainly would advance the discussion of important issues. Granting access to all comers might not be compatible with effective operation of the billing process. But imposition of a fairness doctrine, under which the utility was required to make adequate provision for the presentation of opposing views, surely would be feasible. The use of the first amendment in such a manner would promote significantly the system of freedom of expression.

Should the inclusion of inserts in its bills by Consolidated Edison be viewed as a form of impermissible compelled speech on the part of Con Ed's customers? See *Wooley v. Maynard*, text, p. 151. Justices Blackmun and Rehnquist make a similar argument: "Because of Consolidated Edison's monopoly status and its rate structure, the use of the insert amounts to an exaction from the utility's customers by way of forced aid for the utility's speech." Justice Powell makes it clear in *Consolidated Edison* that *Bellotti* protects Consolidated Edison's right to speak: "* * * [A] state may confine corporate speech to specified issues." On the other hand, if Consolidated Edison is not allowed to speak, i.e., include inserts on policy issues in its billing envelope, this, too, would be a form of impermissible compulsion, i.e., enforced silence. In the *Consolidated Edison*

situation, therefore, free speech rights are in conflict. To assure the free speech of the corporate speaker, Consolidated Edison, is to compel the speech of some of its thousands of customers who have a desire to communicate a different message in the same forum. Suppose the billing envelope is made, as Blackmun suggests, the property of the rate payers and not of the utilities shareholders, how would that affect the compelled speech problem? Would such a device make the inclusion of policy issue inserts in the billing envelope dependent on the consent of the utility's rate payers?

Suppose the activities of Con Ed had been deemed so involved with governmental sponsorship as to be deemed the equivalent of government action? Would the case for rebuttal inserts by antinuclear energy citizen groups have been stronger if the action of Con Ed were seen as governmental or state action?

PACIFIC GAS & ELECTRIC CO. v. PUBLIC UTILITIES COMMISSION OF CALIFORNIA

475 U.S. 1, 106 S.CT. 903, 89 L.ED.2D 1 (1986).

Justice POWELL announced the opinion of the Court in which the Chief Justice, Justice Brennan, and Justice O'Connor joined.

The question in this case is whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees.

* * * Pacific Gas and Electric Company has distributed a newsletter in its monthly billing envelope. Appellant's newsletter [is] called *Progress*. It has included political editorials, feature stories on matters of public interest, tips on energy conservation, and straightforward information about utility services and bills.

In 1980, appellee Toward Utility Rate Normalization (TURN), an intervenor in a ratemaking proceeding before California's Public Utilities Commission, urged the Commission to forbid appellant to use the billing envelopes to distribute political editorials, on the ground that the appellant's customers should not bear the expense of appellant's own political speech. The Commission decided that the envelope space that appellant had used to disseminate *Progress* is the property of the ratepayers. This "extra space" was defined as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost."

In an effort to apportion this "extra space" between appellant and its customers, the Commission permitted TURN to use the "extra space" four times a year for the next two years. During these months, appellant may use any space not used by TURN and it may include additional materials if it pays any extra postage. The Commission found that TURN has represented the interests of "a significant group" of appellant's residential customers, and has aided the Commission in performing its regulatory function. Consequently, the Commission determined that ratepayers would benefit from permitting TURN to use the extra space in the billing envelopes to raise funds and to communicate with ratepayers: "Our goal * * * is to change the present system to one which uses the extra space more efficiently for the ratepayers' benefit. It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG & E." The Commission concluded that appellant could have no interest in excluding TURN's message from the billing envelope since appellant does not own the space that message would fill. The Commission placed no limitations on what TURN or appellant could say in the envelope, except that TURN is required to state that its messages are not those of appellant. The Commission reserved the right to grant other groups access to the envelopes in the future.

Appellant appealed the Commission's order to the California Supreme Court, arguing that it has a First Amendment right not to help spread a message with which it disagrees, see *Wooley v. Maynard*, and that the Commission's order infringes that right. The California Supreme Court denied discretionary review. We noted probable jurisdiction and now reverse.

The constitutional guarantee of free speech "serves significant societal interests" wholly apart from the speaker's interest in self-expression. *First National Bank of Boston v. Bellotti*. The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like

individuals, contribute to the "discussion, debate, and the dissemination of information and ideas" that the First Amendment seeks to foster. [Ibid.] Thus, in *Bellotti*, we invalidated a state prohibition aimed at speech by corporations that sought to influence the outcome of a state referendum. Similarly, in *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, we invalidated a state order prohibiting a privately owned utility company from discussing controversial political issues in its billing envelopes. In both cases, the critical considerations were that the State sought to abridge speech that the First Amendment is designed to protect, and that such prohibitions limited the range of information and ideas to which the public is exposed.

There is no doubt that under these principles appellant's newsletter *Progress* receives the full protection of the First Amendment. In appearance no different from a small newspaper, *Progress*' contents range from energy-saving tips to stories about wildlife conservation, and from billing information to recipes. *Progress* thus extends well beyond speech that proposes a business transaction, see *Zauderer v. Office of Disciplinary Counsel*, and includes the kind of discussion of "matters of public concern" that the First Amendment both fully protects and implicitly encourages. *Thornhill v. Alabama*.

The Commission recognized as much, but concluded that requiring appellant to disseminate TURN's views did not infringe upon First Amendment rights. It reasoned that appellant remains free to mail its own newsletter except for the four months in which TURN is given access. The Commission's conclusion necessarily rests on one of two premises: (i) compelling appellant to grant TURN access to a hitherto private forum does not infringe appellant's right to speak; or (ii) appellant has no property interest in the relevant forum and therefore has no constitutionally protected right in restricting access to it. We now examine those propositions.

Compelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set. These impermissible effects are not remedied by the Commission's definition of the relevant property rights.

The Court's decision in *PruneYard Shopping Center v. Robins*, is not to the contrary. In *PruneYard*, * * * the owner did not even allege that he objected to the content of the pamphlets; nor was the access right content-based. *PruneYard* thus does not undercut the proposition that forced associations that burden protected speech are impermissible.

The Commission's order is inconsistent with these principles. The order does not simply award access to the public at large; rather, it discriminates on the basis of the viewpoints of the selected speakers. Two of the acknowledged purposes of the access order are to offer the public a greater variety of views in appellant's billing envelope, and to assist groups (such as TURN) that challenge appellant in the Commission's ratemaking proceedings in raising funds. Access to the envelopes thus is not content-neutral. The variety of views that the Commission seeks to foster cannot be obtained by including speakers whose speech agrees with appellant's. Similarly, the perceived need to raise funds to finance participation in ratemaking proceedings exists only where the relevant groups represent interests that diverge from appellant's interests. Access is limited to persons or groups—such as TURN—who disagree with appellant's view as expressed in *Progress* and who oppose appellant in Commission proceedings.

The Commission's order is not a "content-based penalty" in the first sense, because TURN's access to appellant's envelopes is not conditioned on any particular expression by appellant. But because access is awarded only to those who disagree with appellant's views and who are hostile to appellant's interests, appellant must contend with the fact that whenever it speaks out on a given issue, it may be forced—at TURN's discretion—to help disseminate hostile views. Appellant "might well conclude" that, under these circumstances, "the safe course is to avoid controversy," thereby reducing the free flow of information and ideas that the First Amendment seeks to promote.

Appellant does not, of course, have the right to be free from vigorous debate. But it *does* have the right to be free from government restrictions that abridge its own rights in order to "enhance the relative voice" of its opponents. *Buckley v. Valeo*. The Commission's order requires *appellant* to assist in disseminating TURN's views; it does not equally constrain both sides of the debate about utility regulation. * * *

The Commission's access order also impermissibly requires appellant to associate with speech with

which appellant may disagree. The order on its face leaves TURN free to use the billing envelopes to discuss any issues it chooses.[11] Should TURN choose, for example, to urge appellant's customers to vote for a particular slate of legislative candidates, or to argue in favor of legislation that could seriously affect the utility business, appellant may be forced either to appear to agree with TURN's views or to respond. This pressure to respond "is particularly apparent when the owner has taken a position opposed to the view being expressed on his property." Especially since TURN has been given access in part to create a multiplicity of views in the envelopes, there can be little doubt that appellant will feel compelled to respond to arguments and allegations made by TURN in its messages to appellant's customers.

That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster. For corporations as for individuals, the choice to speak includes within it the choice of what not to say. And we have held that speech does not lose its protection because of the corporate identity of the speaker. *Bellotti*; *Consolidated Edison*. Were the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next. It is therefore incorrect to say, as do appellees, that our decisions do not limit the government's authority to compel speech by corporations. The danger that appellant will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude, because the message itself is protected under our decisions in *Bellotti* and *Consolidated Edison*. Where, as in this case, the danger is one that arises from a content-based grant of access to private property, it is a danger that the government may not impose absent a compelling interest.

The envelopes themselves, the bills, and *Progress* all remain appellant's property. The Commission's access order thus clearly requires appellant to use *its* property as a vehicle for spreading a message with which it disagrees.

A different conclusion would necessarily imply that our decision in *Tornillo* rested on the Miami Herald's ownership of the space that would have been used to print candidate replies. Nothing in *Tornillo* suggests that the result would have been different had the Florida Supreme Court decided that the newspaper space needed to print candidates' replies was the property of the newspaper's readers, or had the court ordered the Miami Herald to distribute inserts owned and prepared by the candidates together with its newspapers. The constitutional difficulty with the right-of-reply statute was that it required the newspaper to disseminate a message with which the newspaper disagreed. This difficulty did not depend on whether the particular paper on which the replies were printed belonged to the newspaper or to the candidate.

Appellee's argument suffers from the same constitutional defect. The Commission's order forces appellant to disseminate TURN's speech in envelopes that appellant owns and that bear appellant's return address. Such forced association with potentially hostile views burdens the expression of views different from TURN's and risks forcing appellant to speak where it would prefer to remain silent. Those effects do not depend on who "owns" the "extra space."

Notwithstanding that it burdens protected speech, the Commission's order could be valid if it were a narrowly tailored means of serving a compelling state interest.

Appellees identify two assertedly compelling state interests that the access order is said to advance. First, appellees argue that the order furthers the State's interest in effective ratemaking procedures. The State's interest in fair and effective utility regulation may be compelling. The difficulty with appellees' argument is that the State can serve that interest through means that would not violate appellant's First Amendment rights, such as awarding costs and fees. The State's interest may justify imposing on appellant the reasonable expenses of responsible groups that represent the public interest at ratemaking proceedings. But "we find 'no substantially relevant correlation between the governmental interest asserted

11. The presence of a disclaimer on TURN's messages, does not suffice to eliminate the impermissible pressure on appellant to respond to TURN's speech. The disclaimer serves only to avoid giving readers the mistaken impression that TURN's words are really those of appellant. *PruneYard* (opinion of Powell, J.). It does nothing to reduce the risk that appellant will be forced to respond when there is strong disagreement with the substance of TURN's message.

and the State's effort' " to compel appellant to distribute TURN's speech in appellant's envelopes. *Bellotti*.

Second, appellees argue that the order furthers the State's interest in promoting speech by making a variety of views available to appellant's customers. We have noted above that this interest is not furthered by an order that is not content neutral. Moreover, the means chosen to advance variety tend to inhibit expression of appellant's views in order to promote TURN's. Our cases establish that the State cannot advance some points of view by burdening the expression of others. *First National Bank of Boston v. Bellotti; Buckley v. Valeo*. It follows that the Commission's order is not a narrowly tailored means of furthering this interest.

We conclude that the Commission's order impermissibly burdens appellant's First Amendment rights because it forces appellant to associate with the views of other speakers, and because it selects the other speakers on the basis of their viewpoints. The order is not a narrowly tailored means of furthering a compelling state interest, and it is not a valid time, place, or manner regulation. For these reasons, the decision of the California Public Utilities Commission must be vacated.

Justice Blackmun took no part in the consideration or decision of this case.

Chief Justice BURGER, concurring.

I join Justice Powell's opinion, but think we need not go beyond the authority of *Wooley* to decide this case. I would not go beyond the central question presented by this case, which is the infringement of Pacific's right to be free from forced association with views with which it disagrees.

Justice MARSHALL, concurring in the judgment.

Two significant differences between the State's grant of access in this case and the grant of access in *PruneYard* lead me to find a constitutional barrier here that I did not find in the earlier case.

The first difference is the degree of intrusiveness of the permitted access. In the present case, appellant has never opened up its billing envelope to the use of the public. Appellant has not abandoned its right to exclude others from its property to the degree that the shopping center owner had done in *PruneYard*. Were appellant to use its billing envelope as a sort of community billboard, regularly carrying the messages of third parties, its desire to exclude a particular speaker would be deserving of lesser solicitude. As matters stand, however, appellant has issued no invitation to the general public to use its billing envelope, for speech or for any other purpose. Moreover, the shopping center in *PruneYard* bore a strong resemblance to the streets and parks that are traditional public forums. People routinely gathered there, at the owner's invitation, and engaged in a wide variety of activities. Adding speech to the list of those activities did not in any great way change the complexion of the property. The same is not true in this case.

The second difference between this case and *PruneYard* is that the State has chosen to give TURN a right to speak at the expense of appellant's ability to use the property in question as a forum for the exercise of its own First Amendment rights. While the shopping center owner in *PruneYard* wished to be free of unwanted expression, he nowhere alleged that his own expression was hindered in the slightest. In contrast, the present case involves a forum of inherently limited scope. By appropriating, four times a year, the space in appellant's envelope that appellant would otherwise use for its own speech, the State has necessarily curtailed petitioner's use of its own forum. The regulation in this case, therefore, goes beyond a mere infringement of appellant's desire to remain silent.

While the interference with appellant's speech is, concededly, very slight, the State's justification—the subsidization of another speaker chosen by the State—is insufficient to sustain even that minor burden. We have held that the State may use its own resources for subsidization, *Regan v. Taxation with Representation of Washington*, but that interest, standing alone, cannot justify interference with the speech of others.

In the present case, the State has redefined a property right in the extra space in appellant's billing envelope in such a way as to achieve a result—burdening the speech of one party in order to enhance the speech of another—that the First Amendment disallows. In doing so, moreover, it has sanctioned an intrusion onto appellant's property that exceeds the slight incursion permitted in *PruneYard*. Under these circumstances, I believe that the State has crossed the boundary between constitutionally permissible and impermissible redefinitions of private property.

In reaching this conclusion, I do not mean to suggest that I would hold, contrary to our precedents, that the corporation's First Amendment rights are coextensive with those of individuals, or that

commercial speech enjoys the same protections as individual speech. In essentially all instances, the use of business property to carry out transactions with the general public will permit the State to restrict or mandate speech in order to prevent deception or otherwise protect the public's health and welfare. In many instances, such as in *PruneYard*, business property will be open to the public to such an extent that the public's expressive activities will not interfere with the owner's use of property to a degree that offends the Constitution. The regulation at issue in this case, I believe, falls on the other side of the line. Accordingly, I join the Court's judgment.

Justice REHNQUIST, with whom Justice White and Justice Stevens join in part, dissenting.

I do not believe that the right of access here will have any noticeable deterrent effect. Nor do I believe that negative free speech rights, applicable to individuals and perhaps the print media, should be extended to corporations generally. I believe that the right of access here is constitutionally indistinguishable from the right of access approved in *PruneYard Shopping Center v. Robins* and therefore I dissent.

This Court established in *Bellotti* that the First Amendment prohibits the Government from *directly* suppressing the affirmative speech of corporations. A newspaper publishing corporation's right to express itself freely is also implicated by governmental action that penalizes speech because the deterrent effect of a penalty is very much like direct suppression. Our cases cannot be squared, however, with the view that the First Amendment prohibits governmental action that only *indirectly* and *remotely* affects a speaker's contribution to the overall mix of information available to society. The plurality does not adequately explain how the potential deterrent effect of the right of access here is sufficiently immediate and direct to warrant strict scrutiny. While a statutory penalty may sufficiently deter speech to trigger such heightened First Amendment scrutiny, the right of access here will not have such an effect on PG & E's incentives to speak.

The record does not support the inference that PUC issued its order to penalize PG & E because of the content of its inserts or because PG & E included the inserts in its billing envelopes in the first place. The order does not prevent PG & E from using the billing envelopes in the future to distribute inserts whenever it wishes. Nor does its vitality depend on whether PG & E includes inserts in any future billing envelopes. Moreover, the central reason for the access order—to provide for an effective ratepayer voice—would not vary in importance if PG & E had never distributed the inserts or ceased distributing them tomorrow. The most that can be said about the connection between the inserts and the order is that the existence of the inserts quite probably brought to TURN's attention the possibility of requesting access.

Nor does the access order create any cognizable risk of deterring PG & E from expressing its views in the most candid fashion. The right of access here bears no relationship to PG & E's future conduct. PG & E cannot prevent the access by remaining silent or avoiding discussion of controversial subjects. The plurality suggests, however, that the possibility of minimizing the undesirable content of TURN's speech may induce PG & E to adopt a strategy of avoiding certain topics in hopes that TURN will not think to address them on its own. But this is an extremely implausible prediction. The success of such a strategy would depend on any group given access being little more than a reactive organization. TURN or any other group eventually given access will likely address the controversial subjects in spite of PG & E's silence. I therefore believe that PG & E will have no incentive to adopt the conservative strategy. Accordingly, the right of access should not be held to trigger heightened First Amendment scrutiny on the ground that it somehow might deter PG & E's right to speak.

The plurality argues, however, that the right of access also implicates PG & E's right not to speak or to associate with the speech of others, thereby triggering heightened scrutiny. The thrust of the plurality's argument is that if TURN has access to the envelopes, its speech will have the effect of *forcing* PG & E to address topics about which it would prefer to remain silent. The plausibility of any such prediction depends upon the perceived ineffectiveness of a disclaimer or the absence of any effective alternative means for consumer groups like TURN to communicate to the ratepayers. In *PruneYard Shopping Center*, this Court held that the availability of an effective disclaimer was sufficient to eliminate any infringement upon negative free speech rights. If an alternative forum of communication exists, TURN or the other consumer groups will be able to *induce* PG & E to address the additional topics anyway. Finally, because PG & E retains complete editorial freedom over the content of its

inserts, the effect of the right of access is likely to be qualitatively different from a direct prescription by the Government of "what shall be orthodox in * * * matters of opinion." *West Virginia Board of Education v. Barnette.*

There is, however, a more fundamental flaw with the plurality's analysis. This Court has recognized that natural persons enjoy negative free speech rights because of their interest in self-expression; an individual's right not to speak or to associate with the speech of others is a component of the broader constitutional interest of natural persons in freedom of conscience. Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an "intellect" or "mind" for freedom of conscience purposes is to confuse metaphor with reality. Corporations generally have not played the historic role of newspapers as conveyors of individual ideas and opinion. In extending positive free speech rights to corporations, this Court drew a distinction between the First Amendment rights of corporations and those of natural persons. *[Bellotti]* recognized that corporate free speech rights do not arise because corporations, like individuals, have any interest in self-expression. *Consolidated Edison.* It held instead that such rights are recognized as an instrumental means of furthering the First Amendment purpose of fostering a broad forum of information to facilitate self-government.

The interest in remaining isolated from the expressive activity of others, and in declining to communicate at all, is for the most part divorced from this "broad public forum" purpose of the First Amendment. The right of access here constitutes an effort to facilitate and enlarge public discussion; it therefore furthers rather than abridges First Amendment values. [B]ecause the interest on which the constitutional protection of corporate speech rests is the societal interest in receiving information and ideas, the constitutional interest of a corporation in not permitting the presentation of other distinct views clearly identified as those of the speaker is *de minimis.* This is especially true in the case of PG & E, which is after all a regulated public utility. Any claim it may have had to a sphere of corporate autonomy was largely surrendered to extensive regulatory authority when it was granted legal monopoly status.

This argument is bolstered by the fact that the two constitutional liberties most closely analogous to the right to refrain from speaking—the Fifth Amendment right to remain silent and the constitutional right of privacy—have been denied to corporations based on their corporate status. The Court in *Bellotti* recognized that some " 'purely personal' guarantees * * * are unavailable to corporations and other organizations," and therefore declined to hold that "corporations have the full measure of rights that individuals enjoy under the First Amendment."

PG & E is not an individual or a newspaper publisher; it is a regulated utility. The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same. Because I think this case is governed by *PruneYard,* I would affirm the judgment of the Supreme Court of California.

Justice STEVENS, dissenting.

The narrow question we must address is whether a state public utility commission may require the fund-raising solicitation of a consumer advocacy group to be carried in a utility billing envelope. Since the utility concedes that *it* has no right to use the extra space in the billing envelope for its own newsletter, the question is limited to whether the Commission's requirement that it be the courier for the message of a third party violates the First Amendment. In my view, this requirement differs little from regulations applied daily to a variety of commercial communications that have rarely been challenged—and to my knowledge never invalidated—on First Amendment grounds.

I assume that the plurality would not object to a utility commission rule dictating the format of the bill, even as to required warnings and the type size of various provisos and disclaimers. Such regulation is not too different from that applicable to credit card bills, loan forms, and media advertising. I assume also the plurality would permit the Commission to require the utility to disseminate legal notices of public hearings and ratemaking proceedings written by it. These compelled statements differ little from mandating disclosure of information in the bill itself, as the plurality recognizes.

Given that the Commission can require the utility to make certain statements and to carry the Commission's own messages to its customers, it seems but a small step to acknowledge that the Commis-

sion can also require the utility to act as the conduit for a public interest group's message that bears close relationship to the purpose of the billing envelope.

If the California Public Utility Commission had taken over company buildings and vehicles for propaganda purposes, or even engaged in viewpoint discrimination among speakers desirous of sending messages via the billing envelope, I would be concerned. But nothing in this case presents problems even remotely resembling or portending the ones just mentioned. Although the plurality's holding may wisely forestall serious constitutional problems that are likely to arise in the future, I am not convinced that the order under review today has crossed the threshold of unconstitutionality. Accordingly, I respectfully dissent.

COMMENT

In *Miami Herald Publishing* Co. *v. Tornillo*, 418 U.S. 241 (1974), the Court held that the state mandated right of reply for political candidates to newspaper attacks was unconstitutional. See text, p. 497. In *Pacific Gas & Electric*, Justice Powell declared that the utility should not be required by the state to facilitate the expression of views it did not share. In Justice Rehnquist's view, this goes farther than the doctrine of *Bellotti*—from which, incidentally, he dissented. *Bellotti* forbade Massachusetts from interfering with an affirmative exercise of corporate expression, i.e., participation in the political process.

Pacific Gas & Electric says that a speaker who is required by the state to transmit "potentially hostile views" may, therefore, feel required to speak where it "would prefer to remain silent." In short, the utility might feel impelled to transmit views which it might otherwise ignore. State requirements in such circumstances, the Court concludes, burden expression.

How should such a burden on expression be evaluated? Here the student sees the critical significance of the strict scrutiny test in First Amendment adjudication. Since free expression rights of the speaker are at issue, heightened scrutiny is in order. The regulation at issue cannot stand unless it is a "narrowly tailored means of furthering a compelling state interest." The *Bellotti* doctrine protects a right not to speak; this right is then evaluated under a heightened scrutiny test. This is too potent a combination for the California PUC regulation to withstand.

Neither *Bellotti* nor *Pacific Gas & Electric* held that corporations had free expression rights. In each case, the corporation was referred to as a speaker whose identity was irrelevant. In *Bellotti*, the Court feared that the legislation at issue would subtract from the total of expression available to the citizenry. Was that the fear in *Pacific Gas & Electric?*

Justice Rehnquist in dissent said *Wooley* protected natural persons from being compelled to speak. *Tornillo* protected "newspapers." (Actually it protected newspaper corporations.) But he pointed out that business corporations were in a different category. Corporations did not have free speech rights; free speech rights were accorded to speakers (who happened to be corporations) for purposes of fostering information to facilitate self-government. But is this value served by extending freedom of conscience rights to those who wish not to speak? And, one might add, by enabling those who do not wish to speak themselves to silence others?

If government, as Justice Powell says, may not burden some expression to enhance other expression, how will expression which does not have a corporate source be able to compete in the high-priced marketplace of ideas?

TWO

Libel and the Journalist

Few areas of law are more complex than libel or more dependent upon verbal nuance that varies from one jurisdiction to another. Libel law assumes a theory of human response that has evolved without help from science. One might argue that libel's threshold elements of publication, identification, and defamation are necessary but not necessarily sufficient conditions to alter the opinions of reasonable people.

While the layperson is at sea as to the meaning and application of libel, most lawyers have yet to undo its semantic tangles. That leaves the journalist very much alone in deciding initially whether or not to publish. Editorial judgment is often suspended or delegated to a libel lawyer. An alternative is knowledge of libel, for libel is a serious business.

In 1979, the *Point Reyes Light*, a 3,100-circulation northern California weekly, won a Pulitzer Prize for a series on Synanon, then a drug rehabilitation program. It soon found itself threatened by four libel suits asking for $1 billion in damages.

The *Alton* (Illinois) *Telegraph* was reduced to bankruptcy for a memo it sent to the Justice Department. The newspaper settled for $1.2 million in lieu of an original damage claim of $9.2 million brought by a developer.[1]

Libel broke the $3 million barrier in 1988 when the United States Supreme Court let stand a $3.05 million libel judgment won by a tobacco company against CBS. Earlier the United States Court of Appeals for the Seventh Circuit, in a surprising move, had upped a trial court's award and permitted a judgment nearly four times larger than any prior libel award.[2] At about the same time, a United States District Court in Nevada allowed a $5 million award in punitive damages to entertainer Wayne Newton for a NBC broadcast that was said to create the impression that Newton received financial help from organized crime to purchase a hotel. NBC, said the court, had "serious subjective doubts" about the truth of its report. While the court reduced a jury megaverdict of $15 million in actual damages to $50,000, it thought the punitive award defensible under Nevada law, given the network's net worth of $2 billion and its insistence in repeating the defamatory statements after Newton had asked for a retraction.[3] The judgment was appealed.

And it's not just the money. Defending against a libel suit robs a newsroom of many hours better spent on newsgathering. Pretrial issues of constitutional privilege and discovery, and appeals on these and other issues, can take as long as four years.

1. *Green v. Alton Telegraph Printing* Co., 438 N.E.2d 203, 8 Med.L.Rptr. 1345 (1982).
2. *Brown & Williamson Tobacco Corp. v. Walter Jacobson and CBS, Inc.*, 14 Med.L.Rptr. 1497, 827 F.2d 1119 (7th Cir. 1987). This case is presented on p. 232.
3. *Newton v. NBC*, 14 Med.L.Rptr. 1914 (D.Nev. 1987).

The *Boston Globe* in 1988 marked its seventh year of defending a libel suit brought by former Massachusetts Governor Edward King. King claimed defamation in three cartoons, one editorial, an op-ed piece, and two political columns. Because statements of opinion are increasingly being granted constitutional protection—at least where the line can be drawn between fact and opinion—only one of the columns remained in litigation in 1987. A superior court judge, after six years of briefs, motions, and depositions, had granted the newspaper summary judgment on all of the pieces. The state's highest court, however, held that an article asserting that the governor had "called a judge and demanded that he change a decision he had rendered in a gang rape case" was a statement of fact susceptible of defamatory meaning and should be considered by a jury. That item was remanded for trial and later dismissed.[4]

Eighty per cent of cases are thus delayed, and defendants bear the costs. Once cases get to trial, plaintiffs win seven of ten. Of cases won, jurors on the average award plaintiffs actual damages of $1 million and punitive damages of $600,000, larger awards than in medical malpractice and product liability suits. Juries seldom understand abstract First Amendment interests. They see only a big corporation telling a lie about someone. Approximately five of these seven cases are reversed on appeal, or damage awards are sharply reduced. Awards surviving appeal average about $150,000.

The upside of this is that network investigative reporters are beginning to have serious reservations about ambush interviews, the rehearsing of witnesses, and the edited cutaways that give the viewers partial answers or reconstructed paragraphs that distort the original interviews. The downside is that some suits are brought mainly to harass. The small or unconventional publisher may not be able to afford the costs of defending. He may settle instead or go broke defending a principle that eventually would have been upheld in court.

Many libel suits result from carelessness, haste, or lack of knowledge. Reporters would do well to have more than one source for potentially libelous allegations. It should be standard procedure also to talk to the person against whom charges are made. Controversial statements should be documented. And the ethical consequences of one's publication ought to be pondered.

There is some evidence that plaintiffs win by suing; they don't sue to win.[5] They sue to put the world on notice that their reputations are worth fighting for. They will take as long as necessary to legitimize their claims of falsity. Public people, on occasion, are less interested in truth than in revenge. In either case, the newsroom is tied up, distracted, and sometimes intimidated. Intimidation is inversely proportional to the newsroom's knowledge of libel law. When Jack Newfield profiled "The Ten Worst Judges in New York," only one of them ever brought suit.[6]

And yet both plaintiffs and defendants lose in the long run. Defendants lose in the court of public opinion and in time and treasure. Plaintiffs lose in the courts of law and in psychological well-being (nearly eight out of ten libel suits never make it to trial). But what is libel? How do we define it? How do we prevent it? How do we defend against it?

DEFINITIONS

Libel is essentially a false and defamatory attack in written form on a person's reputation or character. Broadcast defamation is libel because there is usually a written script. Oral or spoken defamation is slander. "[A] communication is defamatory if 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."[7]

We might reasonably expect imputations of crime, gross immorality, criminal associations, financial unreliability, incompetence, or irresponsibility (in descending order of disapprobation) to have these effects. Each state will have its own peculiar definition of defamation: words which expose one to public hatred, shame, contempt, ridicule, ostracism, degradation, or disgrace or disparage one in her business, profession, or office.

Reputation—essentially what other people think of you—is a slippery concept when out of time, place, and context. Harm to reputation may also

4. *King v. Globe Newspaper Co.*, 14 Med.L.Rptr. 1811, 512 N.E.2d 241 (Mass. 1987).

5. Randall P. Bezanson, Gilbert Cranberg, and John Soloski, "Libel and the Press, Setting the Record Straight," 1985 Silha Lecture, University of Minnesota, 26. See also, *Libel Law and the Press* (1987).

6. Newfield, "The Ten Worst Judges in New York," *New York*, 15 (October 16, 1972): 42.

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

depend upon who makes the charge. To be an enemy of the intemperate may give one stature in the community. Who hears the charge? What would an average reader or viewer infer from the message? and what is the "temper of the times"?[8]

The true connotation of words should be cast in our own times, for the harmless word of yesterday may today be one of reproach and odium,[9] or, as Oliver Wendell Holmes put it, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." [10]

In a Vermont case, a plaintiff was characterized by a political opponent as a "horse's ass," a "jerk," an "idiot," and "paranoid." Words used in the context of a political skirmish between two candidates for mayor, said the court, could not reasonably have been believed in their literal sense or with a willful or malicious intent to denigrate or ridicule the plaintiff in his profession as an accountant. Such words, the state supreme court added, may be insulting, abusive, unpleasant, and objectionable, but they are not defamatory in and of themselves, and they reflect more on the character of the user than on the person for whom they are intended.[11]

It is fortunate and historically consistent that the courts tolerate political hyperbole. The Supreme Court held in 1970 that the term "blackmail," when used in characterizing the negotiating position of a real estate developer, was not slander when spoken in the heat and passion of a city council meeting and not actionable libel when subsequently reported accurately in newspaper articles. A trial court judgment against a newspaper was reversed.[12]

On occasion, media lawyers have prepared lists of "red flag" words for their clients. Such lists can never be complete. A more general guide might be to be very cautious with felonious allegations, unless they are made in a judicial context, and to empathize or identify with subjects of your news stories whenever they are cast in the vale of misfortune.

Single Instance Rule

A number of states subscribe to what New York and Florida call the *single-instance* rule. Under this rule, "language charging a professional person with ignorance or error on a single occasion only and not accusing that person of general ignorance or lack of skill is not actionable unless special damages are pleaded." [13]

The rule is premised on the notion that sooner or later everyone makes a mistake. The trick is to avoid an implication of general ignorance or lack of skill applicable to past, present, and future.

It is a dangerous rule. How can one be sure that a publication is the first time a reference has been made to a prospective plaintiff's mistakes?

Innocent Construction Rule

As has been noted, libel may hinge upon connotation and colloquialisms. But when a plaintiff attaches an unfamiliar or a special meaning to a word or expression, the burden rests on that person to prove its defamatory nature. If the plaintiff succeeds, the defendant then has an opportunity to rebut by showing that the words could not have been taken in a defamatory sense, were not intended to be taken that way, and had their meaning stretched beyond the obvious understanding of readers and listeners.

A minority of states has written the above proposition into a rule known as the "*innocent construction rule.*" If language is capable of an innocent construction, it should be interpreted that way. Although a statement may lend itself to a neurotic interpretation, courts following the rule are more interested in ordinary, commonly accepted interpretations rather than convoluted, strained, or otherwise unusual meanings.

Illinois has such a rule. A newspaper editorial paraphrasing a village trustee's argument for higher trustee salaries chose to interpret the trustee's remarks as an expression of his belief that good gov-

8. *Schermerhorn v. Rosenberg*, 73 A.D.2d 276, 426 N.Y.S.2d 274 (1980).
9. *Munafo v. Helfand*, 140 F.Supp. 234 (S.D.N.Y. 1956).
10. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).
11. *Blouin v. Anton*, 7 Med.L.Rptr. 17141, 431 A.2d 489 (Vt. 1981). Some states, Alabama, Mississippi, and Virginia, for example, have passed "insulting words" laws which are meant to punish insults before they reach the level of defamation. See Hanson, *Libel and Related Torts*, Vol. 1, Case and Comment, 1969, § 17.
12. *Greenbelt Co-op Publishing Association v. Bresler*, 398 U.S. 6 (1970).
13. *Brower v. New Republic*, 7 Med.L.Rptr. 1605 (N.Y.Sup.Ct. 1981).

ernment had to be paid for. The trustee, however, read the editorial as suggesting that he, the trustee, regarded the alternative to adequate salaries to be the illegal practice of taking money under the table. In a subsequent libel suit against a Niles newspaper, the trustee contended that the editorial constituted a published attack on his ability to perform his duties and on his integrity. An Illinois court preferred to attach an innocent construction to the editorial and denied relief to the trustee.[14]

Not capable of an innocent construction, however, was a city clerk's statement, concerning the city's award of a garbage collection contract, that "I think 240 pieces of silver changed hands—30 for each alderman." When an alderman brought suit, the Illinois Supreme Court held the words to be a defamatory statement of fact, not a constitutionally protected expression of opinion.[15]

It is sometimes a fine line. A New York court said, "It is not libelous to assert that a public official was appointed to a high paying but unnecessary public office as a political reward, without consideration of merit or competence. Such charges are commonplace in the political arena. Whether or not they are true, they are not actionable."[16]

Far more assured of punishment was the newspaper article that, by repeated use of words such as "fix, bribe, payoff," and "improper offers," led average readers to conclude that an attorney had solicited a high legal fee from a drug defendant in order to bribe the judge and "fix" the case. Such language was clearly defamatory, said the Kentucky Supreme Court.[17]

In most jurisdictions juries will decide whether a statement is to be given a defamatory or nondefamatory meaning. So there is no *innocent construction rule* as such.

Illustrations and Headlines

Libel occurs not only on the printed page but in photos, cartoons, film, tape, records, signs, bumper stickers, advertisements, and, yes, even in skywriting and on gravestones.

Illustrations and headlines may be libelous by innuendo even when nothing false or defamatory is stated. The Boston *Herald-Traveler* printed a picture of a witness before a congressional committee on its front page. Although the witness had testified as to how he had refused to take part in an alleged fraud, his picture appeared under the banner headline—"Settlement Upped $2,000: $400 Kickback Told." Though no reference was made to the witness in an accompanying article, the court said the innuendo was capable of being defamatory and that the plaintiff was entitled to a jury trial to prove that he was defamed.[18]

In a much discussed case a photograph of the plaintiff's home in a story about how a gang of thieves used the basement of one of their homes as a warehouse for stolen property was declared to state a claim for defamation. The case was *Troman v. Wood.*[19] Similarly an article about trucking companies going out of business was illustrated with an auction notice announcing public sale of trucking equipment owned by the plaintiff. Since the trucking company was not going out of business and nothing in the story said it was, use of the firm's name in the context of the illustration was held to state a claim for libel.[20]

Since reporters seldom write headlines for their stories, they don't feel responsible when headline and story are mismatched. Courts, however, sensitive to the fact that often only the headline is read, have upheld libel judgments on the basis of headlines alone. For example, in *Sprouse v. Clay Communication, Inc.*, 1 Med.L.Rptr. 1695, 211 S.E.2d 674 (W.Va. 1975), a state supreme court upheld a $250,000 award in actual damages against a newspaper which had libeled an unsuccessful gubernatorial candidate by what the court called "misleading words in oversized headlines." Said the court:

> Where oversized headlines are published which reasonably lead the average reader to an entirely different

14. *Kaplan v. Greater Niles Township Publishing Corp.*, 278 N.E.2d 437 (Ill. 1971). See also, *Levinson v. Time, Inc.*, 6 Med.L.Rptr. 2167, 411 N.E.2d 1118 (Ill. 1980). *Chapski v. Copley Press*, 442 N.E.2d 195 (1982) holds that, given an innocent construction, a plaintiff may proceed but will have to prove injury and special damages.

15. *Catalano v. Pechous*, 4 Med.L.Rptr. 2094, 387 N.E.2d 714 (Ill. 1978), affirmed, 6 Med.L.Rptr. 2511, 419 N.E.2d 350 (Ill. 1980).

16. *Lerner v. The Village Voice, Inc.* (Sup.Ct.N.Y., Co.) (N.Y. Law Journal 8/24/77).

17. *McCall v. Courier-Journal and Louisville Times Co.*, 7 Med.L.Rptr. 2118, 623 S.W.2d 882 (Ky. 1981), cert. den. 456 U.S. 975 (1982).

18. *Mabardi v. Boston Herald-Traveler Corp.*, 198 N.E.2d 304 (Mass. 1964).

19. 340 N.E.2d 292 (Ill. 1975).

20. *Drotzmanns, Inc. v. McGraw-Hill, Inc.*, 500 F.2d 830 (8th Cir. 1974).

> conclusion than the facts cited in the body of the story, and where the plaintiff can demonstrate that it was the intent of the publisher to use such misleading headlines to create a false impression on the normal reader, the headline may be considered separately with regard to whether a known falsehood was published.

The United States Supreme Court declined to review that holding, and the successful plaintiff went on to become a justice of the very court that had upheld his claim.

Similarly in *McNair v. Hearst Corp.*, 494 F.2d 1309 (9th Cir. 1974), a federal appeals court said that if a newspaper publisher knew of the false impression which the headline and first two paragraphs of an article would make upon the reader, fifty subsequent paragraphs countering that impression would not keep the headline and first two paragraphs from constituting libel.

On the other hand, courts have held that a headline must be read in context with an entire article before a judgment can be made about libel.[21] Courts are divided, then, as to whether headlines should be read in the context of an entire article or in isolation. The Oklahoma Supreme Court decided that headlines "susceptible of 'innocent meanings' cannot constitute evidence of actual malice."[22]

Indirect Libel

It used to be that lawyers made a distinction between direct libels—referring to someone as a criminal—and indirect libels—libel by innuendo, implication, or omission. Lawyers called the two categories libel *per se* and libel *per quod* respectively, and only lawyers, and very few of them, understood the difference.[23]

Since some degree of fault on the part of the defendant must now be proved by the plaintiff, the *per quod* category may no longer be important. Since plaintiffs must also prove falsity, actual injury, and either actual malice or negligence, the libel *per se* concept may also be undermined. Since the great *New York Times* case of 1964[24] and its progeny, notably *Gertz v. Robert Welch*,[25] such concepts are no longer as significant as they once were.

False implications may not alone support a libel action. Actual malice may not be inferred from otherwise accurate statements that beg the question: Did the publisher have serious doubts as to the truth of the statement? Where private persons bring suit and need only prove negligence on the part of the publisher or her reporter, defamatory implications should have some connection to fact. A careless headline, for example, could imply an indefensible fact. But generally a publisher will not be liable for a seemingly harmless report he had no reason to suspect of having a libelous meaning. A libel may occur due to outside or extrinsic circumstances about or over which a reporter had no knowledge or control. For example, to help someone with her suitcase is not obviously libelous, but if that person turns out to be a fugitive from justice, a defamatory meaning could be drawn. The legal term for this is *inducement*.

These more elaborated forms of libel, as well as slander, have traditionally required a showing of special damages, heretofore defined as actual monetary loss. Their gradual departure from the vocabulary of libel will relieve news organizations of many nasty surprises.

Trade Libel

Special damages or actual money loss must also be shown in cases of trade libel or *disparagement*. A federal district court in *Bose Corp. v. Consumers Union*, 7 Med.L.Reptr. 2481, 529 F.Supp. 357 (D.Mass. 1981), defined trade libel:

> The tort of product disparagement, as distinguished from individual or corporate defamation, is a narrow cause of action. The interests protected are not those of the reputation of the corporation or the intangible concerns peculiar to individual reputation such as community standing, privacy and psychic well-being. * * * A cause of action for product disparagement is made out only when the plaintiff has satisfactorily proved that it suffered special damages flowing from a false statement concerning the nature or quality of plaintiff's product. * * * The tort exists to provide redress only for tangible and direct pecuniary loss, a purely economic injury to which society accords a lesser value

21. *Gambuzza v. Time, Inc.*, 239 N.Y.S.2d 466 (1963).
22. *Hodges v. Oklahoma Journal Publishing Co.*, 617 P.2d 191 (Okla. 1980).
23. Robert D. Sack, *Libel, Slander, and Related Problems* (New York: Practising Law Institute, 1980), 98ff.
24. *New York Times v. Sullivan*, 376 U.S. 254 (1964).
25. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

> than reputational interests. * * * In a product disparagement case, the plaintiff must prove that special damages resulted from the publication and that the disparagement was a substantial factor in inducing others not to buy the plaintiff's product.

In *National Dynamics Corp. v. Petersen Publishing Co.*, 185 F.Supp. 573 (S.D.N.Y. 1960), a federal district court said that where a publication states that the construction of a manufacturer's product is not as good as that of a competitor, there is a libel of the product only. No inference can be drawn that the manufacturer is practicing a deceit on the public simply because he is selling a product which is not the best in its field. The court added that, under New York law, disparagement of a product, even to the extent of saying it is completely worthless, is not sufficient to make out a case of libel *per se* of the manufacturer.

On the other hand, when Jerry Lewis said on a television program that a product called "Snooze," a sleep aid, was full of habit-forming drugs, that nothing short of a hospital cure could make one stop taking it, and that one would feel like "a run-down hound dog" and would lose weight under its effects, the New York Court of Appeals ruled that such an aspersion could readily be understood as charging the manufacturer, even though his name was not mentioned, with fraud and deceit in putting unwholesome and dangerous products on the market. The statement was libelous *per se*, and a showing of special damages was unnecessary. *Harwood Pharmacal Co. v. National Broadcasting Co., Inc.*, 214 N.Y.S.2d 725, 174 N.E.2d 602 (1961).

The distinction between an attack on a product and an attack on its producer must be carefully drawn by the publisher who would avoid litigation.

Corporate Libel

The *Bose* court speaks of corporate reputation. Corporations are collective persons—directors, managers, employees. Their reputations depend upon their image-making abilities, their handling of conflict, and the quality of their products. Can this group character be libeled? Courts disagree.

In *Transworld Accounts v. Associated Press*, 425 F.Supp. 814 (N.D.Cal. 1977), the court declared that there is no meaningful distinction between the protectible interest in the reputation of corporations and that of individuals, given the fact that many of these enterprises are conducted as individual proprietorships or partnerships.

But a year earlier in *Martin Marietta Corp. v. Evening Star Newspaper*, 417 F.Supp. 947, 956 (D.D.C. 1976)—the newspaper had alleged that prostitutes were being provided to government officials by defense contractors—a federal district court said:

"[T]he values considered important enough to merit accommodation with interests protected by the first amendment are associated solely with natural persons, and that corporations, while legal persons for some purposes, possess none of the attributes the (Gertz) Court sought to protect." Martin Marietta, by providing an atmosphere in which, it was alleged, a naked woman could swing from a stuffed moose head, had become a public figure by thrusting itself into a matter of public controversy. So what would become a public issue or *Rosenbloom* test (see p. 203) was appropriate in trying the libel case.

A year later this approach was expressly rejected in *Reliance Insurance Co. v. Barron's*, 442 F.Supp. 1341 (S.D.N.Y. 1977). And in *Bruno & Stillman v. Globe Newspaper*, 633 F.2d 583 (1st Cir. 1980), a corporation not involved in a public controversy was held not to be a public figure.

The fact that a company advertises its goods and services does not make it a public figure or suggest a public controversy, said the California Supreme Court.[26] But, a federal appeals court held that where a meat company, after a media advertising blitz, was charged by a broadcast consumer reporter with selling an inferior product, the company had initiated disagreement. Its advertising and public relations campaign made it the focal point of a public controversy.[27]

Access to media and a voluntary decision to "go public" will likely make a corporation a public figure. Doing business with government or being closely regulated by government will have the same effect. Herbert Schmertz's issue advertising on behalf of the Mobil Oil Company is clearly controversial and makes the company a public figure in the context of the issues raised. A few states, Minnesota for

26. *Vegod Corp. v. American Broadcasting Company*, 603 P.2d 14 (Cal. 1979). For a distressing application of this rule, see *Rancho La Costa, Inc. v. Superior Court*, 165 Cal.Rptr. 347 (1980).

27. *Steaks Unlimited v. Deaner*, 623 F.2d 264 (3d Cir. 1980).

example, make corporations public figures by definition.[28] In the key Minnesota case, however, the state supreme court required defendant to show that its publication was in the realm of legitimate public interest. In spite of disorder in this line of cases, courts will probably follow the rule that where a corporation voluntarily makes itself a public figure, it will have to prove actual malice to win a libel verdict.

Nonprofit organizations, foundations, special interest groups, and labor unions may attempt libel actions on behalf of their memberships, but successful suits in these categories are rare.

Governments, political parties, and political interest groups are barred from libel suits because the citizen's right to criticize power brokers, no matter how abusive the criticism, is said to be fundamental to a democratic society. In *Johnson City v. Cowles Communications, Inc.*, 477 S.W.2d 750 (Tenn. 1972), the state supreme court said that Johnson City, a municipal corporation, was not a "person" within the meaning of the state's libel statute. Any citizen, individual, or corporate body, the court added, is absolutely privileged (excepting only treasonable utterances) to make statements about a city government.

The classic precedent was a much earlier case. In 1920 the City of Chicago sued the *Chicago Tribune* for libeling its credit in the bond market and impairing its functioning as a municipality. The Illinois Supreme Court ruled against the city noting that "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence;" * * * and * * * "assuming that there was a temporary damage to the city and a resultant increase in taxes, it is better that an occasional individual or newspaper that is so perverted in judgment or so misguided in his or its civic duty should go free than that all of the citizens should be put in jeopardy of imprisonment or economic subjugation if they venture to criticize an inefficient or corrupt government." *City of Chicago v. Tribune Co.*, 139 N.E. 86 (Ill. 1923). That sentiment was perhaps ahead of its time.

Where the plaintiff in a libel suit is an agent or agency of government, the action becomes a criminal proceeding known as *criminal libel*. As we shall see, this form of libel is rarely enforced in the United States, but some states still have criminal libel statutes on their books. In the United Kingdom, according to C. Duncan and B. Neill, *Defamation*, 151–52 (1978), a criminal libel case occurs on the average once a year.

Damages

At the risk of getting ahead of the core concepts of libel law, we will attempt a discussion of damages, a subject the courts have complicated almost beyond comprehension.

Compensatory or *general* damages are intended as monetary compensation paid by publishers for injury to reputation, injured feelings, shame, hurt, humiliation, disgrace, and mental anguish—the latter generally depending on first establishing damage to reputation. Before *New York Times v. Sullivan*, general damages were presumed in libel *per se*. Juries would fix the amount; courts would review and frequently reduce excessive awards. After *New York Times*, juries were required to consider the publisher's degree of fault (negligence or actual malice) in fixing damages.

Although it is unclear, general damages may not have survived *Gertz v. Robert Welch* in 1974, and, if they did, they became hopelessly tangled with *actual* damages (awarded when actual injury is shown, but the Court elected not to define actual injury) and *special* damages (compensation for actual money loss). Justice Powell wrote for the Court:

> The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States

28. *Jadwin v. Minneapolis Star*, 367 N.W.2d 476 (Minn. 1985).

have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. *It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss.* Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury. [Emphasis added.]

Actual damages, it appears, are meant to redress injury to reputation as well as mental suffering where these can be demonstrated. They are not to be assessed simply to show disdain for a news organization. Where actual malice has been proven by a plaintiff, perhaps general or compensatory damages, without a showing of actual injury, are still in order.

Special damages and actual damages were once considered synonymous by some authorities. They were meant to repay one for actual money loss, e.g., loss of income or medical bills, due to a false and defamatory publication, if the connection could be proven. That meaning still attaches to special damages—provable monetary injury. It is the relationship between compensatory (general) damages and actual damages that the *Gertz* case has clouded. It is clear, however, that the Court expects a plaintiff to show that she has been injured in her reputation before collecting damages of any kind. That may require testimony as to a reputation before and after publication. Generally, after reputational injury has been demonstrated, damage claims begin to pile up: bills for emotional or physical treatment, loss of clients, customers, and associations, and attorneys' fees and court costs.

Punitive or exemplary damages, the bane of defendants because they are often awarded out of all proportion to the injury inflicted, are meant to punish and set an example for future would be libelers. Lawyers have called them "smart" money because they can sting.

Recognizing the inhibiting effect massive awards of punitive damages could have on First Amendment rights, the Court in *Gertz* sought to discourage them by tying them to a showing of actual malice (knowing falsehood or reckless disregard as to truth or falsity). The states have gone their own way. In some jurisdictions common law malice (ill will, spite, hostility, or a desire for revenge) may have to be shown as well as actual malice before punitive damages will be permitted.[29] Other states, among them Massachusetts,[30] Washington,[31] and Oregon,[32] prohibit punitive damages altogether because of their chilling effect on free discussion. Michigan has not been sympathetic to punitive damages.[33]

Where punitive damages are allowed, juries have wide discretion in deciding how much and when to levy them. Evidence of an intent to harm (common law malice) or an insensitive response to a request for retraction may be sufficient. Many states, incidentally, permit punitive damages only when a defendant ignores a request for a retraction.

Other states have tried to put a lid on punitive damages. Washington state may be unique in computing a figure over and above proven actual out-of-pocket losses on the bases of life expectancy (of the plaintiff) and the state's average annual wage. In Carol Burnett's successful libel case against the *National Enquirer*, the court took into consideration the assets and profits of the publication so as to punish and deter rather than destroy.[34] In *Brown &*

29. *Burnett v. National Enquirer*, 9 Med.L.Rptr. 1921, 144 Cal.App.3d 991 (2d Dist. 1983).

30. *Stone v. Essex County Newspapers*, 330 N.E.2d 161 (Mass. 1975).

31. *Taskett v. KING Broadcasting Co.*, 546 P.2d 81 (Wash. 1976).

32. *Wheeler v. Green*, 593 P.2d 777 (Ore. 1979) and *McCall v. Zaitz*, 14 Med.L.Rptr. 1886 (D.C.Ore. 1987). Nebraska and New Hampshire may also belong on this list.

33. *Peisner v. Detroit Free Press*, 364 N.W.2d 600 (Mich. 1984).

34. *Burnett v. National Enquirer*, 7 Med.L.Rptr. 1321 (Cal.Super.Ct. 1981). A California appeals court considered an initial punitive damages award of $750,000 too high and ordered a new trial on the question unless Burnett would accept a reduced award of $150,000. See fn. 29.

Williamson v. Jacobson, damages were measured against CBS's net worth of $1 billion and the reporter's assets of $5 million. NBC's net worth was estimated at $2 billion by a federal district court in Nevada in the *Wayne Newton* case. From a defendant's perspective, these are disturbing developments, although appeals courts are expected to correct grossly excessive or unreasonable jury awards, actuated by prejudice and unrelated to the damage inflicted. The proper relationship between punitive and compensatory damages was addressed by Justice Harlan in a concurring opinion in *Rosenbloom v. Metromedia*, 403 U.S. 29, 75, n. 4 (1971):

> A carefully and properly instructed jury should ordinarily be able to arrive at damage awards that are self-validating. * * * [T]o the extent that supervision of jury verdicts would be required * * * defendant's resources, the actual harm suffered by the plaintiff, and the publication's potential for actual harm are all susceptible of more or less objective measurement. * * * I would hold unconstitutional, in a private libel case, jury authority to award punitive damages which is unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done.

Justices Marshall and Stewart in dissent thought no such objective measurement possible. In their view, punitive damages would remain a threat to the First Amendment.

In a case painful to the press, the Supreme Court in 1985 seemed to be returning to the old rule of presumed damages in libel *per se* when it held in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985), that presumed and punitive damages, to use the Court's language, may be awarded "even absent a showing of actual malice" where no matters of public concern are involved. Proof of actual damages might be impossible, said the Court, but the circumstances could suggest that serious harm had been done. This language distinguishes *Gertz* by inferring that private plaintiffs in nonpublic situations might recover punitive damages *without* a showing of actual malice. Clearly the Court was not prepared to constitutionalize the entire common law of libel; some of the pre-*New York Times* rules would prevail. Justice White would retain all the common law rules where the plaintiff was neither a public official nor a public figure.

"[E]ven accepting the *Gertz* premise that the press also needed protection in suits by private parties," he wrote in a concurring opinion, "there was no need to modify the common-law requirements for establishing liability and to increase the burden of proof that must be satisfied to secure a judgment authorizing at least nominal damages and the recovery of additional sums within the limitations that the Court might have set."

Courts are divided on whether the burden of proof or standard of evidence for punitive damages ought to be clear and convincing (a higher standard) or preponderance of evidence.[35]

Nominal damages are referred to in the brief excerpt from Justice White's *Dun & Bradstreet* opinion. They are token damages (one dollar, for example) symbolizing a moral victory rather than compensation for any actual injury to reputation or financial standing. Since *Gertz* requires a showing of actual injury, nominal damages may not have survived that case. On the other hand, if *Dun & Bradstreet* does indeed revive some common law libel rules, nominal damages may still be available, especially where actual malice has been demonstrated.

THRESHOLD ELEMENTS OF ACTIONABLE LIBEL: DEFAMATION, IDENTIFICATION, PUBLICATION, FALSITY, AND ACTUAL INJURY

Before we are awash in seemingly disconnected definitions, it is advisable to explore libel in a historical and operational manner. To do this, we will pose a chronology of questions which the reporter or editor must consider in dealing with a libel threat or an actual lawsuit. So we will move from the initial question of defamation to a prayerful consideration of mitigation (a means of lowering damages).

Defamation

No libel action will succeed unless the plaintiff can prove that a publication is defamatory. Falsely attributing a felony to someone is the most dangerous form of defamation. Moral turpitude is not far be-

35. See *Marcone v. Penthouse Int'l, Ltd.*, 577 F.Supp. 318 (E.D.Pa. 1983), rev'd on other grounds 754 F.2d 1072 (3d Cir. 1985).

hind. Other forms of defamation were reviewed briefly at the beginning of the chapter.

Identification

The identification must refer to a specific person. A nickname, a pseudonym, or a connecting circumstance might suffice. One authority explains:

> It is sufficient if he is described by his initial letters, or by the first and last letter of his name, or even by asterisks, or blanks, or if he be referred to under the guise of an allegorical, historical, fictitious or fanciful name, or by means of a description of his physical peculiarities, or by the places which he has visited on his travels. Gatley, *Libel and Slander* (4th ed. 1953), 113.

Photographs also identify people. So do sketches and cartoons. Context, addresses, unique physical or emotional characteristics may also present an author with surprises. David Anderson gives good advice when he says never use the name of an acquaintance, or even a slight modification of that name, in a fiction piece. A set of behaviors which by their sheer uniqueness identify a particular person can be dangerous in the docudrama or "faction" piece that puts fictional characters into historical events and may tempt a reader or viewer to confuse fact and fantasy.[36] New York courts, however, do hold plaintiffs up to stringent standards of identification in order to protect works of imagination.[37]

A self-designated plaintiff must prove that the defamatory words were understood to be "of and concerning" him.[38] If a defamatory statement could apply to persons other than the plaintiff, a libel action will not be permitted.[39] And, of course, the *Gertz* case does hold that "innocent" defamations are defensible where public figures and matters of public concern are involved.

Identification can be lost in a crowd. The English common law did not recognize *group libel*. This tradition was continued in American law, partly because of First Amendment considerations. Recognition of group libel might inject the misplaced power of government into the social dialogue. Group libel bears at least a remote resemblance to seditious libel or punishment for criticism of government. Seditious libel was often rationalized as necessary in keeping the public peace and good order.

How large must a group be to make individual identification possible? The rule of thumb is twenty-five. A prominent person in a group of any size, of course, could stick out like a sore thumb. An instructive case is *Neiman-Marcus Co. v. Lait*, 13 F.R.D. 311 (D.N.Y. 1952). Two authors charged in a book that store models and saleswomen were call girls and salesmen were predominantly gay.

Nine models, the total number then employed, and 15 of 25 salesmen were allowed to bring suit. But 30 saleswomen, acting on behalf of 382, were not, the latter group being too large for individual identification. The case was settled without trial. None of the plaintiffs received compensation, but attorney fees were paid, and the danger signal had flashed. The court in *Neiman-Marcus* did lay down the following rules:

(1) Where the group or class libeled is large, none can sue even though the language used is inclusive; (2) when the group or class libeled is small and each and every member of the group is referred to, then any individual member can sue; and (3) where there is disagreement whether some or all of a group has been libeled, at least an action can be attempted.

No one specifically was identified in an article about Washington, D.C.'s "parking lot racket."[40] Or in *Time* magazine's charge that western officials of a union were conspiring with Seattle gamblers to control Portland's law enforcement agencies.[41] *Red Channels*' anticommunist blacklist of 151 persons was too many for a radio-television actor to claim identification.[42] An Associated Press story identifying a murder and robbery suspect as a member of the Socialist Workers party did not defame either the party or its chief executive officers, said a New York court.[43] One consequence of the controversial network film, "Death of a Princess," was a libel suit on behalf of "all Muslims." A California federal court

36. Anderson, *Avoiding Defamation Problems in Fiction*, 51 Brooklyn L.R. 383 (Winter 1985).
37. *Springer v. Viking Press*, 8 Med.L.Rptr. 2613, (N.Y.S.Ct., App.Div. 1982). Superficial similarities not enough.
38. *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir. 1981).
39. *Belmonte v. Rubin*, 7 Med.L.Rptr. 2248, 386 N.E.2d 904 (Ill. 1979).
40. *Service Parking Corp. v. Washington Times Co.*, 92 F.2d 502 (D.C.Cir. 1937).
41. *Crosby v. Time, Inc.* 254 F.2d 927 (7th Cir. 1958).
42. *Julian v. American Business Consultants, Inc.* 155 N.Y.S.2d 1, 137 N.E.2d 1 (1956).
43. *Socialist Workers Party v. Associated Press*, 8 Med. L.Rptr. 1554, 458 N.Y.S.2d 970 (N.Y.Sup.Ct. 1982).

would not permit the suit to proceed in view of the size of the class.[44]

A Boston *Globe* editorial referred to the Manchester (N.H.) *Union Leader* as "probably the worst newspaper in America" and charged that its publisher "runs a newspaper by paranoids for paranoids." For lack of identification, a federal district court disallowed suit by 24 of the newspaper's 325 employees and three of the *Union Leader's* eight editors.[45] Care is recommended, however, when a group is as small as eight. In that case the public quality of the controversy and the fact that its rhetoric fell in the category of opinion undoubtedly influenced the court. Similarly a laetrile distributor failed to gain the sympathy of a federal district court because he was part of too large a group for identification. The court went on to say, "To hold that statements commenting generally on the laetrile controversy are of and concerning individuals prominent in the controversy would chill heated public debate into lukewarm pap. The First Amendment does not countenance such a deterrent of free speech."[46]

Someone other than the plaintiff must reasonably infer from the publication that the defamatory reference is to that person. A single individual may constitute that audience or third party. If a name is not used, the plaintiff must show, by what lawyers call *colloquium*, that the defamatory reference has hit him or her.

Until recently, most American courts followed the English rule that "To *libel the dead* is not an offense known to our law: the dead have no rights and can suffer no wrongs."[47] [Emphasis added.]

When the New York *Daily Mirror* confused the name of a recently deceased person with that of a notorious criminal, the deceased's wife and children, who had been listed in the article, brought an action against the newspaper. See *Rose v. Daily Mirror*, 31 N.E.2d 182 (N.Y. 1940). New York's highest court said:

> Defendant does not deny that the publication complained of was a libel on the memory of the deceased Jack Rose. Plaintiffs make no claim of any right to recover for that wrong. They stand upon the position that the publication—while it did not affect their reputations in respect of any matter of morals—tended to subject them in their own persons to contumely and indignity and was, therefore, a libel upon them. * * * In this state, however, it has long been accepted law that a libel or slander upon the memory of a deceased person which makes no direct reflection upon his relatives gives them no cause of action for defamation.

In 1957, Helen C. Frick, daughter and sole survivor of Pennsylvania industrialist Henry Clay Frick, brought a libel suit against Dr. Sylvester Stevens, chairman of the Pennsylvania Historical Society and author of a widely acclaimed book, *Pennsylvania: Birthplace of a Nation*. Ms. Frick complained that the book misrepresented her father as a stern and autocratic union buster who underpaid and overworked his employees, provided them with minimal safety conditions, pressured them to buy overpriced goods at the company store and to live in shoddy wooden shacks without sanitary facilities at inflated rents. Anything tending to blacken the memory of her father, Ms. Frick averred, would tend to lower her in the esteem of the community, for through her philanthropies she had become associated with the memory of her father.

A Pennsylvania county court, embarking upon an historical investigation of its own, found the charges either to be true or nondefamatory. The court implied that Steven's book was a first-rate historical study, and it added:

> First, no substantial right of the plaintiff will be impaired to a material degree. * * * [N]o rights of the plaintiff are involved here, only the rights of her deceased father, if any. Her name is not mentioned and her reputation is not involved, so that no right of reputation or privacy of hers is involved.
>
> Second, the remedy at law is not inadequate; there has been no wrong done by defendant and plaintiff has suffered no injury so there is nothing to redress in this case. There being no injury, there is no remedy at law or in equity.
>
> * * *
>
> Next, the exercise of previous restraint in a case of this type would impose an impossible burden on the court. It is true the courts are open to redress wrongs, but it would be impossible to exercise previous restraint over the voluminous publications now on the market.

44. *Mansour v. Fanning*, 6 Med.L.Rptr. 2055, 506 F.Supp. 186 (D.C.N.Cal. 1980).
45. *Loeb v. Globe Newspaper Co.*, 6 Med.L.Rptr. 1235, 489 F.Supp. 481 (D.Mass. 1980).
46. *Schuster v. U.S. News & World Report, Inc.* 459 F.Supp. 973, 978 (D.Minn. 1978), aff'd, 602 F.2d 850 (8th Cir. 1979).
47. *R. v. Ensor*, 3 L.T.R. 366 (1887).

> If equity would undertake to decree corrections in a book for every person named therein who sought to obtain corrections satisfactory to his beliefs, a court of equity would be writing the book not the author.
>
> If everyone read a book as plaintiff read this one, by looking into the index for an ancestor's name, and on cursory examination started action to enjoin or correct the book, our bookshelves would either be empty or contain books written only by relatives of the subject. *Frick v. Stevens*, 43 D. & C.2d 6 (Pa. 1964).

New Jersey, Pennsylvania, and a number of other states, either by statute or case law, now recognize libel of the dead. See *Canino v. New York News, Inc.*, 475 A.2d 528 (N.J. 1984) and *Moyer v. Phillips*, 341 A.2d 441 (Pa. 1975). The situation in New York is unclear. Bills recognizing libel of the dead were introduced in both 1986 and 1987 sessions of the New York State Legislature. At the same time, New York's Estates Powers and Trust Laws (E.P.T.L. 11-3.2(a), McKinney 1967 & Cum. Supp. 1984–1985) stating "Action in libel and slander does not abate upon death of the plaintiff, except insofar as punitive damages are sought," was interpreted to extend the right of the deceased in *Moore v. Washington*, 311 N.Y.S.2d 310 (1970).

Statutes that can be interpreted as extending the right are Michigan (Comp. Laws Ann. § 6000.2921, West Cum. Supp. 1984–1985), Pennsylvania (20 Pa. Const. Stat. Ann. § 3371, Purdon Cum. Supp. 1984–1985), and Wisconsin (Wis. Stat. Ann. § 895.01, West 1983). See also statutes in Alaska, Connecticut, Florida, Georgia, Iowa, Maine, Mississippi, Montana, Oregon, South Dakota, Texas, Utah, Vermont, Virginia, and Washington.

Publication

Publication—throwing a defamation to the four winds—is where the real damage to a plaintiff occurs. Print media because of their permanence, radio and television because of their reach and impact can convey libels with devastating effect.

For there to be a libel, or a slander, there must be publication to a third person. The third person may be anyone, including a member of the plaintiff's family, although publication to one's spouse, attorney, physician, or priest is generally insufficient, since these are frequently privileged relationships.

In *Avery Corp. v. Peterson*, 178 F.Supp. 132 (D.C.Pa. 1959), dictation of a defamatory letter to a corporation secretary by an officer of the firm was ruled a publication.

Printing, posting, circulating, or disseminating is the first step in publication. Someone reading, viewing, or hearing a message is the second. Early cases speak of publication to a "considerable and respectable class in the community" who may think badly of an identifiable person after publication.[48]

Some states, including California, Illinois, and Pennsylvania, either by case law or by adoption of the Uniform Single Publication Act (13 U.L.A. 517), subscribe to what is called the *single publication rule*: an entire edition of a newspaper is treated as a single publication, rather than every single copy constituting a distinct publication and therefore a separate basis for a libel suit. In other words, the initial publication is one libel, one offense, one cause of action regardless of how many persons read it or how often they read it. The number of readers neither increases the magnitude of the libel nor allows for multiple causes of action, although a plaintiff is permitted to plead and prove extent of circulation as evidence bearing on damages.[49]

The Supreme Court of Georgia said in 1964: "To allow a suit for damages each time a different person sees the newspaper would unreasonably shackle the press and might quickly bankrupt it, thus doing great harm to both the publisher and the readers."[50]

In spite of California's Uniform Single Publication Act, a new libel action based on the paperback edition of a book was permitted, even though identical passages in the original hardcover edition had already been litigated.[51]

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48. *Kimmerle v. New York Evening Journal*, 262 N.Y. 99, 186 N.E. 217 (1933).

49. *Rives v. Atlanta Newspapers, Inc.*, 139 S.E.2d 395 (Ga. 1964).

50. Ibid., p. 398. See also Waskow v. Associated Press, 462 F.2d 1173 (D.C.Cir. 1972). Waskow, a "public figure" under the *New York Times v. Sullivan* doctrine, had argued that "back issues" of the *Washington Star* were sold subsequent to the date of the appearance of the original item in the *Star* libeling him and that as a result the libel was "republished" under the *New York Times* malice test. In view of the deadline under which metropolitan newspapers operate and the predetermined distribution system that they use once an edition is printed, the court rejected the libel plaintiff's republication theory: "[F]or purposes of the *Times* rule, a daily newspaper is 'published' once only—when it is printed and placed in the distribution system—unless it is redistributed *outside the normal channels* with the specific intent to convey the libelous information."

51. *Kanarek v. Bugliosi*, 6 Med.L.Rptr. 1864, 166 Cal.Rptr. 526 (1980).

In cases of multistate circulation of newspapers or magazines, the single publication rule dictates that a cause of action for libel be absolutely complete at the time of first publication. Later circulation is relevant only in computing damages.[52] The rule obviously protects a publisher from the perpetual harassment of multiple and never-ending libel actions.[53]

A suit may be brought in the place where the defendant resides or does business, and this is frequently the point of publication; or in the place of largest circulation of the offending publication; or where the greatest harm was done the plaintiff—generally the plaintiff's place of residence. What lawyers call *long-arm statutes* can be applied to publishers of national newspapers without violating due process. So the *Los Angeles Times* and other news media could be sued in Wyoming for a story on organized crime that was researched in Wyoming by three *Times* reporters and had its major impact there. *Anselmi v. Denver Post, Inc.*, 2 Med.L.Rptr. 1530, 552 F.2d 316 (10th Cir. 1977).

Generally, however, a newspaper published in a distant place must have sufficient business and professional impact or activity where the alleged libel has occurred to trigger a long-arm statute.

"[T]o sustain jurisdiction over a nonresident newspaper," said a court of appeals in 1964, "plaintiff must show more than 'mere circulation of a periodical through the mail to subscribers * * * and sporadic news gathering by reporters.' " *Buckley v. New York Times Co.*, 338 F.2d 470, 474 (5th Cir. 1964).

In dismissing a libel suit for want of jurisdiction, a United States district court in Texas concluded that twenty-eight daily copies of the *Detroit Free Press* (.0044 percent of the paper's total daily circulation) were insufficient to constitute the minimum contacts necessary to sustain jurisdiction under the due process clause. *Kersh v. Angelosante*, 8 Med.L.Rptr. 1282 (N.D.Tex. 1982).

Where the single publication rule is in effect, the libel suit may have to be brought in the place where the libel was published or where publication first occurred. Several courts have refused to let the single publication rule cross state lines and have allowed a separate cause of action in each state where publication took place. A Pennsylvania rule recognized one aggregate cause of action for all single publication states plus additional causes of action for libels committed in multiple publication states. *Hartmann v. Time, Inc.*, 166 F.2d 127 (3d Cir. 1948) cert. den., 334 U.S. 838 (1948).

As has been noted, the second step in publication is taken when the libel effectively reaches those readers, listeners, viewers for whom publication is intended. In *Zuck v. Interstate Publishing Corp.*, 317 F.2d 727 (2d Cir. 1963), it was decided that mere delivery of bundles of a periodical designed as an insert for a newspaper to a carrier or distributor did not constitute publication. There was no publication until the newspaper went on sale or began to circulate to the great mass of its subscribers. In such cases, the third party to publication is defined as the bulk of readers rather than a small or atypical segment of them. *Osmers v. Parade Publications, Inc.*, 234 F.Supp 924 (S.D.N.Y. 1964); *Fleury v. Harper & Row*, 7 Med.L.Rptr. 1795 (D.Cal. 1981).

On the other hand, a number of courts have held that publication is effected when the libelous matter is delivered to common carriers for distribution. See *Konigsberg v. Long Island Daily Press Publishing Co.*, 293 N.Y.S.2d 861 (1968); *Novel v. Garrison*, 294 F.Supp. 825 (D.Ill. 1969). Most states by statute protect retailers of newspapers against libel suits. The extent to which a cablecaster is a mere conduit and thereby not liable for defamation is not yet clear. Whatever the rule, there is no necessity to prove that any part of the content of a publication has been read. See *Hornby v. Hunter*, 385 S.W.2d 473 (Tex.Civ.App. 1964).

Publication may occur when a reporter says something defamatory about a third person while gathering news. This might happen when pushing a reluctant news source for information. *Davis v. Schuchat*, 510 F.2d 731, 732 (D.C.Cir. 1975). The disastrous Alton, Illinois case, you will recall, involved a memo sent by reporters to the Justice Department and containing information not quite solid enough for publication in the newspaper. The reporters thought they were acting as good citizens. As it turned out, no one at the Justice Department ever saw the memo. A summary, however, was sent to and read by the Federal Home Loan Bank Board. Since the plaintiff was a developer who would depend on bank loans and since there had been intimations in the memo of connections with organized

52. *Insul v. New York World Telegram Corp.*, 273 F.2d 166 (7th Cir. 1959).
53. *Sorge v. Parade Publications, Inc.*, 247 N.Y.S.2d 317 (1964).

crime, both agencies were salient to his interests. The result was a damage claim for $9.2 million. *Green v. Alton Telegraph Printing Co.*, 438 N.E.2d 203 (1982).

Everyone who takes a conscious part in a publication is theoretically *liable* for damages. Usually the corporation—the party capable of paying hefty damages—is named defendant. A news source who generates a libel and authorizes its publication may also be liable.[54] Innocent coworkers such as carrier boys, vendors, broadcast engineers are generally not liable.[55] Reporters are often named as defendants by angry plaintiffs.

Plaintiffs in a minority of states—including New York and California where a high proportion of publishing takes place—must show actual malice on the part of executives higher up for punitive damages.[56] For example, in *Dresbach v. Doubleday Co.*, 7 Med.L.Rptr. 2105, 518 F.Supp. 1285 (D.D.C. 1981), a United States district court held that a book publisher is not responsible for the independent verification of everything a reputable author writes. In most states, however, higher-ups *are* responsible for libel committed by permanent or free-lance employees. This proposition is known as the *complicity rule*.

Under the *complicity rule*, editors or publishers could deny knowing what their reporters were doing; but this is hardly the mark of a responsible newspaper and could redound to the disadvantage of defendant when a court or jury considers the question of fault. Conversely, in New York or California, a plaintiff might argue that a reporter is operating at a managerial level with a full mandate from a publisher. In the Alton, Illinois case, plaintiff could not show that the publisher knew of the defamatory memo sent by *Telegraph* reporters to a federal prosecutor, and, as it turned out, he didn't have to.

Every purposive or authorized repetition of a defamation—picking up a libel from another publication, a new edition of a book, a rebroadcast—is a new and separate publication. The rule appears to be that the original publisher will be held responsible for the *republication* if it could reasonably have been anticipated. There is no liability, however, if a libelous article or statement is reprinted or rebroadcast without the original author's consent.[57] The original author is not responsible for accidental or unintentional publication or publication in a distorted form.[58] Libraries, booksellers, and newspaper and magazine vendors, as has been noted, are protected against liability for republication. They can't read everything they handle, and, as we shall see, there can be "no liability without fault."

Identifying a source but leaving room for disbelief by an attribution such as "it is alleged" is no defense, although it might mitigate damages.[59]

A physician, a drugstore manager, and a restaurant owner won libel awards when a radio station, which invited the public to call in on an "open-mike" program and used no delay device to edit out defamatory statements, implied the illicit sale and distribution of narcotics. The station was liable, said the court, even though it had no actual knowledge of the falsity of the statements made by an unidentified caller. Liability, however, did not include the unsuspecting sponsor of the program.[60]

Similarly, in *Demman v. Star Broadcasting Co.*, 497 P.2d 1378 (Utah 1972), a delay device did not immunize a broadcaster from fault.

Letters to the editor may be the print media equivalent of the open-mike program, although there will be much more time for editing. Nevertheless, letters should be handled with care.

"Libel law invokes the fiction," says Robert Sack, "that a republisher of defamatory charges adopts them

54. *Roberts v. Breckon*, 52 N.Y.S. 638 (1898); *Storch v. Gordon*, 197 N.Y.S.2d 309 (1960), reargument 202 N.Y.S.2d 43; *Campo v. Paar*, 239 N.Y.S.2d 494 (1963).

55. *Seroff v. Simon & Schuster, Inc.*, 162 N.Y.S.2d 770 (1957).

56. Other states exempting employers from liability unless they authorized misconduct are Delaware, Idaho, New Mexico, North Dakota, Ohio, Texas, Vermont, Virginia, Wisconsin, and the District of Columbia. See also, Restatement (Second) of Torts § 909 (1979).

57. *Di Giorgio Corp. v. Valley Labor Citizen*, 67 Cal.Rptr. 82 (1968); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 943 (1977), cert den. 434 U.S. 969 (1977).

58. *Seroff v. Simon & Schuster, Inc.*, 162 N.Y.S.2d 770 (1957), affirmed 210 N.Y.S.2d 479 (1960). See also, *Storch v. Gordon*, 197 N.Y.S.2d 309 (1960).

59. *Maloof v. Post Publishing Co.*, 28 N.E.2d 458 (Mass. 1940).

60. *Snowden v. Pearl River Broadcasting Corp.*, 251 So.2d 405 (La. 1971). But see *Adams v. Frontier Broadcasting Co.*, 555 P.2d 556 (Wyo.1976) in which a state supreme court ruled that a radio station's failure to use a tape delay system, resulting in defamation concerning a public figure, did not demonstrate "reckless disregard" within the meaning of *New York Times* since a delay system would reduce "uninhibited, robust, and wide-open" public debate.

for himself and is therefore legally responsible for their accuracy and the harm that they may cause."[61] He suggests that the partial defense of *neutral reportage* (see p. 267) may be a remedy, but that is by no means assured.

Remember that the offense is in the publication, in spreading the defamatory falsehood, whatever its form: the community press, the neighborhood press, the scholastic press, the alternative press, the religious press, the newsletter press, the leaflet press. Weakness does not immunize a publication from the libel laws. All are the equal of the *New York Times* in feeling the sting of the law.

On February 24, 1980, the Minneapolis *Tribune* carried a UPI story from Baltimore reporting that a superior court jury there had ordered Bernard Gladsky to pay his sister $2,000 in damages for an inscription he had carved on their father's tombstone:

"Stanley J. Gladsky, 1895–1977, abused, robbed and starved by his beloved daughter."

The sister, Gloria Kovatch, had asked for $500,000. Gladsky said the inscription was a joke. Some joke! And some publication: written in stone! Tombstone carver Kirby L. Smith also agreed to pay Kovatch $3,000 as part of the settlement. He was liable because he took part in the publication.

Falsity

To the singular advantage of the media, the *New York Times* construct requires the libel plaintiff to prove a negative: that the defamatory publication as it applies to a particular person is false. *New York Times* was extended to "speech of public concern" in the case of a "private-figure plaintiff" when a Pennsylvania law placed the burden of proof of falsity on the defendant. The Pennsylvania statute was struck down by the United States Supreme Court in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). Whether such a statute would be valid when the speech was not of public concern and there was a private figure plaintiff was not passed on by the Court in *Hepps*.

Where a newspaper publishes speech of public concern about either a private or public person, said the Court, that person cannot recover damages without showing that the statement at issue was false. Difficult though it may be to separate truth from falsehood in specific cases, the Constitution requires the scales to be tipped in favor of "true" speech. To ensure that true speech on matters of public concern is not deterred, the Court added, the common law presumption that defamatory speech is false would not stand. Hepps, a beer distributor, was alleged to have connections with organized crime.

The relevant language of the Court follows.

PHILADELPHIA NEWSPAPERS v. HEPPS

106 S.CT. 1558, 12 MED.L.RPTR. 1977 (1986).

Justice O'CONNOR delivered the Opinion of the Court.

* * *

Our opinions to date have chiefly treated the necessary showings of fault rather than of falsity. Nonetheless, as one might expect, given the language of the Court in *New York Times*, a public-figure plaintiff must show the falsity of the statements at issue in order to prevail on a suit for defamation. See *Garrison v. Louisiana*, 379 U.S. 64, 74 (1 Med.L.Rptr. 1548) (1964) (reading *New York Times* for the proposition that "a public official [is] allowed the civil [defamation] remedy only if he establishes that the utterance was false"). See also *Herbert v. Lando*, 441 U.S. 153, 176 (1979) ("the plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability").

Here, as in *Gertz*, the plaintiff is a private figure and the newspaper articles are of public concern. In *Gertz*, as in *New York Times*, the common-law rule was superseded by a constitutional rule. We believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.

There will always be instances when the factfinding process will be unable to resolve conclusively whether the speech is true or false; it is in those cases that the burden of proof is dispositive. Under a rule forcing the plaintiff to bear the burden of showing

61. Sack, *Libel, Slander and Related Problems* (1980), 146.

falsity, there will be some cases in which plaintiffs cannot meet their burden despite the fact that the speech is in fact false. The plaintiff's suit will fail despite the fact that, in some abstract sense, the suit is meritorious. Similarly, under an alternative rule placing the burden of showing truth on defendants, there would be some cases in which defendants could not bear their burden despite the fact that the speech is in fact true. Those suits would succeed despite the fact that, in some abstract sense, those suits are unmeritorious. Under either rule, then, the outcome of the suit will sometimes be at variance with the outcome that we would desire if all speech were either demonstrably true or demonstrably false.

This dilemma stems from the fact that the allocation of the burden of proof will determine liability for some speech that is true and some that is false, but *all* of such speech is *unknowably* true or false. Because the burden of proof is the deciding factor only when the evidence is ambiguous, we cannot know how much of the speech affected by the allocation of the burden of proof is true and how much is false. In a case presenting a configuration of speech and plaintiff like the one we face here, and where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting 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.

In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified. See *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 540, 6 Med.L.Rptr. 1518 (1980) (content-based restriction); *First National Bank v. Bellotti*, 435 U.S. 765, 786, 3 Med.L.Rptr. 2105 (1978) (speaker-based restriction); *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 12 Med.L.Rptr. 1721 (1986) (secondary-effects restriction). See also *Speiser v. Randall*, 357 U.S. 513 (1958) (striking down the precondition that a taxpayer sign a loyalty oath before receiving certain tax benefits). It is not immediately apparent from the text of the First Amendment, which by its terms applies only to governmental action, that a similar result should obtain here: a suit by a private party is obviously quite different from the government's direct enforcement of its own laws. Nonetheless, the need to encourage debate on public issues that concerned the Court in the governmental-restriction cases is of concern in a similar manner in this case involving a private suit for damages: placement by state law of the burden of proving truth upon media defendants who publish speech because of the fear that liability will unjustifiably result. See *New York Times*, 376 U.S. 279; *Garrison, supra*, at 74 ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned"). Because such a "chilling" effect would be antithetical to the First Amendment's protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could "only result in a deterrence of speech which the Constitution makes free." *Speiser, supra*, at 526.

We recognize that requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so. Nonetheless, the Court's previous decisions on the restrictions that the First Amendment places upon the common law of defamation firmly support our conclusion here with respect to the allocation of the burden of proof. In attempting to resolve related issues in the defamation context, the Court has affirmed that "[t]he First Amendment requires we protect some falsehood in order to protect speech that matters." *Gertz*, 418 U.S. 341. Here the speech concerns the legitimacy of the political process, and therefore clearly "matters." See *Dun & Bradstreet*, 472 U.S., at ___ (speech of public concern is at the core of the First Amendment's protections). To provide " 'breathing space,' " *New York Times, supra*, at 272 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)), for true speech on matters of public concern, the Court has been willing to insulate even *demonstrably* false speech from liability, and has imposed additional requirements of fault upon the plaintiff in a suit for defamation. See, *e.g.*, *Garrison*, 379 U.S. 75; *Gertz, supra*, at 347. We therefore do not break new ground here in insulating speech that is not even demonstrably false.

We note that our decision adds only marginally to the burdens that the plaintiff must already bear as a result of our earlier decisions in the law of defamation. The plaintiff must show fault. A jury is obviously more likely to accept a plaintiff's con-

tention that the defendant was at fault in publishing the statements at issue if convinced that the relevant statements were false. As a practical matter, then, evidence offered by plaintiffs on the publisher's fault in adequately investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted. See Keeton, *Defamation and Freedom of the Press*, 54 Texas.L.Rev. 1221, 1236 (1976). See also Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825, 856–857 (1984).

We recognize that the plaintiff's burden in this case is weightier because of Pennsylvania's "shield" law, which allows employees of the media to refuse to divulge their sources. But we do not have before us here the question of the permissible reach of such laws. Indeed, we do not even know the precise reach of Pennsylvania's statute. The trial judge refused to give any instructions to the jury as to whether it could, or should, draw an inference adverse to the defendant from the defendant's decision to use the shield law rather than to present affirmative evidence of the truthfulness of some of the sources. That decision of the trial judge was not addressed by Pennsylvania's highest court, nor was it appealed to this Court. In the situation before us, we are unconvinced that the State's shield law requires a different constitutional standard than would prevail in the absence of such a law.

For the reasons stated above, the judgment of the Pennsylvania Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

* * *

COMMENT

Hepps requires falsity to be established by clear and convincing evidence where the plaintiff is a public person. The lesser standard of a fair preponderance of evidence may be sufficient for private plaintiffs.[62]

In the common law of libel, as will be seen, the burden of proof of truth (an absence of falsity) was squarely on the defendant, contrary to the rule of other negligence torts. That peculiar exception has been overcome.

Is it a desire to proclaim "truth" that really motivates libel plaintiffs? Should courts be in the business of divining truth? Perhaps they should where simple facts are concerned but not where opinion, belief, or ideology is entangled.

And can a plaintiff ever satisfactorily prove a negative—the judge, for example, who is accused of being "probably corrupt."[63] Some commentators believe that courts should assess fault only and leave questions of truth or falsity to the gods.

Actual Injury

As noted in the section on damages, the United States Supreme Court in the significant *Gertz* case elected not to define actual injury, leaving that task to the state courts. "Suffice it to say," said the Court, "that actual injury is not limited to out-of-pocket loss [so by inference it could mean money loss]. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."

That statement by the Court has by no means foreclosed debate on what kinds of injury ought to be compensated. David Anderson argues that only actual harm to reputation ought to be compensated. There would be no presumption of harm. Compensation for mental anguish might follow proof of harm to reputation as, what lawyers call, a parasitical award. *Gertz*, he says, permitted mental anguish to support a claim of actual injury, and the Court in the *Firestone* case (see p. 215) certified it. If Anderson had his choice, Mrs. Firestone would have lost her case because she waived her claim to loss of reputation.[64]

Actual injury might also take the form of job loss or loss of the companionship of spouse, as would be the case in most of the rest of tort law. A showing of mental anguish might follow. But William Van Alstyne disagrees. He would not equate libel with

62. See also, *Sharon v. Time, Inc.*, 609 F.Supp. 1291 (S.D.N.Y. 1984).
63. *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 366 N.E.2d 1299, cert. den. 434 U.S. 969 (1977).
64. Anderson, *Reputation, Compensation, and Proof*, 25 William & Mary, L.R. 747 (1983–1984).

other torts since the First Amendment provides special protection to the press: government involvement is not permitted in libel as it is in other forms of negligence.[65]

There is something circular about these arguments. Mental anguish or distress would seem to be integral to an attack on reputation and perhaps should benefit from all the rules of libel. Most plaintiffs claim emotional suffering rather than financial loss, concluded the Iowa Libel Research Project. Plaintiffs seek, not money damages, but restoration of their reputations, and they talk to offending editors before calling their lawyers.

Some courts have held that public figures cannot sue for punitive damages unless there is a showing of actual injury to reputation.[66] Clearly states will define actual injury for themselves.

Although we have examined the five prerequisites to an actionable libel suit—defamation, identification, publication, falsity, and actual injury—we are not yet close to the heart of libel law. A new age of libel began with the *New York Times* case in 1964. How did we get there, and where has it taken us?

COMMON LAW LIBEL AND THE ORIGINS OF THE CONSTITUTIONAL DEFENSE

Strict Liability

Under the common law rule of *strict liability*, libel *per se* was defined as defamatory words published in reference to a plaintiff with obvious and substantial damage to reputation. Falsity as to fact, lack of justification as to opinion, malice on the part of the publisher, and injury to the plaintiff were all presumed. Plaintiff having met the then three threshold elements of actionable libel, defamation, identification, and publication, the burden of proof shifted to the defendant to present an affirmative defense of truth, privilege, or fair comment and criticism. Since these three common law defenses are still available to defendants, they will be discussed in more detail in later sections.

The problem with the rule of strict liability was that it took no account of a publisher's intent, degree of negligence, or level of professionalism, nor did it consider the extent of injury suffered by plaintiff. Indeed a publisher could be liable even where there was no apparent fault on his or her part. The rule begged timidity and self-censorship, although there is little evidence that such occurred.

Constitutionalizing the Law of Libel

Influenced by Alexander Meiklejohn's thesis that speech in the public realm is crucial to self-government and therefore warrants near absolute protection, Justice William Brennan in his 1964 opinion for the Court in *New York Times v. Sullivan* made libel of public officials a constitutional matter. But for the qualification of *actual malice*, Brennan would have reached the Meiklejohnian summit of protection for public speech.[67]

The *New York Times* case rose out of the turmoil of the Black Revolution. On March 29, 1960, a full-page editorial advertisement appeared in the *New York Times* under the headline, "Heed Their Rising Voices." The ad copy began by stating that the nonviolent civil rights movement in the South was being met by a wave of terror. The ad concluded with an appeal for funds in support of the student movement, voting rights, and the legal defense of Martin Luther King, Jr. In addition to the signatures of sixty-four prominent Americans, sixteen southern clergymen were purported to have signed the ad. Segments of two paragraphs of the text became the focal points of subsequent litigation:

> In Montgomery, Alabama, after students sang "My Country 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission. * * *
>
> Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation

65. Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on "the Anderson solution,"* 25 William & Mary L.R. 793 (1983–1984).

66. *Schiavone Construction Co. v. Time*, 13 Med.L.Rptr. 1664, 646 F.Supp. 1511 (D. N.J. 1986).

67. Gillmor, "Justice William Brennan and the Failed "Theory" of Actual Malice," 59 *Journalism Quarterly* 249 (Summer 1982).

> and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury"—a *felony* under which they could imprison him for *ten years*. * * *

L. B. Sullivan, one of three elected commissioners of Montgomery, brought a civil libel action against four black Alabama clergymen, whose names had appeared in the ad, and the *Times*. In accordance with Alabama law, Sullivan, before bringing action, demanded in writing a public retraction from the clergymen and the newspaper. The clergymen did not respond on the grounds that use of their names was unauthorized. The *Times* did not publish a retraction but wrote Sullivan asking how the statements in the ad reflected on him. The commissioner filed suit without answering the query.

Although not mentioned by name, Sullivan contended that he represented the "police" referred to in the ad; therefore he was being accused of ringing the campus with police and starving the students into submission. He also claimed that the term "Southern violators" was meant to apply to him; therefore he was being accused of "intimidation and violence," bombing Dr. King's home, assaulting his person, and charging the civil rights leader with perjury. Witnesses testified that they identified the commissioner in the ad.

With the elements of libel thus established, Sullivan proceeded to show that most of the charges could not in fact have applied to him because they referred to incidents which had occurred before his election. Moreover, there were serious inaccuracies in the ad, creating a presumption of general damages under Alabama law.

In its defense, the *Times* pointed out that the ad had come to it from a New York advertising agency representing the signatory committee. A letter from A. Philip Randolph accompanied the ad and certified that the persons whose names appeared in it had given their permission. It was not considered necessary to confirm the accuracy of the ad by the manager of the Advertising Acceptability Department or anyone else at the *Times*. Nor were there any doubts about the authorization of the ad by the individual southern clergymen (they were later absolved of any responsibility because they were unaware of the ad).

The *Times* could not see how any of the language of the ad referred to Sullivan.

The trial judge submitted the case to the jury under instructions that the statements in the ad were libelous *per se* and without privilege. He also left the door open for punitive damages by an imprecise definition of what was required to support them.

The Circuit Court awarded $500,000 to Sullivan. The Supreme Court of Alabama affirmed, and the *Times* appealed to the United States Supreme Court.

At the heart of the brief submitted to the Court on behalf of Sullivan was the argument that "the Constitution has never required that states afford newspapers the privilege of leveling false and defamatory 'facts' at persons simply because they hold public office. The great weight of American authority has rejected such a plea by newspapers." See *Brief for the Respondent*, 376 United States Supreme Court Records and Briefs 254–314 (Vol. 12), p. 23.

The argument for the *Times* was more provocative and, as it turned out, more persuasive. In part it stated:

> Under the doctrine of *libel per se* applied below a public official is entitled to recover "presumed" and punitive damages for a publication found to be critical of the official conduct of a governmental agency under his general supervision if a jury thinks the publication "tends" to "injure" him "in his reputation" to "bring" him "into public contempt" as an official. The publisher has no defense unless he can persuade the jury that the publication is entirely true in all its factual, material particulars. The doctrine not only dispenses with proof of injury by the complaining official, but presumes malice and falsity as well. Such a rule of liability works an abridgement of the freedom of the press. *Brief for the Petitioner*, 376 United States Supreme Court Records and Briefs 254–314 (Vol. 12), pp. 28–29.

Attorneys for the *Times* had deftly raised the specter of seditious libel, and the Court responded.

NEW YORK TIMES CO. v. SULLIVAN

376 U.S. 254, 84 S.CT. 710, 11 L.ED.2D 686 (1964).

Justice BRENNAN delivered the Opinion of the Court: * * *

Because of the importance of the constitutional issues involved, we granted the separate petitions for

certiorari of the individual petitioners and of the *Times*. * * * We reverse the judgment. We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. We further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court—that "The Fourteenth Amendment is directed against State action and not private action." That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. * * *

The second contention is that the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the *Times* is concerned, because the allegedly libelous statements were published as part of a paid, "commercial" advertisement. The argument relies on *Valentine v. Chrestensen*, 316 U.S. 52 (1942), where the Court held that a city ordinance forbidding street distribution of commercial and business advertising matter did not abridge the First Amendment freedoms, even as applied to a handbill having a commercial message on one side but a protest against certain official action on the other. The reliance is wholly misplaced. The Court in *Chrestensen* reaffirmed the constitutional protection for "the freedom of communicating information and disseminating opinion"; its holding was based upon the factual conclusions that the handbill was "purely commercial advertising" and that the protest against official action had been added only to evade the ordinance.

The publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. That the *Times* was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." To avoid placing such a handicap upon the freedoms of expression, we hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement.

Under Alabama law as applied in this case, a publication is "libelous per se" if the words "tend to injure a person * * * in his reputation" or to "bring [him] into public contempt"; the trial court stated that the standard was met if the words are such as to "injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust * * *." The jury must find that the words were published "of and concerning" the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once "libel per se" has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. * * * His privilege of "fair comment" for expressions of opinion depends on the truth of the facts upon which the comment is based. * * * Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. * * *

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.

The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." * * * The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943).

Thus we consider this case against the background of a profound national 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. [Emphasis added.] The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. * * *

[E]rroneous statement is inevitable in free debate, and * * * it must be protected if the freedoms of expression are to have the "breathing space" that they "need * * * to survive." * * *

Just as factual error affords no warrant for repressing speech that would otherwise be free, the same is true of injury to official reputation. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge of his decision. This is true even though the utterance contains "half-truths" and "misinformation." Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. If judges are to be treated as "men of fortitude, able to thrive in a hardy climate," surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized in national awareness of the central meaning of the First Amendment. See Levy, *Legacy of Suppression* (1960), at 258 et seq. * * * That statute made it a crime, punishable by a $5,000 fine and five years in prison, "if any person shall write, print, utter or publish * * * any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress * * * or the President * * * with intent to defame * * * or to bring them * * * into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." The Act allowed the defendant the defense of truth, and provided that the jury were to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. * * * Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. * * *

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. * * * Alabama, for example, has a criminal libel law which subjects to prosecution "any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude," and which allows as punishment upon con-

viction a fine not exceeding $500 and a prison sentence of six months. * * * Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication.[18] Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. * * *

The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in *Smith v. California*, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale. * * * A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. * * * Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be 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 make only statements which "steer far wider of the unlawful zone." * * * The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct *unless he proves that the 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*. [Emphasis added.]

Such a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen. In *Barr v. Matteo*, 360 U.S. 564, 575 (1959), *this Court held the utterance of a federal official to be absolutely privileged if made "within the outer perimeter" of his duties*. [Emphasis added.] The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy. But all hold that all officials are protected unless actual malice can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Barr v. Matteo*. Analogous considerations support the privilege for citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. As Madison said, "the censorial power is in the people over the Government, and not in the Government over the people." It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.

We conclude that such a privilege is required by the First and Fourteenth Amendments.

We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable. While Alabama law apparently requires proof of actual malice for an award of punitive damages, where general damages are concerned malice is "presumed." Such a presumption is inconsistent with

18. The *Times* states that four other libel suits based on the advertisement have been filed against it by others who have served as Montgomery City Commissioners and by the Governor of Alabama; that another $500,000 verdict has been awarded in the only one of these cases that has yet gone to trial; and that the damages sought in the other three total $2,000,000.

the federal rule. * * * Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded. * * *

Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see * * * whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." * * * We must "make an independent examination of the whole record," * * * so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

Applying these standards, we consider that the proof presented to show actual malice lacks the *convincing clarity* which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support. [Emphasis added.]

As to the *Times*, we similarly conclude that the facts do not support a finding of actual malice. The statement by the *Times*' Secretary that, apart from the padlocking allegation, he thought the advertisement was "substantially correct," affords no constitutional warrant for the Alabama Supreme Court's conclusion that it was a "cavalier ignoring of the falsity of the advertisement [from which], the jury could not have but been impressed with the bad faith of the *Times*, and its maliciousness inferable therefrom." The statement does not indicate malice at the time of the publication; even if the advertisement was not "substantially correct"—although respondent's own proofs tend to show that it was—that opinion was at least a reasonable one, and there was no evidence to impeach the witness' good faith in holding it. The *Times*' failure to retract upon respondent's demand, although it later retracted upon the demand of Governor Patterson, is likewise not adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. *First*, the letter written by the *Times* reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. *Second*, it was not a final refusal, since it asked for an explanation on this point—a request that respondent chose to ignore. * * *

Finally, there is evidence that the *Times* published the advertisement without checking its accuracy against the news stories in the *Times*' own files. The mere presence of the stories in the files does not, of course, establish that the *Times* "knew" the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the *Times*' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. There was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable under the *Times*' policy of rejecting advertisements containing "attacks of a personal character"; their failure to reject it on this ground was not unreasonable. We think the evidence against the *Times* supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.

We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respon-

dent. Respondent relies on the words of the advertisement and the testimony of six witnesses to establish a connection between it and himself. * * * There was no reference to respondent in the advertisement, either by name or official position. A number of the allegedly libelous statements—the charges that the dining hall was padlocked and that Dr. King's home was bombed, his person assaulted, and a perjury prosecution instituted against him—did not even concern the police; despite the ingenuity of the arguments which would attach this significance to the word "They," it is plain that these statements could not reasonably be read as accusing respondent of personal involvement in the acts in question. The statements upon which respondent principally relies as referring to him are the two allegations that did concern the police or police functions: that "truckloads of police * * * ringed the Alabama State College Campus" after the demonstration on the State Capitol steps, and that Dr. King had been "arrested * * * seven times." These statements were false only in that the police had been "deployed near" the campus but had not actually "ringed" it and had not gone there in connection with the State Capitol demonstration, and in that Dr. King had been arrested only four times. The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here. Although the statements may be taken as referring to the police, they did not on their face make even an oblique reference to respondent as an individual. Support for the asserted reference must, therefore, be sought in the testimony of respondent's witnesses. But none of them suggested any basis for the belief that respondent himself was attacked in the advertisement beyond the bare fact that he was in overall charge of the Police Department and thus bore official responsibility for police conduct; to the extent that some of the witnesses thought respondent to have been charged with ordering or approving the conduct or otherwise being personally involved in it, they based this notion not on any statements in the advertisement, and not on any evidence that he had in fact been so involved, but solely on the unsupported assumption that, because of his official position, he must have been. This reliance on the bare fact of respondent's official position was made explicit by the Supreme Court of Alabama. That court, in holding that the trial court "did not err in overruling the demurrer [of the *Times*] in the aspect that the libelous matter was not of and concerning the [plaintiff,]" based its ruling on the proposition that:

"We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body."

This proposition has disquieting implications for criticism of governmental conduct. For good reason, "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." * * * The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. There is no legal alchemy by which a *State* may thus create the cause of action that would otherwise be denied for a publication which, as respondent himself said of the advertisement, "reflects not only on me but on the other Commissioners and the community." Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression. We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect the statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent.

The judgment of the Supreme Court of Alabama is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Justice BLACK, with whom Justice Douglas joins (concurring).

* * * In reversing, the Court holds that "the Constitution delimits a State's power to award damages

for libel in actions brought by public officials against critics of their official conduct." I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct" but completely prohibit a State from exercising such a power. The Court goes on to hold that a State can subject such critics to damages if "actual malice" can be proved against them. "Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the *Times* and the individual defendants had an absolute, unconditional constitutional right to publish in the *Times* advertisement their criticisms of the Montgomery agencies and officials.

* * *

Expanding the New York Times Doctrine

Later the same year, the Court expanded the *New York Times* doctrine to reach *criminal libel* prosecutions. Historically, criminal libel laws were intended to protect the public peace and good order. Mob violence or other breaches of the peace, it was asserted, would be created by defamations against social groups (religious, racial, family, etc.) or government officials. The distinction between criminal and seditious libels was less than clear.

So the state became plaintiff on behalf of the public. Truth, or truth published with good motives and for justifiable ends, was a defense. Privilege was a defense in some jurisdictions. As a result of *Garrison v. Louisiana*, 379 U.S. 64 (1964), actual malice had to be proven by the prosecution beyond a reasonable doubt in criminal libel cases.

Because of its closeness to sedition, criminal libel has not found favor in American courts. It reached its high-water mark in 1952 when the United States Supreme Court decided *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

Beauharnais, a hatemonger who circulated pamphlets designed to pit white against black, was convicted under a 1949 Illinois criminal libel law, a law that would reappear in the *Skokie* cases twenty-five years later. The law made it a crime to exhibit in any public place any publication which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, or any race, color, creed or religion."

Its constitutionality was upheld in a 5–4 decision in which Justice Felix Frankfurter for the Court said no to the question, Is speech devoted to racial hatred so high on the scale of constitutional values that it cannot be abridged by lawmakers?

Frankfurter argued that the importance of protecting groups from harassment and vilification was so important that it justified some limitation on free speech. Furthermore, the Court had held in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) that "fighting words"—those which by their very utterance inspire violence or tend to incite an immediate breach of the peace—are not constitutionally protected; such expression forms no essential part of the exposition of ideas and has slight social value.

Black and Douglas in dissent contended that free speech is too important a part of the democratic commitment to be sacrificed to the comfort and protection of any single social group. And they advanced a shoe-on-the-other-foot argument: tomorrow, under a criminal libel law, advocacy of rejection of the Ku Klux Klan might be declared illegal.

This confrontation between free speech and social equality remains an interesting one. Which value do we risk? Do some of us need protection from the wrath of the bigot?[68]

Beauharnais has neither been followed nor reversed, but its minority opinions would seem to have carried the day. The fear that criminal libel laws would eventually suppress unpopular expression has prevailed.

For example, a labor organizer was sentenced to six months and fined $3,000 under Kentucky's common law of criminal libel for printing a pamphlet in support of striking miners and defamatory of law enforcement officials and a newspaper publisher.

On appeal, Justice Douglas, writing for the Court, said "that to make an offense of conduct which is 'calculated to create disturbances of the peace' leaves

68. David Riesman in *Democracy and Defamation: Control of Group Libel*, 42 Columbia L.Rev. 727 (1942) relates how the Nazis used group defamation to purge their opposition, set up Jewish scapegoats, and prepare the way for the Holocaust.

wide open the standard of responsibility. It involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments *per se*. This kind of criminal libel 'makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence.' "[69]

It has been suggested that bad motives should never be assumed where public speech is concerned, and rather than limit discussion about minority groups, we should facilitate discussion *by* minority groups.[70]

The coup de grace for criminal libel in the United States may have come when the once notorious District Attorney Jim Garrison took it upon himself to criticize eight New Orleans judges.

GARRISON v. STATE OF LOUISIANA

379 U.S. 64, 85 S.CT. 209, 3 L.ED.2D 125 (1964).

Justice BRENNAN delivered the opinion of the Court.

Appellant is the District Attorney of Orleans Parish, Louisiana. During a dispute with the eight judges of the Criminal District Court of the Parish, he held a press conference at which he issued a statement disparaging their judicial conduct. As a result, he was tried without a jury before a judge from another parish and convicted of criminal defamation under the Louisiana Criminal Defamation Statute. * * * The principal charges alleged to be defamatory were his attribution of a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vacations of the judges, and his accusation that, by refusing to authorize disbursements to cover the expenses of undercover investigations of vice in New Orleans, the judges had hampered his efforts to enforce the vice laws. In impugning their motives, he said:

"The judges have now made it eloquently clear where their sympathies lie in regard to aggressive vice investigations by refusing to authorize use of the DA's funds to pay for the cost of closing down the Canal Street clip joints.

"* * * This raises interesting questions about the racketeer influences on our eight vacation-minded judges."

The Supreme Court of Louisiana affirmed the conviction. * * * The trial court and the State Supreme Court both rejected appellant's contention that the statute unconstitutionally abridged his freedom of expression. * * *

* * * At the outset, we must decide whether, in view of the differing history and purposes of criminal libel, the *New York Times* rule also limits state power to impose criminal sanctions for criticism of the official conduct of public officials. We hold that it does.

Where criticism of public officials is concerned, we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore, should not be subject to the same limitations. * * * At common law, truth was no defense to criminal libel. Although the victim of a true but defamatory publication might not have been unjustly damaged in reputation by the libel, the speaker was still punishable since the remedy was designed to avert the possibility that the utterance would provoke an enraged victim to a breach of peace. * * * [P]reference for the civil remedy, which enabled the frustrated victim to trade chivalrous satisfaction for damages, had substantially eroded the breach of the peace justification for criminal libel laws. In fact, in earlier, more violent, times, the civil remedy had virtually pre-empted the field of defamation; except as a weapon against seditious libel, the criminal prosecution fell into virtual desuetude. Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that "* * * under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation."

* * *

* * * In any event, where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth.

* * *

We held in *New York Times* that a public official might be allowed the civil remedy only if he estab-

69. *Ashton v. Kentucky*, 384 U.S. 195 (1966).

70. Beth, *Group Libel and Free Speech*, 39 Minn.L.Rev. 167 (1955).

lishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true. The reasons which led us so to hold in *New York Times* apply with no less force merely because the remedy is criminal. The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy. Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since "* * * erroneous statements is inevitable in free debate, and * * * it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need * * * to survive' * * *," *only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions.* [Emphasis added.] For speech concerning public affairs is more than self-expression; it is the essence of self-government.

The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. * * * That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. * * *" Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

* * *

We do not think, however, that appellant's statement may be considered as one constituting only a purely private defamation. The accusation concerned the judges' conduct of the business of the Criminal District Court. Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. *To this end, anything which might touch on an official's fitness for office is relevant.* [Emphasis added.] Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character. * * *

Applying the principles of the *New York Times* case, we hold that the Louisiana statute, as authoritatively interpreted by the Supreme Court of Louisiana, incorporates constitutionally invalid standards in the context of criticism of the official conduct of public officials. For contrary to the *New York Times* rule, which absolutely prohibits punishment of truthful criticism, the statute directs punishment for true statements made with "actual malice." * * * The statute is also unconstitutional as interpreted to cover false statements against public officials. The *New York Times* standard forbids the punishment of false statements, unless made with knowledge of their falsity or in reckless disregard of whether they are true or false. But the Louisiana statute punishes false statements without regard to that test if made with ill-will; even if ill-will is not established, a false statement concerning public officials can be punished if not made in the reasonable belief of its truth. * * * The reasonable-belief standard applied by the trial judge is not the same as the reckless-disregard-of-truth standard. According to the trial court's opinion, a reasonable belief is one which "an ordinarily prudent man might be able to assign a just and fair reason for"; the suggestion is that under this test the immunity from criminal responsibility in the absence of ill-will disappears on proof that the exercise of ordinary care would have revealed that the statement was false. The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth.

Reversed.

COMMENT

Justice Douglas in a concurring opinion rejected "actual malice" as a constitutional standard, and of criminal libel he said:

> *Beauharnais v. Illinois*, * * * a case decided by the narrowest of margins, should be overruled as a misfit in our constitutional system and as out of line with the dictates of the First Amendment. I think it is time to face the fact that the only line drawn by the Constitution is between "speech" on the one side and conduct or overt acts on the other. The two often do blend. I have expressed the idea before: "Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it * * *."

Is this essentially the theory of freedom of expression articulated by Thomas I. Emerson in *Toward a General Theory of the First Amendment* (1967) and in *The System of Freedom of Expression* (1970)?

It should be noted that state constitutions may in some cases provide greater protection to free press than the U.S. Constitution, and the U.S. Supreme Court will be reluctant to review state court rulings based on those constitutions.

Having extended the *New York Times* rule to criminal libel, the next step in the onward march of the doctrine for the Supreme Court was to define, and by defining to expand, the term "public official."

In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), Justice Brennan, speaking for the Court, held "that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for government operations * * * lest criticism of government itself be penalized." No matter that plaintiff in the case was a former supervisor of a county recreation area whose policy-making responsibilities were modest.

Within a few years, scores of unsuccessful libel plaintiffs in both state and federal courts learned that a public official could be anyone, past or present, who belonged, or had belonged, to a bureaucracy. Officials and quasi officials on the periphery of power were included.[71]

There was a prophetic intimation in Justice Douglas's concurring opinion in *Rosenblatt* that the central question in such cases should not be who is a public official but whether a *public issue* is being discussed. The Court would come to that, but there was to be a prior step.

One of the fathers of the atomic bomb and a vocal pacifist, Dr. Linus Pauling, brought unsuccessful suits against the *New York Daily News* and William Buckley's *National Review*. Both had charged him with Communist and pro-Soviet sympathies. A federal court of appeals in the *Daily News* case upheld a district court's characterization of Pauling as a *public figure*, open to the same comment and criticism as a public official. *Pauling v. News Syndicate Co., Inc.*, 335 F.2d 659 (2d Cir. 1964).

Two cases decided together, one involving a football coach and the other a retired army general, Edwin Walker, brought to its acme the *public figure* test and for a time provided a formula for measuring "reckless disregard for the truth."

The case of the coach began with an article entitled "The Story of a College Football Fix" in the March 23, 1963, issue of the *Saturday Evening Post*. The article reported a telephone conversation between Wally Butts, athletic director at the University of Georgia, and Paul Bryant, then head football coach at the University of Alabama, in which the two allegedly conspired to "fix" a football game between the two schools.

Notes had been taken on the conversation by an insurance salesman of questionable character, who, due to an electronic quirk, cut into the conversation when he picked up a telephone receiver at a pay station. Some of his notes appeared in the article, which compared this "fix" to the Chicago "Black Sox" scandal of 1919. The article went on to describe the game, the subsequent presentation of the salesman's notes to Georgia head coach, Johnny Griffith, and Butts's resignation. There was nothing subtle about the *Post's* charges against Butts.

Butts sued for $5 million compensatory and $5 million punitive damages. The *Post* tried to use truth as its defense, but the evidence contradicted its version of what had occurred. Expert witnesses supported Butts by analyzing the salesman's notes and

71. For example, *Rose v. Koch*, 154 N.W.2d 409 (Minn. 1967), a former legislator and university professor; *News-Journal Co. v. Gallagher*, 233 A.2d 166 (Del. 1967), a highway department employee; *Medina v. Time, Inc.*, 319 F.Supp. 398 (D.Mass. 1970), an army officer; *Priestley v. Hastings & Sons Publishing Co. of Lynn*, 271 N.E.2d 628 (Mass. 1971), a city architect; and *Klahr v. Winterble*, 418 P.2d 404 (Ariz. 1966), a state college student senator.

films of the game. The jury returned a verdict of $60,000 in general damages and $3 million in punitive damages.

Soon after the trial, the *New York Times* decision was handed down, and the *Post* sought a new trial under its rules. The motion was rejected by the trial judge. He held *Times* inapplicable because Butts was not a "public official," and he ruled there was ample evidence of "reckless disregard" of the truth in the researching of the article. His judgment was affirmed by the United States Court of Appeals. From there the case went to the Supreme Court.

Justice Harlan, who wrote the opinion for the Court, focused on the public interest in the circulation of the *Post* and in the activities of Butts. Did Butts, therefore, qualify as a "public figure"? The opinion was a study in the problems presented by the forward motion of *New York Times*, and it defined a separate test for public figures.

CURTIS PUBLISHING CO. v. BUTTS and ASSOCIATED PRESS v. WALKER

388 U.S. 130, 87 S.CT. 1975, 18 L.ED.2D 1094 (1967).

Justice HARLAN delivered the opinion of the Court:
* * *

These similarities and differences between libel actions involving persons who are public officials and libel actions involving those circumstanced as were Butts and Walker, viewed in light of the principles of liability which are of general applicability in our society, lead us to the conclusion that libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard, but that the rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake. We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, *on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.* [Emphasis added.]

Nothing in this opinion is meant to affect the holdings in *New York Times* and its progeny. * * *

Having set forth the standard by which we believe the constitutionality of the damage awards in these cases must be judged, we turn now, as the Court did in *New York Times*, to the question whether the evidence and findings below meet that standard. * * *

The *Butts* jury was instructed, in considering punitive damages, to assess "the reliability, the nature of the sources of the defendant's information, its acceptance or rejection of the sources, and its care in checking upon assertions." These considerations were said to be relevant to a determination whether defendant had proceeded with "wanton and reckless indifference." In this light we consider that the jury must have decided that the investigation undertaken by the *Saturday Evening Post*, upon which much evidence and argument was centered, was grossly inadequate in the circumstances. * * *

This jury finding was found to be supported by the evidence by the trial judge and the majority in the Fifth Circuit. * * *

The evidence showed that the Butts story was in no sense "hot news" and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless, ignored. The *Saturday Evening Post* knew that Burnett had been placed on probation in connection with bad check charges, but proceeded to publish the story on the basis of his affidavit without substantial independent support. Burnett's notes were not even viewed by any of the magazine's personnel prior to publication. John Carmichael, who was supposed to have been with Burnett when the phone call was overheard, was not interviewed. No attempt was made to screen the films of the game to see if Burnett's information was accurate, and no attempt was made to find out whether Alabama had adjusted its plans after the alleged divulgence of information.

The *Post* writer assigned to the story was not a football expert and no attempt was made to check the story with someone knowledgeable in the sport. At trial experts indicated that the information in the Burnett notes was either such that it would be evident to any opposing coach from game films regularly exchanged or valueless. Those assisting the *Post* writer in his investigation were already deeply involved in another libel action, based on a different article, brought against Curtis Publishing Co. by the Alabama coach and unlikely to be the source of a complete and objective investigation. The *Saturday Evening Post* was anxious to change its image by instituting a policy of "sophisticated muckraking,"

and the pressure to produce a successful exposé might have induced a stretching of standards. In short, the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

Affirmed. * * *

COMMENT

Chief Justice Earl Warren concurred in the result but objected to the Court's making a distinction between "public official" and "public figure." Consistent with their absolutist rejection of libel actions against the press, Justices Black and Douglas dissented in *Butts* but concurred in the result in *Walker*.

But four members of the Court—Harlan, Clark, Fortas, and Stewart—adopted a new standard, albeit a shaky one, for public figures. It would come to be known as the *prudent publisher* test, and it would reappear in *Gertz v. Robert Welch, Inc.* in modified form (this text, p. 208).

The *Walker* case did not divide the Court as did *Butts*. General Edwin Walker was clearly an actor in the tumultuous events surrounding the entry of James Meredith into the University of Mississippi. An Associated Press report stated that Walker, who was present on the campus, had taken command of the violent crowd and had personally led a charge against federal marshals. It also described Walker as encouraging rioters to use violence and providing them technical advice on combating the effects of tear gas.

Walker was a private citizen at the time of the riot but, since his resignation from the army, had become a political activist. There was little evidence relating to the preparation of the news dispatch. It was clear, however, that Van Savell, the reporter, was actually present during the events he described and had communicated them almost immediately to the Associated Press office in Atlanta.

Walker sought to collect millions in a *chain suit* against newspapers and broadcasting stations which had carried the AP reports. The present case began in Texas when a trial court awarded Walker $500,000 in general damages and $300,000 in exemplary or punitive damages. The trial judge, finding no actual malice to support the punitive damages, entered a final judgment of $500,000. The Texas Court of Civil Appeals, agreeing that the defense of fair comment did not apply because the press reports constituted "statements of fact," affirmed the judgment of the trial court. The Texas Supreme Court declined to review the case, and the case went up to the United States Supreme Court. *Associated Press v. Walker*, 388 U.S. 130 (1967).

Certainly Walker was a public figure, said the Court, for he had cast his personality into the whirlpool of an important public controversy. Moreover, "in contrast to the *Butts* article, the dispatch which concerns us in *Walker* was news which required immediate dissemination. The Associated Press received the information from a correspondent who was present at the scene of the events and gave every indication of being trustworthy and competent. His dispatches in this instance, with one minor exception, were internally consistent and would not have seemed unreasonable to one familiar with General Walker's prior publicized statements on the underlying controversy. Considering the necessity for rapid dissemination, *nothing in this series of events gives the slightest hint of a severe departure from accepted publishing standards*. We therefore conclude that General Walker should not be entitled to damages from the Associated Press." [Emphasis added.]

The *public figure* rule was subsequently applied to policemen and firemen seeking election to a public safety council,[72] to a head basketball coach, [73] to a well-known horse trainer,[74] to political party workers and precinct delegates,[75] to letter carriers who, upon refusing to join a union, were called "scabs, traitors, and men of low character and rotten principles," [76] to a suspect in a $1.5 million mail robbery who chose to expose himself publicly by granting interviews and calling press conferences,[77] to a re-

72. *Tilton v. Cowles Publishing Co.*, 459 P.2d 8 (Wash. 1969).
73. *Grayson v. Curtis Publishing Co.*, 436 P.2d 756 (Wash. 1967).
74. *Lloyds v. United Press International, Inc.*, 311 N.Y.S.2d 373 (1970).
75. *Arber v. Stahlin*, 159 N.W.2d 154 (Mich. 1968).
76. *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL–CIO v. Austin*, 418 U.S. 264 (1974).
77. *Tripoli v. Boston Herald-Traveler Corp.*, 268 N.E.2d 350 (Mass. 1971).

tired professional basketball player,[78] and to an escapee from a federal jail.[79]

A further attempt to define "reckless disregard" generated language which has persisted in court opinions. The case is *St. Amant v. Thompson*, 390 U.S. 727 (1968), and it involved defamatory charges made during the heat of a political campaign.

There Justice Byron White for the Court pointed out that "the defendant in a defamation action brought by a public official cannot * * * automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Justice White went on to say that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the *defendant in fact entertained serious doubts as to the truth of his publication*." [Emphasis added.]

"The occupation of public officeholder," said Justice Abe Fortas in an acerbic dissent, "does not forfeit one's membership in the human race."

Public official–public figure designations were to do yeoman service for the press in this period.

The Ocala (Fla.) *Star-Banner* may have come close to the outer limits of permissible comment when it confused a mayor who was a candidate for the office of county tax assessor with his brother and charged falsely that he had been indicted for perjury in a civil rights suit.

A new editor, who had never heard of the mayor's brother, changed the first name when a reporter phoned in the story. A jury awarded the mayor $22,000, but a precise application of the *New York Times* rule of knowing falsehood or reckless disregard of the truth had not been made and the judgment was reversed. *Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971).*

A deputy chief of detectives sued *Time* magazine when it implied in a story about a Civil Rights Commission report that the police officer was guilty of brutality. Although the news magazine had confused a complainant's testimony with the independent findings of the Commission itself, the Supreme Court ruled that in the circumstances of the case the magazine had not engaged in a "falsification" sufficient in itself to sustain a jury finding of "actual malice."

"The author of the *Time* article," said Justice Potter Stewart for the Court, "testified in substance, that the context of the report of the * * * incident indicated to him that the Commission believed that the incident had occurred as described. He therefore denied that he had falsified the report when he omitted the word 'alleged.' The *Time* researcher, who had read the newspaper stories about the incident and two reports from a *Time* reporter in Chicago, as well as the accounts of [the deputy chief's] earlier career, had even more reason to suppose that the Commission took the charges to be true. * * *

"These considerations apply with even greater force to the situation where the *alleged libel consists in the claimed misinterpretation of the gist of a lengthy government document. Where the document reported on is so ambiguous as this one was, it is hard to imagine a test of 'truth' that would not put the publisher virtually at the mercy of the unguided discretion of a jury.*" [Emphasis added.] *Time, Inc. v. Pape, 401 U.S. 279 (1971).*

These examples are not meant to suggest that a libel case couldn't be won by a plaintiff in the period following *New York Times v. Sullivan.*

As far back as 1964, a Kentucky court had disallowed application of the *New York Times* rule where it appeared that the published attack was not on the "official" conduct of a policeman.[80] And an Illinois appeals court would not accept the contention that a society columnist's remarks about the marital affairs of a prominent industrial family were privileged

78. *Time, Inc. v. Johnston*, 448 F.2d 378 (4th Cir. 1971).
79. *McFarland v. Hearst Corp.*, 332 F.Supp. 746 (D.Md. 1971).
80. *Tucker v. Kilgore*, 388 S.W.2d 112 (Ky. 1964).

because the plaintiffs were "public" people.[81] The Supreme Court of Pennsylvania would not permit application of the rule when a defendant admitted that he knew his defamatory comments were false.[82]

Senator Barry Goldwater, the most notable plaintiff of the period, won a $75,000 judgment against Ralph Ginzburg, publisher of *Fact* magazine. Ginzburg had attempted to put together a "psychobiography" on Goldwater so as to alert the American people to what he perceived to be the potential danger of his presidency. Facts and comments on Goldwater were carefully selected to support Ginzburg's assumptions, including responses from more than 2,000 psychiatrists who had received a manifestly "loaded" questionnaire. The simplistic conclusion from all of this was that Goldwater was mentally ill—his "infantile fantasies of revenge and dreams of total annihilation of his adversaries," his "paralyzing, deep-seated, irrational fear," his "fantasy of a final conflagration" which Ginzburg compared with the "death-fantasy of another paranoiac woven in Berchtesgaden and realized in a Berlin bunker."

At trial Ginzburg was unable to identify a single source for his statements. Nor could he document, in any medical sense, his reports that Goldwater had suffered two nervous breakdowns.

In upholding the judgment, a federal court of appeals relied on the "hot news" premise of the *Butts* and *Walker* cases and the less stringent actual malice definition of *St. Amant*. *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969).

There were those, nevertheless, who wondered how a candidate for the nation's highest office could argue that any part of his private life, particularly his psyche, be immune from public comment, no matter how willfully distorted and inaccurate.

In dissenting vigorously to a denial of certiorari, Justice Black, joined by Justice Douglas, agreed.

"This suit," wrote Black, "was brought by a man who was then the nominee of his party for the [p]residency of the United States. In our times, the person who holds that high office has an almost unbounded power for good or evil. The public has an unqualified right to have the character and fitness of anyone who aspires to the [p]residency held up for the closest scrutiny. Extravagant, reckless statements and even claims which may not be true seem to me an inevitable and perhaps essential part of the process by which the voting public informs itself of the qualities of a man who would be [p]resident. The decisions of the [d]istrict [c]ourt and the [c]ourt of [a]ppeals in this case can only have the effect of dampening political debate by making fearful and timid those who should under our Constitution feel totally free openly to criticize Presidential candidates. * * *

"Another reason for the particular offensiveness of this case is that the damages awarded Senator Goldwater were, except for $1.00, wholly punitive. Goldwater neither pleaded nor proved any special damages and the jury's verdict of $1.00 nominal compensatory damages established that he suffered little if any actual harm. * * * It is bad enough when the First Amendment is violated to compensate a person who has actually suffered a provable injury as a result of libelous statements; it is incomprehensible that a person who has suffered no provable harm can recover libel damages imposed solely to punish a defendant who has exercised his First Amendment rights.

"I would grant certiorari and reverse the [c]ourt of [a]ppeals summarily." *Ginzburg v. Goldwater*, 396 U.S. 1049 (1970).

A Doctrine Stretched to Its Limits: The Public Issue Test

Justice Douglas's notion that any matter of legitimate public interest, that is, any public issue, should be the standard for application of the *Times* doctrine was reminiscent of philosopher Alexander Meiklejohn's premise that the people of the United States are both the governors and the governed, and therefore "those activities of thought and communication by which we 'govern' must be free from interference."[83] Speech having social importance, whether of a political nature or not, must be free, said Meiklejohn, not because persons "desire to speak," but because people "need to hear."

That constitutional doctrine was strengthened in 1968 when the United States Court of Appeals for the Ninth Circuit, noting the escalation from *public official* to *public figure* to *public issue* in applications

81. *Lorillard v. Field Enterprises, Inc.*, 213 N.E.2d 1 (Ill. 1965).
82. *Fox v. Kahn*, 221 A.2d 181 (Pa. 1966).
83. Meiklejohn, *The First Amendment Is An Absolute*, 1961 Sup.Ct.Rev. 245 at 253–55. See also Meiklejohn, *Political Freedom* (1960).

of the *Times* doctrine, ruled against a medical laboratory which had brought a trade libel suit against CBS for a network program exposing faulty laboratory testing and the lack of federal supervision. In part the court said:

> If some analogy were to be looked for here, in caution against an uncertain extension of First Amendment immunity being made, this aspect would exist sufficiently in the elements of the field in which United Labs was engaged being, from the nature and extent of its capacity to affect health, as naturally entitled to public gaze and interest, and as inherently subject to right of public information and discussion. * * *
>
> It is, of course, not possible to say just how far the Court will continue to carry such extensions. But unless all other areas, not merely those of legitimate general interest but also those affecting personal concern to the public, are to be artificially ignored, we are not able to see how the path upon which the Court has been moving can be regarded as having reached an end. *United Medical Laboratories, Inc. v. CBS, Inc.*, 404 F.2d 706, 710, 711 (9th Cir. 1968), cert. den. 394 U.S. 921 (1969).

There was still room for expansion. The Supreme Court held in 1970 that the term "blackmail," when used in characterizing the negotiating position of a real estate developer, was not slander when spoken in the heated public meetings of a city council and not actionable libel when subsequently reported accurately in newspaper articles.

The plaintiff in the case had entered into agreements with the city for zoning exemptions in the past and was again seeking such favors to expedite the construction of high density housing units. At the same time, the city was trying to obtain from the plaintiff land for the purpose of building a school.

In addition, the trial judge's instructions to the jury, reflecting confusion in his mind as to what the Supreme Court had meant by "actual malice" in earlier cases, was considered by Justice Stewart to be an "error of constitutional magnitude." A trial court judgment against the newspaper was reversed. *Greenbelt Co-op Publishing Association v. Bresler*, 398 U.S. 6 (1970).

Final extension of the *New York Times* doctrine—and it would prove the breaking point—came in 1971 when a badly divided Court upheld a court of appeals reversal of a $275,000 trial court judgment in favor of a magazine distributor. Rosenbloom had been called a "smut distributor" and "girlie-book peddler" in a radio news report, although he was subsequently acquitted of criminal obscenity charges.

ROSENBLOOM v. METROMEDIA

403 U.S. 29, 91 S.CT. 1811, 29 L.ED.2D 296 (1971).

Justice BRENNAN announced the judgment of the Court and an opinion in which The Chief Justice and Justice Blackmun join.

* * * The instant case presents the question whether the *New York Times*' knowing or reckless falsity standard applies in a state civil libel action brought not by a "public official" or a "public figure" but by a private individual for a defamatory falsehood uttered in a news broadcast by a radio station about the individual's involvement in an event of public or general interest. * * *

* * *

Petitioner concedes that the police campaign to enforce the obscenity laws was an issue of public interest, and, therefore, that the constitutional guarantees for freedom of speech and press imposed limits upon Pennsylvania's power to apply its libel laws to compel respondent to compensate him in damages for the alleged defamatory falsehoods broadcast about his involvement. As noted, the narrow question he raises is whether, because he is not a "public official" or a "public figure" but a private individual, those limits required that he prove that the falsehoods resulted from a failure of respondent to exercise reasonable care, or required that he prove that the falsehoods were broadcast with knowledge of their falsity or with reckless disregard of whether they were false or not. That question must be answered against the background of the functions of the constitutional guarantees for freedom of expression.

Self-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government. The commitment of the country to the institution of private property, protected by the Due Process and Just Compensation Clauses in the Constitution, places in private hands vast areas of economic and social power that vitally affect the nature and quality of life in the Nation. Our efforts to live and work together in a free society not completely dominated by governmental regulation necessarily encompass far more than politics in a narrow sense. * * *

Although the limitations upon civil libel actions, first held in *New York Times* to be required by the First Amendment, were applied in that case in the context of defamatory falsehoods about the official

conduct of a public official, later decisions have disclosed the artificiality, in terms of the public's interest, of a simple distinction between "public" and "private" individuals or institutions. * * *

Moreover, the constitutional protection was not intended to be limited to matters bearing broadly on issues of responsible government. "[T]he Founders * * * felt that a free press would advance 'truth, science, morality, and arts in general' as well as responsible government." * * *

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. [Emphasis added.] The present case illustrates the point. The community has a vital interest in the proper enforcement of its criminal laws, particularly in an area such as obscenity where a number of highly important values are potentially in conflict: the public has an interest both in seeing that the criminal law is adequately enforced and in assuring that the law is not used unconstitutionally to suppress free expression. Whether the person involved is a famous large scale magazine distributor or a "private" businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue. We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.

* * *

* * * Drawing a distinction between "public" and "private" figures makes no sense in terms of the First Amendment guarantees. The *New York Times* standard was applied to libel of a public official or public figure to give effect to the Amendment's function to encourage ventilation of public issues, not because the public official has any less interest in protecting his reputation than an individual in private life. While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not "hot" news, and rarely receive the prominence of the original story. When the public official or public figure is a minor functionary, or has left the position which put him in the public eye, see *Rosenblatt v. Baer*, the argument loses all of its force. In the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story. Thus the unproven, and highly improbable, generalization that an as yet undefined class of "public figures" involved in matters of public concern will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial a reed on which to rest a constitutional distinction. Furthermore, in First Amendment terms, the cure seems far worse than the disease. If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.[15]

Further reflection over the years since *New York Times* was decided persuades us that the view of the "public official" or "public figure" as assuming the risk of defamation by voluntarily thrusting himself into the public eye bears little relationship either to the values protected by the First Amendment or to the nature of our society. We have recognized that "[e]xposure of the self to others in varying degrees

15. Some States have adopted retraction statutes or right of reply statutes. See Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 Va.L.Rev. 367 (1948); Note, *Vindication of the Reputation of a Public Official*, 80 Harv.L.Rev. 1730 (1967). Cf. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion. Barron, *Access to the Press—A New First Amendment Right*, 80 Harv.L.Rev. 1641, 1666–1678 (1967). [See also, Barron, *Freedom of the Press for Whom?* 1973.] It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly.

is a concomitant of life in a civilized community." *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). Voluntarily or not, we are all "public" men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern. * * * Thus, the idea that certain "public" figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of "public figures" which are not in the area of public or general concern.

* * *

We are aware that the press has, on occasion, grossly abused the freedom it is given by the Constitution. All must deplore such excesses. In an ideal world, the responsibility of the press would match the freedom and public trust given it. But from the earliest days of our history, this free society, dependent on it is for its survival upon a vigorous free press, has tolerated some abuse. * * * We thus hold that a libel action, as here, by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not. * * *

Petitioner argues finally that *WIP's* failure to communicate with him to learn his side of the case and to obtain a copy of the magazine for examination, sufficed to support a verdict under the *Times* standard. *But our "cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.* [Emphasis added.] There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S., at 731. Respondent here relied on information supplied by police officials. Following petitioner's complaint about the accuracy of the broadcasts, *WIP* checked its last report with the judge who presided in the case. While we may assume that the District Court correctly held to be defamatory respondent's characterizations of petitioner's business as "the smut literature racket," and of those engaged in it as "girlie-book peddlers," there is no evidence in the record to support a conclusion that respondent "in fact entertained serious doubts as to the truth" of its reports.

Affirmed.

COMMENT

In retrospect it was to be Justice Harlan's dissenting opinion in *Rosenbloom v. Metromedia* which would undo the *public issue* standard.

"It is * * * my judgment," said Harlan, "that the reasonable care standard adequately serves those First Amendment values that must inform the definition of actionable libel and that those special considerations that made even this standard an insufficiently precise technique when applied to plaintiffs who are 'public officials' or 'public figures' do not obtain where the litigant is a purely private individual."

Justice Thurgood Marshall, joined by Justice Stewart in dissent, framed propositions which were also to reappear in *Gertz*. Agreeing with Harlan, he said that the plurality's doctrine would threaten society's interest in protecting private individuals from being thrust into the public eye by the distorting light of defamation.

But beyond that he saw a formidable danger in punitive and presumed damages, and so a proposal:

> The threats to society's interest in freedom of the press that are involved in punitive and presumed damages can largely be eliminated by restricting the award of damages to proven, actual injuries. The jury's wide ranging discretion will largely be eliminated since the award will be based on essentially objective, discernible factors. * * * [S]elf-censorship resulting from the fear of large judgments themselves would be reduced. At the same time society's interest in protecting individuals from defamation will still be fostered.

The Court seemed ready for *Gertz v. Robert Welch, Inc.*

THE PRESENT STATE OF LIBEL: *GERTZ* AND BEYOND

By removing libel from its ancestral home in tort law and putting it under the protection of the Constitution, *New York Times v. Sullivan* was truly a landmark case. Simply put, the Court had decided that in the interests of a vigorous social dialogue public officials would have to surrender their sensitivity to "vehement, caustic, and sometimes unpleasantly sharp" verbal assaults. But the Court left an opening to remedy injury to reputation. If the public official could with convincing clarity[84] prove *actual malice*, that is, that the statement was published *with knowledge that it was false or with reckless disregard of whether it was false or not*, a libel suit could still be pursued and won. The major burden of proof, however, was now on the public-person plaintiff, and libel would be governed by a national, First Amendment-based standard of fault. Reviewing courts would make an independent examination of the record to assure that the plaintiff had satisfied the constitutional standard.

Much was made of *New York Times I*, as it would be called, to distinguish it from the *Pentagon Papers* case of 1971. Harry Kalven, Jr. saw it as laying to rest for all time sedition or libel of government—"an impossible notion for a democracy."[85] And Kalven reported Meiklejohn as exclaiming that the ruling was "an occasion for dancing in the streets."

Justices Black, Douglas, and Goldberg, however, had serious reservations, and Black, in a concurring opinion, said of *New York Times*: "The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and does not measure up to the sturdy safeguard embodied in the First Amendment."

First Amendment theorist Thomas Emerson rejected the ruling for failing to take into account the value of even intentional falsehood in forcing people to defend, justify, and rethink their positions. Emerson referred to Brennan's actual malice test as a "relapse to the two level theory [the idea that certain forms of speech are exempt from First Amendment protection]," and he added:

> [S]uper-refined attempts to separate statements of fact from opinions, to winnow truth out of a mass of conflicting evidence * * * to probe into intents, motives and purposes—all these do not fit into the dynamics of a system of freedom of expression. * * * The health and vitality of the system depend more upon untrammeled freedom of discussion, in which all citizens contend vigorously, than in judicial attempts to establish the motives of participants.[86]

Perennial concern is that because of *New York Times* fewer people will choose to participate in public affairs as officeholders. This is based partly on the assumption that public persons have no superior access to publicity,[87] an assumption of doubtful validity.

In the decade following *New York Times*, the Court stretched the application of its *actual malice* rule to public figures in *Butts* and *Walker* and finally, in the 1971 *Rosenbloom* case, to private persons caught up in matters of public interest, even though involuntarily.

"We honor the commitment to robust debate on public issues," said Justice Brennan in his plurality opinion for the *Rosenbloom* Court, "* * * by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."

But the Court was bitterly fragmented on the question of how far the First Amendment ought to go in protecting libel. Dissenting Justice John Marshall Harlan, because he preferred a less severe proof than actual malice for private persons in pursuit of libel damages, was to have the last word. But for three years the press enjoyed a near immunity to libel laws. Whatever was published was, at least by an editor's definition, a matter of public interest and therefore subject to the actual malice test.

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84. "Convincing clarity" is a standard of evidence which falls somewhere between "preponderance of evidence" and "beyond reasonable doubt," the latter the test in criminal cases. Under the standard, proof must be strong, positive, free from doubt, clear, precise, unmistakable, proof that persuades. State court applications of the *Gertz* standard of negligence to private plaintiffs suggest that the "preponderance of evidence" burden of proof will now be sufficient. This is also suggested in the Restatement (Second) of Torts § 580B, Comment i (Tent.Draft No. 21, April 5, 1975). The three standards are discussed by the Massachusetts Supreme Judicial Court in *Callahan v. Westinghouse Broadcasting Co. Inc.*, 2 Med.L.Rptr. 2226, 363 N.E.2d 240 (1977).

85. Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 Sup.Ct.Rev. 205.

86. Emerson, *The System of Freedom of Expression*, 1970, pp. 530, 531, 538.

87. Schaefer, *Defamation and the First Amendment: The Coen Lecture*, 52 U. of Colorado L.R. 1 (Fall 1980).

Gertz v. Robert Welch, Inc. swung the pendulum back, not all the way to the position of strict liability but to a point of recognizing the private person in libel law. The onward rush of *New York Times* had ended.

The family of a youth shot by a policeman had retained Elmer Gertz, a nationally known attorney and self-defined public person, to represent them in a civil suit for damages against the policeman. The policeman had already been convicted of second-degree murder. Meanwhile, the editor of the John Birch Society magazine, *American Opinion*, saw as his patriotic duty the publication of an article discrediting Gertz by identifying him with a "conspiracy" to undermine law enforcement in order to effect a Communist takeover of the United States.[88]

In order to heap opprobrium upon Gertz, the article stated falsely that he had a criminal record, that he had planned the 1968 Chicago demonstrations, and that he was a Leninist and Communist-fronter.

What he was, in fact, was one of Chicago's best-known lawyers, a legal expert on libel, censorship, civil rights, free speech, the death penalty, and housing. He was also the author of books, pamphlets, magazine articles, book reviews, and radio plays; a professor of law; a civil rights leader; and a founder and member of countless organizations ranging from the Civil War Roundtable to the Henry Miller Literary Society.

Hardly a private person, Gertz was instrumental in writing a new Illinois constitution, having been elected to the post. He was a dedicated theater buff and literary dilettante. He founded the George Bernard Shaw Society. In 1931 he wrote his first book, a work on Frank Harris, the renegade literary-libertine. He won a parole for Nathan Leopold and later a death sentence commutation for Jack Ruby.

Poet and historian Carl Sandburg once said that "Elmer Gertz fears no dragons." Probably true. More likely, though, he knew his libel law and had clearly discerned the divided nature of the Court in *Rosenbloom* and the significant changes in its membership since 1971.

Gertz sued *American Opinion* and a sympathetic jury awarded him $50,000. A federal district court disallowed the award, agreeing with the magazine that the *public issue* rule of *Rosenbloom* protected it against that kind of judgment. The court of appeals affirmed, and Gertz sought review in the Supreme Court.

In an imprecise but significant opinion by Justice Lewis Powell the Supreme Court reversed, declaring the very public Mr. Gertz to be a private person in the circumstances of the case. The Court pointed out that Gertz, unknown to the jury, was simply a lawyer serving a client. On the assumption that private persons don't have the same access to the media that public officials and public figures have—although it was doubtful that this was true of Elmer Gertz—the Court essentially rejected the public issue rule of *Rosenbloom* and held that henceforth purely private or nonpublic persons, to succeed as plaintiffs in a libel suit, need only show *negligence* on the part of the defendant, a much lighter burden than actual malice.

The Court said a lot more, however, and not all of it unfavorable to the press. No longer was it enough for a plaintiff to be falsely defamed (the traditional libel *per se* where falsity, malice, and damages are presumed). There now *must* be a showing of *negligence* for, said Powell, there can be "*no liability without fault.*" And the separate states would be allowed "substantial latitude" in determining the standard of care required of publishers.

Moreover, to discourage damages which may be destructive of unpopular ideas and of the press itself, private-person plaintiffs, said Powell, would have to come all the way up to the actual malice standard to claim punitive damages, which too often in the past had been out of all proportion to the harm inflicted by publication. Awards, then, in private person suits would henceforth be restricted to actual damages for demonstrated injury, whether personal humiliation, mental anguish, or whatever. (Note how Powell's notion of actual damages appears to subsume what we referred to earlier as compensatory or general damages.) A jury would assess injury on the basis of relevant testimony. In addition, there would be no punishment for opinions, no matter how pernicious. Under the First Amendment, said the Court, there is *no such thing as a false idea.* Facts and opinion would be distinguished whenever possible. *Gertz* governs the present law of libel. The plaintiff in April 1981 was awarded $100,000 in compensatory and $300,000 in punitive damages,

88. See, *Frame-up: Richard Nuccio and the War on Police*, American Opinion, April 1969.

and that result was affirmed by the Seventh Circuit Court of Appeals on June 16, 1982 (*Gertz v. Welch*, 8 Med.L.Rptr. 1769, 680 F.2d 527 [7th Cir. 1982].) Gertz had proven actual malice to the satisfaction of the district court jury, although there was some disagreement between trial and appeals courts as to whether quotations from public documents of a time past required such proof. More than a decade of litigation finally ended in early 1983 when the Supreme Court declined to review the seventh circuit holding.

GERTZ v. ROBERT WELCH, INC.

418 U.S. 323, 94 S.CT. 2997, 41 L.ED.2D 789 (1974).

Justice POWELL delivered the opinion of the Court:

* * *

The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements. The Court considered this question on the rather different set of facts presented in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 * * * (1971). Rosenbloom, a distributor of nudist magazines, was arrested for selling allegedly obscene material while making a delivery to a retail dealer. The police obtained a warrant and seized his entire inventory of 3,000 books and magazines. He sought and obtained an injunction prohibiting further police interference with his business. He then sued a local radio station for failing to note in two of its newscasts that the 3,000 items seized were only "reportedly" or "allegedly" obscene and for broadcasting references to "the smut literature racket" and to "girlie-book peddlers" in its coverage of the court proceeding for injunctive relief. He obtained a judgment against the radio station, but the Court of Appeals for the Third Circuit held the *New York Times* privilege applicable to the broadcast and reversed. 415 F.2d 892 (1969).

This Court affirmed the decision below, but no majority could agree on a controlling rationale. The eight Justices who participated in *Rosenbloom* announced their views in five separate opinions, none of which commanded more than three votes. The several statements not only reveal disagreement about the appropriate result in that case, they also reflect divergent traditions of thought about the general problem of reconciling the law of defamation with the First Amendment. One approach has been to extend the *New York Times* test to an expanding variety of situations. Another has been to vary the level of constitutional privilege for defamatory falsehood with the status of the person defamed. And a third view would grant to the press and broadcast media absolute immunity from liability for defamation. To place our holding in the proper context, we preface our discussion of this case with a review of the several *Rosenbloom* opinions and their antecedents.

In affirming the trial court's judgment in the instant case, the Court of Appeals relied on Justice Brennan's conclusion for the *Rosenbloom* plurality that "all discussion and communication involving matters of public or general concern," warrant the protection from liability for defamation accorded by the rule originally enunciated in *New York Times* Co. *v. Sullivan*, 376 U.S. 254 * * * (1964). There this Court defined a constitutional privilege intended to free criticism of public officials from the restraints imposed by the common law of defamation. The *Times* ran a political advertisement endorsing civil rights demonstrations by black students in Alabama and impliedly condemning the performance of local law-enforcement officials. A police commissioner established in state court that certain misstatements in the advertisement referred to him and that they constituted libel *per se* under Alabama law. This showing left the *Times* with the single defense of truth, for under Alabama law neither good faith nor reasonable care would protect the newspaper from liability. This Court concluded that a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions" would deter protected speech, and announced the constitutional privilege designed to counter that effect:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the 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." [Fn. omitted.]

Three years after *New York Times*, a majority of the Court agreed to extend the constitutional privilege to defamatory criticism of "public figures." This

extension was announced in *Curtis Publishing* Co. *v. Butts* and its companion, *Associated Press v. Walker*, 388 U.S. 130 * * * (1967). The first case involved the Saturday Evening Post's charge that Coach Wally Butts of the University of Georgia had conspired with Coach "Bear" Bryant of the University of Alabama to fix a football game between their respective schools. *Walker* involved an erroneous Associated Press account of former Major General Edwin Walker's participation in a University of Mississippi campus riot. Because Butts was paid by a private alumni association and Walker had resigned from the Army, neither could be classified as a "public official" under *New York Times*. Although Justice Harlan announced the result in both cases, a majority of the Court agreed with Mr. Chief Justice Warren's conclusion that the *New York Times* test should apply to criticism of "public figures" as well as "public officials." [7] The Court extended the constitutional privilege announced in that case to protect defamatory criticism of nonpublic persons who "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."

In his opinion for the plurality in *Rosenbloom v. Metromedia, Inc.*, Justice Brennan took the *New York Times* privilege one step further. He concluded that its protection should extend to defamatory falsehoods relating to private persons if the statements concerned matters of general or public interest. He abjured the suggested distinction between public officials and public figures on the one hand and private individuals on the other. He focused instead on society's interest in learning about certain issues: "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." Thus, under the plurality opinion, a private citizen involuntarily associated with a matter of general interest has no recourse for injury to his reputation unless he can satisfy the demanding requirements of the *New York Times* test.

Two Members of the Court concurred in the result in *Rosenbloom* but departed from the reasoning of the plurality. Justice Black restated his view, long shared by Justice Douglas, that the First Amendment cloaks the news media with an absolute and indefeasible immunity from liability for defamation. Justice White concurred on a narrower ground. He concluded that "the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view." He therefore declined to reach the broader questions addressed by the other Justices.

Justice Harlan dissented. Although he had joined the opinion of the Court in *New York Times*, in *Curtis Publishing* Co. he had contested the extension of the privilege to public figures. There he had argued that a public figure who held no governmental office should be allowed to recover damages for defamation "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." In his *Curtis Publishing* Co. opinion Justice Harlan had distinguished *New York Times* primarily on the ground that defamation actions by public officials "lay close to seditious libel. * * *" Recovery of damages by one who held no public office, however, could not "be viewed as a vindication of governmental policy." Additionally, he had intimated that, because most public officials enjoyed absolute immunity from liability for their own defamatory utterances under *Barr v. Matteo*, 360 U.S. 564 * * * (1959), they lacked a strong claim to the protection of the courts.

In *Rosenbloom* Justice Harlan modified these views. He acquiesced in the application of the privilege to defamation of public figures but argued that a different rule should obtain where defamatory falsehood harmed a private individual. He noted that a private person has less likelihood "of securing access to channels of communication sufficient to rebut falsehoods concerning him" than do public officials

7. Professor Kalven once introduced a discussion of these cases with the apt heading, "You Can't Tell the Players without a Score Card." Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 Sup.Ct.Rev. 267, 275. Only three other Justices joined Justice Harlan's analysis of the issues involved. In his concurring opinion, Chief Justice Warren stated the principle for which these cases stand—that the *New York Times* test reaches both public figures and public officials. Justice Brennan and Justice White agreed with the Chief Justice on that question. Justice Black and Justice Douglas reiterated their view that publishers should have an absolute immunity from liability for defamation, but they acquiesced in the Chief Justice's reasoning in order to enable a majority of the Justices to agree on the question of the appropriate constitutional privilege for defamation of public figures.

and public figures, and has not voluntarily placed himself in the public spotlight. Justice Harlan concluded that the States could constitutionally allow private individuals to recover damages for defamation on the basis of any standard of care except liability without fault.

Justice Marshall dissented in *Rosenbloom* in an opinion joined by Justice Stewart. He thought that the plurality's "public or general interest" test for determining the applicability of the *New York Times* privilege would involve the courts in the dangerous business of deciding "what information is relevant to self-government." He also contended that the plurality's position inadequately served "society's interest in protecting private individuals from being thrust into the public eye by the distorting light of defamation." Justice Marshall therefore reached the conclusion, also reached by Justice Harlan, that the States should be "essentially free to continue the evolution of the common law of defamation and to articulate whatever fault standard best suits the State's need," so long as the States did not impose liability without fault. The principal point of disagreement among the three dissenters concerned punitive damages. Whereas Justice Harlan thought that the States could allow punitive damages in amounts bearing "a reasonable and purposeful relationship to the actual harm done * * *," Justice Marshall concluded that the size and unpredictability of jury awards of exemplary damages unnecessarily exacerbated the problems of media self-censorship and that such damages should therefore be forbidden.

We begin with the common ground. *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. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. *New York Times* Co. *v. Sullivan*, 376 U.S., at 270 * * *. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 * * * (1942). [Emphasis added.]

Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. As James Madison pointed out in the Report on the Virginia Resolutions of 1798: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 J. Elliot, *Debates on the Federal Constitution of 1787*, p. 571 (1876). And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. *Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.* Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. As the Court stated in *New York Times* Co. *v. Sullivan*, "Allowance of the defense of truth with the burden of proving it on the defendant, does not mean that only false speech will be deterred." The First Amendment requires that we protect some falsehood in order to protect speech that matters. [Emphasis added.]

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as Justice Stewart has reminded us, the individual's right to the protection of his own good name

> "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. The protection of private personality, like the protection of life itself, is left primarily to the individual States

under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (concurring opinion).

* * *

The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. Despite this substantial abridgment of the state law right to compensation for wrongful hurt to one's reputation, the Court has concluded that the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures. We think that these decisions are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather, we believe that the *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. *For the reasons stated below, we conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.* [Emphasis added.]

* * *

* * * The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in *Garrison v. Louisiana*, 379 U.S., at 77 * * *, the public's interest extends to "anything which might touch on an official's fitness for office. * * * Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."

Those classed as public figures stand in a similar position. *Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.* For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment. [Emphasis added.]

Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an "influential role in ordering society." He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling

call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not—to determine, in the words of Justice Marshall, "what information is relevant to self-government." *Rosenbloom v. Metromedia, Inc.*, 403 U.S., at 79 * * *. We doubt the wisdom of committing this task to the conscience of judges. Nor does the Constitution require us to draw so thin a line between the drastic alternatives of the *New York Times* privilege and the common law of strict liability for defamatory error. The "public or general interest" test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of *New York Times*. This is true despite the factors that distinguish the state interest in compensating private individuals from the analogous interest involved in the context of public persons. On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions. And liability may far exceed compensation for any actual injury to the plaintiff, for the jury may be permitted to presume damages without proof of loss and even to award punitive damages.

We hold 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. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent." This phrase places in perspective the conclusion we announce today. Our inquiry would invqlve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Such a case is not now before us, and we intimate no view as to its proper resolution. [Emphasis added.]

Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*. This conclusion is not based on a belief that the considerations which prompted the adoption of the *New York Times* privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. *But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.* [Emphasis added.]

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate

individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. *It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss.* Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury. [Emphasis added.]

We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. *Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions.* They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. *In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury.* [Emphasis added.]

Notwithstanding our refusal to extend the *New York Times* privilege to defamation of private individuals, respondent contends that we should affirm the judgment below on the ground that petitioner is either a public official or a public figure. There is little basis for the former assertion. Several years prior to the present incident, petitioner had served briefly on housing committees appointed by the mayor of Chicago, but at the time of publication he had never held any remunerative governmental position. Respondent admits this but argues that petitioner's appearance at the coroner's inquest rendered him a "de facto public official." Our cases recognized no such concept. Respondent's suggestion would sweep all lawyers under the *New York Times* rule as officers of the court and distort the plain meaning of the "public official" category beyond all recognition. We decline to follow it.

Respondent's characterization of petitioner as a public figure raises a different question. That designation may rest on either of two alternative bases. *In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.* In either case such persons assume special prominence in the resolution of public questions. [Emphasis added.]

Petitioner has long been active in community and professional affairs. He has served as an officer of local civic groups and of various professional organizations, and he has published several books and articles on legal subjects. Although petitioner was consequently well known in some circles, he had achieved no general fame or notoriety in the community. None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population. We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. *Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable*

to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation. [Emphasis added.]

In this context it is plain that petitioner was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation.

We therefore conclude that the *New York Times* standard is inapplicable to this case and that the trial court erred in entering judgment for respondent. Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary. We reverse and remand for further proceedings in accord with this opinion.

It is so ordered.

Reversed and remanded.

COMMENT

Justices Brennan and White wrote strong dissenting opinions for different reasons. Brennan, who authored the landmark opinion for the Court in *New York Times v. Sullivan* and the opinion for the plurality in *Rosenbloom v. Metromedia*, did not wish to abandon the *actual malice* standard of those cases. In his view anyone involved in events of public or general interest should have to show knowing or reckless falsity to win a libel judgment.

Matters of public interest, said Brennan, reiterating his opinion for the Court in *Rosenbloom*, do not "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."

Brennan had used his opinion for the Court in the landmark privacy case, *Time, Inc. v. Hill*, 385 U.S. 374 (1967), this text, p. 316, to argue for a "public issue" or "newsworthiness" test in all libel and privacy cases. Anything less, for example a "reasonable care" standard, is "elusive," said Brennan, and would saddle the press with "the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait." The result would be self-censorship.

At the other end of the spectrum, Justice White would have moved the Court back to the common law standard of "strict liability." That is, one who publishes a statement that later turns out to be inaccurate can never be "without fault," for one is not compelled to circulate a falsehood.

White, joined by Chief Justice Warren Burger, objected to the scrapping of state libel laws in favor of a newly announced First Amendment mandate which required private plaintiffs to prove actual injury to their reputations and culpability on the part of the defendant. People would now be powerless to protect their reputations. "No longer," said White, "will the plaintiff be able to rest his case with proof of a libel defamatory on its face or proof of a slander historically actionable *per se*." And it was the apparent demise of libel *per se* through a discarding of "history and precedent" that White lamented. Clearly, White was calling for a return to something like the common law rules of libel.

It was also the "severe invasion of the prerogatives of the [s]tates" that exercised Justice White. But the trend may truly be in the other direction. Justice Brennan has called the ascendancy of the states "probably the most important development in constitutional jurisprudence today."[89] Two 1986 New Jersey Supreme Court rulings reflect the renewed reliance on state statute or precedent.[90] The question remains: How do we fit such cases into the federal mandate of *New York Times v. Sullivan* and its progeny?

Whatever the merits of Justice White's long and vigorous *Gertz* dissent, he was at least partially correct when he said that "judges and juries who must live by these rules [the *Gertz* rules] will find them * * * incomprehensible."

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89. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harvard L.R. 489 (1977).

90. *Dairy Stores v. Sentinel Publishing*, 13 Med.L.Rptr. 1594 (1986); *Sisler v. Gannett*, 13 Med.L.Rptr. 1577 (1986).

Two years after *Gertz*, the Supreme Court tried unsuccessfully to clarify it in a melodramatic case involving the scion of one of America's wealthier industrial families and his socialite spouse.[91] In dissolving their marriage, a Florida circuit court issued a judgment containing language such as "extramarital escapades * * * which would have made Dr. Freud's hair curl" and "bounding from one bedpartner to another with the erotic zest of a satyr." In a comparatively temperate "Milestones" paragraph, *Time* magazine erroneously reported that Mary Alice Firestone had been divorced for adultery. Technically she hadn't. The marriage had been dissolved because "neither of the parties has shown the least susceptibility to domestication." Mrs. Firestone sued.

In spite of the fact that plaintiff employed a clipping bureau, regularly held press conferences and was a visible part of the Palm Beach social whirl, Justice Rehnquist, writing for the Court, defined her as a private person who had "not thrust herself to the forefront of any particular public controversy. * * * She was compelled to go to court by the state in order to obtain legal release from the bonds of matrimony."

Privilege to report on judicial proceedings, Rehnquist added, did not include the false and inaccurate. But here the jury's finding rested on a rather technical point of legal language: the divorce court had not based its decision on adultery, as stated in the *Time* article. Granted that the trial court's decree was unclear: this did not license *Time*, said the Court, to choose from among several conceivable interpretations the one most damaging to Mrs. Firestone.

Another obfuscating element in the case was that Mrs. Firestone had withdrawn her claim for damages to reputation and had based her case on "personal humiliation and mental anguish and suffering." This would have the effect of giving life to a new tort that would eventually be aborted in the 1988 case involving *Hustler* magazine and the Rev. Jerry Falwell[92] (see p. 261).

The Core of Libel

Gertz and *Firestone*, whatever their problems, do get us, finally, to the core of libel: *There can be no liability without fault*. Public persons would be required to show actual malice; private persons negligence. [*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) may require amendment of this core principle of libel, i.e., fault must be shown only where there is a matter of public concern. Otherwise, state rules of strict liability may still be valid.] Mrs. Firestone, in the circumstances of the case, was a private person. Had the news magazine been negligent in misreading the complicated judicial order? No court below had considered the question. Said Justice Rehnquist:

> *It may well be that petitioner's account in its "Milestones" section was the product of some fault on its part, and that the libel judgment against it was, therefore, entirely consistent with* Gertz. *But in the absence of a finding in some element of the state court system that there was fault, we are not inclined to canvass the record to make such a determination in the first instance.* [Emphasis added.]

The judgment of Florida's supreme court was vacated, and the case remanded. It appears that a retrial was never held.

Central to the case was the question of how much care the publication took in reading an admittedly ambiguous court order. Should the magazine have known that Florida law denies alimony to an adulterous spouse? That question aside, the report was inaccurate. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court did say that the Constitution precludes states from imposing liability on truthful publication based on official court records open to public inspection. But *Time's* report was false.

Gertz and *Firestone* leave a number of questions unanswered but, at the same time, lay down what are the current rules of libel law. For example:

1. There is no more strict liability, that is, libel *per se* where defamation, falsity, and injury are presumed, even where there is a private-person plaintiff if the defamation involves a matter of public concern. These elements in such circumstances must now be demonstrated by the plaintiff.
2. The line between public and private persons is often a fine one, and, according to Justice Rehnquist, the involuntary public figure may indeed be a rare breed.

91. *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976).
92. *Hustler Magazine v. Falwell*, 14 Med.L.Rptr. 2281, 108 S.Ct. 876 (1988).

3. As long as fault has been demonstrated, the states may define negligence (the burden of proof placed on private plaintiffs) as they see fit.[93] By implication the actual malice standard, applicable to public plaintiffs, is a federal constitutional standard with a firm definition—knowing falsehood or reckless disregard as to truth or falsity. (Actually there are two definitions within that single phrase.)
4. States may only compensate plaintiffs for actual injury (whatever form that injury may take).
5. Punitive damages, even for private plaintiffs if involved in matters of public concern, require a showing of actual malice. Unrestrained punitive damages, the Court believes, "inhibit the vigorous exercise of First Amendment freedoms."

CONSTRUCTING A DEFENSE

Falsity and Fault

It can be argued from *Gertz* and *Firestone* that he who must prove fault (negligence or actual malice depending upon the private/public status of the plaintiff) must also prove falsity. They are part of the same package. Falsity alone is not enough. But failure to demonstrate falsity at the threshold may lead to summary judgment in favor of the defendant news organization and end the suit. Certainly minor errors of fact are not enough if the general characterization or contours of a situation are adequately presented.

The headline, "Killer Who Came Straight From Hell," characterizing a convicted triple murderer, was close enough to the truth to warrant summary judgment for a newspaper, despite a pending appeal.[94] More precisely, of course, the headline has nothing to do with the elusive concept of truth at all: it is purely a statement of opinion (see p. 252 ff).

This is not to suggest that an editor shouldn't have tangible evidence of truth at her fingertips. Latitude will be given to inaccuracies where the complex or technical language of law, science, or economics is involved.

The highly publicized libel cases of the generals—Sharon and Westmoreland—demonstrate the symbiosis between falsity and fault. Sharon and Westmoreland sued *Time* and CBS for $50 million and $120 million respectively. In a report on the massacre of Palestinian refugees, a *Time* report intimated that the Israeli general had discussed revenge with Phalangist assassins. Westmoreland was accused in a 1982 broadcast, "The Uncounted Enemy: A Vietnam Deception," of conspiring to deflate the reported number of enemy troops.

Both libel cases were heard at the same time in a federal district court building in Manhattan and were presided over by two distinguished federal judges, Abraham Sofaer for Sharon and Pierre Leval for Westmoreland. Each judge tried to simplify the rules of libel for the jury. Judge Sofaer, in fact, instructed his jury to consider three factors separately and in order: defamation; falsity; and actual malice (fault).

It is important to note that both cases were concluded in early 1985 before the juries ever reached the "fault" question. General Sharon claimed victory when the jury, at the second stage of his case as defined by the judge, said, yes, the story was false. He was probably correct in anticipating that actual malice (knowing falsehood or reckless disregard as to truth or falsity) would be difficult to prove. General Westmoreland dropped his case against CBS in exchange for a statement from the network saying that it had never intended to impugn the general's patriotism or loyalty. Westmoreland's case never got beyond the barrier of falsity. When two former aides to the general indicated that some of their testimony would contradict his, his probability of showing falsity diminished. Although no damages were paid, both plaintiffs claimed victory against the news media. And, in a sense, they did win.

William Shannon in a November 9, 1986 *Washington Post* review of Renata Adler's book on the two cases, *Reckless Disregard*, wrote that she "leaves in shreds and tatters the professional reputations of both *Time* and CBS * * *" They were wrong, he added, refused to admit error, and deployed huge financial and legal resources "to obscure the truth and defeat justice."

Marvin Frankel's same-day review in the *New York Times* called the book a critical commentary on both law and journalism, perhaps equally repre-

93. *Firestone* may also stand for the proposition that "the law must allow some leeway for misinterpretation and error" where the technical language of the law is concerned. See *Orr v. Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978), cert. den. 440 U.S. 960 (1979).
94. *Ruebke v. Globe Communications*, 14 Med.L.Rptr. 1193, 738 P.2d 1246 (Kansas Sup.Ct. 1987).

hensible, and both not above trying to intimidate an author—lawyers by attempting to discourage original publication of the book in *The New Yorker*[95] and journalists by threatening lawsuits of their own.

Eventually Adler, lawyer, critic, reporter, and novelist, became as adversarial as the lawyers she criticized for using any means to win. She sued and was herself sued. Numerous reviews faulted the accuracy of Adler's report and interpretations of the trial documents. Some of the reviewers, however, did not appear to have read the book carefully. Frankel, for example, missed her explanation for Westmoreland's decision to settle: her feeling that his attorney had been outmatched and no longer had stomach for the contest.

Among the most thoughtful and temperate reviews of Adler and her book was Jonathan Z. Larsen's "Tort Song Trilogy" in the November 1986 issue of *Manhattan, Inc.* The disagreements over accuracy in interpreting complex judicial records and the records of actual events, he believes, are best left to history. But he does criticize Adler for using techniques herself that she condemns in others, e.g., failing to contact those against whom allegations are to be made. Nevertheless, Adler does write with an authority missing in the work of some of her detractors.

What other evidence was there in the cases for flawed journalism? Under questioning by Judge Sofaer, *Time* magazine's correspondent, David Halevy, admitted that he had merely inferred that Appendix B to the Kahan Commission report (an Israeli government document) implicated General Sharon in the Phalangist massacre of more than 500 Palestinian women and children.

Katherine Evans, writing in the *New York Times Book Review*, reminded her readers that the CBS program was attacked in *TV Guide* (Don Kowet and Sally Bedell), on PBS, and in its own in-house investigation by CBS veteran Burton Benjamin (*Fair Play: CBS, General Westmoreland, and How a Television Documentary Went Wrong*, New York: Harper & Row, 1988). His report uncovered imbalance, coddling of sympathetic witnesses, misleading editing, and lack of supervision by editors. Speculation on the effects of the suit on CBS are contained in P. J. Boyer's, *Who Killed CBS?* (New York: Random House, 1988) and in E. Joyce's *Prime Times, Bad Times* (New York: Doubleday, 1988).

Bob Brewin of *The Village Voice* and Sydney Shaw of UPI in *Vietnam on Trial* (New York: Atheneum, 1987), an evenhanded account of the Westmoreland case, believe that all the players felt a need to justify their positions within the debacle that was Vietnam. CBS was unfair. Westmoreland's case was greatly weakened when two military aides testified that he had placed a lid on enemy troop estimates.

The cases of the generals do demonstrate the advantage the *New York Times/Gertz* standards give defendants in libel suits. First, the plaintiff must prove falsity, that a publication is *not* true. The law may be assuming too clear a line between truth and falsehood, especially when one moves into the nether world of opinion. But the law expects the threshold requirement of falsity to be met by the plaintiff, and, if the plaintiff fails, it becomes a defense for the publisher. Plaintiff will attack defendant's evidence of truth—witnesses, sources, veracity—and defendant will respond. Together they will test the probable truth of a publication. Plaintiff will have some advantage in having more convincing evidence about himself than a defendant has. The discovery process preceding trial is meant to uncover all relevant evidence of truth or falsity. Many cases end at this point either by dismissal or summary judgment.

In *Philadelphia Newspapers, Inc. v. Hepps*, 106 S.Ct. 1558, 12, Med. L.Rptr. 1558 (1986), the Court said that inability to prove a publication false would prevent a judgment for the plaintiff where the defamation involved a matter of public concern, no matter how reprehensible the media defendant's conduct. And a poorly written story, handled recklessly or negligently, is not actionable if true.

Having proven falsity, the plaintiff must move on to prove fault, a no less formidable task. Fault comes in two sizes: *negligence* for private-person plaintiffs, *actual malice* for public-person plaintiffs.

Negligence

Adding complexity to the tapestry of libel law was *Gertz's* invitation to the states to define for themselves the appropriate standard of liability for defa-

95. Adler, "Annals of Law, Two Trials—I and II," *The New Yorker*, June 16 and 23, 1986. See *Westmoreland v. CBS, Inc.*, 596 F.Supp. 1170 (S.D.N.Y. 1984); *Sharon v. Time, Inc.*, 609 F.Supp. 1291 (S.D.N.Y. 1984).

mation of private persons. There would be "no liability without fault," said the Court, but application of the rule might vary from state to state.

More than forty states have adopted the *negligence* rule of *Gertz* for private-person libels. A few states, among them Alaska, California, Colorado, Indiana, and New Jersey, require the higher standard of *actual malice* where private plaintiffs are involved in controversial issues of public concern. This may suggest the sturdiness of *Rosenbloom's* public issue test.

A few states seem to require something less than actual malice but more than negligence for private-person plaintiffs. Although this situation is always fluid and must be checked carefully by the practitioner, Connecticut, Iowa, Louisiana, Montana, and New Hampshire may fall in this category.

New York's somewhat unique private person test, also somewhere between negligence and actual malice, echoes the *Butts-Walker* "prudent-publisher" test. A New York public school teacher sued a Utica newspaper for reporting erroneously that he was part of a trio arrested for a serious drug offense involving heroin. A trial court denied the newspaper's motion for summary judgment, but the appellate division reversed and was affirmed by the court of appeals, New York's highest court. The news report was said to fall within a sphere of legitimate public concern. In such circumstances a plaintiff may recover only if it is established by a preponderance of evidence that the publisher acted in a *grossly irresponsible* manner and without due consideration for standards of information gathering and dissemination ordinarily followed by responsible journalists. The offending article was written only after two authoritative sources had been consulted, and it was not published until it had been checked by at least two persons other than the writer. *Chapadeau v. Utica Observer-Dispatch*, 1 Med.L.Rptr. 1693, 379 N.Y.S.2d 61 (1975). In *Greenberg v. CBS*, 5 Med.L.Rptr. 1470, 419 N.Y.S.2d 988, 997 (1979), another New York court used a "gross negligence" standard. Yet another in *Karaduman v. Newsday*, 6 Med.L.Rptr. 2345, 435 N.Y.S.2d 556 (1980), spoke of plaintiffs having to show that an editor acted in a "grossly irresponsible manner."

Justice Powell in *Gertz* talks about the "reasonably prudent editor or broadcaster." *Chapadeau* suggests that fault be measured against the standards of the profession of journalism, the industry, or what is "normal" publishing practice. States, however, increasingly appear to favor a "reasonable man" or "ordinary care" standard. Courts have been unwilling to allow the press to establish its own standard as the norm. A host of questions rush in at this point.

What are the standards of industry? Journalism educators have made themselves controversial by testifying on the question as expert witnesses.[96] Professor W. Wat Hopkins recommends a "journalistic malpractice" standard which can be compared with known news presentation norms.[97] Could it be? Would journalism's codes of ethics become the standard? And is this acceptable? Or would judges and jurors, in the final analysis, measure compliance against codes and decide what is proper journalistic practice? How about "expert" opinions from other editors as a help to courts in establishing norms? Should anyone believe fellow members of the "news" club?

While these questions remain for the most part unanswered, it may be useful to suggest some of the journalistic sins that have constituted negligence: Reliance on a single or an anonymous source without further checking. Reliance on other media without an independent investigation. Careless misstatement of the contents of a document, transcript, or report to the detriment of the plaintiff. Failure to contact a defamed person before publication or make use of available sources who might view that person favorably. Check and recheck is still the best guide to accuracy. And use tape-recorders where feasible, although jurors have proven not to like surreptitious taping. Consider the reliability of sources—always. Strive for balance and fairness. Print denials. Check the accuracy of previously published information. Watch letters to the editor like a hawk. Look out for sources with axes to grind or a financial interest in what you print.

Normally a publication crossing many state lines should be prepared to meet at least the *negligence* standard of *Gertz*. Federal courts have followed the case more strictly than state courts, although federal

96. Editor & Publisher (May 29, 1982), 28; Columbia Journalism Review (July/August 1982), 16.
97. Hopkins, *Negligence 10 Years After Gertz v. Welch*, 93 Journalism Monographs 17 (August 1985).

courts will show deference to state libel laws.[98] *Gertz* has been interpreted to mean that any state standard will do as long as there is "no liability without fault"—at least where the defamation involves a matter of public concern.

Actual Malice

Actual malice is negligence raised to a higher power. "Knowledge of falsity or reckless disregard for the truth" is how *Gertz* defines the term. Knowing falsehood would seem to require the reading of a newsperson's mind, and there is a divergence of opinion as to whether our First Amendment tradition permits that kind of governmental intrusion. Judges Kaufman and Oakes in their Second Circuit Court of Appeals opinions in *Herbert v. Lando*[99] acknowledged that "knowing falsehood" and its parent concept of malice had always implied the reading of a defendant's mind by hunch, impression, inference, or what Oakes would call later the "inquisition of Galileo."[100] But they would close the door to such probing on the assumption that exposure of subjective thought processes would chill journalistic endeavor completely.

Justice Brennan, dissenting in part in the next step of the case that would reverse Kaufman and Oakes,[101] defined the interior mental sets of newspersons as unprivileged matters of fact which, if regulated, would regulate expression itself. But, he said, if mental processes can't be regulated, they can be probed. Any other view, of course, would seriously question the actual malice test that Brennan had fashioned for the Court. Brennan went on to suggest that the editorial process writ large, predecisional and deliberative conversations among newsroom personnel, would be privileged in the absence of prima facie evidence of defamatory falsehood. But once falsity is demonstrated, does he mean that what one says in the newsroom is better protected than what one thinks? Is this judicial "sodium pentathol," court certification of the probing of the unconscious journalistic mind?[102]

In *Herbert v. Lando* a federal district court held that a public figure who had brought a $45 million libel suit against a "60 Minutes" producer was entitled under the federal rules of civil procedure to undertake pretrial discovery of any documents in the network's files relevant to the broadcast in order to produce evidence of defendant's "slipshod and sketchy investigative techniques."[103] Plaintiff, a maverick former army colonel, was permitted to appraise conclusions reached by CBS reporters during and after their investigations by having access to their informal conversations with one another and with their sources and by exploring their states of mind and intentions. Newspeople were distressed. *Lando's* deposition required twenty-six sessions and stretched over a year. The nearly 3,000 pages of transcripts and 240 exhibits included reporters' notes, network memoranda, drafts and scripts, unused film, and videotapes of interviews. Plaintiff's depositions were in turn substantial.

HERBERT v. LANDO ET AL.

441 U.S. 153, 99 S.CT. 1635, 60 L.ED.2D 115 (1979).

Justice WHITE delivered the opinion of the Court.

By virtue of the First and Fourteenth Amendments, neither the Federal nor a State Government may make any law "abridging the freedom of speech, or of the press * * *." The question here is whether those Amendments should be construed to provide further protection for the press when sued for defamation than has hitherto been recognized. More specifically, we are urged to hold for the first time that when a member of the press is alleged to have circulated damaging falsehoods and is sued for injury to the plaintiff's reputation, the plaintiff is barred from inquiring into the editorial processes of those

98. Collins and Drushal, *The Reaction of the State Courts to Gertz*, 28 Case Western Reserve L.Rev. 306 (Winter 1978).

99. *Herbert v. Lando*, 568 F.2d 974 (2d Cir. 1977).

100. James Oakes, *Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 Hofstra L.Rev. 655 (Spring 1979).

101. *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635 (1979).

102. Theodore Glasser and James Ettema in their studies of investigative reporters ask why shouldn't the public, through its legal system, probe the motivations of investigative reporters? See *On the Epistemology of Investigative Journalism* in M. Gurevitch and M. R. Levy (eds.), Mass Communication Yearbook, No. 6 (1987).

103. *Herbert v. Lando*, 73 F.R.D. 387 (D.N.Y. 1977).

responsible for the publication, even though the inquiry would produce evidence material to the proof of a critical element of his cause of action.

* * *

We have concluded that the Court of Appeals misconstrued the First and Fourteenth Amendments and accordingly reverse its judgment.

* * *

* * * *New York Times* and its progeny made it essential to proving liability that plaintiffs focus on the conduct and state of mind of the defendant. To be liable, the alleged defamer of public officials or of public figures must know or have reason to suspect that his publication is false. In other cases proof of some kind of fault, negligence perhaps, is essential to recovery. Inevitably, unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination.

It is also untenable to conclude from our cases that, although proof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred, plaintiffs may not inquire directly from the defendants whether they knew or had reason to suspect that their damaging publication was in error. In *Butts*, 388 U.S. 130 (1967), for example, it is evident from the record that the editorial process had been subjected to close examination and that direct as well as indirect evidence was relied on to prove that the defendant magazine had acted with actual malice. The damages verdict was sustained without any suggestion that plaintiff's proof had trenched upon forbidden areas.

Reliance upon such state-of-mind evidence is by no means a recent development arising from *New York Times* and similar cases. Rather, it is deeply rooted in the common-law rule, predating the First Amendment, that a showing of malice on the part of the defendant permitted plaintiffs to recover punitive or enhanced damages. In *Butts*, the Court affirmed the substantial award of punitive damages which in Georgia were conditioned upon a showing of "wanton or reckless indifference or culpable negligence" or "ill will, spite, hatred and an intent to injure * * *." 388 U.S., at 165–166. Neither Justice Harlan, id., at 156–162, nor Chief Justice Warren, concurring, id., at 165–168, raised any question as to the propriety of having the award turn on such a showing or as to the propriety of the underlying evidence, which plainly included direct evidence going to the state of mind of the publisher and its responsible agents.

Furthermore, long before *New York Times* was decided, certain qualified privileges had developed to protect a publisher from liability for libel unless the publication was made with malice. Malice was defined in numerous ways, but in general depended upon a showing that the defendant acted with improper motive. This showing in turn hinged upon the intent or purpose with which the publication was made, the belief of the defendant in the truth of his statement, or upon the ill will which the defendant might have borne towards the defendant.

Courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant and necessary to defeat a conditional privilege or enhance damages. The rules are applicable to the press and to other defendants alike, and it is evident that the courts across the country have long been accepting evidence going to the editorial processes of the media without encountering constitutional objections.

In the face of this history, old and new, the Court of Appeals nevertheless declared that two of this Court's cases had announced unequivocal protection for the editorial process.

In each of these cases, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973), we invalidated governmental efforts to pre-empt editorial decision by requiring the publication of specified material. In *Columbia Broadcasting System*, it was the requirement that a television network air paid political advertisements and in *Tornillo*, a newspaper's obligation to print a political candidate's reply to press criticism. Insofar as the laws at issue in *Tornillo* and *Columbia Broadcasting System* sought to control in advance the content of the publication, they were deemed as invalid as were prior efforts to enjoin publication of specified materials.

But holdings that neither a State nor the Federal Government may dictate what must or must not be printed neither expressly nor impliedly suggest that the editorial process is immune from any inquiry

whatsoever. It is incredible to believe that the Court in *Columbia Broadcasting System* or in *Tornillo* silently effected a substantial contraction of the rights preserved to defamation plaintiffs in *Sullivan*, *Butts* and like cases.

Tornillo and *Gertz v. Robert Welch, Inc.*, were announced on the same day; and although the Court's opinion in *Gertz* contained an overview of recent developments in the relationship between the First Amendment and the law of libel, there was no hint that a companion case had narrowed the evidence available to a defamation plaintiff. Quite the opposite inference is to be drawn from the *Gertz* opinion since it, like prior First Amendment libel cases, recited without criticism the facts of record indicating that the state of mind of the editor had been placed at issue. Nor did the *Gertz* opinion, in requiring proof of some degree of fault on the part of the defendant editor and in forbidding punitive damages absent at least reckless disregard of truth or falsity, suggest that the First Amendment also foreclosed direct inquiry into these critical elements.

In sum, contrary to the views of the Court of Appeals, according an absolute privilege to the editorial process of a media defendant in a libel case is not required, authorized or presaged by our prior cases, and would substantially enhance the burden of proving actual malice, contrary to the expectations of *New York Times*, *Butts* and similar cases.

* * *

In the first place, it is plain enough that the suggested privilege for the editorial process would constitute a substantial interference with the ability of a defamation plaintiff to establish the ingredients of malice as required by *New York Times*. As respondents would have it, the defendant's reckless disregard of the truth, a critical element, could not be shown by direct evidence through inquiry into the thoughts, opinions and conclusions of the publisher but could be proved only by objective evidence from which the ultimate fact could be inferred. It may be that plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself, but the relevance of answers to such inquiries, which the District Court recognized and the Court of Appeals did not deny, can hardly be doubted. To erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their good-faith belief in the truth of their publications, and libel plaintiffs are required to prove knowing or reckless falsehood with "convincing clarity." *New York Times v. Sullivan*, 376 U.S., at 285–286.

Furthermore, the outer boundaries of the editorial privilege now urged are difficult to perceive. The opinions below did not state, and respondents do not explain, precisely when the editorial process begins and when it ends. Moreover, although we are told that respondent Lando was willing to testify as to what he "knew" and what he had "learned" from his interviews, as opposed to what he "believed," it is not at all clear why the suggested editorial privilege would not cover knowledge as well as belief about the veracity of published reports. It is worth noting here that the privilege as asserted by respondents would also immunize from inquiry the internal communications occurring during the editorial process and thus place beyond reach what the defendant participants learned or knew as the result of such collegiate conversations or exchanges. If damaging admissions to colleagues are to be barred from evidence, would a reporter's admissions made to third parties not participating in the editorial process also be immune from inquiry? We thus have little doubt that Herbert and other defamation plaintiffs have important interests at stake in opposing the creation of the asserted privilege.

Nevertheless, we are urged by respondents to override these important interests because requiring disclosure of editorial conversations and of a reporter's conclusions about the veracity of the material he has gathered will have an intolerable chilling effect on the editorial process and editorial decision-making. But if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and other cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First Amendment credentials. "[T]here is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S., at 340.

Realistically, however, some error is inevitable; and the difficulties of separating fact from fiction convinced the Court in *New York Times*, *Butts*, *Gertz*, and similar cases to limit liability to instances

where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material. Those who publish defamatory falsehoods with the requisite culpability, however, are subject to liability, the aim being not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation. Permitting plaintiffs such as Herbert to prove their cases by direct as well as indirect evidence is consistent with the balance struck by our prior decisions. If such proof results in liability for damages which in turn discourages the publication of erroneous information known to be false or probably false, this is no more than what our cases contemplate and does not abridge either freedom of speech or of the press.

Of course, if inquiry into editorial conclusions threatens the suppression not only of information known or strongly suspected to be unreliable but also of truthful information, the issue would be quite different. But as we have said, our cases necessarily contemplate examination of the editorial process to prove the necessary awareness of probable falsehood, and if indirect proof of this element does not stifle truthful publication and is consistent with the First Amendment, as respondents seem to concede, we do not understand how direct inquiry with respect to the ultimate issue would be substantially more suspect. Perhaps such examination will lead to liability that would not have been found without it, but this does not suggest that the determinations in these instances will be inaccurate and will lead to the suppression of protected information. On the contrary, direct inquiry from the actors, which affords the opportunity to refute inferences that might otherwise be drawn from circumstantial evidence, suggests that more accurate results will be obtained by placing all, rather than part, of the evidence before the decisionmaker. Suppose, for example, that a reporter has two contradictory reports about the plaintiff, one of which is false and damaging, and only the false one is published. In resolving the issue whether the publication was known or suspected to be false, it is only common sense to believe that inquiry from the author, with an opportunity to explain, will contribute to accuracy. If the publication is false but there is an exonerating explanation, the defendant will surely testify to this effect. Why should not the plaintiff be permitted to inquire before trial? On the other hand, if the publisher in fact had serious doubts about accuracy, but published nevertheless, no undue self-censorship will result from permitting the relevant inquiry. Only knowing or reckless error will be discouraged; and unless there is to be an absolute First Amendment privilege to inflict injury by knowing or reckless conduct, which respondents do not suggest, constitutional values will not be threatened.

It is also urged that frank discussion among reporters and editors will be dampened and sound editorial judgment endangered if such exchanges, oral or written, are subject to inquiry by defamation plaintiffs. We do not doubt the direct relationship between consultation and discussion on the one hand and sound decisions on the other; but whether or not there is liability for the injury, the press has an obvious interest in avoiding the infliction of harm by the publication of false information, and it is not unreasonable to expect the media to invoke whatever procedures that may be practicable and useful to that end. Moreover, given exposure to liability when there is knowing or reckless error, there is even more reason to resort to prepublication precautions, such as a frank interchange of fact and opinion. Accordingly, we find it difficult to believe that error-avoiding procedures will be terminated or stifled simply because there is liability for culpable error and because the editorial process will itself be examined in the tiny percentage of instances in which error is claimed and litigation ensues. Nor is there sound reason to believe that editorial exchanges and the editorial process are so subject to distortion and to such recurring misunderstanding that they should be immune from examination in order to avoid erroneous judgments in defamation suits. The evidentiary burden Herbert must carry to prove at least reckless disregard for the truth is substantial indeed, and we are unconvinced that his chances of winning an undeserved verdict are such that an inquiry into what Lando learned or said during editorial process must be foreclosed.

This is not to say that the editorial discussions or exchanges have no constitutional protection from casual inquiry. There is no law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest; and if there were, it would not survive constitutional scrutiny as the First Amendment is presently construed. No such problem exists here, however, where there is a specific

claim of injury arising from a publication that is alleged to have been knowing or recklessly false.[23]

Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances. The President, for example, does not have an absolute privilege against disclosure of materials subpoenaed for a judicial proceeding. *United States v. Nixon*, 418 U.S. 683 (1974). In so holding, we found that although the President has a powerful interest in confidentiality of communications between himself and his advisers, that interest must yield to a demonstrated specific need for evidence. As we stated, in referring to existing limited privileges against disclosure, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." Id., at 710.

With these considerations in mind, we conclude that the present construction of the First Amendment should not be modified by creating the evidentiary privilege which the respondents now urge.

Although defamation litigation, including suits against the press, is an ancient phenomenon, it is true that our cases from *New York Times* to *Gertz* have considerably changed the profile of such cases. In years gone by, plaintiffs made out a prima facie case by proving the damaging publication. Truth and privilege were defenses. Intent, motive and malice were not necessarily involved except to counter qualified privilege or to prove exemplary damages. The plaintiff's burden is now considerably expanded. In every or almost every case, the plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability on the part of the publisher. If plaintiffs in consequence now resort to more discovery, it would not be surprising; and it would follow that the costs and other burdens of this kind of litigation have escalated and become much more troublesome for both plaintiffs and defendants. It is suggested that the press needs constitutional protection from these burdens if it is to perform its task, which is indispensable in a system such as ours.

Creating a constitutional privilege foreclosing direct inquiry into the editorial process, however, would not cure this problem for the press. Only complete immunity from liability from defamation would effect this result, and the Court has regularly found this to be an untenable construction of the First Amendment. Furthermore mushrooming litigation costs, much of it due to pretrial discovery, are not peculiar to the libel and slander area. There have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus. But until and unless there are major changes in the present rules of civil procedure, reliance must be had on what in fact and in law are ample powers of the district judge to prevent abuse.

The Court has more than once declared that the deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials. But the discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they "be construed to secure the just, *speedy*, and *inexpensive* determination of every action." [Emphasis added.] To this end, the requirement of Rule 26(b)(1) that the material sought in discovery be "relevant" should be firmly applied, and the district courts should not neglect their power to restrict discovery where "justice requires [protection for] a party or person from annoyance, embarassment, oppression, or undue burden or expense. * * *" Fed. Rule Civ.Proc. 26(c). With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process.

Whether, as a nonconstitutional matter, however, the trial judge properly applied the rules of discovery was not within the boundaries of the question certified under 28 U.S.C.A. § 1292(b) and accordingly is not before us. The judgment of the Court of Appeals is reversed. So ordered.

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23. Justice Brennan would extend more constitutional protection to editorial discussion by excusing answers to relevant questions about in-house conversations until the plaintiff has made a prima facie case of falsity. If this suggestion contemplates a bifurcated trial, first on falsity and then on culpability and injury, we decline to subject libel trials to such burdensome complications and intolerable delay. On the other hand, if, as seems more likely, the prima facie showing does not contemplate a mini-trial on falsity, no resolution of conflicting evidence on this issue, but only a credible assertion by the plaintiff, it smacks of a requirement that could be satisfied by an affidavit or a simple verification of the pleadings. We are reluctant to imbed this formalism in the Constitution.

[Authors' note: Ironically, this bifurcated trial that Justice White rejected would be the modus operandi of the trial judges in the 1984 *Sharon* and *Westmoreland* cases.]

Burger, C. J., and Blackmun, Powell, Rehnquist, and Stevens, JJ., joined the opinion of the Court.

Justice STEWART, dissenting.

It seems to me that both the Court of Appeals and this Court have addressed a question that is not presented by the case before us. As I understand the constitutional rule of *New York Times v. Sullivan*, 376 U.S. 254 (1964), inquiry into the broad "editorial process" is simply not relevant in a libel suit brought by a public figure against a publisher. And if such an inquiry is not relevant, it is not permissible. Fed. Rule Civ. Proc. 26(b).

Although I joined the Court's opinion in *New York Times*, I have come greatly to regret the use in that opinion of the phrase "actual malice." For the fact of the matter is that "malice" as used in the *New York Times* opinion simply does not mean malice as that word is commonly understood. In common understanding, malice means ill will or hostility, and the most relevant question in determining whether a person's action was motivated by actual malice is to ask "why." As part of the constitutional standard enunciated in the *New York Times* case, however, "actual malice" has nothing to do with hostility or ill will, and the question "why" is totally irrelevant.

Under the constitutional restrictions imposed by *New York Times* and its progeny, a plaintiff who is a public official or public figure can recover from a publisher for a defamatory statement upon convincingly clear proof of the following elements:

1. the statement was published by the defendant.
2. the statement defamed the plaintiff,
3. the defamation was untrue,
4. and the defendant knew the defamatory statement was untrue, or published it in reckless disregard of its truth or falsity.

The gravamen of such a lawsuit thus concerns that which was in fact published. What was *not* published has nothing to do with the case. And liability ultimately depends upon the publisher's state of knowledge of the falsity of what he published, not at all upon his motivation in publishing it—not at all, in other words, upon actual malice as those words are ordinarily understood.

This is not the first time that judges and lawyers have been led astray by the phrase "actual malice" in the *New York Times* opinion. In *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), another defamation suit brought by a public figure against a publisher, the trial judge instructed the jury that the plaintiff could recover if the defendant's publication had been made with malice, and that malice means "spite, hostility, or deliberate intention to harm." In reversing the judgment for the plaintiff, we said that this jury instruction constituted "error of constitutional magnitude." 398 U.S., at 10.

In the present case, of course, neither the Court of Appeals nor this Court has overtly committed the egregious error manifested in *Bresler*. Both courts have carefully enunciated the correct *New York Times* test. But each has then followed a false trail, explainable only by an unstated misapprehension of the meaning of *New York Times* "actual malice," to arrive at the issue of "editorial process" privilege. This misapprehension is reflected by numerous phrases in the prevailing Court of Appeals opinions: "a journalist's exercise of editorial control and judgments," "how a journalist formulated his judgments," "the editorial selection process of the press," "the heart of the editorial process," "reasons for the inclusion or exclusion of certain material." See 568 F.2d 974, *passim*. Similar misapprehension is reflected in this Court's opinion by such phrases as "improper motive," "intent or purpose with which the publication is made," "ill will," and by lengthy footnote discussion about the spite or hostility required to constitute malice at common law.

Once our correct bearings are taken, however, and it is firmly recognized that a publisher's motivation in a case such as this is irrelevant, there is clearly no occasion for inquiry into the editorial process as conceptualized in this case. I shall not burden this opinion with a list of the 84 discovery questions at issue.[2] Suffice it to say that few if any of them seem to me to come within even the most liberal construction of Rule 26(b), Fed. Rule Civ. Proc.

* * *

In a system of federal procedure whose prime goal is "the just, speedy, and inexpensive determination

2. The following are some random samples:

"Did you ever come to a conclusion that it was unnecessary to talk to Capt. Laurence Potter prior to the presentation of the program on February 4th?

of every action," time-consuming and expensive pretrial discovery is burdensome enough, even when within the arguable bounds of Rule 26(b). But totally irrelevant pretrial discovery is intolerable.

Like the Court of Appeals, I would remand this case to the District Court, but with directions to measure each of the proposed questions strictly against the constitutional criteria of *New York Times* and its progeny. Only then can it be determined whether invasion of the editorial process is truly threatened.

Justice Marshall, dissenting.

* * *

Justice BRENNAN, dissenting in part.

* * * The Court today rejects respondents' claim that an "editorial privilege" shields from discovery information that would reveal respondents' editorial processes. I agree with the Court that no such privilege insulates factual matters that may be sought during discovery, and that such a privilege should not shield respondents' "mental processes." I would hold, however, that the First Amendment requires predecisional communication among editors to be protected by an editorial privilege, but that this privilege must yield if a public figure plaintiff is able to demonstrate to the prima facie satisfaction of a trial judge that the libel in question constitutes defamatory falsehood.

* * * An editorial privilege would thus not be merely personal to respondents, but would shield the press in its function "as an agent of the public at large. * * * The press is the necessary representative of the public's interest in this context and the instrumentality which effects the public's right." *Saxbe v. Washington Post* Co., 417 U.S. 843, 863–864 (1974) [Powell, J., dissenting].

* * * Through the editorial process expression is composed; to regulate the process is therefore to regulate the expression. The autonomy of the speaker is thereby compromised, whether that speaker is a large urban newspaper or an individual pamphleteer. The print and broadcast media, however, because of their large organizational structure, cannot exist without some form of editorial process. The protection of the editorial process of these institutions thus becomes a matter of particular First Amendment concern.

* * *

I find compelling these justifications for the existence of an editorial privilege. The values at issue are sufficiently important to justify some incidental sacrifice of evidentiary material. The Court today concedes the accuracy of the underlying rationale for such a privilege, stating that "[w]e do not doubt the direct relationship between consultation and discussion on the one hand and sound decisions on the other * * *." The Court, however, contents itself with the curious observation that "given exposure to liability when there is knowing or reckless error, there is even more reason to resort to prepublication precautions, such as a frank interchange of fact and opinion." Because such "prepublication precautions" will often prove to be extraordinarily damaging evidence in libel actions, I cannot so blithely assume such "precautions" will be instituted, or that such "frank interchange" as now exists is not impaired by its potential exposure in such actions.

I fully concede that my reasoning is essentially paradoxical. For the sake of more accurate information, an editorial privilege would shield from disclosure the possible inaccuracies of the press; in the name of a more responsible press, the privilege would make more difficult of application the legal restraints by which the press is bound. The same paradox, however, inheres in the concept of an executive privilege: so as to enable the government more effectively to implement the will of the people, the people are kept in ignorance of the workings of their government. The paradox is unfortunately intrinsic to our social condition. Judgment is required to evaluate and balance these competing perspectives.

Judgment is also required to accommodate the tension between society's "pervasive and strong interest in preventing and redressing attacks upon reputation," *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966), and the First Amendment values that would be served by an editorial privilege. In my view this tension is too fine to be resolved in the abstract. As is the case

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"Did you ever come to the conclusion that you did not want to have a filmed interview with Sgt. Carmon for the program?

"When you prepared the final draft of the program to be aired, did you form any conclusion as to whether one of the matters presented by that program was Col. Herbert's view of the treatment of the Vietnamese?

"Do you have any recollection of discussing with anybody at CBS whether that sequence should be excluded from the program as broadcast?

"Prior to the publication of the *Atlantic Monthly* article, Mr. Lando, did you discuss that article or the preparation of that article with any representative of CBS?"

with executive privilege, there must be a more specific balancing of the particular interests asserted in a given lawsuit. A general claim of executive privilege, for example, will not stand against a "demonstrated, specific need for evidence * * *." *United States v. Nixon*, 418 U.S. 683, 713 (1974). Conversely, a general statement of need will not prevail over a concrete demonstration of the necessity for executive secrecy. *United States v. Reynolds*, 345 U.S. 1, 11 (1953). Other evidentiary privileges are similarly dependent upon the particular exigencies demonstrated in a specific lawsuit. *Roviaro v. United States*, 353 U.S. 53 (1957), for example, held that the existence of an informer's privilege depends "on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Id., at 62. *Hickman v. Taylor*, 329 U.S. 495 (1947), similarly required ad hoc balancing to determine the existence of an attorneys' work product privilege. The procedures whereby this balancing is achieved, so far from constituting mere "formalism," are in fact the means through which courts have traditionally resolved competing social and individual interests.

In my judgment the existence of a privilege protecting the editorial process must, in an analogous manner, be determined with reference to the circumstances of a particular case. In the area of libel, the balance struck by *New York Times* between the values of the First Amendment and society's interest in preventing and redressing attacks upon reputation must be preserved. This can best be accomplished if the privilege functions to shield the editorial process from general claims of damaged reputation. If, however, a public figure plaintiff is able to establish, to the prima facie satisfaction of a trial judge, that the publication at issue constitutes defamatory falsehood, the claim of damaged reputation becomes specific and demonstrable, and the editorial privilege must yield. Contrary to the suggestion of the Court, an editorial privilege so understood would not create "a substantial interference with the ability of a defamation plaintiff to establish the ingredients of malice as required by *New York Times*." Requiring a public figure plaintiff to make a prima facie showing of defamatory falsehood will not constitute an undue burden, since he must eventually demonstrate these elements as part of his case-in-chief. And since editorial privilege protects only deliberative and policymaking processes and not factual material, discovery should be adequate to acquire the relevant evidence of falsehood. A public figure plaintiff will thus be able to redress attacks on his reputation, and at the same time the editorial process will be protected in all but the most necessary cases.

Applying these principles to the instant case is most difficult, since the five categories of objectionable discovery inquiries formulated by the Court of Appeals are general, and it is impossible to determine what specific questions are encompassed within each category. It would nevertheless appear that four of the five categories (see fn. 2, Opinion of the Court) concern respondents' mental processes, and thus would not be covered by an editorial privilege. Only the fourth category—"Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication"—would seem to be protected by a proper editorial privilege. The Court of Appeals noted, however, that respondents had already made available to petitioner in discovery "the contents of pretelecast conversations between Lando and Wallace * * *." 568 F.2d, at 982 [Kaufman, C.J.]. Whether this constitutes waiver of the editorial privilege should be determined in the first instance by the District Court. I would therefore, like the Court of Appeals, remand this case to the District Court, but would require the District Court to determine (a) whether respondents have waived their editorial privilege; (b) if not, whether petitioner Herbert can overcome the privilege through a prima facie showing of defamatory falsehood; and (c) if not, the proper scope and application of the privilege.

COMMENT

Herbert v. Lando got nearly as much attention for its being "leaked" to the press and reported by ABC forty-eight hours before being announced by the Court as it did for its substance.

Some lawyers were quick to note that the ruling did little to disturb the doctrine of *New York Times*. Yet Justice White, consistent with his dissenting opinion in *Gertz*, and in an array of authorities dating back to 1837 (see his fn. 15 in the full text), reiterated his belief in the common law standards of "strict liability," libel *per se*, and broad state definitions of malice.

Justice Powell in a concurring opinion reminded the Court of First Amendment interests, while Justice Stewart, clearly disturbed about White's pref-

erences, especially his flexible definition of actual malice, reminded the Court of what it had done in *New York Times v. Sullivan*.

Justice Thurgood Marshall's dissent best represented the initial fears of the press that investigative reporting of public matters would be discouraged by the ruling and that the status of existing shield laws would be endangered.

Justice William Brennan, dissenting in part, sought a palliative for an actual malice test, a test that didn't seem to be working.

The near hysterical response of the press to *Herbert v. Lando* offended Brennan. It had been a difficult case. It seemed to him that the press misunderstood the actual malice concept. Brennan, in a speech at Rutgers University, quietly rebuked the press and attempted to rehabilitate the concept.[103] But he remained entangled in it.

Brennan's 1965 invocation of Meiklejohn's theory[104] had largely been in vain. Wouldn't Meiklejohn have extended, at the very least, an absolute, or near absolute, privilege to all communication bearing on the public behavior of public officials and quite likely to the utterances of public figures involved in controversial issues of public importance as well? Political libel is seditious libel and should not be subject to governmental control.

What, then, is actual malice? The first part of its definition—knowing falsehood—suggests a mind oblivious to evidence of falsity. *Gertz* calls it "subjective awareness of probable falsity"; *Garrison* "a high degree of awareness of * * * probable falsity"; *Butts* an "awareness of probable falsity"; and *St. Amant* (see p. 201) "serious doubts as to the truth of his publication." All of these imply a state of mind, an intention to hurt whatever the truth of the matter. Reckless disregard, a seemingly lesser degree of fault, could be construed to mean all of the above with less thought given to the matter and therefore less premeditation.

Actual malice, a concept well established in common law and much discussed in America at least since passage of the Sedition Act of 1798, had long been defined as "well knowing" or "designed" falsity. In *New York Times*, Justice Brennan relied on the influential opinion of Judge Rousseau Burch for the Kansas Supreme Court in a 1908 case, *Coleman v. MacLennan*.[105] Although Burch's thresholds for state interference with freedom of the press are lower than today's courts would allow, he did speak of the need for a plaintiff to show actual malice where matters of public interest were involved. By 1964 and the Supreme Court's landmark ruling, at least six states and a number of legal commentators had adopted, or favored, what had evolved from the nineteenth century as a more liberal but still minority rule of public-person defamation.

A problem remains in distinguishing actual malice from common law malice. "In the context of a libel suit," said a federal district judge in *Reliance Insurance* Co. *v. Barron's*,[106] " 'actual malice' simply does not mean ill will or spite. Rather, 'malice' must be taken to mean fraudulent, knowing publication of a falsehood or reckless disregard of falsity. And we also note that reckless does not mean grossly negligent, its common use, but rather *intentional disregard*. When the Supreme Court uses a word, it means what the Court wants it to mean."

Ill will, for example, a prior statement of hatred of plaintiff by defendant, may be relevant and admissible as evidence of a state of mind conducive to reckless disregard of falsity,[107] but it is not itself actual malice. Specific evidence does seem to be needed: fabrication, fictionalization, failure to check with available sources or with parties to your investigation, use of anonymous or unverified phone calls, obviously biased sources, or inherently improbable allegations. An Oklahoma reporter, overhearing a telephone conversation in a sheriff's office and without further checking, assumed and reported that a police officer in breaking up a fight between two boys had kidnapped one at gunpoint. The Oklahoma Supreme Court said that was reckless disregard of truth or falsity.[108]

Protection for defendants will be found in agreement among reputable sources as to what was said

103. Brennan, *The Symbiosis Between the Press and the* Court, The National Law Journal (October 29, 1979), 15.

104. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harvard L.R. 1, 5, 13–14 (November 1965).

105. 98 P. 281 (Kan. 1908).

106. 3 Med.L.Rptr. 1033, 442 F.Supp. 1341, 1349–50 (D.N.Y. 1977).

107. *Cochrane v. Indianapolis Newspapers*, 3 Med.L.Rptr. 2131, 372 N.E.2d 1211 (Ind. 1978).

108. *Akins v. Altus Newspapers, Inc.*, 3 Med.L.Rptr. 1449, 609 P.2d 1263 (Okl. 1977), cert.den. 449 U.S. 1010 (1980). *Rinaldi v. Viking Penguin, Inc.*, 5 Med.L.Rptr. 2506, 422 N.Y.S.2d 552 (1979), affirmed 7 Med.L.Rptr. 1202, 438 N.Y.S.2d 496 (1981) is instructive on the degree to which facts should be checked.

to reporters and how accurately it was recounted; by headlines that agree with the possibly defamatory portions of a story; and by prompt publication of retractions, although retractions alone are not sufficient to establish lack of malice.[109] With "hot" news, slight inaccuracies may not constitute actual malice.[110]

Failure to discuss a charge with a potential plaintiff (although it's often a good idea) or to search for contrary evidence to a charge does not constitute actual malice. Flights of imagination in a story, sources or contributors of established incompetence or unreliability may. It's often a close call. It's a question of a defendant's prepublication state of mind. Did she intend to print something she knew to be false? Errors of judgment, misconceptions, bias, or ill will are not enough. A reporter trying to confirm a previously formed suspicion, and so, obviously biased, was not guilty of actual malice.[111] But a reporter who relied on an anonymous source who was trying to get the plaintiff fired and didn't check further was said to show actual malice.[112] In the highly publicized libel case brought by presidential candidate Pat Robertson against former Congressman Paul McCloskey, and later dropped, a federal district court judge wrote, "McCloskey's sin of omission was not simply a failure to investigate, but a failure to consider contradictory evidence already in his possession."[113]

A South Carolina court held that reliance on an obviously biased source, a warning that the information conveyed was false, and the lack of investigation into material that was not "hot news" was evidence of actual malice.[114] Similarly, an Arizona publisher who, when told of inaccuracies in his reports, made no effort at verification was also in trouble.[115] A reporter's intentional and reckless distortion of overheard comments of a football coach to his quarterback was evidence of actual malice.[116] Context will be an important consideration for judge and jury since biased, even hostile, sources alone may not constitute actual malice, nor does carelessness in investigating or checking information.

Shoddy journalism alone is not enough.[117] Nor is ill will, omissions, or lack of deadline pressure.[118] The case of Carol Burnett against the *National Enquirer* was one of the few jury verdicts for plaintiffs to be sustained on appeal on the issue of actual malice:

BURNETT v. NATIONAL ENQUIRER

7 MED.L.RPTR. 1321, (CAL. SUP. CT. 1981).

SMITH, J.:

It is not the intention of the court to deal at great length with every issue raised by defendant in its motion for judgment notwithstanding the verdict and motion for new trial, but simply to articulate the reasons for denying defendant's motions, save and except the motion for new trial as it relates to the issue of damages.

Initially, defendant contends that its publication of March 2, 1976 about plaintiff was not libelous per se. It is clear to the court that the average reader, viewing the article in its entirety, would conclude that plaintiff was intoxicated and causing a disturbance. The evidence is undisputed that the article was false. There can be little question that the described conduct of plaintiff holds her up to ridicule within the meaning of California Civil Code section 45.

The *National Enquirer's* protestation that it was not guilty of actual malice borders on absurdity. Not only did plaintiff establish actual malice by clear and convincing evidence, but she proved it beyond a reasonable doubt. At the very minimum Brian Walker, the de facto gossip columnist, had serious doubts as to the truth of the publication. There is

109. *Kerwick v. Orange County Publications*, 5 Med.L.Rptr. 2502, 422 N.Y.S.2d 179 (1979), reversed 7 Med.L.Rptr. 1152, 438 N.Y.S.2d 778 (1981); *DiLorenzo v. New York News*, 7 Med.L.Rptr. 1452, 432 N.Y.S.2d 483 (1980).

110. *Simonson v. United Press International, Inc.*, 6 Med.L.Rptr. 2313, 500 F.Supp. 1261 (D.Wis. 1980), affirmed 7 Med.L.Rptr. 1737, 654 F.2d 478 (7th Cir. 1981).

111. *Silvester v. ABC*, 650 F.Supp. 766, 779 (S.D.Fla. 1986).

112. *News Publishing Co. v. DeBerry*, 321 S.E.2d 112 (Ga. 1984), cert.den. 471 U.S. 1053 (1985).

113. *Robertson v. McCloskey*, 14 Med.L.Rptr. 1437, 1444, 666 F.Supp. 241 (D.D.C. 1987).

114. *Stevens v. Sun Publishing Co.*, 240 S.E.2d 812 (S.C. 1978), cert.den. 436 U.S. 945 (1978).

115. *Dombey v. Phoenix Newspapers*, 724 P.2d 562 (Ariz. 1986).

116. *Mahoney v. Adirondack Publishing*, 123 AD2d 10 (3d Dept. 1986).

117. *Crau v. Kleinschmidt*, 14 Med.L.Rptr. 1353, 509 N.E.2d 399 (Ohio Sup.Ct. 1987).

118. *Richmond Newspapers v. Lipscomb*, 14 Med.L.Rptr. 1953, 362 S.E.2d 32 (Va.Sup.Ct. 1987).

a high degree of probability that Walker fabricated part of the publication—certainly that portion relating to plaintiff's row with Henry Kissinger.

Walker received information from Couri Hay, a free lance tipster for the *National Enquirer*, that Carol Burnett had been in the Rive Gauche restaurant, that she ordered a Grand Marnier souffle and that she passed her dessert to other parties in a boisterous or flamboyant manner, that she had been drinking, *but was not drunk*. Hay contends that this was verified through the maitre'd. On the other hand, Hay related to Walker that he had received *unverified* information that Burnett had spilled wine on a customer and the customer had returned the favor by spilling water on her.

Shortly after receiving the information from Hay, Walker called Steve Tinney, the nominal gossip columnist, to see if he had any contacts in Washington who could verify Hay's tip. Walker expressed doubts to Tinney about Hay's trustworthiness. Tinney agreed with Walker's assessment of Hay, but told him he had no contacts in Washington.

Next Walker asked Greg Lyon, defendant's employee, to verify the "incident at the Rive Gauche." Walker told Lyon he had a one hour deadline to meet even though the publication was not due to "hit the streets" for thirteen days.

Lyon was asked to verify the following information: That Carol Burnett had been in a Washington, D.C. restaurant, that she had some sort of interchange with other customers and that an altercation took place with another customer—to wit, "the wine spilling and water throwing incident."

Lyon reported to Walker that he had not been able to verify anything other than the fact that plaintiff had passed dessert to other patrons. Additionally, he told Walker a fact *not* previously disclosed to him by Hay—that Henry Kissinger and plaintiff had carried on a good-natured conversation at the Rive Gauche that same night.

Confronted with this disappointing revelation, Walker expressed concern to Lyon as to whether he should publish the article. He kept pushing Lyon for his opinion. Lyon became angry and told him that he (Walker) was being paid to make those decisions.

At this point, it is fair to infer that Walker decided that there was little news value in the fact that Burnett and Kissinger had a good-natured conversation and that Burnett distributed her dessert to other patrons. A little embellishment was needed to "spice up" the item.

An entire afternoon was devoted to the issue of whether the *National Enquirer* was a newspaper or magazine. The court reaffirms its finding that the defendant does not qualify for the protection of California Civil Code section 48a [California's retraction statute] because, * * * the predominant function of the publication is the conveying of news which is neither timely nor current. Additionally, the defendant has been registered as a magazine with the Audit Bureau of Circulation since 1963, and carries a designation as a magazine or periodical in eight mass media directories.

In *Werner v. Southern California Associated Newspapers*, 216 P.2d 825 (1950) our Supreme Court upheld the constitutionality of California Civil Code section 48a against an attack that it unfairly discriminated in favor of newspaper and radio stations. The court articulated its rationale as follows:

> In view of the complex and far flung activities of the news services upon which newspapers and radio stations must largely rely and the necessity of publishing *news while it's new* [emphasis mine], newspapers and radio stations may in good faith publicize items that are untrue but whose falsity they have neither the time nor the opportunity to ascertain.

Since the defendant rarely deals with "news while it' s new," it is not entitled to the protection of Civil Code section 48a.

Defendant has gone to great lengths to blame the adverse jury verdict on prejudicial trial publicity and, in particular, the blast by entertainer Johnny Carson. Some will question the sagacity of Carson's timing, but no one can question his constitutional right to air his grievance with defendant. [Carson defended Burnett against the Enquirer in his nighttime show.] While the defendant had the right to publish an article about Carson, it exercised incredibly poor judgment in publishing the article on the eve of the trial.

The *National Enquirer* successfully challenged two jurors who viewed or heard the Carson tirade. It did not see fit to challenge any others even though the trial could have proceeded with as few as eight jurors. Accordingly, defendant cannot now complain about three other jurors being tainted. The court questioned all jurors individually in chambers in the presence of counsel. Counsel were afforded an opportunity to question the jurors. The court denied the defendant's motion for a mistrial because it was satisfied, without any reservation whatsoever, that the remaining eleven jurors could render a fair trial to defendant.

Preliminary to the subject of general and punitive damages is the question of whether defendant published an adequate correction since that is an issue relating to the mitigation of damages. In the present case, two critical questions must be answered:

1. Was the correction published with prominence substantially equal to the statement claimed to be libelous?
2. Did the correction without uncertainty and ambiguity, honestly and fully and fairly correct the statement claimed to be libelous?

The answer to both questions is in the negative. Had the defendant published a slightly modified version of Exhibit 154 [plaintiff's request for retraction in copy format, dated 3–15–76] * * * it would not be before the court in its present predicament. The correction would have passed muster even if the reference to defendant's negligence had been deleted. Should the defendant have chosen not to print a headline relating to the retraction, a photo of plaintiff in the gossip column next to the correction would have been sufficient to call attention to the retraction.

Instead, defendant tendered to plaintiff and published a "half hearted" correction that had a tendency to aggravate any reasonable person who had been previously libeled. The correction was buried at the bottom of the gossip column.

One can infer from the evidence that the *National Enquirer's* failure to publish an adequate correction was primarily motivated by an unwillingness to engage in some form of self deprecation which conceivably might adversely affect its circulation.

Ian Calder, the president of *National Enquirer*, knew shortly after March 2, 1976 that none of the libelous material in the article could be substantiated. Both he and Generoso Pope, the sole stockholder and Chairman of the Board of the defendant, approved the copy of the "correction" that appeared in the April 13, 1976 edition of the National Enquirer.

Despite the fact that Calder knew that none of the libelous material could be substantiated, he insisted on using the words "we understand" as a modifier so that a reader could conclude that even though the defendant had no personal knowledge of the events—that the incident *could have* occurred. It should be noted in passing that the March 2, 1976 gossip column contains an apology to Steve Allen for falsely accusing him of smashing in a glass door of the William Morris Agency. The columnist *unequivocally* observed that Steve Allen is not the window breaking type without prefacing the phrase with the words "we understand."

Calder and Pope's cavalier approach to plaintiff's demand for retraction was simply another manifestation of bad faith and malice.

Included within the sum of $300,000 compensatory damages was the sum of $299,750 general damages,[1] representing the jury's award for plaintiff's emotional distress. Plaintiff correctly felt that the article portrayed her as being drunk, rude, uncaring and abusive. This portrayal was communicated to approximately sixteen million readers nationally.

Burnett testified, "What really hurts is that I know most people believe what they read." This belief was reinforced when she was taunted by a New York cab driver, whom she never met before, "Hey, Carol, I didn't know you like to get into fights."

Plaintiff is a person who is very sensitive to the problems of alcoholism. Both her parents died at the age of 46 from complications brought about by alcohol abuse. As a result of her tragic experience, Carol Burnett became active in anti-alcohol work. Since the defendant's publication, she was worried about being viewed by the public as a hypocrite if and when she spoke out against alcohol abuse.

While the record is clear that she suffered no actual pecuniary loss as a result of the libelous article, she had every right to suffer anxiety reactions in the immediate aftermath of the March 2, 1976 article and in the ineffectual correction. Emotional distress is more difficult to quantify than pain and suffering, but it is no less real. A review of other verdicts for emotional distress is not particularly helpful since the facts of each case vary significantly. The fact that defendant's false publication was communicated to sixteen million readers coupled with an inadequate correction, is of substantial significance in measuring the extent of plaintiff's emotional distress. Finally, the only residual aspect of emotional distress which has lingered with plaintiff since the immediate aftermath of the publication is the fact

1. Plaintiff claimed special damages of $250.00, a sum expended for attorneys fees in order to obtain a retraction.

she occasionally gets a little paranoid about talking too loudly in restaurants.

Defendant points to the fact that Burnett never sought the services of a psychiatrist, psychologist or counselor. Plaintiff acknowledged that she was able to set aside her anxiety to the point where she was able to function in her profession. Miss Burnett should be commended for not seeking the unnecessary services of some "phony build up artist" in order to inflate her damages. She should not be penalized for self-treating.

The court finds the plaintiff was a highly credible witness who did not exaggerate her complaints. Nevertheless, the jury award is clearly excessive and is not supported by substantial evidence. The court finds that the sum of $50,000.00 is a more realistic recompense for plaintiff's emotional distress and special damage.

In reviewing the award of $1,300,000 in punitive damages the court must consider the reprehensibility of defendant's acts, the wealth of the defendant and whether punitive damages bear a reasonable relationship to actual damages.

The evidence before the court cries out for a substantial award of punitive damages. The conduct of the defendant was highly reprehensible. The acts of fabrication and reckless disregard by Brian Walker are both clearly proscribed by California Civil Code section 3294. Failure by top management to publish an adequate correction is substantial evidence of malice and bad faith.

The defendant's net worth amounted to approximately $2,600,000 and it had earnings of $1,300,000 after taxes for the last ten month period. The court will not consider any evidence not before the jury, to wit: Mr. Pope's salary and dividends. The function of deterrence will not be served if the wealth of the defendant will allow it to absorb the award with little or no discomfort and by the same token, the function of punitive damages is not served by an award that exceeds the level necessary to properly punish and deter.

This court has the distinct impression, after listening to the testimony of certain officers and employees of the *National Enquirer*, that the defendant has absolutely no remorse for its misdeeds. The only issue defendant has not seriously contested is that the libelous statements were, in fact, false. Couri Hay, the admittedly untrustworthy tipster, whose misinformation started this travesty, was promoted to gossip columnist shortly after the article in question was published—a position he still held during the trial. Brian Walker only recently left the employ of defendant. Haydon Cameron, the spokesman for the defendant, asserts that it is the policy of the *National Enquirer* to publish two or three unflattering articles about celebrities every week.

The defendant engages in a form of legalized pandering designed to appeal to the readers' morbid sense of curiosity. This style of journalism has been enormously profitable to the defendant. While the First Amendment to the United States Constitution permits such journalistic endeavor, it does not immunize the defendant from accountability when the rules are broken in such a flagrant manner.

An award of $1,300,000 will probably not amount to "capital punishment" (bankruptcy), as publicly espoused by defendant's counsel after the jury verdict, because of the defendant's strong cash position. The court finds that it is excessive because it does not bear a reasonable relationship to the compensatory damages that amount to only $50,000. A review of California case law indicates that appellate courts have not sanctioned any particular ratio of general and punitive damages. Each case turns on its own set of facts.

The court finds that there is substantial evidence in the record to support an award of $750,000 in punitive damages, a sum which should be sufficient to deter the defendant from further misconduct.

The motion for judgment notwithstanding the verdict is denied. The motion for new trial is denied because plaintiff accepted the remittitur in open court reducing actual damages to $50,000 and punitive damages to $750,000.

COMMENT

A California Court of Appeals later reduced the punitive damages award to $150,000. See *Burnett v. National Enquirer*, 9 Med.L.Rptr. 1921, 144 Cal. App. 3d 991 (1983), appeal dismissed, 104 S.Ct. 1260 (1984). The Court of Appeal gave Burnett the choice of accepting the lower award or of facing a new trial on the issue of punitive damages. It also gave credence in its complex opinion to what a New York trial judge said about malice in 1898:

> The jumble in some modern textbooks on slander and libel concerning malice, actual malice, malice in law, malice in fact, implied malice and express malice (all

> derived from judicial utterances, it is true), is a striking testimony of the limitations of the human mind.[119]

Although the *Enquirer*, *Hustler*, and *Penthouse* are hardly the standardbearers of American journalism, their legal travails involve principles of constitutional law common to all publications. That it can happen to mainline news media is illustrated by the Brown & Williamson suit brought against CBS and Chicago TV anchorman Walter Jacobson, a case referred to in the opening pages of this chapter.

A CBS news report, misrepresented as a commentary, accused a cigarette manufacturer of linking smoking to "pot, wine, beer and sex" in order to attract young people to the habit. In the "commentary" Jacobson called the company "liars." The most compelling evidence of actual malice, in the opinion of the court, was the intentional destruction of documents critical to the case, contrary to CBS's own policy. Segments relevant to actual malice in the opinion of the U.S. Court of Appeals for the Seventh Circuit follow:

BROWN & WILLIAMSON v. JACOBSON

14 MED.L.RPTR. 1497, 827 F.2D 1119 (7th CIR. 1987).

BAUER, C. J.

* * *

The attitude of most knowledgeable and disinterested persons toward the tobacco industry is certainly negative; at least it has been negative for the past decade. In such an atmosphere, it becomes difficult to imagine how the tobacco people can be libeled. The bashing of the industry by government and private groups has become a virtual cottage industry. This case, however, demonstrates that general bum raps against the whole tobacco industry are different from specific accusations of skulduggery by a specific company or person. And this case involves some very specific statements against a very specific company in the tobacco industry. The facts are as follows: Walter Jacobson, an employee of the CBS-owned Chicago television station WBBM-TV, has served for a number of years as the co-anchor for the 10 p.m. weekday newscasts. In addition to fulfilling his duties as an anchorman, Jacobson also delivers a nightly feature known as "Walter Jacobson's Perspective." When Jacobson delivers his Perspectives, he moves from his normal location at the anchor desk, which is located in the station's newsroom rather than in a separate studio, to a special "Perspective" section of the newsroom. During the feature, the word Perspective appears on the screen with Mr. Jacobson's signature below it. The Perspective segments are rebroadcast the following day during WBBM's early evening news broadcasts.

As part of its activities promoting the quality of its news personalities, CBS ran ads which stated that "[w]ith ten years of experience on our anchor desk, [Walter Jacobson] has established himself as the city's most savvy political reporter * * * with contacts as solid as his credentials." Jacobson was touted by CBS as someone who "pulls no punches" and "lays it on the line." According to the ads, he is a journalist who will "make you angry. Or make you cheer. Walter Jacobson is liable to evoke all kinds of reactions * * * and he'll always leave you informed." When he delivered his Perspective on November 11, 1981, he made the Brown & Williamson Tobacco Corporation very angry.

Jacobson's November 11 Perspective was the third in a series on the cigarette industry. The first in the series dealt with the political influence of tobacco manufacturers while the second in the series discussed the failure of cigarette manufacturers to incorporate fire prevention features into their products. The final segment in the series, which was promoted on the day of the broadcast as "[t]obacco industry hooks children * * * Tonight at 10:00," dealt with the marketing practices of the cigarette industry. After Jacobson had moved to the Perspective section of the newsroom, his co-anchor, Harry Porterfield, introduced Jacobson's Perspective by stating:

> For the past two nights in Perspective, Walter has been reporting on the companies that make cigarettes and the clout they carry in Washington.
>
> Tonight he has the last in his series of special reports, a look at how the cigarette business gets its customers.

Jacobson then delivered his Perspective:

> Ask the cigarette business how it gets its customers and you will be told over and over again, that it's hard these days to get customers; that the good old days are gone

119. *Ullrich v. New York Press Co.*, 50 N.Y.S. 788 (1898).

forever. The good old ads for cigarettes cannot be used anymore. Old St. Nick, for example, pushing Lucky Strikes because * * * "Luckies are easy on my throat." The cigarette business can't count on that kind of an ad anymore. Or the doctors pushing Camels; more doctors smoke Camels than any other cigarette. The business can't count on an ad like [that] anymore, either.

Nor can it count anymore on television. Pushing cigarettes on television is prohibited. Television is off limits to cigarettes. And so the business (the killer business) has gone to the ad business in New York for help; to the slicksters on Madison Avenue, with a billion dollars a year for bigger and better ways to sell cigarettes.

Go for the youth of America. Go get 'em guys. Get some young women, give them some samples. Pass them out on the streets, for free, to the teenagers of America. Hook 'em while they're young. Make 'em start now. Just think how many cigarettes they'll be smoking when they grow up.

Or, here's another cigarette-slickster idea. The Merit report wants your opinion; a survey, they say, on current events. A $270,000 Merit wagon. Walk in, children, and let us know what you think about President Reagan. Get involved, children. Thank you, on behalf of Merit cigarettes. Or another cigarette-slickster idea. Go for the children through sports. You'll never guess who's likely to be a winner at the Winter Olympics. How about Rudd Pyles, from Colorado? But better than that, how about Benson & Hedges? At-a-way. The best possible way to addict the children to poison. There are more subtle ways, as well. A scene, for example, in Superman II. A bus crashing into a truck. Could be any truck, couldn't it? But, in a movie that's being seen by millions of children who love Superman, the bus crashes into a Marlboro truck.

Jacobson then reached the portion of his Perspective that the jury and the district court found libeled Brown & Williamson:

The cigarette business insists, in fact, it will swear up and down in public, it is not selling cigarettes to children; that if children are smoking (which they are, more than ever before), it's not the fault of the cigarette business. Who knows whose fault it is, says the cigarette business.

That's what Viceroy is saying. Who knows whose fault it is that children are smoking? It's not ours. Well, there is a confidential report on cigarette advertising in the files of the federal government right now, a Viceroy advertising [sic]. The Viceroy strategy for attracting young people (starters, they are called) to smoking.

"For the young smoker a cigarette falls into the same category with wine, beer, shaving, or wearing a bra," says the Viceroy strategy. "A declaration of independence and striving for self-identity. Therefore, an attempt should be made," says Viceroy, "to present the cigarette as an initiation into the adult world, to present the cigarette as an illicit pleasure, a basic symbol of the growing-up maturity process. An attempt should be made," says the Viceroy slicksters, "to relate the cigarette to pot, wine, beer, and sex. Do not communicate health or health-related points."

That's the strategy of the cigarette-slicksters, the cigarette business which is insisting in public * * * we are not selling cigarettes to children.

They're not slicksters. They're liars.

While Jacobson was making his statements about Viceroy, superimposed on the screen was a current Viceroy ad featuring two packs of Viceroy Rich Lights, a golf ball, and a part of a golf club. The relation of that particular ad to "pot, wine, beer, and sex" advertisements is not clear. Jacobson testified that the golf club ad was used only as a means of identifying the brand name for the viewer.

The "confidential report in the files of the federal government" referred to by Jacobson was a report by members of the staff of the Federal Trade Commission (FTC). The report first came to the attention of Jacobson's researcher, Michael Radutzky, in the summer of 1981 when Radutzky saw an article in a Kentucky newspaper that referred to the FTC report. Radutzky, who went on to become the producer of the 5:00 p.m. and then the 10:00 p.m. news at WBBM-TV, received copies of the pertinent pages of the FTC report from the author of the newspaper article.

The FTC report stated that documents obtained from Brown & Williamson and one of its advertising agencies, Ted Bates & Company, "set forth the development of an advertising strategy for Viceroy cigarettes designed to suppress or minimize public concern about the health effects of smoking." The report stated that the documents showed that Bates, which had the Viceroy account in 1975, requested a marketing and research firm, Marketing and Research Counselors, Inc., (MARC) to assist Bates in developing a marketable image for Viceroy cigarettes. After conducting a number of focus group interviews on the subject of smoking, MARC delivered a report, which was authored by N. Kennan, to Bates. The MARC report made recommendations on what its author thought were the important elements of a successful cigarette advertising campaign. As sum-

marized by the FTC report, "the basic premise of the [MARC] report's recommendations is that since there 'are not any real, absolute, positive qualities and attributes in a cigarette,' the most effective advertising is designed to 'reduce objections' to the product by presenting a picture or situation ambiguous enough to provide smokers with a rationale for their behavior and a means of repressing their health concerns about smoking."

The MARC report discussed in a later chapter how "starters" could be introduced to the Viceroy brand. The FTC report quoted the MARC report's discussion of how the young smoker related to cigarettes. "For them," the MARC report opined, "a cigarette, and the whole smoking process, is part of the illicit pleasure category. * * * In a young smoker's mind a cigarette falls into the same category with wine, beer, shaving, wearing a bra (or *purposely* not wearing one), declaration of independence and striving for self-identity. For the young starter, a cigarette is associated with introduction to sex life, with courtship, with smoking 'pot' and keeping late studying hours." FTC report at 17 (quoting MARC report) (emphasis in MARC report). The MARC report went on to suggest a strategy for attracting "starters" to the Viceroy brand based "on the following major parameters":

> Present the cigarette as one of a few initiations into the adult world.
> Present the cigarette as part of the illicit pleasure category of products and activities.
> In your ads create a situation taken from the day-to-day life of the young smoker but in an elegant manner have this situation touch on the basic symbols of the growing-up, maturity process.
> To the best of your ability, (considering some legal constraints), relate the cigarette to "pot," wine, beer, sex etc.
> *Don't* communicate health or health-related points.

FTC report at 18 (quoting MARC report). The FTC report then stated that Brown & Williamson had adopted many of the ideas contained in the MARC report in the development of an advertising campaign for Viceroy. Specifically, the reported noted that in a document it had received directly from Brown & Williamson, rather than from a advertising agency or a firm hired by the advertising agency, Brown & Williamson had indicated that it must provide consumers with a rationalization for smoking and a "means of repressing their health concerns about smoking a full flavor Viceroy." FTC report at 18 (quoting Viceroy strategy paper dated March 3, 1976). The Viceroy strategy paper also indicated that other major full flavor brands had either consciously or unconsciously "coped" with the smoking and health issues in advertising by appealing to repression. The strategy paper suggested that Viceroy's advertising objective should be to "communicate effectively that Viceroy is a satisfying flavorful cigarette which young adult smokers enjoy, by providing them a rationalization for smoking, or, a repression of the health concern they appear to need." FTC report at 19 (citing Viceroy strategy paper).

The FTC report then cited three Viceroy advertising strategies that were used in a six-month media campaign conducted in three test cities in 1976. The first campaign was the "satisfaction" campaign which was intended to provide a "rationalization." Specifically, the intention was to convey the message that "Viceroy is so satisfying that smokers can smoke fewer cigarettes and still receive the satisfaction they want." The second campaign, the "tension release" campaign, was intended to convince the smoker that Viceroy's satisfying flavor would help the smoker in a tense situation. The third campaign, the "feels good" campaign, was intended to repress concerns that smokers might have about smoking by justifying it with the simple slogan "if it feels good, do it; if it feels good, smoke it." FTC report at 20 (citing internal memorandum dated July 14, 1976). None of these campaigns was cited in the FTC report as an example of Viceroy implementing the MARC report strategy to relate the cigarette to "pot," wine, beer, and sex. The FTC report stated, however, that Brown & Williamson documents did indicate that the company had "translated the advice on how to attract young 'starters' into an advertising campaign featuring young adults in situations that the vast majority of young people probably would experience and in situations demonstrating adherence to a 'free and easy, hedonistic lifestyle.' " FTC report at 20 (citing document titled Viceroy Marketing/Advertising Strategy dated January 26, 1976).

After reviewing the report, Radutzky contacted members of the FTC staff who had drafted the report to confirm that the partial copy of the report he had received from the Kentucky newspaper was accurate. The staff members told Radutzky that they could not send him the confidential documents cited in

the report but did confirm that the report and its findings were accurate.

Radutzky also spoke on at least two occasions with Brown & Williamson public relations officer Thomas Humber. At trial, CBS introduced two internal Viceroy documents, which were written by Humber for his superiors, that relate the substance of the conversations that Humber had with Radutzky. In a conversation on November 4, 1981, Humber stated that the internal Viceroy memoranda could only be understood in context. The context included the fact that the Ted Bates agency was told prior to their submission of the memo that it was in trouble on the Viceroy account because Brown & Williamson was unhappy with its work. Humber told Radutzky that Brown & Williamson had not requested any ad campaign similar to the one suggested by Bates. Moreover, he stated that Brown & Williamson had rejected the strategy embodied in the documents submitted by Bates. Humber also noted that "thus far [we] have been unable to find copies of the proposed ads, to the best of our knowledge, no ads as described by the memo were ever actually published." Radutzky was also informed that partly as a result of Brown & Williamson's dissatisfaction with the specific proposal submitted by Bates, Brown & Williamson had terminated Bates' participation in Viceroy advertising. In a conversation with Radutzky on November 5, Humber told Radutzky that all Brown & Williamson ads must have the approval of the legal department and the highest levels of senior management. He also stated that the legal department did not get involved in the creative process and did not review the ads until they "are at the point of worked-up ads." Humber stated that the proposals referred to in the FTC report were similar to a proposed libelous story that a young inexperienced reporter might submit to his editors but that was corrected by a news organization's editors and attorneys. Humber stated that in such a case no legitimate criticism could be leveled at the news organization. He clearly implied that because Brown & Williamson had never run any of the controversial proposals as ads, it would be unfair to criticize Brown & Williamson simply because such proposals had been made by individuals who could not authorize an ad campaign.

In addition to contacting Brown & Williamson, Radutzky, on Jacobson's request, conducted a search for "pot," wine, beer and sex ads that were used by Viceroy. Unable to locate any such ads, Radutzky reported the result of his search to Jacobson. Radutzky also commented to Jacobson prior to the broadcast that Jacobson's script for the broadcast omitted Brown & Williamson's statement that it had never adopted a "pot," wine, beer or sex strategy. Jacobson did not alter his script.

During the course of his investigation, Radutzky made contemporaneous interview notes and extensive handwritten notes on his copy of the FTC report. In addition, he developed an eighteen-page sample script for the broadcast. The sample script, which was duplicated at least six times and distributed to various people in the newsroom including Walter Jacobson, reported "both sides of the issue." The jury never saw much of Radutzky's work product. Prior to trial, Radutzky destroyed all of his contemporaneous interview notes, five of the ten pages of the FTC report including those pages that contained the recommendations from the MARC report, and fifteen of the original eighteen pages of his sample script. CBS was unable to produce any of the copies of the sample script that Radutzky had distributed in the newsroom.

Radutzky testified that he destroyed his materials as part of a general housecleaning after the original complaint in this case had been dismissed by the district court but before he became aware that Brown & Williamson appealed that dismissal. His destruction of the documents contravened a CBS retention policy that provides that once litigation has commenced "any and all related materials should be retained until specifically released." The policy also provides that "[o]bviously if there is a * * * pending legal action, our policy is to retain all pertinent materials unless specifically released by the Law Department." Although Radutzky conceded that he did destroy the documents without the approval of the Law Department at CBS, he stated that he was unaware that the policy existed.

When Radutzky destroyed the documents, he was no longer assigned to the Perspective unit and therefore his desk was in a completely different section of the newsroom. Nonetheless, he apparently made a point of "cleaning house" in the Perspective section of the newsroom even though he had not worked there for several months.

Brown & Williamson attempted to prove that Jacobson's charges were false by introducing every Viceroy advertisement published between 1975 and

1982. They argued to the jury that none of these advertisements was a "pot," wine, beer, or sex ad. In addition, Robert Pittman, the Brown & Williamson Vice President whose approval was required before any Viceroy ad could be published, testified that he had never seen the MARC report prior to the litigation in this case. Pittman also stated that Brown & Williamson had never asked Bates to design any "pot," wine, beer, and sex ads. William Scholz, the Bates employee in charge of the Viceroy account, confirmed that Brown & Williamson had never asked Bates to utilize a "pot," wine, beer, and sex strategy in developing advertisements.

Brown & Williamson put forth evidence that it adhered vigorously to the Cigarette Advertising Code, which bars advertising to persons under 21. In addition to adhering to the Code, Brown & Williamson took the additional step of establishing a detailed procedure to ensure that its advertising agencies did not use models who either were or appeared to be younger than 25. When undertaking advertising campaigns that involved the distribution of samples, Brown & Williamson required the individuals distributing the samples to sign statements promising not to distribute cigarettes to people under 21.

Walter Jacobson also testified at trial. Jacobson indicated that he had read the FTC report prior to delivering his Perspective and was aware that the FTC report was quoting a document prepared by Market and Research Counselors. He agreed that the way in which the Perspective was delivered, with the Viceroy graphics on the screen at the time he was referring to the "pot," wine, beer, and sex strategy, would convey the impression that the "pot," wine, beer, and sex comment was made by Viceroy itself rather than MARC. After agreeing that such an impression would be created, Jacobson added that "I even said that 'Viceroy says.' "

Jacobson's testimony indicated that he had reviewed Radutzky's sample script prior to delivering the Perspective. Jacobson corroborated part of Radutzky's testimony by confirming that Radutzky had told him that he had been unable to find any ads showing that Brown & Williamson had implemented a "pot," wine, beer, and sex advertising strategy. Jacobson was also aware that Radutzky had spoken with Brown & Williamson and that the company denied adopting the strategy and therefore had no advertisements that they could supply that would reflect that strategy. According to Jacobson, he paraphrased Viceroy's denial in the broadcast when he stated "Viceroy insists * * * whose fault is it that children are smoking? It's not ours."

Jacobson also agreed, at least at one point, that it would be fair to say that when he wrote the Perspective script he wrote it in the present tense with respect to Viceroy and the purported "pot," wine, beer, and sex strategy. For example, he agreed that when he used a phrase such as "[t]hat's what Viceroy is saying," he realized that it would be interpreted by any reasonable listener as referring to the present tense. At other points during his testimony, however, Jacobson appeared to state that some language used during the broadcast was past tense. While recognizing that there was no indication in the Perspective that the strategy mentioned in the MARC report had been recommended in 1975, six years before the broadcast, Jacobson testified that because the FTC report described it as "the Viceroy strategy" he did not believe that he gave the viewer "an impression of time that varies from the facts." Under further questioning, Jacobson did agree that the phrase "[a]n attempt should be made, says the Viceroy slicksters to relate the cigarette to 'pot,' wine, and beer" would be "more current" than the phrase "the Viceroy strategy." [2]

Jacobson also noted that there was a distinction between a report, an analysis, a commentary and an editorial. An example of a report, according to Jacobson, would be if a newsperson went on the air and said "[t]he FTC says that Viceroy did such and such, and Viceroy says it did not." He agreed that when delivering such a statement a reporter should try to be fair and accurate. Jacobson also stated that "[m]y life is research" and indicated that what he said in the Perspective was "absolutely true."

On direct examination, Jacobson's counsel brought out his client's state of mind at the time of the broadcast. Jacobson asserted that he "believed" at the time he delivered the Perspective that it was truthful and that it was a fair and accurate summary of what the Federal Trade Commission had said about Viceroy cigarettes. Jacobson also testified about what he "intend[ed]" to inform the viewers about Viceroy when he "sat down to write" the Perspective. When cross examined, Jacobson confirmed that he

2. Jacobson also agreed that when he said "Viceroy slicksters" he was talking about Brown & Williamson and the people who make Viceroy cigarettes as opposed to their advertising agency.

had testified on direct examination about what he was thinking when he wrote the script and attempted to refute the allegation that he "really [had] no recollection at all of what [he] thought about in" preparing the script by stating that such an assertion was "absolutely untrue." Brown & Williamson's counsel then read Jacobson's 1984 deposition in which the following exchange took place:

Question: I just want to know if you have a recollection whether in 1981, when you called the manufacturers of Viceroy cigarettes liars, you were attempting then to be objective?

Jacobson: I don't remember what I was thinking now when I wrote that three and a half years ago.

Question: Can you recall whether you wrote the November 11, 1981 script, you were trying to fairly present both sides of the question?

Jacobson: I don't remember what I was thinking when I wrote that script. It's hard to remember three and a half years ago.

Question: You don't remember what was in your mind?

Jacobson: Right.

Question: You do remember you wrote the script though?

Jacobson: I don't remember writing it. I do see it.

Question: You don't remember writing it?

Jacobson: Yes, I mean—I don't remember sitting at my typewriter, what I was thinking and how my hands were working. I see the script. It has a date. I wrote it, obviously, and I remember being involved in a series of reports on that subject.

On redirect examination, Jacobson asserted that his recollection of his state of mind at the time of the broadcast had improved from the time of his deposition to the time of the trial because he had "gone over everything that ha[d] been given to [him] by a whole team of lawyers" including the script that he used during his Perspective and the videotape of the actual broadcast. Jacobson stated that as a consequence his memory was jarred and he was able to "just recall more specifically some things that I didn't recall from before."

* * *

Disregarding Jacobson's testimony (including his admission that he intended to attribute the MARC language to Viceroy), the evidence shows that Jacobson received and reviewed the FTC report. In addition, he was aware that Radutzky's search for "pot," wine, beer, and sex ads had been unsuccessful and that Brown & Williamson had denied publishing ads implementing the strategy. Defendants argue vigorously that each of these facts, standing alone, cannot provide clear and convincing proof of actual malice. Responsive Brief at 26–31 (citing *Time, Inc. v. Pape*, 401 U.S. 279, 289–92 (1971) (rational misinterpretation of government report that "bristled with ambiguities" does not create jury issue on actual malice); *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 121 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977) (actual malice cannot be predicated solely on mere denials)); see also *Bose*, 466 U.S. at 511 (there is a significant difference between proof of actual malice and mere proof of falsity); *Woods v. Evansville Press*, 791 F.2d 480, 489 (7th Cir. 1986) (reporter's journalism skills are not on trial in a libel case). The cases defendants cite are unlike this one because none of them combines a distortion of a government report with a vehement denial of the "pot," wine, beer, and sex charge and an investigation by the journalist that tended to corroborate the denial. Moreover, none of those cases had evidence of document destruction. We conclude that when the intentional destruction of the sample script (which Jacobson did review prior to delivering the broadcast) is considered along with the distortion of the FTC report, Brown & Williamson's denial, and the corroboration of the denial, Brown & Williamson has met its burden of proving that Walter Jacobson and CBS acted with actual malice.[9]

Taking only the first two factors into account, we conclude that the district court's decision upholding the jury's punitive damage award was clearly correct. Brown & Williamson's attorney's fees were $1,360,000 prior to post-trial motions. Jacobson's net worth including his contract with CBS was over $5,000,000, while CBS's net worth was approximately one and one-half billion dollars. The punitive damage award of $50,000 against Jacobson is a modest one considering his net worth. It might provide some deterrent value without being destructive. In light of the attorney's fees that Brown & Williamson incurred and CBS's substantial net worth, the

9. Brown & Williamson also argues that pressures to produce interesting stories brought on by the November "sweeps" is "strong proof of actual malice." Ratings during "sweeps" months such as November and May are especially important in determining the rates that advertisers will pay to stations to promote their products. * * *

$2,000,000 award against CBS is reasonable. The award might provide some deterrence to future misconduct and yet will not burden CBS with a debt that it cannot easily discharge.[13] See also *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 540 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983) (upholding $300,000 punitive damage award).

One of the most important functions of the court system in the United States is to protect the freedom of the press. See, *e.g.*, *Bose v. Consumers Union*, 466 U.S. 485 (1984); *New York Times v. United States*, 403 U.S. 713 (1971); *New York Times v. Sullivan*, 376 U.S. 254 (1964). The federal courts of appeals including this one have played an important role in fulfilling this function. See, *e.g.*, *Tavoulareas v. Piro*, — F.2d — (D.C. Cir. 1987) (en banc); *Sunward Corporation v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 538 (10th Cir. 1987); *Woods v. Evansville Press*, 791 F.2d 480, 489 (7th Cir. 1986). In considering the merits of this case, this court has granted the defendants the fullest possible review; the standard of review that we have used, giving essentially no deference to the jury's findings, may be far broader than the review to which the defendants are entitled. See *Bose*, 466 U.S. at 499–500 (constitutionally based rule of independent review permits reviewing court to give "due regard" to the trial court's opportunity to observe the demeanor of the witnesses). After conducting such a review, it is unfortunate that we are forced to conclude that this case does not involve freedom of the press. Rather, it is one in which there is clear and convincing evidence that a local television journalist acted with actual malice when he made false statements about Brown & Williamson Tobacco Corporation. Because false statements of fact made with actual malice are not protected by the First Amendment, this court is required to affirm the district court's finding that Jacobson and CBS libeled Brown & Williamson.

Affirmed in Part, Reversed in Part.

COMMENT

In early May 1988, the United States Supreme Court declined to hear the case. The result was to certify the largest libel award ever upheld on appeal: $3.05 million.

This costly case, and others, suggests that news organizations should have a standardized, rationalized policy on what to do with notes and other reportorial records. Unfortunately, reporters' notes are often destroyed. Memos about errors or potential lawsuits may be routed through lawyers to give them the attorney-client privilege. Anything circumventing this procedure may be exposed on discovery. The problem with this is that lawyers begin to assume editorial functions, and judges measure journalism against their own fanciful standards of investigative reporting.[120]

Live broadcasts are particularly hazardous because news directors have little control over defamatory statements by witnesses or law enforcement officers.[121]

William Tavoulareas and his son Peter sued the *Washington Post* for libel when the newspaper reported that Tavoulareas, president of Mobil Oil, had used his influence to set up Peter as a partner in a shipping firm that did millions of dollars of business with the oil company. After more than five years of litigation, a United States court of appeals, examining the entire record, found the original stories substantially true and declared that hostility toward the subject of an investigation does not in itself support a charge of actual malice against a reporter. The jury had found for plaintiffs; the judge overturned its verdict.

The case is important for a number of seemingly unrelated reasons. Tavoulareas had made himself a public figure through contentious speeches and the Mobil advertorials that appeared in some liberal periodicals. In passing, the court may have struck a blow against libel *per quod* when it noted that "nothing in law or common sense supports saddling a libel defendant with civil liability for a defamatory

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13. Defendants also argue that the punitive damage award violates the Eighth Amendment which provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Even if we were to accept the defendants' argument that the excessive fines clause applies to civil proceedings, we conclude that the punitive damage award in this case is not excessive.

120. Lyle Denniston, Supreme Court reporter for the Baltimore *Sun* and absolutist in his support for freedom of speech and press, believes that Federal District Court Judge Oliver Gasch in the case of *Tavoulareas v. Washington Post*, 567 F.Supp. 651, 9 Med.L.Rptr. 1553 (D.D.C. 1983), functioned as an editor in his twenty-three-page opinion by measuring the newspaper against his personal standard of "fair, unbiased, investigative journalism." Denniston expressed this in columns and public presentations.

121. *KARK-TV v. Simon*, 656 S.W.2d 702 (Ark. 1983).

implication nowhere to be found in the published article itself."

On the negative side, the case provides further evidence of Judge Sofaer's concern in *Sharon* that jurors tend to confuse falsity with actual malice. It is for this reason that he asked the jurors in that case to consider the two matters separately. No wonder the confusion. In *Tavoulareas* the court says that "substantial truth precludes any reasonable inference of actual malice," and "defamation plaintiffs cannot show actual malice in the abstract; they must demonstrate actual malice in *conjunction* with a false defamatory statement."

But the court does provide this helpful elaboration on actual malice, using the influential *St. Amant* case as a model.

TAVOULAREAS v. WASHINGTON POST

13 MED.L.RPTR. 2377, 817 F.2D 762, (D.C. CIR. 1987).

STARR and WRIGHT, J. J.:

* * *

It is well established that the "serious doubt" standard requires a showing of subjective doubts by the defendant. It does not turn on whether a reasonably prudent person would have published under the circumstances. The rejection of an objective standard of care, however, does not mean that libel defendants can defame with impunity merely by testifying that they published the challenged statements with the belief that they were true. To the contrary, a plaintiff may prove the defendant's subjective state of mind through the cumulation of circumstantial evidence, as well as through direct evidence. See, *e.g.*, *Herbert v. Lando*, 441 U.S. 153, 160 (1979); *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

At the same time, actual malice does not automatically become a question for the jury whenever the plaintiff introduces pieces of circumstantial evidence tending to show that the defendant published in bad faith. Such an approach would be inadequate to ensure correct application of both the actual malice standard and the requirement of clear and convincing evidence. Thus, as all parties and *amici* agree, the Supreme Court has directed us to "exercise particularly careful review," and to "make an independent examination of the whole record." *Edwards*, 372 U.S. at 235, *quoted in Sullivan*, 376 U.S. at 285.

This constitutionally mandated duty of independent review has been applied unflinchingly. The Supreme Court and other courts have more often than not concluded that public figure libel plaintiffs failed to adduce evidence of sufficient clarity to convincingly support a jury finding of actual malice. For example, in the leading case of *St. Amant v. Thompson*, 390 U.S. 727, the Supreme Court reversed a jury finding of liability in a public official's defamation action. Because of *St. Amant's* importance in actual malice analysis, we pause to recall the facts of that case. Briefly stated, Deputy Sheriff Thompson sued St. Amant, a candidate for public office, for repeating in the course of a televised speech the false allegation that Sheriff Thompson had taken bribes from a local Teamsters Union president. The record showed that St. Amant had based his allegation exclusively on information provided by an active member of a dissident faction within the Teamsters. At the time, the dissident faction was locked in a struggle for control against the faction led by the Teamster's official alleged to have paid bribes to the Sheriff. Although he had no knowledge of the source's reputation for veracity, St. Amant failed to investigate independently the obviously serious charge of bribery and failed to seek confirmation of the information from others who might have known the facts. Notwithstanding this evidence, the Supreme Court found the record insufficient to support a finding of actual malice.

Before evaluating the specific record before it, the *St. Amant* Court provided examples of the kind of proof that would likely support a finding of actual malice. The examples fell into three general categories: evidence establishing that the story was (1) "fabricated"; (2) "so inherently improbable that only a reckless man would have put [it] in circulation"; or (3) "based wholly on an unverified anonymous telephone call" or some other source that the defendant had "obvious reasons to doubt." 390 U.S. at 732. After setting forth these illustrative examples, the Court held that the evidence before it, by comparison, was clearly inadequate. St. Amant's failure to investigate was deemed not indicative of actual malice, inasmuch as the plaintiff had not proven "a low community assessment of [the source's] trustworthiness or unsatisfactory experience with him by St. Amant." *Id.* at 733. The court also found support

for its decision in evidence tending to show that St. Amant published the charge in good faith, including St. Amant's testimony that he had verified other aspects of his source's information and evidence that the source had sworn to his answers in the presence of newsmen.

* * *

As the District Court correctly observed in the case at hand, the Supreme Court's reasoning and result in *St. Amant* are instructive for inferior tribunals in attempting faithfully to apply the "serious doubt" test. 567 F.Supp. at 656. The examples provided there of when a jury may reasonably infer actual malice from circumstantial evidence are by no means exhaustive, but, as numerous courts have recognized, constitute useful benchmarks for lower courts to employ in determining whether a record is sufficient to sustain a finding of constitutional malice. See, *e.g.*, *Marcone v. Penthouse International Magazine For Men*, 754 F.2d 1072, 1089–90 (3d Cir.), *cert. denied*, 106 S.Ct. 182 (1985); *Hunt v. Liberty Lobby*, 720 F.2d 631, 643–46 (11th Cir. 1983). When the entire record in this case is scrutinized in light of *St. Amant* and other governing precedents, it is clear beyond cavil that Judge Gasch's decision to grant j.n.o.v. [judgment notwithstanding the verdict of the jury] was fully justified.

COMMENT

Additional negative fallout from the *Tavoulareas* case was that it played a major role in the establishment by some major corporations of plaintiff insurance for their executives and in the founding in 1984 of the Libel Prosecution Resource Center, a fifty-state reference network of plaintiff libel lawyers. Sponsored by the American Legal Foundation, the new Center was meant to counter the Libel Defense Resource Center, already functioning for the benefit of defendants.

The Capital Legal Foundation provided funding and attorneys for the Westmoreland suit, and Accuracy in Media, a press monitoring group, has assisted libel plaintiffs in the past.

Public or Private Person

At least three forms of fault have been identified: *Negligence* must be demonstrated by private-person plaintiffs; *knowing falsehood* or *reckless disregard* of truth or falsity by public-person plaintiffs, both public officials and public figures. The trick is to be able to tell one kind of person from another. Appellate courts have provided some guidance, but it is all too easy to get fooled. At first glance, both Elmer Gertz and Mrs. Firestone looked like public people. The Supreme Court said that in the circumstances of their cases they were not. In anticipating a defense, public or private person is one of the first major questions the prospective defendant must ask.

Public Officials

In this category are elected or appointed government officials. Elected officials are particularly vulnerable to criticism, not only in office but while running for office and upon leaving office. Law enforcement officers, because they wield power in the name of the state, fit the category; public school teachers and administrators because they influence the minds of the citizenry. *Rosenblatt v. Baer* (see p. 198) is still an important precedent: the closer an official to the levers of power, the more open he or she is to criticism; but not everyone employed by government (the janitor, for example) will have the same burden of fault to prove. Defamatory statements about public officials should have a bearing on that person's public responsibilities, whatever they are. "A charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's * * * fitness for office * * *," said the Supreme Court in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971). Consultants and aides to public officials may not qualify as "public officials," unless allegations made against them relate to their involvement in important public matters.[122] There are large patches of gray where engineers, architects, scientists, contractors, and developers supply services to government. When they participate in policymaking and their contributions have important public consequences, they may be open to criticism. But be careful! Even though judges will make the public/

122. *Lawrence v. Moss*, 639 F.2d 634 (10th Cir. 1981), cert. den. 451 U.S. 1031 (1981). But see, *Roche v. Egan*, 433 A.2d 757 (Me. 1981); *Reed v. Northwestern Publishing*, 471 N.E.2d 1071 (Ill. 1985).

private distinctions at the threshold and will be influenced by federal definitions, their decisions will continue to be arbitrary and ambiguous. A police informant was said not to be a public official.[123] A civilian jailer with no policymaking power did not fit the category.[124]

Without drawing any precise boundaries, Chief Justice Burger did suggest in footnote 8 in *Hutchinson v. Proxmire*, 5 Med.L.Rptr. 1279, 443 U.S. 111 (1979), that not all public employees are public officials. In that case the Court also held that Senator Proxmire, in making his often uninformed Golden Fleece award to a publicly funded research behavioral scientist, was not insulated by the Constitution's speech or debate clause from a libel suit based on a press release sent from his office. The speech or debate clause, Proxmire argued, gave absolute immunity to libel committed in the course of one's legislative duties or, more generally, as part of the "informing function" of the Congress. Has the Court overruled, without citing it, *Barr v. Matteo* (see this text, p. 192) in which it held the "utterance of a federal official to be absolutely privileged if made 'within the outer perimeter' of his duties?" Senator Proxmire retracted erroneous statements contained in his newsletter and paid Dr. Hutchinson $10,000 in a settlement. The United States Senate paid $125,000 out of public funds for Proxmire's defense.

Nor has the Court drawn boundaries between the public and private lives of public officials. Can the two be separated? What aspects of one's private life bear on one's fitness or capacity for public office? Does a stormy marriage negatively affect the decision-making capabilities of a head of state? Does a record of psychiatric treatment disqualify a person for the vice-presidency of the United States?

Public Figures

Pervasive, All-Purpose, or Public Personality. Famous, widely known people fall in this category, those whose names have become common currency worldwide. Performers, athletes, authors, those who depend upon publicity and public approbation for their fame and success. Would we argue about the public status of Meryl Streep, Pete Rose, or Tom Wolfe?

When a *Sports Illustrated* writer sued *New York Magazine* for criticizing his prose, a New York court said, "plaintiff not only welcomed but actively sought publicity for his views and professional writing and by his own purposeful activities thrust himself into the public eye. He had become a public personality."[125] One who had expansively extolled his literary and public past as an author, public speaker, and award winner could not escape the "pervasive public figure" label.

In *WTSP-TV v. Vick*, 11 Med.L.Rptr. 1543, 1544, 475 S.2d 703 (Fla.Cir.Ct. 1985), a corporation took on the mantle of public figure. "How much more public can any person or corporation be?" asked the court, although it may better have placed the regulated public television station in the "public official" category.

President Nixon's friend and financial adviser Charles G. (Bebe) Rebozo was said to be an all-purpose public figure. Rebozo is quoted in the court's opinion as touting his own visibility: "[W]hen you are traveling in the circles that I have traveled in there are press people all over the place." *Rebozo v. Washington Post*, 637 F.2d 375 (5th Cir. 1981), cert. den. 454 U.S. 964 (1981).

An Oregon bank was not a pervasive public figure. "We find," said the court, "that the bank does not have 'general fame or notoriety' in the community in which the article was published, nor does it exhibit 'pervasive involvement' in the affairs of society."[126]

If it is any help, a bigtime gangster, Johnny Carson's wife, Ralph Nader, and candidates for public office have been classified as all-purpose public figures. Actors, athletes, Nobel Prize winners, former Playmates, civil rights activists, professors, and columnists have been called limited purpose public figures. Obviously, context or circumstances make a difference.

Vortex or Limited Purpose. This is one of the slipperiest concepts in libel law. Public figures in this

123. *Jenoff v. Hearst Corp.*, 644 F.2d 1004 (4th Cir. 1981).
124. *Smith v. Copley Press*, 488 N.E.2d 1032 (Ill.App. 1986), cert. den. 93 L.Ed.2d (1986).
125. *Maule v. NYM Corporation*, 54 N.Y.2d 880, 883 (1981).
126. *Bank of Oregon v. Independent News*, 693 P.2d 35, rehearing denied en banc, 696 P.2d 1095, cert. den. 474 U.S. 826 (1986).

category are those who, standing in the wings or sitting in the audience, may, voluntarily or involuntarily, make brief appearances on the stage of life. Here today, gone tomorrow.

Gertz defined vortex public figures as those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." In *Firestone* the Court noted, "A person who engages in criminal conduct does not automatically become a public figure for purposes of comment on a limited range of issues relating to his conviction." To hold otherwise would create an "open season" for all who sought to defame persons convicted of crime.

In a companion case to *Hutchinson—Wolston v. Reader's Digest Association, Inc.*, 5 Med.L.Rptr. 1273, 443 U.S. 157 (1979)—a plaintiff who twenty years earlier had pleaded guilty to criminal contempt of court charges during grand jury investigations into spy charges was said not to be a public figure. Although Wolston at a point in time past had consciously and half voluntarily chosen not to appear before a grand jury, he had long since returned to private life and had made no effort at any time to inject himself into a public controversy in order to change its course.

"A private individual," wrote Justice William Rehnquist for the Court, "is not automatically transformed into a public figure by becoming involved in or associated with a matter that attracts public attention. To accept such reasoning would in effect re-establish the doctrine advanced by the plurality opinion in *Rosenbloom v. Metromedia*."

An older rule—once a public figure always a public figure—was suggested by the Sixth Circuit Court of Appeals in *Street v. National Broadcasting Co.*, 7 Med.L.Rptr. 1001, 645 F.2d 1227 (6th Cir. 1981), cert. dismissed 454 U.S. 1095 (1981). The plaintiff, whom NBC had assumed to be dead, had been a witness forty years before in the rape prosecutions of the nine young and black Scottsboro Boys. NBC's docudrama depicted a judge setting aside a guilty verdict because he did not believe Street's testimony. The Sixth Circuit held that once a person becomes a public figure in connection with a particular public controversy, that person remains a public figure for purposes of later commentary on the same controversy. Street had given press conferences at the time of the trial. She therefore had access to the media. If she had been raped in 1931, however, her involvement in the case from that point forward could never have been *a priori* voluntary.

NBC chose to settle out of court before the Supreme Court could hear arguments, leaving only partly resolved the question of whether a public figure can retreat into anonymity and whether the factual accuracy of the broadcast would affect the issue of voluntariness. In other words, what effort was made by the plaintiff to attract public attention during the original episode? The key question seems to be: Can there be any such category as *involuntary public figure*? Can the media foist public figure status on an unwilling person? If the courts say no, are they making editorial judgments about public figures and public issues? What about potentially newsworthy people—criminals, for example—who take great pains to remain anonymous and behind the scene, or mask their involvement, but nevertheless contribute mightily to the passing parade?

In a 1976 case involving *Playboy* magazine and an alleged mobster, a federal district court in Georgia said that "Defining public figures is much like trying to nail a jellyfish to the wall." To rebut *Playboy*'s evidence of extensive contacts over a period of years with underworld figures and criminal prosecutions, Louis Rosanova argued that he was not a public figure because he didn't have access to the media to contradict charges against him and because he had not thrust himself voluntarily into the vortex of any public issue. Again the involuntary public figure.

The court defined Rosanova somewhat vaguely as a public figure because of "his voluntary contacts and involvements related to the subject matter of the [offending] article." In the absence of clear and convincing proof of actual malice or reckless disregard of truth, the court granted *Playboy* summary judgment. *Rosanova v. Playboy Enterprises, Inc.*, 411 F.Supp. 440 (D.Ga. 1976).

Noting that criminals, financial manipulators, and political power brokers may prefer to operate quietly behind the scenes, Bruce Sanford believes they are public figures once exposed. For those who commit heinous crimes or are frequent offenders Sanford constructs a "notorious public figure" category—persons whose activities will sooner or later come to public attention. Such plaintiffs, he believes, are "libel proof"; no reputation remains to be damaged.[127] A federal district court used the term "libel

127. Sanford, *Libel and Privacy* (1985), 271–72.

proof" in *Logan v. District of Columbia*, 447 F.Supp. 1328 (D.D.C. 1978).

Other courts doubt the existence of the involuntary public figure category.[128] Granted the status is rarely recognized by the courts. But where else do we put criminals, accident victims, and the relatives of famous people?

What examples have the courts provided of vortex public figures? A Texas attorney who as president of a soft drink company had experienced labor trouble was accused by columnist Jack Anderson of organizing an "unmercifully ruthless campaign of intimidation and terror." Since plaintiff played a role in a public controversy involving labor violence, he was a public figure.[129] This case, and others, set down a number of conditions for limited purpose public figures:

1. there must be a public controversy;
2. a person's role in that controversy should be
   a. prominent,
   b. voluntary,
   c. designed to influence the outcome, and preferably
   d. with access to media for rebuttal.[130]

A public controversy has been defined as any topic upon which sizable segments of society have different, strongly held views, *Lerman v. Flynt Distributing* Co., 745 F.2d 123, 137–138 (2d Cir. 1984).

Other examples of court designated vortex public figures were: an author who became embroiled in a controversy as to how intimate he was with Ernest Hemingway;[131] the sons of Julius and Ethel Rosenberg who publicly asserted the innocence of their parents in speeches and a book;[132] persons who voluntarily involved themselves in the fluoridation controversy;[133] a high school coach who verbally assaulted referees;[134] a civil rights activist;[135] a major corporation making a public stock option;[136] a civic organization member who wrote a letter to a newspaper editor on a public issue;[137] advertisers involved in an intensive advertising campaign;[138] a discharged police officer who had complained to the media;[139] a student senate president who ran for a school board seat;[140] and a journalist roommate of a noted fugitive from the law who agreed to an interview about the fugitive.[141]

Mercifully, the tide seems to be running against the *Wolston* notion that a public person can fade into anonymity once the event that gave him prominence has become history. One example: a libel plaintiff who was indicted and tried for murder in 1952 was a public figure then and remained a public figure in 1980, said a Minnesota district court, when his name appeared in a town history that summarized his trial.[142]

What remains vague and uncertain in libel law, and thereby contrary to our First Amendment mandate and the spirit of the *New York Times* doctrine, is the distinction between vortex public people and the private person. Case law gives us no rule by which to distinguish the two categories.[143]

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128. *Schultz v. Reader's Digest Ass'n, Inc.*, 468 F.Supp. 551, 559 (E.D.Mich. 1979). In *Ruebke v. Globe Communications*, 14 Med.L.Rptr. 1193, 738 P.2d 1246 (Kan.Sup.Ct. 1987), the court said a convicted triple murderer was not "libel proof" because he had not earned the designation prior to the publication. But he *was* a limited public figure.

129. *Trotter v. Jack Anderson Enterprises, Inc.*, 14 Med.L.Rptr. 1180, 818 F.2d 431 (5th Cir. 1987).

130. *Clark v. ABC*, 684 F.2d 1208, 1218 (6th Cir. 1982), cert. den. 460 U.S. 1040 (1983). The same rules would seem to apply to all-purpose public figures. *Gertz* (at 418 U.S. 344 and 345) speaks of those who have significantly greater access to the channels of effective communication and those who voluntarily expose themselves to increased risk of injury.

131. *Hotchner v. Castillo-Puche*, 404 F.Supp. 1041 (D.N.Y. 1975), reversed 2 Med.L.Rptr. 1545, 551 F.2d 910 (2d Cir. 1977) on failure to show actual malice.

132. *Meeropol v. Nizer*, 381 F.Supp. 29 (D.N.Y. 1974), affirmed 2 Med.L.Rptr. 2269, 560 F.2d 1061 (2d Cir. 1977).

133. *Exner v. American Medical Association*, 529 P.2d 863 (Wash. 1974); *Yiamouyiannis v. Consumers Union*, 6 Med.L.Rptr. 1065, 619 F.2d 932 (2d Cir. 1980).

134. *Winter v. Northern Tier Publishing Co.*, 4 Med.L.Rptr. 1348 (N.Y. 1978).

135. *Williams v. Trust Co. of Georgia*, 230 S.E.2d 45 (Ga. 1976).

136. *Reliance Insurance Co. v. Barron's*, 3 Med.L.Rptr. 1033, 442 F.Supp. 1341 (D.N.Y. 1977).

137. *Wright v. Haas*, 586 P.2d 1093 (Okl. 1978).

138. *Steaks Unlimited v. Deaner*, 6 Med.L.Rptr. 1129, 623 F.2d 264 (3d Cir. 1980).

139. *DiLeo v. Koltnow*, 6 Med.L.Rptr. 2011, 613 P.2d 318 (Colo. 1980).

140. *Henderson v. Van Buren Public School Superintendent*, 6 Med.L.Rptr. 2409, 644 F.2d 885 (6th Cir. 1981). See also, *Fitzgerald v. Penthouse, International*, 7 Med.L.Rptr. 2385, 525 F.Supp. 585 (D.Md. 1981), judgment affirmed in part, reversed in part 691 F.2d 666 (1982), cert. denied 103 S.Ct. 1277, 75 L.Ed.2d 497 (1983).

141. *Jensen v. Times Mirror*, 634 F.Supp. 304, on reconsideration 647 F.Supp. 1525 (D.Conn. 1986).

142. *Underwood v. First National Bank*, 8 Med.L.Rptr. 1278 (Minn.Dist.Ct. 1982).

143. "First Amendment law *should* be as predictable and clear as possible; uncertainty can kill protected commentary as effectively as the bluntest censorship." Sanford, op. cit., 247.

Private Persons

It is tempting to define this category by putting in it all those who don't fit the foregoing categories. Case law will not permit that. Another approach might be to assume that everyone is a private person until a defendant news organization can demonstrate otherwise. Case law does not encourage that either. The following examples suggest the precarious quality of judicial distinctions between private and public persons: a public school teacher who was the subject of a newspaper story in which parents and students accused her of incompetence was a private person because she had only limited access to the media, was not in a position to influence school policy, and couldn't fully answer the charges against her without disclosing students' names and records in violation of the law.[144]

Also defined as private persons were the president of a shopping mall accused of criminal harassment following a traffic accident;[145] a man alleged to have shot his wife;[146] and an administrative aide to Spiro Agnew and later a political adviser to Senator Orrin Hatch in his election campaign who was called a "bagman" for the former vice president by an incumbent senator. Like Mrs. Firestone, who might have been a public person in Florida but didn't quite make it in a national arena, the aide, conversely, might have been a public figure in a national arena but was not in Utah where the defamation was first published.[147]

A man whose brother was convicted of murdering their parents, but who had played no part in the crime itself, was ruled a private person.[148] So was a historical and archaeological research corporation employed by a county as a scientific fact-finding consultant for the county's water supply.[149] Also private was a defendant in a wrongful-death civil suit,[150] a former airline executive whose competence was questioned,[151] and five corporate plaintiffs and two owners of a movie and television production company in a $490 million libel suit against *Penthouse* magazine.[152] In the latter case the judge said in his instructions to the jury that corporate plaintiffs would be all-purpose public figures only if they had achieved fame and notoriety in the affairs of society. Selling one's services to the public, buying advertising, and having access in this way to the media did not constitute involving oneself in a public controversy. Similarly, in a case brought by a Gulf + Western personnel director wrongfully accused of taking kickbacks, the court classified the plaintiff as private because he had no public office, did not have general fame or notoriety, had no pervasive involvement in public affairs, and had not injected himself into a public controversy.[153]

The question of *voluntariness* remains central, and fame appears to have geographical boundaries. Did the plaintiff enjoy access to the media to rebut allegations? Did she invite attention in any way? Burden of proof, generally by a preponderance of evidence, in making a private person "public" will rest with the defendant. And the judge will decide whether you have succeeded.

Courts are divided on whether the public/private/actual malice/negligence model of *Gertz* and its progeny applies to *nonmedia* defendants. Given the contributions nonmedia speakers make to the social dialogue and the danger to the press of being the recipient of special governmental privileges, not to mention the spirit of *New York Times*, no such distinction should be made.

Public Issue

It has been suggested that the inexorable logic of the public issue test has given the 1971 *Rosenbloom* case a life of its own. *Dun & Bradstreet v. Greenmoss Builders*, a 1985 Supreme Court ruling, combines that question, at least indirectly, with the question of whether nonmedia defendants enjoy the full protection of the *New York Times-Gertz* formulations.

Vermont's Supreme Court thought nonmedia defendants should not receive such protection and

144. *Richmond Newspapers v. Lipscomb*, 14 Med.L.Rptr. 1953, 362 S.E.2d 32 (Va.Sup.Ct. 1987), cert. den. 108 S.Ct. 1997 (1988).
145. *Grobe v. Three Villages Herald*, 4 Med.L.Rptr. 1829 (Suffolk Co. 1978), aff'd 69 A.D.2d 175, 420 N.Y.S.2d 3 (1979).
146. *Phillips v. Evening Star Newspaper Co.*, 2 Med.L.Rptr. 2201, 424 A.2d 78 (D.C.App. 1980), cert. den. 451 U.S. 989 (1981).
147. *Lawrence v. Moss*, 6 Med.L.Rptr. 2377, 639 F.2d 634 (10th Cir. 1981), cert. den. 451 U.S. 1031 (1981).
148. *Dresbach v. Doubleday & Co.*, 7 Med.L.Rptr. 2105, 518 F.Supp. 1285 (D.D.C. 1981).
149. *Arctic Co. Limited v. Loudoun Times-Mirror*, 6 Med.L.Rptr. 1433, 624 F.2d 518 (4th Cir. 1980), cert. den. 449 U.S. 1102 (1981).
150. *Newell v. Field Enterprises*, 6 Med.L.Rptr. 2450, 415 N.E.2d 434 (Ill. 1980).
151. *Dixson v. Newsweek*, 3 Med.L.Rptr. 1123, 562 F.2d 626 (10th Cir. 1977)
152. *Rancho LaCosta Inc. v. Superior Court*, 6 Med.L.Rptr. 1351, 165 Cal.Rptr. 347 (1980).
153. *Lawlor v. Gallagher Presidents' Report, Inc.*, 394 F.Supp. 721 (S.D.N.Y. 1975).

a divided United States Supreme Court affirmed on different grounds. A credit reporting agency had reported erroneously to five subscribers that a construction contractor had filed for bankruptcy. The Court held that presumed and punitive damages may be recovered by private persons in the absence of actual malice if no public issue is involved. So the Court revived the public issue test, at least by implication, gave new life to punitive damages (where the *Gertz* Court had tried to discourage them), and, because they played no part in a wider public dialogue, withheld constitutional protection against libel actions from nonmedia defendants.

Justice White, who concurred in the opinion of the Court, again demonstrated his desire to overturn *Gertz* and go back to the common law rules of libel. Four dissenters, Justices Brennan, Marshall, Blackmun, and Stevens, wanted a uniform application of fault requirements (negligence and actual malice) to all defendants.

DUN & BRADSTREET v. GREENMOSS BUILDERS

472 U.S. 749, 105 S.CT. 2939, 86 L.ED.2D 593 (1985).

Justice POWELL announced the judgment of the Court.

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about businesses. All the information is confidential; under the terms of the subscription agreement the subscribers may not reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary petition for bankruptcy. This report was false and grossly misrepresented respondent's assets and liabilities. That same day, while discussing the possibility of future financing with its bank, respondent's president was told that the bank had received the defamatory report. He immediately called petitioner's regional office, explained the error, and asked for a correction. In addition, he requested the names of the firms that had received the false report in order to assure them that the company was solvent. Petitioner promised to look into the matter but refused to divulge the names of those who had received the report.

After determining that its report was indeed false, petitioner issued a corrective notice on or about August 3, 1976 to the five subscribers who had received the initial report. The notice stated that one of respondent's former employees, not respondent itself, had filed for bankruptcy and that respondent "continued in business as usual." Respondent told petitioner that it was dissatisfied with the notice and it again asked for a list of subscribers who had seen the initial report. Again petitioner refused to divulge their names.

Respondent then brought this defamation action in Vermont state court. It alleged that the false report had injured its reputation and sought both compensatory and punitive damages. The trial established that the error in petitioner's report had been caused when one of its employees, a seventeen year old high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed to respondent a bankruptcy petition filed by one of respondent's former employees. Although petitioner's representative testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information about respondent before reporting it.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner moved for a new trial. It argued that in *Gertz v. Robert Welch, Inc.* this Court had ruled broadly "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and it argued that the judge's instructions in this case permitted the jury to award such damages on a lesser showing. The trial court indicated some doubt as to whether *Gertz* applied to "non-media cases," but granted a new trial "[b]ecause of * * * dissatisfaction with his charge and * * * conviction that the interests of justice require[d]" it.

The Vermont Supreme Court reversed. 143 Vt. 66, 461 A.2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defendants may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services." Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contem-

plated by *New York Times* [*Co. v. Sullivan*, 376 U.S. 254 (1964),] and its progeny." It held that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of special fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant." Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions."

Recognizing disagreement among the lower courts about when the protections of *Gertz* apply,[1] we granted certiorari. (1983). We now affirm, although for reasons different from those relied upon by the Vermont Supreme Court.

As an initial matter, respondent contends that we need not determine whether *Gertz* applies in this case because the instructions, taken as a whole, required the jury to find "actual malice" before awarding presumed or punitive damages. The trial court instructed the jury that because the report was libelous per se, respondent was not required "to prove actual damages * * * since damage and loss [are] conclusively presumed." It also instructed the jury that it could award punitive damages only if it found "actual malice." Its only other relevant instruction was that liability could not be established unless respondent showed "malice or lack of good faith on the part of the Defendant." Respondent contends that these references to "malice," "lack of good faith," and "actual malice" required the jury to find knowledge of falsity or reckless disregard for the truth—the "actual malice" of *New York Times*—before it awarded presumed or punitive damages.

We reject this claim because the trial court failed to define any of these terms adequately. It did not, for example, provide the jury with any definition of the term "actual malice." In fact, the only relevant term it defined was simple "malice." And its definitions of this term included not only the *New York Times* formulation but also other concepts such as "bad faith" and "reckless disregard of the [statement's] possible consequences." The instructions thus permitted the jury to award presumed and punitive damages on a lesser showing than "actual malice." Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct, and the Vermont Supreme Court's determination that *Gertz* was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore must consider whether *Gertz* applies to the case before us.

* * *

In *Gertz*, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times*. These protections, we found, were not "justified solely by reference to the interest of the press and broadcast media in immunity from liability." 418 U.S., at 343. Rather, they represented "an accommodation between [First Amendment] concern[s] and the limited state interest present in the context of libel actions brought by public persons." *Ibid.* In libel actions brought by private persons we found the competing interests different. Largely because private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements, *id.*, at 345, we found that the State possessed a "strong and legitimate * * * interest in compensating private individuals for injury to reputation." *Id.*, at 348–349. Balancing this stronger state interest against the same First Amendment interest at stake in *New York Times*, we held that a State could not allow recovery of presumed and punitive damages absent a showing of "actual malice." Nothing in our opinion, however, indicated that this same balance would be struck regardless of the type of speech involved.

We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in *Gertz* and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This State interest is identical to the one weighed in *Gertz*. There we found that it was "strong and legitimate." 418 U.S.,

1. Compare *Denny v. Mertz*, 106 Wis.2d 636, 318 N.W.2d 141, cert. denied, 459 U.S. 883 (1982) (*Gertz* inapplicable to private figure suits against nonmedia defendants); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980) (same); *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978) (same); and *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977) (same); with *Antwerp Diamond Exchange v. Better Business Bureau*, 130 Ariz. 523, 637 P.2d 733 (1981) (Gertz applicable in such situations); and *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976) (same).

at 348. A State should not lightly be required to abandon it,

> "for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name '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. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. * * *' *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (concurring opinion)." 418 U.S., at 341.

The First Amendment interest, on the other hand, is less important than the one weighed in *Gertz*. We have long recognized that not all speech is of equal First Amendment importance.[5] It is speech on " 'matters of public concern' " that is "at the heart of the First Amendment's protection." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), quoting *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940). As we stated in *Connick v. Myers*, 461 U.S. 138, 145 (1983), this "special concern [for speech on public issues] * * * is no mystery":

> "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' " *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the " 'highest rung of the hierarchy of First Amendment values,' " and is entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980)."

In contrast, speech on matters of purely private concern is of less First Amendment concern. 461 U.S., at 146–147. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.[6] In such a case,

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 366, 568 P.2d 1359, 1363 (1977).

* * *

While such speech is not totally unprotected by the First Amendment, see *Connick v. Myers*, 461 U.S., at 147, its protections are less stringent. In *Gertz*, we found that the state interest in awarding presumed and punitive damages was not "substantial" in view of their effect on speech at the core of First Amendment concern. 418 U.S., at 349. This interest, however, *is* "substantial" relative to the incidental effect these remedies may have on speech of significantly less constitutional interest. The ra-

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5. This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. Obscene speech and "fighting words" long have been accorded no protection. *Roth v. United States*, 354 U.S. 476, 483 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572 (1942); cf. *Harisiades v. Shaughnessy*, 342 U.S. 580, 591–592 (1952) (advocating violent overthrow of the government is unprotected speech); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (publication of troop ship sailings during war time may be enjoined). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 771–772 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 562–563 (1980).

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples * * * of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, * * * corporate proxy statements, * * * the exchange of price and production information among competitors, * * * and employers' threats of retaliation for the labor activities of employees." 436 U.S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown v. Hartlage*, 456 U.S. 45, 52–53 (1982); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279, n. 19 (1964); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, and public school teachers—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas v. Collins*, 323 U.S. 516 (1945); see also *Rosenbloom v. Metromedia*, 403 U.S. 29, 44 (1971) (opinion of Brennan, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern").

6. As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for credit"—the case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw.L.Rev. 1212, 1268 (1983).

tionale of the common law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." W. Prosser, *Law of Torts* § 112, p. 765 (4th ed. 1971); accord, *Rowe v. Metz*, 425–426, 579 P.2d, at 84; Note, Developments in the Law—Defamation, 69 Harv.L.Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications. *Restatement of Torts* § 568, comment b, at 162 (1938) (noting that Hale announced that damages were to be presumed for libel as early as 1670). This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of "actual malice." [7]

The only remaining issue is whether petitioner's credit report involved a matter of public concern. In a related context, we have held that "[w]hether * * * speech addresses a matter of public concern must be determined by [the expression's] content, form, and context * * * as revealed by the whole record." *Connick v. Myers*, 461 U.S., at 147–148. These factors indicate that petitioner's credit report concerns no public issue.[8] It was speech solely in the individual interest of the speaker and its specific business audience. Cf. *Central Hudson Gas & Elec. v. Public Service Comm.*, 447 U.S. 557, 561 (1980). This particular interest warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's business reputation. Cf. *id.*, at 566; *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 771–772 (1976). Moreover, since the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any "strong interest in the free flow of commercial information." *Id.*, at 764. There is simply no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S., at 270.

In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. See *Virginia Pharmacy Board v. Virginia Consumer Council, supra*, at 771–772. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. Arguably, the reporting here was also more objectively verifiable than speech deserving of greater protection. In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.

We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Accordingly, we affirm the judgment of the Vermont Supreme Court.

It is so ordered.

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7. The dissent, purporting to apply the same balancing test that we do today, concludes that even speech on purely private matters is entitled to the protections of *Gertz*. * * * Its "balance," however, rests on a misinterpretation. In particular, the dissent finds language in *Gertz* that, it believes, shows the State's interest to be "irrelevant." * * * It is then an easy step for the dissent to say that the State's interest is outweighed by even the reduced First Amendment interest in private speech. *Gertz*, however, did not say that the state interest was "irrelevant" in absolute terms. Indeed, such a statement is belied by *Gertz* itself, for it held that presumed and punitive damages were available under some circumstances. 418 U.S., at 349. Rather, what the *Gertz* language indicates is that the State's interest is not substantial relative to the First Amendment interest in *public speech*. This language is thus irrelevant to today's decision.

The dissent's "balance," moreover, would lead to the protection of all libels—no matter how attenuated their constitutional interest. If the dissent were the law, a woman of impeccable character who was branded a "whore" by a jealous neighbor would have no effective recourse unless she could prove "actual malice" by clear and convincing evidence. This is not malice in the ordinary sense, but in the more demanding sense of *New York Times*. The dissent would, in effect, constitutionalize the entire common law of libel.

8. The dissent suggests that our holding today leaves all credit reporting subject to reduced First Amendment protection. This is incorrect. The protection to be accorded a particular credit report depends on whether the report's "content, form, and context" indicate that it concerns a public matter. We also do not hold, as the dissent suggests we do, * * * that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech. We discuss speech, along with advertising, only to show how many of the same concerns that argue in favor of reduced constitutional protection in those areas apply here as well.

COMMENT

In his *Rosenbloom* dissent (*Rosenbloom*, you will recall, was the case in which the Court stretched the actual malice rule to extend to "public issues"), Justice Marshall said that he did not wish judges to be making editorial judgments as to the public interest, an elusive concept at best. This may be the chink in the armor of *Rosenbloom*.[154] The vague line between what is and what is not a public issue drawn in *Dun & Bradstreet*, and reinforced a year later in *Hepps*, seems to give judges the editorial discretion normally reserved for editors. *Gertz*, because it was content neutral, avoided this problem, but it does require editors to intuit the difference between public and private plaintiffs.

An additional problem with *Dun & Bradstreet* is that it revives the commercial/noncommercial debate, qualifying First Amendment protection to the former. Few communication or information transactions in modern society are without some profit elements.

What we are left with is a public issue test depending on the purpose of the speaker and the size and nature of her audience and a *Gertz* rule applied to nonmedia defendants in some states and not in others.

COMMON LAW OR STATUTORY DEFENSES

In constructing a libel defense, a news organization will attempt to use every available weapon. Prior to *New York Times* and the constitutionalization of the tort, only the common law defenses, largely incorporated into state statutes, were available. Their main drawback was that in using them the burden of proof of *truth* or *privilege* was on the defendant. *New York Times* would put the burden of proof on plaintiff.

Moreover, the common law defenses have in a sense been absorbed by the constitutional defense. If a defamation cannot be shown at the threshold to be false, it is true. So *truth* is a defense that does not initially have to be demonstrated by a defendant. One traditional form of privilege is *fair comment and criticism*, the right to express critical opinions about those who through politics, performance, or authorship seek public approval. Since the Court in *Gertz* ("no such thing as a false idea") made *opinion* part of the constitutional defense, the old fair comment privilege has also been absorbed.

Assuming then that there is advantage to the press in piling up its defenses, let us look briefly at how the common law protections against libel suits have been applied in the past.

Truth or Justification

Justice White's concurring opinion in *Dun & Bradstreet* has been interpreted by some as a reflection of his desire to abandon the *New York Times* doctrine and return to a situation where only common law defenses would be available against libel. "* * * First Amendment values," said White, "are not served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates those values. They are even more disserved when the statements falsely impugn the honesty of those men and women and lessen confidence in government."

If only common law defenses were available, what would the press face? Historically, some state jurisdictions, either by statute or constitutional mandate, considered truth a defense only if published for good motives and justifiable ends. In others, to plead truth unsuccessfully, that is, to insist upon defending a falsehood, was to show malice. The common law was inhospitable to libel, even when based on provable fact.

Justice O'Connor's opinion for the Court in *Philadelphia Newspapers v. Hepps*, reprinted earlier in part to illustrate the locus of the burden of proof of truth or falsity, implies that truth alone is now a complete defense, part of the constitutional fabric. And the burden of proof of falsity is on the plaintiff. In the common law of libel, contrary to the rule of other negligence torts and with no consideration for First Amendment values, the burden of proof of truth was on the defendant.

Where *truth* or justification alone is pleaded as a defense, the proof must be at least as broad as the charge. "[I]t is generally agreed," said Prosser, an authority on tort law, "that it is not necessary to prove the literal truth of the accusation in every detail, and that it is sufficient to show that the im-

154. Helle, "Judging Public Interest in Libel: The *Gertz* Decision's Contribution," 61 *Journalism Quarterly* 117 (Spring 1984).

putation is substantially true, or, as it is often put, to justify the 'gist,' the 'sting,' or the 'substantial truth' of the defamation." [155]

Where a plaintiff, in testifying before a congressional committee, attacked "political Zionist planners for absolute rule via a one-world government," a newspaper article charging that the plaintiff had attacked Jews was held substantially true and therefore not actionable. [156]

It is important for the press to understand that a truth defense requires proof of a defamatory charge, not simply proof that the charge has been made. For example, when a newspaper charging an architectural firm with the faulty design of a school building based its article on a confidential report, it was faced with proving not only that its informant made the statements attributed to him but with proving that those statements were in fact true. [157]

The defense of truth until recently was never satisfied by simply showing that the report was an accurate repetition of a libelous charge. For the journalist, the basic question was whether the facts he or she had stated were provably true, regardless of where they came from.

A publication will be considered in its entirety and in relation to its structure, nuances, implications, and connotations. It is not enough to take sentences separately and demonstrate their individual accuracy, detached and wrenched out of context.

Sometimes the evidence needed to prove the truth is just not available. Until it is, an alleged defamatory statement is presumed to be false under this common law defense. [158] A defendant may need depositions, affidavits, exhibits—difficult to obtain after the fact. Truth can be a costly and hazardous defense.

The strength of one's belief in the truth of a defamatory publication does not constitute proof of truth or justification. Truth is an acceptable defense only as part of the *New York Times* defense or as a complement to that defense.

Qualified Privilege

Also known as the fair report, the public eye or public record privilege, this defense is rooted in the theory that in some situations the public interest in the full disclosure of public business overrides harm to individual reputation. "A report of any meeting, assembly or gathering that is open to the general public and is held for the purpose of discussing or otherwise dealing with matters of public concern" [159] may be privileged. Although the purpose of the privilege was historically to expose to the citizenry the process of self-government, nongovernmental or private meetings may be covered when their agendas are political.

Here again state law is determinative. There are wide variations from one jurisdiction to another. Generally a news organization may publish with impunity a fair and accurate report of any judicial, quasi-judicial, legislative, executive or administrative proceeding at any level of government. Reports and documents relating to such proceedings are also protected.

Traditionally, common law malice would destroy the privilege. Thus a *qualified* privilege. There is disagreement as to whether actual malice even destroys the privilege since actual malice is a state of mind and a reporter's views of the truth or falsehood of a report are irrelevant. If they were not, it is argued, the idea of the privilege would be demolished. [160] At the same time, the purposeful distortion of a record in its reporting might destroy even the constitutional defense. *Gertz* says the privilege attaches only to fair and accurate republications of statements made in government documents. Not everything a legislator, an administrator, a council member, board member, committee member, or law enforcement officer says to a reporter is privileged, although some state laws stretch the rule. [161]

Look out for unofficial statements by police officers, witnesses, or attorneys in the early phases of

155. Prosser, *Handbook of the Law of Torts* (4th ed. 1971), 798. See also, *Fairbanks Publishing Co. v. Pitka*, 445 P.2d 685 (Alaska 1968); *Mitchell v. Peoria* Journal-Star, Inc., 221 N.E.2d 516 (Ill. 1966); *Meier v. Meurer*, 98 N.W.2d 411 (Wis. 1959).

156. *Dall v. Pearson*, 246 F.Supp. 812 (D.D.C. 1963).

157. *Miller, Smith & Champagne v. Capital City Press*, 142 So.2d 462 (La. 1962).

158. *Medico v. Time, Inc.*, 6 Med.L.Rptr. 1968, 509 F.Supp. 268 (D.Pa. 1980), affirmed 6 Med.L.Rptr. 2529, 643 F.2d 134 (3d Cir. 1981).

159. Restatement (Second) of Torts § 611 comment (1977).

160. Sanford, *Libel and Privacy* (1985), 377.

161. See *Medico v. Time, Inc.*, 643 F.2d 134 (3d Cir. 1981), cert. den. 454 U.S. 832 (1981) for a broad application of privilege. But in *Jones v. Taibbi*, 14 Med.L.Rptr. 1844, 512 N.E.2d 260 (Mass.Sup.Jud.Ct. 1987), unofficial police sources in a murder investigation were not privileged.

crime stories. "Hot line" reports from police to media were not part of an official record and would not give a privilege to a newspaper's false report that a husband had shot his wife.[162]

Reports of judicial proceedings are generally privileged, although there is disagreement as to when a judicial process has begun. In some states privilege depends upon some official action having been taken by a judge or officer of the court. A pleading, deposition, or complaint filed in a case, but not yet acted upon, may not be privileged. The assumption is that these documents, containing possibly false, defamatory, and uncontradicted charges, are addressed to the courts and not to the public at large. In some states a reporter must be certain that a legal document has been served on the party named as defendant before its contents are divulged. If legal papers are filed in a court clerk's office but the defendant has not been served with process, there is no privilege, for no legal proceeding has begun.

The majority view, however, is that a report on pleadings or complaints is privileged whether or not judicial actions regarding them have occurred. Under California's broad law, even secret grand jury proceedings are covered.[163] In Washington, D.C., on the other hand, privilege applies only to statements that are clearly identifiable to the reader as based on public records and does not extend to statements that the ordinary reader would interpret as background information.[164] In Massachusetts, privilege covers nonpublic governmental reports that reveal government misconduct,[165] while New York prefers to protect more "official proceedings." State by state examples may only serve to confuse, however.

More important is the Court's holding in *Firestone*: a constitutional defense does not automatically extend to all judicial proceedings. The Court said that there was no reason that libel plaintiffs "should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom." Moreover, the *Firestone* case involved an inaccurate report of a judicial record. The case was distinguished from *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), where an accurate report from a judicial record broadcasting the name of a rape victim, contrary to Georgia law, was said to be privileged.

Substantial accuracy may be the standard governing the privilege. Errors in fact may be overlooked where complex technical language is involved, if they do not lead to serious distortion.[166] Generally an editor's motivation for publishing will not come into play if the report fairly reflects the record.

So a substantially accurate account of a state auditor's report of "questionable ties" between a school board administrator and the suppliers of educational materials was privileged.[167]

Sealed records and documents withheld from public scrutiny by court order, or affidavits which have not become part of a judicial process, may not be privileged. In some states, court rules or statutes provide that papers filed in juvenile, matrimonial, divorce, and morals cases are sealed and not open to the public generally. Court hearings dealing with such matters, even though closed, may be privileged in the absence of a state secrecy statute. A fair and accurate report of a judicial proceeding involving a youthful offender not open to the public was nevertheless privileged, said a New York court.[168] But be careful. Know your state's rules.

Statements made in court but stricken from the record may not be privileged. A New York court, however, ruled that anything pertinent to a case, whether part of the record or not, would be protected. "To be outside of the privilege," it said, "a statement made in open court must be so outrageously out of context as to permit one to conclude, from the mere fact that the statement was uttered, that it was motivated by no other desire than to defame."[169] California's rule doesn't even require pertinence. Any publication that has any reasonable relation to a judicial proceeding, even though made outside the courtroom, may be privileged. The de-

162. *Phillips v. Evening Star Newspaper Co.*, 6 Med.L.Rptr. 2191, 424 A.2d 78 (D.C. 1980), cert. den. 451 U.S. 989 (1981).
163. *Kilgore v. Younger*, 102 Cal.App.3d 744, 162 Cal.Rptr. 469 (1980), aff'd, 30 Cal.App.3d 770, 180 Cal.Rptr. 657, 640 P.2d 793 (1982).
164. *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C.Cir. 1985), cert. den. 106 S.Ct. 2247 (1986).
165. *Ingeneri v. American Broadcasting Cos.*, 11 Med.L.Rep. 1227 (D.Mass. 1984).
166. *Jennings v. Telegram-Tribune Co.*, 16 Cal.App.3d 119, 210 Cal.Rptr. 485 (1985).
167. *Hines v. New York News*, 6 Med.L.Rep. 182 (N.Y.Sup.Ct. 1980).
168. *Gardner v. Poughkeepsie Newspapers, Inc.*, 326 N.Y.S.2d 913 (1971).
169. *Martirano v. Frost*, 307 N.Y.S.2d 425 (1969).

famatory matter need not be relevant, pertinent, or material to any issue before the court, as long as there is a connection.[170]

Once again, reports must be balanced, fair, and substantially accurate. They need not be verbatim. Get names correct. Indicate the source of your information. It can be safely reported that a crime has been committed and a particular person is being held for questioning. An arrest should not be reported until a suspect is booked. A police blotter or log book is usually an official public record.[171] Although some states have statutes extending the protection of privilege to reports of arresting officers, police chiefs, country prosecutors, and coroners, collateral details on investigations and speculation on evidence from these such sources are generally not privileged.[172]

The "Community of Interests" Privilege

Closely related to the broader defense of qualified privilege is the conditional privilege to publish defamatory matter in defense of one's own reputation or property rights; or to circulate defamation among members of religious, fraternal, labor, corporate, or charitable organizations in pursuit of mutual property, business, or professional interests; among members of one's own family; or in fulfilling one's social obligations to assist in law enforcement.[173] Such activities frequently involve credit agencies, hired investigators, and prospective employers. Seldom does this defense pertain to the press.

A father's letter objecting to the involvement of a suspended policeman in a Boy Scout bus trip in which the father's fifteen-year-old son was a participant was conditionally privileged. The father's complaint was sent to the directors and officers of the corporation planning the trip. The policeman, who was facing trial for burglary, had the burden of showing actual malice on the part of the father in order to win a libel judgment.[174]

Fair Comment and Criticism: The "Opinion" Defense

Fair Comment and Criticism, another common law form of privilege, has been enfolded into the constitutional defense. Recall the *Gertz* Court saying: "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."

The privilege may have come into the common law in *Carr v. Hood*, 1 Camp. 355, 170 Eng.Rep. 983 (1808). The classic American case is *Cherry Sisters v. Des Moines Leader*, 86 N.W. 323 (Iowa 1901). The latter case is amusing (the Cherry Sisters were a notoriously grotesque vaudeville act), and it established the general rule that one may go to the utmost lengths of denunciation, condemnation, and satirization when criticizing persons and institutions seeking public approval or inviting public attention.

Since fair comment was a defense for the libelous expression of an opinion, a perennial problem was to distinguish between fact and opinion and to avoid basing opinions on false facts. When you consider that factual implications are implicit or enmeshed in most opinions—the editorial or the review, for example—the task was near impossible.

John Stuart Mill, in chapter two of his great *Essay on Liberty*, seemed not to be making the distinction when he wrote: "We can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still." Nevertheless, the rule gradually emerged that defamatory opinions were actionable only if based on the allegation of undisclosed or false facts. A leading case was *Rinaldi v. Holt, Rinehart & Winston*, 2 Med.L.Rptr. 2169, 397 N.Y.S.2d 943 (1977), cert. den. 434 U.S. 969 (1977). It appeared to certify opinion as a constitutional defense. The question of fact or opinion would initially be for the court. It is not certain that the opinion defense has taken the

170. *Ascherman v. Natanson*, 100 Cal.Rptr. 656 (1972). See also, *Trans World Accounts, Inc. v. Associated Press*, 425 F.Supp. 814 (D.Cal. 1977).

171. *Francois v. Capital City Press*, 166 So.2d 84 (La.App. 1964).

172. See Elder, *The Fair Report Privilege* (Butterworth, 1988), for a detailed case review of the subject. Press releases, news conferences, speeches, private meetings, and all branches of government are considered.

173. *Barr v. Matteo*, 360 U.S. 564 (1959). See also, *Warfield v. McGraw-Hill, Inc.*, 108 Cal.Rptr. 652 (1973); *Greenya v. George Washington University*, 512 F.2d 556 (D.C.Cir. 1975); *Ward v. Sears, Roebuck & Co.*, 339 So.2d 1255 (La.App. 1976); *Trans World Accounts, Inc. v. Associated Press*, 425 F.Supp. 814 (D.Calif. 1977).

174. *Coopersmith v. Williams*, 468 P.2d 739 (Colo. 1970).

place of the older fair comment rule, a defense that could be overcome by common law malice—ill will, spite, or hostility. But as a broader defense, opinion has probably absorbed fair comment.

Under the opinion rule none of the following characterizations was actionable: "unscrupulous charlatans" and "cancer con artists;" [175] "the Al Capone of the City;" [176] "neo-Nazi;" [177] "an unbelievably unscrupulous character;" [178] "a sleazebag" who "kind of slimed up from the bayou;" [179] a school superintendent who was said to look like an "ignorant and spineless politician;" [180] an abortion activist referred to as a "merchant of death;" [181] and an editorial cartoon of former Los Angeles Mayor Yorty being approached by orderlies with straitjackets and thinking they were Secret Service officers sent to protect the new "secretary of defense." [182] Humor, if it is too subtle, may backfire; a reader could take a joke literally.

Communicators can also be on the receiving end. A letter-to-the-editor asserting that a journalist had conducted "the worst single example of a journalistic smear" in covering the appointment of a college president and was the "journalistic scum of the earth" was protected opinion. [183] So was a magazine's description of a newspaper publisher as "near-Neanderthal," whose newspaper is published "by paranoids for paranoids." Rhetorical hyperbole, said a federal district court, is absolutely protected under the First Amendment. [184] And magazine statements describing a television announcer as the "worst" sports announcer in Boston and "enrolled in a course for remedial speaking" were, said Massachusetts' highest court, protected statements of opinion, especially in the context of a humorous "best and worst" article. [185] The idea of context brings us to the leading case on the opinion defense.

Columnists Evans and Novak criticized the appointment of a Marxist, Bertell Ollman, to head the University of Maryland's department of politics and government. He would use the classroom, they said, as an instrument for preparing "the revolution." They belittled his standing in academe and challenged his pedagogic motives. Ollman asked for a retraction. It was refused, but a letter from Ollman was published in the *Washington Post*. Ollman sued and a federal district court granted summary judgment to the columnists. Ollman appealed that judgment.

OLLMAN v. EVANS

11 MED.L.RPTR. 1433, 750 F.2D 970 (D.C.CIR. 1984), CERT DEN., 471 U.S. 1127 (1985).

STARR, J.

* * *

This case presents us with the delicate and sensitive task of accommodating the First Amendment's protection of free expression of ideas with the common law's protection of an individual's interest in reputation. It is a truism that the free flow of ideas and opinions is integral to our democratic system of government. * * * At the same time, an individual's interest in his or her reputation is of the highest order. Its protection is an eloquent expression of the respect historically afforded the dignity of the individual in Anglo-American legal culture. A defamatory statement may destroy an individual's liveli-

175. *Kirk v.* CBS, 14 Med.L.Rptr. 1263 (D.C.N.Ill. 1987).

176. *Rowland v. Fayed*, 14 Med.L.Rptr. 1257, 1262–63 (D.C. Superior Ct. 1987).

177. *Populist Party of Iowa v. American Black Hawk Broadcasting Co.* 14 Med.L.Rptr. 1217 (Iowa Dist.Ct. 1987).

178. *Chalpin v. Amordian Press*, 128 A.D.2d 81 (1st Dept. 1987).

179. *Henderson v. Times Mirror* Co., 14 Med.L.Rptr. 1659 (D.C.Colo. 1987).

180. *Dow v. New Haven Independent*, 14 Med.L.Rptr. 1652 (Conn.Super.Ct. 1987).

181. *Baird v. Roussin*, 6 Med.L.Rptr. 1555 (D.Mass 1980).

182. *Yorty v. Chandler*, 13 Cal.App.3d 467, 91 Cal.Rptr. 709 (1970); See also, *Celebrezze v. Dayton Newspapers*, 13 Med.L.Rptr. 1911 (Ohio Common Pleas 1986), in which an editorial cartoon is said to be an exaggeration and a nonactionable expression of opinion; and *Keller v. Miami Herald Publishing Co.*, 778 F.2d 711, 178 (11th Cir. 1985), in which the court said "Cartoons are seldom vehicles by which facts are reported; quite the contrary, they are deliberate departures from reality designed forcefully, and sometimes viciously to express opinion." An analysis of twenty-two reported cases involving editorial cartoons or parodies (1970–1987) showed only one successful plaintiff in the seventeen-year period. Roslyn A. Mazer, "Liability for Editorial Cartoons," Williamsburg: College of William & Mary, Nov. 6–7, 1987.

183. *Pease v. Telegraph Publishing*, 7 Med.L.Rptr. 1114, 426 A.2d 463 (N.H. 1981). A review of thirty-two appellate cases involving letters to the editor for a twenty-two-year period by Marc Franklin showed only one successful plaintiff.

184. *Loeb v. New Times Communication Group*, 6 Med.L.Rptr. 1438, 497 F.Supp. 85 (D.N.Y. 1980).

185. *Myers v. Boston Magazine*, 403 N.E.2d 376 (Mass. 1980).

hood, wreck his standing in the community, and seriously impair his sense of dignity and self-esteem.

The judiciary's task in accommodating these competing interests is by no means new: at common law, the fair comment doctrine bestowed qualified immunity from libel actions as to certain types of opinions in order that writers could express freely their views about subjects of public interest.[5] However, since *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 1 Med.L.Rptr. 1633 (1974), the nature of this accommodation has fundamentally changed. In *Gertz*, the Supreme Court in *dicta* seemed to provide absolute immunity from defamation actions for all opinions and to discern the basis for this immunity in the First Amendment. The Court began its analysis of the case by stating:

> Under the First Amendment there is no such thing as 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. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open debate on the public issues."[6]

By this statement, *Gertz* elevated to constitutional principle the distinction between fact and opinion, which at common law had formed the basis of the doctrine of fair comment. *Gertz's* implicit command thus imposes upon both state and federal courts the duty as a matter of constitutional adjudication to distinguish facts from opinions in order to provide opinions with the requisite, absolute First Amendment protection. At the same time, however, the Supreme Court provided little guidance in *Gertz* itself as to the manner in which the distinction between fact and opinion is to be discerned. That, as we shall see, is by no means as easy a question as might appear at first blush.

Indeed, *Gertz* did not focus on this distinction at all. Rather, assuming without lengthy discussion that the statements in that case could be construed as statements of fact, the Court held that the plaintiff, who was a private rather than public figure, could prove that the statements at issue there were libelous upon demonstrating that they were negligently made. The distinction in our law between public and private figures, however, does not directly bear on the distinction between fact and opinion. Expressions of opinion are protected whether the subject of the comment is a private or public figure. See *Lewis v. Time, Inc.*, 710 F.2d 549, 555, 9 Med.L.Rptr. 1984 (9th Cir. 1983). In a word *Gertz's* reasoning immunizes an opinion, not because the opinion is asserted about a public figure, but because there is no such thing as a "false" opinion.

* * *

To evaluate the totality of the circumstances of an allegedly defamatory statement, we will consider four factors in assessing whether the average reader would view the statement as fact or, conversely, opinion. While necessarily imperfect, these factors will, we are persuaded, assist in discerning as systematically as possible what constitutes an assertion of fact and what is, in contrast, an expression of opinion.

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

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5. To establish the defense of fair comment, the defendant had to show (1) that the published criticism was one of legitimate public interest, (2) that the criticism was based on facts either stated or otherwise known to the reader, (3) that the criticism represented the actual opinion of the critic, and (4) that the criticism was not made solely for the purpose of causing harm to the person criticized. See *Restatement (Second) of Torts* §606 (1938). *See also*, Carman, *Hutchinson v. Proxmire and the Neglected Fair Comment Defense: An Alternative to "Actual Malice,"* 30 DePaul L. Rev. 1, 13 (1980).

6. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). The statement is clearly *dicta*. As we discuss below, the actual holding of *Gertz* was that in order to prevail in a libel action, private figures did not have to show that a false statement was made with actual malice. Despite its status as *dicta*, a majority of federal circuit courts, including this one, have accepted the statement as controlling law. *See McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 717 F.2d 1460, 1464 & n.7 (D.C. Cir. 1983); *Bose Corp. v. Consumers Union, Inc.*, 692 F.2d 189, 192–94 (1st Cir. 1983), *affirmed on other grounds*, 104 S.Ct. 1949 (1984); *Hammerhead Enterprises, Inc. v. Brezenoff*, 707 F.2d 33, 40 (2d Cir.), *cert. denied*, 104 S.Ct. 237 (1983); *Avins v. White*, 627 F.2d 637, 642 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980); *Church of Scientology v. Cazares*, 638 F.2d 1272, 1286 (5th Cir. 1981); *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1114 (6th Cir.), *cert. denied*, 440 U.S. 960 (1979); *Lewis v. Time, Inc.*, 710 F.2d 549, 552–53 (9th Cir. 1983); *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983). *See also National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc.*, 705 F.2d 98 (4th Cir.), *cert. denied*, 104 S.Ct. 108 (1983) (finding that statement that charity was not "spending a reasonable percentage of total income on program services" was constitutionally protected opinion on the authority of *Greenbelt Cooperative Publishing Assoc. v. Bresler*, 398 U.S. 6 (1970)).

The *Gertz* dictum was recently quoted with approval by the Supreme Court. *See Bose Corp. v. Consumers Union, Inc.*, 104 S.Ct. 1949, 1961 (1984).

a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous. See *Buckley v. Littell*, 539 F.2d 882, 895, 1 Med.L.Rptr. 1762 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977). Readers are, in our judgment, considerably less likely to infer facts from an indefinite or ambiguous statement than one with a commonly understood meaning. Second, we will consider the statement's verifiability—is the statement capable of being objectively characterized as true or false? See, *e.g.*, *Hotchner v. Castillo-Puche*, 551 F.2d at 913. Insofar as a statement lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content. And, in the setting of litigation, the trier of fact obliged in a defamation action to assess the truth of an unverifiable statement will have considerable difficulty returning a verdict based upon anything but speculation. Third, moving from the challenged language 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 content. See *Greenbelt Cooperative Publishing Association v. Bresler*, *supra*, 398 U.S. at 13–14; cf. *Restatement (Second) of Torts* § 563. Finally, we will consider the broader context or setting in which the statement appears. Different types of writing have, as we shall more fully see, widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion. See *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, *supra*, 418 U.S. at 286.

The first factor of our inquiry is to analyze the common usage or meaning of the allegedly defamatory words themselves.[17] We seek in this branch of our analysis to determine whether the allegedly defamatory statement has a precise meaning and thus is likely to give rise to clear factual implications.[18] A classic example of a statement with a well-defined meaning is an accusation of a crime. To be sure, such accusations are not records of sense perceptions. Quite to the contrary, they depend for their meaning upon social normative systems. But those norms are so commonly understood that the statements are seen by the reasonable reader or hearer as implying highly damaging facts. Post-*Gertz* courts have therefore not hesitated to hold that accusations of criminal conduct are statements "laden with factual content" that may support an action for defamation. See, *e.g.*, *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 63, 6 Med.L.Rptr. 1625, 2145 (2d Cir. 1980) (holding that an article which implied that the Mayor of Providence, R.I., had committed rape and which charged him with paying the alleged victim not to bring charges was not protected opinion). Even a somewhat less well defined accusation that a "judge is corrupt" has been held actionable. *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299, 2 Med.L.Rptr. 2169 (N.Y.), *cert. denied*. 431 U.S. 969, 3 Med.L.Rptr. 1432 (1977). "Corruption," at least in the context of public service, was deemed to imply factual allegations of bribery or other official malfeasance.

On the other hand, statements that are "loosely definable" or "variously interpretable" cannot in most contexts support an action for defamation. See *Buckley v. Littell*, *supra*, 539 F.2d at 895. In that case, a writer in his book on the political right in the United States accused columnist and author William F. Buckley, Jr., of being a "fellow traveler" of "fascists." Noting that Mr. Buckley and the author of this particular tome embraced widely different definitions of "fascism" and different views as to which journals could be described as "fascist," the court declined to develop a "correct" definition of

17. We do not, of course, suggest that the four-factor analysis is to be undertaken in a rigid lock-step fashion. Thus, as will become evident below, a logical starting point in applying the fact-opinion analysis may be the broad social context or setting within which the defamatory statement appears (factor "four") and the language surrounding the challenged statements (factor "three").

18. Our review of the definiteness of the allegedly defamatory statement should not be confused with the rather curious doctrine of "innocent construction." This doctrine prevents a statement from being found defamatory as a matter of law, if it has two or more meanings, one of which is nondefamatory. The doctrine is accepted only in Illinois. See *John v. Tribune Co.*, 181 N.E.2d 105, 108 (Ill.), *cert denied*, 371 U.S. 877 (1962). See *generally Comment, The Illinois Doctrine of Innocent Construction: A Minority of One*, 30 U. Chi. L. Rev. 524 (1963). See also *McBride v. Merrell Dow*, *supra*, 717 F.2d at 1465.

When we review a statement and find that it is indefinite in this context, we are not declaring that the statement has an innocent meaning, but are instead holding that the statement is so ambiguous that the average reader would not fairly infer any specific factual content from it. Thus, the statement should be classified as protected opinion.

this pivotal term.[19] The Second Circuit held, rather, that the use of such expressions "cannot be regarded as having been proved to be statements of facts, among other reasons, because of the tremendous imprecision of the meaning and usage of these terms in the realm of political debate, an imprecision which is similarly echoed in the book."[20] *Id.* at 893. Pursuing a line of analysis similar to that found in *Buckley*, the same court that held actionable the term "corrupt" concluded that the term "incompetent" as applied to a judge was too vague to support a claim of libel. *Rinaldi v. Holt, Rinehart & Winston, Inc., supra*, 366 N.E.2d at 1303.

The use of indefinite terms is obviously not confined to the realm of politics and public policy. In *Cole v. Westinghouse Broadcasting Co., Inc.*, 435 N.E.2d 1021, 8 Med.L.Rptr. 1828 (Mass.), *cert. denied*, 459 U.S. 1037 (1982), the Massachusetts Supreme Judicial Court held that the statement that a reporter had engaged in "sloppy and irresponsible reporting" and had poor reporting technique was too "imprecise" to support a defamation action. Similarly, in *Avins v. White*, 627 F.2d 637 (3d Cir.), *cert. denied*, 449 U.S. 982 (1982), the former dean of a law school claimed that his academic ability and performance had been falsely disparaged in the summary evaluation of the school's first accreditation report. The summary bluntly stated: "[T]he most important deficiency [of the law school] is an intangible one; there is an academic ennui that pervades the institution. The intellectual spark is missing in the faculty and students." *Id.* at 642. Emphasizing that the statement itself described its criticism as "intangible," the *Avins* court classified the statement as an expression of opinion.

The straightforward but important principle to be drawn from cases such as *Buckley*, *Rinaldi*, *Cole* and *Avins* is that in all types of discourse, the courts must analyze the allegedly defamatory statement to determine whether it has a sufficiently definite meaning to convey facts.

In assessing whether the challenged statements are facts, rather than opinion, courts should, secondly, consider the degree to which the statements are verifiable—is the statement objectively capable of proof or disproof? See *Goodrich v. Waterbury Republican-American, supra*, 448 A.2d at 1319; *Hotchner v. Castillo-Puche, supra*, 551 F.2d at 913. The reason for this inquiry is simple: a reader cannot rationally view an unverifiable statement as conveying actual facts. Moreover, insofar as a statement is unverifiable, the First Amendment is endangered when attempts are made to prove the statement true or false. Lacking a clear method of verification with which to evaluate a statement—such as labelling a well-known American author a "fascist," see *Buckley v. Littell, supra*—the trier of fact may improperly tend to render a decision based upon approval or disapproval of the contents of the statement, its author, or its subject.

In making this observation, we imply no criticism of a jury's ability to find facts, if facts are to be found. The rule against allowing unverifiable statements to go to the jury is, in actuality, merely one of many rules in tort law that prevent the jury from rendering a verdict based on speculation. *Cf. Hobson v. Wilson*, No. 82-2159, slip op. at 120 (D.C. Cir. June 8, 1984) (permitting First Amendment interests to be compensated "if they can be conceptualized and if harm can be shown with sufficient certainty to avoid damages based * * * on pure speculation"). An obvious potential for quashing or muting First Amendment activity looms large when juries attempt to assess the truth of a statement that admits of no method of verification.

Needless to say, it will often be difficult to assay whether a statement is verifiable. Statements made in written communication or discourse range over a spectrum with respect to the degree to which they can be verified rather than dividing neatly into categories of "verifiable" and "unverifiable." But even if the principle of inquiring as to verifiability pro-

19. The court did hold, however, that the following statement was not constitutionally protected: "Like Westbrook Pegler, who lied day after day in his column about Quentin Reynolds and goaded him into a lawsuit, Buckley could be taken to court by any one of several people who had enough money to hire competent legal counsel and nothing else to do." *Buckley v. Littell, supra*, 539 F.2d at 895. The court treated this statement as implying that Buckley was a libeler and found that this proposition was capable of being proven false. *Id.* at 896. The charge that one has committed libel, like the charge that one has committed a crime, is obviously verifiable through the submission of evidence to the trier of fact.

20. Of course, we do not hold that the term "fascist" cannot be a statement of fact in any context. The issue is obviously not before us. But as an illustration of the application of our analysis, we observe that if the term were applied in a history of Italy between the World Wars and from the context it was clear that the application of the term was to adherents of Mussolini, the statement would be defamatory. See *Buckley v. Littell, supra*, 539 F.2d at 894 n.11. Courts, however, must be sensitive to the fact that some words that began their existence with a definite meaning have simply become epithets.

vides no panacea, this approach will nonetheless aid trial judges in assessing whether a statement should have the benefit of the absolute privilege conferred upon expressions of opinion. Trial judges have rich experience in the ways and means of proof and so will be particularly well situated to determine what can be proven.

In addition to evaluating the precision-indefiniteness and verifiability-unverifiability of a challenged statement, courts should, thirdly, examine the context in which the statement occurs. Readers will inevitably be influenced by a statement's context, and the distinction between fact and opinion can therefore be made only in context. As the Supreme Court's opinions in *Greenbelt* and *Letter Carriers* suggest, the context to be considered is both narrowly linguistic and broadly social.

The degree to which a statement is "laden with factual content" or can be read to imply facts depends upon the article or column, taken as a whole, of which the statement is a part. See *Information Control v. Genesis One Computer, supra*, 611 F.2d at 783. The language of the entire column may signal that a specific statement which, standing alone, would appear to be factual is in actuality a statement of opinion. An example of the power of context to transform an ostensibly factual statement into one of opinion is *Greenbelt Publishing*. Because the local newspaper in that case had described the substance of the land developer's negotiating proposals, the use of the term "blackmail" to characterize those proposals was quite plainly to be seen as an expression of opinion.[23]

An article or column, however, plainly does not have to include a complete set of facts to make it clear that a statement is being used in a metaphorical, exaggerated or even fantastic sense. In *Myers v. Boston Magazine Co., Inc.*, 403 N.E.2d 376, 6 Med.L.Rptr. 1241 (Mass. 1980), the court held as protected opinion a magazine's statement that a television sports reporter was "the only newscaster in town who is enrolled in a course for remedial speaking." *Id.* at 377. Although the statement on its face appears quite factual, the court emphasized in its analysis that the statement appeared in an article describing the best and worst sports personalities in a series of "one-liners." *Id.* For instance, the court noted that another item in the article described the Boston Bruins hockey team members as looking "like a gargoyle" and that the various descriptions had corresponding cartoons. The court concluded that the average reader would have been put on notice that he or she was reading opinions, and not being showered with facts. *Id.* at 379.

Another consideration in this respect, of particular relevance to the case at hand and useful in distinguishing between fact and opinion, is the inclusion of cautionary language in the text in which the statement at issue is found, see *Information Control, supra*, 611 F.2d at 784 (noting that the allegedly libelous statement was preceded by the phrase, "In the opinion of Genesis' management" and that this favored treating the statement which followed as opinion), or framing the statement as an interrogatory ("Is it not true that * * * ?"). The rationale typically advanced for this consideration is that cautionary language or interrogatories of this type put the reader on notice that what is being read is opinion and thus weaken any inference that the author possesses knowledge of damaging, undisclosed facts. See *Pease v. Telegraph Publishing* Co., 426 A.2d 463, 465, 7 Med.L.Rptr. 1114 (N.H. 1981). In a word, when the reasonable reader encounters cautionary language, he tends to "discount that which follows.' See *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1360, 9 Med.L.Rptr. 1257 (Colo. 1983).

To be sure, there is authority against giving weight to cautionary or interrogatory language. Stating that "[i]t would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think,' " *Cianci, supra*, 639 F.2d at 64, the Second Circuit in an opinion by Judge Friendly rejected the notion that cautionary language could immunize an otherwise defamatory statement. While Judge Friendly's argument is not without force, it may be overstated if applied outside the type of facts before the court in *Cianci*—the accusation of a crime—since cautionary language is only one of several fac-

23. See also *Rinsley v. Brandt*, 700 F.2d 1304 (10th Cir. 1983). In *Rinsley*, an author levied harsh criticism at one doctor's method of treatment. The author stated that the doctor had "a theory to which [he was] willing to sacrifice a life." *Id.* at 1309. In a second passage, the author put the question "What does it take to put a stop to such a man [the doctor]? How many more children must die?" *Id.* The doctor claimed that the statement purported to convey information that he had purposely killed a patient and that other patients were in imminent danger of being purposely killed. The court rejected the claim, stating that the author's actual descriptions of the doctor's method of treatment and the circumstances of a patient's death, made it clear that these statements constituted the author's opinion. *Id.*

tors to be considered in assessing an allegedly defamatory statement.[24] *Burns v. McGraw-Hill, supra*, 659 P.2d at 1360 N.4. When a statement is as "factually laden" as the accusation of a crime, which of course was the issue in *Cianci*, cautionary language is by and large unavailing to dilute the statement's factual implications. However, in statements less clearly factual, cautionary language may make a more substantial difference to the reader's understanding.

What is more, we cannot forget that the public has an interest in receiving information on issues of public importance even if the trustworthiness of the information is not absolutely certain. The First Amendment is served not only by articles and columns that purport to be definitive but by those articles that, more modestly, raise questions and prompt investigation or debate. By giving weight on the opinion side of the scale to cautionary and interrogative language, courts provide greater leeway to journalists and other writers and commentators in bringing issues of public importance to the public's attention and scrutiny.

Besides looking to the immediate context of the allegedly defamatory statement, courts should examine, finally, the broader social context into which the statement fits. Some types of writing or speech by custom or convention signal to readers or listeners that what is being read or heard is likely to be opinion, not fact.[25] It is one thing to be assailed as a corrupt public official by a soapbox orator and quite another to be labelled corrupt in a research monograph detailing the causes and cures of corruption in public service. This observation reflects no novel principle. The Supreme Court has expressly recognized the importance of social context when, in finding as an expression of opinion the use of the word "traitor" as applied to an employee who crossed a picket line, the Court stated that "such exaggerated rhetoric was commonplace in labor disputes." *Letter Carriers, supra*, 418 U.S. at 286.

Similarly, in *Myers v. Boston Magazine, supra*, the Massachusetts Supreme Judicial Court was even more explicit in focusing upon the reader's understanding of a particular type of writing. Emphasizing that the "magazine's statement partook of an ancient, lively tradition of criticizing, even lampooning, performers," the court concluded that the statement that a sportscaster was attending a course in remedial speaking constituted privileged opinion. *Id.* at 381. In the lampooning tradition, the court emphasized, it is well understood that "a critic may resort to caricature and rhetorical license." *Id.* See also *Pring v. Penthouse, Inc.*, 695 F.2d 438, 8 Med.L.Rptr. 2409 (10th Cir. 1982), *cert. denied*, 103 S.Ct. 3112 (1983) (finding that the imputation that the plaintiff had committed sexual acts on stage at the Miss America Pageant could not support a libel action when the writing in which the statement appeared was clearly a "fantasy").

Courts have, in the same vein, considered the influence that other well established *genres* of writing will have on the average reader. Of particular relevance in this respect to the case before us is *Loeb v. Globe Newspaper Co.*, 489 F.Supp. 481 (D. Mass. 1980). In that case, the court observed that the article containing the alleged defamations of the publisher of the *Manchester Union-Leader* was situated on the *Boston Globe's* editorial page. The court held that, in the specific context or setting at issue there, the statement to the effect that Mr. Loeb never backed a winner in a presidential election was protected opinion. Plainly, the general understanding of the nature of the statements on the editorial page was relevant to the decision; if the statement had appeared on the front page where news is reported, it would most likely have been treated as a statement of fact. See also *National Rifle Association v. Dayton Newspapers, Inc.*, 555 F.Supp. 1299 (S.D. Ohio 1983) (holding that the statement in an editorial that the National Rifle Association "happily encourages * * * murders and robberies" was protected opinion). In short, it is well understood that editorial writers and commentators frequently "resort to the type of caustic bombast traditionally used in editorial writing to stimulate public reaction." *Id.* at 1309. Hence, in analyzing the distinction between fact and opinion, the court will take fully into account the different social conventions or customs inherent in different types of writing.[27]

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24. See Note, *Fact and Opinion after Gertz v. Robert Welch, Inc.: The Evolution of a Privilege, supra*, 34 Rutgers L. Rev. at 107–108.

25. *Cf. Restatement (Second) of Torts* §566, comment e (stating that "there are some statements that are in form statements of opinion, or even of fact, which cannot reasonably be understood to be meant literally and seriously and are obviously mere vituperation and abuse"). The Restatement does not, however, comment on the power of other *genres* of writing or speaking to influence the audience's view of a statement.

27. See also *National Ass'n of Gov't Employees v. Central Broadcasting Corp.*, 396 N.E.2d 996, 1001 (Mass. 1979), *cert. denied*, 346 U.S. 935 (1980) (holding that the charge of communism levied against a union was opinion because the audience heard the charge on a radio call-in talk show called "Sound Off" and would likely have regarded it as "pejorative rhetoric").

[Judge Starr in his plurality opinion then proceeds to apply the four-part test to the Evans and Novak column and he finds that it fits. He concludes:]

* * *

But most fundamentally, we are reminded that in the accommodation of the conflicting concerns reflected in the First Amendment and the law of defamation, the deep-seated constitutional values embodied in the Bill of Rights require that we not engage, without bearing clearly in mind the context before us, in a Talmudic parsing of a single sentence or two, as if we were occupied with a philosophical enterprise or linguistic analysis. Ours is a practical task, with elemental constitutional values of freedom looming large as we go about our work. And in that undertaking, we are reminded by *Gertz* itself of our duty "to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Gertz, supra*, 418 U.S. at 342. For the contraction of liberty's "breathing space" can only mean inhibition of the scope of public discussion on matters of general interest and concern. The provision of breathing space counsels strongly against straining to squeeze factual context from a single sentence in a column that is otherwise clearly opinion. As the Ninth Circuit so succinctly put it, "[t]he court must consider all the words used, not merely a particular phrase or sentence." *Information Control Corp. v. Genesis One Computer Corp., supra*, 611 F.2d at 784.

The judgment of the District Court is therefore *Affirmed*.

COMMENT

Judge Starr's four-point test, while not without its problems, is an improvement over the *Restatements'* older model of pure fact, pure opinion, and mixed fact/opinion. No dependable rule emerged from the myriad cases decided under that model. But no "bright-line rule" comes out of Starr's model either.

Although it has been variously interpreted, Starr's model seems to comprise (not necessarily in the order he presents them) the following elements:

1. *Common Usage*—the precision or indefiniteness with which the language is used;
2. *Verifiability*—the notion (probably erroneous) that only facts can be assessed as to truth or falsity;
3. *Context*—placement of the statement in the text, surrounding language, social conventions inherent in different types of writing, audience, and its likely interpretations;
4. *Cautionary Language*—metaphor, hyperbole, is the audience tipped off that the statement is an expression of opinion?

Former Judge Robert Bork, concurring in a ringing defense of freedom of the press, added a fifth element to the Starr test: *political or public speech*. "Those who step into areas of public dispute," said Bork, "who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement and even wounding assessments."

Bork saw damage awards as "quite capable of silencing political commentators forever" and with respect to freedom of expression he observed: "A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty."

In a dissenting opinion that seemed designed to rebut Bork and reverse the trend of First Amendment doctrine, Judge Scalia, speculated in somewhat chilling language:

* * *

> It seems to me that the identification of "modern problems" to be remedied is quintessentially legislative rather than judicial business—largely because it is such a subjective judgment; and that the remedies are to be sought through democratic change rather than through judicial pronouncement that the Constitution now prohibits what it did not prohibit before. The concurrence perceives a "modern problem" consisting of "the freshening stream of libel actions, which * * * may threaten the public and constitutional interest in free, and frequently rough, discussion," and of claims for damages that are "quite capable of silencing political commentators forever." Perhaps that perception is correct, though it is hard to square with the explosion of communications in general, and political commentary in particular, in this "Media Age." But then again, perhaps those are right who discern a distressing tendency for our political commentary to descend from discussion of public issues to destruction of private reputations; who believe that, by putting some brake upon that tendency, defamation liability under existing standards not only does not impair but fosters the type of discussion the first amendment is most concerned to protect; and who view high libel judgments as no more than an accurate reflection of the vastly expanded damage that can be caused by media that are capable of holding individuals up to public obloquy from coast to coast and that reap financial rewards commensurate

> with that power. I do not know the answers to these questions, but I do know that it is frightening to think that the existence or nonexistence of a *constitutional* rule (the willfully false disparagement of professional reputation in the context of political commentary cannot be actionable) is to depend upon our ongoing personal assessments of such sociological factors. And not only is our cloistered capacity to identify "modern problems" suspect, but our ability to provide condign solutions through the rude means of constitutional prohibition is nonexistent. What a strange notion that the problem of excessive libel awards should be solved by permitting, in political debate, intentional destruction of reputation—rather than by placing a legislative limit upon the amount of libel recovery. It has not often been thought, by the way, that the press is among the least effective of legislative lobbyists.
>
> In recent years, the Supreme Court confronted a similar assertion of a "modern problem" that required a new first amendment mutant. The omnipresence of the modern press, the popularity of "investigative reportage," and the eagerness of many dissident groups actively to seek out press coverage, have with increasing frequency caused members of the press to be in possession of information regarding unlawful activity, necessary for the detection or prevention of crime.
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> * * *

Bork's "public issue" test was added to the Starr model in *Janklow v. Newsweek, Inc.*, 12 Med.L.Rptr. 1961, 788 F.2d 1300 (8th Cir. 1986), when a divided court of appeals rejected the libel claim of the governor of South Dakota against a magazine for recounting American Indian charges of rape of a teenaged Indian girl against the governor. "[T]he disputed statement," said a majority of the Eighth Circuit, " * * * is imprecise, unverifiable, presented in a forum where spirited writing is expected and involves criticism of the motives and intentions of a public official * * *."

In a nutshell, the less precise a statement, the more likely it is to be opinion; the less verifiable, the more likely it is to be opinion; and the literary, social, and political context of the statement will be considered in differentiating fact from opinion.

The *Ollman* model is not without its problems. "Context" can also be an extremely subjective matter. Objective proof of a fact in a statement is seldom available. But the model is better than anything preceding it. Some media lawyers see it as a firm defense of opinion; others are wary of it or think it applicable only to the D.C. Circuit.

Some courts have said that opinions are absolutely immune;[186] others have used variations of *Ollman*.[187] In the *Belli* case the court reduced the test to public figure and context considerations and noted that where the plaintiff aggressively advertised his own opinions about a public matter, he shouldn't be surprised when the targets of his wrath "returned the favor."

Press freedom may seem tenuous under tests that quickly dissolve into matters of literary predilection or political preference. A public issue test, standing alone, may be preferable for public officials and voluntary public figures. Anything less could make libel law unconstitutional due to vagueness, if not overbreadth.

Intentional Infliction of Emotional Distress

Recalling Mrs. Firestone's claim for damages based not on reputation but on "personal humiliation and mental anguish and suffering," media lawyers speculated on whether a new tort had entered the law when Jerry Falwell sued Larry Flynt for the "intentional infliction of emotional distress."

But was it a new tort? Something like it came into English law in 1897;[188] the tort was widely recognized after Dean William Prosser certified it in the 1950s; and the *Restatement* speaks of a tort involving extreme and outrageous conduct exceeding all reasonable bounds of decency that is extraordinarily vindictive, intentional, or reckless and leading to severe emotional distress.[189] Emotional distress for some time has been sufficient to support a libel suit in Maryland, Louisiana, Massachusetts, and Florida and perhaps in Virginia, whereas most states have required a showing of damage to reputation. And where libel has been presumed to cause shame, mental

186. *Spelson v. CBS, Inc.*, 581 F.Supp. 1195, 1202 (N.D. Ill. 1984); *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 (1986).

187. *Belli v. Berryhill*, 11 Med.L.Rptr. 1221, 1224 (Cal.Ct.App. 1984). *Mr. Chow v. Ste. Jour Azur, S.A.*, 759 F.2d 219 (2d Cir. 1985).

188. *Wilkinson v. Downston*, 2 Q.B.D. 57 (1897).

189. *Restatement (Second) of Torts* § 46 (1977). Virginia recognizes a similar cause of action if a plaintiff can show that he suffered severe distress as a result of intentional or reckless misconduct that exceeds "generally accepted standards of decency and morality." What does a provision such as this mean for the unpopular, unorthodox, or immoral speaker?

anxiety, and humiliation—and why wouldn't it—how does it differ from the "new" tort?

Whatever its origins and legal standing, the new tort was greatly limited by the Supreme Court in its 1988 ruling in *Hustler Magazine v. Falwell*. The principals, Flynt and Falwell, seemed to deserve one another. Flynt frankly declared that he intended metaphorically at least to "assassinate Jerry Falwell." Falwell, then, in spite of his deep emotional hurt, distributed the tasteless parody throughout the land, using it to raise $800,000 for his ministry.

Taking its cue from a brilliant dissent by Judge Wilkinson in the court below, the Supreme Court ruled for *Hustler*, and hundreds of libel lawyers, who believed Larry Flynt was "killing them," sighed in relief.

HUSTLER MAGAZINE v. FALWELL

14 MED.L.RPTR. 2281, 108 S.CT. 876 (1988).

REHNQUIST, C. J., delivered the opinion of the Court, in which Brennan, Marshall, Blackmun, Stevens, O'Connor, and Scalia, JJ., joined. White, J., filed an opinion concurring in the judgment. Kennedy, J., took no part in the consideration or decision of the case.

Petitioner Hustler Magazine, Inc., is a magazine of nationwide circulation. Respondent Jerry Falwell, a nationally known minister who has been active as a commentator on politics and public affairs, sued petitioner and its publisher, petitioner Larry Flynt, to recover damages for invasion of privacy, libel, and intentional infliction of emotional distress. The District Court directed a verdict against respondent on the privacy claim, and submitted the other two claims to a jury. The jury found for petitioners on the defamation claim, but found for respondent on the claim for intentional infliction of emotional distress and awarded damages. We now consider whether this award is consistent with the First and Fourteenth Amendments of the United States Constitution.

The inside front cover of the November 1983 issue of Hustler Magazine featured a "parody" of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled "Jerry Falwell talks about his first time." This parody was modeled after actual Campari ads that included interviews with various celebrities about their "first times." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times." Copying the form and layout of these Campari ads, Hustler's editors chose respondent as the featured celebrity and drafted an alleged "interview" with him in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, "ad parody—not to be taken seriously." The magazine's table of contents also lists the ad as "Fiction; Ad and Personality Parody."

Soon after the November issue of Hustler became available to the public, respondent brought this diversity action in the United States District Court for the Western District of Virginia against Hustler Magazine, Inc., Larry C. Flynt, and Flynt Distributing Co. Respondent stated in his complaint that publication of the ad parody in Hustler entitled him to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. The case proceeded to trial.[1] At the close of the evidence, the District Court granted a directed verdict for petitioners on the invasion of privacy claim. The jury then found against respondent on the libel claim, specifically finding that the ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." The jury ruled for respondent on the intentional infliction of emotional distress claim, however, and stated that he should be awarded $100,000 in compensatory damages, as well as $50,000 each in punitive damages from petitioners. Petitioners' motion for judgment notwithstanding the verdict was denied.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the judgment against petitioners. *Falwell v. Flynt*, 797 F.2d 1270, 13 Med.L.Rptr. 1145 (CA4 1986). The court rejected petitioners' argument that the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), must be met before respondent can re-

1. While the case was pending, the ad parody was published in Hustler magazine a second time.

cover for emotional distress. The court agreed that because respondent is concededly a public figure, petitioners are "entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in [respondent's] claim for libel." 797 F.2d, at 1274. But this does not mean that a literal application of the actual malice rule is appropriate in the context of an emotional distress claim. In the court's view, the *New York Times* decision emphasized the constitutional importance not of the falsity of the statement or the defendant's disregard for the truth, but of the heightened level of culpability embodied in the requirement of "knowing * * * or reckless" conduct. Here, the *New York Times* standard is satisfied by the state-law requirement, and the jury's finding, that the defendants have acted intentionally or recklessly. The Court of Appeals then went on to reject the contention that because the jury found that the ad parody did not describe actual facts about respondent, the ad was an opinion that is protected by the First Amendment. As the court put it, this was "irrelevant," as the issue is "whether [the ad's] publication was sufficiently outrageous to constitute intentional infliction of emotional distress." *Id.*, at 1276. Petitioners then filed a petition for rehearing en banc, but this was denied by a divided court. Given the importance of the constitutional issues involved, we granted certiorari.

This case presents us with a novel question involving First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress. We must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most. Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503–504 (1984). We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a "false" idea. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). As Justice Holmes wrote, "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market * * *." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion).

The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Associated Press v. Walker*, decided with *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C. J., concurring in result). Justice Frankfurter put it succinctly in *Baumgartner v. United States*, 322 U.S. 665, 673–674 (1944), when he said that "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks," *New York times, supra*, at 270. "[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971).

Of course, this does not mean that *any* speech about a public figure is immune from sanction in the form of damages. Since *New York Times Co. v. Sullivan, supra*, we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280. False statements of fact are particularly valuless; they interfere with the truth-seeking function

of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective. See *Gertz*, 418 U.S., at 340, 344, n. 9. But even though falsehoods have little value in and of themselves, they are "nevertheless inevitable in free debate," *id.*, at 340, and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted "chilling" effect on speech relating to public figures that does have constitutional value. "Freedoms of expression require 'breathing space.' " *Philadelphia Newspaper, Inc. v. Hepps*, 475 U.S. 767, 772 (1986) (quoting *New York Times*, 376 U.S., at 272). This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability.

Respondent argues, however, that a different standard should apply in this case because here the State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication. Cf. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (ruling that the "actual malice" standard does not apply to the tort of appropriation of a right of publicity). In respondent's view, and in the view of the Court of Appeals, so long as the utterance was intended to inflict emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false. It is the intent to cause injury that is the gravamen of the tort, and the State's interest in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type.

Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), we held that even when a speaker or writer is motivated by hatred or ill-will his expression was protected by the First Amendment:

> "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Id.*, at 73.

Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awarded without any showing that their work falsely defamed its subject. Webster's defines a caricature as "the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect." Webster's New Unabridged Twentieth Century Dictionary of the English Language 275 (2d ed. 1979). The appeal of the political cartoon or caricature is often based on exploration of unfortunate physical traits or politically embarrassing events—an exploration often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or even-handed, but slashing and one-sided. One cartoonist expressed the nature of the art in these words:

> "The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters." Long, *The Political Cartoon: Journalism's Strongest Weapon*, The Quill, 56, 57 (Nov. 1962).

Several famous examples of this type of intentionally injurious speech were drawn by Thomas Nast, probably the greatest American cartoonist to date, who was associated for many years during the post-Civil War era with *Harper's Weekly*. In the pages of that publication Nast conducted a graphic vendetta against William M. "Boss" Tweed and his corrupt associates in New York City's "Tweed Ring." It has been described by one historian of the subject as "a sustained attack which in its passion and effectiveness stands alone in the history of American graphic art." M. Keller, *The Art and Politics of Thomas Nast* 177 (1968). Another writer explains that the success of the Nast cartoon was achieved "because of the emotional impact of its presentation. It continuously goes beyond the bounds of good taste and conventional manners." C. Press, *The Political Cartoon* 251 (1981).

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as "The Royal Feast of Belshazzar," and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.

Respondent contends, however, that the caricature in question here was so "outrageous" as to distinguish it from more traditional political cartoons. There is no doubt that the caricature of respondent and his mother published in *Hustler* is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character * * * simply because it may embarrass others or coerce them into action"). And, as we stated in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978):

> "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Id.*, at 745–746.

See also *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that * * * the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers").

Admittedly, these oft-repeated First Amendment principles, like other principles, are subject to limitations. We recognized in *Pacifica Foundation*, that speech that is " 'vulgar,' 'offensive,' and 'shocking' " is "not entitled to absolute constitutional protection under all circumstances." 438 U.S., at 747. In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), we held that a state could lawfully punish an individual for the use of insulting " 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.*, at 571–572. These limitations are but recognition of the observation in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985), that this Court has "long recognized that not all speech is of equal First Amendment importance." But the sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles stated above.

We conclude that public figures and public official[s] may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application" of the *New York Times* standard, see *Times, Inc. v. Hill*, 385 U.S. 374, 390 (1967), it reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.

Here it is clear that respondent Falwell is a "public figure" for purposes of First Amendment law.[5] The

5. Neither party disputes this conclusion. Respondent is the host of a nationally syndicated television show and was the founder and president of a political organization formerly known as the Moral Majority. He is also the founder of Liberty University in Lynchburg, Virginia, and is the author of several books and publications. *Who's Who in America* 849 (44th ed. 1986–1987).

jury found against respondent on his libel claim when it decided that the Hustler ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." The Court of Appeals interpreted the jury's finding to be that the ad parody "was not reasonably believable," 797 F.2d, at 1278, and in accordance with our custom we accept this finding. Respondent is thus relegated to his claim for damages awarded by the jury for the intentional infliction of emotional distress by "outrageous" conduct. But for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here. The judgment of the Court of Appeals is accordingly

Reversed.

COMMENT

Falwell voided a method of circumventing the libel laws, firmed up the *New York Times* doctrine (without the support of Justice White), and reassured parodists, satirists, cartoonists, and others that their work falls within the boundaries of protected opinion.

An additional concern for the opinion doctrine is "faction" or the docudrama, those presentations in which the distinction between reportage and art becomes blurred. How is the *Ollman* test, with the public interest appendage, applied to this mix of journalism and the creative process?

Did creators of the film *Missing* portray an American official with actual malice as ordering or approving an order to kill Charles Horman, an American residing in Chile at the time of the 1973 coup? A federal district court thought not and had this to say about actual malice and this hybrid art form in dismissing the complaint with costs.

DAVIS v. COSTA-GAVRAS

13 MED.L.RPTR. 2112, 654 F.SUPP. 653 (S.D.N.Y. 1987).

* * *

Pollock, J.

The theme of the film is the search for a missing man by his father and his wife. The man who disappeared is finally found to have been executed by the Chilean military. The film is *based upon* a true story. It is only in that setting that the composite conduct of the American governmental representatives in Chile at the time and the degree of their assistance in that search comes under scrutiny and criticism. There is no person named Ray Davis referred to in the film at any time. Ray Tower, with whom the plaintiff associates himself, is a symbolic fictional composite of the entire American political and military entourage in Chile.

The film derives from and is solidly documented and supported by the stories relied on by the filmmakers, taken from the acts and statements of the concerned father and the anguished wife set forth in detail in Thomas Hauser's book, *Execution*. Those sources are shown to have been heavily investigated and confirmed by the filmmakers, who entertained no serious doubts of their truth or knowledge to the contrary of what they portrayed.

* * *

There is nothing in the record tending to show that the filmmakers questioned Hauser's credentials or his book in any respect at the time "Missing" was made. The record is to the contrary. The filmmakers met with Hauser, went over his investigation and sources, supplied him with drafts of the script under preparation and were satisfied that there was no reason to doubt his work. No evidence whatever challenges those facts. Certainly the filmmakers obtained no knowledge contradicting the veracity or accuracy of Hauser's book and the stories of the Hormans as told to them and reflected in the book. There is no suggestion to the contrary from any provable sources. Indeed, nothing in plaintiff's papers demonstrates that either Hauser's credentials or his book, which was nominated for a Pulitzer Prize, are in fact "suspect" in any way.

The filmmakers knew that Hauser was a lawyer who had served as a judicial clerk in the Chambers of a Federal Judge and then worked for a prestigious Wall Street law firm. They knew that Hauser interviewed Captain Ray Davis, as well as other United States officials in Chile and numerous other persons when preparing *Execution*. The filmmakers also knew that no legal action whatsoever was taken against the book in the approximately four years since its publication. In an August 1980 meeting where Costa-Gavras, the film's director, and Stewart, the co-scriptwriter, met with Hauser to verify the accuracy

of his book, Hauser described his meticulous research methods and broad inquiries. There is no evidence to the contrary.

The filmmakers then met with Charles Horman's parents, his wife, and one Terry Simon, a close friend who was in Chile with Charles around the time of his disappearance. Each of these individuals made clear to Costa-Gavras and Stewart that Hauser's book accurately and reliably depicted events as they knew and believed them. There is no evidence that any of defendants' further research and review of documents regarding Horman and events in Chile during the coup caused them to doubt the veracity of Hauser's book.

* * *

Plaintiff enumerates nine scenes in "Missing" which the filmmakers allegedly created, or in which they distorted the context, or made baseless suggestions. None of these scenes provides or contributes to the requisite evidence of actual malice.

It should be made clear that "Missing" is not a documentary, but a dramatization of the Horman disappearance and search. The film does not purport to depict a chronology of the events precisely as they actually occurred; it opens with the prologue: "This film is *based on* a true story. The incidents and facts are documented. Some of the names have been changed to protect the innocent and also to protect the film." (emphasis supplied). No one challenged the accuracy and veracity of Hauser's book to the knowledge of defendants. Defendants concede that although the substance of the film's scenes is extracted almost directly from Thomas Hauser's book, not everything in their film is literally faithful to the actual historical record as if in a documentary. That is not to say that which was not historical was set out in bad faith, portrayed with actual malice, or established or increased the defamatory impact.

The film is not a documentary. A documentary is a non-fictional story or series of historical events portrayed in their actual location; a film [of] real people and real events as they occur. A documentary maintains strict fidelity to fact.

"Missing," on the other hand, is an art form sometimes described as "Docu-Drama." The line separating a documentary from a docudrama is not always sharply defined, but is nonetheless discernible. Both forms are necessarily selective, given the time constraints of movies and the attention span of the viewing audience. The docudrama is a dramatization of an historical event or lives of real people, using actors or actresses. Docudramas utilize simulated dialogue, composite characters, and a telescoping of events occurring over a period into a composite scene or scenes. This treatment is singularly appropriate and unexceptionable if the context is not distorted when dealing with public and political figures.

Self-evidently a docudrama partakes of author's license—it is a creative interpretation of reality—and if alterations of fact in scenes portrayed are not made with serious doubts of truth of essence of the telescoped composite, such scenes do not ground a charge of actual malice.

Each scene questioned by the plaintiff is a telescoped composite of events, personalities, and of the American representatives in Chile who are involved therein. Each uses permissible literary license to fit historical detail into a suitable dramatic context. Such dramatic embellishments as are made do not distort the fundamental story being told—the frantic search by his family for a missing man who has suddenly disappeared, their emotions, anxieties, impatience, frustration, and doubts of assistance from American officialdom. The scenes are thus a hybrid of fact and fiction, which, however, do not materially distort the analysis. Always to be remembered is that they fairly represent the source materials for the film believed to be true by the filmmakers. Leeway is properly afforded to an author who thus attempts to recount a true event.

As a matter of law, the dramatic overlay supplied by the film does not serve to increase the impact of what plaintiff charges as defamatory since it fairly and reasonably portrays the unassailable beliefs of the Hormans, the record thereof in the Hauser book, and the corroborative results of the authors' inquiries. In docudrama, minor fictionalization cannot be considered evidence or support for the requirement of actual malice.

The nine scenes selected by plaintiff as support for the requirement of actual malice do no such thing. Each is related solely and unquestionably to the theme of this film. The movie's Ray Tower character is a fictional composite of the American presence operating in Chile at the time. He is a symbolic figure. The artistic input in the scenes questioned is found in permissible syntheses and

composite treatment in the film. Although in actuality particular individuals were not physically present when certain dialogue occurred, in the movie scene the composite character portrayed was.

The content of the film reflects what happened according to the book, the persons who complained, and the sources relied on by defendants. While the actual persons involved in the events portrayed do not appear in on-scene interviews to describe their experiences, actions, and motivations, the real names of some individuals are employed. But the name Ray Davis is never mentioned. Real life personalities are accordingly represented by telescope composites in many instances.

The cases on point demonstrate that the First Amendment protects such dramatizations and does not demand literal truth in every episode depicted; publishing a dramatization is not of itself evidence of actual malice.

* * *

The complaint is dismissed with cause.

Neutral Reportage

Court definitions of "reckless disregard" have greatly modified the reporter's liability for simply stating someone else's libelous charges. To have a reliable source and to represent it objectively may be all that is needed.

"While verification of the facts remains an important reporting standard," the Fifth Circuit Court of Appeals said in 1966, "a reporter, without a 'high degree of awareness of their probable falsity,' may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution. * * * "[190]

And the constitutional rule of *Medina v. Time, Inc.* in 1971[191] was that news media reports of statements made by participants in a public controversy are protected, where the fact that one participant levels charges against another is itself a newsworthy event.

The difficult but necessary task is to report such charges dispassionately and not to assert them as your own views. Perhaps courts are willing to concede that newspapers are in no position to guarantee the truth of everything they print.

When the Illinois Crime Investigating Commission director said in a published interview that two men were "lieutenants of * * * [a] Southern Illinois crime syndicate chieftain," one of the men filed suit against the *Chicago Sun-Times*. An appellate court upheld a lower court's granting of a summary judgment to the newspaper and ruled that the news story was an accurate account of a government official's statement and was therefore privileged. *Doss v. Field Enterprises, Inc.*, 332 N.E.2d 497 (Ill. 1975). Similarities to the qualified privilege of reporting governmental processes were also noted in *Joplin v. WEWS Television Station*, 6 Med.L.Rptr. 1331 (Ohio App. 1980).

The defense of *neutral reportage* came into its own in the framework of a long and heated controversy between opponents and proponents of the use of DDT. While both sides were impugning the honesty of the other, the *New York Times* got in the middle, and in 1972 reported that officials of the National Audubon Society were accusing a number of prominent scientists of being "paid to lie" by pesticide companies.

The reporter, however, contacted as many of the maligned scientists as he could and incorporated their angry responses into his story. Three of them nevertheless brought libel suits against the Society and the *New York Times*, and a jury awarded them each $20,000 in damages.

Concluding that the jury believed the reporter "reckless" in failing to investigate further when the scientists warned him of the libel potential of the charges, the trial judge let the verdict stand. The court of appeals reversed, dismissing the complaints.

Relying on a series of cases beginning with *Time, Inc. v. Pape* (see this text, p. 201), as appellant's brief had proposed, Judge Kaufman for the United States Court of Appeals for the Second Circuit gave the defense of *neutral reportage* its initial articulation.

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190. *New York Times Co. v. Connor*, 365 F.2d 567, 576 (5th Cir. 1966). See also, *Time, Inc. v. Johnson*, 448 F.2d 378 (4th Cir. 1971).

191. 439 F.2d 1129 (1st Cir. 1971). The case involved Captain Medina of My Lai fame. See also, *Thuma v. Hearst Corp.*, 340 F.Supp. 867 (D.Md. 1972).

EDWARDS v. NATIONAL AUDUBON SOCIETY

556 F.2D 113 (2D CIR. 1977), CERT. DEN. 434 U.S. 1002.

Irving R. KAUFMAN, Chief Judge:

* * *

At stake in this case is a fundamental principle. Succinctly stated, when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation. The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.

The contours of the press's right of *neutral reportage* are, of course, defined by the principle that gives life to it. Literal accuracy is not a prerequisite: if we are to enjoy the blessings of a robust and unintimidated press, we must provide immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made. It is equally clear, however, that a publisher who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of *neutral reportage*. In such instances he assumes responsibility for the underlying accusations. See *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), cert. den., 396 U.S. 1049 (1970). [Emphasis added.]

* * * The *Times* article * * * was the exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretemps. Accordingly, we hold that it was privileged under the First Amendment.

COMMENT

Publication of a "completely fabricated accusation" and "wholly imagined but supposedly precisely quoted conversations" will destroy any privilege of neutral reportage,[192] as will an admission by a defendant that "he did not know whether what he said was true" and that he "did nothing, or almost nothing, to verify his charges."[193] Such behavior also reflects "reckless disregard" for the truth.

Echoes of *Rosenbloom's* public issue test ring in *Edwards*. A newsworthy source, even an irresponsible one, may develop into a libel defense. A year later in *Dickey v. CBS*, 4 Med.L.Rptr. 1353, 583 F.2d 1221, 1225–6 (3d Cir. 1978), the Third Circuit took pains to repudiate the rule of *Edwards*. See also, *Medico v. Time, Inc.*, 643 F.2d 134 (3d Cir. 1981), cert. den., 454 U.S. 836 (1981), where the same court declined to follow *Edwards* but said the press would not likely be punished for what others say, especially public officials. But the rule was adopted by an Illinois appeals court in *Krauss v. Champaign News Gazette*, 3 Med.L.Rptr. 2507, 375 N.E.2d 1362 (Ill. 1978), and rejected by another Illinois court in *Catalano v. Pechous*, 4 Med.L.Rptr. 2094, 387 N.E.2d 714 (1978), affirmed 6 Med.L.Rptr. 2511, 419 N.E.2d 350 (Ill. 1980). Kentucky's Supreme Court disavowed the neutral reportage defense in *McCall v. Courier Journal & Louisville Times*, 7 Med.L.Rptr. 2118, 623 S.W.2d 882 (Ky. 1981).

As of this writing, some courts in Wyoming, Indiana, Florida, Ohio, and Vermont, as well as Illinois, have adopted the neutral reportage defense. Courts in New York, and South Dakota, as well as Kentucky, have rejected it.

Neutral reportage remains a new and half-fashioned common law defense that ought to be approached with caution. Many federal courts—but not the U.S. Supreme Court—have given *Edwards* some credence, although less enthusiastically, or not at all, where the plaintiff is a private person[194] or where the charges are originated by the media.[195] A New York federal district court judge said pointedly in a 1980 ruling that the *Edwards* privilege did not

192. *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976).

193. *Guam Teachers' Local 1581 (AFT) v. Ysrael*, 492 F.2d 438 (9th Cir. 1974), cert. den., 419 U.S. 872 (1974).

194. *Dixson v. Newsweek*, 3 Med.L.Rptr. 1123, 562 F.2d 626 (10th Cir. 1977). In *Dresbach v. Doubleday*, 8 Med.L.Rptr. 1793, 518 F.Supp. 1285 (D.D.C. 1981), the defense was limited to statements made about public figures.

195. *Schermerhorn v. Rosenberg*, 6 Med.L.Rptr. 1376, 426 N.Y.S.2d 274 (1980).

apply to investigative reporting: "Unlike *Edwards*, no controversy raged around the libelous statement before the reporter entered the scene." [196]

There remains substantial disagreement among courts on the constitutional acceptability of the neutral reportage defense. Most have not decided.

In summary, the defense of neutral reportage will require a controversy of public importance, charges made by responsible persons of the organizations party to the dispute, and an accurate and somewhat disinterested job of reporting.

Consent

Consent, especially if it is in written form, may on occasion be a sturdy defense. Most often, however, consent is simply implied. When a reporter asks a person to comment on a charge someone has made against him or her, it is not possible to write about a denial without mentioning the original charge. A denial alone could be meaningless. One who initiates a conversation with a reporter has consented.

Controversy of any kind obligates the reporter to try hard to get both sides and to tell readers he or she has tried. When successful, consent may be implied in what was reported. Reporters write for publication. Talk to a reporter and you are speaking for publication.

A vice chairman of the Democratic National Committee was fired for negotiating a $9 million tungsten contract with the federal government on behalf of a Portuguese corporation. In his own defense he gave the old *New York Herald Tribune* a detailed statement for publication, and he issued a statement to the wire services.

One day before the statute of limitations would have run, he brought libel actions against a number of newspapers. In ruling against him a federal appeals court judge, Chief Judge Parker, wrote:

> The only portions of the article of which plaintiffs can complain as not being statements of fact is that portion relating to the Herald-Tribune's terming the case "the biggest five percenter deal ever exposed in Washington" and General Eisenhower's referring to it as the "sort of crookedness that goes on and on in Washington." These, however, cannot be deemed unfair comments when read, as they must be, in connection with the remainder of the article, which sets forth in detail the facts to which the comments relate and carries the statement of Westbrook with regard thereto including his denial that he had used or attempted to use his position to influence the awarding of the contract or that his services were of the "so-called 'five percenter' variety." *In view of the fact that Westbrook gave this statement to the press in an interview to be published, he is hardly in a position to complain of the publication with it of the charge to which it was an answer, even if the latter were otherwise objectionable.* [Emphasis added.] *Pulvermann v. A. S. Abell Co.*, 228 F.2d 797 (4th Cir. 1956).

Similarly, when a Methodist minister and his family were unintentionally libeled in a college humor magazine, the minister found himself without a remedy after granting interviews to two student journalists. Where the plaintiff told the reporters that he wanted publicity, and publicity printed in his own words, and then referred them to his lawyer for legal details, the newspaper publication was absolutely privileged. The Tennessee court of appeals dismissed the minister's libel suit against the college newspaper, and a similar suit against the humor magazine never came to trial. *Langford v. Vanderbilt University*, 318 S.W.2d 568 (Tenn. 1958).

Similarly, the Rev. Jerry Falwell was unsuccessful in a suit against *Penthouse* magazine following publication of a concededly accurate account of an interview he had granted. Violation of conditions imposed by the minister did not negate his *consent* nor constitute publication with actual malice. *Falwell v. Penthouse International, Limited*, 7 Med.L.Rptr. 1891, 521 F.Supp. 1204 (D.Va. 1981).

TECHNICAL DEFENSES

The following defenses are so complete, when available, that they should be considered at the very outset of constructing a libel defense.

Statute of Limitations

Statutes of limitations define the time span within which legal actions can be brought. Their purpose is to protect an alleged wrongdoer against stale claims which he or she may be totally unprepared to meet.

196. *McManus v. Doubleday*, 7 Med.L.Rptr. 1475, 513 F.Supp. 1383 (D.N.Y. 1981). For a useful review of the defense, see Stonecipher, *Neutral Reportage Privilege Faces an Uncertain Future*, 59 Joum.Q. 367 (Autumn 1982).

The statutes of limitations for libel are one, two, or three years in most jurisdictions. Among one-year states are New York, California, New Jersey, Mississippi, and Maryland. At this writing Florida has a four-year statute, New Hampshire and Rhode Island six-year statutes. Rhode Island and Arkansas (a three-year state) have one-year statutes for slander. These laws may change from time to time and must be regularly checked by those who would depend upon them. Statutes of limitations provide an absolute defense against libel actions.

Parade magazine tried to deny liability in a libel action by arguing that 1,800 advance copies had been sold a month earlier in a particular locale, thus giving the magazine the protection of the statute of limitations. But a federal court said that under such a rule scurrilous articles could be printed without fear of retribution simply by selling a few advance copies and keeping the date secret until a libel action had been brought. This would be particularly easy where the statute is a single year. So the statute starts running, said the court, when the publication goes into general circulation for the first time. *Osmers v. Parade Publications*, 234 F.Supp. 924 (D.N.Y. 1964).

In at least one state, the statute covers an analogous false light invasion of privacy claim. *Smith v. Esquire, Inc.*, 6 Med.L.Rptr., 1825, 494 F.Supp. 967 (D.Md. 1980).

In 1977 Kathy Keeton, associate publisher of *Penthouse*, sued *Hustler* and its publisher for libel and invasion of privacy. The claims were dismissed because Ohio's statute of limitations had run. Keeton then filed suit in New Hampshire because that state's six-year statute had not expired. A federal district court dismissed the suit on the ground that the due process clause of the Fourteenth Amendment forbade application of New Hampshire's long-arm statute to acquire personal jurisdiction over *Hustler*. The court of appeals affirmed holding that Keeton's lack of contact with New Hampshire made it unfair for the state to assert jurisdiction over the magazine.

In an opinion by Justice Rehnquist, a unanimous U.S. Supreme Court reversed. Rehnquist was starkly unsympathetic with the statute of limitations argument.

"The chance duration of statutes of limitations in nonforum jurisdictions has nothing to do with the contacts among respondent *(Hustler)*, New Hampshire and this multistate libel action," wrote Rehnquist. "Whether Ohio's limitations period is six months or six years does not alter the jurisdictional calculus in New Hampshire. Petitioner's [Keeton's] successful search for a State with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations. Certainly Hustler Magazine, Inc., which chose to enter the New Hampshire market, can be charged with knowledge of its laws and no doubt would have claimed the benefit of them if it had a complaint against a subscriber, distributor, or other commercial partner." *Keeton v. Hustler*, 10 Med.L.Rptr. 1405, 465 U.S. 770, (1984).

The implications of Rehnquist's arguments for "statute hunters" greatly distressed media lawyers at the time, even though the Court's animus toward *Hustler's* publisher Larry Flynt was evident.

Equal Time in Political Broadcasts

POLITICAL BROADCASTS. Prior to 1959, radio and television stations granting equal time to political candidates under the provisions of § 315 of the Federal Communications Act of 1934 were liable for any defamation in those broadcasts. At the same time, a station was absolutely prohibited from censoring a political talk:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. 47 U.S.C.A. § 315(a).

Surely then, the broadcasting industry had argued for many years, if stations are required to carry libelous speeches and prevented from exerting any editing judgment, they should not be held responsible for damages.

The test case came in North Dakota. On October 29, 1956, A. C. Townley, a colorful remnant of the Progressive movement which had swept the Dakotas like a prairie fire four decades earlier, demanded equal time as an independent candidate for the United States Senate. Equal time was provided, and in a telecast over WDAY-TV, Fargo, a highly reputable station, Townley charged that the North Dakota Farmers Union was Communist controlled. WDAY

had warned Townley that it believed his charge was libelous.

It was, and the Farmers Union brought a $100,000 damage suit against Townley and the station. A district court dismissed the complaint against WDAY on the ground that § 315 rendered the station immune from liability. The Farmers Union carried an appeal to the North Dakota Supreme Court, and that court became the first appellate court in the country to consider the question of whether a broadcasting station is liable for defamatory statements made by a political candidate using the station's facilities in accordance with federal law.

Attorneys for the Farmers Union contended that § 315 did not apply in this case because a third party—the Farmers Union—was involved, making the case something more than a heated confrontation between opposing political candidates. They cited a Nebraska case, *Sorensen v. Wood*, 243 N.W. 82 (Neb. 1932), which they interpreted as holding that a station could not willingly join in publication of a libel and that the "no censorship" provision referred only to the political content of the speech.

In a 4–1 decision the North Dakota Supreme Court ruled that radio and television broadcasters are not liable for false or libelous statements made over their facilities by political candidates. Noting that WDAY had advised Townley that his remarks, if false, were libelous, the court said: "We cannot believe that it was the intent of Congress to compel a station to broadcast libelous statements and at the same time subject it to the risk of defending actions for damages." *Farmers Educational & Cooperative Union of America, North Dakota Division v. WDAY*, 89 N.W.2d 102, 109 (N.D. 1958).

The majority felt the attack on the Farmers Union was "in context" with a candidate's criticism of his opponent since "Communism" was a campaign issue. The majority added that the Farmers Union should have brought action against Townley alone. (The problem here was that Townley's income was a mere $98.50 a month—a promise of little satisfaction to an aggrieved party.)

The Farmers Union carried an appeal to the Supreme Court of the United States. The American Civil Liberties Union intervened on the side of WDAY and in support of the North Dakota Supreme Court decision. In its appeal, the Farmers Union posed two questions with First Amendment implications:

a. Does § 315 relieve radio and television stations from liability for broadcasting libelous statements by candidates when the statements defame a third party, not a competing candidate?

b. Did Congress, when it passed the 1934 act, intend to repeal or annul state laws covering liability?

In a surprisingly close 5–4 decision, the U.S. Supreme Court answered "yes" to the questions and affirmed the North Dakota decision upholding WDAY.

FARMERS EDUCATIONAL AND CO-OPERATIVE UNION OF AMERICA v. WDAY INC.

360 U.S. 525, 79 S.CT 1302, 3 L.ED.2D 1407 (1959).

Justice BLACK delivered the Opinion of the Court:

* * * Petitioner argues that § 315's prohibition against censorship leaves broadcasters free to delete libelous material from candidates' speeches, and that therefore no federal immunity is granted a broadcasting station by that section. The term censorship, however, as commonly understood, connotes *any* examination of thought or expression in order to prevent publication of "objectionable" material. We find no clear expression of legislative intent, nor any other convincing reason to indicate Congress meant to give "censorship" a narrower meaning in § 315. In arriving at this view, we note that petitioner's interpretation has not generally been favored in previous considerations of the section. Although the first, and for years the only judicial decision dealing with the censorship provision did hold that a station may remove defamatory statements from political broadcasts, subsequent judicial interpretations of § 315 have with considerable uniformity recognized that an individual licensee has no such power. And while for some years the Federal Communications Commission's views on this matter were not clearly articulated, since 1948 it has continuously held that licensees cannot remove allegedly libelous matter from speeches by candidates. Similarly, the legislative history of the measure both prior to its first enactment in 1927, and subsequently, shows a deep hostility to censorship either by the Commission or by a licensee. More important, it is obvious that permitting a broadcasting station to censor allegedly libelous remarks would undermine the basic purpose for which § 315 was passed—full and unrestricted discussion of political issues by legally qualified candidates. That section dates back to, and was adopted verbatim from, the Radio Act of 1927. In that Act,

Congress provided for the first time a comprehensive federal plan for regulating the new and expanding art of radio broadcasting. Recognizing radio's potential importance as a medium of communication of political ideas, Congress sought to foster its broadest possible utilization by encouraging broadcasting stations to make their facilities available to candidates for office without discrimination, and by insuring that these candidates when broadcasting were not to be hampered by censorship of the issues they could discuss. Thus, expressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any power of censorship over radio communication. It is in line with this same tradition that the individual licensee has consistently been denied "power of censorship" in the vital area of political broadcasts.

The decision a broadcasting station would have to make in censoring libelous discussion by a candidate is far from easy. Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question, involving as it does, consideration of various legal defenses such as "truth" and the privilege of fair comment. Such issues have always troubled courts. Yet, under petitioner's view of the statute they would have to be resolved by an individual licensee during the stress of a political campaign, often, necessarily, without adequate consideration or basis for decision. Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution. Moreover, if any censorship were permissible, a station so inclined would intentionally inhibit a candidate's legitimate presentation under the guise of lawful censorship of libelous matter. Because of the time limitation inherent in a political campaign, erroneous decisions by a station could not be corrected by the courts promptly enough to permit the candidate to bring improperly excluded matter before the public. It follows from all this that allowing censorship, even of the attenuated type advocated here, would almost inevitably force a candidate to avoid controversial issues during political debates over radio and television, and hence restrict the coverage of consideration relevant to intelligent political decision. We cannot believe, and we certainly are unwilling to assume, that Congress intended any such result.

Petitioner alternatively argues that § 315 does not grant a station immunity from liability for defamatory statements made during a political broadcast even though the section prohibits the station from censoring allegedly libelous matter. Again, we cannot agree. For under this interpretation, unless a licensee refuses to permit any candidate to talk at all, the section would sanction the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee. Accordingly, judicial interpretations reaching the issue have found an immunity implicit in the section. And in all those cases concluding that a licensee had no immunity, § 315 had been construed—improperly as we hold—to permit a station to censor potentially actionable material. In no case has a court even implied that the licensee would not be rendered immune were it denied the power to censor libelous material.

* * * Thus, whatever adverse inference may be drawn from the failure of Congress to legislate an express immunity is offset by its refusal to permit stations to avoid liability by censoring broadcasts. And more than balancing any adverse inferences drawn from congressional failure to legislate an express immunity is the fact that the Federal Communications Commission—the body entrusted with administering the provisions of the Act—has long interpreted § 315 as granting stations an immunity. Not only has this interpretation been adhered to despite many subsequent legislative proposals to modify § 315, but with full knowledge of the Commission's interpretation Congress has since made significant additions to that section without amending it to depart from the Commission's view. In light of this contradictory legislative background we do not feel compelled to reach a result which seems so in conflict with traditional concepts of fairness.

Petitioner nevertheless urges that broadcasters do not need a specific immunity to protect themselves from liability for defamation since they may either insure against any loss, or in the alternative, deny all political candidates use of station facilities. We have no means of knowing to what extent insurance is available to broadcasting stations, or what it would cost them. Moreover, since § 315 expressly prohibits stations from charging political candidates higher rates than they charge for comparable time used for other purposes, any cost of insurance would probably have to be absorbed by the stations themselves. Petitioner's reliance on the stations' freedom from

obligation "to allow use of its station by any such candidate," seems equally misplaced. While denying all candidates use of stations would protect broadcasters from liability, it would also effectively withdraw political discussion from the air. Instead the thrust of § 315 is to facilitate political debate over radio and television. Recognizing this, the Communications Commission considers the carrying of political broadcasts a public service criterion to be considered both in license renewal proceedings, and in comparative contests for a radio or television construction permit. Certainly Congress knew the obvious—that if a licensee could protect himself from liability in no other way but by refusing to broadcast candidates' speeches, the necessary effect would be to hamper the congressional plan to develop broadcasting as a political outlet, rather than to foster it. We are aware that causes of action for libel are widely recognized throughout the States. But we have not hesitated to abrogate state law where satisfied that its enforcement would stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Here, petitioner is asking us to attribute to § 315 a meaning which would either frustrate the underlying purposes for which it was enacted, or alternatively impose unreasonable burdens on the parties governed by that legislation. In the absence of clear expression by Congress we will not assume that it desired such a result. Agreeing with the state courts of North Dakota that § 315 grants a licensee an immunity from liability for libelous material it broadcasts, we merely read § 315 in accordance with what we believe to be its underlying purpose.

Affirmed.

A Practical Defense: Insurance

Libel insurance can help restore an editor's flagging courage. Available in one form or another for at least the past twenty-five years, it is estimated that only about one-half of broadcasters and publishers carry it. This is unfortunate. Insurance dims the prospect of devastating losses resulting from frivolous suits or the shriveling of the journalistic spirit from out-of-court settlements.

It is estimated that damage awards have increased by more than 400 percent since *New York Times v. Sullivan*. The additional costs of defending against a suit have gone up almost as much. Damage awards in 1986 were estimated to average $2 million, more than twice that of product liability or medical malpractice awards.[197]

Given these figures, some companies have left the libel insurance business. Others have increased both premiums and deductibles, or policyholders are expected to pay a percentage of legal fees beyond the deductible. If smaller news organizations can't afford coverage, they may not be able to afford the risks of investigative journalism; the costs of defending against a suit can be staggering. The libel business did begin to stabilize somewhat in 1987 after premium increases of 300 percent between 1983 and 1986, although this may be temporary.

Attractive policies are those that cover a broad range of First Amendment matters such as privacy, access, copyright, piracy, plagiarism, disparagement, antitrust, and possibly, refusals to identify sources, which could lead to loss of a libel suit by default. At the very least, punitive damages and lawyers fees and court costs in the pretrial period should be covered. Be certain also that the policy leaves editor and publisher in control of the suit. Because foreign underwriters of American libel insurance companies do not always appreciate the constitutional principles at stake in libel litigation, they encourage settlements on a cost-benefit basis when a publisher or a broadcaster would have preferred a trial or the appeal of an adverse judgment.

State law may limit some forms of insurance coverage, but courts have generally recognized that libel laws are not designed to destroy publications.[198] Instead they are meant to provide a public forum for vindicating a reputation and awarding just compensation when it is due.

Mitigation

When none of the defenses so far discussed appears to be available or applicable, a defendant must consider mitigating factors. This last line of defense is meant to demonstrate to a judge or jury good faith on the part of a publisher or, if you will, lack of

197. *The Cost of Libel: Economic and Policy Implications, A Conference Report* (New York: The Gannett Center for Media Studies, 1986).
198. *Clark v. Pearson*, 248 F.Supp. 188 (D.D.C. 1965).

malice. The result could be a substantial decrease in damages paid.

Retraction and Correction

In at least thirty states there are retraction statutes, all of them differing in detail. Most require that a defamed person ask for a retraction in writing within a specified period of time before bringing a lawsuit.[199] If a retraction is printed, only special or actual damages (however these are defined) may be available. Some laws use the words "retraction" and "correction" interchangeably. In part a retraction is meant to be a full and fair apology. It is more than a correction. A correction may have nothing to do with libel; a retraction always does. Unlike the right-of-reply statute struck down by the Supreme Court in the *Tornillo* case (see p. 497), both corrections and retractions are arguably voluntary, and failure to retract should not indicate actual malice on the part of a publisher. In fact, a refusal to retract may assert the publisher's confidence in the validity of what's been published. And, if there is no fault on the part of a publisher, he or she is under no obligation to retract, whatever a retraction statute says, because the constitution has clicked in.

Libel laws can be idiosyncratic. See Sanford, *Libel and Privacy* (1985), Appendix B. California's doesn't cover magazines. Minnesota's does not apply to any libel imputing unchastity to a woman. Wisconsin's confuses retraction and correction. Mississippi's exempts candidates for public office when the libel occurs ten days before an election. Know your state's statute. Be simple, direct, and calmly apologetic when you retract. Keep a record of what you do from the moment a retraction is requested. Do not use a retraction to take another poke at a defamed person; that will aggravate the original libel. Mere publication of a defamed person's denial does not constitute a retraction. Some statutes require expressions of regret; a correction of facts is sufficient in others. Some statutes speak to position, type size, placement, and heading.

Retractions, of course, are requested before a libel suit is threatened, although suit may be implied. A publisher may express regret at this point, apologize, and discuss the problem of further publicity in the publication of a retraction. Once a threat has been made, only a lawyer should speak for the publisher.

Lawyers should also be involved when the retraction is part of a written or verbal agreement (preferably written) with an injured person and constitutes a complete accord and satisfaction—also known as a *settlement*. A settlement when properly executed will bar a suit for damages. While a settlement relieves a defendant of lawyers fees, court costs, and damages, if not made carefully and selectively, it will encourage suits by others more intent on money damages than the purifying of reputation.

An offer to retract, whether or not the state has a retraction statute, may mitigate damages. So will an injured person's refusal to accept a retraction offer. Courts generally wish plaintiffs, particularly private-person plaintiffs, to have opportunities for reply and rebuttal.

Courts which have regarded retraction statutes unfavorably have done so because they believe the constitutional protections of life, liberty, and property militate against such laws. They have also argued that the defamed person is denied a speedy recovery for injury to reputation and that retraction statutes represent class legislation favoring the press and denying the equal protection of the laws.

A less philosophical inadequacy of retraction statutes was noted by Justice Brennan in his plurality opinion in *Rosenbloom*. "Denials, retractions, and corrections," he said, "are not 'hot' news, and rarely receive the prominence of the original story." Nevertheless he implied the constitutionality of retraction statutes in his concurring opinion in *Miami Herald Publishing* Co. *v. Tornillo*, 418 U.S. 241 (1974), see p. 503.

As the ethical standards of the press improve, more and more publishers, short of retraction, are printing or broadcasting corrections and clarifications. In perhaps fifty newspapers, ombudsmen of one kind or another intercede with management on behalf of readers.

Tornillo has invalidated mandatory right-of-reply laws. Publication of replies, when they are free of defamation, is becoming a mark of good journalism. But like retractions, their publication must remain voluntary.

With the gradual demise of punitive damages, retractions may be losing some of their appeal.

199. Plaintiffs failure to give defendant seven days' notice, as required by Wisconsin's retraction statute, warrants dismissal of action. *Rogers v. Milwaukee Journal*, 14 Med.L.Rptr. 1767 (Wisc.Cir.Ct. 1987).

Nevertheless, judges and juries will still consider retraction as evidence of goodwill.

Proof of Previous Bad Reputation

A showing that the character and reputation of a prospective plaintiff are so bad that they cannot be further impaired by a fresh accusation will mitigate damages. Such people may even be "libel proof."[200] In a case involving a bishop, a federal district court said: "On the issue of general damages, the reputation of the plaintiff is a definite issue and the defendant may show the plaintiff's bad reputation in order to mitigate damages." The court added, however, that bad reputation may not be established by showing misconduct at a time and place removed from the date and situation of the original injury. Reference to unrelated acts, criminal or otherwise, may be no more sufficient in mitigation than rumors and hearsay.[201]

Reliance on a Usually Reliable Source: the "Wire Service" Defense

Since *New York Times*, reliance on a usually reliable source will contradict a charge of actual malice, but it may only mitigate a charge of negligence. In *Time, Inc. v. Pape*, 401 U.S. 279 (1971), the Supreme Court said that "Where the source of the news makes bald assertions of fact—such as that a policeman has arrested a certain man on a criminal charge—there may be no difficulty. But where the source itself has engaged in qualifying the information released, complexities ramify. Any departure from full direct quotations of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices."

In this case a Civil Rights Commission report was considered by the Court to be "extravagantly ambiguous," and the reporter's "adoption of one of a number of possible interpretations * * * though arguably reflecting a misconception" was not enough to create liability.

But quotations taken out of context or material selected to fit a publisher's preconceptions, as in *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), may not only constitute negligence but actual malice as well. And in *Pape* the Court warned reporters that the word "alleged" may be better than no qualification at all in reports damaging to reputation or those based on less than authoritative sources.

Usually reliable sources are informed persons who have proven accurate in the past and whom reasonable people would have no reason to doubt. Although informants occupy many roles in government, business, and academe, to mention only three, wire services are expected to know a little bit about everything. Moreover, news media rely on wire services for a significant proportion of their news.

A news magazine which relied on a newspaper and wire service reports for an allegedly defamatory article about a divorce case was not negligent, said a Florida court, since the magazine was entitled to rely on other reliable periodicals and wire service reports.[202]

Citing cases in Florida, Puerto Rico, Hawaii, Alaska, New York, and the District of Columbia, Massachusetts's highest court, in a case involving a chain suit against ninety-four newspapers, also invoked the "wire service" defense:

> * * * AP and UPI are recognized throughout the newspaper industry as accurate sources of information. Because of this each of the defendant newspapers stated, in an uncontroverted affidavit, that it customarily republishes wire service stories without independent corroboration for the information they contain. In fact, the newspapers stated that, given their resources and personnel, independent corroboration would ordinarily be impractical. We note that an examination of cases from other jurisdictions suggests that such reliance on the accuracy of the wire services is common throughout the country. We think that the inference is inescapable that requiring verification of wire service stories prior to publication would impose a heavy burden on the media's ability to disseminate newsworthy material.[203]

While some courts may not insist, it may still be advisable for editors to try to confirm libelous references in wire service reports to persons in the paper's immediate circulation area. Those efforts not only suggest responsible journalistic practice, but they may mitigate damages.

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200. *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298 (2d Cir. 1986), cert. den. 107 S.Ct. 1303 (1987).
201. *Nichols v. Philadelphia Tribune Co.*, 22 F.R.D. 89 (D.Pa. 1958). See also, Corabi v. Curtis Publishing Co., 273 A.2d 899 (Pa. 1971).
202. *Nelson v. Associated Press*, 14 Med.L.Rptr. 1577, 667 F.Supp. 1468 (S.D. Fla. 1987).
203. *Appleby v. Daily Hampshire Gazette*, 11 Med.L.Rptr. 2372, 478 N.E.2d 721 (Mass. 1985).

Miscellaneous Mitigating Factors

Statements uttered in the heat and passion of the moment or provoked by actions of the plaintiff lend themselves to mitigation.[204] Efforts to correct errors by stopping the presses or seeking to retrieve copies of a newspaper containing errors must be considered by the jury in mitigation of damages, said a Maryland court.[205]

Belief in the truth of the facts, a Nevada court observed, even though the evidence has not convinced a jury, should be considered in mitigation.[206] So should evidence that positive items concerning the plaintiff were published before or with the libel or evidence that other responsible publications had carried the same charge. The libel may be an unintended case of mistaken identity. Evidence of partial truth may help, as will evidence of journalistic care and competence in getting the plaintiff's side of the story and, where justified, in giving it adequate space.

Journalistic care is an idea that opens the door to the world of ethics and those crossroads where questions of ethics and matters of law meet. The law is an ethical system, albeit one with sanctions, sometimes severe. A Louisiana appeals court nicely expressed the connection:

"To hold a newsperson accountable for his transgressions is not to censor him, it is merely to make him mindful of the awesome responsibility he has to the public. Accountability is not a clarion call of 'stop the press'; it is but a whisper for respect for the people who make the news."[207]

SEEKING SUMMARY JUDGMENT

Construction of a libel defense is designed to win a defendant summary judgment. Summary judgment means that your win without having to go to trial. Rule 56 of the Federal Rules of Civil Procedure provides for summary judgment where there "is no genuine issue as to any material fact and * * * the moving party [defendant in a libel suit] is entitled to judgment as a matter of law." Generally this would mean that the plaintiff is unable to show with convincing clarity that a defendant has published with actual malice.

The rationale of summary judgment, at least from a press perspective, was well stated by Judge Skelly Wright in *Washington Post* Co. *v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966):

* * *

> In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against a trial on the merits. Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is "hardly less virulent for being privately administered."

In a brief to a Minnesota district court on behalf of the Minneapolis *Star Tribune*, which had been sued for libel by the dean of an unaccredited and, as it turned out, ephemeral law school, Minneapolis attorney John Borger demonstrated how summary judgment should be approached. He mustered all relevant libel defenses in short, pithy paragraphs under the following headings: plaintiff must establish each element of his case by clear and convincing evidence; the statements of which plaintiff complains are true; certain statements of which plaintiff complains are nonactionable expressions of opinion; certain statements are not defamatory; the allegedly defamatory statements are privileged under the constitutions of the United States and Minnesota and at common law because plaintiff is a public figure and the statements concern matters of public interest

204. *Farrell v. Kramer*, 193 A.2d 560 (Me. 1963).
205. *Brush-Moore Newspapers, Inc. v. Pollitt*, 151 A.2d 530 (Md. 1959).
206. *Las Vegas Sun, Inc. v. Franklin*, 329 P.2d 867 (Nev. 1958).
207. *Kidder v. Anderson*, 2 Med.L.Rptr. 1645, 345 So.2d 922 (La. 1977).

and plaintiff can recover damages only upon clear and convincing evidence that defendant published with actual malice; certain articles are conditionally privileged as fair and accurate reports of official actions and public proceedings; certain statements of which plaintiff complains are privileged as responses to his own accusations; others are privileged as neutral reportage of newsworthy statements and events; Minnesota law bars most of plaintiff's claims for general and punitive damages; and any award of punitive damages would be unconstitutional.[208]

Not only was the $14.7 million libel suit against the newspaper dismissed, but the plaintiff was ordered by the court to reimburse the Star and Tribune Company for attorney's fees. An appeals court later excused the fees assessment.

Frivolous suits will increasingly face *countersuits*. When former Senator Paul Laxalt of Nevada sued the Sacramento *Bee* for its investigation into a gambling casino he once owned, McClatchy Newspapers countersued charging that Laxalt's suit was designed to cut off discussion. The suit was resolved out of court in 1987.

In 1986 the Vermont legislature passed an amendment to the state's libel law aimed at reducing the number of frivolous lawsuits by requiring courts to award "costs and reasonable attorney fees" to prevailing defendants if the court finds a suit "frivolous and without merit."

Uncertainty as to the availability of summary judgment was created by footnote 9 in Chief Justice Burger's opinion for the Court in *Hutchinson v. Proxmire* in 1979 (text, p. 241):

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule." The proof of "actual malice" calls a defendant's state of mind into question * * * and does not readily lend itself to summary disposition.

Although lower courts generally ignored Burger's recommendation for trial, doubts about summary judgment remained until the Court spoke again in two cases in 1984 and 1986. In *Bose Corporation v. Consumers Union*, 10 Med.L.Rptr. 1625, 466 U.S. 485 (1984)—an unlikely case since the offending statements were clearly opinions about the sound qualities of loudspeakers—Justice Stevens for the Court not only recommended summary judgment but also directed courts to "make an independent examination of the whole record" in order to make sure "that the judgment does not constitute a forbidden intrusion on the field of free expression." Sanford reads the case as a reaffirmation of the *New York Times* doctrine.[209] A further refinement of *Bose* is found in *Connaughton v. Harte-Hanks Communications, Inc.*, 842 F.2d 825 (6th Cir. 1989), aff'd 109 S.Ct. ___ (1989), which held that in *New York Times* cases, independent appellate review should be exercised only over the "ultimate conclusion" of actual malice.

The second case, *Anderson v. Liberty Lobby, Inc.*, 12 Med.L.Rptr. 2297, 477 U.S. 242 (1986), in spite of what a dissenting Justice Brennan considered confusion in both language and logic that will confound lower courts, has been interpreted as negating any lingering influence of footnote 9 and reinstating the preference for summary judgment in libel cases.[210] Justice White for the Court declared that in a *New York Times* libel case the issue on summary judgment is whether the evidence in the record can support a reasonable jury finding that the plaintiff has shown actual malice by clear and convincing evidence.

The influence of both cases was apparent in lower courts. For example, the California Supreme Court held in *McCoy v. Hearst Corp.*, 727 P.2d 711 (Cal. 1986), that an appellate body must scrutinize that part of the record having to do with actual malice and make its own decisions as to fault. And absent specific, strong, positive, unmistakable evidence of actual malice, that motion must be granted defendant.[211]

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208. *Torgerson v. Minneapolis Star and Tribune Company*. Memorandum in support of motion for summary judgment and award of attorney fees and trial brief, District Court Fourth Judicial District, January 12, 1981.

209. Sanford, *Libel and Privacy* (1985), p. 6.

210. With or without *Anderson v. Liberty Lobby*, most libel cases are decided against plaintiffs on summary judgment or on motions to dismiss. In a 1981 study of the states which provide plaintiffs with the largest number of libel victories (14 percent) against 3 percent in all other states, the following emerged: Alabama, Alaska, California, Florida, Hawaii, New Hampshire, Oklahoma, South Carolina, and Vermont. There are undoubtedly differences among the states as to the availability of summary judgment in libel cases. Summary judgment, for example, is difficult to attain in Pennsylvania.

211. *Herbert v. Lando*, 603 F.Supp. 983, 991 and n. 6 (S.D.N.Y. 1985), aff'd in part, rev'd in part 781 F.2d 298 (2d Cir. 1986). *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552–2555 (1986). The Supreme Court in the latter case said that "one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses."

ALTERNATIVES TO LIBEL LITIGATION

Will *New York Times v. Sullivan* continue to dominate American libel law? In *Dun & Bradstreet* (text, p. 245), Justice White, in a vigorous concurrence, called for the abandonment of the *Times* doctrine. If the *Times* doctrine continues to be unloved by both libel plaintiffs and media defendants, what should take its place? A number of judges, writers, and scholars have addressed themselves to that question. Some of their conclusions follow.

Judge Sofaer in *Sharon v. Time, Inc.*, 609 F.Supp. 1291 (S.D.N.Y. 1984), expressed regret that libel laws are being used by parties to inflict as much harm on one another as possible, and he recommended conciliation alternatives.

Jerome Barron, a senior author of this text, believes that libel plaintiffs lack alternative mechanisms of redress. He would combine vindication statutes (a plaintiff would be able to obtain a judgment of falsity without having to prove fault), a right of reply limited to the defamation context, and the usual libel laws. The result, he believes, would be a stimulation of debate with relief from the chilling effects of heavy damages.[212]

In her book, *A Chilling Effect* (1987), Judge Lois G. Forer discusses the need for a legal mechanism to encourage apologies and retractions so as to avoid litigation. She would have a federal statute govern libel and privacy to rationalize the chaos in the law and eliminate jury-shopping.[213]

Because it appeared that most libel plaintiffs claim emotional suffering rather than financial loss, the Iowa Libel group embarked in 1988 on a three-year Libel Dispute Resolution program with the American Arbitration Association. The goal: a dispassionate assessment of truth or falsity, not a settlement but what one of the Iowa group, Gilbert Cranberg, calls "combat by other means."

New York Congressman Charles Schumer earlier introduced a bill in Congress that would have had the same effect: a declaratory judgment that a publication was or was not false and defamatory; but no determination as to publisher's state of mind and no damages.[214]

But libel is not only about truth or falsity. It has to do with criticism of and doubts about those who wield power. It is about opinion; it is about deflation; it is about skepticism. In 1983 the American Civil Liberties Union proposed that no individual, public or private, ought to be protected by libel laws if the subject matter of the attack is of "public concern, anything having an impact on the social or political system or climate."

A compromise might be to deny public officials a libel remedy unless a defamatory publication could be shown to reflect on an area of that person's private life having nothing to do with his or her public responsibilities. And that would be rare. Public figures would be unprotected by libel laws only when their activities impinged upon the public business. Of course, defining the public business would remain a challenge, first for editors and ultimately for the courts. People would not have a libel remedy if they injected themselves into a definable issue of public concern—the inexorable logic of *Rosenbloom's* public issue test. But public figures, both vortex and all-purpose, might have a lesser standard of proof of damages to reputation and fault than public officials.[215] This proposal and others like it could be a disaster for freedom of expression unless the discussion of ideas, political or not, was given the widest latitude.

Others have had more comprehensive proposals. Rodney Smolla in his *Suing the Press* (1986) would put greater emphasis on retraction and reply, restorative speech to cure damaging speech. He would also have losers pay all legal fees. He would put caps on all nonpecuniary losses and eliminate punitive damages. He would also eliminate public official suits, but only those brought by high-ranking policymakers. He would put all ideological debates in the protected opinion category. (Ralph Nader, he says, justifiably sued General Motors for harassment, but he unjustifiably sued columnist Ralph de To-

212. Barron, *The Search for Media Accountability*, 19 Suffolk L.R. 789 (Winter 1985). Barron condones punitive damages because he thinks they get the media's attention. Although he believes some cases should never have been brought—*Tavoulareas, Bose, Sharon*—he would rather have public people involved in public debate than exempted from libel laws. His preference is for reply as an alternative remedy to damages in defamation cases.

213. Letter to author, November 23, 1987. Some of Forer's statutory proposals may be too broad, e.g., prohibiting release of names and photos of all rape victims and juveniles accused of crimes. Many editors would also disagree with her notion that the press and the law are allies. Not enemies certainly, but also not allies.

214. House Resolution #2846, 99th U.S. Congress 1st Session.

215. Frederick Schauer, *Public Figures*, 25 William & Mary L.R. 905, 930 (1983–1984).

ledano simply for disagreeing with him.) He would ask the courts to pay more attention to context in deciding on who is a public person and who is a private person. And he would streamline the complicated and therefore expensive judicial process.

First Amendment advocate Floyd Abrams would also protect opinion, make losers pay, and limit compensatory damages, that is damages for emotional injury. Once corrections were made he would favor damages only for actual out-of-pocket losses.

Many threads of these suggestions came together in *Proposal for the Reform of Libel Law* published late in 1988 by the Annenberg Washington Program. Stage One of the proposal would ask a complainant to seek either a retraction or an opportunity to reply. Stage Two would involve a suit but only to the point of a declaratory judgment as to truth or falsity. A final Stage Three would move beyond declaratory judgment to the question of damages, but *actual* damages only.

While these recommendations may influence the development of the law in the long run, they will not change it in the short run. *New York Times v. Sullivan* abruptly changed the law by taking libel out of tort law and constitutionalizing it. As its rules have evolved, it has brought unexpected problems to defendants. The most grievous, of course, is the intrusive tactics of plaintiff's attorney in "reading the mind" of an editor or reporter in order to prove "knowing falsehood." Another is the time and expense involved in the discovery process. A defendant then may win in a legal sense, usually on summary judgment, but lose in the material sense of time and money.

It will also be time-consuming and expensive to pursue the truth/falsity phase of a suit, whether or not the case concludes at that point. Like the line between fact and opinion, the distinction between truth and falsehood is much harder to draw than lawyers presume. Truth is an elusive and relative concept more attuned to metaphysics than to science. *New York Times* may be intended to reward defendants simply for trying to find the truth.

Were the Annenberg Proposal to become law, it would soon face a test of constitutionality since defendants would lose the protection of the *New York Times* fault standards in Stage Two. Also, the retraction/reply option might lead us back to *Tornillo*. In practice, private-person plaintiffs would have little to gain from bringing a suit and much to lose. But it is not clear whether the Proposal would result in more or fewer lawsuits. One might imagine a lively demand for favorable declaratory judgments.

Some media lawyers fear putting the matter of a model law into the hands of legislators, many of whom may be hostile to the press and unschooled in libel law. Others would accept the Annenberg Proposal only if a defendant could convert a declaratory judgment into a suit where *New York Times* standards of fault would have to be shown by plaintiff. Proponents argue that editors would be relieved of judicially imposed standards of fault if the Proposal were adopted. The debate is not over.

Wall Street insurance broker Ann Heavner estimates that 80 percent of the costs of a libel suit are in defense costs rather than damages—lawyer's fees in large part. Defense costs may be insurable therefore only up to a certain point. Or insurance companies will avoid tenacious defendants. If control of the defense of a libel suit goes from an editor to an insurance company, suits are more likely to be settled on cost efficient grounds than defended on philosophical ones. And settlements attract new suits.

Pessimists fear that in the present judicial climate the media will enjoy no special place in the body politic, that the *Gertz* rules will be applied narrowly to vaguely defined public issues, and that Justice Byron White might just succeed in getting the Court to return to strict liability common law rules by overruling *New York Times*. Media generally seem to be unpopular institutions. Reporters and editors might be momentarily cheered by recalling the words of Justice Black in his *New York Times* concurrence:

> I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions or its officials.

Eugene L. Roberts, Jr., executive editor of the *Philadelphia Inquirer*, said it more concretely in the first paragraph of a cover story for the April 1985 issue of *The Quill*:

> We, as a society, have delivered into the hands of government officials the nation over—indeed the world over—a simple but effective weapon against freedom of expression. It is the capability of using protracted litigation to harass, intimidate and punish the press and private citizens alike for views and reports that officials do not like. * * * We have created an awesome imbalance: public officials who can sue, but who cannot be sued, who can speak with impunity, but who can punish those who speak against them.

For a free society *New York Times v. Sullivan* didn't go far enough, and Justices Black, Douglas, and Goldberg were prescient in their critical concurring opinions. Nevertheless, Smolla is undoubtedly correct in stating what seems to be the premise of his book: the evolution of American law is always more deeply influenced by changing cultural moods than by changes in technical legal doctrine. This has been a premise of other writers as well.[216]

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216. Norman L. Rosenberg, *Protecting the Best Men: An Interpretative History of the Law of Libel* (Chapel Hill: U. of N.C. Press, 1986). John R. Finnegan, Jr., "Defamation, Politics, and the Social Processes of Law in New York State, 1776–1860" (unpublished doctoral dissertation, University of Minnesota, 1985). Robert D. Anderson, "The Law of Defamation in American Political Campaigns: The Emerging Protection of Political Commentary, 1800–1964" (unpublished doctoral dessertation, University of Minnesota, 1989).

THREE

Privacy and the Press

WHAT IS PRIVACY?

Privacy is best understood first as a concept and only second as a cause of action in law. The general idea of privacy is that individuals are entitled to protect personal, intimate aspects of their lives from use or interference by others. Definitions of privacy, however, are necessarily subjective, abstract, elusive. It has perhaps most often been explained using Thomas Cooley's phrase, "the right to be let alone,"[1] which does little to explain what privacy, or a right to privacy, entails. Whatever its form, an invasion of privacy is presumed to have an adverse effect on an identifiable person's psychological well-being.

"The injury is to our individuality," says Professor Edward Bloustein, "to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a [dollar and cents] recompense for the loss suffered."[2]

Others are not so sure. Harry Kalven, Jr. thought privacy a petty tort when measured against First Amendment freedoms.[3] Professor Don Pember is concerned about the number of frivolous privacy claims.[4] Clearly, definition remains a problem. In the absence of evidence of an intent to injure or observable symptoms of pain on the part of the victim, one is seldom certain that real damage has been done. How, then, is an invasion of privacy to be measured? There is no clear answer.

Nevertheless there has been in the past three decades an explosion of interest in protecting privacy in its myriad guises against private, governmental, and press encroachments. Privacy is widely recognized in American jurisdictions.

Justice Louis Brandeis, who with a law partner introduced the right to American law, saw it as the "most comprehensive of rights and the right most valued by civilized men."[5] "The right to be let alone," said Justice William O. Douglas, "is indeed the beginning of all freedom."[6] Milton Konvitz, a constitutional scholar, described privacy as "a kind of

1. Cooley, *Torts* 2d ed. (1888), 29.
2. Bloustein, *Privacy As An Aspect of Human Dignity*, 39 N.Y.U.L. Rev. 962, at 963, 1003 (1964). Gerety in *Redefining Privacy*, 12 Harvard Civil Rights—Civil Liberties L.Rev. 236 (1977), defines privacy in terms of autonomy, identity, and intimacy.
3. Kalven, "Privacy in Tort Law—Were Warren and Brandeis Wrong?" 31 *Law & Contemporary Problems* 326 (1966).
4. Pember, *Privacy and the Press* (1972).
5. *Olmstead v. United States*, 277 U.S. 438 (1928).
6. *Public Utilities Commission v. Pollak*, 343 U.S. 451, 467 (1952) (dissenting opinion). For Justice Black's equivocal views on privacy, see Gillmor "Black and the Problem of Privacy" in *Justice Hugo Black and the First Amendment*, ed. Dennis, Gillmor, and Grey, (1978).

space that a man may carry with him into his bedroom or into the street."[7]

Alan Westin defined privacy as "the voluntary and temporal withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve." Each person, says Westin, must find an acceptable balance between solitude and companionship, intimacy and broader social participation, anonymity and visibility, reserve and disclosure. And a free society will leave these choices to the individual, with only extraordinary exceptions allowed in the general interest of society.[8] It is the extraordinary exception that requires judicial weighing of privacy claims against freedom of the press.

First Amendment scholar Thomas Emerson defines privacy as a set of rules which cut across any opposing rules of the collectivity and which constitute "a sphere of space that has not been dedicated to public use or control." He would include in that space, at the very least, the privacy of bodily functions—such as procreation and contraception,[9] rights of privacy which have been recognized in recent years by the United States Supreme Court.[10]

Within this concept, privacy would protect the woman in childbirth, the couple privately engaged in sexual intercourse, the sleeper from raucous sound trucks operating in residential neighborhoods in the middle of the night.[11] The rule would certainly cover the woman in *York v. Story*, 324 F.2d 450 (9th Circ. 1963), who, when she came to a police station complaining of an assault, was asked to undress and was photographed in the nude; her picture was then cirulated among policemen for their amusement. It would also have protected the woman who found herself without a legal remedy when she was photographed in the rest room of Sad Sam's tavern in Delafield, Wisconsin by the proprietor who used such photos for the entertainment of his male customers.[12]

While Cooley was referring to privacy in general when he referred to "the right to be let alone," three types of privacy rights have become recognized in American law, largely in this century. It is important to distinguish among them, for only one is normally of concern to the mass media. One type of privacy right is based on constitutional law, either federal or state. A second concerns what could be called "data privacy," protection of personal information such as medical or credit records. The third, the common law right of privacy, is concerned with protecting the dignity and personal well-being of the individual rather than information about the individual, although harm to well-being is usually associated with dissemination of information.

While the term privacy does not appear in the U.S. Constitution, the individual's interest in being free from government intrusion is explicit in the Fourth Amendment's guarantee against unreasonable searches and seizures and in the Fifth Amendment's guarantee against self-incrimination.[13] Both the Fourth and Fifth Amendments act as antecedents for later development of privacy law. The Fourth creates an expectation that 'spatial' privacy will be safeguarded, while the Fifth prevents disclosure of information an individual prefers to keep private.

The Fourth Amendment is made effective by the exclusionary rule, which prevents the introduction of evidence at trial if the evidence was the product of an unreasonable search or seizure.[14] When there is no expectation of privacy, as when someone leaves materials in "plain view" or allows material to be distributed to others, no violation of the constitutional guarantee occurs. For example, police did not need a signed warrant from a judge—the usual requirement—to look through garbage that had been left curbside. "It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops and other members of the public," Jus-

7. Konvitz, "Privacy and the Law: A Philosophical Prelude", 31 *Law & Contemporary Problems* 272, 279–280 (1966).
8. Westin, *Privacy and Freedom* (1968), 7, 42.
9. Emerson, *The System of Freedom of Expression*, 1970, p. 562.
10. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).
11. *Kovacs v. Cooper*, 336 U.S. 77 (1949).
12. *Yoeckel v. Samonig*, 75 N.W.2d 925 (Wis. 1956). Wisconsin has provided statutory protection to privacy since 1977.
13. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (Fourth Amendment creates an expectation of seclusion that applies to interior of an automobile); *United States v. Calandra*, 414 U.S. 338 (1974) (Fourth Amendment creates expectation of seclusion in office); *Schmerber v. California*, 384 U.S. 757 (1966) (Fifth Amendment protects only against compelled statements, not against drawing of blood for lab tests).
14. Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Columbia L.Rev. 1365, 1392 (1983).

tice White wrote for the Court in a recent case.[15] One must wonder if "snoops" includes reporters.

Of more recent vintage is creation of an explicit constitutional right to privacy. The Court struck down a state law that made it a crime for even married couples to use contraceptives in *Griswold v. Connecticut*, 381 U.S. 479 (1965). The law also forbade Planned Parenthood from giving advice on the use of contraceptives. The Court was galled by the prospect of the long arm of the government reaching into the marital chamber. In his opinion for the Court, Justice Douglas found a privacy interest in the "penumbras" of the First, Third, Fourth, and Ninth Amendments.

> Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that give them life and substance. *Various guarantees create zones of privacy.* The right of association contained in the penumbra of the First Amendment is one. * * * The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." * * * We have had many controversies over these penumbral rights of "privacy and repose." * * * These cases bear witness that the right of privacy which presses for recognition here is a legitimate one. [Emphasis added.]

Douglas had begun his opinion by citing the broad protection afforded speech and press in the First and Fourteenth Amendments:

> [T]he [s]tate may not, consistent with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach. * * * Without these peripheral rights, the specific rights would be less secure.

Some Court watchers viewed the case as a shocking example of judicial improvisation; others saw it as an affirmation of the Doctrine of Judicial Review whereby the Court could invalidate a noxious law which Connecticut representatives dared not repeal.

Justice Harry Blackmun leaned on *Griswold* in his opinion for the Court in its historic 1973 abortion ruling, *Roe v. Wade*, 410 U.S. 113 (1973).

> The Constitution does not explicity mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific Railway Co. v. Botsford, 141 U.S. 250 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the Court or individual justices have indeed found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. [Case citations are omitted.]

"This right of privacy," Blackman added, "* * * is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. * * * We therefore conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." The controversial decision has been subjected to frequent attacks by opponents of abortion and by frequent attempts by states to apply limitations on the right to an abortion.[16]

The constitutional right to privacy has been applied in many contexts, from cases invalidating state laws prohibiting interracial marriages to guaranteeing individuals the right to live in neighborhoods of their choice.[17] The right was held not strong enough to prevent a state from enforcing antisodomy statutes against consensual homosexual activity that took place in a private home.[18]

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15. *California v. Greenwood*, 108 S. Ct 1625 (1988).
16. *Webster v. Reproductive Health Services*, 109 S.Ct. ____ (1989). Decision below, 851 F.2d 1071 (8th Cir. 1988).
17. Nowak, Rotunda & Young, *Constitutional Law 3d ed.* (1986), 711–21.
18. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

As with other constitutional guarantees, only privacy violations by government or those that amount to "state action" are protected against.[19] Violations by private parties must be addressed through common law or statute, if at all. The states may, as with other constitutional rights, expand but not restrict the rights. Some states have incorporated privacy into the state constitution,[20] or have otherwise interpreted their state constitutions as providing greater privacy rights.[21]

Controlling the flow of data about individuals—"data privacy"—has become a great concern in the last part of the twentieth century as computer data bases and instantaneous transmissions make it ever easier to compile information and more difficult to prevent its dissemination. Electronic snooping by business, government, and even individuals poses a far greater threat to the liberal tradition of individual freedom than does vigorous journalism.

In their separate works on privacy, Westin and Arthur R. Miller[22] were primarily concerned with governmental assaults on privacy for the sake of law enforcement and national security. Computer assisted, government is capable of watching, wiretapping, and data-banking information about the citizenry in a frighteningly Orwellian manner. Every one—almost—has been reduced to a file.

In the last three decades, statutory attempts to protect data privacy have grown, ranging from assuring confidentiality of students' records to preventing access to information about cable television customers. For example, the Federal Privacy Act of 1974[23] is designed to safeguard individual privacy stemming from misuse of federal records. It also provides individuals a right of access to data about themselves. In the act, Congress defines privacy as a fundamental constitutional right. Minnesota, one of the first states to adopt a data privacy statute protecting personal information in official records, has been followed by other states.

Whether or not attempts to keep information private can succeed is widely doubted.[24] In any event, data privacy legislation has not presented problems for the news media, mainly because the statutes are aimed at those who compile and use private information in their normal trade or business activities. The press does not normally create and retain files of matters such as student grades or checking account balances. If, however, a reporter "tapped" into a data base of another that was protected by statute from newsgathering, it is likely that no defense would be available against civil charges based on the unauthorized entry.[25]

Since we cannot deal here with every aspect of what Professor Freund calls the "greedy" concept of privacy,[26] we shall settle on those dimensions of privacy that engage the press. Omitted then are at least the following contexts in which privacy claims arise, claims that are sometimes more urgent and significant than those brought against the press: eavesdropping; surveillance; unreasonable searches and seizures by government; the reasonable expectation of some privacy in public places or in the public mails against obscenity, inappropriate advertising, or certain forms of picketing; door-to-door solicitation; the privacy of a business office or a college dormitory; bodily privacy, for example, hair length or sexual preference; euthanasia; psychosur-

19. *Movie Systems v. Heller*, 710 F.2d 492 (8th Cir. 1983). In *Heller*, the defendant was accused of stealing the signal for Home Box Office by using a device not authorized by the local microwave distributor, a violation of 42 U.S.C.A. § 605. Movie Systems used a van with electronic sensing equipment to patrol the streets of Minneapolis and St. Paul in search of unauthorized users. Since the surveillance was by a private party, the court concluded that Heller's Fourth Amendment rights had not been infringed. Heller also lost on state common law privacy grounds, since Minnesota is one of a handful of states that has refused to recognize the cause of action.

20. *Ravin v. State*, 537 P.2d 494 (Alaska 1975) (use of marijuana in private home for noncommercial purposes protected).

21. *State v. Robertson*, 649 P.2d 569 (Ore. 1982); *Mark v. KING Broadcasting*, 618 P.2d 512 (Wash. App. 1980), affirmed, *Mark v. Seattle Times*, 635 P.2d 1081 (Wash. 1981); *People v. Brisendine*, 13 Cal. 3d 528, 119 Cal. Rptr. 315, 531 P.2d 1099 (1975).

22. Miller, The Assault on Privacy, 1971, *Privacy in the Modern Corporate State*, 25 Admin. L. Rev. 231 (1973), and *The William O. Douglas Lecture: Press v. Privacy*, 16 Gonzaga L. Rev. 843 (1981). See, also, Note, *Privacy and Efficient Government; Proposals for a National Data Center*, 82 Harv. L. Rev. 400 (1968); Report, Databanks in a Free Society (Alan Westin, project director). 1972; Rule, Private Lives and Public Surveillance, 1974.

23. 5 U.S.C.A. § 552a.

24. Selvin, *As Interactive Cable Enters, Does Personal Privacy Go Out the Window?*, 4 Comm/Ent 781 (1982); Feldman & Gordin, *Privacy and Personal Information Reporting: The Legislative Boom*, 35 Business Lawyer 1259 (1980); Comment, *The Use and Abuse of Computerized Information: Striking a Balance between Personal Privacy Interests and Organized Information Needs*, 44 Alabama L. Rev. 589 (1980).

25. *People v. Kunkin*, 9 Cal. 3d 245, 107 Cal. Rptr. 184, 507 P.2d 1392 (1973) (newspaper not criminally liable for obtaining secret government information that was not stolen by the newspaper itself).

26. Freund, "Privacy: One Concept Or Many?", in *Privacy*, ed. Pennock and Chapman (1971), 188.

gery; self-incrimination; and statutory relational privileges between husband and wife, doctor and patient, lawyer and client, and priest and penitent.

The bulk of media and scholarly attention has been focused on the third type, the common law of privacy. Unlike defamation, a privacy violation does not depend upon the altered attitudes other persons have toward you. Rather, it concerns how you are made to feel about yourself. It involves your self-esteem. When first proposed by Louis Brandeis and Samuel Warren in what was to become a seminal law review article,[27] it was referred to strictly in terms of "inviolate personality." The two young Boston lawyers were reacting to what they considered graceless newspaper gossip about private social affairs of the patrician Warren family. Although there is an aura of injured gentility about their rhetoric, Brandeis and Warren were prophetic when they observed that someday "mechanical devices (would) threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetops'."

More important, Brandeis and Warren for the first time wrenched privacy from the domain of property law, where it had been protected, if at all, in the common law. Their key argument was that law and society should recognize a certain category of intimate information about individuals that was sacrosanct. Both textual and photographic information were included. Brandeis and Warren were prepared to exempt publications of public or general interest from their law of privacy but, diverging from libel, would not generally permit truth as a defense in a privacy suit. They would allow a privacy suit where the "dignity and convenience" of the individual was intruded upon in an unwarranted fashion, but did not define what was unwarranted. The action would include damages for mental suffering as well as for any more determinable damages.

Privacy gained momentum when New York in 1903 passed a law making it a misdemeanor and a tort to use someone's name or picture for trade purposes without authorization (New York Civil Rights Law, §§ 50, 51). The legislature was responding to the plight of a young woman who, finding her portrait on posters advertising flour in stores, warehouse walls, and saloons, could invoke no legal remedy.[28] But the right remained one of property, analogous to a breach of contract or copyright. The New York statute, however, has frequently been invoked by plaintiffs pursuing other, nonproperty-related, privacy actions.

Two years later, the Georgia Supreme Court, in a similar case of appropriating one's photograph for trade purposes—this time by an insurance company—became the first court to recognize a personal right of privacy.[29] Under the influence of Brandeis and Warren's arguments, the tort was stretched by courts and commentators to accommodate other kinds of invasions of privacy. The influential Dean William Prosser finally organized the case law into the four categories—appropriation, intrusion, false light, and embarrassing private facts—which today provide a popular framework of analysis. Prosser, *Privacy*, 48 Calif.L.Rev. 389 (1960). For a study of the coalescing quality of the four-category typology, see Ellis, *Damages and the Privacy Tort: Sketching a Legal Profile*, 64 Iowa L.Rev. 1111 (1979).

Most states and the District of Columbia today give common law or statutory recognition to some or all of Prosser's four privacy torts.[30] Eleven states have privacy statutes, but only Rhode Island's provides a cause of action under all four of Prosser's categories. In other states with statutes, privacy categories not covered may nonetheless have been recognized by the courts as a matter of common law. It might also be inferred, however, that the absence of a category in a statute indicates nonrecognition of the cause of action. That view was clearly articulated in *Arrington v. New York Times*, 6 Med.L.Rptr. 2354, 433 N.Y.S.2d 164 (Sup.Ct., App.Div. 1980), when the court would recognize neither a common law nor constitutional privacy cause of action beyond its statute. A false light claim was rejected by the court. One state, North Dakota, has not addressed privacy either in court decisions or by statute.

Just as with libel, federal courts may hear privacy cases where diversity of citizenship jurisdiction applies. More than in most areas of common law where federal courts are required to "predict" state law,

27. Brandeis & Warren, *The Right to Privacy*, 4 Harvard L.Rev. 193 (1890).
28. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).
29. *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68 (Ga. 1905).
30. For a state-by-state listing, see *Privacy Law in the 50 States*, News Media & the Law (Summer 1986), 20.

predictions of a state's privacy law are likely to be in error.[31] More than most other areas of communication law, the protections from state to state vary widely under the common law right of privacy. Knowing the provisions of local law is advised.

While common law invasion of privacy has always had criticism because it is confusing, sometimes contradictory, and always in conflict with the First Amendment goal of a wide-open marketplace of ideas, and its demise has often been predicted or desired,[32] it remains the basis for a considerable number of lawsuits against mass media. Most of those suits result in decisions for defendants, rendering the vast majority of editorial decisions on what the press might do to personal privacy a matter of ethics and good taste rather than of law.[33]

"PURE" PRIVACY: DISCLOSURE OF EMBARRASSING PRIVATE FACTS

Unreasonable public disclosure of *embarrassing private facts* is the branch of invasion of privacy that Warren and Brandeis had most in mind, and it is the branch to which most current definitions of privacy apply. It is also the most difficult for a plaintiff to pursue. Despite odds against winning, plaintiffs file embarrassing private facts lawsuits frequently; only false light actions appear to outnumber them among all privacy cases.

Why do plaintiffs fail? Because the defense of *newsworthiness* intervenes to protect the publisher. Newsworthiness, of course, means different things to different people. A British parliamentary commission attempted definition when it suggested a distinction between material *in* the public interest and material merely *of* interest to the public.[34] The commission ultimately opposed creating any privacy law. An editor will likely consider all published stories newsworthy, while a court may consider only stories covering issues that directly affect readers as newsworthy.[35]

The problem with such Meiklejohnian interpretations is that they focus on the *value* of the story, especially political value, rather than on the intimacy of the material as originally proposed. Narrow distinctions also underestimate the significance of nonpolitical, even purely entertaining, speech. Newsworthiness has been applied with a broad brush anyway, using a common sense approach rather than a categorical one. Ironically, where plaintiffs have succeeded, they have done so at the cost of additional publicity.

The leading case on embarrassing private facts arose from a story that asked the perennial reporter's question, "whatever happened to . . . ?" A writer for *The New Yorker* in 1937 decided to learn what had become of William James Sidis, a one-time child prodigy who had attracted extensive press attention in the early part of the century. Sidis had become an anonymous recluse. Although the magazine article was sympathetic,[36] the privacy Sidis had carefully cultivated was shattered. In 1940, a federal appeals court rejected Sidis's privacy claim.

SIDIS v. F-R PUBLISHING CORP.

1 MED.L.RPTR. 1775, 113 F.2D 806 (2D CIR. 1940).

CLARK, Circuit Judge

* * *

Warren and Brandeis realized that the interest of the individual in privacy must ineveitably conflict with the interest of the public in news. Certain public figures, they conceded, such as holders of public office, must sacrifice their privacy and expose at least part of their lives to public scrutiny as the price of the powers they attain. But even public figures were not to be stripped bare.

31. *State ex rel. Elvis Presley Int'l. Memorial Foundation v. Crowell*, 14 Med.L.Rptr. 1043, 733 S.W.2d 89 (Tenn.App. 1987).

32. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 Cornell L.Rev. 291 (1983).

33. Logan and Tillinghast, "Ethical and Legal Underpinnings of the Right to Privacy: Jeffersonian Social Libertarian Theory or Madisonian Independent Press Theory?," paper presented to Mass Communications and Society Division and Law Division, Association for Education in Journalism and Mass Communication Convention, San Antonio, Texas, August 2, 1987.

34. Report of the Committee on *Privacy*. Kenneth Younger, Chairman, London [July 1972.] 47 See also, Bloustein, Individual and Group Privacy (1978); Bezanson, *Public Disclosures as News: Injunctive Relief and Newsworthiness in Privacy Actions Involving the Press*, 64 Iowa L.Rev. 1073 (1979).

35. *Rouch v. Enquirer & News of Battle Creek*, 13 Med.L.Rptr. 2201, 398 N.W.2d 245 (1986) (distinguishing material that is merely interesting to the public from material that may affect the public for application of "public interest" privilege in libel case).

36. Manley, "Where Are They Now? April Fool!" *The New Yorker*, August 14, 1937. Herbert Strentz, former dean of the School of Journalism at Drake University, speculates from evidence contained in James Thurber's *The Years With Ross* that Thurber may have been the author of the Sidis article. April Fool's Day was Sidis's birthdate.

* * *

Sidis today is neither politician, public administrator, nor statesman. Even if he were, some of the personal details revealed were of the sort that Warren and Brandeis believed "all men alike are entitled to keep from popular curiosity."

But despite eminent opinion to the contrary, we are not yet disposed to afford to all the intimate details of private life an absolute immunity from the prying of the press. Everyone will agree that at some point the public interest in obtaining information becomes dominant over the individual's desire for privacy. Warren and Brandeis were willing to lift the veil somewhat in the case of public officers. We would go further, though we are not yet prepared to say how far. At least we would permit limited scrutiny of the "private" life of any person who has achieved, or has had thrust upon him, the questionable and indefinable status of a "public figure."

William James Sidis was once a public figure. As a child prodigy, he excited both admiration and curiosity. Of him great deeds were expected. In 1910, he was a person about whom the newspapers might display a legitimate intellectual interest, in the sense meant by Warren and Brandeis, as distinguished from a trivial and unseemly curiosity. But the precise motives of the press we regard as unimportant. And even if Sidis had loathed public attention at that time, we think his uncommon achievements and personality would have made the attention permissible. Since then Sidis has cloaked himself in obscurity, but his subsequent history, containing as it did the answer to the question of whether or not he had fulfilled his early promise, was still a matter of public concern. The article in *The New Yorker* sketched the life of an unusual personality, and it possessed considerable popular news interest.

We express no comment on whether or not the newsworthiness of the matter printed will always constitute a complete defense. *Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency.* [Emphasis added.] But when focused upon public characters, truthful comments upon dress, speech, habits, and the ordinary aspects of personality will usually not transgress this line. Regrettably or not, the misfortunes and frailties of neighbors and "public figures" are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.

COMMENT

The rule of *Sidis*—that revelations so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency are actionable under privacy standards—has stood the test of time. Truthful publication may be punished in some circumstances.

"One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public." *Restatement (Second) of Torts* § 652D (1977).

As in libel, where the Supreme Court extended substantial latitude to the states to develop their own standards of fault, the Court in privacy has developed what is essentially a *community standards* test, or what one commentator has called the *unconscionability* rule.[37]

The Scope of "Outrage" and the Defense of Newsworthiness

Just what is able to "outrage the community's notions of decency" has been addressed in many cases. Stories that resulted from routine reporting and publishing practices have seldom been subjected to liability. Only material that is truly intimate or media practices that are truly unreasonable have sufficed to impose liability.

A case in point involved a plastic surgeon who used "before and after" photos of a patient for public demonstrations and television appearances. Mary Vassiliades, a retired secretary, underwent cosmetic surgery—apparently a facelift—in 1978. Photos were taken during surgery and at postoperation visits, the doctor assuring her that taking photos was "part of the doctor's regular routine." In 1979, the doctor appeared on a Washington, D.C. talk show and gave

37. Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum.L.Rev. 1205, 1274 (1976).

a presentation at Garfinckel's department store. The doctor used four photos and identified Vassiliades by name. Acquaintances of Vassiliades saw the television show and began spreading the news of her surgery. Vassiliades herself testified that she was "devastated" and "went into a terrible depression" upon learning of the use of the photos. *Vassiliades v. Garfinckel's*, 11 Med.L.Rptr. 2057, 492 A.2d 580 (D.C.App. 1985).

Relying upon *Barber v. Time, Inc.*,[38] an early case where a hospital patient with an eating disorder was photographed without consent while her attention was diverted, the court agreed that Vassiliades's privacy was invaded. "Although the photographs may not have been uncomplimentary or unsavory, the issue is whether the publicity * * * was highly offensive to a reasonable person * * *", the court said. The defense argued that plastic surgery is a matter of legitimate public interest. This newsworthiness argument was rejected. The court could find no "logical nexus" between the admittedly newsworthy subject and the use of Vassiliades's photos to explain the subject. Surely, the court reasoned, the need to inform the public does not include a need to use photos of the most intimate sort. In an interesting side issue, the court held the department store was not responsible, since it had been given assurances of consent by the doctor.

Similar arguments were used after the *Oakland Tribune* identified Toni Ann Diaz, the recently elected first female president of the student body at the College of Alameda, as having undergone sex change surgery some years before. Diaz had concealed knowledge of the operation, telling only immediate family members and close friends. A reporter developed the story from a tip and confirmed it using confidential sources. The story also reported on an arrest record for Antonio Diaz from 1971. *Diaz v. Oakland Tribune*, 9 Med.L.Rptr. 1121, 139 Cal.App.3d 118, 188 Cal.Rptr. 762 (1983).

In the course of deciding to send the case back to trial, the court examined the four elements of public disclosure actions in California: "(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern." The court determined that sexual identity, Diaz's Puerto Rican birth certificate, and the arrest were all private matters. The *Tribune's* connection of Antonio Diaz to Toni Diaz, relying upon records that did not contain *both* names and on confidential sources, was seen as tenuous. Regarding the arrest record itself, the court noted, "[M]atter which was once of public record may be protected as private facts where disclosure of that information is not newsworthy." In addition, the court said that Diaz's status as student body president did not support a newsworthiness defense. "The public arena entered by Diaz is concededly small," the court said. Diaz could be considered a public figure for only a limited range of matters.

While *Diaz* and *Vassiliades* might seem to indicate that details of one's sex life or medical history are especially intimate details deserving protection, such is not always the case. Oliver Sipple sued after he was identified in news stories as a member of San Francisco's gay community. The former Marine, who had kept his sexual preference from his family, suffered estrangement from his parents, brothers, and sisters. But Sipple had become a hero when he deflected Sara Jane Moore's gun hand when Moore tried to shoot President Gerald Ford in San Francisco in 1975. Since Sipple was a widely known and active member of the city's gay community, and that information was not capable of shocking the community, the court refused to consider his sexual preference a private fact. Even if it had, the court said, newsworthiness prevented any liability. While Sipple could perhaps not have foreseen the consequences, his voluntary actions made Sipple subject to coverage, which "is not limited to the event that itself arouses the public interest. * * *" *Sipple v. Chronicle Pubg. Co.*, 10 Med.L.Rptr. 1690, 154 Cal.App.3d 1040, 201 Cal.Rptr. 665 (1984). Is there any genuine difference between *Diaz* and *Sipple*?

Similarly, two minors who filed suit against *Hustler* magazine after its publication of nude photos taken years earlier and republished by the magazine as part of a review of two books containing the photos, lost their case because the facts had ceased to be private. Their mother had originally consented to the taking of the photos and had signed a release. No matter how embarrassing the facts were today to the children and mother, that which had been allowed to become public could not later be made private by judicial fiat. The plaintiffs also claimed

38. 1 Med.L.Rptr. 1779, 159 S.W.2d 291 (Mo. 1942).

false light and appropriation, but since the court determined that no reasonable person could interpret the appearance of the photos as approval of *Hustler* or as indicating the plaintiffs posed for the magazine, the extra claims were also thrown out. *Faloona v. Hustler*, 13 Med.L.Rptr. 1353, 799 F.2d 1000 (5th Cir. 1986). The attempt to combine several related claims occurs frequently in privacy litigation. The case is typical of a growing number of suits brought against *Hustler* for its tendency to run photographs from virtually any source of subjects posing nude. Not surprisingly, many photo subjects are dismayed, to say the least, at appearing in Larry Flynt's magazine without notice.[39] Apparently many plaintiffs consider merely appearing in *Hustler* at odds with notions of decency.

Note that cases addressing issues of community standards do not, with the exception of *Sipple*, make explicit reference to the community in which the story appeared. The "community" that truly matters for private facts cases is the jury. Since what is private and what violates community standards is an issue of fact, it is initially for the jury to decide. And some appeals courts are reluctant to reverse juries. In one case, a teenage mother told a newspaper reporter that Craig Hawkins was the father of her child. The reporter also talked to Hawkins himself. Despite what was apparently a fairly well-known fact, the court said a jury was entitled to find it a private fact. *Hawkins v. Multimedia*, 12 Med.L.Rptr. 1878, 344 S.E.2d 145 (S.C. 1986). The court also upheld a jury decision that the fact was not newsworthy. In addition, the fact that Hawkins was a minor, and it was not clear that his telephone interview constituted consent, seemed to influence the court. The court emphasized that, "the reporter never asked Craig if she could use his name in a newspaper article." The court referred to plaintiff by first name throughout the opinion. The apparent reporter-never-asked standard of *Hawkins* should chill the spine of every reporter who has conducted an interview without getting permission to publish—in other words, every reporter.

A case that addressed the community standards or decency test at length involved an eccentric bodysurfer and *Sports Illustrated*. Michael Virgil agreed to an interview but revoked consent when he learned that the picture story would include details of what can only be called weird behavior. The article was published anyway and included the following paragraphs:

> Virgil's carefree style at the Wedge appears to have emanated from some escapades in his younger days, such as the time at a party when a young lady approached him and asked where she might find an ashtray. "Why, my dear, right here," said Virgil, taking her lighted cigarette and extinguishing it in his mouth. He also won a small bet one time by burning a hole in a dollar bill that was resting on the back of his hand. In the process he also burned two holes in his wrist.
>
> The article quotes Virgil as saying:
>
> Every summer I'd work construction and dive off billboards to hurt myself or drop loads of lumber on myself to collect unemployment compensation so I could surf at the Wedge. Would I fake injuries? No, I wouldn't fake them. I'd be damn injured. But I would recover. I guess I used to live a pretty reckless life. I think I might have been drunk most of the time.
>
> I love tuna fish. Eat it all the time. I do what feels good. That's the way I live my life. If it makes me feel good, whether it's against the law or not, I do it. I'm not sure a lot of things I've done weren't pure lunacy. Cherilee [plaintiff's wife] says, "Mike also eats spiders and other insects and things."

The article notes: "Perhaps because most of his time was spent engaged in such activity, Virgil never learned how to read."

A photo caption reads: "Mike Virgil, the wild man of the Wedge, thinks it possible his brain is being slowly destroyed."

The Ninth Circuit Court of Appeals wrote no brief for the press when it said:

> To hold that privilege extends to all true statements would seem to deny the existence of "private" facts, for if facts be facts—that is, if they be true—they would not (at least to the press) be private, and the press would be free to publicize them to the extent it sees fit. The extent to which areas of privacy continue to exist, then, would appear to be based not on rights bestowed by law but on the taste and discretion of the press. We cannot accept this result.

Nevertheless, the court added that news of legitimate concern to the public is protected by the First Amendment, and "in determining what is a matter of legitimate public interest, account must be taken

39. See, e.g., *Brewer v. Hustler Magazine*, 11 Med.L.Rptr. 1502, 749 F.2d 527 (9th Cir. 1984); *Douglass v. Hustler Magazine, Inc.*, 11 Med.L.Rptr. 2264, 769 F.2d 1128 (7th Cir. 1985).

of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information of which the public is entitled, and becomes *a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.* * * * But if there is room for differing views as to the state of community mores or the manner in which it would operate upon the facts in question, there is room for the jury function." [Emphasis added.] *Virgil v. Time, Inc.*, 1 Med.L.Rptr. 1835, 527 F.2d 1122 (9th Cir. 1975).

The press had argued that the First Amendment should provide a privilege for publication of any true material. But the Ninth Circuit would accept only the traditional newsworthiness defense, although it noted the defense was required to be allowed under the First Amendment. The case was returned to federal district court for trial.

The district court found that the Virgil story did not violate the "outrageousness" or "unconscionability" standard adopted by the Ninth Circuit. While agreeing that the facts in the story were "generally unflattering and perhaps embarrassing," the court found the story just as positive about Virgil as negative (a concern more appropriate to libel cases). In any event, bodysurfing was a matter of legitimate public interest, and Virgil's prominence in the sport made him fair game. "Any reasonable person * * * would have to conclude that the personal facts concerning Mike Virgil were included as a legitimate journalistic attempt to explain Virgil's extremely daring and dangerous style of bodysurfing at the Wedge." *Virgil v. Sports Illustrated*, 2 Med.L.Rptr. 1271, 424 F.Supp. 1286 (S.D.Cal. 1976).

Journalism practices were the focus of other cases. In *Pasadena Star-News v. Los Angeles Superior Court*, 15 Med.L.Rptr. 1867, 203 Cal.App.3d 131, 249 Cal.Rptr. 729 (1988), the mother of an abandoned baby girl filed a privacy suit after the *Star-News* published a story identifying by name the mother and her brother, who had deposited the baby in a cardboard box at a hospital. The plaintiff asserted that her name was not an integral part of the story, although she conceded the story's newsworthiness. The appeals court issued a writ of mandate ordering the superior court to grant the defendant's motion for summary judgment. The court focused on the consequences of plaintiff's argument in deciding against her. "Plaintiff's proposed rule—that a published report of embarrassing but newsworthy private facts is actionable unless the report omits the name of its subject—*would overhaul journalism as we know it*," the court said. "The press could not without consent reveal the name of anyone other than a public official or a public figure. * * * * This would change the tone of stories about matters of the greatest public concern, many of which are stories about individuals of no renown." (Emphasis added.)

Iowa's Supreme Court held that a newspaper report of a patient subjected to sterilization was not an invasion of privacy because it was newsworthy and insufficiently intimate to outrage the community's notions of decency, and it was part of a public record. Of the story the court said:

> [I]t offered a personalized frame of reference to which the reader could relate, fostering perception and understanding * * * the editors also had a right to buttress the force of their evidence by naming names. We do not say it was necessary for them to do so, but we are certain they had a right to treat the identity of victims of involuntary sterilization as matters of legitimate public concern. * * * The specificity of the report would strengthen the accuracy of the public perception of the merits of the controversy. *Howard v. Des Moines Register and Tribune Co.*, 5 Med.L.Rptr. 1667, 283 N.W.2d 289 (Ia. 1979), cert. den. 445 U.S. 904 (1980).

Indeed, successful private facts cases have been difficult to find since *Time, Inc. v. Hill*[40] in 1967. A federal district court thought it had reached the outer boundaries of community decency when it denied a Twin Cities television station's request to make copies of videotapes that had been shown to a jury in a kidnap-rape-murder trial. The defendant had made videotapes that recorded his multiple rapes of his former high school teacher. The victim and her daughter later escaped their captor. A boy who had been picked up during their abduction had been murdered.

Although not a privacy case as such, the judge relied on privacy notions in denying the motion to copy the videotapes. And the victim, who had agreed to a showing of the tapes for prosecution purposes, also opposed the motion. It is not clear if the denial

40. 1 Med.L.Rptr. 1791, 385 U.S. 374 (1967).

was premised on private facts grounds or on bodily privacy grounds. The judge expressly declined to say, concluding that: "To now expose Mrs. Stauffer to public humiliation and degradation by releasing the tapes for public dissemination would, at best, be unseemly and shameless; it would constitute an unconscionable invasion of her privacy." *In re Application of KSTP-TV*, 6 Med.L.Rptr. 2249, 504 F.Supp. 360 (D.Minn. 1980). The ruling appeared based in part on a presumption that the station would broadcast everything the jury had seen. It would not have.

The *KSTP* case seems to have more in common perhaps with non-media bodily privacy cases such as those involving police strip searches of women arrested for minor crimes and traffic offenses[41] or surreptitious taking of photos of female patrons in the rest room of a bar,[42] or the woman who went to the police to report an assault who was asked to undress, was photographed nude, and the photos later circulated among policemen for their amusement.[43]

The element of misbehavior was at work in a somewhat similar media privacy case involving what might be considered an "ambush" report. When a temporarily deranged man was arrested at his home by Boise, Idaho police for using a shotgun in a threatening manner, he was framed in his doorway, and he was naked. TV cameras filmed the arrest, and for a fraction of a second the man's buttocks and genitals appeared on the evening news. The news editor was fired. The arrested man, claiming embarrassment and humiliation, sued the television station for invasion of privacy, and a jury awarded him $15,000. On appeal to the Supreme Court of Idaho, the judgment was reversed, and the case remanded for retrial. The state supreme court went astray, however, by directing the trial court to decide the case on the issue of actual malice, an issue not governing private facts cases but reserved for false light suits.[44] Does the fact that Taylor appeared naked in his front door, where anyone could have seen him, weaken his private facts claim? Does the fact that the reporter accompanied police make the (un)coverage newsworthy?

A Florida case indicates that facts which might otherwise clearly be considered private will be newsworthy when official police involvement occurs or the magnitude of an event is sure to attract public attention. A Cocoa Beach jury ordered a newspaper to pay $10,000 to a woman who was photographed fleeing from her home naked except for slight coverage from a hand towel after having been held captive by her estranged husband. An appeals court reversed. *Cape Publications v. Bridges*, 8 Med.L.Rptr. 2535, 423 So.2d 426 (Fla.Dist.Ct.App. 1982). The court explicitly noted that the Restatement of Torts regards police activities as newsworthy. The court also noted that the event itself provided a defense to the newspaper, because crime—and by extension crime victims—are matters of public interest. The newspaper's photo, "which won industry awards, could be considered by some to be in bad taste," the court said. Matters of taste, however, should not be the basis for a court's substituting its judgment for that of editors. Notably, the photo run was one of the least revealing taken and "revealed little more than could be seen had appellee been wearing a bikini. * * *" Her claim for intentional infliction of mental distress was thrown out for failure to provide evidence of "outrageousness."

Even in cases of egregious bad taste and faulty editorial judgment, the public interest defense will protect a publisher. A newspaper printed photos of a murdered child's body, wrapped in chains, being pulled from a lake. Additional prints showing the gruesome effects of the crime were sold to the public. But a privacy claim brought by the parents was rejected because, said a Georgia court, the crime, at least until its perpetrator was apprehended, was a matter of urgent public interest. *Waters v. Fleetwood*, 91 S.E.2d 344 (Ga. 1956).

Does "Private Facts" Have a Future?

The rationale underlying the private facts cause of action was severely critiqued by the Oregon Supreme Court in a 1986 case. Justice Hans Linde's opinion for the court argued that the cause of action fails to serve the purposes it was created to protect,

41. *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983).

42. *Yoeckel v. Samonig*, 75 N.W.2d 925 (Wis. 1956). The facts also support an action for intrusion on seclusion since most people have a reasonable expectation of solitude in a rest room.

43. *York v. Story*, 324 F.2d 450 (9th Cir. 1963).

44. *Taylor v. KTVB, Inc.*, 525 P.2d 984 (Idaho 1974).

while doing considerable damage to the operations of the press. Richard Anderson filed suit after station KATU-TV used footage of him from an automobile accident in promotional advertising for its special report on emergency medical services. The material had never been used in a newscast. In the videotape Anderson was identifiable, shown injured and bleeding. He claimed violation of his right of privacy on private facts and appropriation grounds. A trial court gave the station summary judgment on the issue of newsworthiness. The court of appeals had reversed, holding that newsworthiness was a fact issue for the jury.

ANDERSON v. FISHER BROADCASTING COS.

12 MED.L.RPTR. 1604, 712 P.2D 803 (ORE. 1986).

LINDE, J.:

A television cameraman for defendant broadcasting company photographed the scene of an automobile accident in which plaintiff was injured. Plaintiff was recognizable and was shown bleeding and in pain while receiving emergency medical treatment. Defendant did not use the videotaped pictures or report the accident on its regular news program. Some time later, without seeking plaintiff's consent, defendant used a brief excerpt showing plaintiff to illustrate promotional spots advertising a special news report about a new system for dispatching emergency medical help.

Plaintiff sued for general damages for mental anguish, alleging that defendant "violated plaintiff's right to privacy" by "appropriating to defendant's own use and advantage" the pictures its photographer had taken of plaintiff and by "publicizing" his picture in a condition "offensive to a reasonable person" and not of legitimate public concern. In defense, the broadcaster asserted that its use of plaintiff's picture occurred in advertising another news program, that this use was constitutionally privileged and that the undisputed facts gave rise to no common law claim. The trial court gave summary judgment for defendant. * * *

The Court of Appeals held that there was an issue of fact whether the film showing plaintiff's injured condition was newsworthy, because it was not used to report plaintiff's accident itself but only to draw viewers for a different program in which the accident was not mentioned.

* * *

In this court, defendant again stressed its constitutional claims along with its common law arguments, understandably so in defending against a tort claim for wrongful publicity to which media of mass communication are peculiarly vulnerable. The constitutional issues are significant. The right to "speak, write, or print freely on any subject whatever" guaranteed by Article I, section 8, of the Oregon Constitution accommodates laws providing civil responsibility and remedies (though not punitive damages) for an "injury done another in his person, property, or reputation," as guaranteed in Article I, section 10, if the interest said to be injured falls within section 10 and if the defendant's expression meets the test of the word "abuse" in section 8.

* * *

We therefore included the constitutional issues among the questions that we submitted to counsel before argument. But we shall not decide this case on constitutional grounds when it is unnecessary to do so, and when a premature decision would foreclose legislative consideration. In the present case, we hold that the undisputed facts do not give rise to a claim for damages. We therefore reverse the Court of Appeals and reinstate the judgment of the circuit court.

* * *

The question whether truthfully publicizing a fact about a private individual that the individual reasonably prefers to keep private is, without more, a tort, has not yet been squarely decided by this court.

Generally, Oregon decisions have not allowed recovery for injury to a stranger's feelings as such, unless the infliction of psychic distress was the object of defendant's conduct or the conduct violated some legal duty apart from causing the distress. *See Norwest v. Presbyterian Intercommunity Hosp.*, 293 Or at 558–59, reviewing the cases. In the absence of some other duty or relationship of the defendant to plaintiff, it does not suffice for tort liability that defendant's offensive conduct is an intentional act. The conduct must be designed to cause severe mental or emotional distress, whether for its own sake or as a means to some other end, and it must qualify as extraordinary conduct that a reasonable jury could find to be beyond the farthest reach of socially tolerable behavior. *Hall v. The May Dept. Stores*, 292 Or at 137. Here the use of plaintiff's picture, of course, was intentional, but there is no claim or evidence that the broadcaster wished to distress plaintiff.

* * *

"Privacy" denotes a personal or cultural value placed on seclusion or personal control over access to places or things, thoughts or acts. "Privacy" also can be used to label one or more legally recognized interests, and this court has so used the term in several cases. * * * But like the older word "property," which it partially overlaps, "privacy" has been a difficult legal concept to delimit.

* * *

The common law tort claim based solely on publicizing private facts that are true but not newsworthy has met critical response. * * * Such a tort was not part of the "common law of England" adopted by Oregon in 1843, and after studying it was rejected in England, the home of the common law, in favor of alternative theories. Criticism has not implied a lack of sympathy with the feelings of persons whose past or present lives are brought to public attention against their own wishes; but the obstacles to defining when publicity as such is tortious, without more, are formidable.

What is "private" so as to make its publication offensive likely differs among communities, between generations, and among ethnic, religious, or other social groups, as well as among individuals. Likewise, one reader's or viewer's "news" is another's tedium or trivia. The editorial judgment of what is "newsworthy" is not so readily submitted to the *ad hoc* review of a jury as the Court of Appeals believed. It is not properly a community standard.

* * *

If the tort is defined to protect a plaintiff's interest in nondisclosure only against widespread publicity, as in the Restatement's § 652D, it singles out the print, film, and broadcast media for legal restraints that will not be applied to gossip-mongers in neighborhood taverns or card parties, to letter writers or telephone tattlers. Finally, a successful tort action may serve to rectify a defamatory, appropriative, or "false light" publication, but in the pure "private facts" tort even success sacrifices rather than protects the plaintiff's interest in the privacy of the wrongfully publicized facts, for litigation only breeds renewed and often wider publicity, this time unquestionably privileged. Writing in 1979, Professor Dorsey D. Ellis, Jr., found that there had been no reported case in which a plaintiff successfully recovered damages for truthful disclosure by the press since the United States Supreme Court reversed a New York judgment in *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967), and he concluded that the tort's "very existence is in doubt, at least outside the law reviews." Ellis, *Damages and the Privacy Tort: Sketching a Legal Profile*, 64 Iowa L.Rev. 1111, 1133 (1979).

Doubtless in many instances a picture not only is worth a thousand words to a publisher but words would be worth nothing at all. * * * Some filmed or broadcast scenes compare to verbal reports in dramatic impact about as hearing music compares to reading a score, and the emotional reaction of the person who is depicted rather than described may likewise be greater. * * *

Nonetheless, the difference between undesired publicity by word or by picture seems to concern only the degree of the subject's psychic discomfort rather than the nature of the interest claimed to be invaded. Perhaps the present plaintiff would not have felt offended if KATU-TV had verbally described his bloodied and disheveled condition rather than showing it. But neither the courts nor the commentators have made a distinction in principle between one woman's objections to a book based on her experiences, *Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243 (1944), and another's to a motion picture, *Melvin v. Reid*, 112 Cal.App. 285, 297 P. 91 (1931), and we perceive none.

* * *

Plaintiff in the present case concedes that KATU-TV would not be liable to him if it had included his picture in the ordinary news coverage of a traffic accident. He contends that the broadcaster became liable because instead it used the footage to draw audience attention to a later broadcast concerning emergency medical services, in which plaintiff's picture was not included. Does the distinction between "commercial" and "noncommercial" use of a person's name, likeness, or life history rest on a difference in the interest invaded by the publication or in the character of the publisher's motives and purposes? The reason should bear on the remedy.

* * *

This theory is not available, however, to a person whose image, with no established public familiarity, appears in a commercial context only incidentally, perhaps as one of several persons in a public scene, or otherwise under circumstances that plainly are not presented so as to convey any endorsement by that person.

* * *

In the present case, plaintiff does not claim that KATU-TV's promotional spots portrayed him as an accident victim in a manner implying that he endorsed its forthcoming program about emergency medical services, and the record on summary judgment suggests no such inference. His claim is not for the economic value of such an endorsement, nor for any gain unjustly realized by the broadcaster from appropriating a photograph belonging to plaintiff. The videotape was made at the accident scene by defendant's cameraman, and the identity of the accident victim was immaterial. Rather, plaintiff claims damages for mental distress from its publication. Without a showing that plaintiff's picture was either obtained or broadcast in a manner or for a purpose wrongful beyond the unconsented publication itself, that claims fails.

To summarize, we conclude that in Oregon, the truthful presentation of facts concerning a person, even facts that a reasonable person would wish to keep private and that are not "newsworthy," does not give rise to common-law tort liability for damages for mental or emotional distress, unless the manner or purpose of defendant's conduct is wrongful in some respect apart from causing the plaintiff's hurt feelings. * * * Because plaintiff has shown no such wrongful element in defendants' conduct, we have no occasion to anticipate constitutional questions in the event the legislature were to enter this field of tort law.

The decision of the Court of Appeals is reversed, and the judgment of the circuit court is reinstated.

COMMENT

Why did the court not adopt a state constitutional or First Amendment defense for the media against any private facts or appropriation lawsuit whenever the complained-of content was news? Such an analysis would have retained the common law actions for other, nonmedia or non-news purposes. The court instead says that the content of media itself cannot become the basis for a suit, only a "wrongful element in defendants' conduct." In any event the publication of truthful information cannot, standing alone, support a privacy action in Oregon, no matter how private the facts may be. Oregon is nearly alone in its interpretation at present.[45] The logic of not recognizing an action which the court notes had resulted in "no reported case in which a plaintiff successfully recovered damages" seems sound. The factor of wrongful behavior is at the core of cases involving the other three branches of common law privacy, as we shall see. The courts have not always recognized that behavior, not content, is the central issue, however.

Privileging Facts from Official Records

It is reasonable to expect that information gathered from government records and from official proceedings is generally unlikely to be considered so private a fact that its publication warrants liability. That material appears either in records or is made available in proceedings is itself almost *prima facie* evidence of public interest, hence newsworthiness. Judicial records are the least vulnerable to private facts suits. And, despite *Diaz*, a newsworthiness defense based upon records obtained from officials is strong.[46]

In spite of a Georgia statute protecting the identity of rape victims, the privacy claim of a father whose daughter was raped and murdered by six fellow high school students was rejected. A broadcast reporter got the name from a clerk of court since it was included in an official indictment record open to public inspection.

COX BROADCASTING CORP. v. COHN

1 MED.L.RPTR. 1819, 420 U.S. 469, 95 S.CT. 1029, 43 L.ED.2D 328 (1975).

Justice WHITE delivered the opinion of the Court.

* * *

45. North Carolina recently rejected the private facts cause of action as unsound as a matter of common law and as constitutionally suspect. *Hall v. Post*, 15 Med.L.Rptr. 2329 (N.C. 1988). The court noted instead that a plaintiff could seek remedy through actions for intrusion or for infliction of emotional distress, both of which focus on a defendant's conduct rather than a defendant's content. North Carolina had previously rejected the false light cause of action as constitutionally suspect. *Renwick v. News & Observer*, 10 Med.L.Rptr. 1443, 312 S.E.2d 405 (N.C. 1984).

46. *Andren v. Knight-Ridder Newspapers*, 10 Med.L.Rptr. 2109 (E.D.Mich. 1984) (action not allowed where defendant published material from diaries of murdered daughter, in action by parents, because diaries were made available to defendant by police officers; deceased's privacy interest also did not pass to parents).

Georgia stoutly defends both § 26-9901 and the State's common-law privacy action challenged here. Its claims are not without force, for powerful arguments can be made, and have been made, that however it may be ultimately defined, there *is* a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity. Indeed, the central thesis of the root article by Warren and Brandeis, "The Right To Privacy", 4 *Harv.L.Rev.* 193, 196 (1890), was that the press was overstepping its prerogatives by publishing essentially private information and that there should be a remedy for the alleged abuses.

More compellingly, the century has experienced a strong tide running in favor of the so-called right of privacy. * * * Nor is it irrelevant here that the right of privacy is no recent arrival in the jurisprudence of Georgia, which has embraced the right in some form since 1905 when the Georgia Supreme Court decided the leading case of *Pavesich v. New England Life Insurance* Co. * * * 50 S.E. 68 (Ga. 1905).

These are impressive credentials for a right of privacy, but we should recognize that we do not have at issue here an action for the invasion of privacy involving the appropriation of one's name or photograph, a physical or other tangible intrusion into a private area, or a publication of otherwise private information that is also false although perhaps not defamatory. The version of the privacy tort now before us—termed in Georgia "the tort of public disclosure,"—is that in which the plaintiff claims the right to be free from unwanted publicity about his private affairs, which, although wholly true, would be offensive to a person of ordinary sensibilities. Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press. The face-off is apparent, and the appellants urge upon us the broad holding that the press may not be made criminally or civilly liable for publishing information that is neither false nor misleading but absolutely accurate, however damaging it may be to reputation or individual sensibilities.

* * *

The Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure. * * * In similar fashion, *Time, Inc. v. Hill*, expressly saved the question whether truthful publication of very private matters unrelated to public affairs could be constitutionally proscribed.

* * *

In this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society. Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection. We are convinced that the State may not do so.

In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations.

* * *

Appellee has claimed in this litigation that the efforts of the press have infringed his right to privacy by broadcasting to the world the fact that his daughter was a rape victim. The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.

* * *

The developing law surrounding the tort of invasion of privacy recognizes a privilege in the press to report the events of judicial proceedings. The Warren and Brandeis article, *supra*, noted that the proposed new right would be limited in the same manner as actions for libel and slander where such a publication was a privileged communication: "the right to privacy is not invaded by any publication made in a court of justice * * * and (at least in many jurisdictions) reports of any such proceedings would in some measure be accorded a like privilege."

The *Restatement of Torts*, § 867, embraced an action for privacy. Tentative Draft No. 13 of the *Second Restatement of Torts*, §§ 652A–652E, divides the privacy tort into four branches; and with respect to the wrong of giving unwanted publicity about private life, the commentary to § 652D states: "There is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public. Thus there is no liability for giving publicity to facts about the plaintiff's life which are matters of public record. * * *" According to this draft, ascertaining and publishing the contents of public records are simply not within the reach of these kinds of privacy actions.

Thus even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record. The conclusion is compelling when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press. The Georgia cause of action for invasion of privacy through public disclosure of the name of a rape victim imposes sanctions on pure expression—the content of a publication—and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition. * * *

By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served.

* * *

We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish.[26] Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast.

Appellant Wassell based his televised report upon notes taken during the court proceedings and obtained the name of the victim from the indictments handed to him at his request during a recess in the hearing. Appellee has not contended that the name was obtained in an improper fashion or that it was not on an official court document open to public inspection. Under these circumstances, the protection of freedom of the press provided by the First and Fourteenth Amendments bars the State of Georgia from making appellants' broadcast the basis of civil liability.

Reversed.

COMMENT

The Cox decision was a mixed victory for the press. While the Court appears to have erected a near-absolute privilege or defense in private facts cases when the information is obtained from public records that anybody could have seen, the Court declined the press's invitation to declare truth as a defense in all circumstances, a result which would have gutted the private facts tort. The Court's opinion, in fact, is extremely narrow.

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26. We mean to imply nothing about any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records, such as records of juvenile-court proceedings.

Is the difference between Cox, where the First Amendment interest was upheld, and *Firestone*, where it was not, that Cox involved publication of accurate information while *Firestone* did not? Recall that in Firestone's libel case, the allegedly false information concerned the divorce decree. Firestone never actually contested the defamatory assertions—only that the assertions were not the basis for the judge's granting the divorce. See discussion of *Firestone*, text, p. 215.

Does the Court's footnote 26 suggest that certain kinds of trials be closed to avoid creating a public record? There may be no need for such extreme measures, since most news organizations do not publish the names of rape victims as a matter of internal policy. Wolf, Thomason and LaRocque, *The Right to Know vs. the Right of Privacy: Newspaper Identification of Crime Victims*, 64 Journalism Quarterly 503 (1987). The implicit suggestion of closure would also apply to coverage of juveniles, drug offenders, morals violators, and all sorts of persons who may have been rehabilitated. Any rules of automatic closure of proceedings are of dubious constitutionality.[47]

The Scope of the Defense

Cox has been read as creating a virtually impenetrable defense for the media, at least where the information published could have been obtained by anyone. In *Doe v. Sarasota-Bradenton Television*, 9 Med.L.Rptr. 2074, 436 So.2d 328 (Fla.App. 1983), the plaintiff was a rape victim who agreed to testify at trial after assurances from the state that her name and photograph would not be published or displayed. The media defendant was covering the trial and ran a videotape that included part of Doe's testimony on the same day's evening newscast. The plaintiff attempted to rely on a Florida statute making it unlawful to publish material identifying sexual offense victims, but the court concluded that the statute placed the burden of confidentiality on the state, not the press, much as the Georgia statute did in Cox. The Florida court reluctantly applied Cox but reserved judgment on the constitutionality of the statute itself. "[W]e do not conclude that the statute can never be invoked by persons seeking to shield themselves from public scrutiny," the court said, pointing to Justice White's footnote 26 in Cox. The court added that it reached its decision "*reluctantly because the information disclosed * * * appears to us to have been completely unnecessary to the story being presented.*" [Emphasis added.] Were it not for Cox, the court surely would have opted for "balancing the competing interests at stake here. * * *"

Florida's protection of the identities of rape victims by statute was used as the basis for finding a newspaper liable for damages in a private facts case. In an extremely brief opinion, an appeals court said that victims' names were "not to be published as a matter of law" under the statute. Any such publication would, therefore, present what amounts to a *per se* private facts case. The prior restraint aspects of its holding were not even discussed, nor was privacy law. *Florida Star v. B.J.F.*, 499 So.2d 883 (Fla.Dist.Ct.App. 1986). In June 1989, the U.S. Supreme Court, on a 6–3 vote, upheld the newspaper's right to use information released in public documents. It did not directly address the privacy issues. *Florida Star v. B.J.F.*, No. 87–329.

The Florida Star decision was virtually alone in allowing recovery against a media defendant for information obtained from official proceedings or records. Recall that the Iowa Supreme Court held that a report on an involuntary sterilization was privileged in part because based on public record. See discussion of *Howard v. Des Moines Register and Tribune Co.*, text, p. 290. And when the breach of security is not the media's fault, the defense is especially strong. In one case, two newspapers published the results of a bar association rating of a nominee for a judgeship. State law stipulated that such ratings be confidential. The bar found the nominee "unqualified," and he was not appointed. The plaintiff filed suit against both the newspapers and the bar association. Claims against the press were dismissed. The plaintiff was a public figure at the time, so a newsworthiness defense was proper. But the press could not be liable in any event. The court said, "While the government may desire to keep some proceedings confidential and may impose the duty upon *participants* to maintain confidentiality, it may not impose criminal or civil liability upon the press for obtaining and publishing newsworthy information through routine reporting techniques." [Emphasis added.] *Nicholson v. McClatchy*

47. *Globe Newspaper v. Superior Court*, 8 Med.L.Rptr. 1689, 457 U.S. 596 (1982).

Newspapers, 12 Med.L.Rptr. 2009, 177 Cal.App.3d 509, 223 Cal.Rptr. 58 (1986).

Similar results have obtained when the press got information about a juvenile offense from a public parole report,[48] when a newspaper reported the name of a fourteen-year-old rape victim obtained in an open preliminary hearing,[49] and when a newspaper published medical details about a teenager's apparent hit-and-run death from a county sheriff's report.[50] In one case, a rationale similar to that in Cox was used to affirm dismissal of complaints by police officers whose names and addresses were reported in a newspaper story about a gun battle between police and gang members. The court reasoned that since a person's address appears in many public records, all open to public inspection, a home address is always a public fact. *McNutt v. New Mexico State Tribune*, 538 P.2d 804 (N.M.App. 1975).

As shall be noted in the section on the intrusion category of invasion of privacy, it does make a difference how information is obtained. In *Smith v. Daily Mail Publishing* Co., 443 U.S. 97 (1979), the Supreme Court said, "[I]f a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." In the cases discussed so far, information was obtained openly.[51]

Not all records have provided a defense. Government's interest in prosecuting criminals through changing witnesses' names was cited as a countervailing interest preventing summary judgment on newsworthiness grounds. A press release from a racing association had given the plaintiffs' former identities. Anthony Ciulla had been convicted of fixing horse races and was allowed to participate in the federal witness protection program in exchange for testimony. Relocated and renamed, his wife Helen applied for a claiming license from the California Horse Racing Board. The defendant conducted an inquiry for the board, denied her application, and issued the press release. While noting that witness protection was a value that deserved weight, the court also urged the jury on remand to consider to what extent the plaintiffs had voluntarily exposed themselves to potential publicity. *Capra v. Thoroughbred Racing Ass'n.*, 12 Med.L.Rptr. 2006, 787 F.2d 463 (9th Cir. 1986). The press release was not on its own a public record, and the defendant was a private entity working on behalf of a government agency. Are those facts alone sufficient to distinguish *Capra* from *Cox*?

An individual's interest in personal safety and the state's interest in conducting criminal investigations were considered sufficient to allow trial on a privacy suit brought by a witness to a murder who was identified by name. *Times Mirror v. San Diego Superior Court*, 15 Med.L.Rptr. 1129, 198 Cal.App.3d 1420, 244 Cal.Rptr. 556 (1988). The plaintiff, identified in the opinion only as Doe, found her roommate's body. The roommate had been raped, beaten, and strangled. Looking up, she saw a man, then fled the apartment. She provided a description to the police, who withheld her identity. The *Los Angeles Times* published a story identifying Doe. The *Times* claimed it had obtained her name from an "unknown person" at the coroner's office. Doe sued for publication of private facts and for infliction of emotional distress. The court said that Cox did not apply because there was a question of fact about the *Times* having gotten the name from the coroner's office. And while coroner's reports are public records, Doe was not the decedent, and the report on the murder was not made public until a month passed. Newsworthiness would not support a summary judgment for the newspaper because the value to the public in being informed of a witness's name must be balanced against the effect publication might have on the witness. A dissenting opinion urged that the majority erred by failing to apply a "public event" analysis to the case, an analysis that clearly would cover the use of Doe's

48. *Montesano v. Las Vegas Review Journal*, 9 Med.L.Rptr. 2266, 668 P.2d 1081 (Nev. 1983).

49. *Poteet v. Roswell Daily Record*, 4 Med.L.Rptr. 1749, 584 P.2d 1310 (N.M.App. 1978).

50. *Moloney v. Tribune Pub.*, 6 Med.L.Rptr. 1426, 613 P.2d 1179 (Wash.App. 1980). The court relied upon the *Restatement (Second) of Torts* delineation of the official proceedings qualified privilege in libel rather than upon Cox. The action was also disallowed because the subject of the article was deceased, and privacy rights normally terminate at death under common law.

51. For example, *Cox Broadcasting v. Cohn* and *Howard v. Des Moines Register*. See also *Ayers v. Lee Enterprises*, 2 Med.L.Rptr. 1698, 561 P.2d 998 (Or. 1977); *McCormack v. Oklahoma Publishing*, 613 P.2d 737 (Okl. 1980); and *Ross v. Burns*, 5 Med.L.Rptr. 2277, 612 F.2d 271 (6th Cir. 1980). In *Griffith v. Rancocas Valley Hospital*, 8 Med.L.Rptr. 1760 (1982), a New Jersey court held that publication of the name and address of a sexual assault victim, obtained from police and hospital sources despite victim's request that the information not be released, was not an invasion of privacy. The court relied on *Smith v. Daily Mail*, which involved the naming of a juvenile murder suspect.

name. The majority seemed determined to find that no defense or privilege applied, at least at the pretrial stage.

The Passage of Time and Newsworthiness By Implication

Two additional lines of cases in private facts concern whether facts which occurred in the past and were of public interest or public record then will be considered public today if resurrected by the media, and whether one who is closely associated with another who is newsworthy will also be considered newsworthy. Overall, the courts appear to take the position that a person who was newsworthy or an event that was newsworthy will remain so over time. One typical situation involved the *Iberville South's* "Page From Our Past" column, which each week drew from its files of stories on local events. Twice in four years, the paper published stories more than twenty years old about the plaintiffs'—three brothers—cattle theft trial and subsequent convictions. Asserting that the story was no longer of public concern, they filed a private acts suit. *Roshto v. Hebert*, 9 Med.L.Rptr. 2417, 439 So.2d 428 (La. 1983). The court determined that controlling weight should be given to the fact that the stories were true and a matter of public record. It distinguished a case that had allowed an action by a rehabilitated criminal for a story that retold of his conviction for truck hijacking.[52]

Even mere allegations, when taken from public records, were sufficient to prevent liability when a newspaper published twenty-year-old charges based on FBI reports.[53] The existence of public records, of course, is not necessary to a finding of continued newsworthiness over time, as *Sidis* makes plain. For example, the Julius and Ethel Rosenberg espionage case retains its public character to this day. When Michael and Robert Meeropol, the natural children of Julius and Ethel Rosenberg, brought a multiclaim suit based on the book, *The Implosion Conspiracy*, they lost on privacy, defamation, and copyright grounds. An appeals court upheld a trial court determination that the events remained of public interest. *Meeropol v. Nizer*, 2 Med.L.Rptr. 2269, 560 F.2d 1061 (2d Cir. 1977). Ironically, the brothers were never referred to in the books by their adoptive name, and their identities were known to only a handful of individuals. By suing, they attracted the publicity they had shunned.

Newsworthiness by proximity to an event or to another person has been less of a concern. In *Campbell v. Seabury Press*, 5 Med.L.Rptr. 2612, 614 F.2d 395 (5th Cir. 1980), a federal appeals court seemed to answer that question when it decided that private facts based on references to a former sister-in-law in a civil rights leader's biography were nonactionable. Citing Cox, the court extended the public interest or newsworthiness privilege to entirely private persons because of a "logical nexus * * * between the complaining individual and the matter of legitimate public interest." The complainant, who asserted that her virtue had been impugned, would pay for her brother-in-law's notoriety, and he, by inference, would have no private facts claim whatsoever.

In *Gilbert v. Medical Economics*, 7 Med.L.Rptr. 2372, 665 F.2d 305 (10th Cir. 1981), the subject of an article entitled "Who Let This Doctor in the O.R.?" found no remedy in privacy law because accurate personal facts about the doctor again were closely related to his malpractice suit.

Flora Schreiber, a criminal justice professor at New York University, wrote *The Shoemaker*, which detailed the psychological makeup of Joseph Kallinger, who had committed a series of rapes and murders during a string of robberies in New Jersey and Pennsylvania. The book recounted the ordeal of several people held hostage, including the murder of one, in 1975. When the book appeared in 1983, a number of the survivors sued for publication of private facts, false light privacy, libel, and unjust enrichment. The key to resolving all the claims lay in the incident's continued newsworthiness or lack thereof.

ROMAINE v. KALLINGER

15 MED.L.RPTR. 1209, 537 A.2D 284 (N.J. 1988).

HANDLER, J.:

More than ten years ago Joseph Kallinger and his son went on a criminal rampage in Pennsylvania and New Jersey. The offenses were vicious, involving physical threats and sexual abuse of victims dur-

52. *Briscoe v. Reader's Digest Ass'n.*, 1 Med.L.Rptr. 1845, 4 Cal.3d 529, 93 Cal.Rptr. 866, 483 P.2d 34 (1971).
53. *McCormack v. Oklahoma Pubg. Co.*, 6 Med.L.Rptr. 1618, 613 P.2d 737 (Okla. 1980).

ing the course of robberies of suburban homes. Kallinger murdered his victims on three occasions. In 1983, approximately eight years after Kallinger and his son had been apprehended, the defendant Simon & Schuster Publishing Inc. published a book entitled "The Shoemaker," written by the defendant Flora Rheta Schreiber, depicting the life and crimes of Joseph Kallinger. The book gave rise to this litigation.

The plaintiffs, Randi Romaine, Edwina Wiseman, Retta Romaine Welby, and Frank Welby, were victims of Kallinger, whose criminal acts against them resulted in the murder of a young woman, Maria Fasching. Plaintiffs sued the defendants Kallinger, Elizabeth Kallinger, his wife, Schreiber, Simon & Schuster, and Paul J. Giblin, claiming to have been legally injured by defamatory and offensively intrusive statements relating to those crimes contained in "The Shoemaker." Plaintiffs sought in separate counts the award of compensatory and punitive damages based respectively on libel and invasion of privacy by being cast in a false light; they also claimed that their privacy had been invaded through the unreasonable publication of private facts.

* * *

The trial court granted defendants' motion for summary judgment with respect to the defamation and privacy claims. It also granted defendants summary judgment with respect to the unjust enrichment claims. However, the court denied the motions for summary judgment with respect to claims based on the Criminal Injuries Compensation Act. The court also denied plaintiffs' cross-motion for summary judgment.

Plaintiffs filed a notice of appeal; no cross-appeals were filed by defendants. In an unpublished opinion, the Appellate Division affirmed the dismissal of the defamation and privacy claims substantially for the reasons expressed in the comprehensive opinion of Judge Cassidy, the trial judge. Plaintiffs then filed a petition for certification, which was granted by this Court. ____N.J. ____(1987).

The factual context of this litigation is important. Ms. Schreiber, the author of "The Shoemaker," is a professor at the City University of New York, John Jay College of Criminal Justice. Although she has no formal training as a psychologist, Ms. Schreiber has written extensively about psychological subjects, and has focused on the problem of child abuse in her work. She is the author of *Sybil*, a study of a woman who suffered from a multiple-personality disorder.

According to defendants, Professor Schreiber's work is an in-depth study of the psychological make-up of a killer. Specifically, the book explores the relationship between the abuse suffered by Kallinger as a child and the psychotic behavior that led to his criminal acts. "The Shoemaker" received a significant amount of critical praise and Schreiber was named "Author of the Year" by the American Society of Journalists and Authors in 1985 in recognition of her work.

The complaint focuses on a chapter of "The Shoemaker" called "The Hunting Knife." The chapter, which consists of twenty-one pages out of a total of 423, describes the murder of Maria Fasching on January 8, 1975, in Leonia, New Jersey. The chapter relates that Kallinger and his son broke into the home of Mr. and Mrs. DeWitt Romaine. Eight people, who were in the home, were held hostage by Kallinger and his son. Kallinger ordered several of them to remove their clothes, and tied them up. He committed acts of personal abuse and physical degradation on two of the women. While this was occurring, Maria Fasching, a friend of one of the victims, the plaintiff Randi Romaine, came into the house. She was also captured by Kallinger. He directed Ms. Fasching, a nurse, to perform an act of sexual mutilation on plaintiff Frank Welby, who was tied up and helpless. When she refused to do so, he killed her by slashing her throat several times. About one-half of the chapter is devoted to Kallinger's own recollections of the murder, obtained by Schreiber during interviews with him; those recollections are presented to indicate the extent that Kallinger's acts were the product of his mental illness. The balance of the chapter consists of the recreation of the murder, as derived from testimony offered at Kallinger's trial by the survivors of the incident.

* * *

[The court determined the chapter was not defamatory.]

Plaintiffs contend that the chapter "The Hunting Knife" publicizes matters pertaining to their private lives in a manner offensive to a reasonable person. They thus claim a cause of action based upon the invasion of privacy by the unreasonable publication of private facts. In making this claim, plaintiffs concede that the chapter is an accurate and truthful depiction of the events that occurred on January 8, 1975. However, they contend that their criminal victimization, personal degradation, and physical

abuse at the hands of Kallinger occurred in private, and that disclosure of the details of these crimes eight years after their occurrence is highly offensive.

The invasion of privacy by unreasonable publication of private facts occurs when it is shown that "the matters revealed were actually private, that dissemination of such facts would be offensive to a reasonable person, and that there is no legitimate interest of the public in being apprised of the facts publicized." * * *

It is important to stress that this privacy tort permits recovery for *truthful* disclosures. For this reason the recognition of such a tort creates significant potential for conflict with the guarantees contained in the first amendment of the Constitution. * * * This constitutional dimension explains the stringency of the requirements that must be met in order successfully to establish this privacy-invasion cause of action.

The critical chapter describes the painful treatment, the humiliation, and abuse that the plaintiffs suffered at the hands of Kallinger. Such publicity is likely traumatic and profoundly disturbing for plaintiffs and would be highly offensive to a reasonable person because it exposes to the public eye the suffering and degradation that they were forced to endure. However, plaintiffs' appeal fails because the facts revealed are not private, and even if they were private, they are of legitimate concern to the public and so privileged under the "newsworthiness" exception to the "unreasonable publication of private facts" claim.

The determination as to whether published facts are actually private constitutes the first key element of this cause of action. If the facts are public information, even though they relate to matters of individual privacy, they cannot for these purposes be considered "private." The court must first determine then whether the published facts were in the public domain, and hence not private facts.

Public records that recount or disclose particular facts may serve to place such facts in the public arena and thus bar a claim for publication of private facts. While the term "public records" is not self-defining, we need not in this case determine the extent to which particular official governmental records place facts in the public domain. Here, the facts complained of were contained in nonconfidential official court records of the Kallinger trial. * * * The circumstances of this case fall squarely within the freedom to publish information contained in public court records sanctioned by Cox *Broadcasting*. The details and facts that plaintiffs claim invaded their privacy were made public by the testimony in court by plaintiffs and other witnesses. They were part of the court record in Kallinger's trial and were extensively reported on at the time of the trial.

Plaintiffs also contend that recovery should not be barred in this case because eight years passed between the crimes depicted in "The Shoemaker" and the publication of the book. This argument is unpersuasive. The Cox *Broadcasting* opinion does not suggest that the absolute privilege to publish matters contained in public records is limited if the events are not contemporaneous or recent. Moreover, courts after Cox *Broadcasting* have found a privilege to disseminate matters contained in public court records despite the passage of a significant period of time. * * *

This claim is related to the additional argument made by defendants that the information that was published in "The Shoemaker" was newsworthy and therefore its publication was privileged. If facts cannot otherwise be considered "private," then a determination of their "newsworthiness" is obviated. *Restatement (Second) of Torts* § 652D, Comment b. However, if the critical facts are private, publication of those facts would not constitute an actionable invasion of privacy if they are "newsworthy" and thus a matter of legitimate public concern.

The "newsworthiness" defense in privacy-invasion tort actions is available to bar recovery where the subject matter of the publication is one in which the public has a legitimate interest. * * * A publication is commonly understood to be "newsworthy" when it contains an "indefinable quality of information" that arouses the public's interest and attention." * * * In such cases it is for the court to determine whether a matter is of legitimate public interest. * * *

In addition, once a matter is found to be within the sphere of public interest, otherwise private facts that are related to the subject may also be considered "newsworthy," and therefore publishable. * * *

* * *

The events that occurred in the Romaine home on January 8, 1975, were newsworthy and matters of legitimate public concern. These events were the subject of widespread and intense publicity when they occurred. Extensive contemporaneous publicity of this sort is a strong indication that the subject is one that is clearly newsworthy. * * * Moreover,

the facts surrounding the commission of a crime are subjects of legitimate public concern. * * * This concern extends to victims and other individuals who unwillingly become involved in the commission of a crime or its prosecution. * * *

The contention of plaintiffs that the publicized matter is stale or remote may suggest that the publicized information was not "newsworthy" or a matter of legitimate public concern, and therefore recovery ought not be barred. The news value and public interest in criminal events are not abated by the passage of time.

* * *

In sum, we conclude that the trial court properly dismissed plaintiffs' unreasonable publicity claim. The facts reported in "The Shoemaker" were in the public domain, newsworthy, and matters of legitimate public concern. Thus, their publication is entitled to protection.

For the reasons set forth in this opinion, we affirm the judgment below.

* * *

COMMENT

The plaintiffs sued not only the publisher but also the perpetrator, a somewhat unusual move apparently prompted by New Jersey's "Son of Sam" law, the Criminal Injuries Compensation Act, which is designed to prevent criminals from profiting from their wrongdoing by selling their stories.

The court noted in a separate section that the privacy claims were invalid in any event because the book relied upon interviews with Kallinger and transcripts from the trial. There was no evidence that any additional "prying" had occurred.

A similar analysis was applied in the case of the brother of a murderer who was written about extensively in the book *Life for Death*. Lee Dresbach sued after the story of his brother Wayne's murder of their parents appeared. The book contained details of the family's home life and of the dismal relationship between the brothers. The book was written by a former neighbor, Michael Mewshaw, with the cooperation of Wayne Dresbach. The plaintiff argued that the murders were no longer of public interest and that he wasn't either. The court disagreed. "The public has a legitimate interest in the facts about past crimes and their investigation and prosecution, as well as the possible motivating forces in the background of the criminal," the court said. His parents' unfavorable comparisons of him to his younger brother were part of what motivated Wayne Dresbach to murder his parents. Further, the court said that the story of Wayne's rehabilitation contributed a more contemporary newsworthy angle. *Dresbach v. Doubleday*, 7 Med.L.Rptr. 2105, 518 F.Supp. 1285 (D.D.C. 1981). Lee Dresbach was allowed to continue his case on libel grounds only. Can the retelling of a famous (or infamous) crime ever be the object of a private facts claim?

The question that remains only partially answered is—what does it take today to outrage a community's sense of decency? Have our sensitivities toward personal privacy diminished? We do know what has outraged some communities and their judicial systems in the past. For example, a woman's disfigured face photographed without her consent while she was semiconscious,[54] a published photograph of an employee's mangled thigh,[55] a photograph of a woman with her skirt blown over her head as she entered a county fair "fun house,"[56] and a newspaper piece which contained the words, "Wanna hear a sexy telephone voice? Call * * * and ask for Louise."[57] In the latter case, the court compared the objectionable language of the newspaper with that commonly found on the walls of public lavatories.

Any iota of voluntariness would seem to invoke a newsworthiness or consent defense. A man simply unfortunate enough to have been having a drink at a bar when police raided for drugs could not recover for television footage of the raid that included his likeness.[58] And a plaintiff, a heroin addict, who had consented to an interview, was said to have constructively consented to use of her photograph.[59] Older cases follow the same lines.

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54. *Clayman v. Bernstein*, 38 D & C 543 (Pa. 1940).
55. *Lambert v. Dow Chemical Co.*, 215 So.2d 673 (La. 1968).
56. *Daily Times Democrat v. Graham*, 162 So.2d 474 (Ala. 1964).
57. *Harms v. Miami Daily News, Inc.*, 127 So.2d 715 (Fla. 1961).
58. *Penwell v. Taft Broadcasting*, 10 Med.L.Rptr. 1850, 469 N.E.2d 1025 (Ohio App. 1984).
59. *Little v. Washington Post*, 11 Med.L.Rptr. 1428 (D.D.C. 1985).

A news report identifying a twelve-year-old mother, despite her objections, was protected. So was a news review ridiculing an inventor's invention, and a photograph of corpulent women exercising in a gymnasium. A group of young Americans who allowed themselves to be interviewed and photographed living in a communal cave in Crete had no privacy claim. Neither did a casino customer who got caught in a photograph which was later used to dress up an article on gambling and organized crime. The Boston "Strangler's" notoriety and the fact that he had consented to a film portrayal of his life, and had even offered technical advice to the filmmaker, left him without a privacy claim. A Pennsylvania court held that public figures have no exclusive right to their own biographies and could not claim an invasion of privacy when their life stories were published.[60]

Nathan Leopold was unable to protect his privacy from invasion by a book and motion picture, the fictionalized aspects of which were reasonably true to the record in the celebrated Leopold and Loeb murder case of many years before. Leopold had pleaded guilty, had served a life sentence, and his participation in the murder of Bobby Franks was a matter of public and historical interest, said an Illinois court, even though the plaintiff had since become a useful citizen.[61]

The last case illustrates the rule that information obtained in a public place will almost never be considered a private fact. When coverage of Ted Fry's death in a fire and of his rumored association with another woman resulted in Mrs. Fry's suing, the court said that all the facts about the fire occurred in public.[62] Plaintiffs who have alleged invasions of privacy because they could be seen leaving or cleaning portable toilets have lost because anyone could have seen them.[63]

Where can a line be drawn between legitimate news and the public's seemingly insatiable appetite for sensational intimacies? Should a line be drawn at all? And, if so, by whom? These questions must await further academic analysis, legislative determination, and case law. In the meantime, there will continue to be uneasiness here in permitting community norms to set the bounds of either one's innermost private life or of freedom of the press.

"SPATIAL" PRIVACY: THE OFFENSE OF INTRUSION

Intrusion upon one's solitude or seclusion is an invasion of privacy likely to occur while news is being gathered but may not result in a lawsuit until the news is published, although publication is not essential to the tort. Surveillance and trespass are forms of intrusion. The *Restatement* includes them both plus a third category.[64]

Intrusion may overlap with other categories of privacy. In the *Penwell* case, for example, where the plaintiff was drinking in a bar, he argued that he had a reasonable expectation of physical solitude.

As a practical matter, intrusion suits present little serious danger to the mass media. Few suits are filed. And, in any event, the rules governing intrusion are relatively clear-cut, so that the press can easily avoid suit in most situations. Successful suits are rare. The clarity of intrusion analysis seems derived in part from its closeness to the common law tort of trespass. At common law, a case for trespass may be made when a plaintiff can show that a defendant has entered into private property and to some extent interfered with the owner's rights of exclusive possession.[65] The key, however, is that the place or property must be a place the plaintiff normally has a right to exclude others from. The similarity to the reasonable expectation of seclusion in Fourth Amendment cases is obvious too. A person is entitled to an expectation of seclusion when it is reasonable under the circumstances to expect that others will not interfere. That

60. *Meetze v. Associated Press*, 95 S.E.2d 606 (S.C. 1956); *Thompson v. Curtis Publishing Co.*, 193 F.2d 953 (3d Cir. 1952); *Sweenek v. Pathe News*, 16 F.Supp. 746 (D.N.Y. 1936); *Goldman v. Time, Inc.*, 336 F.Supp. 133 (D.Cal. 1971); *Holmes v. Curtis Publishing Co.*, 303 F.Supp. 522 (D.S.C. 1969); *DeSalvo v. Twentieth Century-Fox Film Corp.*, 300 F.Supp. 742 (D.Mass. 1969); *Corabi v. Curtis Publishing Co.*, 273 A.2d 899 (Pa. 1971).

61. *Leopold v. Levin*, 259 N.E.2d 250 (Ill. 1970).

62. *Fry v. Ionia Sentinel-Standard*, 6 Med.L.Rptr. 2498, 300 N.W.2d 687 (Mich.App. 1980).

63. *Livingston v. Kentucky Post*, 14 Med.L.Rptr. 2076 (Ky.Cir.Ct. 1987); *Taggart v. Wadleigh-Maurice, Ltd.*, 489 F.2d 434 (3d Cir. 1973).

64. One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person. *Restatement (Second) of Torts* § 652B (1977).

65. Keeton, *Prosser and Keeton on Torts* 5th ed. (1984), 67–84.

the tort is referred to formally as intrusion on seclusion affirms the connection.

Intrusion is also closely related in some respects to nuisance law, especially when it comes to reporting by surveillance. The *conduct* of a journalist in obtaining information may be so beyond the pale that a court might punish the behavior. In such cases, offensive reporting techniques are objectionable in much the same way it is objectionable when a neighbor makes extremely loud noises[66] or starts up a hog farm.[67]

A clear case of intrusion occurred when a *Life* magazine reporter and photographer gained access to a "healer's" home by pretending to be the friends of a friend, then surreptitiously took pictures and relayed tape recordings to law enforcement officials waiting outside while the subject of their investigation examined one of them for breast cancer.

Since the district attorney's office and the state department of health were in on the ruse, although they were not totally dependent upon *Life*'s evidence, it did seem that the magazine was acting as an agent of law enforcement.

The "healer," who specialized in clay, minerals, herbs, and gadgetry, was subsequently arrested and charged with practicing medicine without a license. He pleaded *nolo contendere* and was cited for a number of misdemeanors. The basis of a subsequent privacy suit was *Life*'s illustrated article entitled "Crackdown on Quackery."

A federal district court awarded the plaintiff $1,000 for an invasion of his privacy, and *Life* appealed. The judgment was affirmed by a federal appeals court in an opinion that combined elements of both surveillance and trespass in its analysis.

DIETEMANN v. TIME, INC.

1 MED.L.RPTR. 2417, 449 F.2D 245 (9TH CIR. 1971).

HUFSTEDLER, Circuit Judge:

* * *

In jurisdictions other than California in which a common law tort for invasion of privacy is recognized, it has been consistently held that surreptitious electronic recording of a plaintiff's conversation causing him emotional distress is actionable. Despite some variations in the description and the labels applied to the tort, there is agreement that publication is not a necessary element of the tort, that the existence of a technical trespass is immaterial, and that proof of special damages is not required.

Although the issue has not been squarely decided in California, we have little difficulty in concluding that clandestine photography of the plaintiff in his den and the recordation and transmission of his conversation without his consent resulting in his emotional distress warrants recovery for invasion of privacy in California. * * *

Concurrently, with the development of privacy law, California had decided a series of cases according plaintiffs relief from unreasonable penetrations of their mental tranquility based upon the tort of intentional infliction of emotional distress. [Citations omitted.] Although these cases are not direct authority in the privacy area, they are indicative of the trend of California law to protect interests analogous to those asserted by plaintiff in this case.

We are convinced that California will "approve the extension of the tort of invasion of privacy to instances of intrusion, whether by physical trespass or not, into spheres from which an ordinary man in plaintiff's position could reasonably expect that the particular defendant should be excluded." (*Pearson v. Dodd*, 410 F.2d at 704.)

Plaintiff's den was a sphere from which he could reasonably expect to exclude eavesdropping newsmen. He invited two of defendant's employees to the den. One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select. * * *

The defendant claims that the First Amendment immunizes it from liability for invading plaintiff's den with a hidden camera and its concealed electronic instruments because its employees were gathering news and its instrumentalities "are indispen-

66. *Fox v. Ewers*, 75 A.2d 357 (Md. 1950).
67. *Baldwin v. McClendon*, 288 So.2d 761 (Ala. 1974).

sable tools of investigative reporting." We agree that newsgathering is an integral part of news dissemination. We strongly disagree, however, that the hidden mechanical contrivances are "indispensable tools" of newsgathering. Investigative reporting is an ancient art; its successful practice long antecedes the invention of miniature cameras and electronic devices. *The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering.* [Emphasis added.] The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.

Defendant relies upon the line of cases commencing with *New York Times Co. v. Sullivan* and extending through *Rosenbloom v. Metromedia, Inc.* to sustain its contentions that (1) publication of news, however tortiously gathered, insulates defendant from liability for the antecedent tort, and (2) even if it is not thus shielded from liability, those cases prevent consideration of publication as an element in computing damages. * * *

Privilege concepts developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct antedating publication. Nothing in *New York Times* or its progeny suggests anything to the contrary. Indeed, the Court strongly indicates that there is no First Amendment interest in protecting news media from calculated misdeeds. (E.g., *Time, Inc. v. Hill*, 385 U.S. at 389–390 and 384 n. 9)

No interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired. Assessing damages for the additional emotional distress suffered by a plaintiff when the wrongfully acquired data are purveyed to the multitude chills intrusive acts. It does not chill freedom of expression guaranteed by the First Amendment. A rule forbidding the use of publication as an ingredient of damages would deny to the injured plaintiff recovery for real harm done to him without any countervailing benefit to the legitimate interest of the public in being informed. The same rule would encourage conduct by news media that grossly offends ordinary men.

The judgment is affirmed.

COMMENT

Dietemann illustrates that in privacy intrusion actions a First Amendment defense is very weak. The court did not consider the news value of the story. Why? The newsworthiness of a story has just not balanced well against the offense of intruding upon someone's seclusion. Most courts have followed *Dietemann*'s lead. For example, in *Anderson v. WROC-TV*, 7 Med.L.Rptr. 1987, 441 N.Y.S.2d 220 (1981), the fact that the reporter entered a private home at the invitation of a humane society officer executing a search warrant provided no defense to intrusion, although it would seem to support a newsworthiness defense if the suit was based on disclosure of private facts. Similarly, news value did not immunize reporters charged with trespass after they followed a group of protesters onto a nuclear power plant construction site after the protesters broke through a fence.[68]

Only one court has determined that a trespass onto private property was justified on First Amendment grounds, at least when there is no proof that the media knew it was trespassing. The judge in the case considered the distinction between newsgathering and news publication questionable in an era of live mini-cam television coverage, the type of coverage at issue in the case.[69] The decision, by a trial court, has no authority as precedent and has apparently not been adopted by any appeals courts.

Another case that resulted in a full defense for the press involved the photographing of dead cattle on plaintiff's farm. Reporters accompanied the county sheriff onto the farm. The sheriff had been on the farm several times with the owner's consent as part of an ongoing investigation.[70] The consent was apparently extended to the press.

An action for a trespass form of invasion of privacy and for wrongful intentional infliction of emotional

68. *Stahl v. Oklahoma*, 9. Med.L.Rptr. 1945, 665 P.2d 839 (Okl.Crim.App. 1983).
69. *Allen v. Combined Communications*, 7 Med.L.Rptr. 2417 (Colo.Dist.Ct. 1981).
70. *Wood v. Fort Dodge Messenger*, 13 Med.L.Rptr. 1610 (Iowa Dist.Ct. 1986).

distress was brought against Florida news media by a mother whose daughter died in a fire in her home. So badly was she burned that, after removal of the body, a silhouette of her body remained on a bedroom floor. The mother learned of the tragedy by reading a news story and seeing a picture of the silhouette in the *Florida Times-Union*.

Lower courts refused to grant summary judgment to the newspaper's publisher on the trespass count. On appeal the Florida Supreme Court held that where there was an *implied consent by custom and usage* authorizing a news photographer to accompany police and fire marshals into a home, there was no trespass. In fact a fire marshal had requested that the photographer take the "silhouette" picture for his official file.

Television networks, newspapers, wire services, and professional organizations had provided the court with affidavits attesting to the common practice of reporters accompanying officials into homes where there has been crime or tragedy. The court agreed that "as a matter of law an entry, that may otherwise be an actionable trespass, becomes lawful and nonactionable when it is done under common usage, custom and practice."

The court's opinion can be read to imply that had the plaintiff been present and objected to the photographer's entry, she would have had a stronger case. *Florida Publishing Co. v. Fletcher*, 340 So.2d 914 (Fla. 1976), cert. den. 431 U.S. 930 (1977).[71]

Reporters and photographers who entered "Son of Sam's" apartment after his arrest on suspicion of murder were not guilty of criminal trespass, said a New York city court. Although police had earlier entered the apartment with a warrant, they had no "possessory interest." Only the defendant himself, or the apartment owner, could have withheld consent from the newsmen. Police, however, could have excluded persons from the premises while a lawful criminal search was being conducted. *People v. Berliner*, 3 Med.L.Rptr. 1942 (N.Y.City Ct. 1978).

Deception as occurred with the surveillance in *Dietemann* seems likely to result in some kind of liability. When a television reporter pretended to be an alcoholic to gain entry to an alcohol treatment center, privacy claims were disallowed because, under Missouri law, corporate plaintiffs cannot sue for invasion of privacy. The suit was allowed to continue on common law fraud grounds, however. Fraud rules require that the plaintiff be deceived into having taken some action, normally to plaintiff's detriment. The hospital in which the treatment center was located also claimed a *prima facie* tort violation, which was not allowed because fraud is a more specific cause of action.[72]

Seldom has intrusion been as clear-cut as in *Dietemann* when *Life* photographed and "bugged" the about-to-be-convicted quack doctor. But what if the plaintiff is a very public person, a celebrity, or a government official suspected of corruption? And what if that person constantly appears in public places? Surely a First Amendment-based defense would be considered. Not if the defendant's behavior goes from beyond outer boundaries to almost beyond belief.

The first part of the question was addressed by federal courts in New York in an incredible case involving a peripatetic photographer, said to be America's only *paparazzo*, and Jacqueline Kennedy Onassis. Ronald Galella, a free-lancer, made a modest living photographing celebrities. But his specialty was Mrs. Onassis. His strategy was aggressive pursuit, described by Jackie as a continual stalking of her, popping up everywhere while emitting a curious "grunting" sound which, she said, terrified her.

Galella argued that his subject was simply a camera-shy and uncooperative public person. When she asked the Secret Service and other police officers to intervene on her behalf, the photographer, claiming that he had been roughed up, brought a $1.3 million damage suit and a plea for an injunction against interference with his making a living. Mrs. Onassis then filed a counterclaim for $1.5 million in compensatory and punitive damages and for injunctive relief. The United States joined her to seek injunctive relief against Galella's interference with the activities of Secret Service agents assigned to protect the former first lady and her children.

The two cases were joined, and a federal district court held that the photographer's antics were not protected by the First Amendment but constituted actionable assault, battery, and harassment, violation of the civil rights statute, and tortious infliction

71. But see, *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. 1980). For a general discussion of "common usage, custom and practice," see Middleton, *Journalists, Trespass and Officials: Closing* the Door on *Florida Publishing Co. v. Fletcher*, 16 Pepperdine L.Rev. 259 (1989). The Supreme Court has never heard an intrusion case.

72. *W.C.H. of Waverly v. Meredith Corp.*, 13 Med.L.Rptr. 1648 (W.D.Mo. 1986).

of emotional distress. Both Mrs. Onassis and the government were granted injunctive relief in a ruling in which the court expressed enormous distaste for Galella and rejected his claim along with what it called his perjured testimony. A portion of the ruling follows.

GALELLA v. ONASSIS

353 F.SUPP. 196 (S.D.N.Y. 1972).

COOPER, District Judge:

* * * [T]wenty further episodes are summarized in our supplemental findings of fact. These include instances where the children were caused to bang into glass doors, school parents were bumped, passage was blocked, flashbulbs affected vision, telephoto lenses were used to spy, the children were imperilled in the water, a funeral was disturbed, plaintiff pursued defendant into the lobby of a friend's apartment building, plaintiff trailed defendant through the City hour after hour, plaintiff chased defendant by automobile, plaintiff and his assistants surrounded defendant and orbited while shouting, plaintiff snooped into purchases of stockings and shoes, flashbulbs were suddenly fired on lonely black nights—all accompanied by Galella jumping, shouting and acting wildly. Many of these instances were repeated time after time; all preceded our restraining orders.

He was like a shadow: everywhere she went he followed her and engaged in offensive conduct; nothing was sacred to him whether defendant went to church, funeral services, theatre, school, restaurant, or board a yacht in a foreign land. While plaintiff denied so deporting himself, his admissions clearly spell out his harassment of her and her children.

* * *

Mrs. Onassis' severe emotional distress is evident and reasonable.

When Galella rushed her limousine on September 21, 1969, she was terrified. Galella's pursuit of her and the children at the horse show in Gladstone, New Jersey, caused her concern and anxiety for fear that his activities would frighten the horse and thereby endanger her children. Galella's sudden appearance behind bursting flash bulbs at 2 o'clock in the morning at Oliver Smith's house in Brooklyn Heights stunned and startled her. When Galella crashed about in the tunnel beneath Lincoln Center and tried to push his way through a revolving door with Mrs. Onassis and her children she was frightened that someone would be injured in the door. Galella's antics in the theatre at *40 Carats* so upset Mrs. Onassis that she covered her face with *Playbill*. When Galella cruised around Mrs. Onassis in a power boat as she was swimming off Ischia, he was so close that she was afraid she would be cut by the propeller. Galella's dogging of Mrs. Onassis' footsteps throughout her shopping trip in Capri left her terrified and upset. Galella's taxicab chase with Joyce Smith on October 7, 1971 left Mrs. Onassis a "wreck."

When Galella suddenly jumped from behind the wall in Central Park, frightening John and causing him to lose control of his bicycle, Mrs. Onassis described her state of mind as having been "terrorized." The Santa Claus pursuit in and around the Collegiate School in December 1970 left Mrs. Onassis extremely upset. Galella's outrageous pursuit of Mrs. Onassis on the night of *Two Gentlemen of Verona* terrified her and left her in an "anguished," "humiliated" and "terribly upset" state. Numerous times, and at dangerous speeds, he has followed cars in which the children were passengers, violating the rules of the road, and the Secret Service agents assigned to protect the children have frequently expressed concern for the safety of their principals as a result of Galella's activities.

Additionally, Mrs. Onassis and her children are people who have a very special fear of startling movements, violent activity, crowds and other hostile behavior. It is clear that the assassinations of the first husband of Mrs. Onassis and of her brother-in-law (Senator Robert F. Kennedy) are matters of common knowledge to virtually every citizen. These matters were certainly known to Galella who "specializes" in the affairs of Mrs. Onassis and who chronicled her brother-in-law's funeral. These events make Mrs. Onassis and her children particularly susceptible to Galella's erratic behavior and make his acts all the more outrageous and utterly devoid of any sensitivity whatever for his subjects.

* * *

The proposition that the First Amendment gives the press wide liberty to engage in any sort of conduct, no matter how offensive, in gathering news has been flatly rejected.

* * *

We conclude that the First Amendment does not license Galella to trespass inside private buildings, such as the children's schools, lobbies of friends' apartment buildings and restaurants. Nor does that Amendment command that Galella be permitted to romance maids, bribe employees and maintain surveillance in order to monitor defendant's leaving, entering and living inside her own home.

* * *

Invasion of Privacy. Plaintiff's endless snooping constitutes tortious invasion of privacy.

* * *

First let us reconsider plaintiff's close-shadowing of defendant. Continuously he has had her under surveillance to the point where he is notified of her every movement. He waits outside her residence at all hours. * * * His surveillance is so overwhelmingly pervasive that he has said he has not married because he has been unable to "get a girl who would be willing to go looking for Mrs. Onassis at odd hours."

* * * He has intruded into her children's schools, hidden in bushes and behind coat racks in restaurants, sneaked into beauty salons, bribed doormen, hatcheck girls, chauffeurs, fishermen in Greece, hairdressers and schoolboys, and romanced employees. In short, Galella has insinuated himself into the very fabric of Mrs. Onassis' life and the challenge to this Court is to fashion the tool to get him out.

* * *

The surveillance, close-shadowing and monitoring were clearly "overzealous" and therefore actionable. Moreover, Galella's corruption of doormen, romancing of the personal maid, deceptive intrusions into children's schools, and return visits to restaurants and stores to inquire about purchases were all exclusively for the "purpose of gathering information of a private and confidential nature" * * *. The dictum in *Roberson v. Rochester Folding-Box Co.*, * * * 64 N.E. 442 (1902), does not support the conclusion that invasion of privacy is not actionable under New York law. * * * *Roberson* involved the commercial appropriation of a likeness, which, Dean Prosser teaches has "almost nothing in common" with intrusion, the gravamen of the case at bar.

* * *

Since the *Roberson* dictum was enunciated, freedom from extensive shadowing and observation has come to be protected in most other jurisdictions.

* * *

The essence of the privacy interest includes a general "right to be left alone," and to define one's circle of intimacy; to shield intimate and personal characteristics and activities from public gaze; to have moments of freedom from the unremitted assault of the world and unfettered will of others in order to achieve some measure of tranquility for contemplation or other purposes, without which life loses its sweetness. The rationale extends to protect against unreasonably intrusive behavior which attempts or succeeds in gathering information.

* * *

COMMENT

Galella and his agents were enjoined by the district court from approaching within 300 feet of the Onassis and Kennedy homes and the schools attended by the children; they were also required to remain 225 feet from the children and 150 feet from Mrs. Onassis at all other locations. Galella was also prohibited from putting the family under surveillance or trying to communicate with them.

The Court of Appeals for the Second Circuit essentially upheld the lower court decision. The appeals court did something else. It sharply scaled down the distances Galella was to keep from Mrs. Onassis and her children. It reduced from 150 to 25 feet the distance the photographer must put between himself and Mrs. Onassis; from 225 to 30 feet the distance he must stay from Caroline and John; and it lifted the restriction on Mrs. Onassis's Fifth Avenue home. *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

The court of appeals ruling essentially put Galella back in business. But it wasn't until 1982 that the original New York federal district court, more impatient with Galella than ever, held that the photographer's flagrant, deliberate, and persistent violations of federal court orders restricting coverage of Jacqueline Onassis and her children constituted a contempt of court. He had violated the courts' orders on distance-from-subject at least twelve times. *Galella v. Onassis*, 8 Med.L.Rptr. 1321, 533 F.Supp. 1076 (S.D.N.Y. 1982).

Clearly, Galella's behavior was more akin to a nuisance, even harassment, than to an intrusion. The positions of the various courts uphold the notion that we carry to some extent a zone of privacy wherever we go. While that "zone" may not be a legal construct, it is a practical one. Just try conducting an interview with a source at nose-to-nose closeness.

More typically, an intrusion involves places, not people. Just as in private facts cases, a plaintiff will not prevail when reporters or photographers only observed what anyone could have seen. For example, plaintiffs who objected to pictures of their home could not maintain an intrusion action.[73] Anybody could have taken the same pictures from the public street. Filming the interior of a pharmacy using telephoto lenses was not considered an intrusion when a television station was preparing a story on Medicaid fraud.[74]

Implicit in such cases is the notion that information readily seen is to some extent newsworthy, or at least eligible for news uses. A good general rule for those who would avoid publicity is not to conduct one's affairs where anybody can see. Search and seizure law's plain view doctrine applies—but by another name—in intrusion cases. Will photos taken from outer space be considered as defensible under a plain view rationale? See Lipschutz, *Mediasat and the Tort of Invasion of Privacy*, 65 Journalism Quarterly 507 (1988). Whether or not to report on or photograph what occurs in public places has been left primarily to the field of ethics, not law. Coleman, *Private Lives, Public Places: Street Photography Ethics*, 2 J. of Mass Media Ethics (Spring/Summer 1987), 60.

Newsworthiness can be a prodigious defense. In spite of the fact that Wayne Williams's parents were practically prisoners in their own home and reporters themselves found the stakeout "gross" and "repellent," close coverage of the murder suspect was not enough to support a privacy claim.[75] Williams was convicted of the murders of two of twenty-eight young blacks slain in Atlanta.

On the other side of the law, a policeman had no privacy claim after being filmed by a television camera through a two-way mirror while investigating a massage parlor. Imagine the policeman's consternation when a door opened and someone suddenly cried, "Channel 7 News," and the camera crew exited filming the scene before them. After making suggestive remarks and physical advances to a "lingerie" model and after she had responded with "sufficient physical contact," the officer arrested her for solicitation.[76] His being a public official served to distinguish this case from *Dietemann*.

Less dramatic forms of news gathering, especially those involving mundane events, are normally protected by their newsworthiness. A District of Columbia district court rejected a claim against the *Washington Post* for reporting that an undercover police officer had participated in a narcotics therapy program. But it did permit an embarrassing private facts action against another federal officer who had made the information about his colleague-patient available in violation of federal law and the confidentiality of the doctor-patient relationship.[77]

A federal district court dismissed a privacy claim brought by undercover narcotic agents who had been photographed entering a courthouse, but permitted an award of damages for "emotional distress" brought about by their being identified. That award was reversed by the Sixth Circuit which found the publication insufficiently outrageous—"so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[78]

A recent Supreme Court case on another issue allowed a community to prevent intense but orderly and peaceful picketing directed at a specific individual from in front of that individual's house.[79] Although decided on time, place, and manner grounds, Justice O'Connor's opinion for the Court noted that, "[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." The Court referred repeatedly to privacy

73. *Wehling v. CBS*, 10 Med.L.Rptr. 1125, 721 F.2d 506 (5th Cir. 1983).
74. *Mark v. KING Broadcasting*, 6 Med.L.Rptr. 2224, 618 P.2d 512 (Wash.App. 1980).
75. *Williams v. NBC*, 7 Med.L.Rptr. 1523 (D.Ga. 1981).
76. *Cassidy v. ABC*, 3 Med.L.Rptr. 2449, 377 N.E.2d 126 (Ill. 1978).
77. *Logan v. District of Columbia*, 3 Med.L.Rptr. 2094, 447 F.Supp. 1328 (D.D.C. 1978).
78. *Ross v. Burns*, 5 Med.L.Rptr. 2277, 612 F.2d 271 (6th Cir. 1980). The language is from the Restatement Commentary, *Restatement (Second) of Torts* § 46, comment d at 73 (1948).
79. *Frisby v. Schultz*, 108 S.Ct. 2495 (1988).

interests, although the opinion appears to consider the picketing at issue more a form of nuisance or harassment than an invasion of privacy—like having a pig farm next door. In dissent, Justice Stevens referred to a case that involved an especially noisy sound truck in a residential neighborhood—*Kovacs v. Cooper*, 336 U.S. 77 (1949)—to compare the picketing to a nuisance. Will *Frisby* influence intrusion analysis?

In one of the strangest cases alleging intrusion, plaintiff claimed that repeated mailings from the Columbia Record Club constituted a privacy violation. The court agreed that a privacy interest extends to one's mailbox but could not explain how such a right would be effectuated. In any event, the court said, only unreasonable intrusions are triable and receiving junk mail simply cannot rise to the level of causing distress to a reasonable person.[80]

Not all cases have resulted in victory for media defendants. CBS News was less fortunate when one of its reporters and a camera crew "with cameras rolling" entered a posh French restaurant, Le Mistral, as a follow-up to a New York City Health Service Administration press release alleging health code violations at several city restaurants. Le Mistral sued for defamation and trespass following a WCBS-TV news report which included film clips of the restaurant's staff attempting to eject the CBS crew.

The trial court judge dismissed the defamation suit on "fair comment" grounds but granted a trial on the trespass count since, he said, "the right to publish does not include the right to break and enter upon and trespass upon the property of these plaintiffs." A year later a jury awarded Le Mistral $250,000 in punitive and $1,200 in compensatory damages for trespass. On CBS's motion, the trial court upheld the trespass verdict but set aside the damage awards. "Patronizing a restaurant," said the court, "does not carry with it an obligation to appear on television."

In March 1978 an appeals court reinstated the compensatory damages and directed a new trial solely on the issue of punitive damages. Punitive or exemplary damages require a showing of common law malice (evil or wrongful motive). CBS, the court said, was entitled to explain its motive. A dissenting judge thought CBS perhaps overaggressive, but not malicious. *Le Mistral, Inc. v. CBS*, 3 Med.L.Rptr. 1913, 402 N.Y.S.2d 815 (N.Y.Sup.Ct., App.Div. 1978).

In *Stessman v. Black Hawk Broadcasting* Co., 14 Med.L.Rptr. 2073, 416 N.W.2d 685 (Iowa 1987), a lower court determination that defendant was entitled to dismissal because plaintiff was seated in a restaurant for anyone to see was reversed. The Iowa Supreme Court thought she was entitled to try convincing a jury that there was an expectation of seclusion in the restaurant. The parties disputed whether plaintiff had been in a private room.

A more dramatic form of trespass referred to earlier—that is, where the plaintiff is a public official suspected of corruption—arose in a case involving columnist Drew Pearson and Senator Thomas Dodd. A number of significant questions came into focus in the case.

What is the journalist's liability when he or she receives information "lifted" from the files of a public official? Is receiving information taken without authorization from government files the equivalent of receiving stolen property? In short, how far can the right to gather news be extended?

In the *Pentagon Papers* case, Justices White and Stewart underlined the power of Congress to enact specific criminal laws to protect government property. Justice Marshall also recognized the power of Congress to make criminal the receipt or purchase of certain classifications of official documents. Chief Justice Burger and Justice Blackmun agreed with White that penal sanctions were an appropriate way of protecting government secrets.

In the *Dodd* case, four former employees removed documents from the senator's office, gave photostats to Drew Pearson and his associate Jack Anderson, then returned the originals to the files. Stories appeared based on the documents, and Dodd sued for libel. A United States district court, invoking the *New York Times* rule, disallowed the libel action.

Dodd's lawyers came back with an invasion of privacy plea and an inventive argument based on the common law tort of trover and conversion—"an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights."

Because of the public interest inherent in the documents, the privacy claim was rejected; but the court granted partial summary judgment to Senator Dodd on the theory of conversion. *Dodd v. Pearson*, 279 F.Supp. 101 (D.D.C. 1968), aff'd in part and rev'd

80. *Bennett v. CBS*, 13 Med.L.Rptr. 1237, 798 F.2d 1413 (6th Cir. 1986).

in part, 1 Med.L.Rptr. 1809, 410 F.2d 701 (D.C. Cir. 1969), cert. den. 395 U.S. 947 (1969).

The court said:

> It is well settled, however, that a person who receives and uses the property of another that has been wrongfully obtained, knowing that it was so obtained, is likewise guilty of conversion and liable for damages. * * *
>
> It follows hence that the plaintiff is entitled to recover damages in this case, but only on the theory of a conversion and not on the theory of a violation of a right of privacy. The distinction is not purely theoretical, as a more liberal, flexible and broad measure of damages may perhaps be applicable to actions for invasion of privacy, than govern actions for conversion. * * *

The district court's extension of the tort of conversion to apply to information and ideas rather than to taking possession of physical property was criticized on the ground that the court made a publisher's liability hinge on whether or not the publisher knew the material was wrongfully obtained.[81] But scienter, or knowledge of the offense, has never been considered a requirement for imposing liability for conversion at common law. It is enough to take possession of the property of another; wrongful behavior might add to damages, not prove the cause of action.

The District of Columbia Circuit Court of Appeals affirmed the district court on the privacy claim and reversed on conversion. The court emphasized that Pearson could not be held liable for intrusion committed by others. On the conversion claim Judge J. Skelly Wright, writing for the court, reasoned: "The most significant feature of conversion is the measure of damages, which is the value of the goods converted." Since the documents in Dodd's files were photocopied and the originals returned, the court stated that Dodd was therefore not deprived of his files: "Insofar as the documents' value to appellee resided in their usefulness as records of the business of his office, appellee was clearly not substantially deprived of his use of them." But the court then acknowledged that "documents often have value above and beyond that springing from their physical possession." On the conversion point Judge Wright stated:

> Appellee [Dodd] complains, not of the misappropriation of property bought or created by him, but of the exposure of information either (1) injurious to his reputation or (2) revelatory of matters which he believes he has a right to keep to himself. Injuries of this type are redressed at law by suit for libel and invasion of privacy respectively, where defendants' liability for those torts can be established under the limitations created by common law and by the Constitution.
>
> Because no conversion of the physical contents of appellee's files took place, and because the information copied from the documents in those files has not been shown to be property subject to protection by suit for conversion, the District Court's ruling that appellants are guilty of conversion must be reversed.

Judge Wright's opinion clearly closes the opening wedge of media liability in a *Dodd*-type situation. But the court's emphasis on the money value of the documents themselves rather than on the money value of the information contained in them seems less persuasive more than twenty years later as we hurtle into the "information age."

The court is on much stronger ground basing its arguments on the First Amendment and public interest. Since Pearson had not himself committed an intrusion and the information was of public interest, a First Amendment-based defense was sufficient. It would necessarily follow that active participation in intrusion or commissioning of others to commit an intrusion would prevent the application of a First Amendment defense. The public interest or newsworthiness defense only applies when considering the content *after* publication in any event. Wrongdoing in reporting is clearly separable from publication.

The issue of conversion was raised in another case involving Drew Pearson after he had obtained copies of personal letters from the plaintiff's files. Here the court preferred to ground its ruling on the firmer base of prior restraint. Writing for the United States Court of Appeals for the District of Columbia, then Circuit Court Judge Warren Burger said:

> Upon a proper showing the wide sweep of the First Amendment might conceivably yield to an invasion of privacy and deprivation of rights of property in private manuscripts. But that is not this case; here there is no clear showing as to ownership of the alleged private papers or of an unlawful taking and no showing that Appellees had any part in the removal of these papers or copies from the offices of Appellants or any act other than receiving them from a person with a colorable

81. Note, *Conversion As a Remedy for Injurious Publication—New Challenge to the New York Times Doctrine?*, 56 Georgetown L.J. 1223 (1968).

claim to possession. *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489 (D.C.Cir. 1967).

Dodd has generally been followed. And its rule that the journalist must be an active participant in or instigator of intrusion is easy to apply, both for judges and journalists.

There was no intrusion, said a Maryland appeals court, when newspaper reporters received the academic files of University of Maryland basketball players from an unnamed source. The press itself had not sought out, inspected, or solicited the files. *Bilney v. Evening Star Newspaper Co.*, 4 Med.L.Rptr. 1924, 406 A.2d 652 (Md. 1979).

Exceeding Consent by Recording

Is a reporter liable to wiretap charges if telephone interviews with sources are recorded without consent? More and more states bar nonconsensual (one-party consent) recording either of telephone conversations or of individuals in person.[82]

Illinois was the first state to do so, but only in Florida has such a law been upheld against a press challenge. There a reporter's tape recording of a caller who was unaware that the conversation was being recorded constituted an illegal wire intercept under Florida's Security of Communication Act, even though the reporter was using the recording only to help her write a news story.[83] The constitutionality of Florida's law requiring that all parties to an interception give prior consent was affirmed by the Florida Supreme Court in *Shevin v. Sunbeam Television*, 351 So.2d 723 (Fla. 1977). The United States Supreme Court declined review. A number of state courts, however, have construed their statutes so as to permit one-party participant recording of telephone conversations.[84]

Journalists have not appreciated finding themselves at the other end of the tape recorder. In 1978 a D.C. Circuit Court panel held that the First Amendment was not violated by law enforcement officials' good faith inspection of the toll-call records of reporters released by the telephone company without prior notice. Any First Amendment newsgathering right, said the court, is subject to those general and incidental burdens that arise from good faith enforcement of valid civil and criminal laws. *Reporters Committee for Freedom of the Press v. AT & T*, 4 Med.L.Rptr. 1177, 593 F.2d 1030 (D.C.Cir. 1978), cert.den. 440 U.S. 949 (1979).

Federal court decisions have interpreted 18 U.S.C.A. § 2510 of Title III of the Omnibus Crime Control Act of 1968 (the Federal Wiretap Statute) to mean that if one party to a conversation records it, there is no illegal intercept. *United States v. Turk*, 526 F.2d 654 (5th Cir. 1976). See also, *Boddie v. ABC*, 10 Med.L.Rptr. 1923, 731 F.2d 333, (6th Cir. 1984), and the Electronic Communications Privacy Act of 1986.

The FCC, in its supervisory capacity over broadcasting, prohibits the monitoring and divulging of nonpublic radio broadcasts such as police radios, a hallmark of most newsrooms, but it has not enforced the rule. It has admonished broadcasters to respect the rule and has pointed out the danger of attracting crowds to scenes of crime and disaster.[85]

The FCC also prohibits the private use of radio devices to monitor conversations without the consent of all parties (13 Fed.Reg. 3397, 1966);[86] and it requires broadcasters to give advance warning if a recorded telephone conversation is intended for broadcast.[87] This has superseded the earlier "beep-tone" requirement.

Unannounced recording for broadcast purposes is not permitted, but the federal agency has made notable exceptions for reporters investigating crime.

Wiretapping and bugging by the media are illegal. Eavesdropping or recording conversations that are within hearing distance in public or quasi-public places is legal for both print and broadcast reporters. A Kentucky court had an opportunity in 1980 to address this question. An indicted drug dealer had given two reporters the impression that a lawyer had agreed to "fix" her case for $10,000. The reporters

82. See Middleton, *Journalists and Tape Recorders: Does Participant Monitoring Invade Privacy?*, 2 Comm/Ent L.J. 287 (1979–1980); Spellman, *Tort Liability of the News Media for Surreptitious Recording*, 62 Journalism Quarterly 289 (1985).

83. *News-Press v. Florida*, 2 Med.L.Rptr. 1240, 345 So.2d 865 (Fla. 1977). The Florida statute is West's Fla.Stat.Ann. § 943.03 (Supp. 1978). In 1989, ten states had laws similar to Florida's.

84. *State v. Birge*, 241 S.E.2d 213 (Ga. 1978); Rogers v. Ulrich, 52 Cal.App.3d 894, 125 Cal.Rptr. 306 (1975).

85. Monitoring of Police and Fire Radio Transmissions by Broadcast Stations, 1 Rad.Reg.2d (P & F) 291 (1963). But see, *United States v. Fuller*, 202 F.Supp. 356 (N.D.Cal. 1962).

86. 47 C.F.R. §§ 2.701, 15.11 (1978).

87. *Broadcast of Telephone Conversations*, 23 FCC2d 1, 19 Rad.Reg.2d (P & F) 1504 (codified at 47 C.F.E. § 73.1206 (1978)); *Use of Recording Devices in Connection with Telephone Service*, 38 FCC2d 579, 26 Rad.Reg.2d (P & F) 40 (1972). See also, FCC 88–236 (Sept. 13, 1988).

agreed to provide money to the suspect, if necessary, and asked her to meet with the lawyer in his office and record their conversation with a concealed recording device. When the slightly suspicious lawyer asked her if she was recording, she denied it, and a conversation ensued in which it was clear that the lawyer was not breaking the law or clearly violating his professional code. Nevertheless, part of the recorded conversation was published by the newspaper, and the attorney brought suit. His privacy claims of intrusion by trespass and false light were rejected by the court, as were libel claims. The intrusion portions of the ruling follow.

McCALL v. COURIER-JOURNAL

6 MED.L.RPTR. 1112 (KY.APP. 1980).

HOWERTON, Judge:

* * *

McCall is an attorney. He counseled with Kristie Frazier concerning two criminal charges. Frazier began spreading insinuations that she could buy her way out of her trouble. The appellees, Krantz and Van Howe, reporters for *The Louisville Times*, met with Frazier. In Frazier's words, McCall told her that "for $10,000.00 he would guarantee me that I'd walk in, but I would turn around and walk back out with him."

Krantz and Van Howe decided to investigate the possibility of bribery in the judiciary and met with Frazier again. They furnished her with a tape recorder and asked her to return to McCall's office. They also instructed her as to what questions to ask. They agreed to provide the $10,000.00 for her, if the dismissal of the criminal charges could be fixed.

On March 10, 1976, Frazier returned to McCall's office with the recorder. She asked the prearranged questions. The attorney told her there would be no "fix" and then inquired as to whether she had a recording device on her person. After Frazier's denial, McCall then stated that if he was able to keep Frazier out of jail, his fee would be $10,000.00, but if not, $9,000.00 would be returned to her. Although McCall's conduct was questionable in relation to the professional code, there was no evidence of bribery in the judicial system. Nevertheless, on March 17, 1976, *The Louisville Times* published and circulated a news article based on these events. On August 19, 1976, the newspaper carried an account of the lawsuit which resulted.

* * *

The first tort theory argued is labeled by McCall as invasion of privacy—intrusion/trespass. The appellees claim the nonexistence of this tort, stating that McCall created a hybrid cause of action. Prosser labels the tort "intrusion," which consists of "intrusion upon the plaintiff's physical solitude or seclusion, as by invading his home or other quarters * * *." W. Prosser, *Torts* § 117, at 807 (4th ed. 1971). Prosser extends the tort to include eavesdropping upon private conversations through wiretaps or microphones. Necessary elements of the tort include an intrusion in the nature of prying which is offensive or objectionable to a reasonable man. Also, the thing into which there is an intrusion must be private. *Id.* at 808.

In this case, nothing was learned about McCall which was private or personal. The conversation dealt with Frazier and her legal problems and with how McCall proposed to resolve them. McCall spoke to her at his own risk, and Frazier was free to reveal the conversation to anyone. It is well settled that the attorney-client privilege "is not personal to the attorney but for the protection of the client." * * *

As to the allegation of trespass, we must conclude that neither the conduct of Frazier nor that of the newspaper or its reporters was sufficient under this theory. 75 Am.Jr.2d, *Trespass*, § 14, states:

> The fact that a professional man, merchant, or other person opens an office to transact business with and for the public is a tacit invitation to all persons having business with him, and a permission for such persons to enter, unless forbidden. * * *

Thus, Frazier cannot be considered a trespasser. When McCall suspected a recorder on her person, he should have asked her to depart. By continuing the conversation, McCall consented to her presence and continued to discuss legal services for a fee. McCall argued that even if Frazier is considered an invitee, the newspaper and its reporters are trespassers. * * * However, since Frazier was not a trespasser, this argument must fail.

* * *

Undoubtedly, Mr. McCall's professional reputation has been damaged, but the judgment of the Jefferson Council must be affirmed.

All concur.

COMMENT

It is important to note that the lower court in *McCall* distinguished *Dietemann* on grounds that no fraud or deception was involved in gaining access to the lawyer's office. As a client, the indicted drug dealer suspect was neither a trespasser nor an intruder. How about the reporters? But were the reporters in *Dietemann* also clients who, at least by implication, had been invited into the "healer's" laboratory? *Dietemann* may be an unusual case, but it does establish one-party (consensual) recording or filming in newsgathering as the basis for a tort.

A year later the Kentucky Supreme Court reinstated the lawyer's libel and false light invasion of privacy suits while, at the same time, declining to discuss the intrusion claim. The court seemed to be saying that publication wrongs, i.e., libel and false light privacy violations, were more deserving of a jury's attention than the newsgathering wrong of intrusion. *McCall v. Courier-Journal*, 7 Med.L.Rptr. 2118, 623 S.W.2d 882 (Ky. 1981).

The two parties later reached a settlement, and McCall brought a libel suit against the newspaper for its report of the settlement. That suit was dismissed by a circuit court, and McCall appealed again seven years after the original publication.

"IMPLICATIVE" PRIVACY: FALSE LIGHT INVASIONS FROM *HILL* TO *HUSTLER*

Invasion of privacy by portrayal in a false light is a legal hybrid. Under the common law, damage awards in false light cases were based upon false statements of facts, as in libel, but the false statements were generally expected to be nondefamatory. Hence the privacy rather than libel approach.

When Prosser attempted to outline false light privacy in his famous article delineating the four branches of common law privacy, he was forced to proceed by examples. No definition other than the phrase "publicity that places the plaintiff in a false light in the public eye * * *" was given.[88] Prosser noted that the material need not be defamatory, but might be, and that a dual claim for false light and libel was appropriate. However uncertain its application, false light lawsuit filings remain numerous enough to constitute a significant concern for the press.

The similarity to libel has plagued attempts at consistent analysis in false light cases. Among the most typical instances of false light are coincidental uses of names, fictionalization, distortion, embellishment, and misuse of names or pictures through unfortunate juxtapositions in otherwise legitimate news stories. If there is a general clue to spotting what may constitute a false light privacy invasion, it appears to be that some interpretation or implication that is inaccurate must be drawn.

A classic case illustrating false light is *Duncan v. WJLA-TV*, 10 Med.L.Rptr. 1395, 106 F.R.D. 4 (D.D.C. 1984). Linda Duncan was walking on a street in downtown Washington, D.C. at the same time a television crew was broadcasting a live 6 p.m. report on a new treatment for herpes. Duncan was clearly visible and recognizable to viewers. On the 11 p.m. newscast, the station again used the video, but with a closer focus on Duncan. The anchor led into the story with the phrase "[f]or the twenty million Americans who have herpes, it's not a cure * * *." Duncan was looking directly at the camera during the voiceover.

Duncan sued for libel and false light. The court determined that the same analysis applied to both claims. The early story was not considered capable of a negative interpretation because it was in context: it showed other pedestrians nearby and did not zero in on Duncan. The 11 p.m. story was different:

> [P]laintiff was the only pedestrian who paused and unknowingly looked directly into the camera. As plaintiff turned and walked away from the camera, the film ended; viewers did not see Ms. Ashton [the reporter] as they did in the six o'clock report.
>
> The coalescing of the camera action, plaintiff's action, and the positions of the passersby caused plaintiff to be the focal point on the screen. The juxtaposition of this film and the commentary concerning twenty million Americans with herpes, is sufficient to support an inference that indeed plaintiff was a victim.

The court denied the station's motion for summary judgment. What distinguishes *Duncan* as more false light than libel is the absence of any assertion that the plaintiff had herpes. The audience had to

88. Prosser, *Privacy*, 48 Calif. L.Rev. 383, 398–401 (1960).

reach, or not reach, that conclusion by considering the pictures and words together.

The combination of libel rules with false light rules is somewhat at odds with the traditional common law formulation of false light. That formula, as given in the *Second Restatement of Torts*, allows recovery upon proof of offensiveness, that is, publicity "highly offensive to a reasonable person," but hedges on whether or not knowledge of falsity, reckless disregard, negligence, or the mere fact of having published materials placing someone in a false light constitutes a second requirement.[89]

Analysis similar to that in *Duncan* was used to reverse a grant of summary judgment for a newspaper that used an old photo of a female coal miner. The picture had originally been used in a 1977 article on women miners, and was concededly nonobjectionable then. In 1979, another area newspaper obtained and used the photo to accompany an article concerning incidents of harassment of women miners. Plaintiff asserted that the use of the photo caused harm to her reputation and also caused embarrassment and humiliation. Since the court could not say as a matter of law that the photo failed to place plaintiff in a false light, as the paper claimed, it was considered best decided by a jury. *Crump v. Beckley Newspapers*, 10 Med.L.Rptr. 2225, 320 S.E.2d 70 (W.V. 1983).

Earlier false light cases followed a similar pattern. For example, in 1948 a federal district court granted relief to an honest taxi driver whose photograph had been used by the *Saturday Evening Post* to illustrate a story about crooked cabbies.[90] And an invasion of privacy was acknowledged by a New York court in 1955 when a law-abiding slum child's photo was used in a story about juvenile delinquents.[91] A more frequently cited case, and one which gave impetus to the false light category of suits, is *Leverton v. Curtis Publishing Co.*, 192 F.2d 974 (3d Cir. 1951). A newspaper photo of a child being helped to her feet after a car ran a stoplight and knocked her down was reprinted twenty months later in the *Saturday Evening Post* under the caption, "They Asked To Be Killed." Although the article was concerned with pedestrian carelessness, it erroneously implied that this particular child pedestrian had been at fault. A trial court judgment of $5,000 was sustained.

The original publication of the photo was not actionable because its legitimate news interest overbalanced any claim to privacy. But the magazine's use of the photo, said the court, exceeded the bounds of privilege and would be offensive to persons of ordinary sensibilities.

Since the *Post* had purchased the photograph from a commercial agency, was it aware of the misleading impression it would create? False light cases today turn on the answers to questions of this kind. How will a publisher know when an unaltered photograph has the capacity of placing someone in a false light or when something omitted from an article may embarrass?

The overlap between false light and libel, always lurking in the tort, was brought to the forefront in 1967 when the Supreme Court, perhaps imbued with the spirit of *New York Times v. Sullivan*, invoked the First Amendment to defeat a privacy suit. In so doing, it tied together false light privacy, defamation, and the actual malice test.

The case began in 1952 when James Hill, his wife, and five children were held hostage in their suburban Philadelphia home by three escaped convicts. The Hills were not harmed; in fact they were treated surprisingly well by the intruders. A year later, a novel, *Desperate Hours*, purported to describe the dramatic episode but with the fictionalized addition of captor violence against the father and a son and a verbal sexual assault on a daughter.

The novel led to a Broadway play and the play to a promotional picture-story review in *Life* magazine. By this time the Hill family had moved to Connecticut, supposedly for the purpose of avoiding any further public attention. Hill's privacy suit was brought under New York's privacy statute, which is mainly concerned with appropriation, although the suit contained all the elements of a common law false light action.

Hill found particularly offensive to his desire for anonymity *Life*'s characterization of the play as "a heart-stopping account of how a family rose to heroism in a crisis." The play was set in the actual house the Hills had occupied in suburban Philadelphia; otherwise there was little resemblance between the docile captivity of the family and the sensationalized story line of the play. The incident

89. *Restatement (Second) of Torts* § 652E (1981).
90. *Peay v. Curtis Publishing Co.*, 78 F.Supp. 305 (D.D.C. 1948).
91. *Metzger v. Dell Publishing Co.*, 136 N.Y.S.2d 888 (1955).

inevitably became a Hollywood film starring a commando-like Frederick March as the father and Humphrey Bogart as the convict leader.

Hill won a $75,000 judgment from a jury. The Appellate Division of the New York Supreme Court (which despite its name is the trial court) upheld the verdict for Hill but ordered a new trial on the question of damages. A second jury awarded Hill $30,000 in compensatory damages. That judgment was affirmed by the Court of Appeals, New York's highest court. Time, Inc. appealed to the United States Supreme Court and argued that the rules pertaining to the standards of newsworthiness had not been measured against guidelines which, since 1964 under *New York Times v. Sullivan*, were required under the First Amendment.

A majority of the Court agreed and applied the *New York Times* rule of actual malice to the *Life* article.

TIME, INC. v. HILL

1 MED.L.RPTR. 1791, 385 U.S. 374, 87 S.CT.534, 17 L.ED.2D 456 (1967).

Justice BRENNAN delivered the opinion of the Court.

The question in this case is whether appellant, publisher of *Life* Magazine, was denied constitutional protections for speech and press by the application by the New York courts of §§ 50–51 of the New York Civil Rights Law, McKinney's Consol.Laws, c. 6 to award appellee damages on allegations that *Life* falsely reported that a new play portrayed an experience suffered by appellee and his family.

* * *

Although "Right to Privacy" is the caption of § 51, the term nowhere appears in the text of the statute itself. The text of the statute appears to proscribe only conduct of the kind involved in *Roberson*, that is, the appropriation and use in advertising or to promote the sale of goods, of another's name, portrait or picture without his consent. An application of that limited scope would present different questions of violation of the constitutional protections for speech and press.

The New York courts have, however, construed the statute to operate much more broadly. * * * Specifically, it has been held in some circumstances to authorize a remedy against the press and other communications media which publish the names, pictures, or portraits of people without their consent. Reflecting the fact, however, that such applications may raise serious questions of conflict with the constitutional protections for speech and press, decisions under the statute have tended to limit the statute's application.

* * *

But although the New York statute affords "little protection" to the "privacy" of a newsworthy person, "whether he be such by choice or involuntarily" the statute gives him a right of action when his name, picture, or portrait is the subject of a "fictitious" report or article.

* * *

The Court of Appeals sustained the holding that in these circumstances the publication was proscribed by § 51 of the Civil Rights Law and was not within the exceptions and restrictions for newsworthy events engrafted on the statute. * * *

The opinion goes on to say that the "establishment of minor errors in an otherwise accurate" report does not prove "fictionalization." Material and substantial falsification is the test. However, it is not clear whether proof of knowledge of the falsity or that the article was prepared with reckless disregard for the truth is also required. In *New York Times* Co. *v. Sullivan*, 376 U.S. 254, we held that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Factual error, content defamatory of official reputation, or both, are insufficient to an award of damages for false statements unless actual malice—knowledge that the statements are false or in reckless disregard of the truth—is alleged and proved. The *Spahn* opinion reveals that the defendant in that case relied on *New York Times* as the basis of an argument that application of the statute to the publication of a substantially fictitious biography would run afoul of the constitutional guarantees. The Court of Appeals held that *New York Times* had no application.

* * *

If this is meant to imply that proof of knowing or reckless falsity is not essential to a constitutional application of the statute in these cases, we disagree with the Court of Appeals. *We hold that the constitutional protections for speech and press preclude*

the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth. [Emphasis added.]

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. * * * Erroneous statement is no less inevitable in such case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, "* * * it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need * * * to survive' * * *." We create grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.

* * *

But the constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function. We held in *New York Times* that calculated falsehood enjoyed no immunity in the case of alleged defamation of a public official's official conduct. Similarly calculated falsehood should enjoy no immunity in the situation here presented us. * * *

The judgment of the Court of Appeals is set aside and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

COMMENT

By applying the actual malice test in *Hill*, the Court accepted the argument that false light and libel were in effect twin torts. Importing a test that apparently varies the rule to be applied depending upon the public interest in an event or person in effect brings the private facts newsworthiness defense into false light. A big difference is that, in private facts, the defense ends the case, while in false light it only changes the plaintiff's burden of proof.

Hill required proof of actual malice without regard to whether or not the plaintiff is a private figure or public figure, so long as the publicity concerned a matter of public interest. The rule strongly suggests that the interests served by libel and false light are parallel if not identical. But a number of scholars continued to urge that false light must be considered separately, as a privacy tort addressing the individual's interest in personal well-being and peace of mind.[92]

The actual malice test of *Hill* has been applied in many cases. In *Machleder v. Diaz*, 13 Med.L.Rptr. 1369, 801 F.2d 46 (2d Cir. 1986), the court reversed a jury finding of actual malice stemming from an "ambush" interview of the plaintiff. Diaz, an investigative reporter for WCBS-TV, conducted an interview with plaintiff as part of a story on toxic waste dumping. Diaz spotted abandoned drums and approached the door of Flexcraft, the paint manufacturing plant Machleder managed. Diaz starting asking questions while the cameras rolled. Machleder got upset, told Diaz "I don't need any publicity," but then invited Diaz into the office for an interview. That evening, the station ran the story and included footage of the confrontation. Diaz opened the story admitting he did not know who owned the barrels or had placed them there.[93]

Machleder based his false light claim on two arguments—that viewers would assume he had put the barrels full of toxic waste where they were, and that he had been portrayed as "intemperate and evasive." Machleder was unable to prove that any false assertions or even implications had been made and

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92. Ashdown, *Media Reporting and Privacy Claims—Decline in Constitutional Protection for the Press*, 66 Kentucky L.J. 759 (1977–78); Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 Calif.L.Rev. 935 (1968).

93. For false light claims involving television reporting, see the following, *Clark v. ABC*, 8 Med.L.Rptr. 2049, 684 F.2d 1208 (6th Cir. 1982) and *Cantrell v. ABC*, 8 Med.L.Rptr. 1239, 529 F.Supp. 746 (N.D.Ill. 1981). The former involved passersby in an investigative report on prostitution, the latter a building manager interviewed at the scene of a suspected case of arson.

lost on the first claim. A jury had awarded him $250,000 compensatory damages and $1 million punitive damages for having been portrayed as intemperate and evasive. There could be no falsity in the presentation, the court said, since "it was based on his own conduct which was accurately captured by the cameras." The "true light" was that plaintiff had been intemperate and evasive.[94]

A case in which actual malice was proved involved a surviving husband who was awarded $5,000 compensatory and $15,000 punitive damages when a *National Enquirer* story under the headline, "Happiest Mother Kills Her Three Children and Herself," was held sufficiently untruthful and offensive to constitute an invasion of privacy. The plaintiff pleaded that he had suffered mental anguish to the extent of requiring psychiatric treatment, unemployment, and the disdain of his friends and acquaintances, the latter offense suggesting the affinity of libel and privacy. The "happiest" mother in reality had been extremely depressed and unstable, and only fictitious dialogue in the story could make her appear otherwise. The actual malice standard of knowing falsehood or reckless disregard of truth or falsity had been met. *Varnish v. Best Medium Publishing Co.*, 405 F.2d 608 (2d Cir. 1968).

The Supreme Court's plurality in *Rosenbloom*[95] would temporarily establish the same public interest or public issue standard for defamation. But that case was superseded by *Gertz*,[96] which substantially returned private persons to the protective cloak of libel law. *Time, Inc. v. Firestone*, 1 Med.L.Rptr. 1665, 424 U.S. 448 (1976), with its reluctance to consider a plaintiff who held press conferences a public figure and its recognition of the plaintiff's damage claim based on mental distress rather than harm to reputation, also appeared likely to affect privacy law. What was the effect of the two cases? Should a negligence test replace actual malice in false light as in libel for private figures? It is arguably illogical to use a newsworthiness test in privacy when it has been rejected in libel.[97]

An opportunity to either merge or distinguish false light and libel was provided the Court in a post-*Gertz* case, *Cantrell v. Forest City Publishing Co.*, 1 Med.L.Rptr. 1815, 419 U.S. 245 (1974). In that case a story in the *Cleveland Plain Dealer* Sunday Magazine purported tc describe an interview with Margaret Cantrell, whose husband had died in a bridge collapse, leaving her and her four children in proud but abject poverty. Mrs. Cantrell, however, had been absent when a reporter and photographer entered the home and talked with one of her children. Inaccuracies and false characterizations such as "she wears the same mask of non-expression she wore at the funeral" were inevitable in the story that followed, and the Court reversed the Court of Appeals for the Sixth Circuit and upheld a district court award of compensatory damages. On these facts alone the case may represent two other categories of privacy—intrusion and true but embarrassing private facts.

Since the actual malice test of *New York Times* had again been met, the Court found "no occasion to consider whether a state may constitutionally impose a more severe standard of liability for a publisher or broadcaster of false statements injurious to a *private individual* under a false light theory of invasion of privacy, or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false light cases." [Emphasis added.]

"In essence," Justice Potter Stewart wrote, joined by seven of his colleagues, "the theory of the case was that by publishing the false feature story about the Cantrells and thereby making them the objects of pity and ridicule, the respondents damaged Mrs. Cantrell and her son William by causing them to suffer outrage, mental distress, shame and humiliation. * * * These were 'calculated falsehoods,' and the jury was plainly justified in finding that [the reporter] had portrayed the Cantrells in a false light through knowing or reckless untruth." The photographer was exonerated.

Cantrell, though clearly a private figure, had no occasion to charge negligence against the *Plain Dealer* because its falsehoods had already reached the level of actual malice. Since *Cantrell*, lower courts have disagreed on the amount to which *Hill* should be modified to coexist with *Gertz*.

In the *Crump v. Buckley Newspapers* case, discussed earlier, the West Virginia Supreme Court of Appeals explicitly held that that state's common law

94. *Accord, Prescott v. Bay St. Louis Newspapers*, 13 Med.L.Rptr. 1645, 497 So.2d 77 (Miss. 1986).

95. *Rosenbloom v. Metromedia*, 1 Med.L.Rptr. 1597, 403 U.S. 29 (1971).

96. *Gertz v. Robert Welch, Inc.*, 1 Med.L.Rptr. 1633, 418 U.S. 323 (1974).

97. But see, Walden and Netzhammer, *False Light Invasion of Privacy: Untangling the Web of Uncertainty*, 9 Comm/Ent L.J. 347, 359–364 (1987) (arguing for application of the *Hill* test).

version of the false light tort served an interest different from defamation:

> [p]rivacy actions involve injuries to emotions and mental suffering, while defamation actions involve injury to reputation * * * Second, the false light need not be defamatory, although it often is, * * * Finally, although widespread publication is not necessarily required for recovery under a defamation cause of action, it is an essential ingredient to any false light invasion of privacy claim.

On the conflict between *Hill* and *Gertz*, the court concluded that it would "eventually be resolved in favor of *Gertz*." The court engaged in an exhaustive review of other cases in deciding that a negligence standard was to be used in private person false light suits.[98]

A California appeals court opted to resurrect the public interest test of *Rosenbloom* in a 1981 libel and privacy suit.[99] In 1979, an Arkansas court held that a private person must prove *actual malice* in a false light case if the publication is a matter of public concern.[100] An earlier case, *Rinsley v. Brandt*, 446 F.Supp. 850 (D.Kan. 1977), stood for the rule that *Gertz* limits the *actual malice* standard to false light claims brought by public persons and thus infers that private persons need only show *negligence*. Another federal district court crystallized that inference in *Dresbach v. Doubleday*, 7 Med.L.Rptr. 2105, 518 F.Supp. 1285 (D.D.C. 1981), by applying the District of Columbia's *negligence* standard for libel to false light actions brought by private persons.[101]

Eventual adoption of the *Gertz* approach would aid the cause of legal symmetry, but the split in approaches remains. Some states have addressed narrower issues. For example, it is urged that if libel and false light are very similar, the measure and proof of damages should be as well.[102] In some states the statute of limitations for libel, at one or two years usually shorter than that for privacy, has been held to apply to both causes of action.[103] Most states, however, have retained a longer statute of limitations for false light—three years or more.[104]

The uncertainty of false light has influenced some courts to disallow the cause of action. Two courts were not convinced that the tort was needed,[105] and two have categorically rejected it.[106]

Fictionalization and Embellishment

How can publishers anticipate fictional characters coming to life—and filing lawsuits? In recent years, a number of cases have charged that novels, and even biographies, contained characterizations that placed someone in a false light. In fiction, the claim typically is that a character is a too-thinly-disguised representation of a real person. In embellishment, the plaintiff usually admits the overall accuracy of a portrayal but claims that a small portion is exaggerated or misleading.

One area of special trouble has been the television docudrama, a dramatic form that blends fact, interpretation, and fiction. Former aides to Senator Joseph McCarthy were portrayed without their consent in a television movie. Their real names were used in advertising and promoting the program. Their false light-type claim based on New York's privacy statute was dismissed on public interest grounds.[107] On the other hand, a false light claim was sustained when the real name of an attorney who had represented gangster Lucky Luciano was used in a wholly fictionalized, although not defamatory, episode in a novel.[108]

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98. See also, *Deitz v. Wometco West Michigan TV*, 14 Med.L.Rptr. 1629, 407 N.W.2d 649 (Mich.App. 1987).

99. *Midwife v. Copley*, 7 Med.L.Rptr. 1393 (Cal.App. 1981).

100. *Dodrill v. Arkansas Democrat*, 5 Med.L.Rptr. 1385, 590 S.W.2d 840 (Ark. 1979), cert. den. 444 U.S. 1076 (1980).

101. The same rule was applied in *McCall v. Courier Journal*, 7 Med.L.Rptr. 2118, 623 S.W.2d 882 (Ky. 1981), a case that specifically rejects the public issue test of *Midwife v. Copley*. For the *Gertz* application, see also *Roberts v. Dover*, 7 Med.L.Rptr. 2296, 525 F.Supp. 987 (M.D.Tenn. 1981). *Fitzgerald v. Penthouse International, Limited*, 7 Med.L.Rptr. 2385, 525 F.Supp. 585 (D.Md. 1981), held that a limited purpose public figure must also show actual malice.

102. *Fellows v. National Enquirer*, 13 Med.L.Rptr. 1305, 42 Cal.3d 234, 228 Cal.Rptr. 215, 721 P.2d 97 (1986).

103. *Eastwood v. Cascade Broadcasting Co.*, 13 Med.L.Rptr. 1136, 722 P.2d 1295 (Wash. 1986).

104. *Jensen v. Times Mirror*, 12 Med.L.Rptr. 2137, 634 F.Supp. 304 (D.Conn. 1986); *Wood v. Hustler Magazine*, 10 Med.L.Rptr. 2113, 736 F.2d 1084 (5th Cir. 1984).

105. *Sullivan v. Pulitzer Broadcasting*, 12 Med.L.Rptr. 2187, 709 S.W.2d 475 (Mo. 1986); *Arrington v. New York Times*, 8 Med.L.Rptr. 1351, 449 N.Y.S.2d 941 (N.Y. 1982), cert. den. 459 U.S. 1146 (1983).

106. *Renwick v. News & Observer Publishing Co.*, 10 Med.L.Rptr. 1443, 312 S.E.2d 405 (N.C. 1984); *Angelotta v. ABC*, 14 Med.L.Rptr. 1185, 820 F.2d 806 (6th Cir. 1987).

107. *Cohn v. NBC*, 4 Med.L.Rptr. 2533, 414 N.Y.S.2d 906 (N.Y.Sup.Ct., App.Div. 1979), aff'd 6 Med.L.Rptr. 1398, 430 N.Y.S.2d 265 (N.Y. 1980), cert. den. 449 U.S. 1022 (1981).

108. *Polakoff v. Harcourt Brace Jovanovich, Inc.*, 3 Med.L.Rptr. 2516 (N.Y.Sup.Ct. 1978), aff'd 413 N.Y.S.2d 537 (App.Div. 1979).

NBC found itself embroiled in litigation after it ran a docudrama entitled "Judge Horton and the Scottsboro Boys," which won several major awards. Dubbed "the most famous rape case of the twentieth century" by the Sixth Circuit, the case involved Victoria Price Street who, forty years before as Victoria Price, had charged nine black men with raping her on a train. Price was white. The evidence against the defendants consisted of little more than Price's accusations, and, despite this, Price pressed charges which could have meant the death penalty. All nine were tried quickly in Scottsboro, Alabama, found guilty, and sentenced to death by all-white juries. Several convictions were reversed, some by the U.S. Supreme Court. Judge Horton presided over one of the retrials, setting the new guilty verdict aside as based on insufficient evidence—a decision which did not make Horton popular in the South at the time.

The drama was particularly harsh on Victoria Price, who throughout the many years of trials sought out the press to present her side of the story. NBC had good reason to be harsh. A book the network relied upon and Judge Horton's own comments supported the portrayal of Price as a perjurer and generally bad character. It also had been told that Price, who in the meantime had married and become an absolute nonentity in another state, was dead, and the dead, of course, cannot sue. Street filed, claiming both libel and false light. It was imperative that NBC get her considered a public figure and the Scottsboro Boys case a matter of continuing interest because the network had not done any independent research or fact checking, evidence that the court said could support a jury verdict of negligence. The court decided that Street, despite anonymity and a new name, remained a public figure so long as the case remained of public interest. A bristling dissent argued that Street's lifelong desire for anonymity deserved consideration; apparently no one in her new hometown was aware of her past, and she had been completely rehabilitated. In fact, NBC might never have been sued had it not run a note at the end of the program announcing that Street had died and giving her later name. *Street v. NBC*, 6 Med.L.Rptr. 1001, 645 F.2d 1227 (6th Cir. 1981). Street appealed to the Supreme Court, and certiorari was granted. The parties reached a settlement, and the writ of certiorari was dismissed. How might the high court have approached the issues in the case?

Identification is obviously a key issue in fiction as opposed to "faction." Was Kimberly Pring, a former Miss Wyoming, identified by a salacious *Penthouse* short story about a baton-twirling former Miss Wyoming who wore a costume similar to Pring's? The Tenth Circuit did not reach the identification issue, privileging the story instead as satire.[109] Evidently few of her neighbors in Cheyenne knew the story referred to her, or even knew of the story, until Pring announced it by filing suit.

In another identification case, an author was unwise enough to use the real name and physical description of a casual acquaintance for a fictional transsexual character.[110] Where there is no connection between author and plaintiff, the risk may not be as great.[111] In any case where identification is in doubt, it is initially a question for the jury.

Identification was no issue when A. J. Quinnell wrote and got published *In the Name of the Father*, a novel about a plan concocted by three high Roman Catholic officials to assassinate the late Soviet leader Yuri Andropov. In a preface, readers were alerted that "some real people . . . appear as characters in the book to give a sense of historical accuracy." One of those appearing was Paul Marcinkus, an archbishop who formerly headed the Vatican Bank. In the novel, Marcinkus is the central plotter. Ironically, the author himself had used a pseudonym. When Marcinkus filed suit, the court declared that the disclaimer was insufficient to protect against either false light assertions or a claim of appropriation. Adding insult to injury, the publisher had used Marcinkus's name in promoting and advertising the book.[112]

Traditional disclaimers, such as "all characters portrayed are wholly fictional and any resemblance to actual persons living or dead is purely coincidental," are useful, but they cannot cover every conceivable kind of character. Disclaimers should be explicit, although it is not clear that being explicit alone will provide more protection. Generally speaking, the better known a claimant, the stronger a false

109. *Pring v. Penthouse International*, 8 Med.L.Rptr. 2409, 695 F.2d 438 (10th Cir. 1982).
110. *Geisler v. Petrocelli*, 6 Med.L.Rptr. 1023, 616 F.2d 636 (2d Cir. 1980).
111. *Allen v. Gordon*, 6 Med.L.Rptr. 2010, 446 N.Y.S.2d 48 (N.Y.Sup.Ct. 1982).
112. *Marcinkus v. NAL Publishing*, 14 Med.L.Rptr. 2094 (N.Y.Sup.Ct. 1987).

light claim looks. Conversely, the rarer a work of imagination, the less vulnerable it should be. When the "real" T. J. Hooker filed a right of publicity suit against the network television show about a California policeman with the same name, the court had no difficulty finding that no reasonable person would have connected the two.[113] The real T. J. Hooker was a professional wood-carver from Woodstock, Illinois. Hooker would have fared no better under false light. On the other hand, few fictionalized conversations will be held privileged as fair comment on the life of actual public figures.[114]

In *Frosch v. Grosset & Dunlap*, 4 Med.L.Rep. 2307 (N.Y.Sup.Ct. 1979), aff'd 6 Med.L.Rptr. 1271, 427 N.Y.S.2d 828 (App.Div. 1980), claims by the executors of Marilyn Monroe's estate against the publisher of Norman Mailer's biography *Marilyn* were dismissed on the ground that false light claims do not survive death. A similar case was *Hicks v. Casablanca Records*, 4 Med.L.Rptr. 1497, 464 F.Supp. 426 (S.D.N.Y. 1978), although it was technically brought on the grounds of a right of publicity. Heirs of mystery writer Agatha Christie sued the producers of the film *Agatha*, which purported to tell the events that occurred during an eleven-day disappearance by Christie in 1962 that has intrigued her fans ever since. In the film, Christie was seen as emotionally unstable and starved for affection, which she receives from a man other than her husband. No one knows the truth about the eleven days. It died with her in 1976. The court said that any reasonable audience member would see the film as a work of fiction and not consider portions as assertions of fact. Plaintiffs sought injunctions against the film and a book by the same name, but were unable to get injunctions either on publicity or unfair competition grounds.

The most ominous example of a case of failed fictionalization and one that exercised the literary world was *Bindrim v. Mitchell*. Author Gwen Davis Mitchell not only lost a libel suit (the libel claim here being indistinguishable from a false light claim) to a "nude-encounter" therapist but was also sued by her publisher which, under its contract with her, had a right to recover whatever costs might result from a libel suit. Doubleday had stuck with its author until she finally lost her case. Mitchell, who claimed that she had gone to great pains to change, disguise, and transmute—partly with vulgar dialogue—events at a nude therapy marathon into her novel *Touching*, maintains that there can be no libel in fiction.

The case was complicated by the fact that the plaintiff's appearance and academic credentials had changed to resemble those of the fictional character of "Dr. Herford" between publication and trial. Moreover, Mitchell had signed a contract with the plaintiff not to disclose in any manner what was to take place in the therapy sessions.

Essentially, Mitchell's disguise was inadequate. So again the question of identification. How many persons have to relate the fictional character to an actual person? In *Bindrim*, the California court said that one would suffice. Although technically a libel rather than a false light privacy case, it may be instructive to present here portions of the court's opinion.

BINDRIM v. MITCHELL

5 MED.L.RPTR. 1113, 155 CAL.RPTR. 29 (CAL.APP. 1979), CERT. DEN. 444 U.S. 984, REHEARING DENIED 444 U.S. 1040 (1980).

KINGSLEY, J.:

* * *

There is clear and convincing evidence to support the jury's finding that defendant Mitchell entertained actual malice, and that defendant Doubleday had actual malice when it permitted the paperback printing of *Touching*, although there was no actual malice on the part of Doubleday in its original printing of the hardback edition.

Mitchell's reckless disregard for the truth was apparent from her knowledge of the truth of what transpired at the encounter, and the literary portrayals of that encounter. Since she attended sessions there can be no suggestion that she did not know the true facts. Since "actual malice" concentrates solely on defendants' attitude toward the truth or falsity of the material published * * * and not on malicious motives, certainly defendant Mitchell was in a position to know the truth or falsity of her own material, and

113. *T. J. Hooker v. Columbia Pictures*, 551 F.Supp. 1060 (N.D.Ill. 1982).

114. For an exception to this rule, see *Rosemount Enterprises, Inc. v. Random House*, 366 F.2d 303 (2d Cir. 1966), where the court said that even the imaginary ramblings of Howard Hughes were of interest to the public.

the jury was entitled to find that her publication was in reckless disregard of that truth or with actual knowledge of falsity.

However, plaintiff failed to prove by clear and convincing evidence that the original hardback publication by Doubleday was made with knowledge of falsity or in reckless disregard of falsity. McCormick of Doubleday cautioned plaintiff that the characters must be totally fictitious and Mitchell assured McCormick that the characters in *Touching* were incapable of being identified as real persons. McCormick arranged to have the manuscript read by an editor knowledgeable in the field of libel. * * * There must be sufficient evidence to permit the conclusion that defendant in fact entertained serious doubts as to the truth of his publication, (*St. Amant v. Thompson* (1968) * * * 390 U.S. 727, 731), and there is nothing to suggest that Doubleday entertained such doubts prior to the hardback publication.

Plaintiff suggests that, since the book did not involve "hot news," Doubleday had a duty to investigate the content for truth. Courts have required investigation as to truth or falsity of statements which were not hot news (*Widener v. Pacific Gas & Electric* Co. (1977) * * * 75 Cal.App.3d 445, *Carson v. Allied News* Co. (1976) * * * 529 F.2d 206), but those cases involved factual stories about actual people. In the case at bar, Doubleday had been assured by Mitchell that no actual, identifiable person was involved and that all the characters were fictitious in the novel. Where the publication comes from a known reliable source and there is nothing in the circumstances to suggest inaccuracy, there is no duty to investigate. (See *Baldine v. Sharon Herald* Co. (1968) 391 F.2d 703, 707.) There was nothing in the record to suggest that, prior to the hardback printing defendant Doubleday in fact entertained serious doubts as to the truth or falsity of the publication, and investigatory failure alone is insufficient to find actual malice.

However, prior to the paperback printing there were surrounding circumstances to suggest inaccuracy, such that at that point Doubleday had a duty to investigate. Plaintiff did show that Doubleday sold the rights to the New American Library after receiving a letter from plaintiff's attorney explaining that plaintiff was Herford and the inscription in the paperback said, "This is an authorized edition published by Doubleday and Company." * * * The jury could have inferred that at that point Doubleday either had serious doubts, or should have had serious doubts, as to the possibility that plaintiff was defamed by "Touching" and that at that point Doubleday had some duty to investigate.

* * * Appellants claim that, even if there are untrue statements, there is no showing that plaintiff was identified as the character, Simon Herford, in the novel *Touching*.

Appellants allege that plaintiff failed to show he was identifiable as Simon Herford, relying on the fact that the character in *Touching* was described in the book as a "fat Santa Claus type with long white hair, white sideburns, a cherubic rosy face and rosy forearms" and that Bindrim was clean shaven and had short hair. Defendants rely in part on *Wheeler v. Dell Publishing* Co. (1962) 300 F.2d 372, which involved an alleged libel caused by a fictional account of an actual murder trial.

* * *

However, in *Wheeler* the court found that no one who knew the real widow could possibly identify her with the character in the novel. In the case at bar, the only differences between plaintiff and the Herford character in *Touching* were physical appearance and that Herford was a psychiatrist rather than psychologist. Otherwise, the character Simon Herford was very similar to the actual plaintiff. We cannot say, as did the court in *Wheeler*, that no one who knew plaintiff Bindrim could reasonably identify him with the fictional character. Plaintiff was identified as Herford by several witnesses and plaintiff's own tape recording of the marathon sessions show that the novel was based substantially on plaintiff's conduct in the nude marathon.

Defendant also relies on *Middlebrooks v. Curtis Publishing* Co. (1969) 413 F.2d 141, where the marked dissimilarities between the fictional character and the plaintiff supported the court's finding against the reasonableness of identification. In *Middlebrooks*, there was a difference in age, an absence from the locale at the time of the episode, and a difference in employment of the fictional character and plaintiff; nor did the story parallel the plaintiff's life in any significant manner. In the case at bar, apart from some of those episodes allegedly constituting the libelous matter itself, and apart from the physical difference and the fact that plaintiff had a Ph.D., and not an M.D., the similarities between Herford and Bindrim are clear, and the transcripts of the actual encounter weekend show a close par-

allel between the narrative of plaintiff's novel and the actual real life events. Here, there were many similarities between the character, Herford, and the plaintiff Bindrim and those few differences do not bring the case under the rule of *Middlebrooks*. (See *Fetler v. Houghton Mifflin Co.* (1966) 364 F.2d 650.) There is overwhelming evidence that plaintiff and "Herford" were one.

However, even though there was clear and convincing evidence to support the finding of "actual malice," and even though there was support for finding that plaintiff is identified as the character in Mitchell's novel, there still can be no recovery by plaintiff if the statements in *Touching* were not libelous. There can be no libel predicated on an opinion. The publication must contain a false statement of fact. (*Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596.)

Plaintiff alleges that the book as a whole was libelous and that the book contained several false statements of fact. Plaintiff relies in part on [a] conversation between plaintiff and the minister as one libelous statement of fact. Plaintiff also argues that a particular incident in the book is libelous. That incident depicts an encounter group patient as so distressed upon leaving from the weekend therapy that she is killed when her car crashes. Plaintiff also complains of an incident in the book where he is depicted as "pressing," "clutching," and "ripping" a patient's cheeks and "stabbing against a pubic bone." Plaintiff complains, too, of being depicted as having said to a female patient, "Drop it, bitch." There are also other incidents alleged to be libelous.

Our inquiry then is directed to whether or not any of these incidents can be considered false statements of fact. It is clear from the transcript of the actual encounter weekend proceeding that some of the incidents portrayed by Mitchell are false: i.e., substantially inaccurate description of what actually happened. * * * [W]e regard the case at bench as involving a different issue. Defendants contend that the fact that the book was labeled as being a "novel" bars any claim that the writer or publisher could be found to have implied that the characters in the book were factual representations not of the fictional characters but of an actual nonfictional person. That contention, thus broadly stated, is unsupported by the cases. The test is whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described. (*Middlebrooks v. Curtis Publishing Co.* (1969) * * * 413 F.2d 141, 143.) Each case must stand on its own facts. In some cases, such as *Greenbelt Pub. Assn. v. Bresler* (1970) * * * 398 U.S. 6, an appellate court can, on examination of the entire work, find that no reasonable person would have regarded the episodes in the book as being other than the fictional imaginings of the author about how the character he had created would have acted. * * * We cannot make any similar determination here. Whether a reader, identifying plaintiff with the "Dr. Herford" of the book, would regard the passages herein complained of as mere fictional embroidering or as reporting actual language and conduct, was for the jury. Its verdict adverse to the defendants cannot be overturned by this court.

Defendants raise the question of whether there is "publication" for libel where the communication is to only one person or a small group of persons rather than to the public at large. Publication for purposes of defamation is sufficient when the publication is to only one person other than the person defamed. (*Brauer v. Globe Newspaper Co.* (1966) 217 N.E.2d 736, 739.) Therefore, it is irrelevant whether all readers realized plaintiff and Herford were identical.

* * *

COMMENT

Judge Files wrote a dissenting opinion expressing amazement and displeasure at the majority's reading of the facts and interpretation of libel law. The identification issue was resolved wrongly, the dissent argued, on the basis of three witnesses, all former therapy patients of Bindrim's, rather than on the issue of whether a reader would have identified Bindrim as Dr. Herford. The dissent also urged that Bindrim had failed to prove adequately that a reasonable reader would consider Mitchell's account as containing assertions of fact. Most troubling, however, was the actual malice analysis:

> The majority opinion adopts the position that actual malice may be inferred from the fact that the book was "false." That inference is permissible against a defendant who has purported to state the truth. But when the publication purports to be fiction, it is absurd to infer malice because the fiction is false.
>
> As the majority agrees, a public figure may not recover damages for libel unless "actual malice" is shown.

> Sufficiency of the evidence on this issue is another constitutional issue. (*St. Amant v. Thompson* (1968) 390 U.S. 727, 730.) Actual malice is a state of mind, even though it often can be proven only by circumstantial evidence. The only apparent purpose of the defendants was to write and publish a novel. There is not the slightest evidence of any intent on the part of either to harm plaintiff. No purpose for wanting to harm him has been suggested.
>
> * * *
>
> From an analytical standpoint, the chief vice of the majority opinion is that it brands a novel as libelous because it is "false," i.e., fiction; and infers "actual malice" from the fact that the author and publisher knew it was not a true representation of plaintiff. From a constitutional standpoint the vice is the chilling effect upon the publisher of any novel critical of any occupational practice, inviting litigation on the theory "when you criticize my occupation, you libel me."
>
> * * *

The *Bindrim* case is the judiciary's strongest warning that authors not get too close to describing real characters in their works. While the extent of Mitchell's actual malice can be debated forever, the fact that her portrayal of Herford is directly taken from her own experience should put any author on notice to be careful when drawing characters based on people they know. Friends, families, business colleagues, and acquaintances after all are likely to be among the first to read one's work, and also the first to recoil at an unflattering portrait.

Embellishment presents similar problems of analysis to the courts. When Shila Morganroth's singular method of styling hair caught the attention of *Detroit News* reporter Susan Whitall, the result was a feature article in the newspaper's Sunday magazine. Morganroth thought the personality profile cast her in a false, even foolish, light. Distressed, she sued claiming both libel and false light invasion of privacy.

MORGANROTH v. WHITALL

14 MED.L.RPTR. 1411, 411 N.W.2D 859 (MICH.APP. 1987)

SAWYER, J.:

* * *

In this heated dispute, the trial court granted summary disposition in favor of defendants on plaintiff's claims of libel and invasion of privacy by false light. Plaintiff now appeals and we affirm.

Plaintiff alleges that she was libeled and cast in false light by an article written by defendant Whitall which appeared in the Sunday Supplement of the Detroit News on November 11, 1984. The article was entitled "Hot Locks: Let Shila burn you a new 'do.' " The article was accompanied by two photographs, one depicting plaintiff performing her craft on a customer identified as "Barbara X" and the second showing Barbara X and her dog, identified as "Harry X", following completion of the hairdressing. Central to the article was the fact that plaintiff used a blowtorch in her hairdressing endeavors. According to the article, plaintiff's blowtorch technique is dubbed "Shi-lit" and is copyrighted. The article also describes two dogs, Harry and Snowball, the latter belonging to plaintiff, noting that the canines have had their respective coats colored at least in part. The article also indicates that the blowtorch technique had been applied to both dogs. Additionally, the article described plaintiff's somewhat unusual style of dress, including a silver holster for her blowtorch and a barrette in her hair fashioned out of a $100 bill. * * *

Plaintiff's rather brief complaint alleges that the article, when read as a whole, is false, misleading and constitutes libel. More specifically, the complaint alleges that the article used the terms "blowtorch lady," "blowtorch technique" and the statement that plaintiff "is dressed for blowtorching duty in a slashed-to-there white jumpsuit" without any factual basis and as the result of defendants' intentional conduct to distort and sensationalize the facts obtained in the interview. The complaint further alleges that the article falsely portrays plaintiff as an animal hairdresser, again as part of a deliberate action by defendants to distort and sensationalize the facts.

* * *

In determining whether an article is libelous, it is necessary to read the article as a whole and fairly and reasonably construe it in determining whether a portion of the article is libelous in character. * * *

Reading the article as a whole, we believe that it is substantially true; therefore plaintiff's complaint lacks an essential element of her defamation claim, namely falsity. In looking at plaintiff's specific allegations of falsity, for the most part we find no falsehood. * * * In looking at the photographic exhibits filed by defendants, we believe that the instrument used by plaintiff in her profession can ac-

curately be described as a blowtorch. Accordingly, while the use of the term "blowtorch" as an adjective in connection with references to plaintiff or her hairdressing technique may have been colorful, it was not necessarily inaccurate and certainly not libelous. As for the reference that plaintiff was "dressed for blowtorching duty in a slashed-to-there white jumpsuit", we have examined the photographic exhibits submitted by defendant at the motion hearing and we conclude that reasonable minds could not differ in reaching the conclusion that plaintiff did, in fact, wear a jumpsuit "slashed-to-there." * * *

In her brief, plaintiff claims that defendant inaccurately described her as being a hairdresser for dogs, giving dogs a Mohawk cut, and using a blowtorch on the dogs. While it appears that plaintiff did do hairdressing on dogs, it is not necessarily certain at this point that she did, in fact, use the blowtorch on the dogs. * * * Thus, there has been no showing by plaintiff that the statements relating to the dogs were false.

Moreover, inasmuch as it appears undisputed that plaintiff at least dyed the fur of the dogs, which would constitute hairdressing of dogs, we are not persuaded that the article, when read as a whole, becomes libelous because of an inaccurate reference to using the blowtorch on the dogs. This is particularly true since, by plaintiff's conduct, she asserts that blowtorching is a safe practice when performed on humans. Therefore, it would appear that, from plaintiff's perspective, blowtorching would also be safe on dogs, even if she did not engage in such a practice

* * *

For the above-stated reasons, we conclude that, when reviewing the article and accompanying photographs as a whole, the article was not libelous.

On appeal, plaintiff also argues that the article invaded her privacy by casting her in a false light. * * * As indicated in the above discussion under the theory of defamation, with the exception of certain references to hairdressing dogs, none of the conduct attributed to plaintiff in the article was false. Therefore, it could not place plaintiff in a false light. With reference to the assertions concerning her hairdressing of dogs, we do not believe that a rational trier of fact could conclude that, even if inaccurate, those references are unreasonable or put plaintiff in a position of receiving highly objectionable publicity. The article did not indicate that plaintiff harmed, injured or inflicted pain upon the dogs. Rather, at most, the article inaccurately stated that plaintiff used techniques on the dogs, such as blowtorching, which she also used on humans. While the article may have overstated the techniques that she uses on dogs, inasmuch as she advocates those techniques for use on humans, we cannot conclude that plaintiff would believe it highly objectionable that those techniques also be performed on dogs. Similarly, she cannot have been placed in false light as being both the hairdresser of dogs and humans inasmuch as the tinting of the canines' fur would constitute hairdressing. Thus, it would not be placing plaintiff in a false light to indicate that she serves both dog and man. Accordingly, we believe that summary disposition was also properly granted on the false light claim.

In summary, although the manner in which the present article was written may have singed plaintiff's desire for obtaining favorable coverage of her unique hairdressing methods, we cannot subscribe to the view that it was libelous. We believe that the trial court aptly summarized this case when it stated that "this Court is of the Opinion that the Plaintiff sought publicity and got it." Indeed, it would appear that the root of plaintiff's dissatisfaction with defendants' article is that the publicity plaintiff received was not exactly the publicity she had in mind. While the publicity may have been inflammatory from plaintiff's vantage point, we do not believe it was libelous. At most, defendants treated the article more lightheartedly than plaintiff either anticipated or hoped. While this may give plaintiff cause to cancel her subscription to the Detroit News, it does not give her cause to complain in court.

Affirmed. Costs to defendants.

COMMENT

The *Morganroth* case amply demonstrates the enduring difficulties in this area of the law. While the result ratifies the value of colorful, lively writing, reporters and authors should not rejoice. Consider that the plaintiff consented to the interview, then sued nonetheless. Excepting the disputed line about dog hairdressing, all else in the story appears to be an accurate description of what the reporter saw and heard. When a Massachusetts reporter said that an interview subject was "passionate" and "bitter," the interview subject said the reporter was not entitled to make such an interpretation based on observation,

and sued for false light. Characterizing the interpretation as opinion incapable of supporting a false light claim, a trial court judgment for the defendant was upheld.[115] In both this case and *Morganroth*, the major harm is that the claims ever made it to trial, much less to appeal.

Morganroth is like many other false light cases in the way it combines causes of actions and concepts. In addition to the explicit false light and libel claims, one can find familiar strains from intrusion on seclusion and from private facts cases. Shila Morganroth's case seems indistinguishable from Mike Virgil's a decade earlier but for the cause of action. There is even a hint of intellectual property law or appropriation to her complaint.

At present, a major source of false light filings is *Hustler* magazine's tendency to use photos of people who agreed to pose nude for other photographers, photos that later appeared in *Hustler* without the subjects' consent. The plaintiff's claim typically centers on objections to being allied with *Hustler* in the minds of readers. In general, cases involving the magazine have rejected the argument that one is portrayed in a false light simply by association. A false assertion must be proved, and a claim that appearance in the magazine asserts consent is unpersuasive.[116] Similarly, when footage of paraders at Mardi Gras found its way into a softcore sex film, the paraders could not complain about the company they were unwillingly keeping.[117] And plaintiffs who were photographed wearing negligible costumes at the Halloween Exotic Erotic Ball could not complain when they were later accurately portrayed in printed versions of the photo.[118]

From a journalistic perspective, it is perhaps still best to hope for an eventual merger of false light privacy and libel under the rules of *Gertz*. Justice Brennan's opinion in *Hill* has not been repudiated by the Court. In *Hill*, Brennan nevertheless kept libel and privacy distinct, although, as *Rosenbloom* would demonstrate later, their protection would depend on parallel lines of reasoning based on the "public interest" or "public issue" test first suggested by Warren and Brandeis in their *Harvard Law Review* article. Arguably, if determining when a "libel" involves material which affects the "public interest" is an unsuitable task for courts in a regime governed by the First Amendment, it is a similarly unsuitable task for courts to decide when a publication is "newsworthy" in a privacy case since by doing so they interfere with journalistic prerogatives.

Gertz discarded the "public interest" standard for libel when the media is the defendant, a standard that focused essentially on the subject matter of the defamatory report, in favor of a test based on the *private/public* status of the plaintiff.[119]

Applying *Gertz* has advantages. For one, the plaintiff would clearly have the burden of proof on all elements. Presumed fault, damages, and most likely falsity would not be allowed. It would also clarify an unsettled issue on the malice standard. *Cantrell* appeared to approve of using common law malice rather than actual malice to allow punitive damages in false light cases, which seems plainly contradictory.

Obviously false light invasions do not always harm reputation. Baseball pitcher Warren Spahn was given a fictional Bronze Star by his admiring biographer, and the dramatizers of Hill's captivity made him a hero. But the differences in the nature of the injury—to mental well-being rather than reputation—only suggest that the action is a bit different, not that it should be easier for plaintiffs to prevail in false light cases.

The well-known but nonetheless private figure Mary Alice Firestone may have brought libel and privacy closer together. Though described as an adulteress, she withdrew her claim of damage to reputation and relied solely on a privacy-style claim of mental pain and anguish. Until the tensions and ambiguities in false light privacy are resolved, the press can only hope that the actual malice bond that joins the two areas of mass communication law will remain sturdy and that, as a corollary, truth will remain a defense against both libel and false light privacy claims.

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115. *Fox Tree v. Harte-Hanks Communications*, 14 Med.L.Rptr. 1090, 501 N.E.2d 519 (Mass. 1986).

116. *Ashby v. Hustler*, 13 Med.L.Rptr. 1416, 802 F.2d 856 (6th Cir. 1986); *Douglass v. Hustler Magazine, Inc.*, 11 Med.L.Rptr. 2264, 769 F.2d 1128 (7th Cir. 1985), cert. den. 106 S.Ct. 1489 (1986); *Braun v. Flynt*, 10 Med.L.Rptr. 1497, 726 F.2d 245 (5th Cir. 1984).

117. *Easter Seal Society v. Playboy Enterprises*, 15 Med.L.Rptr. 2384 (La.App. 1988).

118. *Martin v. Penthouse*, 12 Med.L.Rptr. 2059 (Cal.App. 1986).

119. But see, *Philadelphia Newspapers v. Hepps*, 12 Med.L.Rptr. 1977, 475 U.S. 767 (1986) (private figure plaintiff must prove falsity when news story is on a matter of public interest).

PERSONA AS PROPERTY: APPROPRIATION AND THE RIGHT OF PUBLICITY

Appropriation of someone's name, picture, or distinctive personal characteristics was the first type of invasion of privacy tort to be widely accepted by states. It is committed more frequently by advertising, promotions, and merchandising personnel than by news reporters or photographers. Nonetheless, the tort is of concern for mass media.

At bottom, all that is required for someone to prove appropriation is that they were used in an identifiable fashion for a commercial purpose. The original tort was designed to protect the average person from having their "persona" used by the press. In the earliest common law appropriation case, an insurance company used the plaintiff's name and picture in an advertisement, which also contained a phony endorsement from the plaintiff.[120] The two elements—identification and commercial use—have remained to the present.

As originally put forth, appropriation like other privacy actions aimed to protect well-being and self-esteem. But starting in the 1950s and snowballing in the past two decades, more and more cases have involved taking the name, likeness, or characteristics of the famous rather than the unknown. From this line of cases has sprung a separate tort, the right of publicity, which seeks to protect the monetary interests of those whose names, likenesses, and attributes are marketable.[121]

It should be obvious that the best defense against either an appropriation action *or* a right of publicity action will be a signed consent or release from the person whose identity is used. Actually, consent forms are applicable for defense in all four of the privacy torts, although rarely sought in situations likely to provoke private facts, intrusion, or false light cases. Release forms are especially important where private figures are the subject of news or promotional activities. If minors or those incompetent to sign are involved, their parents or guardians should be asked to sign the release. If the signed release accurately reflects how a name or photo is going to be used, it should be a complete defense. The big difference with celebrities is that it normally requires payment to get a release signed. Oral releases may be argued in court, but their validity or strength is dubious; generally they are worth the paper they're not printed on. *Miller v. Madison Square Garden Corp.*, 28 N.Y.S.2d 811 (1941).

Major alterations in a photograph or major changes in treatment will void consent and may open one to false light charges as well. Since passage of time and changed circumstances may nullify the reasons for consent, renewed releases should be sought if a picture or name is to be used for commercial or trade purposes again at a later time, or anytime if the use is for a different reason. *Hustler* publisher Larry Flynt prevailed on false light grounds but lost the right of publicity claim filed against him by nascent actress Robyn Douglass. Flynt obtained nude photos of Douglass with another woman from a photographer who offered verbal assurances that Douglass consented. When the time came to offer proof, the consent forms introduced in evidence were not originals, and expert testimony for Douglass disputed the genuineness of her signature. Douglass had originally signed a valid release for the use of some photos of her alone to *Playboy*. The court, however, reduced her damages to the extent that they relied on distress from having appeared naked in *Hustler*, since she has appeared in the media frequently without clothes.[122]

Consent is apparently required of the heirs and assigns of deceased celebrities in many states that have adopted the right of publicity.[123]

The only other meaningful defense against these two actions is newsworthiness, often claimed on a First Amendment basis. If a person is caught up in a newsworthy event or voluntarily steps forward to participate in debate on a public issue and becomes a public figure, appropriation claims are weak.[124]

Isolated references to television news reporters in the book *The Amityville Horror* did not support their

120. *Pavesich v. New England Life Insurance* Co., 50 S.E. 68 (Ga. 1905).

121. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 Vanderbilt L.Rev. 1199 (1986).

122. *Douglass v. Hustler*, 11 Med.L.Rptr. 2264, 769 F.2d 1128 (7th Cir. 1985); see also, *Shields v. Gross*, 8 Med.L.Rptr. 1928, 451 N.Y.S.2d 419 (N.Y.Sup.Ct., App.Div. 1982) (consent signed by actress Brooke Shields's mother when Shields was ten may be disaffirmed at later age, and use of consented-to photographs made subject of action under New York privacy statute).

123. *Lugosi v. Universal Pictures*, 5 Med.L.Rptr. 2185, 25 Cal.3d 813, 160 Cal.Rptr. 323, 603 P.2d 425 (1979) (right of publicity remains valuable asset to heirs more than twenty years after celebrity's death).

124. *Anderson v. Fisher Broadcasting Cos.*, 11 Med.L.Rptr. 1839, 712 P.2d 803 (Ore. 1986).

invasion-of-privacy claims under New York's law since reports of psychic phenomena were matters of public interest.[125] Following allegations of fraud, they also became matters of public debate.

Joe Namath failed in a suit against *Sports Illustrated* when the magazine used a Super Bowl picture of the football hero it had published in 1969 to promote its subscriptions in other publications. The New York statute permits *incidental* use of once newsworthy photographs for trade purposes but not their direct or *collateral* use. The distinction is sometimes a fine one. But then newsworthiness is a broad and compassing defense. Since the photos had been taken during the 1969 Super Bowl while Namath was doing his job, it could also be argued that any interest in the publicity belonged to the New York Jets who, along with the leagues, had *invited* photographers to attend. *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10 (N.Y.Sup.Ct., App.Div. 1975), aff'd 386 N.Y.S.2d 397 (N.Y. 1976).[126]

Note that the cases seldom focus on private figures. As a practical matter, appropriation of an unknown person to promote or sell something is bad business. As a result, most of the true appropriation cases arise from news rather than from commercial contexts. For example, use of a murder suspect's picture by a gubernatorial candidate was held not to be for trade purposes under New York's statute. The First Amendment value of free political discussion outweighed individual injury.[127] When NBC's Chicago station aired an investigation into judicial bribery, "Operation Greylord," using plaintiff's name and photograph in promotions for the story, it was considered an appropriation, although the same facts might support a false light claim.[128] And when two infants were photographed at a public downtown festival in Baltimore and their pictures later used in an advertising campaign, the court held that the original news value extended to the later advertising use. In addition, the court said, no reader could see the use as an endorsement, a factor seldom addressed in appropriation cases.[129]

Not all subsequent uses will be considered news apparently. In 1987, George Mendonsa filed a suit against *Life*, arguing that he was the sailor in the famous cover photo from V-J day in 1945 by Alfred Eisenstadt. The photo showed a sailor kissing a nurse in Times Square. It is one of the most famous photographs of all time. The sailor and nurse were never identified. In 1980, the magazine ran a copy of the picture and asked anyone who believed they were the two in the picture to contact it. Mendonsa wrote to say he was the man in the photograph; *Life* never responded. In 1987, the magazine began selling copies of the photograph at $1,600. Although the court seemed dubious about Mendonsa's ability to prove that his image was being used for commercial purposes (the faces were largely unseen), it said he had a right to try convincing a jury. The newsworthiness issue was not addressed.[130] The bigger question is why Mendonsa did not step forward earlier. The photograph has been used for promotion many times. A person must be identified to claim appropriation. A claim based on proximity to another is insufficient. That may pose a problem yet for Mendonsa.

Although unsettled by the film *Dog Day Afternoon*, the unidentified wife and children of the bank robber in that true story had not themselves been used in promoting the film, and plaintiffs had chosen subsequently to identify themselves.[131] A race car driver whose face and name were not used in a cigarette ad, but whose race car was, prevailed because the famous car was precisely identified with him. It is also notable that there was no news purpose.[132]

A shoe-on-the-other-foot situation occurred when a WCBS reporter, who had done a story on home insulation, found herself being used to promote a particular product. She brought a $4.5 million damage suit and asked for an injunction against the unauthorized use of the original news film.

"To be effective," said a New York appellate court in permitting the suit to continue, "a news reporter must maintain an image of absolute integrity and

125. *Bauman v. Anson*, 6 Med.L.Rptr. 1487 (N.Y.Sup.Ct. 1980).

126. See also, *Booth v. Curtis Publishing Co.*, 223 N.Y.S.2d 737 (N.Y.Sup.Ct., App.Div. 1962) (actress Shirley Booth's photo, taken on a public beach, used on cover of *Holiday* magazine); *Booth v. Colgate-Palmolive Co.*, 362 F.Supp. 343 (S.D.N.Y. 1973) (Booth's distinctive voice imitated in television commercial).

127. *Davis v. Duryea*, 5 Med.L.Rptr. 1937, 417 N.Y.S.2d 624 (N.Y.Sup.Ct. 1979).

128. *Berkos v. NBC*, 14 Med.L.Rptr. 1833, 515 N.E.2d 668 (Ill.App. 1987).

129. *Lawrence v. A. S. Abell Co.*, 10 Med.L.Rptr. 2001, 475 A.2d 448 (Md.App. 1984).

130. *Mendonsa v. Time, Inc.*, 15 Med.L.Rptr. 1017, 678 F.Supp. 967 (D.R.I. 1988).

131. *Wojtowicz v. Delacorte Press*, 2 Med.L.Rptr. 2023, 395 N.Y.S.2d 205 (N.Y.Sup.Ct., App.Div. 1977), aff'd 3 Med.L.Rptr. 1992, 403 N.Y.S.2d 218 (N.Y. 1978).

132. *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

impartiality. The commercial exploitation of an impartial report by the use of a video tape or other reproduction of the name or picture of such reporter, for advertising or trade purposes, will not only tarnish the reporter's reputation for objectivity, but will have a chilling effect on reporters now involved in a field of expanding concern—consumer protection." [133]

The connections between consent and newsworthiness in the use of a name or picture received a new twist when a television station aired the entire act of human cannonball Hugo Zacchini. The entertainer's act was to shoot himself from a cannon into a net 200 feet away. By all reports, it was a dramatic act lasting about fifteen seconds. Zacchini was reportedly one of the last human cannonballs in the nation.

Zacchini was approached by a free-lance reporter linked to Cleveland station WEWS-TV while Zacchini appeared at a county fair. Zacchini asked that the act not be filmed. The next day, at his employer's behest, the reporter returned and filmed the act. A segment was shown on the evening news.

Contending that the station had appropriated his professional property, Zacchini sued for $25,000. A trial court granted the station summary judgment. An appeals court reversed. The Ohio Supreme Court then reversed again. It first said that plaintiff's claim should be based on a right of publicity, not on appropriation, because the two serve different interests. Zacchini lost in any event because the Ohio court, apparently relying on *Time, Inc. v. Hill*, said a "legitimate public interest test" applied. On a third appeal, the U.S. Supreme Court again reversed. The Court held that the state might provide a newsworthiness defense on state law grounds but was not required to by the First Amendment. The Court also held that the right of publicity did not conflict with the First Amendment. Zacchini had won the battle.

ZACCHINI v. SCRIPPS-HOWARD

2 MED.L.RPTR. 2089, 433 U.S. 562, 97 S.CT. 2849, 53 L.ED.2D 965 (1977).

Justice WHITE delivered the opinion of the Court.

* * *

The Ohio Supreme Court held that respondent is constitutionally privileged to include in its newscasts matters of public interest that would otherwise be protected by the right of publicity, absent an intent to injure or to appropriate for some nonprivileged purpose. If under this standard respondent had merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television, we would have a very different case. But petitioner is not contending that his appearance at the fair and his performance could not be reported by the press as newsworthy items. His complaint is that respondent filmed his entire act and displayed that film on television for the public to see and enjoy. This, he claimed, was an appropriation of his professional property. The Ohio Supreme Court agreed that petitioner had "a right of publicity" that gave him "personal control over the commercial display and exploitation of his personality and the exercise of his talents." * * *

The Ohio Supreme Court nevertheless held that the challenged invasion was privileged, saying that the press "must be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation. No fixed standard which would bar the press from reporting or depicting either an entire occurrence or an entire discrete part of a public performance can be formulated which would not unduly restrict the 'breathing room' in reporting which freedom of the press requires." 351 N.E.2d 454 (1976). Under this view, respondent was thus constitutionally free to film and display petitioner's entire act.

The Ohio Supreme Court relied heavily on *Time, Inc. v. Hill*, but that case does not mandate a media privilege to televise a performer's entire act without his consent. * * *

Time, Inc. v. Hill, which was hotly contested and decided by a divided court, involved an entirely different tort than the "right of publicity" recognized by the Ohio Supreme Court. * * * It is also abundantly clear that *Time, Inc. v. Hill* did not involve a performer, a person with a name having commercial value, or any claim to a "right of publicity." This discrete kind of "appropriation" case was plainly identified in the literature cited by the Court and had been adjudicated in the reported cases.

The differences between these two torts are important. First, the State's interests in providing a cause of action in each instance are different. "The interest protected" in permitting recovery for placing

133. *Reilly v. Rapperswill Corp.*, 377 N.Y.S.2d 488 (1975).

the plaintiff in a false light "is clearly that of reputation, with the same overtones of mental distress as in defamation." Prosser, 48 Calif.L.Rev., at 400. By contrast, the State's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment. As we later note, the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation. Second, the two torts differ in the degree to which they intrude on dissemination of information to the public. In "false light" cases the only way to protect the interests involved is to attempt to minimize publication of the damaging matter, while in "right of publicity" cases the only question is who gets to do the publishing. An entertainer such as petitioner usually has no objection to the widespread publication of his act as long as he gets the commercial benefit of such publication.

* * *

It is evident, and there is no claim here to the contrary, that petitioner's state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner's act. Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner. * * *

The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance. As the Ohio court recognized, this act is the product of petitioner's own talents and energy, the end result of much time, effort and expense. Much of its economic value lies in the "right of exclusive control over the publicity given to his performance"; if the public can see the act for free on television, they will be less willing to pay to see it at the fair. The effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee.

"The rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay." Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 Law and Contemporary Problems 326, 331 (1966). Moreover, the broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer. Thus in this case, Ohio has recognized what may be the strongest case for a "right of publicity"—involving not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.

Of course, Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court.

* * *

These laws perhaps regard the "reward to the owner [as] a secondary consideration," *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948), but they were "intended definitely to grant valuable, enforceable rights" in order to afford greater encouragement to the production of works of benefit to the public. * * *

Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it. Nor do we think that a state-law damages remedy against respondent would represent a species of liability without fault contrary to the letter or spirit of *Gertz*. Respondent knew exactly that petitioner objected to televising his act, but nevertheless displayed the entire film.

We conclude that although the State of Ohio may as a matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so.

Reversed.

Mr. Justice POWELL, with whom Mr. Justice Brennan and Mr. Justice Marshall join, dissenting.

Disclaiming any attempt to do more than decide the narrow case before us, the Court reverses the

decision of the Supreme Court of Ohio based on repeated incantation of a single formula: "a performer's entire act." * * * I do not view respondent's action as comparable to unauthorized commercial broadcasts of sporting events, theatrical performances, and the like where the broadcaster keeps the profits. There is no suggestion here that respondent made any such use of the film. Instead, it simply reported on what petitioner concedes to be a newsworthy event, in a way hardly surprising for a television station—by means of film coverage. The report was part of an ordinary daily news program, consuming a total of 15 seconds. It is a routine example of the press fulfilling the informing function so vital to our system.

* * *

In my view the First Amendment commands a different analytical starting point from the one selected by the Court. Rather than begin with a quantitative analysis of the performer's behavior—is this or is this not his entire act?—we should direct initial attention to the actions of the news media: what use did the station make of the film footage? When a film is used, as here, for a routine portion of a regular news program, I would hold that the First Amendment protects the station from a "right of publicity" or "appropriation" suit, absent a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private or commercial exploitation.

* * *

COMMENT

The split between White and Powell is also the split that has pervaded right of publicity analysis generally. Powell focuses on the news or First Amendment value of the use to which the information is put, while White focuses on the economic value of the thing taken. Since there has been no other case in which a celebrity's entire act has been at issue, the viability of the "entire act" standard has not been tested.

One argument for a First Amendment "fair use" defense is based on the public's investment in celebrities. Since the value of their personae stems from the public, it is argued, the rights should be shared; placing all rights with the celebrity puts full control over information of general public interest in just a few hands. And it is argued that, after death, a celebrity's persona should fall into the public domain on the grounds that the celebrity has reaped the rewards of fame.[134] Most celebrities, after all, are able to protect heirs through contracts without relying on the right of publicity. In addition, copyright endures after death.

Note that the Court's opinions in *Zacchini* dealt with the right of publicity, not appropriation, in line with Ohio's view that the two torts serve different interests. The Court finds the right of publicity more akin to copyright, an intellectual property issue, than to privacy. Later right of publicity cases draw upon many related areas of law: copyright, trademark, service mark, unfair competition, and misappropriation.[135] As a result, publicity cases often become extremely complicated.

The Court never reached the issue of harm or damages, but it is difficult to conceive of how the news story actually cost Zacchini anything. Did the station gain extra viewers or advertisers? Such evidence would seem extremely relevant to proving that there was a commercial as opposed to news purpose. Might not the fifteen-second film be considered "free" advertising for Zacchini? The station in fact urged viewers that they should see the act in person. Is it true that the public will be less willing to pay to see Zacchini after seeing the act for nothing? Certainly general admission to the fair promised much more than just the human cannonball show.

In the years since *Zacchini*, many states have recognized a right of publicity, either on a common law basis or by statute. States with statutes include California, Florida, Kentucky, Massachusetts, Nebraska, New York, Oklahoma, Rhode Island, Tennessee, Utah, Virginia, and Wisconsin.[136] New York's right of publicity is considered implicit in its privacy statute. On common law grounds, apparently every state that has had occasion to consider the right has recognized it.[137] The general rule for establishing the existence of publicity rights in most states is twofold: the celebrity's name or likeness must have some value and the celebrity must have exploited

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134. LeBlanc-Wicks, *Free Speech v. Free Enterprise: The Public Policy Clash Between the First Amendment and the Right of Publicity*, paper presented to the Law Division, Association for Education in Journalism and Mass Communication convention, Norman, Oklahoma, August 1986.

135. Simon, *Right of Publicity Reified: Fame as Business Asset*, 30 New York Law School L.Rev. 699 (1985).

136. Lawrence, *The Right of Publicity: A Research Guide*, 10 Comm/Ent L.J. 143, 159 (1987).

137. Id., 183–303.

the right,[138] although the ability to exploit the right may be sufficient.[139] Some states, such as California, treat the right as nearly identical to copyright. And like copyright it is descendible, even salable, after death. A recent Tennessee case, one of many involving the estate of Elvis Presley, sees the issue primarily in property law terms.

STATE EX REL. PRESLEY v. CROWELL

14 MED.L.RPTR. 1043, 733 S.W.2D 89 (TENN. APP. 1987).

KOCH, J.:

This appeal involves a dispute between two not-for-profit corporations concerning their respective rights to use Elvis Presley's name as part of their corporate names. The case began when one corporation filed an unfair competition action in the Chancery Court for Davidson County to dissolve the other corporation and to prevent it from using Elvis Presley's name. Elvis Presley's estate intervened on behalf of the defendant corporation. It asserted that it had given the defendant corporation permission to use Elvis Presley's name and that it had not given similar permission to the plaintiff corporation.

The trial court determined that Elvis Presley's right to control his name and image descended to his estate at his death and that the Presley estate had the right to control the commercial exploitation of Elvis Presley's name and image. Thus, the trial court granted the defendant corporation's motion for summary judgment and dismissed the complaint.

The plaintiff corporation has appealed. Its primary assertion is that there is no descendible right of publicity in Tennessee and that Elvis Presley's name and image entered into the public domain when he died.

* * *

Elvis Presley's career is without parallel in the entertainment industry. * * * Elvis Presley was aware of this recognition and sought to capitalize on it during his lifetime. He and his business advisors entered into agreements granting exclusive commercial licenses throughout the world to use his name and likeness in connection with the marketing and sale of numerous consumer items. As early as 1956, Elvis Presley's name and likeness could be found on bubble gum cards, clothing, jewelry and numerous other items. * * *

Elvis Presley's death on August 16, 1977 did not decrease his popularity. If anything it preserved it.

* * *

The demand for Elvis Presley merchandise was likewise not diminished by his death. The older memorabilia are now collector's items. New consumer items have been authorized and are now being sold. Elvis Presley Enterprises, Inc., a corporation formed by the Presley estate, has licensed seventy-six products bearing his name and likeness and still controls numerous trademark registrations and copyrights. * * * The commercial exploitation of Elvis Presley's name and likeness continues to be a profitable enterprise. It is against this backdrop that this dispute between these two corporations arose.

A group of Elvis Presley fans approached Shelby County officials sometime in 1979 concerning the formation of a group to support a new trauma center that was part of the Memphis and Shelby County hospital system. This group, calling themselves the Elvis Presley International Memorial Foundation, sought a charter as a Tennessee not-for-profit corporation in October, 1980. The Secretary of State denied their application on November 12, 1980 stating that "[t]he name Elvis Presley cannot be used in the charter."

Lawyers representing the group of fans and the Presley estate met to discuss the group's use of Elvis Presley's name following the Secretary of State's rejection of the charter application. In December, 1980, the Presley estate and its trademark counsel formally declined to give the group the unrestricted right to use Elvis Presley's name and likeness. However, the Presley estate offered the group a royalty-free license to use Elvis Presley's name and likeness if the group agreed to abide by eight conditions limiting the group's activities. The group declined the offer of a royalty-free license.

The Presley estate incorporated Elvis Presley Enterprises, Inc. on February 24, 1981. Two days later

138. *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*, 8 Med.L.Rptr. 2377, 296 S.E.2d 697 (Ga. 1982).

139. *Grant v. Esquire, Inc.*, 367 F.Supp. 876 (S.D.N.Y. 1973) (actor Cary Grant objected to use of his likeness in sweater promotion largely because he never sold the highly marketable rights to his name or likeness).

on February 26, 1981, the Secretary of State, reversing its original decision, granted the fan group's renewed application and issued a corporate charter to the Elvis Presley International Memorial Foundation (International Foundation). The International Foundation raises funds by charging membership fees and dues and by sponsoring an annual banquet in Memphis. It uses its funds to support the trauma center of the new City of Memphis Hospital which was named after Elvis Presley and to provide an annual award of merit.

The Presley estate and Elvis Presley Enterprises, Inc. incorporated the Elvis Presley Memorial Foundation, Inc. (Foundation) as a Tennessee not-for-profit corporation on May 14, 1985. The Foundation is soliciting funds from the public to construct a foundation in the shopping center across the street from Elvis Presley's home.

The International Foundation's heretofore amicable relationship with the Presley estate and Elvis Presley Enterprises, Inc. deteriorated after the formation of the Foundation. On July 17, 1985, the International Foundation filed this action seeking to dissolve the Foundation and to enjoin it from using a deceptively similar name.

* * *

We are dealing in this case with an individual's right to capitalize upon the commercial exploitation of his name and likeness and to prevent others from doing so without his consent. This right, now commonly referred to as the right of publicity, is still evolving and is only now beginning to step out of the shadow of its more well known cousin, the right of privacy.

The confusion between the right of privacy and the right of publicity has caused one court to characterize the state of the law as a "haystack in a hurricane." *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 485 (3d Cir. 1956). This confusion will not retard our recognition of the right of publicity because Tennessee's common law tradition, far from being static, continues to grow and to accommodate the emerging needs of modern society. * * *

Writing in 1890, Warren and Brandeis could not have foreseen today's commercial exploitation of celebrities. They did not anticipate the changes that would be brought about by the growth of the advertising, motion picture, television and radio industries. American culture outgrew their concept of the right of privacy and soon began to push the common law to recognize and protect new and different rights and interests.

It would be difficult for any court today, especially one sitting in Music City U.S.A. practically in the shadow of the Grand Ole Opry, to be unaware of the manner in which celebrities exploit the public's recognition of their name and image. The stores selling Elvis Presley tee shirts, Hank Williams, Jr. bandannas or Barbara Mandrell satin jackets are not selling clothing as much as they are selling the celebrities themselves. We are asked to buy the shortening that makes Loretta Lynn's pie crusts flakier or to buy the same insurance that Tennessee Ernie Ford has or to eat the sausage that Jimmy Dean makes.

There are few every day activities that have not been touched by celebrity merchandising. This, of course, should come as no surprise. Celebrity endorsements are extremely valuable in the promotion of goods and services. * * * These endorsements are of great economic value to celebrities and are now economic reality. * * *

In his later writings, Prosser characterized the right of publicity as:

> an exclusive right in the individual plaintiff to a species of trade name, his own, and a kind of trade mark in his likeness. It seems quite pointless to dispute over whether such a right is to be classified as "property;" it is at least clearly proprietary in nature. W. Prosser, *Handbook of the Law of Torts* §117, at 807 (4th ed. 1971).

* * *

Now, courts in other jurisdictions uniformly hold that the right of publicity should be considered as a free standing right independent from the right of privacy. * * *

The status of Elvis Presley's right of publicity since his death has been the subject of four proceedings in the Federal courts. The conflicting decisions in these cases mirror the difficulty other courts have experienced in dealing with the right of publicity.

The first case originated in Tennessee and involved the sale of pewter statuettes of Elvis Presley without the exclusive licensee's permission. The United States District Court recognized Elvis Presley's independent right of publicity and held that it had descended to the Presley estate under Tennessee law. *Memphis Development Foundation v. Factors, Etc. Inc.*, 441 F.Supp. 1323 * * * (W.D.Tenn. 1977). The United States Court of Appeals for the Sixth Circuit reversed. Apparently without consid-

ering Tennessee law, the court held that Tennessee courts would find that the right of publicity would not survive a celebrity's death. *Memphis Development Foundation v. Factors, Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980).

* * *

The second and third cases originated in New York and were originally decided under New York law. On two successive days, Judge Charles H. Tenney recognized Elvis Presley's right of publicity and held that it descended at death like any other intangible property right. *Factors Etc., Inc. v. Creative Card Co.*, 444 F.Supp. 279 * * * (S.D.N.Y. 1977) and *Factors Etc., Inc. v. Pro Arts, Inc.*, 444 F.Supp. 288, 290 (S.D.N.Y. 1977). Pro Arts, Inc. appealed, and the United States Court of Appeals for the Second Circuit, applying New York law, agreed that Elvis Presley's right of publicity survived his death and remanded the case. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978).

* * *

The dispute between Factors, Etc., Inc. and Pro Arts, Inc. did not end. On remand, Judge Tenney permanently enjoined Pro Arts from making any commercial use of Elvis Presley's name and likeness. Pro Arts, Inc. again appealed to the United States Court of Appeals for the Second Circuit. This time Pro Arts insisted that the controversy was governed by Tennessee law and that the United States Court of Appeals for the Sixth Circuit's opinion in *Memphis Development Foundation v. Factors, Etc., Inc.* should control.

The United States Court of Appeals for the Second Circuit agreed that Tennessee law controlled the case. While it expressly disagreed with the Sixth Circuit's holding in *Memphis Development Foundation v. Factors, Etc., Inc.*, it concluded that it was required to accept the Sixth Circuit's decision as controlling authority. *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981).

* * *

The fourth case originated in New Jersey and involved an Elvis Presley impersonator. Applying New Jersey Law, the United States District Court recognized Elvis Presley's right of publicity and held that it would be descendible under New Jersey law. *Estate of Elvis Presley v. Russen*, 513 F.Supp. 1339, 1354–55 (D.N.J. 1981).

The courts in each of these cases recognized the existence of Elvis Presley's right of publicity. All the courts, except one, also recognized that this right was descendible upon Elvis Presley's death.

* * *

The appellate courts of this State have had little experience with the right of publicity. The Tennessee Supreme Court has never recognized it as part of our common law or has never undertaken to define its scope. However, the recognition of individual property rights is deeply embedded in our jurisprudence.

* * *

The concept of the right of property is multifaceted. It has been described as a bundle of rights or legally protected interests. These rights or interests include: (1) the right of possession, enjoyment and use; (2) the unrestricted right of disposition; and (3) the power of testimonial disposition. * * *

Our courts have recognized that a person's "business," a corporate name, a trade name and the good will of a business are species of intangible personal property.

* * *

Tennessee's common law thus embodies an expansive view of property. Unquestionably, a celebrity's right of publicity has value. It can be possessed and used. It can be assigned, and it can be the subject of a contract. Thus, there is ample basis for this Court to conclude that it is a species of intangible personal property.

* * *

What remains to be decided by the courts in Tennessee is whether a celebrity's right of publicity is descendible at death under Tennessee law. * * * The only reported opinion holding that Tennessee law does not recognize a *postmortem* right of publicity is *Memphis Development Foundation v. Factors, Etc., Inc.* * * * We have carefully reviewed this opinion and have determined that it is based upon an incorrect construction of Tennessee law and is inconsistent with the better reasoned decisions in this field.

The United States Court of Appeals for the Sixth Circuit appears to believe that there is something inherently wrong with recognizing that the right of publicity is descendible. * * * We do not share this subjective policy bias. Like the Supreme Court of

Georgia, we recognize that the "trend since the early common law has been to recognize survivability, notwithstanding the legal problems which may thereby arise." * * *

We have also concluded that recognizing that the right of publicity is descendible promotes several important policies that are deeply ingrained in Tennessee's jurisprudence. First, it is consistent with our recognition that an individual's right of testamentary distribution is an essential right. If a celebrity's right of publicity is treated as an intangible property right in life, it is no less a property right at death. * * *

Second, it recognizes one of the basic principles of Anglo-American jurisprudence that "one may not reap where another has sown nor gather where another has strewn." * * * This unjust enrichment principle argues against granting a windfall to an advertiser who has no colorable claim to a celebrity's interest in the right of publicity. * * *

Third, recognizing that the right of publicity is descendible is consistent with a celebrity's expectation that he is creating a valuable capital asset that will benefit his heirs and assigns after his death. * * *

It is now common for celebrities to include their interest in the exploitation of their right of publicity in their estate. While a celebrity's expectation that his heirs will benefit from his right of publicity might not, by itself, provide a basis to recognize that the right of publicity is descendible, it does recognize the effort and financial commitment celebrities make in their careers. This investment deserves no less recognition and protection than investments celebrities might make in the stock market or in other tangible assets. * * *

Fourth, concluding that the right of publicity is descendible recognizes the value of the contract rights of persons who have acquired the right to use a celebrity's name and likeness. The value of this interest stems from its duration and its exclusivity. If a celebrity's name and likeness were to enter the public domain at death, the value of any existing contract made while the celebrity was alive would be greatly diminished. * * *

Fifth, recognizing that the right of publicity can be descendible will further the public's interest in being free from deception with regard to the sponsorship, approval or certification of goods and services. * * *

Finally, recognizing that the right of publicity can be descendible is consistent with the policy against unfair competition through the use of deceptively similar corporate names.

The legal literature has consistently argued that the right of publicity should be descendible. A majority of the courts considering this question agree. We find this authority convincing and consistent with Tennessee's common law and, therefore, conclude that Elvis Presley's right of publicity survived his death and remains enforceable by his estate and those holding licenses from the estate.

While Tennessee's courts are capable of defining the parameters of the right of publicity on a case by case basis, the general Assembly also has the prerogative to define the scope of this right. The General Assembly undertook to do so in 1984 when it enacted Tenn. Code Ann. §47-25-1101 *et seq.* which is known as "The Personal Rights Protection Act of 1984." Tenn. Code Ann. §47-25-1103(a) recognizes that an individual has "a property right in the use of his name, photograph or likeness in any medium in any manner." Tenn Code Ann. §47-25-1103(b) provides that this right is descendible. Tenn. Code Ann. §47-25-1104(a) & (b)(1) provide that the right is exclusive in the individual or his heirs and assigns until it is terminated. Tenn. Code Ann. §47-25-1104(b)(2) provides that the right is terminated if it is not used after the individual's death.

Our decision concerning the descendibility of Elvis Presley's right of publicity is not based upon Tenn. Code Ann. §47-25-1101 *et seq*, but rather upon our recognition of the existence of the common law right of publicity. We note, however, that nothing in Tenn. Code Ann. §47-25-1101 *et seq.* should be construed to limit vested rights of publicity that were in existence prior to the effective date of the act. To do so would be contrary to Article I, Section 20 of the Tennessee Constitution. A statute cannot be applied retroactively to impair the value of a contract right in existence when the statute was enacted. * * *

Our finding that Elvis Presley's estate has retained the exclusive right to control the commercial exploitation of his name and likeness does not end our inquiry. Elvis Presley Enterprises, Inc. sought relief through a Tenn.R.Civ.P. 56 motion for summary judgment. It was entitled to this relief only if there are no disputes of material fact and if it satisfied the trial court that it was entitled to a judgment as a matter of law.

* * *

There is evidence in this record indicating that Elvis Presley Enterprises, Inc. was aware for over four years that the International Foundation was using Elvis Presley's name in its corporate name, that it acquiesced and even encouraged this use, and that the International Foundation relied upon Elvis Presley Enterprises, Inc.'s apparent acquiescence to its detriment.

* * *

There is also evidence that the International Foundation relied to its detriment upon the Presley estate's apparent acquiescence in its use of Elvis Presley's name. It has solicited funds and sponsored various activities. It has also entered into contracts for marketing and promotion. * * * This record does not support finding that the International Foundation has carried its burden of proof with regard to its laches defense. However, it does not support finding that Elvis Presley Estate, Inc. is entitled to a judgment as a matter of law.

The summary judgment granted in favor of Elvis Presley Enterprises, Inc. is vacated and the case is remanded for further proceedings consistent with this opinion. * * *

COMMENT

The court traces the history of litigation involving the Presley estate, citing seven separate court opinions involving Elvis's right of publicity. It is an understatement to say that the estate zealously guards its right of publicity.

Once the property rights approach is accepted, descendibility and transferability naturally follow. Unsettling to the media is that the courts give no weight or mention to public uses of the persona of Elvis Presley. One court found that an Elvis impersonator violated the "King's" right of publicity and service mark by presenting the "Big El Show." By all accounts the excellent Elvis impersonator, Rob Russen, may have been too good. Under the right of publicity, the court said, only Elvis's estate has the right to commission live imitations. But of course the estate could not provide the real thing, an Elvis performance. The tort was created to protect a celebrity from having others take something only the celebrity can provide. In Russen, no reasonable audience member could have thought that defendant was really Elvis. The argument that Russen is somehow in competition with the estate is hard to swallow. In addition, the court shunted aside Russen's First Amendment arguments, saying that the show was not *informative*, only entertaining. While the "Big El Show" might have some value, this court concluded that some values are more protected than others.[140]

Much as in libel, right of publicity standards vary widely from state to state. But generally, all require a "taking" of a celebrity's persona for commercial gain. In some cases there is no commercial gain because the picture or attribute had already been used with consent. When a magazine published a photo from a movie of actress Ann-Margret partially clothed, she was unable to collect both because she is a public figure and because the rights belonged to the film owners. The court in addition seemed puzzled she'd complained after millions had seen the movie.[141] Clint Eastwood established his right to sue for the *National Enquirer*'s nondefamatory use of his name and photo on the front page and in television advertising at common law, but to recover under the California statute he would have to prove actual malice. The *Enquirer*'s claim of newsworthiness failed. The court said the statute had no news privilege but tracked libel law instead. The *Enquirer*'s argument that there was no portrayal of Eastwood as endorsing the publication was almost summarily dismissed.[142] Is this the kind of fact pattern the right of publicity was meant to apply to? Is Eastwood trying to protect the commercial value of his name or his reputation? Can the two be separated?

Just what constitutes an identifiable attribute that will be considered part of a person's right of publicity? Is it necessary that potential audience members will interpret the use as an endorsement? Those questions arose when Johnny Carson's "trademark" slogan was used in a company's name. The Sixth Circuit opinion is also an excellent review of the elements in common law right of publicity cases.

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140. *Estate of Presley v. Russen*, 513 F.Supp. 1339 (D.N.J. 1981).
141. *Ann-Margret v. High Society Magazine*, 6 Med.L.Rptr. 1774, 498 F.Supp. 401 (S.D.N.Y. 1980).
142. *Eastwood v. Superior Court*, 10 Med.L.Rptr. 1073, 198 Cal.Rptr. 342 (Cal.App. 1983).

CARSON v. HERE'S JOHNNY PORTABLE TOILETS, INC.

9 MED.L.RPTR. 1153, 698 F.2D 831 (6TH CIR. 1983).

BROWN, J.:

This case involves claims of unfair competition and invasion of the right of privacy and the right of publicity arising from appellee's adoption of a phrase generally associated with a popular entertainer.

Appellant, John W. Carson (Carson), is the host and star of "The Tonight Show," a well-known television program broadcast five nights a week by the National Broadcasting Company. Carson also appears as an entertainer in night clubs and theaters around the country. From the time he began hosting "The Tonight Show" in 1962, he has been introduced on the show each night with the phrase "Here's Johnny." This method of introduction was first used for Carson in 1957 when he hosted a daily television program for the American Broadcasting Company. The phrase "Here's Johnny" is generally associated with Carson by a substantial segment of the television viewing public. In 1967, Carson first authorized use of this phrase by a chain of restaurants called "Here's Johnny Restaurants." [The court recounts other Carson licensing ventures.]

Appellee, Here's Johnny Portable Toilets, Inc., is a Michigan corporation engaged in the business of renting and selling "Here's Johnny" portable toilets. Appellee's founder was aware at the time he formed the corporation that "Here's Johnny" was the introductory slogan for Carson on "The Tonight Show." He indicated that he coupled the phrase with a second one, "The World's Foremost Commodian," to make "a good play on a phrase."

Shortly after appellee went into business in 1976, appellants brought this action alleging unfair competition, trademark infringement under federal and state law, and invasion of privacy and publicity rights. They sought damages and an injunction prohibiting appellee's further use of the phrase "Here's Johnny" as a corporate name or in connection with the sale or rental of its portable toilets.

The [trial] court ordered the dismissal of the appellants' complaint. On the unfair competition claim, the court concluded that the appellants had failed to satisfy the "likelihood of confusion" test. On the right of privacy and right of publicity theories, the court held that these rights extend only to a "name or likeness," and "Here's Johnny" did not qualify.

* * *

Appellants' first claim alleges unfair competition from appellee's business activities in violation of §43(a) of the Lanham Act, 15 U.S.C. §1125(a) (1976), and of Michigan common law. The district court correctly noted that the test for equitable relief under both § 43(a) and Michigan common law is the "likelihood of confusion" standard.

* * *

In *Frisch's Restaurants* we approved the balancing of several factors in determining whether a likelihood of confusion exists among consumers of goods involved in a § 43(a) action. In that case we examined eight factors:

1. strength of the plaintiff's mark;
2. relatedness of the goods;
3. similarity of the marks;
4. evidence of actual confusion;
5. marketing channels used;
6. likely degree of purchaser care;
7. defendant's intent in selecting the mark;
8. likelihood of expansion of the product lines.

The district court first found that "Here's Johnny" was not such a strong mark that its use for other goods should be entirely foreclosed. 498 F.Supp. at 74. Although the appellee had intended to capitalize on the phrase popularized by Carson, the court concluded that appellee had not intended to deceive the public into believing Carson was connected with the product. *Id.* at 75. The court noted that there was little evidence of actual confusion and no evidence that appellee's use of the phrase had damaged appellants. For these reasons, the court determined that appellee's use of the phrase "Here's Johnny" did not present a likelihood of confusion, mistake, or deception. *Id.* at 75–77.

Our review of the record indicates that none of the district court's findings is clearly erroneous. Moreover, on the basis of these findings, we agree with the district court that the appellants have failed to establish a likelihood of confusion. The general concept underlying the likelihood of confusion is that the public believe that "the mark's owner *sponsored or otherwise approved* the use of the trademark."

* * *

The facts as found by the district court do not implicate such likelihood of confusion, and we affirm the district court on this issue.

The appellants also claim that the appellee's use of the phrase "Here's Johnny" violates the common law right of privacy and right of publicity. The confusion in this area of the law requires a brief analysis of the relationship between these two rights.

* * *

Dean Prosser's analysis has been a source of some confusion in the law. His first three types of the right of privacy generally protect the right "to be let alone," while the right of publicity protects the celebrity's pecuniary interest in the commercial exploitation of his identity. * * * Thus, the right of privacy and the right of publicity protect fundamentally different interests and must be analyzed separately.

We do not believe that Carson's claim that his right of privacy has been invaded is supported by the law or the facts. Apparently, the gist of this claim is that Carson is embarrassed by and considers it odious to be associated with the appellee's product. Clearly, the association does not appeal to Carson's sense of humor. But the facts here presented do not, it appears to us, amount to an invasion of any of the interests protected by the right of privacy.

* * *

The district court dismissed appellants' claim based on the right of publicity because appellee does not use Carson's name or likeness. 498 F.Supp. at 77. It held that it "would not be prudent to allow recovery for a right of publicity claim which does not more specifically identify Johnny Carson." 498 F.Supp. at 78. We believe that, on the contrary, the district court's concept of the right of publicity is too narrow. The right of publicity, as we have stated, is that a celebrity has a protected pecuniary interest in the commercial exploitation of his identity. If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his "name or likeness" is used. Carson's identity may be exploited even if his name, John W. Carson, or his picture is not used.

* * *

In *Ali v. Playgirl, Inc.*, 447 F.Supp. 723 (S.D.N.Y. 1978), Muhammad Ali, former heavyweight champion, sued Playgirl magazine under the New York "right of privacy" statute and also alleged a violation of his common law right of publicity. The magazine published a drawing of a nude, black male sitting on a stool in a corner of a boxing ring with hands taped and arms outstretched on the ropes. The district court concluded that Ali's right of publicity was invaded because the drawing was captioned "Mystery Man." The district court found that the identification of Ali was made certain because of an accompanying verse that identified the figure as "The Greatest." The district court took judicial notice of the fact that "Ali has regularly claimed that appellation for himself." *Id.* at 727.

In *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis.2d 379, 280 N.W.2d 129 (1979), the court held that the use by defendant of the name "Crazylegs" on a shaving gel for women violated plaintiff's right of publicity. Plaintiff, Elroy Hirsch, a famous football player, had been known by this nickname. The court said:

> The fact that the name, "Crazylegs," used by Johnson, was a nickname rather than Hirsch's actual name does not preclude a cause of action. All that is required is that the name clearly identify the wronged person. In the instant case, it is not disputed at this juncture of the case that the nickname identified the plaintiff Hirsch. It is argued that there were others who were known by the same name. This, however, does not vitiate the existence of a cause of action. It may, however, if sufficient proof were adduced, affect the quantum of damages should the jury impose liability or it might preclude liability altogether. Prosser points out "that a stage or other fictitious name can be so identified with the plaintiff that he is entitled to protection against its use." 49 Cal.L. Rev., *supra* at 404. He writes that it would be absurd to say that Samuel L. Clemens would have a cause of action if that name had been used in advertising, but he would not have one for the use of "Mark Twain." If a fictitious name is used in a context which tends to indicate that the name is that of the plaintiff, the factual case for identity is strengthened. Prosser, *supra* at 403., 280 N.W.2d at 137.

In this case, Earl Braxton, president and owner of Here's Johnny Portable Toilets, Inc., admitted that he knew that the phrase "Here's Johnny" had been used for years to introduce Carson. Moreover, in the opening statement in the district court, appellee's counsel stated:

> Now, we've stipulated in this case that the public tends to associate the words "Johnny Carson," the words "Here's Johnny" with plaintiff, John Carson and, Mr. Braxton, in his deposition, admitted that he knew that and probably absent that identification, he would not have chosen it.

That the "Here's Johnny" name was selected by Braxton because of its identification with Carson was

the clear inference from Braxton's testimony irrespective of such admission in the opening statement.

We therefore conclude that, applying the correct legal standards, appellants are entitled to judgment. The proof showed without question that appellee had appropriated Carson's identity in connection with its corporate name and its product.

* * *

It should be obvious from the majority opinion and the dissent that a celebrity's identity may be appropriated in various ways. It is our view that, under the existing authorities, a celebrity's legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes. We simply disagree that the authorities limit the right of publicity as contended by the dissent. It is not fatal to appellant's claim that appellee did not use his "name." Indeed, there would have been no violation of his right of publicity even if appellee had used his name, such as "J. William Carson Portable Toilet" or the "John William Carson Portable Toilet" or the "J. W. Carson Portable Toilet." The reason is that, though literally using appellant's "name," the appellee would not have appropriated Carson's identity as a celebrity. Here there was an appropriation of Carson's identity without using his "name."

* * *

The judgment of the district court is vacated and the case remanded for further proceedings consistent with this opinion.

COMMENT

The *Carson* and *Crowell* cases give a sense of how solicitous the courts have been to right of publicity claims. While the phrase concededly is identified with Carson, there is no proof of financial harm and no evidence that anyone confused the portable toilet company with Carson. Might the concern celebrities have about their attributes be similar to those of companies fearing that media use of trademarked names will render the terms generic? [143]

One characteristic the right of publicity retains in common with common law invasion of privacy is the notion of wrongful use or wrongful behavior. Plaintiffs Carson, Eastwood, and Presley seem more concerned with exclusive control than with financial harm. Using anyone's name or likeness is wrongful in the sense that it falsely implies assent. But the cases are not consistent in requiring proof that the typical audience member interpret the use as assent, an apparently critical element to establishing that a defendant is profiting from a celebrity.

Judge Kennedy's dissent in *Carson* was based largely on the false implication of assent argument:

* * *

> There is nothing in the record to suggest that "Here's Johnny" has any nexus to Johnny Carson other than being the introduction to his personal appearances. The phrase is not part of an identity that he created. In its content "Here's Johnny" is a very simple and common introduction. The content of the phrase neither originated with Johnny Carson nor is it confined to the world of entertainment. The phrase is not said by Johnny Carson, but said of him. Its association with him is derived, in large part, by the context in which it is said—generally by Ed McMahon in a drawn out and distinctive voice after the theme music to "The Tonight Show" is played, and immediately prior to Johnny Carson's own entrance. Appellee's use of the content "Here's Johnny," in light of its value as a double entendre, written on its product and corporate name, and therefore outside of the context in which it is associated with Johnny Carson, does little to rob Johnny Carson of something which is unique to him or a product of his own efforts.
>
> * * *
>
> The right of publicity, whether tied to name, likeness, achievements, identifying characteristics or actual performances, etc. conflicts with the economic and expressive interests of others.

* * *

Kennedy suggested in a footnote that the phrase may be more closely associated with McMahon than with Carson.

In a similar case, Guy Lombardo's common law claim for appropriation of his "public personality" as "Mr. New Year's Eve" was allowed. [144]

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143. See, Heneghan & Wamsley, *The Service Mark Alternative to the Right of Publicity: Estate of Presley v. Russen*, 2 Loyola Entertainment L.J. 113 (1982).

144. *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 2 Med.L.Rptr. 2321, 396 N.Y.S.2d 661 (N.Y.Sup.Ct., App.Div. 1977).

The greatest risk for the press and media generally is from those cases that have allowed actions or recovery despite plainly creative or newsworthy ventures. A Broadway musical's use in parody of the appearance and style of the Marx Brothers violated the deceased entertainers' right of publicity.[145] A First Amendment defense was allowed when comedian Pat Paulsen, a perennial gag candidate for president, found his picture being sold on campaign posters.[146] Similarly, a New York political activist's claim failed when he was satirized in print. The use of the public figure's identity was a fair one.[147]

By contrast, overt commercial uses are normally easy to spot—and therefore easy for the press and media to avoid. When a car company hired Bette Midler's former backup singer to imitate Midler as closely as possible on a song associated with Midler, it took little time to see the wrongful use.[148]

The issues regarding the right of publicity, as so much else in the law of privacy and related areas of the law, are in flux. The best advice for those who would use another's likeness or name is to be sure to get a release or be confident that the use is newsworthy. Some have suggested a federal right of publicity statute is needed.[149] Until such a statute is passed or the courts reach uniformity, it will be important to know local state law.

SEARCHING FOR MEDIA LIABILITY: EMOTIONAL DISTRESS, FORESEEABLE HARMS, AND OUTRAGEOUS BEHAVIORS

Resourceful plaintiffs, or more likely resourceful plaintiffs' lawyers, are always seeking new approaches to imposing liability upon the press. Recently numerous cases have been filed alleging either negligent or intentional infliction of emotional (mental) distress. A key to the cause of action is that, like private facts, liability hinges on the behavior and content of the press, not on truth or falsity.

Like privacy, infliction of mental distress protects individual well-being, and has been adopted slowly as a common law tort against the media. Generally, negligent infliction requires that the defendant have published something where danger of harm is apparent.[150] For example, it would be reasonable to foresee that publication of names and pictures of undercover espionage agents places them at risk. The infliction of distress occurs when the risk was recognized and information published anyway, or when the risk was not recognized but was of a nature that it should have been. The latter was the basis of a claim by a woman who had been assaulted. When the local newspaper obtained her address from the police and published it with the suspect still at large, she claimed they put her at risk, and sued both.

HYDE v. CITY OF COLUMBIA

637 S.W.2D 251 (MO.APP. 1982).

SHANGLER, Presiding J.:

The plaintiff Hyde sued the City of Columbia for the negligent disclosure of her name and address by the city police to reporter Brown of the *Columbia Daily Tribune* and to reporter Potter of the *Columbia Missourian* and for the negligent publication of that information subsequently by the newspapers. The petition alleges that on August 20, 1980, after midnight, the plaintiff was abducted and kidnapped by an unknown male assailant but escaped from his car; that she made a full report of that incident to the City of Columbia Police Department; that on that date, the police, without knowledge or authority of the plaintiff, released her name and address to the reporters for publication when the police knew the assailant was still at large; that on that very day the *Columbia Daily Tribune* published that information and on the next day, August 21, 1980, the *Columbia Missourian* published that information with the knowledge that the assailant was not in custody. The petition then alleges that the release and publication of her name and address identified the plaintiff to the unknown assailant who thereafter terrorized her on seven different occasions. The petition joined the reporters Brown and Potter, the newspapers *Columbia Daily Tribune* and *Columbia Missourian* and the City of Columbia as defendants. The prayer was for actual damages.

145. *Groucho Marx Productions v. Day and Night Co.*, 7 Med.L.Rptr. 2030, 523 F.Supp. 485 (S.D.N.Y. 1981).
146. *Paulsen v. Personality Posters*, 299 N.Y.S.2d 501 (N.Y.Sup.Ct. 1968).
147. *Velez v. VV Publishing*, 14 Med.L.Rptr. 2290, 524 N.Y.S.2d 186 (N.Y.Sup.Ct., App.Div. 1988).
148. *Midler v. Ford Motor Co.*, 15 Med.L.Rptr. 1620, 849 F.2d 460 (9th Cir. 1988).
149. Note, *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 Southern Calif. L.Rev. 1179 (1987).
150. Drechsel, *Mass Media and Negligent Infliction of Emotional Distress*, 62 Journalism Quarterly 523 (1985).

The several defendants moved to dismiss the petition on the general ground that the allegations failed to state a claim for relief. The memorandum of reporter Brown and newspaper *Columbia Daily Tribune* explicated the grounds more specifically: "The plaintiff's petition fails to state a claim against these defendants either as an action for libel, or for the invasion of privacy." The memorandum of the defendant City of Columbia explicated that the petition amounted to neither a claim of outrageous conduct nor of an invasion of privacy and that the information disclosed to the press was, in any event, a public record under §§ 610.010 and 610.025, so the disclosure was not actionable. The motions were sustained and the court dismissed the petition with prejudice. The plaintiff appeals the judgment, but only as to the defendants City of Columbia, reporter Brown and newspaper *Columbia Daily Tribune.*

Actionable negligence encompasses essential proofs: a duty by the defendant to protect the plaintiff from harm, neglect of that duty, and injury to the plaintiff from that neglect. *Stevens v. Wetterau Foods, Inc.*, 501 S.W.2d 494, 498[7, 8] (Mo.App. 1973). To plead the ultimate fact of actionable negligence [and hence a substantive remedy well-stated], the petitioner must describe the duty owed by the defendant, the breach the petitioner charges, and the injury which results. *Einhaus v. O. Ames Co.*, 547 S.W.2d 821[4, 5] (Mo.App. 1977).

The pleadings enlarged by the interrogatory evidence, understood in legal effect, posit that the plaintiff reported the kidnapping and assault to the police as an official account of a crime and not for publication, and that the municipality owed the victim a duty not to disclose her identity and address to the reporter for publication without prior consent—and so protect her from the foreseeable risk of intentional harm by the assailant, when the police knew the assailant was still at large and the practice of disclosure was otherwise forbidden in the circumstances by internal policy, but that the municipality breached the duty and the plaintiff suffered emotional harm from the intentional threats of imminent death and injury proximately caused by the negligent conduct of the City of Columbia. The pleadings understood in legal effect posit also that the defendants reporter and newspaper owed a duty to the victim not to publish her identity and address and so protect her from the foreseeable risk of intentional harm by the assailant, when they knew the assailant was still at large and the practice of publication was otherwise forbidden by internal policy, but that reporter Brown and newspaper Columbia Daily Tribune breached the duty and the plaintiff suffered emotional harm from the intentional threats of imminent death and injury proximately caused by the negligent conduct of the reporter and newspaper.

The several defendants contend, nevertheless, that these averments amount to no duty the law fixes upon them, and so none they are bound to observe. The newspaper defendants contend moreover that such a duty were onerous to the free speech and free press the First Amendment protects, and so not a valid limitation to that exercise. The several defendants argue also that, in any event, a crime against persons report is a *public record* under the Sunshine Law [§§ 610.010 to 610.120], thus, to give publicity to information already public can engender no liability.

In negligence jurisprudence, whether a duty exists presents a question of law. Restatement (Second) of Torts § 4 (1965). When the existence of a duty to use due care rests on a relationship between persons, the law has simply placed the actor under obligation for the benefit of another person—the plaintiff—in the given circumstances. Or, more simply, the law has determined that "the interest of the plaintiff which has suffered invasion [is] entitled to legal protection at the hands of the defendant." Prosser, *The Law of Torts*, § 37, p. 206 and § 53 (4th ed. 1971). Thus, essential to liability for negligence is a relationship the law recognizes as the basis of a duty of care between the inflictor of injury and the person injured. * * * The judicial determination of the existence of a duty rests on sound public policy as derived from a calculus of factors: among them, the social consensus that the interest is worthy of protection; the foreseeability of harm and the degree of certainty that the protected person suffered injury; moral blame society attaches to the conduct; the prevention of future harm; considerations of cost and ability to spread the risk of loss; the economic burden upon the actor and the community—and others. * * * To these determinants we add that, when the actor is a public agency [or quasi-public institution, such as the press], the role the law assigns to that function.

* * *

Our law imposes the duty of an actor in some circumstances to foresee that the misconduct of a third person will result in injury to another [the

plaintiff] and imposes liability for failure to protect against that risk of harm. * * * *Scheibel v. Hillis*, 531 S.W.2d 285 (Mo. banc 1976) expounds the standard [a paraphrase of Restatement (Second) of Torts § 449 (1965)], l.c. 288[9]:

> [I]f the foreseeable likelihood that a third person may act in a particular manner is one of the hazards which makes a person negligent, such an act of a third party, whether innocent, negligent, intentionally tortious or criminal, does not prevent that person from being liable for the harm caused thereby.

* * * Thus, conduct may be negligent solely because the actor should have recognized that it would expose the person of another to an unreasonable risk of criminal aggression. Restatement (Second) of Torts § 448, comment c (1965). In certain situations, the law expects a reasonable actor to anticipate and protect the plaintiff against the intentional or criminal misconduct of a third person whom the actor has given occasion for association with the plaintiff, when the actor knows or should know that the third person is "peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity for temptation for such misconduct."

* * *

The integral Law opens to the public—even without an interest to vindicate—the meetings and records of those entrusted with the public business. * * * The information disclosed by the municipal police department to the reporter and published by the newspaper was not from a record of arrest, but from a criminal investigation record. The enumerations of § 610.025 do *not* exempt from disclosure the investigation records of a law enforcement agency. [In that respect, our Conduct of Public Business [Sunshine] Law stands alone and singular from all other such enactments.] Thus, absent an intention otherwise discernible from the statutory purpose as aided by construction of the text, the records of the criminal investigation process up to the event of arrest are public records and altogether unprotected from disclosure on demand.

* * *

The averments of the petition given the most favorable intendment as a negligence cause of action fall within these statements of principle and incidences of tort liability. The allegations by the female plaintiff that she was abducted by an unknown assailant, made escape, then gave official report of the crime [and description of the assailant] to the municipal police, the release of the name and address of the victim by the police to the reporter without her consent and with knowledge that the assailant was still at large, and the publication of that information by the newspaper also with that knowledge, describe conditions which posed an especial temptation and opportunity to the third-party assailant for intentional and criminal aggression upon the victim to her injury, and so plead a prima facie breach of duty—unless, as the municipality and newspaper contend, the information was a *public record* under the Sunshine Law and otherwise protected by the First Amendment. The press enjoys no constitutional right to police records. * * * The right of the defendant news medium to *have* the name and address of the victim from the municipal police, therefore, depends upon whether that information was a *public record*.

* * * Whatever vestige of a common law interest to enable inspection lingered in §§ 109.180 and 109.190 was swept away by the enactment of the Sunshine Law [§§ 610.010 through 610.120]. That chapter defines a *public record* as *any record retained by or of any public governmental body* [§ 610.010(4)] and then directs that *the public records shall be open to the public for inspection and duplication* [§ 610.015].

* * *

To construe the Sunshine Law to open *all* criminal investigation information to *anyone* with a request subserves neither the public safety policy of our state nor the personal security of a victim—but rather, courts constitutional violations of the right of privacy of a witness or other citizen unwittingly drawn into the criminal investigation process as well as the right of an accused to a fair trial. Such a construction leads to the absurdity [adroitly drawn by the defendants] that an assailant unknown as such to the authorities, from whom the victim has escaped, need simply walk into the police station, demand name and address or other personal information—without possibility of lawful refusal, so as to intimidate the victim as a witness or commit other injury. * * *

* * *

To avoid an absurd—even unlawful—application of the statute as written, we determine that the name

and address of a victim of crime who can identify an assailant not yet in custody is not a *public record* under the Sunshine Law.

In the absence of an obligation imposed by the statute, the disclosure of the name and address of the victim-plaintiff by the municipal police department to the reporter was gratuitous. The disclosure served no essential criminal investigation role of the police, but rather was a foreseeable impediment to that function by the encouragement of an obstruction of justice by the assailant. The disclosure was also a threat to the very personal safety of the victim. The deliberate practice of the municipal police department to withhold information of that ilk from the general public attests to the fact that the risk of injury to the victim-plaintiff from disclosure was foreseeable.

* * *

The defendant reporter and newspaper contend that the report of the abduction by the victim to the police—facts pleaded in the petition—was her consent to the preparation of the formal crime report and its subsequent publication by the news medium. That argument disregards altogether the duty of citizenship to report criminal conduct—to raise a "hue and cry" of felony to the authorities. * * *

That the victim-name-and-address information kept by the municipal police department was by law confidential does not mean that once disclosed to a newspaper it retained its confidential character. Nor do allegations which suffice to plead a cause of action against the official keeper for the negligent release of that confidential record *ipso facto* suffice as a tort cause of action against a news medium for publication of that information. * * *

The defendants reporter and newspaper contend that the report of crime was a matter of legitimate public concern and interest so that the adjudication of tort liability for the publication of that information were an impermissible interference with the exercise of free speech and of a free press in violation of the First Amendment. The defendants develop argument in terms of *newsworthiness* of the publication and the status of the victim-plaintiff as a subject of public interest. They apply these considerations and commingle them with the invasion of privacy, outrageous conduct and defamation torts. The petition, however, pleads negligence—a tort which protects an interest distinctive from the other torts. The First Amendment protects a news medium from tortious publication to the extent that the interest in free speech and free press overbalances the governmental interest the tort protects.

* * *

New York Times v. Sullivan, held that the First Amendment protects a newspaper from liability for defamatory publications about the official conduct of a public official unless done with actual malice * * * with a knowing falsity or reckless disregard for the truth. That decision rested on the rationale that the First Amendment protected erroneous speech exercised in good faith more than the personal reputation of a public official—and, cognately, that the threat of large damage awards unduly inhibits open debate on public issues.

* * *

Gertz repudiated the public interest-newsworthy test [the principle the news media defendants assert to avoid liability to the victim-plaintiff] in actions for defamation and balanced, rather, the free speech free press values against the cogent state interests in the compensation of private injury to reputation. In that analysis, the Court acknowledged the unique role of the institutional press under the constitution.

* * *

It is thus the public figure—private person dichotomy [and not the newsworthiness of the conduct] which determines between a public and private defamation plaintiff—and hence whether the stricture of the *New York Times* constitutional privilege applies. * * *

> *The state may not impose liability without fault* [the usual common law rule] against the news media; a plaintiff must prove *at least negligence* against the publisher. [*Gertz*, l.c. 347, 94 S.Ct. 3010] The recovery is limited to compensation for actual damages and compensation for a tort injury. [*Gertz*, l.c. 348, 94 S.Ct. 3011]
>
> A recovery for punitive damages is allowed *only* * * * upon proof of * * * the *New York Times* knowing or reckless falsity standard of liability. [*Gertz*, l.c. 350, 94 S.Ct. 3012]

* * *

The cause of action the victim-plaintiff asserts against the news medium defendants is for *negligence*, and not on any theory of liability without fault. The events the petition describes are of a private person become unwilling victim of a crime—

not of one who has injected her person into a public controversy. The damages she pleads are for actual loss. In sum, the petition comes validly within the culminated constitutional balance struck by *Gertz* which allows a private redress against a newspaper for a negligent publication of information on a theory of fault free from the proof constraints of *New York Times*. The question remains then whether under the negligence law of our state the petition pleads a cause of action.

The contentions of the several defendants confront the petition, variously, as a cause of action for defamation, invasion of privacy, and for outrageous conduct. Their constitutional, as well as local law, arguments recite principles apt to defamation and privacy, but not negligence cases. The defendants assume that each of those remedies protects the same private interest. They do not. * * * The negligence remedy extends to protect against invasion of bodily security even to life itself.

* * *

Just as the law does not extend privilege to protect a news medium against the defamatory or invasion of privacy publication of information of trivial public interest, so the law does not impose a duty of care to foresee an injury to another on a slight probability alone, but only on "some probability of sufficient moment to induce the reasonable mind to take precautions which would avoid it."

* * *

We have determined that the name and address of the victim-plaintiff prior to the arrest of the assailant was not an official report under the Sunshine Law and so was not a privileged publication under the tenor of that statute or the rules of the common law. That view accords with the rationale of our decisions, the statement of principle in Restatement (Second) of Torts § 611 (1977) and other sound authority. *Cianci v. New York Times Publishing Company*, 639 F.2d 54, 70 (2d Cir. 1980); *Lancour v. Herald & Globe Ass'n.*, 111 Vt. 371, 17 A.2d 253 (1941). We determine also that the name and address of an abduction witness who can identify an assailant still at large before arrest is a matter of such trivial public concern compared with the high probability of risk to the victim by their publication, that a news medium owes a duty in such circumstances to use reasonable care not to give likely occasion for a third party [assailant still at large] to do injury to the plaintiff by the publication. That duty derives as an "expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." Prosser, *The Law of Torts*, 325–6 (4th ed. 1971). It derives from a balance of interests between the public right to know and the individual right to personal security—between the social value of the right the press advances and the social value of the right of the individual at risk. Restatement (Second) of Torts §§ 291–293 (1965). It derives from the social consensus that common decency considers such information of insignificant public importance compared to the injury likely to be done by the exposure. * * *

The petition does not contest the truth of the publication nor assail an unpopular opinion. It does not tend the medium to that course of self-censorship which offends a free press, but engenders an attitude of due care for the safety of one likely to be harmed from the reportage of trivial information. To delete the name and address of the abduction victim from the news medium publication would impair no significant news function nor public interest in the reportage of crime and apprehension of criminals. To report that information when the assailant can be identified—as the news publication clearly informs—rather, encourages not only a likelihood of injury but of additional crime.

The petition of the victim-plaintiff taken at most favorable intendment states a cause of action in negligence against the news medium defendants free from the proof constraints of *New York Times v. Sullivan* as well as any constraints of common law privilege.

* * *

The municipal defendant contends finally that—a legal duty to the plaintiff and a breach of that duty assumed—nevertheless the petition does not allege a physical injury and so does not state a cause of action in negligence. The argument goes that "absent physical injury or malicious, wilfull, wanton and inhuman conduct" our law does not permit recovery for mental distress—the only injury the petition pleads.

The petition is in negligence. It is the likelihood of injury to another that gives rise to the duty to exercise due care. The test of negligence liability is foreseeability: that the actor knows or has reason to foresee that the act involves an unreasonable risk of injury to another but fails to protect against that hazard.

* * *

These pleadings and facts of discovery, at best intendment, allow inference that the past conduct, reported character and tendency of the third-person assailant to violence, were known or reasonably knowable to the several defendants so that it was reasonably foreseeable that the publication of the name and address of the victim, while the assailant was still at large, was a temptation to that third person to inflict an intentional harm upon the victim-plaintiff—a foreseeable risk the several defendants had a duty to prevent.

COMMENT

The court seemed to be influenced by evidence of the police practice of not ordinarily giving out addresses. The practice, the court said, "attests to the fact that the risk of injury to the victim-plaintiff from disclosure was foreseeable." While that may be true of the risk of injury, it does not explain how the newspaper could have or should have assessed the risk of mental distress.

The court refused to apply libel law's qualified privilege to report on matters in the public interest in this context. The privilege applies, the court said, "only as to information which affects a *sufficiently important public interest*." Why was not truth or newsworthiness a defense?

The *Hyde* case has understandably worried many. It is not easy to foresee the limits of its rationale. Can any information which carries the potential of causing harm now be the subject of a negligent infliction of mental distress action? For example, can the press harm people by printing truthful but defamatory stories? Is injured reputation the sort of harm the *Hyde* court has in mind?

While the newspaper's decision to publish the address and name certainly appears unwise, is the corollary of having judges and juries address these issues wiser? Such editorial judgments have traditionally been the province of ethics, not law. Under the *Sullivan* approach used in libel and much of privacy, the law will countenance much that is questionable, tacky, even undesirable. Does *Hyde* signal a judicial willingness to enforce social responsibility upon the press? [151]

The courts have certainly been busy with mental and emotional distress claims. Few cases have succeeded. Some courts see the cause of action as duplicative of privacy or libel and tell plaintiffs to bring those suits instead. [152] Several cases have involved erroneous obituaries or telephone listings, with decisions for defendants. [153] One plaintiff failed after charging that an inadequate retraction constituted infliction. [154] But at the same time specific cases fail, many states have nonetheless recognized the cause of action as it applies to the media. The difficult part for plaintiffs has been foreseeability.

Intentional infliction requires proof of intent, normally by showing a pattern or course of behavior. In addition, the harmful material generally must be aimed directly at the person claiming distress. In common law cases not involving media, four factors were identified with proving intentional infliction. The defendant's conduct must be extreme and outrageous; the defendant must have acted with intent or recklessness; the defendant's conduct must have been the proximate cause of the distress; and, the distress must be severe. [155] Most of the elements were in place when Jerry Falwell sued Larry Flynt for libel, invasion of privacy, and intentional infliction of emotional distress over a parody that portrayed Falwell as a drunkard who was introduced to sex by his mother. There was no doubt about intent—Flynt stood on the steps of the Supreme Court to tell reporters he had aimed to cause Falwell distress. By the time the case reached the high court, only the infliction claim remained.

The Supreme Court's opinion in *Hustler Magazine, Inc. v. Falwell*, 14 Med.L.Rptr. 2281, 108 S.Ct. 876 (1988), see this text, p. 261, makes it plain

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151. See Drechsel, *The Legal Risks of Social Responsibility*, paper presented to Law Division, Association for Education in Journalism and Mass Communication convention, San Antonio, Texas, August 1987; Forer, *Autonomy and Responsibility: A Search for New Bases of Legal Rights and Obligations*, 1986 Utah L.Rev. 665 (1986); Barron, *The Search for Media Accountability*, 19 Suffolk U.L.Rev. 789 (1985); Weingarten, *Tort Liability for Nonlibelous Negligent Statements: First Amendment Considerations*, 93 Yale L.J. 744 (1983).

152. *Rutledge v. Phoenix Newspapers*, 12 Med.L.Rptr. 1969, 715 P.2d 1243 (Az.App. 1986); *Dworkin v. Hustler*, 14 Med.L.Rptr. 1673, 668 F.Supp. 1408 (C.D.Cal. 1987); *Smith v. Dameron*, 14 Med.L.Rptr. 1879 (Va.Cir.Ct. 1987).

153. *Decker v. Princeton Packet*, 15 Med.L.Rptr. 1775, 541 A.2d 292 (N.J.Super.Ct., App.Div. 1988) (obituary); *Rubinstein v. New York Post*, 11 Med.L.Rptr. 1329, 488 N.Y.S.2d 331 (N.Y.Sup.Ct. 1985) (obituary); *Tatta v. News Group Publications*, 12 Med.L.Rptr. 2318 (N.Y.Sup.Ct. 1986) (phone number listed in advertisement for a pay-per-call sex talk service).

154. *Beasley v. Hearst Corp.*, 11 Med.L.Rptr. 2067 (Cal.Super.Ct. 1985).

155. *Restatement (Second) of Torts* § 46(1) (1977).

that parody or satire of public figures is unlikely to result in liability. But the Court's holding implies that imposing liability will be easier for private figures:

> We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

The Court applies a libel test to a case where truth or falsity is not the issue. It had already been decided that no reasonable reader would construe the parody as a statement of fact. So a test focusing on falsity seems misplaced. Why didn't the Court simply say that humor was absolutely protected? Perhaps it is willing to see how the tort develops in the lower courts. Based on *Falwell*, intentional infliction of emotional distress, like false light privacy before it, seems to be on its way to becoming a hybrid tort.

Closely related to negligent or intentional infliction are claims that media content led to physical injury. In the past, such cases have usually failed. When teens committed suicide after listening to heavy metal rock music[156] and a child was injured trying to duplicate a trick from the Mickey Mouse Club,[157] they were barred from suit on First Amendment grounds. Although plaintiffs have not prevailed, again largely on the grounds that it was not reasonable to expect that defendants would have foreseen risks to specific plaintiffs, scholarly comment seems to favor recovery.[158]

When murder is the risk, attention gets focused. *Soldier of Fortune* magazine, a specialized publication for self-styled mercenary soldiers, lost twice in two separate cases in its attempts for summary judgment. In both cases, plaintiffs claimed that the magazine ran ads promoting murderers for hire. In the first case, the murder was attempted but failed,[159] in the second the victim was murdered.[160] The parties dispute whether the language of the advertisements clearly enough solicits contracts for murder to have placed the magazine on notice of the risk. Normally, publishers have no duty to investigate the contents of advertisements. If the courts subsequently adopt a rule that ads must be investigated if the risk of harm is apparent, the press will have another avenue to liability to deal with. Does the argument that extreme risks justify imposing a standard of reasonable inspection seem persuasive?

Other causes of action, including *outrage*, and even *conspiracy* under federal civil rights laws, have been tried by plaintiffs seeking to impose liability on the media. These alternative actions have failed—for now. Modern tort law development has focused to a significant extent on preventing harms and on spreading the costs of injuries.[161] Perhaps recent developments in media liability for nondefamatory content are part of that trend.

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156. *McCollum v.* CBS, 15 Med.L.Rptr. 2001, 202 Cal.App. 3d 989, 249 Cal.Rptr. 187, (1988); but see, *Judas Priest v. Nevada District Court*, 15 Med.L.Rptr. 2010 (Nev. 1988).

157. *Walt Disney Productions, Inc. v. Shannon*, 276 S.E.2d 580 (Ga. 1981).

158. Dee, *Media Accountability for Real-Life Violence: A Case of Negligence or Free Speech?*, 37 J. of Communication 106 (1988).

159. *Norwood v. Soldier of Fortune Magazine*, 13 Med.L.Rptr. 2025, 651 F.Supp. 1397 (W.D.Ark. 1987).

160. *Eimann v. Soldier of Fortune*, 15 Med.L.Rptr. 1026, 680 F.Supp. 863 (S.D.Tex. 1988).

161. Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Calif. L.Rev. 772 (1985).

FOUR

Journalist's Privilege

IS THERE A CONSTITUTIONAL OR COMMON LAW PRIVILEGE TO PROTECT NOTES, TAPES, AND THE IDENTITIES OF SOURCES?

The acceptance of a privilege for reporters to withhold the names of sources or to refuse to provide notes and materials used in preparing news stories was high on the media's agenda of journalism law issues in the 1970s and early 1980s. Journalists argued that safeguarding identities of sources was essential to effective newsgathering. They claimed, and continue to claim, that the privilege is needed to ensure the flow of vital information to the public. Refusal to recognize the privilege would result in a "chill" on the newsgathering process.

Chill occurs when sources who might otherwise give information to reporters refuse to do so because their identities or information may not remain confidential. It also occurs when journalists fearing reprisals do not publish what they otherwise would. Calls for recognition of the privilege are not new, having been made since the mid-1850s. The practice of using anonymous sources itself began in the early years of the nation.

Rapid increases in the number of subpoenas issued against journalists and news organizations in the late 1960s and early 1970s gave urgency to the call for privilege.[1] Most subpoenas at that time derived from criminal proceedings and grand jury investigations. The subpoena explosion coincided with a growth in the role of investigative reporting in American journalism and, later, with the Watergate scandal.

However sound the privilege appeared to reporters, it is directly opposed by the legal system's distaste for evidentiary privileges. Traditionally, "the public has a right to every man's evidence."[2] The tradition is based on the belief that society is best served by requiring every individual to testify to relevant facts on issues being investigated or litigated.[3] Unless covered by a specific statutory or other exception to the general requirement of testifying, one must appear and answer questions when subpoenaed or otherwise called.

A number of privileges have long been accepted, but a privilege for reporters and journalists is not among them. Traditionally, the common law exempted compelled testimony concerning a lawyer-client relationship. Relationships between husbands

1. Osborn, *The Reporter's Confidentiality Privilege: Examining the Empirical Evidence After a Decade of Subpoenas*, 17 Columbia Human Rights L.Rev. 57, 59–60 (1985); Note, *The Case for a Federal Shield Law*, 24 U.C.L.A. L.Rev. 160, 162–164 (1976).
2. Wigmore, *Evidence*, § 2192, at 70 (McNaughton rev. ed. 1961).
3. *United States v. Bryan*, 339 U.S. 323, 331 (1950).

and wives, priests and penitents, and doctors and patients were accorded a similar privilege. These privileges entered our legal system through the common law but are now usually covered by state and federal statutes.

A number of other privileges have been recognized in some jurisdictions, including relationships between accountants, architects, and their clients. Even government informers have enjoyed anonymity unless their identities are needed to determine guilt or innocence.[4] Limited privilege has also been granted against disclosure of religious beliefs, political votes, trade secrets, state secrets, and other categories of personal or official information. Even those privileges provided by statute, however, are subject to a judicial rule that any privilege must be interpreted as narrowly as possible,[5] to keep exceptions at a minimum.

Similar recognition of journalists' claims for a privilege to protect the identities of sources and material such as unpublished notes, tapes, and photographs has been slower to emerge.

Massachusetts, for example, has been more resistant than most states to a privilege for reporters. In 1982, when Paul Corsetti of the *Boston Herald American* refused to testify in court about what an identified source told him in a telephone conversation, he was sentenced to three months in jail for criminal contempt. Corsetti's source had implicated himself in a murder. The Massachusetts Supreme Judicial Court (that state's highest court) upheld the contempt order.[6] Corsetti ultimately served only eight days in jail as the case wound its way through the courts.

The Massachusetts court rejected both Corsetti's claims for a constitutional and common law privilege to refuse to testify. But the court implied that in some circumstances it might recognize a privilege:

> Where the source is disclosed and the testimony sought from the reporter concerns information already made public, the [s]tate's interest in the use of that information overrides the reporter's claim that the use of that information should be restricted. This is not a case where the Commonwealth has used a reporter to obtain an indictment or to do its investigative work.

The court reflects a judicial willingness to balance what it sees as the needs of justice against the reporter's perception of what it takes to serve the public's informational needs.

In *Sinnott v. Boston Retirement Board*, 15 Med.L.Rptr. 1608, 524 N.E.2d 100 (Mass. 1988), the same Massachusetts court upheld a trial judge's decision to deny a motion that would have compelled a nonparty reporter to disclose confidential sources. Richard Sinnott filed a civil action against various city officials after the contents of his application for a disability pension had been disclosed in a *Boston Globe* story written by reporter Charles Radin. Sinnott, according to the article, attributed his disability to the emotional effects of having acted as "city censor" at two rock concerts, among other things. A lone appeals court judge had entered a judgment of civil contempt against Radin. Radin's article specifically noted that the information was "shared with a *Globe* reporter by City Hall sources." Characterizing the issue as simply one of whether the trial judge had abused his discretion in supervising discovery, the court concluded:

> It is well settled that, in supervising discovery, a presiding judge is "obliged to consider the effect that compelled discovery would have on the 'values protected by the First Amendment [even] though * * * entitled to no constitutional privilege.' " * * * [T]he critical inquiry, *once there is "some showing that the asserted damage to the free flow of information is more than speculative"* * * * requires "a balancing between the public interest in every person's evidence and the public interest in protecting the free flow of information." (Emphasis added.)

The court reviewed the trial judge's balancing of the interests and concluded that denial of the motion was appropriate because Sinnott had not exhausted potential alternative sources before seeking Radin's sources. While the Supreme Judicial Court protested that it had not previously recognized and was not now recognizing a special privilege for journalists, it nonetheless prevented disclosure of sources for reasons that would not apply to "every person," using a variety of legal bases.

The disingenuous Massachusetts approach is not unusual. Flat assertions of absolute privilege on either constitutional or common law grounds have generally been rejected. Common law is an awkward device for creation of evidentiary privileges at a time

4. *Roviaro v. United States*, 353 U.S. 53 (1957).
5. *United States v. Nixon*, 418 U.S. 683 (1974); E. Cleary, *McCormick on Evidence* §§ 72–77 (2d. ed. 1972).
6. *Massachusetts v. Corsetti*, 8 Med.L.Rptr. 2113, 438 N.E.2d 805 (Mass. 1982).

when most are statutory. And the federal Constitution by its terms extends no such privilege beyond the Fifth Amendment's provision against self-incrimination. Developments in Massachusetts and other states are a result of a direct invitation by the United States Supreme Court.

THE ENIGMATIC *BRANZBURG* CASE

In 1972, a divided Court in *Branzburg v. Hayes*, 1 Med.L.Rptr. 2617, 408 U.S. 665 (1972), struck the balance in favor of requiring reporters to testify when called. The Court, recognizing a duty to testify that covers even the president of the United States, refused to find either an absolute or a qualified privilege in the First Amendment that protects reporters when called to testify before a grand jury.

A minority of four justices vigorously pressed the case for privilege. Justice Potter Stewart modified his position from a 1958 case in which Marie Torre, a columnist for the *New York Herald Tribune*, went to jail in spite of her then-novel First Amendment justification for refusing to name a source. The source, who remained unidentified, was responsible for a statement that provoked Judy Garland into filing a libel suit against CBS. Stewart, then a circuit judge, held for a unanimous court that the duty to testify in court had roots as deep as the free press guarantee. The question asked of Torre, the court said, *went to the heart of the plaintiff's claim*, and there were no alternate sources.

"The right to sue and defend in the courts," said Stewart, "is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." The suggestion is that balancing in these kinds of cases is possible. *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), cert. den. 358 U.S. 910 (1958).

In *Branzburg*, the Court considered three appeals. All three involved reporters who were called to testify before grand juries. Paul Branzburg, a reporter for the *Louisville Courier-Journal*, had written a story in 1969 describing his observations of marijuana being processed into hashish. He promised confidentiality as a condition of being allowed to observe. The published story noted the confidentiality promise. Branzburg was subpoenaed by the county grand jury, appeared, but refused to answer when asked to identify his sources. He based his refusal on Kentucky's reporters' privilege statute, the First Amendment, and the Kentucky constitution. The state court said that the constitutional and statutory arguments did not permit a reporter to refuse to testify about events that had been personally observed. *Branzburg v. Pound*, 461 S.W.2d 345 (Ky.App. 1970).

A grand jury sought Branzburg's testimony a second time after a January 1971 story on drug use in Frankfort, Kentucky. Part of the report was based on information from sources also promised anonymity. Branzburg moved to quash the grand jury subpoena. He did obtain an order protecting him from revealing "confidential associations, sources, or information," but was told to testify concerning what he had witnessed. He refused to appear, and the court of appeals again rejected his privilege arguments.

Paul Pappas, a reporter for television station WTEV in New Bedford, Massachusetts, reported on civil disorders there. He planned to cover a Black Panther news conference, but the group was initially distrustful. The militant Blank Panthers were believed by many officials to be planning guerrilla warfare against white society. Pappas was allowed to enter the group's headquarters on condition that he not disclose anything he saw or heard. He prepared no story based on the visit. Later he was called by the county grand jury. He appeared but refused to answer questions about what had taken place, claiming a privilege based on the First Amendment. A second summons was served, and Pappas this time refused even to appear. The Massachusetts Supreme Judicial Court denied Pappas's motion to quash, emphasizing the need for everyone's testimony. The claim that lack of privilege would chill newsgathering was deemed "indirect, theoretical, and uncertain." *In re Pappas*, 266 N.E.2d 297 (Mass. 1971).

Earl Caldwell, West Coast bureau chief for the *New York Times*, was in California also covering the Black Panthers. He received a subpoena *duces tecum* ordering him both to appear before a federal grand jury and to bring his notes, tape-recorded interviews, and other materials. Caldwell and his attorneys negotiated a continuance with federal government attorneys. A second subpoena ordered Caldwell to appear and testify. He moved to quash, arguing that appearing in secret before the grand jury would destroy his working relationship with sources among the Black Panthers. A federal district court issued a protective order preventing disclosure of sources and materials. *Application of Caldwell*, 311 F.Supp. 358 (N.D.Cal. 1970). The grand jury term expired.

A new grand jury was convened, and a third subpoena was issued to Caldwell. This time Caldwell's motion to quash was denied, and he was found in

contempt. The Ninth Circuit reversed. Viewing the issue as whether Caldwell was required to appear before the grand jury at all, the court first agreed that the First Amendment provided a qualified testimonial privilege to journalists. The court accepted Caldwell's arguments that compelled testimony would deter informants and cause him to censor his writings. The court held that Caldwell was privileged to withhold his testimony unless there were compelling reasons for it. The Ninth Circuit began to fashion a three-part test to balance interests: (1) relevance, (2) lack of alternate sources, and (3) compelling public need. The court also determined there was little need for Caldwell to appear before the grand jury since there was nothing he could testify to that had not already been made public in his news stories. *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970). The three-part test would reappear a year later in Alexander Bickel's oral arguments before the Supreme Court on the *New York Times*'s behalf in *Branzburg*.

The Ninth Circuit had delivered what ultimately would become a key decision in the realm of journalist's privilege. The court declared:

> To convert news gatherers into Department of Justice investigators is to invade the autonomy of the press by imposing a governmental function upon them. To do so where the result is to diminish their future capacity as news gatherers is destructive of their public function. To accomplish this where it has not been shown to be essential to the Grand Jury inquiry simply cannot be justified in the public interest. Further it is not unreasonable to expect journalists everywhere to temper their reporting so as to reduce the probability that they will be required to submit to interrogation. The First Amendment guards against governmental action that induces self-censorship.

The stage was set for a landmark decision.

BRANZBURG v. HAYES

408 U.S. 665, 92 S.CT. 2646, 33 L.ED.2D 626 (1972).

[EDITORIAL NOTE Certiorari was granted to review judgment of the United States Court of Appeals for the Ninth Circuit, upholding refusal of a newsman to appear and testify before a grand jury with respect to confidential sources, and judgments of the Court of Appeals of Kentucky, and the Supreme Judicial Court of Massachusetts, rejecting claimed rights of newsmen to refuse to testify before grand juries with respect to confidential sources. The Supreme Court, per Justice White, held that requiring journalists to appear and testify before state or federal grand juries does not abridge the freedom of speech and press guaranteed by the First Amendment; and that a journalist's agreement to conceal criminal conduct of his news sources, or evidence thereof, does not give rise to any constitutional testimonial privilege with respect thereto.]

* * *

Opinion of the Court by Justice WHITE, announced by the Chief Justice.

* * *

Petitioners Branzburg and Pappas and respondent Caldwell press First Amendment Claims that may be simply put: that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment. Although petitioners do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure.

* * *

We do not question the significance of free speech, press or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But this case involves no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. * * * The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is

made to require the press to publish its sources of information or indiscriminately to disclose them on request.

The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. [Emphasis added.] Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence. The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them.

It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. * * *

The prevailing view is that the press is not free with impunity to publish everything and anything it desires to publish. Although it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. See *New York Times Co. v. Sullivan.* * * *

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.

* * *

It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury. * * * These courts have applied the presumption against the existence of an asserted testimonial privilege, and have concluded that the First Amendment interest asserted by the newsman was outweighed by the general obligation of a citizen to appear before a grand jury or at trial, pursuant to a subpoena, and give what information he possesses. * * *

The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury which has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions. Grand jury proceedings are constitutionally mandated for the institution of federal criminal prosecutions for capital or other serious crimes, and "its constitutional prerogatives are rooted in long centuries of Anglo-American history." The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The adoption of the grand jury "in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice." Although state systems of criminal procedure differ greatly among themselves, the grand jury is similarly guaranteed by many state constitutions and plays an important role in fair and effective law enforcement in the overwhelming majority of the States.

* * *

"It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." Hence the grand jury's authority to subpoena witnesses is not only historic, but essential to its task. * * * The long-standing principle that "the public has a right to every man's evidence," except for those persons protected by a constitutional, common law, or statutory privilege, 8 J. Wigmore, *Evidence* § 2192 (McNaughton rev. 1961), is particularly applicable to grand jury proceedings.

A number of States have provided newsmen a statutory privilege of varying breadth, but the ma-

jority have not done so, and none has been provided by federal statute. Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.

* * *

Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. In so far as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.

There remain those situations where a source is not engaged in criminal conduct but has information suggesting illegal conduct by others. Newsmen frequently receive information from such sources pursuant to a tacit or express agreement to withhold the source's name and suppress any information that the source wishes not published. Such informants presumably desire anonymity in order to avoid being entangled as a witness in a criminal trial or grand jury investigation. They may fear that disclosure will threaten their job security or personal safety or that it will simply result in dishonor or embarrassment.

The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. But we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. The available data indicates that some newsmen rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure and may be silenced if it is held by this Court that, ordinarily, newsmen must testify pursuant to subpoenas, but the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common law and constitutional rule regarding the testimonial obligations of newsmen. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative. * * * Reliance by the press on confidential informants does not mean that all such sources will in fact dry up because of the later possible appearance of the newsman before a grand jury. The reporter may never be called and if he objects to testifying, the prosecution may not insist. Also, the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena: quite often, such informants are members of a minority political or cultural group which relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public.

There is little before us indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind, would in fact, be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters. We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his.

Accepting the fact, however, that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification by a reporter in an official investigation we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.

* * *

Of course, the press has the right to abide by its agreement not to publish all the information it has, but the right to withhold news is not equivalent to a First Amendment exemption from the ordinary duty of all other citizens to furnish relevant information to a grand jury performing an important public function. Private restraints on the flow of information are not so favored by the First Amendment that they override all other public interests.

* * *

Neither are we now convinced that a virtually impenetrable constitutional shield, beyond legislative or judicial control, should be forged to protect a private system of informers operated by the press to report on criminal conduct, a system that would be unaccountable to the public, would pose a threat to the citizen's justifiable expectations of privacy, and would equally protect well-intentioned informants and those who pay for or otherwise betray their trust to their employer or associates. The public through its elected and appointed law enforcement officers regularly utilizes informers, and in proper circumstances may assert a privilege against disclosing the identity of these informers. * * * Such informers enjoy no constitutional protection. Their testimony is available to the public when desired by grand juries or at criminal trials; their identity cannot be concealed from the defendant when it is critical to his case.

It is said that currently press subpoenas have multiplied, that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources. * * * These developments, even if true, are treacherous grounds for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere.

* * *

The requirements of those cases, which hold that a State's interest must be "compelling" or "paramount" to justify even an indirect burden on First Amendment rights, are also met here. As we have indicated, the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called "bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." If the test is that the Government "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," it is quite apparent (1) that the State has the necessary interest in extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing the community from being disrupted by violent disorders endangering both persons and property; and (2) that, based on the stories Branzburg and Caldwell wrote and Pappas' admitted conduct, the grand jury called these reporters as they would others—because it was likely that they could supply information to help the Government determine whether illegal conduct had occurred, and, if it had, whether there was sufficient evidence to return an indictment.

Similar considerations dispose of the reporters' claims that preliminary to requiring their grand jury appearance, the State must show that a crime has been committed and that they possess relevant information not available from other sources, for only the grand jury itself can make this determination. The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it.

* * *

The privilege claimed here is conditional, not absolute; given the suggested preliminary showings and compelling need, the reporter would be required to testify. Presumably, such a rule would reduce the instances in which reporters could be required to appear but predicting in advance when and in what circumstances they could be compelled to do so would be difficult. Such a rule would also have implications for the issuance of compulsory process to reporters at civil and criminal trials and at legislative hearings. If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem. For them it would appear that only an absolute privilege would suffice.

We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. *The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order.* [Emphasis added.] Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Freedom of the press is a "fundamental personal right" which "is not confined to

newspapers and periodicals. It necessarily embraces pamphlets and leaflets * * *." The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.

In each instance where a reporter is subpoenaed to testify, the courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporters' appearance: Is there probable cause to believe a crime has been committed? Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege?

Thus, in the end, by considering whether enforcement of a particular law served a "compelling" governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws.

* * *

At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to address the evil discerned and, equally important, to re-fashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to erect any bar to state courts responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute. [Emphasis added.]

In addition, there is much force in the pragmatic view that the press has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm. Furthermore, if what the newsmen urged in these cases is true—that law enforcement cannot hope to gain and may suffer from subpoenaing newsmen before grand juries—prosecutors will be loath to risk so much for so little. Thus, at the federal level the Attorney General has already fashioned a set of rules for federal officials in connection with subpoenaing members of the press to testify before grand juries or at criminal trials.[41] * * *

Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.

We turn, therefore, to the disposition of the cases before us. From what we have said, it necessarily follows that the decision in *United States v. Caldwell* must be reversed. If there is no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation, then it is *a fortiori* true that there is no privilege to refuse to appear before such a grand jury until the Government demonstrates some "compelling need" for a newsman's testimony. * * *

The decisions in *Branzburg v. Hayes* and *Branzburg v. Meigs* must be affirmed. Here, petitioner refused to answer questions that directly related to criminal conduct which he had observed and written about. The Kentucky Court of Appeals noted that marijuana is defined as a narcotic drug by statute, and that unlicensed possession or compounding of it is a felony punishable by both fine and imprisonment. It held that petitioner "saw the commission of the statutory felonies of unlawful possession of marijuana and the unlawful conversion of it into hashish." Petitioner may be presumed to have observed similar violations of the state narcotics laws during the research he did for the story which forms

41. *Guidelines for Subpoenas to the News Media* were first announced in a speech by the Attorney General on August 10, 1970, and then were expressed in Department of Justice Memo. No. 692 (Sept. 2, 1970), which was sent to all United States Attorneys by the Assistant Attorney General in charge of the Criminal Division. [New guidelines were promulgated in 1980. See *Guidelines on News Media Subpoenas*, 6 Med.L.Rptr. 2153 (1980)].

the basis of the subpoena in *Branzburg v. Meigs*. In both cases, if what petitioner wrote was true, he had direct information to provide the grand jury concerning the commission of serious crimes.

The only question presented at the present time in *In the Matter of Paul Pappas* is whether petitioner Pappas must appear before the grand jury to testify pursuant to subpoena. The Massachusetts Supreme Judicial Court characterized the record in this case as "meager," and it is not clear what petitioner will be asked by the grand jury. It is not even clear that he will be asked to divulge information received in confidence. We affirm the decision of the Massachusetts Supreme Judicial Court and hold that petitioner must appear before the grand jury to answer the questions put to him, subject, of course, to the supervision of the presiding judge as to "the propriety, purposes, and scope of the grand jury inquiry and the pertinence of the probable testimony."

So ordered.

Justice POWELL, concurring in the opinion of the Court.

I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources.

* * *

As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Justice STEWART, with whom Justice Brennan and Justice Marshall join, dissenting.

The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society. The question whether a reporter has a constitutional right to a confidential relationship with his source is of first impression here, but the principles which should guide our decision are as basic as any to be found in the Constitution. While Justice Powell's enigmatic concurring opinion gives some hope of a more flexible view in the future, the court in these cases holds that a newsman has no First Amendment right to protect his sources when called before a grand jury. The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not only will this decision impair performance of the press' constitutionally protected functions, but it will, I am convinced, in the long run, harm rather than help the administration of justice.

I respectfully dissent.

The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public. It is this basic concern that underlies the Constitution's protection of a free press because the guarantee is "not for the benefit of the press so much as for the benefit of all of us."

Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society. * * *

In keeping with this tradition, we have held that the right to publish is central to the First Amendment and basic to the existence of constitutional democracy.

A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated. We have, therefore, recognized that there is a right to publish without prior governmental approval.

No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly,

a right to gather news, of some dimensions, must exist. * * *

The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality—the promise or understanding that names or certain aspects of communications will be kept off-the-record—is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) the existence of an unbridled subpoena power—the absence of a constitutional right protecting, in *any* way, a confidential relationship from compulsory process—will either deter sources from divulging information or deter reporters from gathering and publishing information.

It is obvious that informants are necessary to the news-gathering process as we know it today. If it is to perform its constitutional mission, the press must do far more than merely print public statements or publish prepared handouts.

* * *

It is equally obvious that the promise of confidentiality may be a necessary prerequisite to a productive relationship between a newsman and his informants. An officeholder may fear his superior; a member of the bureaucracy, his associates; a dissident, the scorn of majority opinion. All may have information valuable to the public discourse, yet each may be willing to relate that information only in confidence to a reporter whom he trusts.

* * *

Finally, and most important, when governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because uncertainty about exercise of the power will lead to "self-censorship." The uncertainty arises, of course, because the judiciary has traditionally imposed virtually no limitations on the grand jury's broad investigatory powers. See Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. (1965).

After today's decision, the potential informant can never be sure that his identity or off-the-record communications will not subsequently be revealed through the compelled testimony of a newsman. A public spirited person inside government, who is not implicated in any crime, will now be fearful of revealing corruption or other governmental wrongdoing, because he will now know he can subsequently be identified by use of compulsory process.

* * *

Again, the common sense understanding that such deterrence will occur is buttressed by concrete evidence. The existence of deterrent effects through fear and self-censorship was impressively developed in the District Court in *Caldwell*. Individual reporters and commentators have noted such effects. Surveys have verified that an unbridled subpoena power will substantially impair the flow of news to the public, especially in sensitive areas involving governmental officials, financial affairs, political figures, dissidents, or minority groups that require in-depth, investigative reporting. And the Justice Department has recognized that "compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights." No evidence contradicting the existence of such deterrent effects was offered at the trials or in the briefs here by the petitioners in *Caldwell* or by the respondents in *Branzburg* and *Pappas*.

The impairment of the flow of news cannot, of course, be proven with scientific precision, as the Court seems to demand. * * *

But we have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist; we have never before required proof of the exact number of people potentially affected by governmental action, who would actually be dissuaded from engaging in First Amendment activity.

Rather, on the basis of common sense and available information, we have asked, often implicitly, (1) whether there was a rational connection between the cause (the governmental action) and the effect (the deterrence or impairment of First Amendment activity) and (2) whether the effect would occur with some regularity, i.e., would not be *de minimus*. * * * And, in making this determination, we have shown a special solicitude towards the "indispensable liberties" protected by the First Amendment for "freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interfer-

ence." Once this threshold inquiry has been satisfied, we have then examined the competing interests in determining whether there is an unconstitutional infringement of First Amendment freedoms.

* * *

Thus, we cannot escape the conclusion that when neither the reporter nor his source can rely on the shield of confidentiality against unrestrained use of the grand jury's subpoena power, valuable information will not be published and the public dialogue will inevitably be impoverished.

* * *

Accordingly, when a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information. [Emphasis added.]

This is not to say that a grand jury could not issue a subpoena until such a showing were made, and it is not to say that a newsman would be in any way privileged to ignore any subpoena that was issued. Obviously, before the government's burden to make such a showing were triggered, the reporter would have to move to quash the subpoena, asserting the basis on which he considered the particular relationship a confidential one.

The crux of the Court's rejection of any newsman's privilege is its observation that only "where news sources themselves are implicated in crime or possess information *relevant* to the grand jury's task need they or the reporter be concerned about grand jury subpoenas." But this is a most misleading construct. * * * As noted above, given the grand jury's extraordinarily broad investigative powers and the weak standards of relevance and materiality that apply during such inquiries, reporters, if they have no testimonial privilege, will be called to give information about informants who have neither committed crimes nor have information about crime. It is to avoid deterrence of such sources and thus to prevent needless injury to First Amendment values that I think the government must be required to show probable cause that the newsman has information which is clearly relevant to a specific probable violation of criminal law.

Similarly, a reporter may have information from a confidential source which is "related" to the commission of crime, but the government may be able to obtain an indictment or otherwise achieve its purposes by subpoenaing persons other than the reporter. It is an obvious but important truism that when government aims have been fully served, there can be no legitimate reason to disrupt a confidential relationship between a reporter and his source. To do so would not aid the administration of justice and would only impair the flow of information to the public. Thus, it is to avoid deterrence of such sources that I think the government must show that there are no alternative means for the grand jury to obtain the information sought.

Both the "probable cause" and "alternative means" requirements would thus serve the vital function of mediating between the public interest in the administration of justice and the constitutional protection of the full flow of information. These requirements would avoid a direct conflict between these competing concerns, and they would generally provide adequate protection for newsmen. No doubt the courts would be required to make some delicate judgments in working out this accommodation. But that, after all, is the function of courts of law. Better such judgments, however difficult, than the simplistic and stultifying absolutism adopted by the Court in denying any force to the First Amendment in these cases.

* * *

The sad paradox of the Court's position is that when a grand jury may exercise an unbridled subpoena power, and sources involved in sensitive matters become fearful of disclosing information, the newsman will not only cease to be a useful grand jury witness; he will cease to investigate and publish information about issues of public import. I cannot subscribe to such an anomalous result, for, in my view, the interests protected by the First Amendment are not antagonistic to the administration of justice. Rather, they can, in the long run, only be complementary, and for that reason must be given great "breathing space."

In deciding what protection should be given to information a reporter receives in confidence from a news source, the Court of Appeals for the Ninth Circuit affirmed the holding of a District Court that the grand jury power of testimonial compulsion must not be exercised in a manner likely to impair First Amendment interests "until there has been a clear

showing of a compelling and overriding national interest that cannot be served by alternative means." *Caldwell v. United States*, 434 F.2d 1081, 1086 (9th Cir. 1970). * * *

I think this decision was correct. On the record before us the United States has not met the burden which I think the appropriate newsman's privilege should require.

* * *

In the *Caldwell* case, the Court of Appeals further found that Caldwell's confidential relationship with the leaders of the Black Panther Party would be impaired if he appeared before the grand jury at all to answer questions, even though not privileged. On the particular facts before it, the Court concluded that the very appearance by Caldwell before the grand jury would jeopardize his relationship with his sources, leading to a severance of the news-gathering relationship and impairment of the flow of news to the public.

* * *

I think this ruling was also correct in light of the particularized circumstances of the *Caldwell* case. Obviously, only in very rare circumstances would a confidential relationship between a reporter and his source be so sensitive that mere appearance before the grand jury by the newsman would substantially impair his news-gathering function. But in this case, the reporter made out a prima facie case that the flow of news to the public would be curtailed. And he stated, without contradiction, that the only non-confidential material about which he could testify was already printed in his newspaper articles.

* * *

Accordingly, I would affirm the judgment of the Court of Appeals in *United States v. Caldwell*. In the other two cases before us, *Branzburg v. Hayes* and *Branzburg v. Meigs*, and *In the Matter of Paul Pappas*, I would vacate the judgments and remand the cases for further proceedings not inconsistent with the views I have expressed in this opinion.

Justice DOUGLAS, dissenting.

* * *

It is my view that there is no "compelling need" that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime. His immunity in my view is therefore quite complete, for *absent his involvement in a crime*, the First Amendment protects him against an appearance before a grand jury and if he is involved in a crime, the First Amendment stands as a barrier. [Emphasis added.] Since in my view there is no area of inquiry not protected by a privilege, the reporter need not appear for the futile purpose of invoking one to each question. And, since in my view a newsman has an absolute right not to appear before a grand jury it follows for me that a journalist who voluntarily appears before that body may invoke his First Amendment privilege to specific questions. The basic issue is the extent to which the First Amendment * * * must yield to the Government's asserted need to know a reporter's unprinted information.

The starting point for decision pretty well marks the range within which the end result lies. The *New York Times*, whose reporting functions are at issue here, takes the amazing position that First Amendment rights are to be balanced against other needs or conveniences of government. My belief is that all of the "balancing" was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the *New York Times* advances in the case.

COMMENT

Long before courts ruled in either *Caldwell* or *Branzburg*, journalists had contended that the First Amendment implied at least a qualified or conditional right to protect confidential sources. And for at least 100 years reporters and editors had argued that compelled testimony not only chills newsgathering but also violates their employers' rules and violates professional codes of journalism ethics. Compelled testimony could also cost journalists their jobs.

For most journalists, however, protecting source confidentiality has been seen as an ethical and professional imperative. Few tenets of journalism are so sacred as that calling for reporters to abide by promises of confidentiality.[7] Indeed, in some of the

7. J. Hulteng, *The Messenger's Motives: Ethical Problems of the News Media*, at 89–95 (2d ed. 1985).

cases that have arisen, the potential harm to newsgathering seems so slight and the benefit to society from disclosure so great that only a stand based on principle can explain refusal to testify.

In Idaho in 1980, Ellen Marks of *The Idaho Statesman* wrote an article based on an interview with a father who had taken his daughter into hiding in violation of a court's custody order following divorce. The child's mother brought a habeas corpus proceeding to regain lawful custody, and Marks was called to testify while she covered the habeas corpus hearing. Marks refused to testify and moved to quash. The magistrate found her in contempt and levied a $500 per day fine. The Idaho Supreme Court ultimately affirmed the contempt order. *Marks v. Vehlow*, 9 Med.L.Rptr. 2361 (Idaho 1983). The Idaho court, which had previously vigorously refused to recognize a privilege, and in fact had interpreted *Branzburg* as prohibiting state courts from creating reporter privileges, *Caldero v. Tribune Publishing* Co., 2 Med.L.Rptr., 562 P.2d 791, 1490 (Idaho), cert. den. 434 U.S. 930 (1977), noted its agreement with a number of post-*Branzburg* cases creating privilege. Disclosure was nonetheless ordered because both the writ of habeas corpus and the safety of the child constituted compelling interests, and Marks was the only person with any clue to the father's whereabouts.

Most cases where privilege is claimed present conflicts between newsgathering and law enforcement more clearly. That was especially true in the tumultuous period between the 1968 Democratic Convention in Chicago and the Watergate scandal of the early 1970s, when a cloudburst of subpoenas showered the press.

In a typical case, Will Lewis, manager of station KPFK-FM in Los Angeles, was held in contempt and jailed in 1973 for refusing to turn over to a federal grand jury the originals of a letter and tape recording sent him by two radical groups claiming to have inside information on the Patty Hearst affair.

After sixteen days in solitary confinement at Terminal Island Federal Prison, Lewis was released by Supreme Court Justice William O. Douglas pending appeal. The Ninth Circuit Court of Appeals affirmed the contempt conviction, Lewis appealed, and the U.S. Supreme Court denied review. That left Lewis with the choice of going back to jail or turning over the subpoenaed material to federal prosecutors. Lewis chose the latter.[8] Other reporters have chosen either to remain in or to go back to jail.

William Farr of the *Los Angeles Herald-Examiner*, for example, refused to disclose to a county court judge the names of prosecution attorneys who had supplied him with a copy of a witness's deposition in the gruesome Charles Manson case, this after the judge had forbidden officers of the court to publicize the case. Farr spent two months in jail.[9]

Judges—especially in California it would seem—take umbrage when their direct orders are defied. In the *Rosato* case,[10] bribery-conspiracy indictments had been handed down by a Fresno County grand jury against three accused. A day before the grand jury transcripts would have become public documents, the judge sealed the record for the duration of the trial and issued a restrictive order prohibiting public communications by attorneys, parties, public officials, and witnesses. Stories replete with quotations from the sealed transcript nevertheless appeared in the *Fresno Bee*, and the judge demanded to know where they came from. When he asked reporters to name their sources, he was met with silence. Two reporters, the city editor, and the managing editor of the *Bee* were then cited for contempt.

The court's rationale was that in enforcing its power over its own officers, the concomitant interest of journalists in protecting their sources was irrelevant and the California "shield" law inapplicable. The journalists went to jail.

Despite inclusion of a reporter privilege in state statute and in the California Constitution, that state's courts continue to limit the protection of the privilege. While the constitution forbids entry of contempt against journalists, it does not prevent a court from imposing *other* sanctions, including entry of judgment against the journalist when the journalist is a party in the case.[11]

Punishment has most frequently resulted from refusals to cooperate with grand juries and in criminal trials. The Supreme Judicial Court of Maine

8. *In re Lewis*, 377 F.Supp. 297 (C.D.Cal. 1974), aff'd 501 F.2d 418 (9th Cir.), cert. den. 420 U.S. 913 (1975).

9. *Farr v. Superior Court of Los Angeles County*, 99 Cal.Rptr. 342 (1971), cert. den. 409 U.S. 1011 (1972).

10. *Rosato v. Superior Court*, 1 Med.L.Rptr. 2560, 124 Cal.Rptr. 427 (1975), cert. den. 427 U.S. 912 (1976). In spite of subsequent state recognition of a First Amendment privilege, there is no privilege against disclosure of unpublished information. See *KSDO v. Riverside Superior Court*, 8 Med.L.Rptr. 2360, 186 Cal. Rptr. 211 (1982).

11. *Hallissy v. Contra Costa Superior Court*, 15 Med.L.Rptr. 1325, 200 Cal.App.3d 1038, 248 Cal.Rptr. 635 (1988).

affirmed a conviction of criminal contempt against Robert Hohler, a reporter for the *Concord Monitor* in New Hampshire, after Hohler refused to testify in a murder trial about an article based on an interview with the defendant which named the defendant as the source. The court reversed a Superior Court holding that Maine would recognize a qualified privilege against compelled testimony concerning nonconfidential, published information.[12]

In a celebrated case of yesteryear, Peter Bridge of the *Newark News* was jailed for three weeks because he would not reveal to a grand jury unpublished details of an interview with a state bureaucrat who alleged she had been offered a bribe. Bridge had forfeited protection under the New Jersey shield law, as it stood in 1972, by naming the source in the article. New Jersey's highest court declined to hear the case, and the U.S. Supreme Court denied a stay of his contempt sentence.[13]

Television news reporter Stewart Dan and cameraman Roland Barnes of WGR-TV, Buffalo, were pressed to tell a grand jury what they had seen and heard inside Attica prison during a 1971 riot. They refused, and later Dan was sentenced to thirty days in jail. Reporter Joe Pennington of KAKZ-TV, Wichita, was sentenced to sixty days for criminal contempt after he refused to turn over information believed by defendant's counsel to be relevant to the issue of guilt or innocence.[14]

THE MEANING OF *BRANZBURG*

The *Branzburg* decision has been, it seems, given almost as many interpretations as there have been lower courts construing it. Derived meanings range from conclusions that *Branzburg* precludes creation of a journalist's privilege,[15] to determinations that the case allows lower courts (or legislatures) to devise such a privilege,[16] all the way to assertions that *Branzburg* itself recognizes a privilege.[17]

Much as in libel law, the law of journalist's privilege varies from jurisdiction to jurisdiction and from context to context. Unlike libel law, however, the reporter who wants to understand the entire law of journalist's privilege must consider the standards of the federal circuit courts and of a number of federal district courts in addition to the laws of the fifty states.

Some form of the privilege, most often a variation of the three-part test first offered by the Ninth Circuit in *Caldwell* and championed by Justice Stewart in *Branzburg*, has permeated the constitutional, statutory, and common law of both state and federal courts. Stewart's dissent in *Branzburg* legitimized the test, so that by the late 1980s eight circuit courts plus the District of Columbia circuit recognized it,[18] federal district courts in the other circuits apparently recognized it, and at least fourteen state courts had apparently accepted it despite the absence of a shield statute.[19] In states without shield laws, nearly all of their courts have applied at least some of the three-part test, and usually the journalist's claim of privilege has been upheld.

The Court held narrowly in *Branzburg* that the First Amendment, because it is silent on the privilege, does not immunize a journalist from the usual duty of responding to a grand jury subpoena seeking evidence in a criminal case. A journalist witnessing a crime, moreover, clearly has no testimonial privilege under the holding.

Note that none of the opinions discusses the constitutional status of notes, tapes, or other raw materials of a reporter's work-a-day world. The majority opinion does not address itself to whether a privilege might exist when there was no reason to think a reporter had observed illegal activity. Similarly, the status of privilege in civil actions and in nontrial legal proceedings other than grand juries was not addressed.

The single question in *Branzburg*, Justice White emphasized in a footnote, is "whether a newspaper reporter who has published articles about an orga-

12. *Maine v. Hohler*, 15 Med.L.Rptr. 1611 (Maine 1988).
13. *In re Bridge*, 295 A.2d 3 (N.J. 1972), cert. den. 410 U.S. 991 (1973).
14. *People by Fischer v. Dan*, 342 N.Y.S.2d 731 (N.Y. Sup.Ct., App.Div. 1973); *State v. Sandstrom*, 4 Med.L.Rptr. 1333, 581 P.2d 812 (Kan. 1978), cert. den. 440 U.S. 929 (1979).
15. *In re Roche*, 6 Med.L.Rptr. 2121, 411 N.E.2d 466 (Mass. 1980).
16. *Brown v. Commonwealth*, 204 S.E.2d 429 (Va. 1974).
17. *Baker v. F & F Investment*, 1 Med.L.Rptr. 2551, 470 F.2d 778 (2d Cir. 1972), cert. den. 411 U.S. 966 (1973).
18. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 Missouri L.Rev. 1 (1986).
19. Simon, *Reporter Privilege: Can Nebraska Pass a Shield Law to Bind the Whole World?*, 61 Nebraska L.Rev. 446, 469–475 (1982).

nization can, under the First Amendment, properly refuse to appear before a grand jury investigating possible crimes by members of that organization who have been quoted in the published articles."

Not even Justice Stewart believed that a subpoena could simply be ignored. Only Justice Douglas thought that. Both Stewart and Justice Powell in his concurring opinion stress the need for a judge to balance the interests of reporters and of justice by allowing a hearing before a reporter is compelled to testify.

The case is made even narrower by the majority's reliance upon the constitutionally guaranteed function of grand juries as an interest counterbalancing journalists' interests in First Amendment activities. Justice White consistently emphasizes that no privilege will be recognized due to the facts of the case. Perhaps the combined appeals in *Branzburg* did not represent the best occasion for the press to seek a constitutionally based privilege before the Supreme Court. It is clear from Powell's concurrence that he would have been more favorably disposed to a privilege claim under a different fact pattern.

In Justice White's opinion for the Court an explicit invitation was extended to the state legislatures and to Congress to create—within constitutional limits—a statutory privilege. Led by Maryland in 1896, twenty-six states have done just that, six since the *Branzburg* decision. Other states have amended their pre-*Branzburg* shield statutes since 1972. White's invitation urges a response to the privilege issue based on principles of federalism, recognizing that states may offer more protection either under their constitutions or by statute than is required by the First Amendment, exactly the approach taken regarding state fault standards for libel in *Gertz*.

"At the federal level," White wrote, "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable. * * * [T]here is also merit in leaving state legislatures free * * * to fashion their own standards. * * * It goes without saying, of course, that we are powerless to erect any bar to state courts responding in their own way * * * to recognize a newsman's privilege. * * *"

Both leading opinions addressed the available empirical evidence as to the use of confidential sources and on the effect of subpoenas, whatever the quality of that evidence. For the majority, White suggests that the empirical data fail to show the existence of a chilling effect when source identity is compelled or that the evidence indicates the effect is not significant. In a footnote, Stewart responded to White's concern about the "speculative nature" of the evidence:

> Empirical studies, after all, can only provide facts. It is the duty of courts to give legal significance to facts; and it is the special duty of this Court to understand the constitutional significance of facts. We must often proceed in a state of less then perfect knowledge, either because the facts are murky or the methodology used in obtaining the facts is open to question. It is then that we must look to the Constitution for the values that inform our presumptions.

Use of anonymous sources was widespread in the early 1970s, with some reporters using them in half their stories. By 1984, however, reliance on anonymous sources had decreased significantly.[20] Since a majority of jurisdictions had accepted a privilege in some form, lesser reliance on anonymous sources cannot be attributed to a chilling effect alone. Journalists report that on-the-record sources are preferred to assure credibility. Many news organizations have also become more cautious in their use of confidential sources following nationwide embarrassment in 1981 when *Washington Post* reporter Janet Cooke admitted that statements attributed to a confidential source in an article that had won a Pulitzer Prize had been fabricated. Approval of and review by editors of reporters' use of confidential sources has since become routine.

Justice White said that a subpoena is just another example of application to the press of valid general laws like tax laws or labor laws. But those laws are enforced neutrally and impose no special burden on First Amendment freedoms and, if they do, are subject to constitutional challenge. See text, p. 124. White also observed that prosecutors risk a great deal when they subpoena newsmen. Does the press have powerful means of protecting itself as he suggests?

What do reporters actually risk when, having assured their sources they will go to jail rather than reveal source identities, they ignore subpoenas or refuse to testify? James Reston, perhaps facetiously, sees jail sentences as providing reporters much-needed respite. But should jail be an occupational hazard

20. St. Dizier, *Reporters' Use of Confidential Sources, 1974 and 1984: A Comparative Study*, 6 Newspaper Research J. 44 (Summer 1985).

of journalism? Editors and reporters take the risks of anonymous sources seriously; in most newsrooms, using anonymous sources routinely is forbidden. Only extremely important stories that would go unreported in the absence of an anonymous source should use them, editors say.

Justice White noted that "* * * the privilege claimed is that of the reporter, not the informant, and * * * if the authorities independently identify the informant, neither his own reluctance to testify nor the objection of the newsman would shield him * * * whatever the impact on the flow of news. * * *" It has been agreed by subsequent courts that the privilege, and with it the decision to disclose or not, lies with the journalist,[21] not the source. The major reason for granting the journalist control over the privilege is that, unlike traditional evidentiary privileges, the public interest is served directly with reporter privilege by enhancing the free flow of information. By contrast, in doctor-patient or lawyer-client privileges, the patient or client, not the professional, controls the privilege. The interest protected is primarily private, although these professional privileges assume that the public interest is indirectly enhanced by increased confidence in these professionals.

One court recently announced that journalistic privilege is not a one-way matter. During a three-party race for governor and lieutenant governor in Minnesota in 1982, Dan Cohen, a former city council member, provided information about a twelve-year-old shoplifting conviction against a candidate for lieutenant governor. Cohen, a Republican operative, secured a promise of anonymity from reporters employed by the *St. Paul Pioneer Press Dispatch* and the Minneapolis *Star Tribune*. Editors at both papers, thinking Cohen's disclosure a dirty trick, named him as the source. Cohen was fired from his public relations job the same day.

Cohen filed suit alleging that the promise of confidentiality was a contract that was breached by the two newspapers. After defenses based on both the First Amendment and contract law were rejected by the trial court, the case was tried before a six-person jury. The newspapers had argued that the promise of confidentiality was not substantial enough to constitute an enforceable contract and that the First Amendment in any event protected their editorial freedom to name Cohen in the stories. Cohen argued that the reporters, as agents of the newspapers, had legal authority to enter a binding contract on the newspapers' behalfs, and he argued fraud and misrepresentation. The jury agreed 5–1 and awarded $100,000 in actual damages and $250,000 in punitive damages against each newspaper, a total of $700,000.[22]

The case had immediate effect in other ways. The *Star Tribune* paper was forced to pull all 640,000 copies of its next Sunday magazine because it contained an article identifying by name a woman who said she had been promised anonymity. She had threatened to sue if the story was published.

Part of the trial strategy in the Cohen case was to capitalize on public unease about news leaks to the mass media and about the media in general. Throughout the trial, Cohen's lawyer referred to notable issues such as revelations about Senator Joe Biden's plagiarism while a candidate for president in 1987, and Senator Thomas Eagleton's emotional disorders while the Democratic nominee for vice-president in 1972. The tactic drew criticism from trial judge Franklin Knoll.[23]

Media lawyers see endless possibilities for plaintiffs using a contract approach. Would it be a breach of contract to quote someone inaccurately, to surprise a source by disparaging his views, or to disappoint a source by playing down statements she assumed would get front-page attention? And what if a confidential source lies to a reporter? Does the contract remain binding? Will Cohen's victory mean that the privilege protects the source as much as it does the journalist? How much did the decision of Twin Cities's editors erode a fundamental proposition of American journalism: journalistic privilege serves the flow of the information to the public?

It is likely that the law of newsgathering will grow in the next decade, and courts may continue to give First Amendment arguments in this area less than their full attention.

The greatest puzzle of the various opinions in *Branzburg* was the dispositive concurring opinion by Justice Powell. Although joining the result, Pow-

21. *People v. LeGrand*, 4 Med.L.Rptr. 2524, 415 N.Y.S.2d 252 (N.Y.Sup.Ct., App.Div. 1979).

22. Oberdorfer, "Is 'Burning a Source' A Breach of Contract?", National L. J. (August 1, 1988), 8.

23. *Cohen v. Cowles Media*, 15 Med.L.Rptr. 2288 (Minn. Dist. Ct. 1988); Kauffman, "The Source Who Sued," paper presented to the Law Division, Association for Education in Journalism and Mass Communication, Washington, D.C., August 1989.

ell did not reject a qualified privilege based on the First Amendment. Powell instead emphasized that courts would be open to journalists' claims "under circumstances where legitimate First Amendment interests require protection."

Why didn't Powell join the dissenters? Apparently because he thought journalists should obey the summons of a grand jury. Only after appearing could they press their privilege claims. This approach would have done Caldwell, who asserted that merely appearing would chill sources, no good.

Would Powell's approach be the same as Stewart's in contexts other than grand jury inquiries? No. For Powell, Stewart's three-part test placed too heavy a burden of proof on government. A balancing approach, on the other hand, placed the clashing interests in a more desirable state of rough equivalence. Do you agree with Powell that a journalist should at least appear before the grand jury and that rights to confidentiality should be determined after questions have been posed? In *Caldwell*, the Ninth Circuit emphasized that reporters would seldom have as sensitive a relationship with sources as Caldwell had.

An interesting sidelight on the *Caldwell* case is that the *New York Times*, although paying legal expenses, did not wholeheartedly support the appeal. "We are not joining the appeal," said Managing Editor A. M. Rosenthal in a memo to his staff, "because we feel that when a reporter refuses to authenticate his story, the *Times* must, in a formal sense, step aside. Otherwise some doubt may be cast upon the integrity of the *Times* news stories." How does this square with the position of the *Times* in the *Pentagon Papers* case? In the *Farber* case? See text, p. 377.

Enactment of a federal shield law, qualified or unqualified, seems unlikely. Repeated introductions of bills to establish a federal privilege have gone nowhere. One major reason is that the press itself is not sure it supports a federal shield law. Under the rationale that what Congress gives, Congress can take away, many members of the press oppose shield laws and prefer instead a privilege squarely based on the First Amendment. Under the Supremacy Clause of the U.S. Constitution, a First Amendment-based privilege would override any less protective statute. But why would journalists oppose shield laws in the interim while waiting for creation of a First Amendment privilege?

The great surprise of the *Branzburg* decision was that its most influential feature has not been Justice White's plurality decision but Justice Stewart's dissent advocating a qualified First Amendment-based journalist's privilege. The Stewart approach now governs much of the law of journalist's privilege in the context of civil *and* criminal proceedings. The three-part test of Stewart's *Branzburg* dissent has thus become enormously important.

The fact that the Stewart dissent has become so influential is really not that remarkable if a careful count of how the justices actually voted in *Branzburg* is undertaken. The plurality opinion authored by Justice White, refusing to acknowledge the existence of a First Amendment-based privilege, either absolute or qualified, in the context of the criminal grand jury, was supported by three justices in addition to Justice White. Justice Powell, however, filed a concurring opinion which did acknowledge that courts would be "available to newsmen under circumstances where legitimate First Amendment interests require protection." Two justices (Brennan and Marshall) joined Justice Stewart in his dissent in *Branzburg*. Justice Douglas, in a separate dissent, advocated even greater First Amendment protection. As a result, if a careful count of the justices in *Branzburg* is made, it becomes clear that a majority supports some basis in the First Amendment for the establishment of a constitutionally based journalist's privilege.

Although the Supreme Court has not heard another case on journalist's privilege, it has recently indicated that there is no impediment in a state's choosing to apply its shield law in a libel case by a plaintiff required to prove falsity. "We recognize that the plaintiff's burden in this case is weightier because of Pennsylvania's 'shield' law, which allows employees of the media to refuse to divulge their sources," Justice O'Connor wrote for the majority. "* * * [W]e are unconvinced that the State's shield law requires a different constitutional standard than would prevail in the absence of such a law." [24] The Court noted that the issue had not been addressed by state courts earlier. Still, the almost offhand dis-

24. *Philadelphia Newspapers v. Hepps*, 12 Med.L.Rptr. 1977, 106 S.Ct. 1558 (1986).

missal of the plaintiff's claim to source identities indicates the Court is comfortable with how privilege has developed since *Branzburg*.

Although the influence of Stewart's three-part test on the lower courts is clear, its application has not always been. Interpretations of the test vary. When a murder defendant sought documents from reporters for the University of New Hampshire student newspaper that would have identified sources, the state supreme court affirmed a lower court quashing the subpoena. Although the state had no shield law, a qualified privilege based on both the First Amendment and the state constitution was held to exist. This qualified privilege could be overcome only by the following showing on the part of the defendant: (1) exhaustion of alternative sources, (2) relevance, and (3) a reasonable probability that information sought would affect the verdict. The third qualification or condition had not been met. *New Hampshire v. Siel*, 8 Med.L.Rptr. 1265, 444 A.2d 499 (N.H. 1982).

Variations on the three-part test are sometimes semantic. At other times, they either expand or contract the test. Where "information going to the heart of the claim" subsumes "relevance" and "compelling public need," we have a two-part test. Where the information seeker's purpose must be more than "frivolous," we may have a four-part test. In Ohio "relevance" and "exhaustion of alternative sources" are standard parts of the test, but the information seeker also must make an effort to examine a reporter's nonconfidential information first and request an *in camera* inspection of anything confidential. *People v. Monica* (Ohio Ct. of Appeals, 8th Dist., No. 39950, April 12, 1979). In Florida "less chilling" means of getting information have to be tried, and there has to be a showing that failure to produce the information sought will result in a miscarriage of justice or substantially prejudice a defendant's case. *Florida v. Reid*, 8 Med.L.Rptr. 1249 (Fla. 1982).

Washington state's qualified privilege, said to be part of its common law, requires all or part of a five-part test. The privilege can be defeated by showing that the request for information is necessary, there are no alternative sources, the purpose is nonfrivolous, the reporter got the information by unacceptable means, and the source had no reasonable expectation of confidentiality. *Senear v. Daily Journal-American*, 8 Med.L.Rptr. 1151, 641 P.2d 1180 (Wash. 1982). Why do some courts rely on a common law-based privilege rather than a constitutional privilege? In West Virginia, the burden may be placed on the reporter to show harm to the newsgathering process in support of a motion to quash. *Maurice v. NLRB*, 7 Med.L.Rptr. 2221, 691 F.2d 182 (4th Cir. 1982).

There are almost as many variations in interpretation and application of the test as there are jurisdictions which have adopted it. Journalists should be aware of the qualifications in their jurisdiction.

Only a handful of state courts, led by Washington and Florida, have relied exclusively on common law as the source of a journalist's privilege. One reason is that the common law has traditionally opposed the creation of evidentiary privileges. Another is that most states link constitutional justifications with common law ones. Just to be sure, they might even hold that a privilege is created under both federal and state constitutions as well as under common law. *In re Contempt of Wright*, 11 Med.L.Rptr. 1937, 700 P.2d 40 (Idaho 1985).

Although federal courts have not had authority to create common law for over fifty years, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1983), and common law—judge-made law—is now the sole province of the states, the limitation applies only to *substantive*, not *procedural* law. Federal courts retain power to create common law rules of evidence, including journalist's privilege, since it is commonly considered procedural in nature. In diversity of citizenship cases, federal courts are supposed to apply state substantive law but also use federal procedure. It is an issue whether privilege is substantive or procedural.

In a civil federal rights action filed by William Riley, a policeman who was running for mayor of Chester, Pennsylvania, against the incumbent mayor and chief of police for having damaged Riley by disclosing information, the Third Circuit used federal common law to create a privilege. Riley called Gerry Oliver, a reporter for the *Delaware County Daily Times*, to testify about how she obtained leaks of investigative materials. Oliver refused. The court said that Rule 501 of the Federal Rules of Evidence justified its creation of a testimonial privilege. Rule 501 provides in part:

> * * * the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

The Third Circuit reasoned that the free expression interests underlying Oliver's claim of privilege outweighed Riley's interest in obtaining her testimony. Several other reporters had already identified sources for the same material. The test adopted for determining when the privilege is overcome blends elements of Powell's demand for case-by-case balancing and of Stewart's three-part test. *Riley v. City of Chester*, 5 Med.L.Rptr. 2161, 612 F.2d 708 (3d Cir. 1979).

Some of the variations on the three-part test have themselves been subject to litigation, and there have been differences of definition and application from one jurisdiction to another. In a case on the issue of exhaustion of alternate sources from Massachusetts, at a time when that state still steadfastly opposed any privilege, Justice William Brennan granted a stay of a civil contempt conviction because he thought the information could have been obtained by "other—albeit roundabout—methods." He feared that First Amendment interests were being weighed to their detriment against the court's convenience.

The case—*In re Roche*, 6 Med.L.Rptr. 1551, 448 U.S. 1312 (1980)—had to do with information about a state judge that led to an investigation by the Massachusetts Commission on Judicial Conduct and formal charges. Sixty-five witnesses, including Roche, a television reporter, were identified. Roche refused to identify any of his sources or disclose what they had said to him unless the judge could independently uncover them on the list, for they were on the list. A judge of Massachusetts's Supreme Judicial Court ordered Roche to testify. The court saw the central issue as whether a reporter could determine the sequence of discovery and by that means delay the release of information.

Justice Brennan granted the reporter's petition for a stay of enforcement of the Massachusetts judge's order holding him in civil contempt pending petition for writ of certiorari. Brennan described the matter as follows:

> If I am correct, therefore, that a majority of the Court recognizes at least some degree of constitutional protection for newsgatherers' confidences it is reasonably probable that four of my Brothers will vote to grant certiorari, and there is a fair prospect that the Court will reverse the decision below.

Interestingly enough, the Massachusetts Supreme Judicial Court picked up the gauntlet thrown down by Justice Brennan and subsequently upheld the Massachusetts judge's denial of the journalist's motion for a protective order against disclosure. The Massachusetts court said a protective order would only delay the disclosure of sources and thus the danger to the free flow of information was negligible. See *In re Roche*, 6 Med.L.Rptr. 2121, 411 N.E.2d 466 (Mass. 1980).

Justice White's opinion for the Court in *Branzburg* raises another problem with the privilege that has not been resolved. Who is a journalist or reporter? Who is covered by the constitutional or statutory shield? Can a workable definition be achieved? Was Daniel Ellsberg, who leaked the Pentagon Papers, covered? Underground, minority, and student editors? Pollsters, pamphleteers, book authors, freelancers, researchers? White believes that crafting a privilege will require courts to define categories of qualified, legitimate, or "respectable" journalists, a process that offends a First Amendment tradition hostile to any form of state certification or licensing.

The question was put in memorable language in the case of Annette Buchanan, a college editor who on May 24, 1966 wrote a story for the University of Oregon *Daily Emerald* about pot smoking on the campus. The story quoted seven unidentified marijuana users under the unfortunate headline, "Students Condone Marijuana Use." A district attorney subpoenaed Buchanan, and she twice refused to identify her sources before the grand jury. She was cited for contempt, tried, and convicted. Upholding her conviction the Oregon Supreme Court addressed the problem of adjusting the definition of newsman to the implications of the First Amendment:

> Assuming that legislators are free to experiment with such definitions, it would be dangerous business for courts, asserting constitutional grounds, to extend to an employee of a "respectable" newspaper a privilege which would be denied to an employe of a disreputable newspaper; or to an episodic pamphleteer; or to a freelance writer seeking a story to sell on the open market; or, indeed, to a shaggy nonconformist who wishes only to write out his message and nail it to a tree. If the claimed privilege is to be found in the Constitution, its benefits cannot be limited to those whose credentials may, from time to time, satisfy the government. *State v. Buchanan*, 436 P.2d 79 (Or. 1968).

Although the Oregon court assumed that legislators could experiment with definition, that too is risky for reporters and others. Two reporters for the student newspaper at Hofstra University were ordered to testify at a pretrial hearing in a criminal

case. Their argument that New York's shield law protected them was rejected because that law "* * * is limited to protecting the class of professional journalists, who, for gain or livelihood are engaged in preparing or editing of news for a newspaper." The shield law requires that a newspaper have paid circulation and a second class postal classification to qualify. Hofstra's paper had neither. *New York v. Hennessy*, 13 Med.L.Rptr. 1109 (N.Y.Dist.Ct. 1986).

A student, Mario Brajuha, who was doing research work for his Ph.D. degree while employed as a waiter at a restaurant to do field research on "The Sociology of the American Restaurant," was subpoenaed to appear before a federal grand jury investigating a fire at the restaurant. Brajuha moved to quash on grounds that the material sought should be privileged. Academics doing scholarly research, he argued, would be chilled if material identifying parties to the research was routinely disclosable. The Second Circuit did not find a privilege under the facts of the case and remanded to a lower court for more fact-finding. The appeals court did say that a privilege should be available if a researcher can demonstrate the nature and seriousness of the research. *In re Grand Jury Subpoena*, 11 Med.L.Rptr. 1224, 750 F.2d 223 (2d Cir. 1984). How would a researcher demonstrate the nature and seriousness of a research project?

In September 1977, Karen Silkwood, a nuclear industry worker, died under mysterious circumstances while driving to meet a reporter to whom she apparently was to divulge information alleging unsafe working conditions at a Kerr-McGee nuclear power plant. The administrator of Silkwood's estate brought a civil action against the company claiming violation of her civil rights.

The company subpoenaed Arthur Hirsch, a documentarist who, while not a party to the suit, had investigated Silkwood's death and had received confidential information in the course of his filmmaking. The federal district court denied Hirsch's claim of privilege because he was not a newsman regularly engaged in obtaining, editing, or otherwise preparing news.

The Tenth Circuit Court of Appeals concluded that Hirsch was an investigative reporter as far as the film was concerned and noted that the Supreme Court had not limited the privilege to newspaper reporters. The court said the three-part test applied. *Silkwood v. Kerr-McGee*, 3 Med.L.Rptr. 1087, 563 F.2d 433 (10th Cir. 1977).

STATE LAW PRIVILEGES: COMMON LAW, CONSTITUTIONAL, AND STATUTORY GROUNDS

The state courts and legislatures have taken seriously the Supreme Court's recommendation to look at shield laws on their own. Virtually every state has considered passing such a statute. Twenty-six states have shield laws, while at least fourteen others have recognized a privilege based on common law, state constitutional law, the First Amendment, or a combination of the three.

The shield law states are Alabama, Alaska, Arizona, Arkansas, California, Delaware, Illinois, Indiana, Kentucky, Louisiana, Maryland,[25] Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, and Tennessee. New Mexico's first attempt at a shield law was passed in 1975, but declared unconstitutional the next year by the state supreme court as an interference with judicial prerogatives concerning evidence.[26] The statute was later amended to address the constitutional issues.

States without shield laws that have recognized a qualified privilege based on common law or constitutional law include Connecticut, Florida, Idaho, Iowa, Kansas, Maine, Massachusetts, New Hampshire, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin. Generally, states taking a nonstatutory approach have adopted Stewart's three-part test or a variation of it. A key advantage of a state court's relying on state rather than federal law as the basis for the privilege is that its interpretation cannot be overridden unless there is an overt conflict with federal law.

Some states straddle the line between common law and constitutional grounds. Wisconsin, for example, implied a qualified common law privilege based upon its constitutional guarantees of freedom of speech and press. The case, *State v. Knops*, 183 N.W.2d 93 (Wis. 1971), grew out of a grand jury

25. Maryland passed the first shield law in 1896. See Gordon, *The 1896 Maryland Shield Law: The American Roots of Evidentiary Privilege for Newsmen*, Journalism Monographs, No. 22 (February 1972).

26. *Ammerman v. Hubbard Broadcasting, Inc.*, 551 P.2d 1354 (N.M. 1976).

investigation into the bombing of a research center on the University of Wisconsin-Madison campus in which a young research assistant was killed.

A Madison "underground" newspaper, *Kaleidoscope*, had printed a front page story entitled "The Bombers Tell Why and What Next—Exclusive to the Kaleidoscope." The editor, Mark Knops, was subpoenaed, appeared, asserted his Fifth Amendment right against self-incrimination, was granted immunity, and then pleaded that he had a First Amendment privilege against revealing his confidential informants.

Wisconsin's Supreme Court rejected his claim and upheld a contempt sentence on the ground that the answers sought carried an overriding need of the public to protect itself against attack. Relevance was discussed when the court, comparing the case with *Caldwell*, noted that unlike that case Knops did not face "an unstructured fishing expedition composed of questions which will meander in and out of his private affairs without apparent purpose or direction."

A telling admission was made, however, in Justice Heffernan's dissenting opinion. Could the compelling state interest in obtaining Knops' testimony have been achieved by alternative means? It was a comment on the times that, according to Heffernan, both state and federal officials had stated under oath that they knew who had bombed Sterling Hall and that federal warrants had been issued for the arrest of the suspects. Did official action in the case reflect anathema toward editor Knops and his newspaper more than a concern for criminal justice?

Seven years later in *Zelenka v. Wisconsin*, 4 Med.L.Rptr. 1055, 266 N.W.2d 279 (Wis. 1978), the Wisconsin Supreme Court squarely based a qualified privilege on its constitutional guarantee of freedom of speech and press.

While most states have relied on a combination of grounds for the privilege, others have taken the Court's invitation in *Branzburg* literally and narrowly. In an advisory opinion sought by state officials, the New Hampshire Supreme Court relied solely on that state's constitution in finding that a reporter has a privilege not to disclose sources in a civil proceeding:

> In the absence of a statutory reporter's privilege we turn briefly to the question of whether such a privilege exists at common law. * * * No such general right existed at common law for civil proceedings.
>
> However, in rejecting the proposed test in criminal proceedings before a grand jury the (U.S. Supreme) Court made clear that it was "powerless to bar state courts from responding in their own way." * * * The New Hampshire Constitution, part 1, article 22 provides that "liberty of the press" is "essential to the security of freedom in a state" and ought, therefore, "to be inviolably preserved."
>
> Our constitution quite consciously ties a free press to a free state, for effective self-government cannot succeed unless the people have access to an unimpeded and uncensored flow of reporting. News gathering is an integral part of the process.

The court declined to offer an opinion on the scope of the privilege, what persons it applied to, or if the analysis would be different in a criminal proceeding. *Opinion of the Justices*, 2 Med.L.Rptr. 2083, 373 A.2d 644 (N.H. 1977). Advisory opinions are allowed in the states, but federal courts are prevented from rendering advisory opinions due to the federal constitution's requirement that there be a "case or controversy." Note how the New Hampshire court carefully used its specific state constitutional language in deciding in favor of a privilege. Are there advantages to this approach? Disadvantages?

The scope of the privilege has been addressed in a number of states using a common law or constitutional privilege. The privilege has been held to include other material, such as unpublished notes, but it has also been held inapplicable when a plaintiff in a libel suit was required to prove that a defendant entertained serious doubts about a story.[27] And generally, no privilege applies when a reporter is called to answer questions about nonconfidential, published information from named sources.[28]

It is somewhat dangerous to generalize about common law and constitutional interpretations,

27. *Florida v. Reid*, 8 Med.L.Rptr. 1249 (Fla. 1982). See also, *Coira v. Depoo Hospital*, 4 Med.L.Rptr. 1692 (Fla. 1978). The Coira court held also that in civil litigation the reporter's privilege not to produce unpublished information is paramount. In *Downing v. Monitor Publishing Co.*, 6 Med.L.Rptr. 1193, 415 A.2d 683 (N.H. 1980), the New Hampshire Supreme Court decided that disclosure was required where plaintiff had no other way to demonstrate that a newspaper had reason to doubt its source under the actual malice test. In the absence of disclosure, the court could assume the newspaper had no source. California did the same in *Rancho La Costa, Inc. v. Superior Ct. of Los Angeles County*, 6 Med.L.Rptr. 1249, 106 Cal.App.3d 646, 165 Cal.Rptr. 347 (1980).

28. *Maine v. Hohler*, 15 Med.L.Rptr. 1325 (Maine 1988).

however, because the differences between the various states are significant. Curiously, the interpretations of these courts are often similar to those of courts in other states with shield statutes.

The Scope of Shield Laws

State shield laws are perhaps a firmer form of protection because they are formalized in statutes and are therefore less susceptible to alteration or manipulation than is the case-by-case approach used under common law and constitutional tests. Shield laws are written in both absolute and conditional terms; most are conditional. Shield laws may cover only the identity of sources or may cover everything up to and including a reporter's thought processes; most protect sources, notes, and videotapes or negatives. Shield laws may be written so that they apply in only certain types of proceedings. They define who is protected and occasionally specify what news-gathering intent is required for a reporter to claim protection. However written, nearly all shield laws contain exceptions allowing compelled testimony or production of materials.

Shield laws range from stingy to generously absolute. Michigan's shield law is the stingiest, protecting journalists only before state grand juries and under no other circumstances. The statute was even narrower before Brad Stone, a reporter and producer for a Detroit television station, was subpoenaed to appear before a grand jury. He was also told to bring all written and filmed materials from his station's coverage of youth gangs in Detroit. The grand jury, investigating the death of an off-duty policeman, thought that Stone's materials and testimony might help identify suspects. Stone protested that many of his sources had been promised anonymity, and argued that the identities of youth gang members he interviewed were readily available to the police. Stone also relied on the state shield law. In a decision that is an example of the tendency of state courts to construe privileges literally and narrowly, the Michigan Court of Appeals told Stone the shield law, written in 1949, did not apply to him:

> First, we note that the statute itself makes no mention of television or radio reporters. Rather, it refers to "reporters of newspapers or other publications." Appellant urges us to construe the statute broadly to read "publication" as including a television news show.
>
> Courts may not speculate as to the probable intent of the Legislature beyond the words employed in a statute. Ordinary words are given their plain and ordinary meaning. When the language of a statute is clear and unambiguous, judicial construction is neither required nor permitted. Such a statute * * * speaks for itself.
>
> As the trial court noted, reading the statute to include television news reporters would be an inappropriate exercise of the judicial function, and arguments concerning the fairness of the statute must be addressed to the Legislature.

The court also rejected Stone's claim that the statute as written violated the First Amendment by treating some members of the press preferentially. Only a broad interpretation, he argued, would render the statute constitutional. This argument too was rejected. *Michigan v. Storer Communications*, 13 Med.L.Rptr. 1901 (Mich.App. 1986). Stone's First Amendment equal protection argument was rejected later by the Sixth Circuit, which first read *Branzburg* as allowing no privilege under the circumstances, then said that, under a rational basis standard, "such action by a legislature is presumed to be valid." *Storer Communications v. Giovan*, 13 Med.L.Rptr. 2049, 810 F.2d 580 (6th Cir. 1987). Within months, the Michigan legislature amended the law to include broadcast reporters. But at the same time, an exception allowing compelled disclosure when grand juries are investigating capital crimes was inserted into what had been an absolute shield law.[29]

Even the most absolutist privilege laws may fall before the Sixth Amendment rights of a criminal defendant.[30] The federal constitutional right takes precedence over the state shield. In civil cases absolute shields are more likely to be applied absolutely,[31] but a demonstration that disclosure is needed for preservation of a constitutional or compelling interest may override the shield.[32]

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29. Mich. Comp. Laws Annotated § 767.5a (West 1982 and Supp. 1987).

30. *Hammarley v. Superior Court*, 4 Med.L.Rptr. 2055, 89 Cal. App.3d 388, 153 Cal.Rptr. 608 (1979); *Oregon v. Knorr*, 8 Med.L.Rptr. 2067 (Ore. Cir.Ct. 1982).

31. *Mazzella v. Philadelphia Newspapers*, 5 Med.L.Rptr. 1983, 479 F.Supp. 523 (E.D.N.Y. 1979).

32. *Marks v. Vehlow*, 9 Med.L.Rptr. 2361, 671 P.2d 473 (Idaho 1983).

The scope of shield laws shows complex variation from state to state. They may cover the source of information but not shield the information itself.[33] In others, shield laws discriminate between regular employees of the traditional news media and free-lancers.[34] Still others differentiate, as Michigan does, among media, granting more protection to newspaper writers than magazine writers, for example.[35] In still others, the question of who is covered is determined solely by discerning an intent to disseminate to the public, regardless of the journalistic status of the individual claiming protection.[36] Some states, including Florida and Illinois, do not protect reporters who are defendants in libel cases. And in some states the courts have found it relatively easy to find that a journalist has waived the privilege, which would otherwise have applied.[37]

California's shield law did not protect William Farr while he was between newspaper jobs, even though the information he was ordered to produce was gathered while he was employed as a reporter. A New York court ruled that its law did not cover a television cameraman. In 1981, amendments extended that law's protection to free-lancers, photographers, book authors, employers of journalists and nonestablishment media. It also protects information not solicited by a reporter, and thereby from nonconfidential sources, and information that may be highly relevant to a judicial proceeding.[38] Minnesota's statute protects all persons communicating with the public. Does it trivialize the privilege to extend it to those on the periphery of public affairs?

Since sources may be inferred from a journalist's work product, the hazard of state laws that protect only sources should be recognized.[39] Some laws require that there be publication and an implied or express agreement of confidentiality between source and reporter for the privilege to be invoked.[40] The privilege may attach to a reporter but not to his or her employer.[41]

The argument for a nationwide, federal shield law is largely based on the uncertainty resulting from so much variation, an uncertainty which some consider unacceptable in a time when much journalism crosses state boundaries.[42] The potential for both uncertainty and overt conflict among and between state shields is more than theoretical. It has arisen frequently in cases where journalistic activities cross state borders. In a case where it is arguable that more than one state's law could apply, a court must choose which is the proper law to apply. Usually that law will be the law of the state where the reporting occurred. But other courts may feel so strongly about local law that another state's law will not be applied, especially if the two conflict. Former Senator Paul Laxalt of Nevada sued three California newspapers for libel over several articles implying he had relationships with organized crime figures. Nevada's federal district court applied that state's rules for deciding what law applies. Despite the fact that the newspapers had performed almost all reporting, writing, and editing in California, and despite limited circulation of the newspapers in Nevada, the court decided that Nevada's shield law applied, not California's. Some of the sources apparently were from Nevada. Under Nevada's shield, the newspapers were protected from compelled source disclosure but were also told they could not rely on the sources in their libel defense. *Laxalt v. McClatchy*, 14 Med.L.Rptr. 1199 (D.Nev. 1987). Does the *Laxalt* case mean that reporters should consider the privilege law of another state when the subject of an article lives in that state? Could the reporters have anticipated that Nevada law applied to their reporting in California?

Other complications abound. In most—but not all—jurisdictions a contempt order for failure to

33. *Lightman v. State*, 295 A.2d 212 (Md. 1972); *New York v. Dupree*, 2 Med.L.Rptr. 2015, 388 N.Y.S.2d 1000 (N.Y.Sup.Ct. 1976); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970).

34. *In re Haden-Guest*, 5 Med.L.Rptr. 2361 (N.Y.Sup.Ct. 1980); Montana Code Ann. §§ 26-1-901 to 903 (1987); North Dakota Century Code § 31-01-06.2 (1976); Ohio Revised Code Ann. §§ 44.510 to 44.540 (Anderson 1981).

35. *Application of Cepeda*, 233 F.Supp. 465 (S.D.N.Y. 1964).

36. Nebraska Revised Stat. § 20-146 (1979); Minnesota Stat. Ann. §§ 595.021 to 595.025 (West Supp. 1988).

37. *In re Schumann*, 15 Med.L.Rptr. 1113, 537 A.2d 297 (N.J.Super.Ct. 1988), reversed 16 Med.L.Rptr. 1092 (N.J. 1989).

38. *People v. Iannaccone*, 8 Med.L.Rptr. 1103, 447 N.Y.S.2d 989 (1982).

39. *State v. Sheridan*, 236 A.2d 18 (Md. 1967); *Ohio v. Geis*, 7 Med.L.Rptr. 1675, 441 N.E.2d 803 (Ohio 1981).

40. *Lightman v. State*, 294 A.2d 149 (Md. 1972); Andrews v. Andreoli, 400 N.Y.S.2d 442 (1977).

41. *In re Investigative File*, No. 40 SPL (Mont.Dist.Ct. 10/2/78).

42. Langley & Levine, *Broken Promises*, Columbia Journalism Rev., at 21 (July/August 1988); Note, *The Case for a Federal Shield Law*, 24 U.C.L.A. L.Rev. 160 (1976).

appear or disclose is considered a final, appealable judgment.[43] In some states the person seeking disclosure is expected to show that the material will be admissible at trial. There is uncertainty over the burden of proof applicable to those seeking disclosure. It may be preponderance of the evidence, clear and convincing evidence, or proof of a compelling interest.[44] And the burden of proof may vary depending upon in what type of proceeding disclosure is sought.

Nonetheless, a shield law works as the first line of defense for a journalist who is plainly covered by it. The "plain meaning" of the words of a statute can settle a dispute readily. A reporter for the *Omaha Sun* who went undercover in 1981 to obtain material on underage drinking and lax enforcement by area bars was subpoenaed to testify as to what and whom she had seen. The newspaper argued that disclosure of *anything* was precluded by Nebraska's shield law. Arguably the most absolute, Nebraska's shield prevents compelled disclosure of "data of whatever sort" from any person or organization processing information for "communication to the public" in "any state or federal proceeding."[45] The disclosure request was quashed on the basis of the text of the statute alone without any formal hearing.

Obviously shield laws must be carefully drafted if they are to avoid judicial interpretations that puncture them. Minnesota's statute, stronger than most, provides an example of comprehensiveness, notably in its broad definition of newsgatherer and use of the three-part test. It also shows economy and clarity of language, which discourages strained constructions by the courts. Note also its exception for libel suits.

MINNESOTA FREE FLOW OF INFORMATION ACT

MINN. STAT. ANN. §§595.021–.025 (WEST SUPP. 1988).

Sec. 1 (Citation.) Sections 1 and 4 may be cited as the Minnesota free flow of information act.

Sec. 2 (Public Policy.) In order to protect the public interest and the free flow of information, the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information. To this end, the freedom of press requires protection of the confidential relationship between the news gatherer and the source of information. The purpose of this act is to insure and perpetuate, consistent with the public interest, the confidential relationship between the news media and its (sic) sources.

Sec. 3 (Disclosure Prohibited.) No person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public shall be required by any court, grand jury, agency, department or branch of the state, or any of its political sub-divisions or other public body, or by either house of the legislature or any committee, officer, member, or employee thereof, to disclose in any proceeding the person or means from or through which information was obtained, or to disclose any unpublished information procured by him in the course of his work or any of his notes, memoranda, recording tapes, film or other reportorial data which would tend to identify the person or means through which the information was obtained.

Sec. 4 (Exception and Procedure.) Subdivision 1. A person seeking disclosure may apply to the district court of the county where the person employed by or associated with a news media resides, has his principal place of business or where the proceeding in which the information sought is pending.

Subd. 2. The application shall be granted only if the court determines after hearing the parties that the person making application, by clear and convincing evidence, has met all three of the following conditions:

1. that there is probable cause to believe that the source has information clearly relevant to a specific violation of the law other than a misdemeanor,
2. that the information cannot be obtained by any alternative means or remedy less destructive of first amendment rights, and

43. *Sinnott v. Boston Retirement Board*, 15 Med.L.Rptr. 1608, 524 N.E.2d 100 (Mass. 1988).
44. *State ex rel. Gerbitz v. Curriden*, 14 Med.L.Rptr. 1997, 738 S.W.2d 192 (Tenn. 1987).
45. "Judge Refuses to Make Reporter Give Sources," *Omaha World-Herald*, (April 1, 1981), 2.

3. that there is a compelling and overriding interest requiring the disclosure of the information where the disclosure is necessary to prevent injustice.

Subd. 3. The district court shall consider the nature of the proceedings, the merits of the claims and defenses, the adequacies of alternative remedies, the relevancy of the information sought, and the possibility of establishing by other means that which the source is expected or may tend to prove. The court shall make its appropriate order after making findings of fact, which order may be appealed directly to the Supreme Court according to the appropriate rule of appellate procedure. The order is stayed and non-disclosure shall remain in full force and effect during the pendency of the appeal.

Sec. 5 (Defamation.) Subdivision 1. The prohibition of disclosure provided in Section 3 shall not apply in any defamation action where the person seeking disclosure can demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice.

Subd. 2. Notwithstanding the provisions of Subdivision 1 of this Section, the identity of the source of information shall not be ordered disclosed unless the following conditions are met:

a. that there is probable cause to believe that the source has information clearly relevant to the issue of defamation;
b. that the information cannot be obtained by any alternative means or remedy less destructive of First Amendment rights.

Subd. 3. The court shall make its order on the issue of disclosure after making findings of fact, which order may be appealed directly to the Supreme Court according to the rules of appellate procedure. During the appeal the order is stayed and nondisclosure shall remain in full force and effect.

One significant advantage of a statute is that it can be amended readily to cover more individuals and more types of media. Shield law amendments have almost always expanded protection rather than contracted it. Under a common law or constitutional approach, those seeking protection must wait for a lawsuit to arise to seek expanded protection. The concern that legislatures will reduce protection or revoke shields altogether as a way of punishing the press has not as yet materialized.

JOURNALIST'S PRIVILEGE IN THE CRIMINAL CONTEXT

Consistent with *Branzburg*, a journalist who witnesses a crime remains highly vulnerable to subpoena. Traditional privilege analysis refuses to recognize a right to refuse to testify unless there is an understanding that a communication is privileged. When a reporter has simply seen what anyone else could have seen, no confidential relationship exists because no communication was understood as privileged. Typically, in *Pankratz v. Colorado District Court*, 6 Med.L.Rptr. 1269, 609 P.2d 1101 (Colo. 1980), the court held there was no state or federal constitutional privilege or common law privilege when a reporter witnesses a crime. The court noted that the reporter was not shielding the identity of a source, only testimony about a meeting attended by the reporter.

Even when a journalist witnesses a crime or has material amounting to a confession by a defendant under a confidentiality agreement, courts may look unfavorably on the claim. Following publication of a story in which a murder defendant made incriminating statements and prosecutors issued a subpoena, a New Jersey court determined that the state's shield law was waived so far as published information was concerned. *In re Schumann*, 15 Med.L.Rptr. 1113 (N.J. Super.Ct. 1988). The New Jersey Supreme Court later said a waiver applies only if a defendant seeks testimony.

In other cases, courts have found that the compelling interest part of Stewart's three-part test is met by government's interest in public safety and in successful prosecution of criminals.

Reporters called to testify before grand juries may rely upon rules in addition to those of privilege. While federal and state constitutional privilege may apply, and so may state shield laws or state common law, grand jury subpoenas may also be attacked generally on grounds of overbreadth, prematurity, duplication, and harassment. The Fifth Amendment right against self-incrimination may be raised in appropriate cases, but a grant of immunity to the reporter witness will negate the right. A reporter who

must "take the Fifth" probably has worries other than protecting sources or notes, however.

In federal cases, the Department of Justice's *Guidelines on News Media Subpoenas*[46] and the *Federal Rules of Evidence* may be added. The *Guidelines* try to strike a balance between news flow and justice, between negotiation and demand. Reporters are not entitled under the First or Fourth Amendments to advance warning that a subpoena is coming, however. *Reporters Committee for Freedom of the Press v. American Telephone & Telegraph* Co., 4 Med.L.Rptr. 1177, 593 F.2d 1030 (D.C.Cir. 1978), cert. den. 440 U.S. 949 (1979). In federal grand jury cases, express authorization by the U.S. Attorney General is required, and in all cases involving news media, alternative sources must be pursued. If the guidelines are not followed, a subpoena may be challenged and quashed. *United States v. Blanton*, 8 Med.L.Rptr. 1106, 534 F.Supp. 295 (S.D.Fla. 1982).

Federal Rules of Evidence § 403 allows a judge to exclude relevant evidence or quash subpoenas altogether if the testimony or subpoena is unlikely to produce significant new information. Any subpoena against a reporter that does not promise new information is premature. *United States v. Burke*, 9 Med.L.Rptr. 1211, 700 F.2d 70 (2d Cir. 1983). Section 501 provides that when state law supplies the rule for a defense, a federal court should apply state law when considering a privilege claim. If a federal circuit recognizes a privilege similar to Stewart's three-part test as a matter of federal constitutional law or federal common law, a federal court would normally apply federal privilege rules if there is no state law or state privilege protection is less than the federal. Where the state's law provides greater protection, *Branzburg* itself may require that state law apply.[47]

Under the *Federal Rules of Criminal Procedure* § 17(c), only "evidentiary materials" may be subpoenaed—in other words, material that would be admissible at trial. State criminal procedure rules may be similar. The case which follows shows the complexity when § 17(c), a federal journalist's privilege, and the Sixth Amendment right of "compulsory process for obtaining witnesses" must be considered together. It also illustrates the difficulty of applying a journalist's privilege generally.

The Third Circuit heard two appeals in the case. In the first appeal, the court extended its common law privilege to notes and materials as well as to the identities of sources. *United States v. Cuthbertson*, 6 Med.L.Rptr. 1551, 630 F.2d 139 (3d Cir. 1980), cert. den. 449 U.S. 1126 (1981) *(Cuthbertson I)*. After further trial court proceedings, the case arose again. Both involved subpoenas by defendants in a criminal fraud and conspiracy trial of outtakes and transcripts of interviews with trial witnesses from CBS's "60 Minutes." What follows is an edited version of *Cuthbertson II*.

UNITED STATES v. CUTHBERTSON

7 MED.L.RPTR. 1377, 651 F.2D 189 (3D CIR. 1981), CERT. DEN. 454 U.S. 1056.

ALDISERT, Circuit Judge.

Because the facts are detailed in *Cuthbertson I*, we need set forth only a synopsis. On December 3, 1978, CBS presented on its news program "60 Minutes" an investigative report describing fast-food franchising by an organization known as Wild Bill's Family Restaurants. The report was based on interviews with a number of persons, including certain franchisees and former employees of Wild Bill's, and local government officials. On September 5, 1979, a federal grand jury returned an indictment against several principals of Wild Bill's charging them with fraud and conspiracy in the operation of the company. On February 4, 1980, on the eve of trial, the defendants served on CBS a subpoena pursuant to rule 17(c) of the *Federal Rules of Criminal Procedure* demanding production of all reporters' notes, file "out takes," audiotapes, and transcripts of interviews prepared in connection with the "60 Minutes" program. The district court's denial of CBS' motion to quash the subpoena and its subsequent order holding CBS in contempt were before us in the previous appeal.

In *Cuthbertson I*, we held that "journalists possess a qualified privilege not to divulge confidential sources and not to disclose unpublished information in their possession in criminal cases." 630 F.2d at 147. We recognized that "compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial proc-

46. *Guidelines on News Media Subpoenas*, 28 C.F.R. § 50.10, 1979, as amended Nov. 12, 1980, 6 Med.L.Rptr. 2153 (U.S. Dept. of Justice 1980).
47. *Mazzella v. Philadelphia Newspapers*, 5 Med.L.Rptr. 1983, 479 F.Supp. 523 (E.D.N.Y. 1979).

esses." *Id.* We concluded that this qualified privilege may be superseded by "countervailing interests" in particular cases, requiring the district courts to "balance the defendant's need for the material against the interests underlying the privilege * * *." *Id.* at 148.

We also established guidelines for the district courts to use in applying rule 17(c) to subpoenas *duces tecum* directed to third parties. Rule 17(c) was not intended to be a broad discovery device, and only materials that are "admissible as evidence" are subject to subpoena under the rule. See *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221 (1951). To obtain pretrial production and inspection of unprivileged materials from a third party witness, a party must show:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition." 630 F.2d at 145 quoting *United States v. Nixon*, 418 U.S. 683, 699–700 (1974). * * *

Because the district court had ordered *in camera* review rather than presentation to the moving party, however, we deemed the second and third elements of this test inapplicable. 630 F.2d at 145.

Defendants had requested previous statements by persons whose names did not appear on the government's witness list as well as statements by persons whose names did appear. They asserted no basis for admissibility of the non-witness statements other than a hope that they would contain some exculpatory material. Accordingly, we held the district court's order to be invalid under rule 17(c) to the extent it sought non-witness material. 630 F.2d at 146. We found, however, that statements of persons on the government's witness list may be inconsistent with trial testimony and admissible for impeachment purposes. 630 F.2d at 144. We recognized that "because such statements ripen into evidentiary material for purposes of impeachment only if and when the witness testifies at trial, impeachment statements, although subject to subpoena under rule 17(c), generally are not subject to production and inspection by the moving party prior to trial." *Id.* Nevertheless, because *in camera* review would aid the district court's trial preparation, we held that the district court's order to produce statements by witnesses for *in camera* inspection before trial was not an abuse of discretion under rule 17(c). *Id.* at 145.

After remand from this court, CBS submitted to the district court for *in camera* review transcripts and audio tapes of three interviews with two persons whose names appear on the government witness list. After some skirmishing over and a hearing on related matters, the court ruled that the witness statements would materially aid the defendants and therefore would be turned over to them before trial under the rationale of *Brady v. Maryland*, 373 U.S. 83 (1963).

The present conflict emerged from that decision. This court had approved *in camera* inspection of witness statements for the purpose of deciding whether they would have impeachment value; if so, they could be turned over to the defendants during the trial *after* the particular government witness had testified. On remand, however, the district court determined that these statements could be turned over to the defendants after commencement of trial but *before* the witnesses testified because they qualified as exculpatory evidence. It entered an order on March 24, 1981, directing disclosure of the materials to defendants on March 30, 1981. * * * On March 25, Judge Gibbons granted a stay of the order, and on March 28, a motions panel consisting of Chief Judge Seitz and Judge Adams extended the stay pending a decision on the merits. The other petition for writ of mandamus * * * challenges the district court's ruling of March 23, 1981, which required CBS to submit certain non-witness material to enhance intelligibility of the witness statements. Although no formal order directing this submission has been filed, CBS filed this second petition for writ of mandamus on March 28.

* * *

[There follows a discussion on the technicalities of appellate jurisdiction and review.] * * *

In *Cuthbertson I*, CBS sustained a contempt citation by refusing to comply with a subpoena. On appeal, we also ordered CBS to submit some documents to the district court for *in camera* review, and the Supreme Court denied defendants' petition for a writ of certiorari. After denial of the petition for writ of certiorari, CBS had no alternative but to comply by submitting the documents.

* * *

We conditioned our mandate, however, by limiting *in camera* inspection to examination of the documents to determine their possible value in impeaching government witnesses. Only after the district court had the materials in its possession did it announce its intention to allow the defendants to examine them prior to the witnesses' trial testimony. Because the trial court was already in possession of the materials as a result of the earlier appeal, it was impossible for CBS to generate an appealable order by resisting production and incurring contempt sanctions.

In the absence of the more lenient methods of appealing interlocutory orders available to civil litigants under 28 U.S.C. § 1292(b) and Fed.R.Civ.P. 54(b), a steadfast requirement that CBS incur contempt before appealing would foreclose it from obtaining review of important issues likely to arise after it submits the documents to the district court. Such a rule would be disadvantageous both to CBS and to the development of this uncertain area of the law. In addition, an invariable requirement of a contempt citation as a ticket to appellate review would work at cross purposes with our earlier admonition that "trial courts should be cautious to avoid an unnecessary confrontation between the courts and the press." *Riley v. City of Chester*, 612 F.2d 708, 718 (3d Cir. 1979). * * *

CBS contends that the materials do not qualify as exculpatory evidence retrievable under rule 17(c), and that the defendants have not met the standards for compelling disclosure of press materials under our decisions in *Riley*, *Cuthbertson*, and *Criden* because they have not demonstrated that this privileged material is the only source of the desired information. We agree on both points.

Rule 17(c) provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

The Supreme Court has determined that a rule 17(c) subpoena reaches only evidentiary materials. "In short, any document or other materials, *admissible as evidence*, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena." *Bowman Dairy* Co. *v. United States*, 341 U.S. at 221 (emphasis added). The court extended the admissibility requirement of rule 17(c) to materials held by third parties in *United States v. Nixon*, 418 U.S. at 699–700, 699 n. 12. See also *United States v. Iozia*, 13 F.R.D. 335, 338, 340–41 (S.D.N.Y. 1952). Neither the government nor the defendants have explained how the CBS materials could be admissible as evidence, unless the interviewees testified and made inconsistent statements.

We believe that the basic error of the district court in its discussion of the statements' potential lay in its failure to discriminate between potential exculpatory material in the possession of the prosecution, generally available under the teachings of *Brady v. Maryland*, and exculpatory evidence in the possession of third parties. Only the latter is retrievable under a rule 17(c) subpoena; naked exculpatory material held by third parties that does not rise to the dignity of admissible evidence simply is not within the rule. That is the teaching of *Bowman Dairy* and *Nixon*, and we applied it in *Cuthbertson I*.

The appellees in this case have not demonstrated, nor does our research disclose, any potential use of the present materials as *evidence* in the trial other than for purposes of impeachment. On their face, these materials are simply hearsay.

* * *

Accordingly, as a matter of law the materials may not be obtained at this time by a rule 17(c) subpoena. Because the district court's *in camera* possession is based on the necessity of evaluating the material against the evidentiary requirement of rule 17(c), it may not release the material to the parties unless that requirement is met. It failed to make such a determination of admissibility in this case, and we therefore reverse its order releasing the materials to the defendants.

We also reverse the district court's order for a separate and independent reason.

* * *

In our most recent decision in the reporters' privilege context, *United States v. Criden*, 633 F.2d 346 (3d Cir. 1980), cert.. denied sub nom. *Schaffer v. United States*, 49 U.S.L.W. 3512 (Jan. 20, 1981), we reviewed our prior decisions in *Cuthbertson I* and *Riley* and cited three criteria that must be met

before a reporter may be compelled to disclose confidential information:

> First, the movant must demonstrate that he has made an effort to obtain the information from other sources. Second, he must demonstrate that the only access to the information sought is through the journalist and her sources. Finally, the movant must persuade the Court that the information sought is crucial to the claim, 633 F.2d at 358–359.

In this case, the identities of the possible witnesses are available from the witness list. The statements were made by franchisees and potential franchisees, with whom the defendants have had business relationships. Defense counsel have conceded that "[w]e know because of the dealings that the defendants have had with all the franchisees, who all of these people are."

In this case, the sources have not yet testified. If their testimony at trial differs from their statement to CBS, the defendants will have the opportunity to obtain the materials for impeachment purposes.

* * *

Our conclusion that the evidentiary potential of the witness statements will arise only when the witnesses testify governs our disposition of the second petition for writ of mandamus. It is our understanding that, at the time the second petition was filed in this court, no formal order on this issue had been entered by the district court. * * * Moreover, the threshold determination giving rise to the appeal and the first petition—that the materials contain exculpatory information to which defendants are entitled—was not made with regard to the non-witness materials. Therefore, the second petition for writ of mandamus is not ripe, and we need not now address it.

Accordingly, * * * the district court's order of March 24, 1981, releasing the witness materials to the defendants, will be reversed and the cause remanded for further proceedings consistent with this opinion. [T]he petition for writ of mandamus will be dismissed as moot; [a second] petition for writ of mandamus will be dismissed as not ripe.

COMMENT

The Third Circuit essentially reversed the federal district court because the defendants seeking disclosure of information failed to make a sufficient showing that the information was needed. Specifically, the court held that disclosure *prior* to trial could not be ordered since there was no showing that (1) the tapes would be admissible at trial as Rule 17(c) requires, and (2) that alternate sources had been exhausted. *Cuthbertson II* recognized and applied a qualified journalist's privilege, consistent with *Riley v. City of Chester*, 5 Med.L.Rptr. 2161, 612 F.2d 708 (3d Cir. 1979). The complex opinion demonstrates multiple strands of analysis possible in privilege cases. Rules of evidence are examined alongside common law privilege in light of First Amendment principles.

Cuthbertson II upholds journalists' claims that they should not be made arms either of the government or of parties in a case when it comes to investigating or proving a case. A privilege claim is most likely to be overcome in criminal cases where the defendant can show that information held by a journalist is essential to the defense because of the Sixth Amendment's guarantee of a fair trial to the defendant. Nonetheless, overcoming the privilege is difficult.

An earlier state case similar to *Cuthbertson II* was *Brown v. Commonwealth of Virginia*, 204 S.E.2d 429 (Va. 1974), where it was held that journalist's privilege could be pierced if the information was material to a defense or to reduction in the charge or penalty for the offense. While the opinion did not rely upon Stewart's three-part test, the court did require defendants to show that the information was (1) essential to the case, and (2) not available from alternative sources. No mention was made of Stewart's third part, that there be a compelling interest for disclosure, but the court may have assumed that the Sixth Amendment fair trial right satisfies it. See Barron and Dienes, *Handbook of Free Speech and Free Press* 447 (1979). The court said that, once the defendant meets the test, "the defendant has a fair trial *right* to compel disclosure. * * * the newsman must, upon pain of contempt, yield to that right."

In *Brown*, the information sought concerned inconsistent statements of a prosecution witness. The Virginia Supreme Court appeared to rely upon both its state law and upon the First Amendment in recognizing a privilege. The material sought was held to be nonessential:

> [T]he record fails to show that either the statements made at trial or the prior statements were material to proof of the crime, to proof of Brown's defense, or to a reduction in the classification or penalty of the crime

charged. Since the inconsistent statements were collateral and not material, the identity of the source was irrelevant.

In criminal cases, the greatest stumbling block for defendants or for prosecutors seeking disclosure of confidential sources or information has been the second prong of Stewart's three-part test, the requirement that there be no alternative method of obtaining the information sought. In *Hallissy v. Contra Costa Superior Court*, 15 Med.L.Rptr. 1325 (Cal.App. 1988), a defendant in a murder trial argued that it was essential to his defense to call as a witness a reporter to whom the defendant had granted an interview. The interview resulted in an article in the *Contra Costa Times* entitled, "I kill many for pay," which included incriminating statements by the defendant. The prosecution relied on the article in pressing charges against the defendant. The trial judge considered a claim of First Amendment protection a "travesty" when the source was known, the information largely known, and the defendant was facing the death penalty.

The court of appeals reversed, noting that the defendant, who sought to attack his own credibility in the published interview, claimed to have confessed to others besides the reporter. This, the court held, indicated that alternative sources existed. In addition, under California's shield law, the defendant had failed to show that the material sought created a "reasonable possibility" that the evidence would exonerate him.

In *State ex rel. Gèrbitz v. Curriden*, 14 Med.L.Rptr. 1797, 738 S.W.2d 192 (Tenn. 1987), the court applied the alternative means analysis to refuse to compel testimony before a grand jury by a reporter whose radio interview with a self-proclaimed killer had prompted a subpoena. The killer used a false name during the interview. The reporter said he did not know the identity of the killer and could provide only a general description. The court, applying the alternative means analysis, reasoned that the state had failed to investigate well enough:

> There is no explanation of what information was sought from appellee or what other efforts, if any, the Attorney General or other law enforcement agencies had made to determine the identity of the criminal offense, the offender himself, or the site of the offense. It does not appear whether the alleged crime occurred in Hamilton County or was subject to the jurisdiction of the Hamilton County grand jury. No investigation or inquiry by Hamilton County officials with officials from surrounding counties appears to have been made, nor has any check of prison or parole records been shown.

In another case where a murder defendant had granted an exclusive interview to a reporter, however, the court ordered disclosure. *Waterman Broadcasting v. Reese*, 14 Med.L.Rptr. 2246, 523 So.2d 1161 (Fla.Dist.Ct.App. 1988). The court reasoned that (1) a confession is *always* relevant in a criminal case, (2) the exclusivity of the interview alone assured that no alternative sources existed, and (3) the state's interest in law enforcement constituted a compelling interest. Which approach is more persuasive—that of California and Tennessee refusing disclosure, or that of Florida requiring disclosure?

The privilege also applies in nontrial contexts. A television reporter was held to be entitled to refuse to answer questions posed during a deposition hearing prior to a criminal case in *State of Vermont v. St. Peter*, 1 Med.L.Rptr. 2671, 315 A.2d 254 (Vt. 1974), "unless the interrogator can demonstrate to the judicial officer appealed to that there is no other adequately available source for the information and that it is relevant and material on the issue of guilt or innocence."

As these cases illustrate, *Branzburg* has resulted in the adoption of a qualified First Amendment privilege in most jurisdictions, even in the grand jury context. *In re Ridenhour*, 15 Med.L.Rptr. 1022 (La. 1988): "The vast majority of the courts that have considered this issue [grand jury subpoenas] after *Branzburg* have read *Branzburg* as merely holding that reporters who witness a crime may be compelled to testify before a grand jury as to whom and what they saw." Despite the apparently unequivocal language of the Sixth Amendment, the rough outlines in Stewart's *Branzburg* dissent prevail in most jurisdictions.

In jurisdictions with decisions less sympathetic to a journalist's privilege—California, Massachusetts, Michigan, and New York among them—neither state shield laws nor the First Amendment will protect journalists in all circumstances. In the *Rosato* case, a judge anxious to discover who defied his orders to not discuss a case recognized neither a privilege for unpublished material nor the requirement of exhausting alternative sources, despite the language of California's statute at the time.[48]

48. *Rosato v. Superior Court*, 1 Med.L.Rptr. 2560, 51 Cal.App.3d 190, 124 Cal.Rptr. 427 (1975), cert. den. 427 U.S. 912 (1976).

Similarly, in *CBS v. Superior Court*, 4 Med.L.Rptr. 1568, 149 Cal.Rptr. 421 (1978), the California Court of Appeal required *in camera* disclosure of outtakes from the program "60 Minutes" showing negotiations for drug sales between undercover agents and the defendants in the case. The officers' identities had been revealed at a hearing on a motion to quash the subpoena. The court reasoned that all of the confidential material must be provided when part of it is revealed. This has sometimes been called the "exposure to view" theory.

After Michigan's shield law, which applied only to print reporters, was held inapplicable to provide protection for a television reporter, *Storer Communications v. Giovan*, 13 Med.L.Rptr. 2049, 810 F.2d 580 (6th Cir. 1987), the state legislature amended the statute to include broadcasters but added an exception and retained the narrow scope of the statute, which shields only in grand jury contexts.

Idaho and Massachusetts refused to recognize a privilege for many years and appear ready to construe theirs narrowly now. Narrow application of shield laws or refusal to provide or apply a privilege is a primary reason for a pattern of nonprotection in a number of states.

Sometimes the balance tips the other way. In *United States v. Burke*, 7 Med.L.Rptr. 2019 (E.D.N.Y. 1981), a federal court applying state law required a magazine reporter to appear after his witness-source had testified but refused to order disclosure of work product.

At an early stage in the "Abscam" investigation, NBC and newspapers in New York and Philadelphia were privy to prosecution strategy. Defendants wanted to learn about relationships between prosecutors and the press. Although defendants met the three-part test, and Justice Department employees were punished for making disclosures to the press, reporter testimony was kept minimal. In re Schaffer, 6 Med.L.Rptr. 1554 (E.D.Pa. 1980), aff'd sub nom. *United States v. Criden*, 6 Med.L.Rptr. 1993, 633 F.2d 346 (3d Cir. 1980), cert. den. 449 U.S. 1113 (1981).

The Special Case of New Jersey: *In re Farber*

The famous *Farber* case at the time seemed a retreat from the advance of a qualified journalist's privilege in the lower courts. More than a decade later, it is clear that *Farber* did not signal a retreat but was at most a delay. Still, the case serves to warn journalists of the dangers possible when they get very close to their sources or when they independently investigate criminal activity.

Investigative work of *New York Times* reporter Myron Farber led to the indictment and prosecution of Dr. Mario E. Jascalevich for murder. Jascalevich subpoenaed Farber's notes on the ground that this might enable him to establish his innocence. Farber and his employer, the *New York Times*, contended that the subpoena was overbroad and that the material sought was privileged under both the new New Jersey and New York shield laws and the First Amendment. The trial judge ruled that the notes in controversy were "necessary and material." Farber and the *New York Times* requested a hearing to air their arguments that the material sought was privileged prior to having to produce it. The trial court judge, William Arnold, rejected this request and ordered that the subpoenaed material be produced for *in camera* inspection by the court.

Farber and the *Times* sought unsuccessfully to stay the trial judge's order for *in camera* or private inspection of Farber's notes in the New Jersey state courts. Both Justices White and Marshall separately declined to stay the trial court's order requiring compliance with the subpoena. Appeals Court Judge Trautwein then determined that Judge Arnold's order for *in camera* inspection had been "willfully condemned" and found Farber and the *Times* guilty as charged.

Judge Trautwein imposed a $100,000 fine on the *New York Times* and ordered Myron Farber to serve six months in the Bergen County jail and to pay a fine of $1,000. In addition, a fine of $5,000 for every day that Judge Arnold's production order was disobeyed was imposed on the *Times*. Farber was confined to the Bergen County jail for forty days. The *Times* and Farber then sought and obtained review of the judgments of civil and criminal contempt against them.

The New Jersey Supreme Court, per Justice Fountain, rejected the contention that the *New York Times* and Myron Farber had a "privilege to remain silent with respect to confidential information and the sources of such information by virtue of the First Amendment.

"In our view the Supreme Court of the United States (in *Branzburg*) has clearly rejected this claim and has squarely held that no such First Amendment right exists." At the same time, it was conceded that "despite the holding in *Branzburg*, those who gather and disseminate news are by no means without First Amendment protections." Among these protections

was the right to refrain from revealing sources except upon legitimate "demand."

What was illegitimate demand? "Demand is not legitimate when the desired information is patently irrelevant to the needs of the inquirer or his needs are not manifestly compelling." However, among the protections afforded by the First Amendment to the press, "there is not to be found the privilege of refusing to reveal relevant and confidential information and its sources to a grand jury."

> Thus, we do no weighing or balancing of societal interests in reaching our determination that the First Amendment does not afford appellants the privilege they claim. The weighing and balancing has been done by a higher court. Our conclusion that appellants cannot derive the protection they seek from the First Amendment rests upon the fact that the ruling in *Branzburg* is binding upon us and we interpret it as applicable to, and clearly including, the particular issue framed here. It follows that the obligation to appear at a criminal trial on behalf of a defendant who is enforcing his Sixth Amendment rights is at least as compelling as the duty to appear before a grand jury.

The New Jersey Supreme Court's decision in *Farber* was hard to evaluate. Unlike the cases discussed earlier, it appeared to take the position that no First Amendment-based newsman's privilege may ever attach in a grand jury context or where a criminal defendant seeks information from a reporter *relevant* to his case.

At the same time, the New Jersey Supreme Court emphasized that the journalist's duty to provide information to a grand jury, spoken of in *Branzburg*, related to "relevant information he possesses." If we speak of "relevant" information, isn't the implication that a privilege would attach to information sought which would not be "relevant"?

A fascinating aspect of the *Farber* case was that it presented a direct clash between the state and federal constitutions and the state shield law. The New Jersey Supreme Court described its shield law, N.J.S.A., 2A:84A–21 and 21A, as one which was "as strongly worded as any in the country." Approached as a matter of statutory construction, the "appellants come fully within the literal language of the enactment." But it was successfully argued in *Farber* that if the shield law was enforced, the Sixth Amendment to the U.S. Constitution as well as Art. I, § 110 of the New Jersey Constitution would be violated:

> Essentially, the argument is this: The Federal and State Constitutions each provide that in all criminal prosecutions the accused shall have the right "to have compulsory process for obtaining witnesses in his favor." Dr. Jascalevich seeks to obtain evidence to use in preparing and presenting his defense in the ongoing criminal trial in which he has been accused of multiple murders. He claims to come within the favor of these constitutional provisions—which he surely does. Finally, when faced with the shield law, he invokes the rather elementary but entirely sound proposition that where Constitution and statute collide, the latter must yield. Subject to what is said below, we find this argument unassailable.

An important part of the decision of the New Jersey Supreme Court involved its rejection of the contention of Farber and the *Times* that permitting *in camera* inspection by the trial court of the information in controversy would be a violation of the shield law. While agreeing with Farber and the *Times* that "they are entitled to a full hearing on the issues of relevance, materiality, and overbreadth of the subpoena," the New Jersey Supreme Court defended preliminary *in camera* inspection of the information "to determine whether, and if so to what extent, the statutory privilege must yield to the defendant's constitutional rights: * * * Judge Arnold refused to give ultimate rulings with respect to relevance and other preliminary matters until he had examined the material. We think he had no other course. It is not rational to ask a judge to ponder the relevance of the unknown."

The appellants had objected that the subpoena was vague and uncertain and that the data sought under it might not be relevant and material. This was all the more reason "for the trial court to inspect *in camera* the subpoenaed items."

IN RE FARBER

4 MED.L.RPTR. 1360, 394 A.2D 330 (N.J. 1978).

FOUNTAIN, J.

* * *

While we agree, then, that appellants should be afforded the hearing they are seeking, one procedural aspect of which calls for their compliance with the order for *in camera* inspection, we are also of the view that they, and those who in the future may be similarly situated, are entitled to a preliminary determination before being compelled to submit the subpoenaed materials to a trial judge for such inspection. Our decision in this regard is not, contrary to the suggestion in some of the briefs filed with us,

mandated by the First Amendment; for in addition to ruling generally against the representatives of the press in *Branzburg*, the Court particularly and rather vigorously, rejected the claims there asserted that before going before the grand jury, each of the reporters, at the very least, was entitled to a preliminary hearing to establish a number of threshold issues. Rather, our insistence upon such a threshold determination springs from our obligation to give as much effect as possible, within ever-present constitutional limitations, to the very positively expressed legislative intent to protect the confidentiality and secrecy of sources from which the media derive information. To this end such a determination would seem a necessity.

The threshold determination would normally follow the service of a subpoena by a defendant upon a newspaper, a reporter or other representative of the media. The latter foreseeably would respond with a motion to quash. If the status of the movant—newspaper or media representative—were not conceded, then there would follow the taking of proofs leading to a determination that the movant did or did not qualify for the statutory privilege. Assuming qualification, it would then become the obligation of the defense to satisfy the trial judge, by a fair preponderance of the evidence including all reasonable inferences, that there was a reasonable probability or likelihood that the information sought by the subpoena was material and relevant to his defense, that it could not be secured from any less intrusive source, and that the defendant had a legitimate need to see and otherwise use it. * * * We wish to make it clear, however, that this opinion is not to be taken as a license for a fishing expedition in every criminal case where there has been investigative reporting, nor as permission for an indiscriminate rummaging through newspaper files.

Although in this case the trial judge did not articulate the findings prescribed above, *it is perfectly clear that on the record before him a conclusion of materiality, relevancy, unavailability of another source, as well as need was quite inescapable.*

* * *

As of June 30, 1978, the date of the challenged decision to examine the materials *in camera*, Judge Arnold had been trying the case for about 18 weeks. He had dealt with earlier pretrial motions. His knowledge of the factual background and of the part Farber had played was intimate and pervasive. Perhaps most significant is the trial court's thorough awareness of appellant Farber's close association with the Prosecutor's office since a time preceding the indictment. This glaring fact of their close working relationship may well serve to distinguish this case from the vast majority of others in which defendants seek disclosure from newsmen in the face of the shield law. Two and a half months before his June 30th decision, Judge Arnold observed,

> The facts show that Farber has written articles for the *New York Times* about this matter, commencing in January 1976. According to an article printed in the *New York Times* (hereinafter the *Times*) on January 8, 1976, Farber showed Joseph Woodcock, the Bergen County Prosecutor at that time, a deposition not in the State's file and *provided additional information that convinced the prosecution to reopen an investigation into some deaths that occurred at Riverdell Hospital.* [Emphasis added.] [*State v. Jascalevich; In the Matter of the Application of Myron Farber and the New York Times Company re: Sequestration*, 158 N.J.Super. 488, 490 (Law Div. 1978).]

And

> The court has examined the news stories in evidence and they demonstrate exceptional quality, a grasp of intricate scientific knowledge, and a style of a fine journalist. *They, also, demonstrate considerable knowledge of the case before the court and deep involvement by Farber*, showing his attributes as a first-rate investigative reporter. [Emphasis added.] However, if a newspaper reporter assumes the duties of an investigator, he must also assume the responsibilities of an investigator and be treated equally under the law, unless he comes under some exception. [Id. at 493–94.]

In the same vein is a letter before the trial court dated January 14, 1977 from Assistant Prosecutor Moses to Judge Robert A. Matthews, sitting as a Presiding Judge in the Appellate Division, undertaking to explain "how the investigation, from which the [Jascalevich] indictment resulted, came to be reopened." In the course of that explanation it is revealed that sometime in the latter part of 1975 "a reporter for the *New York Times* began an investigation into the 1965–66 deaths and circumstances surrounding them. The results of the *New York Times* inquiry were made available to the Prosecutor. *It was thus determined that there were certain items which were not in the file of the Prosecutor.*" [Emphasis added.]

* * *

We hasten to add that we need not, and do not, address (much less determine) the truth or falsity of

these assertions. The point to be made is that these are the assertions of the criminal defendant supported by testimonial or documentary proof; and based thereon it is perfectly clear that there was more than enough before Judge Arnold to satisfy the tests formulated above. Of course all of this information detailed above has long been known to appellants. Accordingly we find that preliminary requirements for *in camera* inspection have been met.

* * *

The judgment of conviction of criminal contempt and that in aid of litigant's rights are affirmed. Stays heretofore entered are vacated * * *.

COMMENT

Chief Judge Hughes, concurring, said the press claim that *in camera* inspection was impermissible was an "absurd proposition that the press, and not the courts should be the final arbiter of the constitutional mandate."

Justice Pashman issued a strong dissent disputing the court's assertion that Farber and the *New York Times* were granted a sufficient hearing prior to issuance of the disclosure order. "[A]ppellants were to be afforded an opportunity to contest the legality of the *in camera* disclosure *only after* the materials had been so disclosed," he said. "Mr. Farber probably assumed, as did I, that hearings were supposed to be held and findings made *before* a person went to jail and not *afterwards*."

Another much-publicized aspect of the case was that Farber was writing a book on the Jascalevich case and had received a large advance from a publisher.[49] Pashman challenged the majority's intimation that a reporter could lose shield law protection if characterized as an investigator:

> To hold therefore that the Shield Law is not applicable to a reporter who is also an investigator is to hold that the Shield Law will never be applicable * * *. [P]ublishing journalistic books for money is no less an illustrious way to perform the function of the press than is writing newspaper articles for a salary.

Pashman disagreed with the majority's implication that a determination of the relevancy of materials sought was appropriate when reporters gained "considerable knowledge" concerning a criminal case. He also thought *in camera* disclosure to determine relevancy was premature and should not be assumed to be appropriate. The hearing on relevance, materiality, and necessity should always precede a disclosure order, he said.

The New Jersey Legislature agreed with Pashman and amended the shield law to protect against routine *in camera* disclosure and to assure a hearing on a disclosure motion prior to any order to disclose. *New Jersey v. Boiardo*, 6 Med.L.Rptr. 1337, 416 A.2d 793 (N.J. 1980). In *Boiardo*, the New Jersey Supreme Court vacated an order compelling a reporter to produce for *in camera* inspection a letter written by a prospective government witness in a murder trial. Once a journalist's status is certified, a party seeking disclosure of either sources or materials in New Jersey must now meet a stiff four-part test. The law also protects eyewitness newsgathering unless the crime witnessed involves "physical violence or property damage."[50]

Still, with its history of reading the shield law narrowly and a number of cases finding that reporters have waived their privilege, New Jersey courts have remained amenable to demands for disclosure in criminal cases. In a noncriminal case, the New Jersey Supreme Court had held that partial disclosure did not constitute a waiver, an apparent rejection of the "exposure to view" analysis. *Maressa v. New Jersey Monthly*, 8 Med.L.Rptr. 1473, 445 A.2d 376 (N.J. 1982).

The *Farber* case became a *cause celébre*. In a dramatic finale, the jury acquitted Jascalevich. The need for information was gone, and Farber was released from jail. With heavy fines still outstanding, the *Times* sought review in the U.S. Supreme Court but was refused. In 1982, New Jersey Governor Brendan Byrne pardoned both the *New York Times* and Farber and returned $101,000 in criminal penalties to the newspaper.

Was the case unique in that investigative reporter Farber had become the *sole* expert on the case and could therefore be assumed to hold information vital to the defense? That assumption was part of the court's holding.

If nothing else is certain when privilege is claimed in the context of a criminal investigation or trial, it

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49. M. Farber, *"Somebody Is Lying": The Story of Dr. X* (1982).
50. *In re Vrazo*, 6 Med.L.Rptr. 2410, 423 A.2d 695 (N.J. 1980).

is clear that "fishing expeditions" are disfavored and will typically result in a decision protecting journalist's sources and materials. The *Journal of the American Medical Association* published an anonymous essay by a doctor who advocated euthanasia for some patients and who claimed to have actually killed a terminal patient. A Cook County, Illinois grand jury subpoenaed the magazine to name the source of its essay. Applying the Illinois shield law, the court refused to enforce the subpoena. Only if the state could provide more information would a subpoena be appropriate. Since there was no evidence that a crime had been committed, much less in Cook County, no basis for disclosure existed. The name of the source was not relevant. *In re Grand Jury Investigation*, 15 Med.L.Rptr. 1469 (Ill.Cir.Ct. 1988).

JOURNALIST'S PRIVILEGE IN LIBEL LITIGATION

Claims of privilege not to disclose identities of sources or not to provide materials create uneasy situations when the journalist or news organization—usually both—find themselves in the defendant's chair in a libel suit. The libel plaintiff frequently asserts that source identification or reporter work product materials are essential to proving the case. And, when the plaintiff is required to prove that a reporter acted negligently or with actual malice, the plaintiff is often correct: the quality and credibility of sources, along with the scope and accuracy of reporting materials, may be the evidence needed to show the requisite evidence of fault.

Courts considering privilege claims in libel litigation have tended to be less solicitous of the privilege than in other contexts. A reporter-defendant has more than a principled desire to prevent a "chilling effect" on newsgathering as a result of government-ordered disclosures. In libel cases, a journalist also has self-interest in avoiding liability. The courts on occasion find it difficult to overlook the specter of media self-interest in addressing issues of principle.

For example, in *Downing v. Monitor Publishing Company*, 6 Med.L.Rptr. 1193, 415 A.2d 683 (N.H. 1980), the police chief of the town of Boscawen sued for libel after the *Concord Monitor* asserted in an article that the chief had failed a lie detector test. Downing sought disclosure of the names of undisclosed sources used in preparing the article. The newspaper refused, was ordered to disclose, and appealed to the New Hampshire Supreme Court. Holding that the plaintiff would be unable to prove that the defendant had "obvious reasons to doubt" the accuracy of its story without the identities of the sources, the court ordered disclosure. The police chief, a public official required to prove actual malice, would be "completely foreclosed" from recovery absent the informer's identity, the court said.

The newspaper argued that Downing should be required to make a facial showing of falsity prior to any disclosure order, reasoning both that falsity must be proved by any libel plaintiff and that a determination of truthfulness would eliminate any need for disclosure. The court instead held that disclosure may be ordered in libel cases if a plaintiff can show "that there is a genuine issue of fact regarding the falsity of the publication." The court's opinion implies a broad, general exception to the application of a journalist's privilege in libel litigation:

> Our earlier ruling in *Opinion of the Justices*, 117 N.H. 386, 373 A.2d 642 (1977), that there is a press privilege under the New Hampshire Constitution not to disclose the source of information when the press *is not a party* to an action is not applicable here. * * * In the case at hand we do not have * * * governmental involvement versus the press * * *. (Emphasis added.]

Concerned that the reporters involved might elect jail rather than reveal their sources, the court concluded that:

> Confining newsmen to jail in no way aids the plaintiff in proving his case. Therefore, we hold that when a defendant in a libel action, brought by a plaintiff who is required to prove actual malice under *New York Times*, refuses to declare his sources of information upon a valid order of the court, there shall arise a presumption *that the defendant had no source.* [Emphasis added.]

Such a presumption of course amounts to a direction by the court that a defendant acted recklessly, virtually assuring that the plaintiff will prove the necessary elements of constitutional libel.

The *Monitor* case highlights the collision of the principles of *New York Times v. Sullivan* (this text, p. 190) with the First Amendment philosophy in Stewart's *Branzburg* dissent, since adopted in most jurisdictions. In short, how can a libel plaintiff prove actual malice if the sources and information underlying the story cannot be obtained? If a public

official or public figure plaintiff can show that identification of a news source will help prove actual malice, does the *New York Times* case in effect guarantee the plaintiff a right to disclosure?

Or, is the risk to the news media of an exception to privilege in libel suits greater because those suits may be filed primarily for the purpose of discovering the identities of confidential sources rather than to obtain money damages for harm to reputation? Regardless of a plaintiff's motivation, the media must bear the expense and inconvenience of litigation.

The issues were joined in a 1972 suit brought by St. Louis Mayor Alfonso Cervantes against *Life* magazine. *Life*'s story alleged that Cervantes had connections with organized crime. Except for the identities of sources, the story was heavily documented. Cervantes took issue with only four out of eighty-seven paragraphs in the story. Arguing that he could not prove actual malice without the identities of specific FBI and Department of Justice sources, Cervantes moved for disclosure.

CERVANTES v. TIME, INC.

1 MED.L.RPTR. 1751, 464 F.2D 986 (8TH CIR. 1972), CERT. DEN. 409 U.S. 1125 (1973).

STEPHENSON, J.:

Mayor Cervantes instituted this diversity libel action in the United States District Court for the Eastern District of Missouri seeking $2,000,000 compensatory and $10,000,000 punitive damages. He sought relief against and named as defendants the publisher of *Life* magazine and the reporter whose investigative efforts produced grist for the article.

* * *

The District Court (The Honorable James H. Meredith, Chief Judge), did not reach the merits of the motion to compel. However, on the basis of a well-developed record consisting of affidavits, depositions, and other documentary evidence, it entered summary judgment for the defendants on the grounds that neither defendant had knowledge of falsity, that neither entertained serious doubts as to the truth of any statement in the article, and that neither acted with reckless disregard for truth or falsity. 330 F.Supp. 936, 940 (1970). This appeal followed.

* * *

Central to the mayor's appellate attack is his contention that he cannot possibly meet his burden of proof if the reporter is allowed to hide behind anonymous news sources. He argues that in a libel case of this kind the identity of a reporter's sources is absolutely essential to the successful outcome of the lawsuit. His arguments in favor of compulsory disclosure may be summarized as follows: (a) disclosure enables the plaintiff to scrutinize the accuracy and balance of the defendant's reporting and editorial processes; (b) through disclosure it is possible to derive an accurate and comprehensive understanding of the factual data forming the predicate for the news story in suit; (c) disclosure assists successful determination of the extent to which independent verification of the published materials was secured; and (d) disclosure is the sole means by which a libeled plaintiff can effectively test the credibility of the news source, thereby determining whether it can be said that the particular source is a perjurer, a well-known libeler, or a person of such character that, if called as a witness, any jury would likely conclude that a publisher relying on such a person's information does so with reckless disregard for truth or falsity. Moreover, these particularized considerations are said to assume extraordinary importance when, as in this case, the information forming the core of the publication by its nature is not available to the public generally and is obtainable only from governmental employees who are under a duty not to reveal it to outsiders. On the basis of these considerations, the mayor advanced arguments in the District Court that it should not reach the defense motion for summary judgment until he was given the opportunity to depose and examine the Federal Bureau of Investigation and Department of Justice employees who supplied *Life*'s reporter with confidential reports and corroboratory materials used in connection with the article. The failure of the District Court to respond favorably to this plea is urged as error here.

* * *

We are aware of the prior cases holding that the First Amendment does not grant to reporters a testimonial privilege to withhold news sources. But to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that

underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws. Such a course would also overlook the basic philosophy at the heart of the summary judgment doctrine.

* * *

Where there is a concrete demonstration that the identity of defense news sources will lead to persuasive evidence on the issue of malice, a District Court should not reach the merits of a defense motion for summary judgment until and unless the plaintiff is first given a meaningful opportunity to cross-examine those sources, whether they be anonymous or known. For only then can it be said that no genuine issue remains to be tried. Thus, if, in the course of pretrial discovery, an allegedly libeled plaintiff uncovers substantial evidence tending to show that the defendant's published assertions are so inherently improbable that there are strong reasons to doubt the veracity of the defense informant or the accuracy of his reports, the reasons favoring compulsory disclosure in advance of a ruling on the summary judgment motion should become more compelling. Similarly, where pretrial discovery produces some factor which would support the conclusion that the defendant in fact entertained serious doubt as to the truth of the matters published, identification and examination of defense news sources seemingly would be in order, and traditional summary judgment doctrine would command pursuit of further discovery prior to adjudication of a summary judgment motion. The point of principal importance is that there must be a showing of cognizable prejudice before the failure to permit examination of anonymous news sources can rise to the level of error. Mere speculation or conjecture about the fruits of such examination simply will not suffice.

But such is not this case. As the opinion of the District Court makes clear, the record contains substantial evidence indicating that it was over a period of many months that *Life*'s reporter carefully collected and documented the data on the basis of which the article was written and published. In turn, *Life*'s key personnel, including one researcher, four editors and three lawyers, spent countless hours corroborating and evaluating this data. Once suit was instituted, the mayor was provided with hundreds of documents utilized in preparation of the article. He then deposed virtually every *Life* employee who possessed any connection whatever with the article's preparation and publication and, with one exception, each affirmed his or her belief in the truth of the article and each gave deposition testimony sufficient to raise a strong inference that there was good reason for that belief. To rebut this evidence, and to support his claim that 4 of the 87 paragraphs conveyed false information, the mayor was content to present little more than a series of self-serving affidavits from himself and from Mr. Sansone, together with other evidentiary materials which framed but a minimal assault on the truth of the matters contained in the four paragraphs. Aside from this evidence, he has not produced a scintilla of proof supportive of a finding that either defendant in fact entertained serious doubts about the truth of a single sentence in the article. Neither has he come forward with competent evidence from which the District Court could reasonably discern the inherent improbability of the matters published. In short, the mayor's proof simply does not meet the standard traditionally required of one against whom a motion for summary judgment is interposed.

* * *

Where, as here, the published materials, objectively considered in the light of all the evidence, must be taken as having been published in good faith, without actual malice and on the basis of careful verification efforts, that is, they were published in good faith without regard to the identity of the news sources, there is no rule of law or policy consideration of which we are aware that counsels compulsory revelation of news sources. Neither is there any evidence by which a jury could reasonably find liability under the constitutionally required instructions. When these factors conjoin, the proper disposition is to grant the defense motion for summary judgment. The judgment of the District Court must therefore be affirmed.

Affirmed.

COMMENT

The *Cervantes* decision attempts a compromise that gives weight to both the interests of plaintiffs and the interests of media defendants. Is it a fair compromise, or does it place an impossible burden on the plaintiff? How does one decide, as *Cervantes*

apparently requires, when the suit is frivolous and brought simply to unearth a source, or when a suit is a legitimate response to a false and irresponsible report which perhaps has no source at all?

A defendant's motion for summary judgment in a libel suit is typically accompanied by affidavits claiming the publisher had good reason to believe the story was true. But where a source is confidential, a defendant has great difficulty proving the claim. It makes for a strong reason supporting the decision of most news organizations to avoid relying solely on anonymous sources. Moreover, such stories are less believable.

Cervantes's dilemma was similar to that of San Francisco Mayor Joseph Alioto, who sued *Look* magazine for a story linking him with organized crime. Both mayors had the burden of proving actual malice whether the sources were identified or not. In *Cervantes*, *Life* had corroboration for what its sources said. In *Alioto*, *Look* lacked corroboration, and Alioto eventually succeeded in forcing disclosure.[51]

The problems that arose in *Cervantes* and in *Monitor* have become more critical, and there is now a significant body of case law addressing claims of journalist's privilege in libel litigation. The courts faced with the problem have had varying reactions. Some have found recognition of a qualified privilege entirely consistent with the *Sullivan* doctrine. Others have been concerned that the privilege might erode the actual malice standards of *Sullivan* or the fault requirements of *Gertz*.

Since 1979, lower courts considering privilege claims in libel cases have addressed the issue in light of the Supreme Court's refusal to create a separate privilege to protect a media defendant's editorial process from inquiry by libel plaintiffs. *Herbert v. Lando*, 3 Med.L.Rptr. 1241, 568 F.2d 974 (2d Cir. 1977), reversed, 4 Med.L.Rptr. 2575, 441 U.S. 153 (1979). The Second Circuit, relying on *Branzburg*, had recognized such a privilege as a necessary corollary to newsgathering. But the Supreme Court, in an opinion by Justice White, declared that the privilege went too far by limiting a plaintiff's inquiry into a defendant's state of mind, necessary to show that a defendant had reason to doubt the accuracy of a story.

A number of courts, including the New Hampshire Supreme Court in *Downing*, read *Lando* as requiring that there be an exception to privilege in libel cases. Other courts concluded instead that individual reputation was but one of many interests a state could choose to protect or not. *Mazzella v. Philadelphia Newspapers*, 5 Med.L.Rptr. 1983, 479 F.Supp. 523 (E.D.N.Y. 1979).

Pennsylvania's shield law, which had previously been held to protect against disclosure of source identities or of any material that might lead to identification of sources, was read narrowly when a libel plaintiff sought nonbroadcast material from a defendant television station. Relying in part on *Lando*, the court ordered that material be disclosed and placed the burden of deciding if a source might be identified from the material on the trial courts. In effect, the opinion called for *in camera* inspection. *Hatchard v. Westinghouse Broadcasting Company*, 14 Med.L.Rptr. 2000, 532 A.2d 346 (Pa. 1987). In passing, the court also added that reputation constitutes a "fundamental interest protected by the Pennsylvania Constitution. * * *" If reputation is considered a fundamental constitutional right, it would follow that reputation would constitute as compelling an interest as the Sixth Amendment's fair trial guarantee in criminal cases:

> [I]n interpreting the statute in question we must presume that the legislature did not intend to violate the Constitution of the United States or of this Commonwealth. Were we to interpret the Shield Law's protection as broadly as appellees urge, serious questions would arise as to the constitutionality of the statute in light of the protection of fundamental rights provided for in the Pennsylvania Constitution.

How does the *Hatchard* case analysis compare with that of the New Jersey Supreme Court in *Farber*? Should the opinion be taken as a sign that the courts will now interpret Pennsylvania's shield law, regarded as one of the strongest in the nation, narrowly to allow disclosures?

A number of courts have addressed the question of whether or not reputation constitutes a fundamental or "compelling" interest for purposes of analyzing a claim of journalist's privilege. Generally, the claim has not fared well, occasionally dismissed

51. *Alioto v. Cowles Communications, Inc.*, 2 Med.L.Rptr. 1801, 430 F.Supp. 1363 (N.D.Cal. 1977), aff'd, 6 Med.L.Rptr. 1573, 623 F.2d 616 (9th Cir. 1980), cert. den. 449 U.S. 1102 (1981).

by the court almost in passing. *McNabb v. Oregonian Publishing Company*, 10 Med.L.Rptr. 2181, 685 P.2d 458 (Ore.Ct.App. 1984). The strongest rejection of a claim that reputation itself constitutes a compelling interest for disclosure was offered by the New Jersey Supreme Court. Joseph Maressa, a state senator, sued *New Jersey Monthly* for libel over an article entitled "Rating the Legislature." Maressa was called one of the worst state senators in New Jersey. He sued and during pretrial sought names and addresses of all sources, copies of all drafts, notes, memos, and writings used by the magazine, plus a summary of what each source told the magazine. Citing New Jersey's shield law, the magazine refused.

Maressa relied on the *Farber* and *Lando* cases to obtain disclosure. Rejecting the argument as "simplistic," the court said that Maressa would have to show that refusal to disclose jeopardized a constitutional interest. He claimed to find that interest in the New Jersey Constitution.

MARESSA v. NEW JERSEY MONTHLY

8 MED.L.RPTR. 1473, 445 A.2D 376 (N.J. 1982).

PASHMAN, J.:

* * *

The article discusses several categories of representatives—including "The Best," "The Worst" and "The Drones." Plaintiff, Senator Joseph Maressa, appeared under "The Worst" category. He was described as a "floundering and ineffectual" man whose shortcomings went unnoticed by scores of extremists who, "appealing to Maressa's considerable ego, managed to enlist him as their advocate this term." Describing Maressa as "callous, stupid, and just plain devious," the article's authors listed several incidents upon which they based the senator's low rating. The article claimed that during a Senate debate of the death penalty, Maressa whined and attempted to cut off debate; that he smuggled an anti-gay lobbyist onto the Senate floor and then lied to the sergeant-at-arms that the lobbyist was his aide; that he was called before the Legislative Ethics Committee; and that he was "shot down" by the Supreme Court Advisory Committee. The article concluded, "Maressa's problem is not so much that he is evil as that he is sneaky, self-interested, and basically unprincipled."

Maressa filed a libel action in the Superior Court, Law Division, on December 12, 1979 against the magazine's owner, publisher, editor-in-chief, an editor and the three reporters who wrote the article. He alleged that the article falsely conveyed to the public that he was unfit to serve the people of New Jersey, and that he had participated in dishonest, illegal and unethical practices. Maressa further alleged that defendants had published the defamatory falsehoods without making reasonable inquiries as to their accuracy, thereby defaming him in reckless disregard of the truth.

This interlocutory appeal arose during pretrial discovery proceedings. On February 11, 1980 plaintiff served interrogatories upon defendants, and on April 8, 1980 plaintiff took the depositions of the three reporter defendants. Maressa sought a broad range of information including names and addresses of all sources interviewed, copies of all rough drafts, notes, questions and memos pertaining to the article, and a summary of what each source told the reporters. Defendants refused to provide any information about their sources or editorial processes. They answered each interrogatory with the word "privileged."

Plaintiff sought an order from the Law Division compelling more specific answers to the interrogatories and deposition questions. On June 27, 1980 the trial court ruled that the responses sought by plaintiff were not privileged; alternatively, the court found that any newsperson's privilege had been waived. Maressa then served upon defendants a supplemental set of interrogatories containing the unanswered questions. After defendants again claimed the newsperson's privilege, the trial court on October 15, 1980 directed them to provide more specific answers within 20 days or face judicial sanctions.

The Appellate Division granted defendants leave to appeal the order compelling disclosure. Before that court heard the appeal, we directly certified the matter on our own motion. We now reverse.

* * *

Unlike most other privileges, however, a newsperson's privilege has a constitutional foundation. While narrowly upholding a grand jury's right to subpoena reporters, the United States Supreme Court has unanimously recognized that a reporter's gathering of information receives some First Amendment protection. See *Branzburg v. Hayes*, [1 Med.L.Rptr. 2617], 408 U.S. 665, 691, (1972).

* * *

Federal constitutional protection of news gathering, however, gives newspersons only a qualified privilege not to reveal sources and other confidential information. In *Branzburg v. Hayes, supra*, the Court upheld grand jury subpoenas of newspaper reporters in three state courts. And in *Herbert v. Lando*, [4 Med.L.Rptr. 2575], 441 U.S. 153, 60 L.Ed.2d 115, (1979), the Court held that the First Amendment does not preclude a plaintiff's inquiries into the editorial processes leading to publication of an allegedly defamatory television program.

To buttress the constitutional protection for news gathering, the Legislature has amended the Shield Law, N.J.S.A. 2A:84A-21, twice in recent years. Both enactments were in large part responses to judicial construction limiting the effect of the statute.

* * *

These amendments left no doubt that the Legislature intended to provide comprehensive protection for all aspects of news gathering and dissemination. The Court recognized this intent in *In re Farber*, holding:

> We read the legislative intent in adopting this statute in its present form as seeking to protect the confidential sources of the press as well as information so obtained by reporters and other news media representatives *to the greatest extent permitted by the Constitution of the United States and that of the State of New Jersey.* [78 N.J. at 270 (emphasis added).]

Disclosure of confidential information was ordered in *Farber* only because the newsperson's privilege conflicted with a criminal defendant's constitutional right to compel the attendance of witnesses and production of evidence in his favor.

* * *

Absent any countervailing constitutional right, the newsperson's statutory privilege not to disclose confidential information is absolute.

* * *

However, the existence of a judicial remedy for injury to reputations is entirely a matter of state law. A plaintiff's "interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions." *Paul v.* Davis, 424 U.S. 693, 712, 47 L.Ed.2d 405, 420 (1976).

* * *

We respectfully reject Justice Schreiber's argument that the New Jersey Constitution creates a constitutional right to maintain a libel action. Our dissenting colleague relies on Article 1, ¶6 of the Constitution:

> 6. *Liberty of speech and of the press; libel; province of jury.*
>
> Every person may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right.* No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. [Emphasis added]

Justice Schreiber would find a constitutional right to sue for libel in the underscored subordinate clause.

We disagree that the framers intended that clause to have such wide-ranging effect. The entire thrust of Art. 1, ¶6 is protection of speech. The framers, however, did not want that protection to be absolute. Specifically, they did not view the existence of a libel action as inimical to free speech. They therefore inserted a clause to insure that the broad speech protection they were providing would not be construed to preclude libel suits.

This is all that the clause means. We do not believe it was intended to create a right to sue for damages in libel. Had the framers intended such a right, they surely would have expressed that intent more directly. In form and in context, this clause is no more than a caveat to the New Jersey equivalent to the First Amendment.

It would not be wise to construe our Constitution in a way that etches in stone any particular resolution of the difficult conflict between the right of the media to criticize public figures and the right of public figures to have redress for libel. Our holding, premised on our perception of legislative intent, balances those interests differently than the dissent would balance them. But the balance we adopt can always be changed by the Legislature. If we were to adopt the dissent's view, full protection for sources or editorial processes could only be provided by constitutional amendment.

* * *

In this case, however, we need not evaluate plaintiff's interest in compelling disclosure, other than to affirm that it does not reach constitutional dimensions. The newsperson's privilege contains no limiting language. *Compare* N.J.S.A. 2A:84A-21 *with* N.J.S.A. 2A:84A-28(b) (limiting language found in informer's privilege). The Legislature has already balanced the interests and concluded that the newsperson's privilege shall prevail. Since a plaintiff in a defamation action has no overriding constitutional interest at stake, the newsperson's privilege is absolute in libel cases.

* * *

The Shield Law privilege may burden some libel plaintiffs who will not survive a summary judgment motion without discovery. It would be unfortunate if some newspersons fabricated malicious lies and then claimed immunity from liability by claiming that they relied in good faith on a confidential source whose identity they decline to reveal. Contrary to states without a Shield Law, in New Jersey a media defendant's refusal to name its source cannot support an inference that no source existed.

* * *

We recognize that our holding may be unfair to certain defamed individuals who cannot meet the difficult burden of proving reckless falsehood without discovery. But the Legislature has determined that the competing interest in a free press outweighs the possibility of damaged reputations. Since defamation is a common law action without a constitutional foundation, the Legislature has the power to limit that action in favor of the right of freedom of press.

Our Constitution grants the press wide freedom because we believe that the public interest is served by an informed citizenry. Those responsible for informing the public can discharge their function best when they can publish without anyone looking over their shoulders. The media must meet stringent deadlines, and it is inevitable that they will occasionally publish an inaccurate statement. The State House is no place for the meek and thin-skinned. Sometimes published statements will hurt. Sometimes they will turn out to be untrue. Nevertheless, those regrettable consequences must yield to the need for an informed citizenry.

Every libel law and every law affecting libel actions, including the New Jersey Shield Law, must balance important competing interests. We in no way seek to minimize the individual's interest in protection of his or her good name, which "reflects no more than our basic concept of the essential dignity and worth of every human being." *Rosenblatt v. Baer*, [1 Med.L.Rptr. 1558], 383 U.S. 75, 92, 15 L.Ed.2d 597, 609, (1966) (Stewart, J., concurring). But the Legislature has weighed the competing interests in a free press and the individual interest in reputation. It has chosen to give greater protection to freedom of speech, and our duty is to enforce that choice.

We therefore hold that the Shield Law affords newspersons complete protection against disclosure of their confidential sources and the editorial processes leading to publication of an alleged libel. The order of the Superior Court, Law Division, is reversed, and the matter is remanded for further proceedings consistent with this opinion.

COMMENT

Justice Schreiber, dissenting, found it incomprehensible that the framers of the state constitution would insert a responsibility clause and mention of libel in the document unless reputation was considered of constitutional magnitude. He noted that similar language appears in many state constitutions. "This terminology acknowledges the press's responsibility for abusing its right to write and publish," he said. "The sense of the words is to protect those who would be defamed by irresponsible utterances."

Despite *Hatchard*, Pennsylvania journalists are still able to rely upon either the credibility of unnamed sources or the material obtained from those sources in defending against a libel suit under that state's shield law. Noting that the Supreme Court in the *Hepps* case apparently found application of a shield law in libel cases constitutionally acceptable, the court determined that refusing defendants use of the information amounted to a form of punishment for having relied on the shield law and kept useful information from the jury. *Sprague v. Walter*, 13 Med.L.Rptr. 1177, 516 A.2d 706 (Pa. 1986).

Other states have adopted rules that limit reliance upon confidential sources or information, while not going so far as to declare reputation a constitutional right. Reasoning that a defendant is unduly advantaged if allowed to rely on sources or evidence that cannot be tested at trial, these courts have said that

such benefit is not within the scope of protection of the privilege. *Oak Beach Inn v. Babylon Beacon*, 10 Med.L.Rptr. 1761, 62 N.Y.2d 158, 476 N.Y.S.2d 269 (N.Y. 1984). One approach is to offer media defendants a choice: they may keep their sources and materials confidential, or they may present as witnesses persons they used as sources and thereby waive the privilege, allowing full examination. *Laxalt v. McClatchy*, 14 Med.L.Rptr. 1199, 116 F.R.D. 438 (D.Nev. 1987). One court determined that when a reporter took the stand to testify, the testimony effectively waived the privilege protecting notes. Identities of sources remained protected. *Sible v. Lee Enterprises, Inc.*, 13 Med.L.Rptr. 1738 (Mont. 1986).

An illustrative and significant case in this area is *Carey v. Hume*, 492 F.2d 631 (D.C.Cir. 1974), where a qualified First Amendment-based privilege was recognized in a civil libel suit. On the facts of the case, the qualified privilege was overcome and the journalist, columnist Jack Anderson, was ordered to identify his sources.

In *Carey*, a union official plaintiff brought an action for libel based on defendant's newspaper column report that the union official had removed documents from the union president's office and then complained to the police that burglars had stolen a box full of items from the office. The court of appeals held that the district court did not abuse its discretion in requiring the journalist who wrote the item to reveal the names of eyewitnesses to the alleged removal. The libel plaintiff in *Carey* was bound by the standard of liability set forth in *New York Times v. Sullivan*. *Carey* gave forceful expression to the conflict between the application of the "actual malice" standard of the *Sullivan* case and a qualified journalist's privilege based on the First Amendment:

> In the context of an asserted newsman's privilege to protect confidential news sources, the *Sullivan* rule is a source of tension. On the one hand, the Court's concern that the spectre of potential libel actions might have an inhibiting effect on the exercise of press freedom militates against compulsory disclosure of sources. Contrarily, the heavy burden of proof imposed upon the plaintiff in such a case will often make discovery of confidential sources critical to any hope of carrying that burden.

In an interesting passage, Judge McGowan rejected the idea that, with the advent of the *Sullivan* doctrine and its imposition of new burdens on some libel plaintiffs, the journalist's First Amendment interest in nondisclosure was the weightier interest in case of conflict:

> In striking the constitutional balance contemplated in *Garland* [259 F.2d 545 (2d Cir. 1958), cert. den. 358 U.S. 910 (1958)] it could perhaps be argued that, although the *Sullivan* decision did not eliminate civil libel suits entirely, it has so downgraded their social importance that a plaintiff's interest in pressing such a claim can rarely, if ever, outweigh a newsman's interest in protecting his sources. The tenor of the Court's opinion in *Sullivan* may be thought to reflect an attitude toward libel actions palpably different from its approach to grand jury proceedings in *Branzburg*. There is, however, the matter of the Court's continuing post-*Sullivan* citations of *Garland*. This strongly suggests the continuing vitality of the latter case, and negates any inference that the Court does not consider the interest of the defamed plaintiff an important one.

The court then explained why it thought that on balance the qualified privilege protecting the journalist had to yield under the facts of *Carey*:

> Turning to the facts of the case before us, the information sought appears to go to the heart of appellee's libel action, certainly the most important factor in *Garland*. It would be exceedingly difficult for appellee to introduce evidence beyond his own testimony to prove that he did not at any time of day or night over an indefinite period of several weeks, remove boxfuls of documents from the UMW offices. Even if he did prove that the statements were false, *Sullivan* also requires a showing of malice or reckless disregard of the truth. That further step might be achieved by proof that appellant in fact had no reliable sources, that he misrepresented the reports of his sources, or that reliance upon those particular sources was reckless.
>
> Knowledge of the identity of the alleged sources would logically be an initial element in the proof of any of such circumstances. Although it might be possible to submit the question of malice to the jury simply on the basis of the conflicting allegations of the parties, that procedure would seem to provide the plaintiff little prospect of success in view of his heavy burden of proof. Consequently, we find that the identity of appellant's sources is critical to appellee's claim.

A case which contrasted sharply with *Carey* was *Caldero v. Tribune Publishing Co.*, 2 Med.L.Rptr. 1490, 562 P.2d 791 (Idaho 1977), cert. den. 434 U.S. 930 (1977). The Idaho Supreme Court apparently felt that *Branzburg* precluded recognition of a journalist's privilege, either qualified or absolute, in the libel case at hand or in other contexts.

The *Lewiston Morning Tribune* ran a story about one of Caldero's experiences while an undercover agent for the Idaho Bureau of Narcotic Enforcement. During an arrest and scuffle, Caldero fired three shots through a car windshield, injuring a companion of the man being arrested. More than a year later the article appeared, questioning the "professional propriety of Caldero's conduct." The story quoted an off-the-record police expert who said Caldero's version of the story "didn't add up." The reporter refused to name his source when asked, was judged in contempt, and ordered to spend thirty days in jail. The order was stayed pending appeal.

The opinion in the *Caldero* case was remarkably insensitive to the journalist's interest in nondisclosure. It rejected all cases adopting a privilege as unpersuasive, and read *Garland v. Torre*, a $1 million libel suit brought by Judy Garland against CBS in which a columnist went to jail for refusing to name a source, as rejecting a First Amendment-based privilege when that case represented the start of current interpretations concerning the privilege. Despite the breadth of the *Caldero* court's rejection of privilege even in civil litigation, the United States Supreme Court refused to review the case. The Idaho court did agree, however, that nondisclosure should be protected if the request was to harass the media or the information sought had an "unnecessary impact" on free expression rights. The court's position is summed up well in the last sentence of its opinion:

> We cannot accept the premise that the public's right to know the truth is somehow enhanced by prohibiting the disclosure of truth in the courts of the public.

Close to the trial date, the widow of the source consented to disclosure. The source was Caldero's boss.

Can anything definitive be said, then, about the status of a journalist's privilege claim in libel litigation? Under most lower court interpretations of *Branzburg*, state statutes, state constitutions, or state common law, disclosure will be ordered if the libel suit is valid, especially in terms of its falsity, if other possible sources have been exhausted and if the information sought is relevant and critically important to the case. If the trial court is uncertain about those points, it can defer disclosure to conduct further discovery that may lead to summary judgment. It can seal notes and documents and forbid attorneys to discuss evidence with their clients. And it can limit attendance at depositions. Note that the last two options may be incompatible with the presumptions of openness of judicial proceedings and of access to court documents (this text, pp. 443).

It may make a difference that a libel case is brought in federal court on the basis of diversity of citizenship. The federal courts have tended to apply federal rules of evidence—and hence a qualified First Amendment privilege—rather than a state privilege. Although Massachusetts recognized no privilege in any form, and all the reporting activities at issue in a libel suit occurred in that state, federal courts applied the First Amendment privilege. *Bruno & Stillman v. Globe Newspaper*, 6 Med.L.Rptr. 2057, 633 F.2d 583 (1st Cir. 1980). In other words, a libel defendant in federal court may have the protections of the analysis from cases such as *Carey* and *Cervantes*, while a libel defendant in state court may not.

On the other hand, many state shield statutes specifically provide an exception to the privilege in libel cases. Recall that Minnesota's shield law, while it may not be typical, has a section that makes the privilege inapplicable in any libel case where information sought would lead to "relevant evidence" about actual malice.

There may come a time when a reporter's string runs out. That person may then have to comply with a court order or face a contempt citation. Or, the reporter may be assumed to have had no source. Or, the reporter will be barred from using at trial any evidence based on anonymous sources or confidential information. The consequences then may be to lose the suit almost by default. It is little wonder the press has become cautious when promising anonymity.

JOURNALIST'S PRIVILEGE IN THE CIVIL CONTEXT

Privilege claims in civil cases where journalists are third parties are much easier to sustain. There is less of a compelling need at stake in civil suits because the rights asserted by parties are unlikely to be of constitutional or equivalent magnitude. In addition, a greater array of alternative sources is typically available in civil cases.

One of the earliest and most influential post-*Branzburg* cases recognizing a qualified First Amendment privilege was *Baker v. F & F Invest-*

ment, 1 Med.L.Rptr. 2551, 470 F.2d 778 (2d Cir. 1972), cert. den. 411 U.S. 966 (1973). A number of potential black home buyers brought a class action suit alleging racially discriminatory housing practices by the defendant. The plaintiffs sought the names of sources used in a 1962 *Saturday Evening Post* article, "Confessions of a Block-Buster," from the article's author, Alfred Balk, who by the time of trial was an editor of the *Columbia Journalism Review*. The federal district court refused to order disclosure, relying both upon First Amendment analysis and on the Illinois and New York shield laws.

The Second Circuit squarely adopted a First Amendment-based privilege. The court agreed that the plaintiffs had failed to prove that all sources had been exhausted or that disclosure was critical to protection of the public interest at issue in the case. Judge Kaufman emphasized that the nature of the claim was important in determining the scope of privilege. He distinguished *Branzburg*, noting, "No such criminal overtones color the facts in this civil case." Referring to *Branzburg*, he added:

> If, as Mr. Justice Powell noted in that case, instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the *private interest* in compelled disclosure. [Emphasis added.]

Another case where a qualified First Amendment-based privilege was recognized was *Democratic National Committee v. McCord*, 356 F.Supp. 1394 (D.D.C. 1973). On motions to quash the subpoenas by news organizations, Federal District Judge Charles Richey granted their request and refused to enforce the subpoenas. Even though the issue was raised after the Supreme Court decision in *Branzburg* had declined to create a journalist's privilege in grand jury proceedings based on the First Amendment, Judge Richey held that in these circumstances the news people concerned were entitled to a qualified privilege under the First Amendment. The federal district court, reflecting Justice Stewart's dissent in *Branzburg*, stated that absent a showing that alternative sources of evidence had been exhausted and absent a showing of the materiality of the documents sought, an order quashing the subpoenas was warranted.

McCord involved subpoenas arising out of civil litigation. In what might be called a "fishing expedition," the Committee for the Re-election of the President (Nixon) seemed to be looking for anything that might help them in a number of civil suits against the opposition party.

Recognizing the reluctance of other courts in civil and criminal cases, including the Supreme Court, to recognize even a qualified journalist's privilege, Judge Richey distinguished the present case as being not a criminal case but an action for monetary damages. Moreover the media were not parties but were simply being used to produce documents. More important, the parties on whose behalf the subpoenas had been issued had not demonstrated that the testimony represented by the documents would go to the "heart of their claim." Note the recurrence of this concept.

"Without information concerning the workings of the [g]overnment," said the Judge, "the public's confidence in its integrity will inevitably suffer. This is especially true where, as here, strong allegations have been made of corruption within the highest circles of government and in a campaign for the presidency itself. This court cannot blind itself to the possible 'chilling effect' the enforcement of the subpoenas would have on the flow of information to the press and, thus, to the public. This court stands convinced that if it allows the discouragement of investigative reporting into the highest levels of government, no amount of legal theorizing could allay the public's suspicions. * * *"

Richey appeared to be following the recommendation in Justice Powell's concurring opinion in *Branzburg* that a journalist's claim of privilege should be judged "on its facts by the striking of the proper balance between freedom of the press and the obligation of all citizens to give relevant testimony."

Federal courts have followed *Baker* and *McCord* almost religiously. But recent cases indicate that, while the privilege itself is nearly universally recognized, qualification to assert the privilege is still an issue. A fired schoolteacher filed a civil suit against former colleagues alleging that they conspired to stigmatize him and get him dismissed. The plaintiff sought identities of sources, background materials, and details of the editorial process from both newspaper and television reporters. The court indicated that the first order of inquiry was for reporters to show that the privilege applies. That proof requires a "*prima facie* showing that responding to particular questions or producing particular documents will impinge on First Amendment interests." While the

court labeled this burden "minimal," only after it is made by the journalist will the burden of proving the three-part test be shifted to a party seeking disclosure. *Bauer v. Brown*, 11 Med.L.Rptr. 2168 (W.D.Va. 1985). What factors should a court use when deciding if First Amendment interests are being impinged?

An alarming recent case is *von Bulow v. von Bulow*, 13 Med.L.Rptr. 2041, 811 F.2d 136 (2d Cir. 1987), cert. den. 107 S.Ct. 1891 (1987). Determining that the qualified privilege provided by the First Amendment and the protections of the New York shield law were congruent, the court said that a reporter was required to prove an intent to use the undisclosed material sought for dissemination to the public and must show that the intent existed at the start of the newsgathering process.

The case was the civil law aftermath of the well-known von Bulow trial, in which Claus von Bulow had been charged with attempting to kill his wife with drugs. He was acquitted, and Martha von Bulow's two children from a previous marriage brought a civil action. Andrea Reynolds, an "intimate friend of [Claus] von Bulow," had commissioned researchers to prepare reports on the case and testified that she planned to write a book on it. When asked to produce some of the documents, Reynolds asserted a claim of privilege. The court said that she did not fit within the class intended to be protected:

> As stated above, the burden was on Reynolds to establish that she had those characteristics which we have delineated as the essential attributes of a journalist. She failed to sustain her burden. * * * At oral argument before us Reynolds' counsel conceded that, when Reynolds commissioned the reports, "her primary concern was vindicating Claus von Bulow." There is no dispute * * * that * * * "Reynolds did not intend to use the reports to disseminate information to the public."

The court's concern appears to have been that a person involved in the case was using journalist's privilege to prevent personal disclosures, not to protect newsgathering. But in the process of ordering discovery, the court applied two qualifications not previously addressed as part of qualified First Amendment analysis. First, anyone claiming journalist's privilege must qualify as a journalist. Second, the person claiming the privilege must prove an intent to serve the public by disseminating news. Both requirements may be found in a number of state statutes and are also found in the case law of New York courts interpreting that state's shield law.

The *von Bulow* court's passing assurance that even "one who is a novice in the field" may meet the burden should be little comfort to journalists who are naturally uneasy over the prospect that government, even in the form of judges, will be placed in the position of deciding who is a journalist or which journalists are "fit" to be covered by the privilege. Was there some way for the court to order disclosure without limiting journalist's privilege?

Other seemingly lesser suits have been lost. While a federal district court in Texas recognized a qualified privilege in a civil action brought by a suspended employee against the Dallas school district, it held a reporter in contempt for refusing to testify *in camera*. The plaintiff argued that the school district had released information to the reporter which led to his suspension after the resulting story was published. The court accepted the plaintiff's assertions that his case affected constitutional interests:

> That claim includes assertion of a denial of constitutionally ordered due process in connection with Dr. Trautman's suspension from duty. * * * It bears repeating that we are here engaged in a sensitive and important balancing exercise of competing needs and interests rooted in constitutional values.

The plaintiff's claim was based on a denial of due process and liberty under the Fourteenth Amendment and also upon a federal civil rights provision, 42 U.S.C.A. § 1983. *Trautman v. Dallas School District*, 8 Med.L.Rptr. 1088 (N.D.Tex. 1982).

More typically, disclosure attempts in civil cases fail. Chilling effect "is a paramount consideration," said a federal district court in New York. A drug company sought the identity of a source that had been consulted for evaluation of a drug in a medical newsletter article but had not met the three-part test.[52] United States Steel, however, was successful in getting outtakes from ABC on its coverage of an underground coal mine fire since there were no confidential sources and ABC had already shown outtakes to one of its outside consultants.[53]

52. *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975).
53. *Davis v. United States Steel*, Civ. No. 79-3318 (S.D.N.Y. Nov. 13, 1980).

THE *STANFORD DAILY* OR "INNOCENT" SEARCH CASE

One response to odds favoring journalists was a circumvention of the subpoena process altogether and the use of search warrants to permit the ransacking of an "innocent" third-party newspaper. Although there were fewer than thirty of these in ten states between the famous *Standard Daily* case in 1978 and ameliorating intervention by federal legislation in 1981, they did represent one of the most serious ruptures ever in press-bench relationships.

Student reporters for *The Stanford Daily* at Stanford University had covered a student demonstration at a hospital which had resulted in violence and injuries to police officers. The newspaper published articles and photographs about the demonstration. A municipal court judge at the request of the police issued a warrant authorizing a search of *The Stanford Daily*. He found probable cause to believe that photographs and negatives would be found on the newspaper premises which would help to identify the demonstrators who had assaulted the police officers. The warrant was issued even though the newspaper's personnel were not suspected of having committed a crime or of having participated in any unlawful acts.

The students brought an action in federal district court against the municipal judge and the law enforcement officers on the ground that their rights under the First and Fourth Amendments had been violated. The federal district court agreed with the students and rendered a declaratory judgment. Where the subject of the search is innocent of wrongdoing and First Amendment considerations are present, the court ruled a search warrant could be issued "only in the rare circumstances where there is a clear showing that (1) important materials will be destroyed or removed from the jurisdiction; and (2) a restraining order would be futile." The United States Court of Appeals for the Ninth Circuit affirmed. But the Supreme Court resolution of the issue left the press angry and disturbed. The Court upheld the search of a newspaper's premises even though no one on the paper's staff was suspected of any crime.

The lineup of the justices was similar to those in *Branzburg* and *Lando*. Justice White wrote the opinion for the Court in a 5–3 decision. Powell wrote an enigmatic concurring opinion. Stewart led three dissenters. White subjected the newsroom to the search warrant mandates of the Fourth Amendment with the same egalitarian approach used to apply the fair trial requirements of the Sixth Amendment in *Branzburg*. Powell steered a middle course. And Stewart urged that newsroom searches should be allowed only if something greater than probable cause was proved.

ZURCHER v. THE STANFORD DAILY

3 MED.L.RPTR. 2377, 463 U.S. 547, 98 S.CT. 1970, 56 L.ED.2D 525 (1978).

Justice WHITE delivered the opinion of the Court.

* * *

But presumptively protected materials are not necessarily immune from seizure under warrant for use at a criminal trial. Not every such seizure, and not even most, will impose a prior restraint. And surely a warrant to search newspaper premises for criminal evidence such as the one issued here for news photographs taken in a public place carries no realistic threat of prior restraint or of any direct restraint whatsoever on the publication of the *Daily* or on its communication of ideas. The hazards of such warrants can be avoided by a neutral magistrate carrying out his responsibilities under the Fourth Amendment, for he has ample tools at his disposal to confine warrants to search within reasonable limits.

* * *

We accordingly reject the reasons given by the District Court and adopted by the Court of Appeals for holding the search for photographs at *The Stanford Daily* to have been unreasonable within the meaning of the Fourth Amendment and in violation of the First Amendment. Nor has anything else presented here persuaded us that the Amendments forbade this search. It follows that the judgment of the Court of Appeals is reversed.

So ordered.

Justice Brennan took no part in the consideration or decision of this case.

Justice POWELL, concurring.

* * *

While there is no justification for the establishment of a separate Fourth Amendment procedure for the press, a magistrate asked to issue a warrant

for the search of press offices can and should take cognizance of the independent values protected by the First Amendment—such as those highlighted by Justice Stewart—when he weighs such factors. If the reasonableness and particularity requirements are thus applied, the dangers are likely to be minimal.

In any event, considerations such as these are the province of the Fourth Amendment. There is no authority either in history or in the Constitution itself for exempting certain classes of persons or entities from its reach.

COMMENT

Press commentary on the case was bitter, as it would be later in *Herbert v. Lando*. How would the ruling have affected Watergate and the *Pentagon Papers* case had it been in place then? Suddenly, subpoenas didn't look so bad; at least you could see them coming.

Following *Stanford Daily*, a printer's office was searched in Flint, Michigan, a television newsroom in Boise, Idaho, the Associated Press in Butte, Montana, the home of an editor in Albany, Georgia. On October 13, 1980, Congress passed the Privacy Protection Act (18 U.S.C.A. § 793 ff). While media organizations had lobbied Congress to prevent surprise invasions of the newsroom, they had asked for a ban on searches of the premises of all innocent third parties. What they got was legislation specific to them. Many journalists are uncomfortable with these kinds of laws since they permit lawmakers to intrude themselves into the realm of the First Amendment.

Nevertheless the law, which went into effect for federal searches on January 1, 1981 and for state searches on October 14, 1981, made it unlawful for law enforcement officers to search for or seize raw materials (photos, audio and videotapes, interview notes) or work products (drafts of articles and notes) possessed by anyone engaged in the dissemination of news or information to the public through newspapers, books, or electronic broadcasts unless there was probable cause to believe that the person with the material was committing a crime.

Exceptions were threats to national defense, the theft of classified or restricted information, and seizures that would be necessary to prevent death or serious injury. Searches would also be permitted if there was reason to believe that a subpoena would lead to the destruction of material that would serve the needs of justice. Police are expected to request voluntary cooperation from news organizations and scholars or, if that fails, to seek a subpoena before going after a search warrant.[54]

State laws incorporating some or all of these provisions in ways having both more and less impact than the parent federal law have been passed in California, Connecticut, Illinois, Nebraska, New Jersey, Oregon, Texas, Washington, and Wisconsin.

POSTSCRIPT

Journalist's privilege continues to provoke much debate among news people. Many prefer a First Amendment approach to legislative enactments, even when the legislature acts with the best intentions, because what is enacted may later be repealed or amended. Others have argued vigorously for no special privileges at all. Still others have supported enactment of a federal shield law which, despite repeated attempts, has never come close to passing.

The *Branzburg* case was greeted with dismay by journalists. Yet, after almost two decades, it is clear that *Branzburg* laid the foundation for privileges in the majority of state and federal courts. While Stewart's three-part test has been most influential, White's invitation to experimentation has also led to adoption of privileges in many instances. More than two-thirds of the states have a legislative or judicially created privilege. And a qualified First Amendment privilege has been adopted in each federal circuit court of appeal that has considered the issue.

For reporters, the spread of journalist's privilege is a mixed blessing, however. Whether a pledge of confidentiality will be upheld in court depends upon whether state or federal privilege applies. And, when a journalist reports on matters from other states in a story, the question of what rule applies is even harder to answer. Reporters who assume that their promises of confidentiality are protected by the First Amendment or by statute are taking a great risk. Unfortunately, many reporters assume protection

54. Atwater, *Newsroom Searches: Is 'Probable Cause' Still in Effect Despite New Law?*, 60 Journalism Quarterly 4 (Spring 1983).

exists and may have been so taught in journalism schools.[55] On the other hand, some have learned that "no protection of confidential sources in federal courts" exists.[56]

Journalists consider honoring pledges of confidentiality a matter of professional obligation and as necessary for effective news gathering. Many reporters remain prepared to go to jail to protect confidential sources. The news media, however, reacting to both the threat of forced disclosure and to a perceived loss of credibility with the public, have reduced their reliance on anonymous sources, believed to have accounted at its peak for 30 to 50 percent of newsgathering.[57]

However the privilege is applied, it appears to protect the communicator, not the source. Only the reporter may waive the privilege. Minnesota's *Cohen* case alone suggests otherwise. Generally, a broken promise by a reporter raises an ethical question but provides no legal cause of action.

Casual assurances of confidentiality may be dangerous for a reporter. A court might wish to know how confidentiality was established with a source. An unambiguous method of establishing confidentiality is needed before facing the prospect of testifying in court. Under some state shield laws, employers are not protected, making evidence of the reporter-source relationship more important. The Associated Press was required to produce a tape recording of a reporter's conversation with a suspected kidnapper because Montana law only covered the reporter. *In re Investigative File*, 4 Med.L.Rptr. 1865 (Mont.Dist.Ct. 1978).

As has been noted, there are many tactics reporters may adopt to deflect subpoenas. As the three-part test continues to permeate the judicial system, the privilege will gain even wider recognition and clearer application. But idiosyncratic state laws and state court interpretations have slowed the spread of Stewart's approach and delayed the day when journalists might know how the privilege works regardless of jurisdiction.

55. M. Mencher, *News Reporting and Writing*, at 365–367 (3d ed. 1984) ["• • • (before 1970s) journalists understood that their sources • • • were protected"].

56. J. Harless, *Mass Communication: An Introductory Survey*, at 473 (1985).

57. P. Meyer, *Ethical Journalism*, at 208–209 (1987); Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Northwestern U.L.Rev. 18 (1969).

FIVE

Access to the Judicial Process: Free Press and Fair Trial

THE PARAMETERS OF THE CONFLICT

The number of cases in which news organizations have challenged limitations on their ability to report on legal proceedings has increased dramatically in recent years.[1] But the tensions between journalism and the judiciary that prompt increased litigation are almost as old as the republic itself.

The freedom of the press guaranteed by the First Amendment and the right of a criminal defendant to a fair trial guaranteed by the Sixth Amendment do not always coexist easily. Often judges and lawyers, whose first obligation is to protect a defendant's rights and assure fairness in the judicial process, fear that extensive news coverage will affect the outcome of a trial. Whether the coverage is designated as pretrial publicity or occurs during or after trial, the concern is the same—that the press, performing its usual task of chronicling events, will alter the resolution of those events.

Fair trial fears center on the jury. The Sixth Amendment requires that a criminal defendant have an "impartial jury" drawn from the geographic area in which the crime was allegedly committed. Generations of judges and lawyers have reasoned that heavy local news coverage of a crime and resulting trial will be noticed by potential jurors; it further stands to reason that some of those potential jurors—called veniremen—may be swayed by the news coverage.[2] To the extent publicity renders finding impartial jurors more difficult, so too does the job of assuring a fair trial become more difficult.

An impartial jury is one capable of rendering a verdict based upon the evidence presented in the case. It is not essential that jurors be totally ignorant of the case, however.[3] The key question in free press-fair trial disputes, then, is the point at which publicity creates prejudgment in such a large number of potential jurors that impaneling an impartial jury becomes impossible as a practical matter.

Other influences may also affect the fairness of a trial. Judges and attorneys might be swayed by news coverage, for example, thereby affecting the outcome of the trial in a material way. And, sometimes, parties in the dispute seek contact with the press outside the courtroom, apparently hoping to affect public opinion if not the outcome of the trial.

Written more than 100 years ago, Mark Twain's seriocomic analysis of the law's search for an im-

1. *Broadcasting* (Nov. 14, 1988), 74.
2. Seymour, *Framing the Issues*, in New York Bar Foundation, Law & the Press (1975), 17.
3. *United States v. Burr*, 25 Fed.Cas. 49 (No. 14692) (1807).

partial jury in *Roughing It* still outlines the problem well:

"I remember one of those sorrowful farces, in Virginia," Twain recounts, "which we call a jury trial. A noted desperado killed Mr. B., a good citizen, in the most wanton and coldblooded way. Of course the papers were full of it, and all men capable of reading read about it. And of course all men not deaf and dumb and idiotic talked about it. A jury list was made out, and Mr. B.L., a prominent banker and a valued citizen, was questioned precisely as he would have been questioned in any court in America:

'Have you heard of this homicide?'

'Yes.'

'Have you held conversations upon the subject?'

'Yes.'

'Have you formed or expressed opinions about it?'

'Yes.'

'Have you read the newspaper accounts of it?'

'Yes.'

'We do not want you.'

"A minister, intelligent, esteemed, and greatly respected; a merchant of high character and known probity; a mining superintendent of intelligence and unblemished reputation; a quartz-mill owner of excellent standing, were all questioned in the same way, and all set aside. Each said the public talk and the newspaper reports had not so biased his mind but that sworn testimony would overthrow his previously formed opinions and enable him to render a verdict without prejudice and in accordance with the facts. But of course such men could not be trusted with the case. Ignoramuses alone could mete out unsullied justice.

"When the peremptory challenges were all exhausted, a jury of twelve men was impaneled—a jury who swore they had neither heard, read, talked about, nor expressed an opinion concerning a murder which the very cattle in the corrals, the Indians in the sage-brush, and the stones in the streets were cognizant of! It was a jury composed of two desperadoes, two low beer-house politicians, three barkeepers, two ranchmen who could not read, and three dull, stupid, human donkeys! It actually came out afterward, that one of these latter thought that incest and arson were the same thing.

"The verdict rendered by this jury was, Not Guilty. What else could one expect?

"The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury. It is a shame that we must continue to use a worthless system because it *was* good a thousand years ago. In this age, when a gentleman of high social standing, intelligence, and probity, swears that testimony given under solemn oath will outweigh, with him, street talk and newspaper reports based upon mere hearsay, he is worth a hundred jurymen who will swear to their own ignorance and stupidity, and justice would be far safer in his hands than in theirs."

Twain highlights an incongruity of the process. The best potential jurors in terms of ability to judge are also often those most likely to stay informed about the news.

When a potential juror is excused due to bias, the basis for the action is a challenge for cause. Any juror who shows bias toward a party in a case is generally subject to challenge for cause. Attorneys for the parties also are given a number of "peremptory" challenges, challenges which can be made for any or no reason, including uneasiness about a juror's appearance or mannerisms.[4] The proceeding at which jurors are questioned and impaneled is the *voir dire*.

While nothing is more basic to the participants in a criminal proceeding than meeting the fair trial demands of the Sixth Amendment, reporting on crime and criminal trials is also one of the most basic functions of American journalism. No category of news gets as much local coverage as does crime and criminal trials.[5] Since James Gordon Bennett and other penny press editors first emphasized crime news more than 150 years ago, crime news

4. *Chestnut v. Ford Motor Co.*, 445 F.2d 967 (4th Cir. 1971) (verdict overturned because juror who owned Ford stock allowed to sit); 28 U.S.C.A. § 1870 (federal courts allow three peremptory challenges).

In criminal cases, peremptory challenges may number fifteen to twenty. Federal court judges rather than attorneys control the examination of a prospective juror. Impaneling is faster, but the procedure is often less thorough than its counterpart in the state courts. Defense attorneys in criminal cases are especially critical of the federal procedure, believing lawyers are better equipped to elicit answers that accurately reflect a potential juror's opinion. See Garry and Riordan, *Gag Orders: Cui Bono?*, 29 Stan.L.Rev. 575, at 583 (1977).

5. Denniston, *The Reporter and the Law* (1980), 3–11. According to one recent study, law enforcement stories and criminal legal proceedings stories in twenty-one major metropolitan daily newspapers are clearly the most dominant type of local news coverage in terms of total stories published, with almost a third more stories than the next largest category, stories about local government. Simon, Fico and Lacy, *Covering Conflict and Controversy: Measuring Balance, Fairness and Defamation in Local News Stories*, 66 Journalism Quarterly ____ (1989).

has caused controversy. Occasional incidents throughout history of news coverage affecting legal proceedings are well known and easy to establish.[6] More often, crime coverage is excoriated as having more generalized negative effects on readers or upon society in general.[7]

Civil disputes traditionally have received less news coverage than criminal proceedings. Nonetheless, reporting on civil cases has increased in recent years, coinciding with the rise in numbers of civil cases filed. Civil disputes involving well-known people or featuring unique issues have attracted reporters' attention and have also been the focus of attempts to restrict press coverage of and access to the judicial process.

Lyle Denniston argues that the legal community's discomfort with journalism is in part a result of basic differences in the operating methods of the legal profession and of journalism:

> The journalist will not (often he cannot) take the time the lawyer *must* to know his subject before he acts. The lawyer will not risk the journalist's daring in drawing quick conclusions.
>
> The journalist tells his story by moving from most significant to least. The lawyer often builds his case the other way around.
>
> The journalist hopes for immediate impact with his audiences—and usually can expect it. The lawyer works toward a contemplative judgment from the courts. . . .
>
> The journalist pursues the novel. The lawyer searches for the familiar.
>
> The journalist is fascinated by the illogical. The lawyer reduces events and emotions to logic.[8]

The standards of news judgment used by most journalists, then, call for the "juiciest"—and therefore most likely prejudicial—facts about a case to be featured most prominently, precisely because they have impact, are novel, have importance and, in criminal cases where an offense by definition violates society's standards, are often illogical. It is little wonder that criticism of criminal trial coverage often accuses the press of "trial by newspaper."

Judge Charles Clark, writing for the Second Circuit in 1951,[9] clearly saw press coverage as a mixed, but unavoidable, blessing when he said:

> Trial by newspaper may be unfortunate, but it is not new and, unless the court accepts the standard judicial hypothesis that cautioning instructions are effective, criminal trials in the metropolitan centers may well prove impossible.

During trial, a copy of the *New York Times*, containing an inaccurate report, had found its way into the jury room. The trial judge reasoned that, since he had given explicit instructions to the jury to disregard the newspaper and had pointed out how the offenses set forth in the indictment differed from those described in the article, there was no error in allowing the trial to proceed.

In a bristling dissent in the same case, Judge Jerome Frank did invoke Mark Twain. "My colleagues admit that 'trial by newspaper' is unfortunate," he declared. "But they dismiss it as an unavoidable curse of metropolitan living (like, I suppose, crowded subways). They rely on the old 'ritualistic admonition' to purge the record. The futility of that sort of exorcism is notorious. As I have elsewhere observed, it is like the Mark Twain story of the little boy who was told to stand in a corner and not to think of a white elephant."

Most judges and lawyers over time have probably agreed with Justice Robert Jackson's position in an earlier case. "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."[10]

Unwilling to rely on this kind of speculation, social scientists for the last forty years have attempted to measure by survey and experiment the *real* effects of trial and pretrial publication on jury verdicts. Their findings, while informative and useful, have been equivocal and contradictory on the question of whether publicity *causes* jury bias.[11] Their studies have been faulted for failing to replicate the actual

6. See Sneed, *Newspapers Call for Swift Justice: A Study of the McKinley Assassination*, 65 Journalism Quarterly 360 (1988).

7. Gordon and Heath, *The News Business, Crime, and Fears*, in Lewis (ed.), Reactions to Crime (1981), 227–50.

8. Denniston, *The Reporter and the Law* (1980), 6.

9. *United States v. Leviton*, 193 F.2d 848 (2d Cir. 1951), cert. den. 343 U.S. 946 (1952).

10. *Krulewitch v. United States*, 336 U.S. 440 (1949).

11. Sherard, *Fair Press or Trial Prejudice?: Perceptions of Criminal Defendants*, 64 Journalism Quarterly 337 (1987); Carroll, Kerr, Alfini, MacCoun and Weaver, Free Press v. Fair Trial: A Review of the Literature (unpublished manuscript 1984); Smith and Gilbert, *Biasing Effect of Pretrial Publicity on Judicial Decisions*, 2 J. Criminal Justice 163 (1974); Rollings and Blascovich, *The Case of Patricia Hearst: Pretrial Publicity and Opinion*, 27 J. of Communication 58 (1977); Einseidel, Salomone and Schneider, *Crime: Effects of Media Exposure and Personal Experience on Issue Salience*, 61 Journalism Quarterly 131 (1984); Wilcox and McCombs, *Confession Induces Belief in Guilt: Criminal Record and Evidence Do Not*, (*continued*)

world of the juror. A hesitant conclusion that may be drawn is that juries or prospective jurors are prejudiced when news of a defendant's confession or past criminal record comes to their attention. Even then, there is less than perfect agreement.

Whatever their value in aiding comprehension of juror behavior, social science findings may be beside the point anyway. Relying on their own impressions of psychological effects, courts will reverse convictions or declare mistrials where press coverage appears to be part of a pattern of community prejudice.

Early Supreme Court cases on jury impartiality stretch back more than 130 years. Their compound holding appeared to be that even preconceived notions of guilt or innocence were not enough to overturn a conviction if the juror swore ability to decide a case based solely on the evidence. Subtle doubts about press influence on jury verdicts were expressed. The burden of proof, as it is today, was clearly on the defendant to demonstrate unfairness.[12]

Not until 1961 did the United States Supreme Court reverse a state criminal conviction solely on the grounds that prejudicial pretrial publicity had made a fair trial before an impartial jury impossible.

On April 8, 1955, Leslie Irvin, a parolee, was arrested by Indiana state police on suspicion of burglary and bad check writing. A few days later Evansville, Indiana police and the county prosecutor issued press releases proclaiming that their burglary suspect, "Mad Dog" Irvin, had confessed to six murders, including the killing of three members of a single family. Irvin went to trial in November, was found guilty, and sentenced to death.

Bothersome was the fact that of 430 prospective jurors questioned by the court before trial, 370 said they believed Irvin guilty. Defense counsel was never satisfied with the level of impartiality of the twelve jurors finally accepted by the court. Theoretically the jury selection process is designed to identify bias-free persons. In fact the selection proceeds on radically different grounds, each attorney scrupulously dedicated to finding jurors whose biases will favor his client's cause.[13]

One research report estimated that 60 percent of lawyers' *voir dire* time was spent indoctrinating jurors and only 40 percent differentiating partial from impartial jurors.[14] Social scientists have begun to play a greater role in trial strategy. In one case, a sociologist conducted a telephone survey to support a change of venue, and psychologists helped select the jurors for the trial.[15] A University of Puerto Rico professor found that 59 percent of potential jurors were highly prejudiced against defendants who were accused of terrorist acts; the court thought it reasonable to draw jurors from the remaining 41 percent.[16] The Puerto Rico court's reasoning tracks that of the Second Circuit in one of the ABSCAM prosecutions in 1980. Philadelphia Congressman Michael Myers was accused of taking bribes from undercover agents posing as Arab businessmen. The transactions were videotaped. When the major television networks sought to copy the tapes, which had been introduced into evidence, Myers objected that broadcast of the tapes would prejudice his fair trial rights. The court responded:

> Defendants, as well as the news media, frequently overestimate the extent of the public's awareness of news. In this very case, despite the extensive publicity about Abscam * * * about half of those summoned

ANPA News Research Bulletin 15, July 7, 1966; Kline and Jess, *Prejudicial Publicity: Its Effect on Law School Mock Juries*, 43 Journalism Quarterly 113 (1966); Simon, *Murders, Juries, and the Press* in Simon (ed.) The Sociology of Law, 1968; Tans and Chaffee, *Pretrial Publicity and Juror Prejudice*, 43 Journalism Quarterly 647 (1966); Bush (ed.), *Free Press and Fair Trial: Some Dimensions of the Problem*, 1971; Riley, *Pre-Trial Publicity: A Field Study*, 50 Journalism Quarterly 17 (1973); Padawer-Singer and Barton, *The Impact of Pretrial Publicity on Jurors' Verdicts* in Simon (ed.), The Jury System in America, 1975; Nagel, *Free Press-Fair Trial Controversy: Using Empirical Analysis to Strike a Desirable Balance*, 20 St. Louis U.L.Rev. 646 (1976). Simon, *Does the Court's Decision in* Nebraska Press Association *Fit the Research Evidence on the Impact on Jurors of News Coverage?* 29 Stanford Law Review 515 (February 1977). An excellent review of social science findings, from a lawyer's perspective, is found in Schmidt, Nebraska Press Association: *An Expansion of Freedom and Contraction of Theory*, 29 Stanford Law Review 443–455 (February 1977); see generally, Buddenbaum, Weaver, Holsinger and Brown, *Pretrial Publicity and Juries: A Review of Research*, Research Report No. 11, School of Journalism, Indiana University (1981).

12. *United States v. Reid*, 53 U.S. 361 (1851); *Reynolds v. United States*, 98 U.S. 145 (1878); *Hopt v. Utah*, 120 U.S. 430 (1886); *Ex parte Spies*, 123 U.S. 131 (1887); *Mattox v. United States*, 146 U.S. 140 (1892); *Holt v. United States*, 218 U.S. 245 (1910); *Shepherd v. Florida*, 341 U.S. 50 (1951); *Stroble v. California*, 343 U.S. 181 (1952); U.S. ex rel. *Darcy v. Handy*, 351 U.S. 454 (1956); and *Marshall v. United States*, 360 U.S. 310 (1959).

13. Schur, *Scientific Method and the Criminal Trial*, 25 Social Research 173 (1958).

14. Broeder, *The University of Chicago Jury Project*, 38 Neb.L.Rev. 744 (1959). See generally, Kalven and Zeisel, *The American Jury*, 1966.

15. Schulman, Shaver, Colman, Emrich, and Christie, *Recipe for a Jury*, Psychology Today (May 1973); Fried, Kaplan, and Klein, *Juror Selection: An Analysis of Voir Dire* in Simon (ed.), The Jury System in America, 1975.

16. *Martinez v. Commonwealth of Puerto Rico*, 343 F.Supp. 897 (D.P.R. 1972); Simon and Eimerman, *The Jury Finds Not Guilty: Another Look at Media Influence on the Jury*, 48 Journalism Quarterly, 343–44 (1971).

for jury selection had no knowledge of Abscam, and only a handful had more than cursory knowledge.[17]

Leslie Irvin didn't have the benefit of sophisticated social science techniques. Nevertheless, after six years of legal maneuvering—and a successful prison break—his case reached the United States Supreme Court for a second time. In a unanimous decision the Court, considering Irvin's constitutional claims in terms of prejudicial news reporting, concluded that he had not been accorded a fair trial before an impartial jury. Moreover he should have been granted a second change of venue, said the Justices, in spite of an Indiana law allowing only a single change in the place of the trial; and it was the duty of the court of appeals to evaluate independently the *voir dire* testimony of the jurors.

IRVIN v. DOWD*

1 MED.L.RPTR. 1178, 366 U.S. 717, 81 S.CT. 1639, 6 L.ED.2D 751 (1961).

Justice CLARK delivered the opinion of the Court:

* * *

It is not required that jurors be totally ignorant of the facts and issues involved, * * * and scarcely any of those best qualified to serve will not have formed some impression or opinion as to the merits of the case. * * * It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

* * *

Here the build-up of prejudice is clear and convincing. An examination of the then current community pattern of thought as indicated by the popular news media is singularly revealing. For example, petitioner's first motion for a change of venue from Gibson County alleged that the awaited trial of petitioner had become the *cause célèbre* of this small community—so much so that curbstone opinions, not only as to petitioner's guilt but even as to what punishment he should receive, were solicited and recorded on the public streets by a roving reporter, and later were broadcast over the local stations. A reading of the 46 exhibits which petitioner attached to his motion indicates that a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months preceding his trial. The motion further alleged that the newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings in Gibson County and that, in addition, the Evansville radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents. These stories revealed the details of his background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on AWOL charges during the war. He was accused of being a parole violator. The headlines announced his police lineup identification, that he faced a lie detector test, had been placed at the scene of the crime and that the six murders were solved but petitioner refused to confess. Finally, they announced his confession to the six murders and the fact of his indictment for four of them in Indiana. They reported petitioner's offer to plead guilty if promised a 99-year sentence, but also the determination, on the other hand, of the prosecutor to secure the death penalty, and that petitioner had confessed to 24 burglaries. * * * On the day before the trial the newspapers carried the story that Irvin had orally admitted the murder of Kerr (the victim in this case) as well as "the robbery-murder of Mrs. Mary Holland; the murder of Mrs. Wilhelmina Sailer in Posey County, and the slaughter of three members of the Duncan family in Henderson County, Ky."

It cannot be gainsaid that the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County. In fact, on the second day devoted to the selection of the jury, the newspapers reported that "strong feelings, often bitter and angry, rumbled to the surface," and that "the extent to which the multiple murders—three in one family—have aroused feelings throughout the area was emphasized Friday when 27 of the 35 prospective

17. *United States v. Myers*, 6 Med.L.Rptr. 1961, 635 F.2d 945 (2d Cir. 1980).

*Although *Irvin* was the first reversal of a state court conviction, two years earlier in *Marshall v. United States*, 360 U.S. 310 (1959), the Court for the first time reversed a conviction in a federal court solely on grounds of prejudicial pretrial publicity. Jurors were exposed to newspapers containing defendant's criminal record.

jurors questioned were excused for holding biased pretrial opinions. * * *"

Finally, and with remarkable understatement, the headlines reported that "impartial jurors are hard to find." * * * An examination of the 2,783-page *voir dire* record shows that 370 prospective jurors or almost 90% of those examined on the point (10 members of the panel were never asked whether or not they had any opinion) entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty. * * *

Here the "pattern of deep and bitter prejudice" shown to be present throughout the community, was clearly reflected in the sum total of the voir dire examination of a majority of the jurors finally placed in the jury box. [Emphasis added.] Eight out of the 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. * * * Where one's life is at stake—and accounting for the frailties of human nature—we can only say that in the light of the circumstances here the finding of impartiality does not meet constitutional standards. * * * As one of the jurors put it, "You can't forget what you hear and see." With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.

COMMENT

Irvin's case was remanded to the district court. He was retried in a less emotional atmosphere, found guilty, and sentenced to life imprisonment, a sentence for which, he confided to his attorney, he was grateful.

Justice Felix Frankfurter, long an advocate of curbing pretrial press reports, concurred in *Irvin*, noting that "such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced, as a practical matter, to forego trial by jury." In the same opinion, Frankfurter noted that a *per curiam* reversal of a federal court conviction a week earlier had turned on a single article in the *St. Louis Post-Dispatch*.[18] "The Court has not yet decided," Frankfurter warned the press, "that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade."

Despite Frankfurter's comments, *Irvin* and the *Sheppard* case that follows are perhaps best seen as especially extreme departures from the normal role of journalism in the judicial process. The intensity and extent of coverage, along with the apparent *intent* of the press to affect the outcome, surely sets these cases apart.

Frankfurter's comments are reflective of the times. The press had not reached rapprochement with the judiciary after more than a century of crime reporting remembered best as sensational rather than serious. Despite the occasional case that receives saturation coverage reminiscent of past times,[19] modern practitioners or students of either journalism or law must rely on historical accounts for the full flavor of crime reporting at its most uninhibited.

THE TRADITION OF CRIME REPORTING

Although the fourth chief justice of the United States, John Marshall, took note in 1807 of extralegal newspaper comment in a reference to the Alexandria, Virginia *Expositor's* coverage of the treason trial of Aaron Burr, crime reporting probably came into its own when London's Bow Street police reporters discovered that crime news, when presented sensationally, had mass appeal.

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18. *Janko v. United States*, 366 U.S. 716 (1961). See also, *Shepherd v. Florida*, 341 U.S. 50 (1951), where Justice Jackson for the Court concluded that the press, in the trial of three black defendants, had dictated the verdict through inflammatory news reports including the report of a confession. But in *Murphy v. Florida*, 1 Med.L.Rptr. 1252, 421 U.S. 794 (1975), the Court concluded that press reports had not caused bias to permeate the community. *Murphy* can be read to reject the idea that bias should be implied from the very fact of publicity which, arguably, *Irvin* and later *Estes* may suggest. Or can *Murphy* be distinguished from *Irvin* on the ground that the *voir dire* in *Irvin* disclosed prejudice while in *Murphy* it did not?

19. *Williams v. NBC*, 7 Med.L.Rptr. 1523 (N.D.Ga. 1981).

Benjamin Day's *New York Sun*, the first successful penny press, specialized in news of crime and violence. Day hired George Wisner, a Bow Street veteran, to cover the courts, and within a year Wisner was co-owner of the paper.[20] Charles Dickens was a Bow Street reporter *par excellence*, and in 1846 his own paper, the *Daily News*, carried a series of articles by Dickens on the brutalizing effects of the death penalty.

Crime news contributed to the success of Pulitzer's *World*; and James Gordon Bennett's *Herald* had no equal in sensational, aggressive, and even fictional crime coverage. William Randolph Hearst's *Journal* led America's "yellow" tabloids into the Jazz Age of journalism.

In 1907, Irwin S. Cobb wrote 600,000 words on the dramatic Harry K. Thaw murder trial for the *World*. Twelve years later the renowned stylist William Bolitho shocked the nation with his accounts in the *World* of the Paris trial of Henri Landru, better known as Bluebeard.

Ben Hecht and the *Daily News* were just right for Chicago in the roaring 20s. Bernarr Macfadden's *Graphic*, nicknamed the "pornographic," promoted the execution of Ruth Snyder in its inimitable style:

> Don't fail to read tomorrow's *Graphic*. An installment that thrills and stuns. A story that fairly pierces the heart and reveals Ruth Snyder's last thoughts on earth; that pulses the blood as it discloses her final letters. Think of it! A woman's final thoughts just before she is clutched in the deadly snare that sears and burns and FRIES AND KILLS! Her very last words! Exclusively in tomorrow's *Graphic*.[21]

Journalistic history was made when a *New York Daily News* photographer strapped a tiny camera to his leg, smuggled it into Sing Sing's execution chamber, and took a picture of Snyder straining at the thongs of the electric chair moments after the current had been turned on. The picture was a front-page sensation. It sold 250,000 extra copies of the paper.

No wonder Damon Runyon compared the big murder trial with a sporting event. "The trial," he wrote, "is a sort of game, the players on the one side the attorneys for the defense, and on the other side the attorneys for the State. The defendant figures in it merely as the prize."[22]

With the Lindbergh kidnaping trial, American crime reporting perhaps reached its zenith. As many as 800 newspersons and photographers joined by the great figures of stage and screen, United States senators, crooners, social celebrities, and 20,000 curious nobodies turned the little town of Flemington, New Jersey into a midsummer Mardi Gras. The small courtroom became a twenty-four-hour propaganda bureau spewing out headlines such as "Bruno Guilty, But Has Aides, Verdict of Man in Street," and story references to Bruno Hauptmann as "a thing lacking human characteristics." One report had it that the jury was seriously considering an offer to go into vaudeville.

From Hauptmann's trial to the present, America has never for very long lacked a case *cause célèbre*, be it the trials of John Z. DeLorean of car-design fame[23] or of Joel Steinberg, a lawyer convicted of beating an illegally adopted daughter to death.[24]

Defense lawyers, prosecutors, and police officers remain the surest sources of information about pending cases. Still, reporters and editors sometimes rush into print, occasionally without even a passing thought for the presumption of innocence.[25] The trial of Dr. Samuel Sheppard was such a case. After a murder conviction and twelve years in prison, Sheppard's attorneys got his case heard by the Supreme Court. He was given a new trial and acquitted.

Sheppard was accused of the July 4, 1954 murder of his wife Marilyn at their home in Bay Village, a suburb of Cleveland. "From the outset officials focused suspicion on Sheppard," Justice Clark noted in his opinion for the Court. He recounted the press's role in subsequent events.

First the newspapers reported extensively on Sheppard's refusal to take a lie detector test. An editorial suggested that Sheppard should have been "subjected instantly to the * * * third degree." Another editorial demanded an inquest. When the coroner called an inquest, it was held in a school gym-

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20. Emery and Emery, *The Press and America*, 4th ed. (1978), 120. A useful historical survey of the free press-fair trial conflict is Lofton, *Justice and the Press*, 1966.

21. Hughes, *News and the Human Interest Story* (1940), 235.

22. Frank, *Courts on Trial* (1949), 92.

23. *CBS v. United States District Court*, 10 Med.L.Rptr. 1529, 729 F.2d 1174 (9th Cir. 1984).

24. *Cameras put followers of Steinberg case in courtroom*, Broadcasting (Dec. 19, 1988), at 65.

25. Tankard, Middleton and Rimmer, *Compliance with American Bar Association Fair Trial-Free Press Guidelines*, 56 Journalism Quarterly 464 (1979).

nasium, was attended by a "swarm" of reporters and photographers, and was broadcast live. The three-day inquest ended with a "public brawl." Sheppard's attorneys were allowed to attend but not to participate. The newspapers reported details of the investigation obtained from police that were never introduced at trial, all of which tended toward showing Sheppard's guilt. The newspapers reported extensively that Sheppard was a womanizer, implying motive, but that too was never introduced at trial. Later editorials asked "Why Don't Police Quiz Top Suspect?" and "Why Isn't Sam Sheppard in Jail?"

When Sheppard was arrested, a crowd of newscasters, reporters, and photographers was waiting for his arrival at city hall. Sensational coverage continued until the trial.

The trial itself began two weeks before elections in which the prosecutor was a candidate for municipal judge and the trial judge was a candidate for reelection. A list of seventy-five prospective jurors was drawn. The newspapers were given and printed each person's name and address. The courtroom was 26 by 48 feet. A temporary table was set up *inside* the bar for approximately twenty reporters who were given assigned seats. Four other rows of benches were assigned to media representatives for the duration of the trial. The press used all the other rooms on the same floor of the courthouse. Telegraph and telephone lines were installed. One radio station set up broadcasting facilities on the third floor, next to the jury room.

During trial, one television broadcast carried an interview with the judge as he entered the courthouse. Prospective jurors were photographed during *voir dire*. Witnesses, counsel, and jurors were all photographed and televised whenever they entered or left. Sheppard himself was brought into the courtroom about ten minutes before the start of each session to allow photographing; picture taking was prohibited while court was in session. Every juror testified at *voir dire* of reading or hearing about the case in the media. During trial, pictures of the jury appeared in the Cleveland papers more than forty times. One feature story told of a juror's home life. On the second day of *voir dire* a live debate was staged on radio. Reporters in the debate said Sheppard effectively admitted his guilt by hiring a prominent criminal defense attorney.

Sheppard's attorneys sought a continuance, a change of venue, and a mistrial, all denied. The jury, however, was not sequestered, and no attempt was made to limit outside contacts and, thereby, exposure to news accounts.

There had long been agreement among parties on both sides of the case that responsibility for preventing "trial by newspaper" rests on judges, prosecutors, and police, not the press. For the second reversal of a state court conviction on due process grounds, the Supreme Court agreed.

SHEPPARD v. MAXWELL

1 MED.L.RPTR. 1220, 384 U.S. 333, 86 S.CT. 1507, 16 L.ED.2D 600 (1966).

Justice CLARK delivered the opinion of the Court:

* * *

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for "[w]hat transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367 (1947). * * * But the Court has also pointed out that "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges v. State of California*, 314 U.S. at 271 (1941). * * * And we cited with approval the language of Justice Black for the Court in *In re Murchison*, 349 U.S. 133, 136 (1955), that "our system of law has always endeavored to prevent even the probability of unfairness."

It is clear that the totality of circumstances in this case also warrant such an approach. * * * Sheppard was not granted a change of venue to a locale away from where the publicity originated; nor was his jury sequestered. * * *

At intervals during the trial, the judge simply repeated his "suggestions" and "requests" that the jury not expose themselves to comment upon the case. Moreover, the jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers. The numerous pictures of the jurors, with their addresses, which

appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends. The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors' privacy. * * * Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial. * * *

While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which the trial was held. In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that "judicial serenity and calm to which [he] was entitled." The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. * * * The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits, and to confer privately with client and co-counsel. It is designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury. Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment. * * *

There can be no question about the nature of the publicity which surrounded Sheppard's trial. * * * Indeed, every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public.

* * *

Nor is there doubt that this deluge of publicity reached at least some of the jury. On the only occasion that the jury was queried, two jurors admitted in open court to hearing the highly inflammatory charge that a prison inmate claimed Sheppard as the father of her illegitimate child. Despite the extent and nature of the publicity to which the jury was exposed during trial, the judge refused defense counsel's other requests that the jury be asked whether they had read or heard specific prejudicial comment about the case, including the incidents we have previously summarized. In these circumstances, we can assume that some of this material reached members of the jury.

The court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. And he reiterated this view on numerous occasions. Since he viewed the news media as his target, the judge never considered other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press nor the charges of bias now made against the state trial judge. [Emphasis added.]

The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. * * * Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested. The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They certainly should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom. * * *

Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard.

* * *

Thirdly, the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate leading to groundless rumors and confusion.

* * *

Under such circumstances, the judge should have at least warned the newspapers to check the accuracy

of their accounts. And it is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers. The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the "evidence" disseminated in this fashion was clearly inadmissible.

* * *

More specifically, the trial court might well have proscribed extra-judicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters. * * * The court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees. In addition, reporters who wrote or broadcast prejudicial stories, could have been warned as to the impropriety of publishing material not introduced in the proceedings. * * * In this manner, Sheppard's right to a trial free from outside interference would have been given added protection without corresponding curtailment of the news media.

* * *

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. *Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom.* [Emphasis added.] But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. *The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.* [Emphasis added.] Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

* * *

The case is remanded to the District Court with instructions to issue the writ and order that Sheppard be released from custody unless the State puts him to its charges again within a reasonable time.

It is so ordered.

Justice Black dissents.

COMMENT

The clearest message from *Sheppard* is the Court's affirmation that it is primarily the judge's job to assure a fair trial. Only after considering a lengthy "laundry list" of alternative measures, apparently, would direct action affecting the press be justified. The *Sheppard* opinion is simultaneously a rebuke based on the effects of press coverage and a defense of the First Amendment. The requirement that alternative measures be tried first means that the defendant and not the press will be inconvenienced, at least initially. It is worth noting the practical effects of the alternatives Clark said the trial judge should have considered.

Change of venue is perhaps the most attractive of the alternatives. In most criminal cases, news coverage is local, not widespread. That means as a practical matter that a shift to another county or another part of the state may remedy any potential publicity effects. There are two problems associated with change of venue, however. First, the Court's suggestion runs counter to the change of venue provisions of many state statutes. Second, it is of little help to the defendant who has attracted statewide or even nationwide news coverage.

Continuance means delaying the trial while waiting for the publicity to wane. It is useful only to

allay the effects of pretrial publicity, since the trial itself will attract renewed press attention. Still, delay can make impaneling an impartial jury easier by allowing bias, if it exists, to erode with incomplete recollection. Unfortunately, the sort of recollection most likely to remain is an impression of guilt or innocence.[26]

Sequestering the jury can help prevent publicity effects during actual trial. It presents tremendous practical problems. It is expensive; jurors may be housed and fed at court expense in hotels for weeks. Jurors would rather be home than effectively held prisoner to assure a fair trial. Court and police personnel must monitor jurors to assure that inappropriate contact or exposure does not occur.

Conducting an intense *voir dire* is perhaps the best of the remedies. It has been the primary method of guaranteeing an impartial jury almost as long as the jury system has been used. And ignorance itself is not necessarily a virtue. In *Murphy v. Florida*, 1 Med.L.Rptr. 1232, 421 U.S. 794 (1975), defendant had been on trial for his part in a series of thefts, including theft of a famous sapphire, the Star of India. Although jurors admitted knowing of the highly publicized case, the Court could find no evidence of juror hostility toward the defendant in the *voir dire* record.

Admonishing the jury to disregard potentially irrelevant or prejudicial information is another traditional remedy, one in fact used by the trial judge in *Sheppard*. But how can a judge be confident that a warning to disregard will be heeded? Often jurors are admonished not to read a newspaper, watch television news, or listen to radio, but unless sequestered, a jury's adherence relies on an unspoken and hard-to-enforce honor system.

Sheppard suggests a judge might place limits on dissemination of information by any person subject to the court's jurisdiction. Court employees and police would automatically fall subject to limits, as would lawyers in their licensed capacity as "officers of the court." Witnesses are also mentioned in *Sheppard* as candidates for limitations, as well as for protection by the court from reporters. Court-ordered "gags" on parties other than the press have raised issues about the First Amendment rights of those parties in recent years, however (see p. 446, this text).

The only direct action against the press approved in *Sheppard* is *time, place, and manner regulation* in the courtroom. A trial judge has an obligation to assure that the conduct of observers, including the press, does not have a detrimental effect on either the conduct or outcome of proceedings.

Clark did emphasize that, "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences," an admonition that could be interpreted as justifying if not advocating direct restraints on the press. The courts, the legal profession, and journalists would all react differently to the message of *Sheppard*.

THE AFTERMATH OF *SHEPPARD*

If Justice Clark spoke sternly to trial judges in the opinion, commanding them to control their courtrooms and use all available remedies to counteract unfairness, he also had words for the press. It would require self-delusion to interpret his pained account of press coverage as anything but disgust for journalism's disregard for fairness. *Sheppard* would be parent to hundreds of "gag" orders directed at the press by lower court judges, culminating in *Nebraska Press Ass'n v. Stuart* in 1976. And the *Nebraska Press* case has not necessarily been the last word on the issue.

In the interim, and partly in response to criticism in the Warren Report on press coverage of Lee Harvey Oswald,[27] the American Bar Association set up an Advisory Committee on Fair Trial and Free Press under chairman Paul C. Reardon, then an associate justice on the Massachusetts Supreme Judicial Court.[28] While the Reardon Report, as it came to be called, primarily addressed officers of the courts, it recommended that judges use the long discredited power of *constructive contempt*.[29] Constructive contempt allows judges to cite for contempt anyone who

26. Sohn, *Determining Guilt or Innocence of Accused from Pretrial News Stories*, 53 Journalism Quarterly 100 (1976).

27. Report of the President's Commission on the Assassination of President John F. Kennedy (1964), 201–242 and *passim*.

28. American Bar Association Legal Advisory Committee on Fair Trial and Free Press, *The Rights of Fair Trial and Free Press*, 1969. See also, Gillmor, *The Reardon Report: A Journalist's Assessment*, 1967 Wisc.L.Rev. 215.

29. For a catalogue of English contempt cases involving the press, see Gillmor, *Free Press and Fair Trial in English Law*, 22 Wash. & Lee L.Rev. 17–42 (1965).

disseminates extrajudicial statements willfully designed to influence a trial's outcome, or anyone who violates a valid court order not to reveal information from a closed judicial hearing, despite the fact that the action took place outside the courtroom.[30]

The Reardon Report also favored closing pretrial hearings to the press and public if it appeared to the court that a fair trial was in jeopardy. Since 90 percent of criminal cases are disposed of in the pretrial stage, widespread closure of pretrial hearings would curtail newsgathering about criminal cases significantly.

The controversial report also established categories of prohibited and publishable information. Prohibited comment included: prior criminal records; character references; confessions; test results; and out-of-court speculation on either guilt or innocence or the merits of evidence. Publishable information included: facts and circumstances of arrests; identity of the person arrested; identity of the arresting officer or agency; descriptions of physical evidence; the charge; facts from public court records; and the next probable steps in the judicial process. The report was soon exerting nationwide influence on both press and bar.

Where there was a threatened interference with the right to a fair trial, the report agreed with Justice Clark in *Sheppard* that motions should be granted for change of venue or venire, severance, continuance, waiver of the right to trial by jury, sequestration, new trial, mistrial, and habeas corpus. Under *voir dire*, jurors could be challenged, and once the jurors were seated, judges could take pains to instruct them on what and what not to consider.

To be sure, these judicial remedies are useful, but there are some obvious problems. The ubiquity of mass media, especially broadcasting, casts a shadow on the effectiveness of changes of venue and venire. A continuance, or postponement, may lead to the disappearance of witnesses and evidence, and, if unable to raise bail, a defendant remains in jail. A mistrial subjects a defendant to the expense and trauma of a new trial. There is some debate over the usefulness of peremptory challenges to jurors and of challenges for cause, both part of *voir dire* proceedings. Jurors as a rule don't like being sequestered, or locked up, and may react adversely to the party initiating such a motion; moreover they have, in most cases, already been exposed to pretrial publicity.

One survey reported that judges favored most of the above remedies appropriate to the pretrial period. Once the trial had begun, motion for a new trial on due process grounds was their choice. Most agreed that the reporting of criminal records, confessions, and the results of pretrial tests, such as the lie detector, were the most damaging forms of pretrial coverage.[31]

The Reardon Report also had a positive side. The report gave momentum to the work of bar-press committees in the states. In most states, representatives of the legal and journalism communities met to discuss what items of coverage were appropriate when the press covered criminal proceedings. The press was motivated, at least in part, to seek better relations with the bar as a way of blunting the Reardon Report's effects after the report was formally adopted by the ABA.

The committees typically wrote bar-press guidelines, which the press hoped would assure limited judicial intervention in newsgathering and which the bar hoped would provide more balanced, less biased coverage. The "Nebraska Bar-Press Guidelines," promulgated by the Nebraska State Bar Association's Committee on Bar/News Media in 1975, are typical. Despite the undesirable notoriety the guidelines attracted in the *Nebraska Press* case, the guidelines were still being distributed to and encouraged upon journalists through the 1980s.

NEBRASKA BAR-PRESS GUIDELINES[32]

Prior Criminal Records

Lawyers and law enforcement personnel should not volunteer their prior criminal records of an accused except to aid in his apprehension or to warn the public of any dangers he presents. The news media can obtain prior criminal records from the public records of the courts, police agencies and other governmental agencies and from their own files. The

30. In re Stone, 11 Med.L.Rptr. 2209 (Colo.Ct.App. 1985) (intent to interfere not required for civil contempt; sufficient if defendants knew that it was violation of the court order to contact murder trial jurors for interviews when jurors were under court order to not discuss case).

31. Bush, Wilcox, Siebert, and Hough, *Free Press and Fair Trial*, 1970.

32. Bar/News Media Committee, *Journalists' Guide to Nebraska Courts* (1980), 43.

news media acknowledge, however, that publication or broadcasts of an individual's criminal record can be prejudicial, and its publication or broadcast should be considered very carefully, particularly after the filing of formal charges and as the time of the trial approaches, and such publication or broadcast should generally be avoided because readers, viewers and listeners are potential jurors and an accused is presumed innocent until proven guilty.

Photographs

1. Generally, it is not appropriate for law enforcement personnel to deliberately pose a person in custody for photographing or televising by representatives of the news media.
2. Unposed photographing and televising of an accused outside the courtroom is generally appropriate, and law enforcement personnel should not interfere with such photographing or televising except in compliance with an order of the court or unless such photographing or televising would interfere with their official duties.
3. It is appropriate for law enforcement personnel to release to representatives of the news media photographs of a suspect or an accused. Before publication of any such photographs, the news media should eliminate any portions of the photographs that would indicate a prior criminal offense or police record.

For Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation

These voluntary guidelines reflect standards which bar and news media representatives believe are a reasonable means of accommodating, on a voluntary basis, the correlative constitutional rights of free speech and free press with the right of an accused to a fair trial. They are not intended to prevent the news media from inquiring into and reporting on the integrity, fairness, efficiency and effectiveness of law enforcement, the administration of justice, or political or governmental questions whenever involved in the judicial process.

As a voluntary code, these guidelines do not necessarily reflect in all respects what the members of the bar or the news media believe would be permitted or required by law.

Information Generally Appropriate for Disclosure, Reporting

Generally, it is appropriate to disclose and report the following information:

1. The arrested person's name, age, residence, employment, marital status and similar biographical information.
2. The charge, its text, any amendments thereto, and, if applicable, the identity of the complainant.
3. The amount or conditions of bail.
4. The identity of and biographical information concerning the complaining party and victim, and if a death is involved, the apparent cause of death unless it appears that the cause of death may be a contested issue.
5. The identity of the investigating and arresting agencies and the length of the investigation.
6. The circumstances of arrest, including time, place, resistance, pursuit, possession of and all weapons used, and a description of the items seized at the time of arrest. It is appropriate to disclose and report at the time of seizure the description of physical evidence subsequently seized other than a confession, admission or statement. It is appropriate to disclose and report the subsequent finding of weapons, bodies, contraband, stolen property and similar physical items if, in view of the time and other circumstances, such disclosure and reporting are not likely to interfere with a fair trial.
7. Information disclosed by the public records, including all testimony and other evidence adduced at the trial.

Information Generally Not Appropriate for Disclosure, Reporting

Generally, it is not appropriate to disclose or report the following information because of the risk of prejudice to the right of an accused to a fair trial:

1. The existence or contents of any confession, admission or statement given by the accused, except it may be stated that the accused denies the charges made against him. This paragraph is not intended to apply to the statements made by the accused to representatives of the news media or to the public.
2. Opinions concerning the guilt, the innocence or the character of the accused.
3. Statements predicting or influencing the outcome of the trial.

4. Results of any examination or tests or the accused's refusal or failure to submit to an examination or test.
5. Statements or opinions concerning the credibility or anticipated testimony of prospective witnesses.
6. Statements made in the judicial proceedings outside the presence of the jury relating to confessions or other matters which, if reported, would likely interfere with a fair trial.

THE CONTEMPT POWER AND GAG ORDERS

With *Sheppard*, the Reardon Report, and various states' guidelines in place, the stage was set for numerous confrontations between the judiciary and the press. The primary question anytime a judge orders the press not to report information is whether or not the order must be obeyed. The second question concerns the constitutional validity of the order.

While the news media were predictably negative toward broad prohibitions against publishing information in public records, such as criminal records, their strongest condemnation was reserved for the part of the Reardon Report that proposed punishing editors for what they printed. History was largely on the editors' side.

As early as 1788, Americans began having doubts about the summary procedure for punishing contempts by publication;[33] the judge acts as complainant, jury, and judge in his or her own case. Pennsylvania passed a law limiting its use in 1809, followed by New York in 1829. Congress enacted the Federal Contempt Act of 1831, limiting punishable contempt to disobedience to any judicial process or decree and to misbehavior in the presence of the court, "*or so near thereto as to obstruct the administration of justice.*" [34]

Judges disagreed on whether "so near thereto" required a geographical or causal construction.[35] Until 1941 the "immemorial" power of judges to punish summarily prevailed. Then, in *Nye v. United States*, 313 U.S. 33 (1941), the Court did an about-face and held that "so near thereto" meant physical proximity. It also rejected the "reasonable tendency" rule used to uphold contempt citations, a rule that virtually assured all citations would be upheld.

That same year, in *Bridges v. California*, 314 U.S. 252 (1941), the power of judges to punish publication was severely limited. Labor leader Harry Bridges and the *Los Angeles Times* had both criticized a judge and the judicial process while a case was pending. The Court declared in this and subsequent cases[36] that the contempt power could be used only against out-of-court comments creating a "clear and present danger" of impairing justice. "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion," Justice Hugo Black wrote for the Court. "[A]n enforced silence * * * would probably engender resentment, suspicion, and contempt much more than it would enhance respect." Dissenters in *Bridges* argued that applying a prior restraint analysis was inappropriate, since the punishment was for past conduct; they also thought the case upset the states' traditional right to establish laws to protect the integrity of their courts.

While of little moment perhaps to the journalist facing a contempt citation, it is important to note that American law provides for two types of contempt, civil contempt and criminal contempt. The difference refers to the actions of the person cited, however, and not to the nature of the action from

33. *Respublica v. Oswald*, 1 Dallas 319 (Pa. 1788).
34. 18 U.S.C.A. § 401.
35. *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918). In a strong dissent, Justice Holmes, interpreting the phrase as "geographical," sought to discredit the summary power in favor of firm and steadfast judges not easily deflected from their sworn duty.
36. *Pennekamp v. Florida*, 328 U.S. 331 (1946). Zechariah Chafee, Jr., an eminent commentator on freedom of speech and press, would have made Justice Frankfurter's concurring opinion in the case required reading in every school of journalism, newspaper office, and broadcasting station. See Chafee, *Government and Mass Communications*, Vol. 2, 1947, p. 433. Frankfurter argued that, ultimately, freedom of the press would depend for its survival on an independent judiciary. "To deny," he said, "that bludgeoning or poisonous comment has power to influence, or at least to disturb, the task of judging is to play make-believe and to assume that men in gowns are angels." And he contended that every right carries with it a concomitant responsibility.

In Craig v. Harney, 331 U.S. 367 (1947), the third in a series of cases denying the contempt power to judges, Justice Douglas said: "Judges are supposed to be men of fortitude, able to thrive in a hardy climate."

which the contempt citation arose.[37] Decided cases offer little sure guide to determining when activity will prompt either type of contempt citation, but criminal contempt is more likely when the refusal to obey a court order is knowing and willful. The biggest difference is in penalties, with criminal contempt typically bringing harsher ones. The exact rules for contempt vary depending upon whether a court is federal or state, whether the action is civil or criminal, and even then they vary tremendously among the states. Normally persons cited for contempt are entitled to a hearing and counsel.

The traditional rule regarding court orders is that they must be obeyed, pending appeal, even when First Amendment interests are affected. The leading modern case on the duty of journalists to obey even an obviously invalid order constituting prior restraint developed from a 1971 Baton Rouge murder-conspiracy case that reminded reporters that judges were not helpless when it came to enforcing their orders. At a preliminary hearing designed to determine whether the state had a legitimate motive in prosecuting a VISTA worker on a charge of conspiring to murder the city's mayor or whether its action was based on racial prejudice, a federal district judge prohibited the publication of testimony taken at a public hearing. Two *State-Times* reporters ignored the order, wrote their stories, and were adjudged guilty of criminal contempt of court. The reporters appealed to the Fifth Circuit, and, in what may have been a turning point in press-bar cooperation, that court upheld the principle that even an unconstitutional court order must be obeyed pending appeal. The court refused to make the First Amendment question of prior restraint the dispositive issue in the case. And it relied heavily on a United States Supreme Court ruling, *Walker v. Birmingham*, 388 U.S. 307 (1967), which required obedience even to a court order that was in apparent violation of the First Amendment pending appeal of the order.

Noting that no jury was yet involved in the case and the press had not created a carnival atmosphere, the Fifth Circuit court observed that the public's right to know the facts brought out in the hearing was particularly compelling since the issue being litigated was a charge that elected state officials had trumped up charges against an individual solely because of his race and civil rights activities. The federal district court's cure, said the federal appeals court, was worse than the disease. But it went on to say the following.

UNITED STATES v. DICKINSON

1 MED.L.RPTR. 1338, 465 F.2D 496 (5TH CIR. 1972).

John R. BROWN, Chief Judge:

* * *

The conclusion that the District Court's order was constitutionally invalid does not necessarily end the matter of the validity of the contempt convictions. There remains the very formidable question of whether a person may with impunity knowingly violate an order which turns out to be invalid. We hold that in the circumstances of this case he may not.

We begin with the well-established principle in proceedings for criminal contempt that an injunction duly issuing out of a court having subject matter and personal jurisdiction *must be obeyed*, irrespective of the ultimate validity of the order. Invalidity is no defense to criminal contempt. * * * *Walker v. City of Birmingham*, 388 U.S. 307 (1967). * * * "People simply cannot have the luxury of knowing that they have a right to contest the correctness of the judge's order in deciding whether to wilfully disobey it. * * * Court orders have to be obeyed until they are reversed or set aside in an orderly fashion."

* * *

The criminal contempt exception requiring compliance with court orders, while invalid non-judicial directives may be disregarded, is not the product of self-protection or arrogance of Judges. Rather it is born of an experience-proved recognition that this rule is essential for the system to work. Judges, after all, are charged with the final responsibility to adjudicate legal disputes. * * *

On the other hand, the deliberate refusal to obey an order of the court without testing its validity through

37. For a more comprehensive treatment of the history of the contempt power, see Nelles and King, *Contempt by Publication in the United States*, 28 Colum. L. Rev. 401–431 and 525–562 (1928); Goldfarb, *The Contempt Power* (1963); Gillmor, *Free Press and Fair Trial*, 1966, Chapt. 11, "Contempt and the Constitution."

established processes requires further action by the judiciary, and therefore directly affects the judiciary's ability to discharge its duties and responsibilities. Therefore, "while it is sparingly to be used, yet the power of the courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory."

* * *

[P]articular language in the recent Supreme Court decision of *New York Times Co. v. United States*, 1971, 403 U.S. 713 suggests that that Court would not sanction disobedience of a court order, even where the injunction unconstitutionally restrains publication of news. In the *Times* case, the lower courts had issued temporary restraining orders prohibiting further publication of the Pentagon Papers pending judicial determination of the merits of the Government's objections. Six of the Justices agreed that these injunctions were violative of the First Amendment. Nevertheless, no one suggested that the injunctions could have been ignored with impunity.

* * *

Where the thing enjoined is publication and the communication is "news," this condition presents some thorny problems. Timeliness of publication is the hallmark of "news" and the difference between "news" and "history" is merely a matter of hours. Thus, where the publishing of news is sought to be restrained, the incontestable inviolability of the order may depend on the immediate accessibility of orderly review. But in the absence of strong indications that the appellate process was being deliberately stalled—certainly not so in this record—violation with impunity does not occur simply because immediate decision is not forthcoming, even though the communication enjoined is "news." Of course the nature of the expression sought to be exercised is a factor to be considered in determining whether First Amendment rights can be effectively protected by orderly review so as to render disobedience to otherwise unconstitutional mandates nevertheless contemptuous. But newsmen are citizens, too. They too may sometimes have to wait. * * * As a matter of jurisdiction, the District Court certainly has power to formulate Free Press-Fair Trial orders in cases pending before the court and to enforce those orders against all who have actual and admitted knowledge of its prohibitions. Secondly, as the District Court's findings of fact establish, both the District Court and the Court of Appeals were available and could have been contacted that very day, thereby affording speedy and effective but *orderly* review of the injunction in question swiftly enough to protect the right to publish news while it was still "news."

* * *

Under the circumstances, reporters took a chance. As civil disobedients have done before they ran a risk, the risk being magnified in this case by the law's policy which forecloses their right to assert invalidity of the order as a complete defense to a charge of criminal contempt. Having disobeyed the Court's decree, they must, as civil disobeyers, suffer the consequences for having rebelled at what they deem injustice, but in a manner not authorized by law. * * * [I]t is appropriate to remand the case to the District Court for a determination of whether the judgment of contempt or the punishment therefor would still be deemed appropriate in light of the fact that the order disobeyed was constitutionally infirm.

Vacated and remanded.

COMMENT

The case was returned to the district court judge, and he again convicted the reporters and upheld their $300 fines. The appeals court also affirmed a second time. 476 F.2d 373 (5th Cir. 1972), cert. den. 414 U.S. 979 (1973).

The court of appeals urged *speedy* review of orders affecting the press, apparently echoing the Supreme Court's principle of accelerated review from the "Pentagon Papers" case. Ironically, the Fifth Circuit itself took nine months from initial appeal to opinion. If a reporter must disobey a written federal court order directed at the press, a move to appeal should be made, despite jeopardizing a story's timeliness. The effort should continue right up to deadline.

Speedy review of an order restraining broadcast of an NBC docudrama and ordering the network to produce the show for judicial scrutiny issued by a district court judge took less than a day in *Goldblum v. NBC*, 4 Med.L.Rptr. 1718, 584 F.2d 904 (9th Cir. 1978). The program was based on the plaintiff's business activities, which had landed him a prison sentence. Goldblum argued that the broadcast would

prejudice his chances for parole and might bias juries should he be tried again in the future. The court of appeals concluded that Goldblum was not even close to meeting the requirements for a prior restraint.

Although the court in *Goldblum* did not directly chide the trial judge who issued the order, choosing rather to berate the plaintiff's case, the court did note that an action for a writ of mandamus on the network's part was appropriate to "correct an abuse of discretion" that affected First Amendment rights, and said in passing that there was "no authority which is even a remote justification for issuance of a prior restraint. * * * "

To be reversed so summarily is surely embarrassing for a trial court judge and provides incentive for judges to "study up" on First Amendment issues before issuing restrictive orders affecting the press.

It may be important to distinguish restrictive orders issued by state courts and those issued by federal courts. Until it is overruled, *Dickinson*, and federal cases upon which it rests, hold that no disobedience to a court order will be permitted, even when the order violates the First Amendment. State law, however, may favor an attack on such orders, particularly where they violate state constitutional guarantees.[38]

Dickinson nevertheless gave impetus to the issuing of protective or restraining orders—what the press prefers to call "gag" orders—in criminal cases. Court proceedings and court records were closed. Names of jurors and witnesses, criminal records, and arrest records were sealed. Prior restraints were imposed by forbidding publication of information about exhibits, pleas, jury verdicts, and editorial comment on guilt or innocence.

With *Sheppard*, the Reardon Report, and *Dickinson* as a base, restrictive orders were bolstered by *dicta* in the landmark journalist's privilege case, *Branzburg v. Hayes*, 1 Med.L.Rptr. 2617, 408 U.S. 665 (1972):

> Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.

The American Bar Association continued to articulate influential guidelines permitting restrictions on the press, at least in extreme cases.

In 1976, under pressure from the Washington-based Reporters Committee for Freedom of the Press, the ABA agreed that no restraining order should be issued without the media's being afforded the basic elements of due process—prior notice, the right to be heard, and an opportunity for speedy appellate review. Direct restraints on the press would generally be avoided,[39] and any kind of restraint would be tailored to the specific circumstances of a criminal case.[40]

In 1978 the ABA's Committee on Fair Trial and Free Press proposed that there be no direct restraints on the news media, that press and public be excluded from hearings, and that records be sealed only on clear evidence of a clear and present danger to jury impartiality and a lack of alternative judicial remedies. The committee further recommended that reporters not be subject to the contempt power unless their potentially prejudicial information was acquired by means of bribery, theft, or fraud. Any judicial order affecting the press, said the committee, ought to be preceded by prior notice, a hearing, and, if the order is issued, an opportunity for prompt appellate review of the validity of the order. In proposing that no person be punished for violating an order later invalidated by an appellate court, the committee, in effect, rejected the Fifth Circuit's holding in *United States v. Dickinson*.

At its annual meeting later that year, the ABA's House of Delegates in large part adopted these proposals. The lawyers would categorically forbid a judge to issue an order prohibiting reporters from publishing information in their possession—"Rather than invite courts to probe the limits of the First Amendment in this area and thereby intensify conflicts with

38. See *S.N.E. v. R.L.B.*, 11 Med.L.Rptr. 2278, 699 P.2d 875 (Alaska 1985) (gag order preventing parties in child custody case from communicating with third parties, including the press, violates state constitution); *State ex rel. Superior Court of Snohomish County v. Sperry*, 483 P.2d 608 (Wash. 1971), cert. den. 404 U.S. 939 (1971).

39. The various guidelines and recommendations still urge restraints be placed on attorneys, witnesses, and other trial participants. See, e.g., *Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 87 F.R.D. 519 (1980).

40. American Bar Association Legal Advisory Committee on Fair Trial and Free Press, *Preliminary Draft Proposed Court Procedure for Fair Trial-Free Press Judicial Restrictive Orders* (July 1975), revised *Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press* (Dec. 2, 1975), adopted by the ABA House of Delegates (August 1976). See also, Landau, *Fair Trial and Free Press: A Due Process Proposal*, 62 ABA J. 55 (January 1976).

the press, it is preferable to close the door entirely to the alternative of prior restraints."

And the clear and present danger test was recommended for gagging lawyers and for closing pretrial hearings and court records.[41]

It was in this somewhat more conciliatory atmosphere that *Nebraska Press Association v. Stuart* came to the Supreme Court.

THE *NEBRASKA PRESS* CASE

On October 18, 1975 in the tiny prairie town of Sutherland, Nebraska, Erwin Simants walked across his yard to a neighbor's, raped and fatally shot ten-year-old Florence Kellie, then murdered all possible witnesses—her grandparents, her father, a brother, and a sister.[42]

The thirty-year-old Simants, after spending the night in a cornfield, turned himself in to authorities. A terrified community was relieved. At his arraignment on six counts of first-degree murder a few days later, County Judge Ronald Ruff, with an eye on the Nebraska Bar-Press Guidelines and without notice to the press, issued a broad order prohibiting publication of anything from public pretrial proceedings. In Nebraska, pretrial hearings must be open to the public. Because of an alleged confession and possibly incriminating medical tests relating to sexual assault, Judge Ruff feared that publicity might affect the fairness of the trial that Simants surely faced.

Within nine days a district court judge in Lincoln County, seeing a clear and present danger to a fair trial, set down essentially the same rules and said he would screen reporters to determine their "suitability" to be in the courtroom. Judge Hugh Stuart did something else. He incorporated the Nebraska Bar-Press Guidelines—or at least his interpretation of them—in his order and then forbade the press to talk about what he had done. Note how easily "voluntary" guidelines had become mandatory ones.

A by-now infuriated press saw this as a "gag on a gag." To the chagrin of those who had called for compromise, "voluntary guidelines" had become part of a formal judicial order.

The Nebraska Press Association, firmly supported by broad elements of the national press, sped to the state supreme court and presented that body with a 120-hour ultimatum for extraordinary relief. But the Nebraska Supreme Court was in no hurry and told the press not to expect a ruling before February. The next step was an appeal to U.S. Supreme Court Justice Harry Blackmun, who is the overseeing Circuit Justice for the region which includes Nebraska. On November 13, in an almost unprecedented order, Blackmun told the Nebraska Supreme Court to consider the case "forthwith and without delay," since freedom of the press was being irreparably infringed by each passing day.

The state supreme court, now aware that the press was seeking parallel relief from the high court, still did not do anything. After a few days, Justice Blackmun, in what is known as a chambers opinion, reassured the state court by postponing a stay sought by the press of the original court order until the state supreme court had had time to act.[43]

The judicial minuet was not over. Five days after Blackmun's opinion was issued, the Nebraska Supreme Court set November 25 to hear arguments. Appalled at how much time was passing, the press filed a reapplication for a stay with Blackmun. On November 20, finding that Nebraska court delays had exceeded "tolerable limits," Justice Blackmun handed down a second chambers opinion in which he granted the press a partial stay of the original trial court order.

Blackmun told Judge Stuart that the language of his order was too vague for First Amendment purposes and that prohibitions on the reporting of details of the crime, the identities of the victims, and the testimony of a pathologist at a public preliminary hearing were unjustified. But the rest of Stuart's order stood.[44]

Meanwhile the Nebraska Supreme Court had heard arguments in the case on November 25 as sched-

41. See Standing Committee on Association Communications of the American Bar Association, *The Rights of Fair Trial and Free Press: The American Bar Association Standards* (1981). Suggestions for making procedures for formulation and review of such guidelines or protective orders statutory came from the ABA's Legal Advisory Committee on Fair Trial-Free Press, the Twentieth Century Fund Task Force on Justice, Publicity and the First Amendment, *Rights in Conflict* (1976), and from *Fair Trial and Free Expression*, a report to the Subcommittee on Constitutional Rights of the Committee on the Judiciary of the United States Senate (1976).

42. An entire issue of the *Stanford Law Review* (29:3, February 1977) is devoted to a symposium on the case. It presents a wide spectrum of views on the free press-fair trial question.

43. *Nebraska Press Association v. Stuart*, 1 Med.L.Rptr. 1059, 423 U.S. 1319 (1975).

44. Ibid., at 1327.

uled. Still reluctant to exercise concurrent jurisdiction with the high court, the Nebraska Supreme Court nevertheless upheld crucial parts of the original order in a 5–2 decision. Noting that "under some circumstances prior restraint may be appropriate," the state court concluded that a "clear and present danger" to a fair trial in North Platte, Lincoln, or even Denver overcame "the heavy presumption of unconstitutionality of the prior restraint." Missing in the court's analysis was evidence of how press coverage influences jury verdicts or any consideration of why rumors in this case were better for prospective jurors than facts.[45]

The state supreme court agreed with Justice Blackmun, however, that voluntary press-bar guidelines were not intended to be contractual or mandatory and could not be enforced as though they were. That part of Judge Stuart's order was overturned. But any information implying guilt or a confession was not to be published.

On December 12, 1975, the United States Supreme Court agreed to review the Nebraska court's order, but not with the speed Justices Marshall, Brennan, and Stewart thought necessary. The three would have lifted the Nebraska Supreme Court's order pending final resolution of the issue.

Simants was convicted on six counts of first-degree murder on January 17, 1976 and sentenced to death.

On June 30, 1976, in an otherwise unanimous decision striking down the Nebraska court's gag order in the Simants case, six justices held that in exceptional circumstances prior restraints might be constitutional in a criminal case. Surprisingly Chief Justice Burger, speaking for the Court, used a test for prior restraint which had become symbolic of the repression of First Amendment rights: whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." The language is Federal Circuit Court Judge Learned Hand's reformulation of the clear and present danger test which was applied by the Supreme Court in *Dennis v. United States*, 341 U.S. 494 (1951), the landmark, and since discredited, Communist conspiracy case.

It is also worth noting that every justice writing an opinion in *Nebraska* makes his own intuitive estimate of the effects of reporting on the fairness of a trial. The empirical literature is ignored.

After reviewing the leading free press-fair trial and prior restraint cases and emphasizing the responsibility of the trial judge in applying, short of prior restraint, the "strong measures" outlined in *Sheppard* to protect the defendant, the Court announced the decision below.

NEBRASKA PRESS ASSOCIATION v. STUART

1 MED.L.RPTR. 1064, 427 U.S. 539, 96 S.CT. 2791, 49 L.ED.2D 683 (1976).

Chief Justice BURGER delivered the opinion of the Court:

* * *

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. * * * If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.

The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment. For the same reasons the protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct. * * * The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly—a duty widely acknowledged but not always observed by editors and publishers. It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors.

Of course, the order at issue—like the order requested in *New York Times*—does not prohibit but only postpones publication. Some news can be delayed and most commentary can even more readily be delayed without serious injury, and there often is a self-imposed delay when responsible editors call for verification of information. But such delays are normally slight and they are self-imposed. Delays imposed by governmental authority are a different

45. *State v. Simants*, 236 N.W.2d 794 (Neb.1975).

matter. * * * As a practical matter, moreover, the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.

* * *

The Nebraska courts in this case enjoined the publication of certain kinds of information about the Simants case. There are, as we suggested earlier, marked differences in setting and purpose between the order entered here and the orders in *Near*, *Keefe*, and *New York Times*, but as to the underlying issue—the right of the press to be free from *prior* restraints on publication—those cases form the backdrop against which we must decide this case.

We turn now to the record in this case to determine whether, as Learned Hand put it, *"the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."* [Emphasis added.] *United States v. Dennis*, 183 F.2d 201, 212 (1950), aff'd, 341 U.S. 494 (1951); see also L. Hand, *The Bill of Rights* 58–61 (1958). To do so, we must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; (c) how effectively a restraining order would operate to prevent the threatened danger.

* * *

Our review of the pretrial record persuades us that the trial judge was justified in concluding that there would be intense and pervasive pretrial publicity concerning this case. He could also reasonably conclude, based on common human experience, that publicity might impair the defendant's right to a fair trial. He did not purport to say more, for he found only "a clear and present danger that pretrial publicity *could* impinge upon the defendant's right to a fair trial." [Emphasis added.] His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with *factors unknown and unknowable*. [Emphasis added.]

* * *

We have therefore examined this record to determine the probable efficacy of the measures short of prior restraint on the press and speech. There is no finding that alternative measures would not have protected Simants' rights, and the Nebraska Supreme Court did no more than imply that such measures might not be adequate. Moreover, the record is lacking in evidence to support such a finding.

* * *

Finally, we note that the events disclosed by the record took place in a community of 850 people. It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. * * *

Finally, another feature of this case leads us to conclude that the restrictive order entered here is not supportable. At the outset the County Court entered a very broad restrictive order, the terms of which are not before us; it then held a preliminary hearing open to the public and the press.

* * *

To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: "there is nothing that proscribes the press from reporting events that transpire in the courtroom." The County Court could not know that closure of the preliminary hearing was an alternative open to it until the Nebraska Supreme Court so construed state law; but once a public hearing had been held, what transpired there could not be subject to prior restraint.

* * *

The record demonstrates, as the Nebraska courts held, that there was indeed a risk that pretrial news accounts, true or false, would have some adverse impact on the attitudes of those who might be called as jurors. But on the record now before us it is not clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court. We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary. Nor can we conclude that the restraining order actually entered would serve its intended purpose. Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the prob-

ability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require.

* * *

It is significant that when this Court has reversed a state conviction, because of prejudicial publicity, it has carefully noted that some course of action short of prior restraint would have made a critical difference. However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.

Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged. *We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact.* [Emphasis added.] We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibited publication based on information gained from other sources, we conclude that the heavy burden imposed as a condition to securing a prior restraint was not met and the judgment of the Nebraska Supreme Court is therefore.

Reversed.

COMMENT

Prior restraints must be preceded by a clear demonstration of the harmful effects of publicity on a jury, the Court seemed to be saying, a relationship Burger at the same time considered "unknown and unknowable." In addition, it must be shown by the judge that a prior restraint would be effective and that no alternatives less destructive of First Amendment rights, such as the actions listed in *Sheppard*, are available. It is hard to imagine a judge ever hurdling these preliminary barriers. Trial judges were being asked to make judgments about juror prejudice before there were any jurors to examine.

The Court indicated that the effectiveness of the prior restraint must also be assured before such an order issues. This again is a tall order, given the difficulties of predicting media effects and human behavior. And, the court's jurisdiction would bind only those media organizations within the jurisdiction, limiting the order's effect in a case such as Simants's that drew broader coverage.

In *Nebraska Press*, Burger said a heavy First Amendment presumption against the validity of gag orders existed. Other justices would have gone further. Justice White wrote a short concurring opinion in which he doubted that a *Nebraska*-type order would ever be justified. He thought that a general rule banning gag orders would be preferable, so the Court could avoid "the interminable litigation that our failure to do so would necessarily entail."

Justice Brennan's exhaustive concurrence, joined by Stewart and Marshall, flatly declared that gag orders applied to the press are always unconsitutional. Brennan advocated a rule that gag orders are *per se* invalid under the First Amendment.

Brennan believed that attempts to use gag orders to bottle up information, like putting a genie back in a bottle, were futile. The news would spread nonetheless. For Brennan, the uncertain benefits of assuring fair trials by gagging the press were far outweighed by harms caused to both journalism and the courts:

> There would be, in addition, almost intractable procedural difficulties associated with any attempt to impose prior restraints on publication of information relating to pending criminal proceedings, and the ramifications of these procedural difficulties would accentuate the burden on First Amendment rights. The incentives and dynamics of the system of prior restraints would inevitably lead to overemployment of the technique. In order to minimize pretrial publicity against his clients and pre-empt ineffective-assistance-of-counsel claims, counsel for defendants might routinely seek such restrictive orders. Prosecutors would often acquiesce in such motions to avoid jeopardizing a conviction on appeal. And although judges could readily reject many such claims as frivolous, there would be a significant danger that judges would nevertheless be predisposed to grant the motions, both to ease their task of ensuring fair proceedings and to insulate their conduct in the criminal proceeding from reversal. We need not raise any specter of floodgates of litigation or drain on judicial resources to note that the litigation

> with respect to these motions will substantially burden the media. For to bind the media, they would have to be notified and accorded an opportunity to be heard.

The argument appeared to be taken from a letter written by the editor and publisher of the Anniston (Alabama) *Star* and included in the media's *amicus* brief to the Court. Brennan feared overuse of restrictive orders would discourage crime and court coverage, especially by less wealthy media that might choose not to contest even blatantly unconstitutional orders.

Simants's conviction was overturned on the grounds that a sheriff had lobbied a sequestered jury. On retrial he was found not guilty by reason of insanity, a result that did not sit well in some Nebraska circles.

The Court bolstered *Nebraska Press* in *Oklahoma Publishing Co. v. District Court*, 2 Med.L.Rptr. 1456, 430 U.S. 308 (1977), when it held that news media could not be prohibited from publishing the name or picture of a juvenile where the name had been reported in open court and the photograph taken without objection outside the courthouse. Both the open court proceeding and the courthouse exterior were considered public places; "what transpired there cannot be subject to prior restraint."

Two terms later in *Smith v. Daily Mail Publishing Co.*, 5 Med.L.Rptr. 1305, 443 U.S. 97 (1979), the Court said that a West Virginia statute imposing criminal sanctions and barring publication of a juvenile offender's name lawfully obtained violated the First Amendment. The state's interest in protecting the anonymity of juveniles was insufficient to justify the encroachment on the press. The Court relied on *Landmark Communications, Inc. v. Virginia*, 3 Med.L.Rptr. 2153, 435 U.S. 829 (1978), which said a statute banning publication of information about confidential judicial review committee hearings against a judge violated the First Amendment.

Nebraska Press has reduced gag order litigation from a flood to a trickle, and gag orders are almost never upheld at the appeals level. Still, judges occasionally issue such restrictive orders, and the orders, if obeyed, suffice to stifle publicity until the appeal is decided—usually long after the trial.

For example, in *KUTV v. Conder*, 9 Med.L.Rptr. 1825, 668 P.2d 513 (Utah 1983), the trial court's *ex parte* (without notice or hearing) order that the media not publish information about an accused rapist's prior convictions or use the heavily publicized term "Sugarhouse rapist" to describe defendant was determined to be an invalid prior restraint, *fourteen months* after the order was issued and the trial concluded. The Utah Supreme Court attempted to distinguish *Nebraska Press* on the grounds that the landmark case dealt only with pretrial publicity, while the order in *KUTV* applied during trial. The court, instead, held the order invalid primarily because of procedural irregularities.

KUTV was before the Utah Supreme Court again a year later, along with other media organizations, contesting a trial judge's order that no information about a defendant's alleged connections with organized crime be published. Reporters present at *voir dire* were asked to "adopt a position of voluntary restraint" but they would not so promise. After two days of news coverage, noticed by one juror, and an instance of a juror's being approached about the case by a stranger, the court issued its order. This time, the trial judge followed procedure and gave the media notice and a hearing. In affirming the order, the Utah Supreme Court held that the three-part *Nebraska Press* test had been met and added a fourth test of its own making:

> [T]he degree of public interest in immediate access to the information. * * * In this case, we perceive no significant public interest in immediate access to the sole subject of the restraining order: that Gatto, on trial for theft by deception, had some direct or indirect connection with organized crime. This case does not involve the trial of a public official, evidence of official misconduct or connections with organized crime.

The court's extra test in effect limits the power of *Nebraska Press* in any case that does not involve government, an approach that should worry any journalist.

The *Swedberg* Case

The second KUTV case, relying in part as it did on the media's refusal to adhere to "voluntary" restraints, follows the reasoning of *Federated Publications v. Swedberg*, 7 Med.L.Rptr. 1865, 633 P.2d 74 (Wash. 1981), cert. den. 456 U.S. 984 (1982). The case has dampened thirty years of dialogue by press, bar, and judiciary on fair and ethical news coverage of court proceedings.

In *Swedberg*, the Washington Supreme Court upheld a trial court order allowing press access to pre-

trial proceedings only upon a promise by reporters that they would abide by that state's voluntary bar-bench-press guidelines. The court said that the order was not a prior restraint but a reasonable limitation to accommodate the interests of both press and public. Justice Rosellini, who had played a prominent role in drafting the original guidelines, wrote the opinion. Opponents of voluntary guidelines had warned that someday a court might interpret voluntary ones as mandatory.

The press saw *Swedberg* as a three-way violation: a prior restraint, an unconstitutional limit on courtroom access, and a content-based and therefore invalid time, place, and manner restraint. In addition, giving the public access but not the press appeared to violate the notion that the First Amendment disallows discrimination against certain speakers. Apparently only Justices Brennan and Marshall, who opposed denial, wanted the Supreme Court to address these arguments.

The trial judge argued that selective exclusion of the press was better than closing court altogether. In the opinion that follows, one finds the ingredients of future tension between press and judiciary. The judge faults the judicial remedies for publicity and sees no prior restraint problems in conditioning attendance on a promise not to publish. He distinguishes *Nebraska Press* and relies instead on the virtually overruled *Gannett v. DePasquale*, 5 Med.L.Rptr. 1337, 443 U.S. 368 (1979).

FEDERATED PUBLICATIONS v. SWEDBERG

7 MED.L.RPTR. 1865, 633 P.2D 74 (WASH. 1981), CERT. DEN. 456 U.S. 984 (1982).

ROSELLINI, J.:

* * *

While this court has found a right of the public to attend a pretrial hearing, under the language of Const. art. 1, § 10, that right is qualified by the court's right and duty to see that the defendant has a fair trial.

* * *

Here the court found that the only alternatives which could conceivably be effective in protecting the defendant's rights were to either close the hearing or exact a commitment from the members of the media to abide by the Bench-Bar-Press Guidelines.

The Bench-Bar-Press Guidelines, insofar as they are relevant here, are set forth in the appendix to this opinion. They are, by definition, not a set of rules but rather principles which guide the courts, lawyers and court personnel, as well as the media, in protecting the rights of an accused and other litigants to a fair trial, while at the same time respecting and preserving the freedoms of speech and press guaranteed by the state and federal constitutions.

* * *

It is true that these guidelines suggest the exercise of caution in reporting matters which may be damaging to the right of an accused to a fair trial, at a time when that risk is greatest—that is, prior to the trial. Ordinarily, members of the media who have declared their adherence to the guidelines do exercise restraint in such reporting, but it had been the experience of the trial judge here that mere oral commitment had not sufficed to produce that restraint. * * * As we view this measure, it was a good faith attempt to accommodate the interests of both defendant and press which, hopefully, would prove both practical and effective as an alternative to closure.

The petitioner's objection to the ruling is grounded upon its fear that, should it publish reports of the hearing, it would be subject to contempt proceedings. Whether the contempt power of the court could in other circumstances properly extend to punishment for alleged violation of an agreement to adhere to a set of standards as nonobligatory as these is a question which has not been briefed and which we need not decide. It would, however, be contrary to the spirit and intent of the Bench-Bar-Press Guidelines to invoke such a remedy for their alleged violation, and the comments of the lower court in making its ruling indicate that the court was in agreement with that principle. It issued no orders prohibiting publication, nor did it threaten any sanctions, if a person signing an agreement to abide by the guidelines should thereafter ignore them. Its ruling was simply that any media member not willing to put his moral commitment in writing would be excluded from the hearing.

Inasmuch as the court had the authority, under our holding in *Federated Publications, Inc. v. Kurtz*, * * * 615 P.2d 440 (Wash. 1980), to exclude all of the public, including the media, it had also the included power to impose reasonable conditions upon attendance. The exaction of an agreement to abide by standards which have gained the approval of all

of the media of mass communications in this state was not unreasonable, particularly in view of the fact that the commitment is a moral one, even when expressed in writing, and not enforceable in a court of law.

* * *

That reasonable limitations may be imposed upon attendance at a judicial proceeding was recognized in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 * * * (1980) (Justice White, concurring). In a footnote at page 581, he said:

> Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, see, e.g., *Cox v. New Hampshire*, 312 U.S. 569 (1941), so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial.

Our conclusion is that the limitation imposed here was a reasonable one, and the petition is accordingly denied.

COMMENT

While *Swedberg* is applicable only to Washington state and any agreement made by the press not to publish would be a moral commitment only, the press could not help but feel compromised and betrayed. The court's interpretation of reporters' promises as moral commitments only is not persuasive; if voluntary guidelines are incorporated by trial judges in court orders, they can be enforced by the contempt power, as *Dickinson* teaches.

Justice Dolliver, joined by three colleagues, dissented. Here the trial court had simply concluded that the "likelihood of jeopardy to a fair trial is overwhelmingly established" and that "the usual methods to protect a fair trial * * * are not adequate safeguards," he noted. "These statements and order by the trial court do not even come close to meeting our requirements in *Federated Publications v. Kurtz* [cited in the majority opinion] * * * much less * * * the standards of the United States Supreme Court for prior restraint as articulated in the *Nebraska Press Assn.* case."

In a recent Florida case, a reporter who had been allowed to attend a child custody hearing only on condition that she abide by the state's confidentiality requirements was found in criminal contempt after she disregarded the promise and wrote an article using material from the hearing. *Mayer v. Florida*, 15 Med.L.Rptr. 2256 (Fla.Dist.Ct.App. 1988). The appeals court concluded the reporter could be punished for violating the order because the order was not strictly "judicial." State statute *required* confidentiality, not the judge's discretion in the case, the court said. The court apparently read *Nebraska Press* as applying only to judicially created rather than legislatively created restraints. The appeals court also limited *Oklahoma Publishing*, interpreting that case as applying only to statutes prohibiting publication of material gathered at a hearing otherwise open to all.

One clear exception to the general rule invalidating prior restraints has been allowed. In *Seattle Times v. Rhinehart*, 10 Med.L.Rptr. 1705, 467 U.S. 20 (1984), the Court held that a trial court order barring the newspaper from publishing material it had obtained during pretrial discovery was valid. The *Times* was defending a libel suit brought by Keith Rhinehart, leader of a religious group, the Aquarian Foundation. Rhinehart had been the subject of numerous articles. Looking at the state's interest in the integrity of the legal process and at Rhinehart's claims of privacy and religious freedom that might be affected if material was published, the trial judge entered the order.

The Supreme Court unanimously upheld the order. Justice Powell, writing the majority opinion, noted that the state's interests were substantial. Substantial interest was sufficient to overcome press rights in the case, in part, because "an order prohibiting dissemination of discovered information before trial is not the kind of *classic* prior restraint that requires exacting First Amendment scrutiny." [Emphasis added.] Although the *Times*' status as a party was not technically a ground for decision, it appears to have weighed heavily, and it may be best to see the case as limited to its unique facts. The case is consistent with opinions in other areas of mass communication law denying the press benefits from status as a litigant that might disadvantage opponents. For example, a reporter could not avail himself of a journalist's confidentiality privilege while a plaintiff too.[46] And reporters have not been allowed to

46. *Anderson v. Nixon*, 3 Med.L.Rptr. 1687, 444 F.Supp. 1195 (D.D.C. 1978).

benefit from the privilege while defendants in libel suits.[47]

While the Court's differentiation between classic prior restraints and other prior restraints suggests a risk that even the Supreme Court might apply a two-level public interest approach as was done in *KUTV*, Justice Brennan, concurring, saw a silver lining for the press. He stressed the importance of the Court's recognition "that pretrial protective orders, designed to limit the dissemination of information gained through the civil discovery process, are subject to scrutiny under the First Amendment." Brennan apparently had his eye on likely future cases in which the press was not a litigant but desired access to materials submitted in advance of trial.[48]

The bottom line for the media, then, is that, while *Nebraska Press* establishes the presumptive invalidity of judicial restraining orders, especially gag orders, a trial judge may nonetheless restrain publicity while an invalid order is contested, perhaps holding up news coverage for months. And, in some cases, state courts have upheld restraints and gag orders as either meeting *Nebraska Press* standards or by narrowly distinguishing cases. The principle of speedy review advocated in both *Dickinson* and *Nebraska Press* appears often to go unheeded.

It should be standard practice that reporters object promptly and strenuously, but diplomatically, to orders forbidding publication or motions to close off parts of the judicial process. Notice and a hearing at which to oppose the orders or motions are required at the very least. Major news organizations have developed procedures and forms that are widely distributed to reporters to deal with these problems.

In retrospect, the Court's use of a modified clear and present danger test in *Nebraska Press* appears disingenuous. The *Simants* facts, objectively, seemed to meet the clear and present danger standard. The fact that the Court thought otherwise only supports the impropriety of the standard and the desirability of invalidating gag orders *per se*. While the test has not resulted in a torrent of gags, the danger of relying on it in such circumstances is that it will mislead courts into issuing gag orders, whether the orders can survive on appeal or not.

Violation of an Order—The Providence Case

Although *Dickinson* has long been the prevailing opinion on whether or not court orders must be obeyed, the First Circuit recently challenged both the reasoning and result of that case in a dispute involving the *Providence Journal's* ten-year attempt to report on the Patriarca crime family. In 1976, the *Journal* had requested logs and memoranda from FBI surveillance and wiretapping of Raymond L. S. Patriarca but was refused on the ground that disclosure would be an unwarranted invasion of personal privacy. After Patriarca's death, the *Journal* again sought the material and, along with other news organizations, received it.

Raymond J. Patriarca, son of Raymond L. S. Patriarca, brought an action for a temporary restraining order based on the federal Freedom of Information Act, the Omnibus Crime Control and Safe Streets Act of 1986, and the Fourth Amendment. Over the objections of both the newspaper and the federal government, the judge issued the order. Nevertheless, the next day the *Journal* published an article using the enjoined material. The district court, in a move that would prove crucial, appointed a special prosecutor, held a hearing, and found the newspaper in criminal contempt. Executive editor Charles M. Hauser received a suspended eighteen-month jail term and an order to perform 200 hours of community service. The *Journal* itself was fined $100,000. The *Journal* appealed, and the First Circuit upheld its right to publish.

IN RE PROVIDENCE JOURNAL

13 MED.L.RPTR. 1945, 820 F.2D 1342 (1ST CIR. 1986).

WISDOM, J.:

This appeal propounds a question that admits of no easy answer. Each party stands on what each regards as an unassailable legal principle. The special prosecutor relies on the bedrock principle that court orders, even those that are later ruled unconstitutional, must be complied with until amended or vacated. This principle is often referred to as the

47. See *Downing v. Monitor Publishing Co.*, 6 Med.L.Rptr. 1193, 415 A.2d 683 (N.H. 1980).

48. See, e.g., *Courier-Journal v. Peers*, 14 Med.L.Rptr. 1248 (Ky.Ct.App. 1987) (newspaper not a party to civil action lacks standing to unseal settlement records that ended action); *Rushford v. The New Yorker Magazine, Inc.*, 15 Med.L.Rptr. 1437, 846 F.2d 249 (4th Cir. 1988) (First Amendment right of access to documents filed in support of summary judgment motion in libel suit; protective order held invalid).

"collateral bar" rule. The Journal relies on the bedrock principle that prior restraints against speech are prohibited by the First Amendment. In this opinion we endeavor to avoid deciding which principle should take precedence by reaching a result consistent with both principles.

* * *

If a publisher is to print a libelous, defamatory, or injurious story, an appropriate remedy, though not always totally effective, lies not in an injunction against that publication but in a damages or criminal action *after* publication. Although the threat of damages or criminal action may chill speech, a prior restraint "freezes" speech before the audience has the opportunity to hear the message. Additionally, a court asked to issue a prior restraint must judge the challenged speech in the abstract. And, as was true in the instant case, a court may issue a prior restraint in the form of a temporary restraining order or preliminary injunction without a full hearing; a judgment for damages or a criminal sanction may be imposed only after a full hearing with all the attendant procedural protection.

Equally well-established is the requirement of any civilized government that a party subject to a court order must abide by its terms or face criminal contempt. Even if the order is later declared improper or unconstitutional, it must be followed until vacated or modified. As a general rule, a party may not violate an order and raise the issue of its unconstitutionality collaterally as a defense in the criminal contempt proceeding.

* * *

Court orders are accorded a special status in American jurisprudence. While one may violate a statute and raise as a defense the statute's unconstitutionality, such is not generally the case with a court order. Nonetheless, court orders are not sacrosanct. An order entered by a court clearly without jurisdiction over the contemnors or the subject matter is not protected by the collateral bar rule. Were this not the case, a court could wield power over parties or matters obviously not within its authority—a concept inconsistent with the notion that the judiciary may exercise only those powers entrusted to it by law.

The same principle supports an exception to the collateral bar rule for transparently invalid court orders. Requiring a party subject to such an order to obey or face contempt would give the courts powers far in excess of any authorized by the Constitution or Congress. Recognizing an exception to the collateral bar rule for transparently invalid orders does not violate the principle that "no man can be judge in his own case" anymore than does recognizing such an exception for jurisdictional defects. The key to both exceptions is the notion that although a court order—even an arguably incorrect court order—demands respect, so does the right of the citizen to be free of clearly improper exercises of judicial authority.

* * *

The line between a transparently invalid order and one that is merely invalid is, of course, not always distinct. As a general rule, if the court reviewing the order finds the order to have had any pretence to validity at the time it was issued, the reviewing court should enforce the collateral bar rule. Such a heavy presumption in favor of validity is necessary to protect the rightful power of the courts.

* * *

In its most recent decision on previous restraints on pure speech, *Nebraska Press Association v. Stuart*, the Court struck down a gag order issued to ensure the protection of a criminal defendant's Sixth Amendment right to a fair trial. Intending to keep "the barriers to prior restraint * * * high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it", the Court established a test so difficult to meet that Justice White was led to express his "grave doubt" that any prior restraint in the area would "ever be justifiable". The test requires proof to be established "with the degree of certainty our cases on prior restraint require", that (1) the nature and extent of pretrial publicity would impair the defendant's right to a fair trial; (2) there were no alternative measures which could mitigate the effects of the publicity; and (3) a prior restraint would effectively prevent the harm. It is patently clear that the order of November 13, 1985, fails to pass muster under the *Nebraska Press Association* test.

* * *

As the Supreme Court made clear in *Nebraska Press Association*, a party seeking a prior restraint against the press must show not only that publication will result in damage to a near sacred right, but also that the prior restraint will be effective and that no less extreme measures are available. The district court

failed to make a finding as to either of these issues, an omission making the invalidity of the order even more transparent. Indeed, had the court considered the likely efficacy of the order it would have concluded that the order would not necessarily protect Patriarca's rights. Other media, including nonparties to the Patriarca litigation, had the same information that the government had disclosed to the Journal. Moreover, Patriarca's complaint specifically alleged that portions of the information disclosed by the FBI had already been "disseminated" by the media. It is therefore hard to imagine a finding that the prior restraint would accomplish its purpose.

An additional point to note is that the prior restraint was issued prior to a full and fair hearing with all the attendant procedural protections. A prior restraint issued in these circumstances faces an even heavier presumption of invalidity, and the transparent unconstitutionality of the order is made even more patent by the absence of such a hearing.

* * *

The court's natural instinct was to delay the matter temporarily so that a careful, thoughtful answer could be crafted. This approach is proper in most instances, and indeed to follow any other course of action would often be irresponsible. But, absent the most compelling circumstances, when that approach results in a prior restraint on pure speech by the press it is not allowed.

It must be said, it is misleading in the context of daily newspaper publishing to argue that a temporary restraining order merely preserves the status quo. The status quo of daily newspapers is to publish news promptly that editors decide to publish. A restraining order disturbs the status quo and impinges on the exercise of editorial discretion. * * * When, as here, the court order is a transparently invalid prior restraint on pure speech, the delay and expense of an appeal is unnecessary. Indeed, the delay caused by an appellate review requirement could, in the case of a prior restraint involving news concerning an imminent event, cause the restrained information to lose its value. The absence of such a requirement will not, however, lead to wide-spread disregard of court orders. Rarely will a party be subject to a transparently invalid court order. Prior restraints on pure speech represent an unusual class of orders because they are presumptively unconstitutional. And even when a party believes it is subject to a transparently invalid order, seeking review in an appellate court is a far safer means of testing the order. For if the party chooses to violate the order and the order turns out not to be transparently invalid, the party must suffer the consequences of a contempt citation.

* * *

Because the order was transparently invalid, the appellants should have been allowed to challenge its constitutionality at the contempt proceedings. A *fortiori*, the order cannot serve as the basis for a contempt citation. The order of the district court finding the Providence Journal Company and its executive editor, Charles M. Hauser, in criminal contempt is therefore reversed.

COMMENT

The court dismissed Patriarca's claims for a prior restraint based upon the Freedom of Information Act, the Omnibus Crime Control and Safe Streets Act, and the Fourth Amendment almost out of hand. None of the three by their terms is designed to allow actions to restrain publication but might allow a post publication action against either the government or the newspaper. A later action based on the Fourth Amendment would require proof that the *Journal* and the government "were somehow conspiring" to violate Patriarca's rights—hard to prove indeed. The court also dismissed Patriarca's claim that the restraining order was needed to protect privacy, arguing that he could always bring a privacy action later. Inasmuch as the material came from government records, it is unlikely that a privacy claim could succeed.[49]

The court's conclusion that a transparently invalid restraining order affecting the press may be ignored without fear of punishment is based on First Amendment principles drawn from many Supreme Court opinions. The court especially relies on *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

As important as the rule that transparently invalid orders can be disobeyed may appear to the press, the method for determining when an order is transparently invalid is just as important. The court in *Providence Journal* applies a three-part test drawn from the *Nebraska Press* case to determine that the district court's order was transparently invalid.

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49. *Cox Broadcasting v. Cohn*, 1 Med.L.Rptr. 1819, 420 U.S. 469 (1975).

> The test requires proof to be established "with the degree of certainty our cases on prior restraint require," that (1) the nature and extent of pretrial publicity would impair the defendant's right to a fair trial; (2) there were no alternative measures which could mitigate the effects of the publicity; and (3) a prior restraint would effectively prevent the harm.

The *Nebraska Press* test, by its own terms, is intended to apply to issues involving pretrial publicity that may jeopardize a defendant's fair trial right. Here, Patriarca was neither a defendant nor involved in any legal action other than the one he himself brought. And, while *Nebraska Press* addressed the validity of a gag order, it did not explicitly address the matter of obeying an order.

Applying such a test places a significant burden on journalists, who may nevertheless feel somewhat chilled at attempting to determine if an order meets the prescribed three-part test. Even after receiving advice from counsel, an editor must recognize that there is no assurance that an order fails the test until a court agrees that it fails. And, while the press may have a First Amendment right to publish in the face of an order not to, the matter of punishment will still await determination in court, an expensive and inconvenient prospect.

The First Circuit, in a subsequent *en banc* opinion which the court itself saw as "technically dictum," affirmed but called for publishers facing a gag order "to make a good faith effort to seek emergency relief from the appellate court." If the appeals court does not act swiftly, then publication would be expected. "[S]uch a price does not seem disproportionate to the respect owing court processes; and there is no prolongation of any prior restraint." *In re Providence Journal*, 14 Med.L.Rptr. 1029, 820 F.2d 1354 (1st Cir. 1987).

The special prosecutor appointed by the district court judge appealed the decision. After having granted certiorari, apparently to review the First Amendment aspects of the First Circuit decision, the Supreme Court dismissed the writ of certiorari altogether on technical grounds, never reaching the First Amendment issues. The Court held that a special prosecutor must be authorized by the solicitor general, pursuant to federal statutes, to represent the government in the appeal. Since the special prosecutor was denied authorization from the solicitor general, there was no proper representative of the government in the case. *United States v. Providence Journal*, 15 Med.L.Rptr. 1241, 108 S.Ct. 1502 (1988).

Since the Supreme Court did not address the First Amendment issues in *Providence*, the reasoning of the court of appeals decision apparently stands. But, if it does, journalists are caught in the middle of a conflict between the First Circuit's invitation to disregard invalid orders and the Fifth Circuit's warning that all orders must be obeyed. Technically, neither *Providence* nor *Dickinson* acts as precedent outside its circuit. Which can journalists rely upon when making a decision?

While *Nebraska Press* and subsequent cases have simplified, if not completely resolved, issues about restraining orders directed at the press, it should be remembered that the opinions of the justices in that case mentioned without comment two alternatives: (1) gag orders against nonmedia personnel such as lawyers, accused, and officers of the court, and (2) exclusionary orders barring the public, including the media, from the courtroom. It is little wonder that such authoritative encouragement made these techniques the most commonly used devices to circumvent the *Nebraska Press* holding, leading themselves to even more free press-fair trial litigation.

CLOSED COURTROOMS

Generations of debate have focused on questions of access to the judicial process and whether the constitutional guarantee of a public trial is meant primarily for the protection of the accused, the benefit of the public, or the benefit of the press.[50] A re-

50. *E. W. Scripps Co. v. Fulton*, 125 N.E.2d 896 (Ohio 1955); *Kirstowsky v. Superior Court*, 300 P.2d 163 (Cal. 1956); *United Press Associations v. Valente*, 308 N.Y. 75, 123 N.E.2d 777 (N.Y. 1954); *Geise v. United States*, 265 F.2d 659 (9th Cir. 1959); *Singer v. United States*, 380 U.S. 24 (1965); *Phoenix Newspapers, Inc. v. Jennings*, 1 Med.L.Rptr. 2404, 490 P.2d 563 (Ariz. 1971); *Oliver v. Postel*, 1 Med.L.Rptr. 2399, 331 N.Y.S.2d 407 (1972); *United States v. Clark*, 475 F.2d 240 (2d Cir. 1973); *Gannett Co. v. Mark*, 2 Med.L.Rptr. 1189, 387 N.Y.S.2d 336 (1976); *Hearst Corp. v. Cholakis*, 2 Med.L.Rptr. 2085, 386 N.Y.S.2d 892 (1976); *Commercial Printing v. Lee*, 2 Med.L.Rptr. 2352, 553 S.W.2d 270 (Ark. 1977); *CBS, Inc. v. Young*, 1 Med.L.Rptr. 1024, 522 F.2d 234 (6th Cir. 1975); *Society of Professional Journalists v. Martin*, 2 Med.L.Rptr. 2146, 556 F.2d 706 (4th Cir. 1977); *United States v. Gurney*, 3 Med.L.Rptr. 1081, 558 F.2d 1202 (5th Cir. 1977); *New Jersey v. Allen*, 2 Med.L.Rptr. 1737, 373 A.2d 377 (N.J. 1977); *Illinois v. March*, 7 Med.L.Rptr. 1465, 419 N.E.2d 1212 (Ill. 1981); *Louisiana v. Birdsong*, 9 Med.L.Rptr. 1010, 422 So.2d 1135 (La. 1982); *Midland Publishing v. District Court Judge*, 11 Med.L.Rptr. 1337, 362 N.W.2d 580 (Mich. 1984); *Morgan v. Foretich*, 14 Med.L.Rptr. 1342, 528 A.2d 425 (D.C.Ct.App. 1987); *New York v. Colon*, 15 Med.L.Rptr. 1235, 526 N.Y.S.2d 932 (N.Y. 1988).

markable string of cases emanating from the U.S. Supreme Court in the 1980s now makes it clear that all three interests are implicated in the fair trial right. Furthermore, judicial developments now establish that other parties to judicial proceedings, including jurors, witnesses, and counsel, have a stake in proceedings open to the public.

The range of proceedings subject to routine closure has also shrunk. The state courts and the lower federal courts have followed the lead of the Supreme Court and extended a presumption of openness to civil trials and to nontrial proceedings. Access to the judicial process, in terms of a right to attend, has evolved rapidly from grudging acceptance to general application.[51]

In the not-so-distant past, courtrooms were routinely closed to press and public. They were closed to protect order and decorum, witnesses, public morality, trade secrets, police confidentiality, national security, privacy rights of participants, and the fragile psyches of juveniles. Judicial records were often sealed if a court was convinced sealing was needed to protect a defendant from prejudice.

Press access might be argued successfully, but not as a matter of right, when it could be demonstrated that alternatives to closure had not been considered, that there was no showing of a serious and imminent threat to the fair administration of justice, that no thought had been given to closing portions of a hearing or redacting parts of a record, and that no hearing had been afforded the press pending an exclusionary order.

To complicate matters, there was wide variation in state rules or statutes on suppression hearings, competency hearings, bail hearings, deposition sessions, general preliminary hearings, *voir dire*, matrimonial and juvenile hearings, trials, and posttrial hearings. Access often depended on whether a state required openness or not.[52] One thing, however, was certain. The judge was the final arbiter of what happened in the courtroom and, for that matter, who entered the courtroom.[53]

In this atmosphere of uncertainty *Gannett v. DePasquale*[54] came to the Supreme Court. A divided Court appeared to resolve doubts in favor of the accused. The Court held that the Sixth Amendment gives press and public no right of access to pretrial suppression hearings closed by agreement of both defense and prosecution. The guarantee of a public criminal trial was for the defendant's benefit, therefore raising no First Amendment issues. The majority opinion, written by Justice Stewart, noted that "a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity, and he may take protective measures even though they are not strictly and inescapably necessary."

The fragile majority did not support Stewart's position well. Although both Chief Justice Burger and Justice Powell joined Stewart's opinion, each concurred separately, apparently to narrow the opinion's scope. Burger openly doubted that the *Gannett* rationale could be applied to actual trials. Powell accepted a qualified First Amendment-based right of access to *all* criminal proceedings; his concurrence rests on the facts that the reporter present at the time of closure had not objected and that *Gannett* had not adequately supported its argument when finally given a hearing at which to oppose closure.

Justice Blackmun's vigorous dissenting opinion, joined by Justices Brennan, Marshall, and White, accepted the right of press and public access under the Sixth Amendment. He would require that a defendant show "substantial probability that irreparable damage" to a fair trial would result and that alternatives to closure were inadequate before allowing closure. But elsewhere, he referred to a "strict and inescapable necessity" formula.

Judges understood Stewart's admonition as a call to protect fair trial rights through closure whenever publicity seemed to pose a risk.

In the twelve-month period after the ruling, an estimated 270 efforts were made to close various phases of criminal proceedings: 131 closure motions were granted and upheld on appeal; 14 were re-

51. Middleton, *Should a Court Keep Secrets?*, National Law Journal, Oct. 17, 1988; Plamondon, *Recent Developments in Law of Access*, 63 Journalism Quarterly 61 (1986); McLean, *The Impact of Richmond Newspapers*, 61 Journalism Quarterly 785 (1984); BeVier, *Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers*, 10 Hofstra L.Rev. 311 (1982); Lewis, *A Public Right to Know About Public Institutions: The First Amendment as a Sword*, 1980 Supreme Court Rev. 1.

52. *Detroit Free Press v. Macomb Circuit Judge*, 4 Med.L.Rptr. 2180, 275 N.W. 2d 482 (Mich. 1979); *Philadelphia Newspapers v. Jerome*, 3 Med.L.Rptr. 2185,, 387 A.2d 425 (Pa. 1978).

53. *Rapid City Journal v. Circuit Court*, 5 Med.L.Rptr. 1706, 283 N.W.2d 563 (S.D. 1979).

54. 5 Med.L.Rptr 1337, 443 U.S. 368 (1979).

versed; and 111 were either denied by the trial court or withdrawn by counsel. Of the total number of motions, 171 sought to close pretrial hearings, 49 to close trials. About half were granted in each category.

In the meantime, the justices themselves seemed to be unsure whether the Court's opinion had meant to ease the closing of trials as well as pretrial hearings. That question would be faced in a landmark case a year later, *Richmond Newspapers, Inc. v. Virginia*, 6 Med.L.Rptr. 1833, 448 U.S. 555 (1980). There Chief Justice Burger held for the Court that closing of a criminal trial in the absence of an overriding counter interest was invalid under First and Fourteenth Amendments.

In spite of the potential significance of the case and near-unanimity in its vote on the result, the Court remained "badly splintered" [55] and imprecise on what was required for someone seeking closure to overcome the right to attend criminal trials.[56] Of the eight justices participating—Justice Powell did not—seven wrote separate opinions. Chief Justice Burger's plurality opinion was joined only by Stevens and White, who each concurred separately as well. Justice Brennan wrote a concurring opinion joined by Marshall, while Blackmun and Stewart each concurred alone. Justice Rehnquist was the lone dissenter, as he often had been in First Amendment cases.[57]

There was a seven-vote majority on one point. All agreed that the First Amendment, effective against the states through the Fourteenth Amendment, guarantees press and public a right to attend criminal trials. The Court was split on the strength of the right and on what proof was needed to overcome the right. Even within individual justices' opinions uncertainty over standards is evident.

None of the justices explained why a Sixth Amendment analysis was used in *Gannett* but a First Amendment approach in *Richmond*. Only Blackmun seems to have reservations about the locus of the access right.

Burger's opinion relied heavily upon history in establishing the value and tradition of openness in criminal trials. Much of the history had been presented by Blackmun in his comprehensive dissent in *Gannett*. So *Richmond*, leaving *Gannett* alone, presented the press with a right of access but with something less than certainty about its newsgathering rights.

RICHMOND NEWSPAPERS, INC. v. VIRGINIA

6 MED.L.RPTR. 1833, 448 U.S. 555, 100 S.CT. 2814, 65 L.ED.2D 973 (1980).

* * *

Chief Justice BURGER announced the judgment of the Court and delivered an opinion in which Justice White and Justice Stevens joined.

The narrow question presented in this case is whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution.

In March 1976, one Stevenson was indicted for the murder of a hotel manager who had been found stabbed to death on December 2, 1975. Tried promptly in July 1976, Stevenson was convicted of second-degree murder in the Circuit Court of Hanover County, Va. The Virginia Supreme Court reversed the conviction. * * *

Stevenson was retried in the same court. This second trial ended in a mistrial. * * *

A third trial, which began in the same court on June 6, 1978, also ended in a mistrial. It appears that the mistrial may have been declared because a prospective juror had read about Stevenson's previous trials in a newspaper and had told other prospective jurors about the case before the retrial began. * * *

Stevenson was tried in the same court for a fourth time beginning on September 11, 1978. Present in the courtroom when the case was called were appellants Wheeler and McCarthy, reporters for appellant Richmond Newspapers, Inc. Before the trial began, counsel for the defendant moved that it be closed to the public. * * *

The trial judge, who had presided over two of the three previous trials, asked if the prosecution had any objection to clearing the courtroom. The prosecutor stated he had no objection and would leave

55. Cox, *Freedom of Expression*, 1982.
56. Nowak, Rotunda and Young, *Constitutional Law* 3d ed. (1986). § 16.25.
57. Taylor, *Rehnquist's Court—Tuning Out The White House*, The New York Times Magazine, Sept. 11, 1988, 38.

it to the discretion of the court. * * * Presumably referring to Virginia Code § 19.2–266, the trial judge then announced: "[T]he statute gives me that power specifically and the defendant has made the motion." He then ordered "that the Courtroom be kept clear of all parties except the witnesses when they testify." * * * The record does not show that any objections to the closure order were made by anyone present at the time, including appellants Wheeler and McCarthy.

Later that same day, however, appellants sought a hearing on a motion to vacate the closure order. The trial judge granted the request and scheduled a hearing to follow the close of the day's proceedings. When the hearing began, the court ruled that the hearing was to be treated as part of the trial; accordingly, he again ordered the reporters to leave the courtroom, and they complied.

At the closed hearing, counsel for appellants observed that no evidentiary findings had been made by the court prior to the entry of its closure order and pointed out that the court had failed to consider any other, less drastic measures within its power to ensure a fair trial. * * * Counsel for appellants argued that constitutional considerations mandated that before ordering closure, the court should first decide that the rights of the defendant could be protected in no other way.

Counsel for defendant Stevenson pointed out that this was the fourth time he was standing trial. He also referred to "difficulty with information between jurors," and stated that he "didn't want information to leak out," be published by the media, perhaps inaccurately, and then be seen by the jurors. Defense counsel argued that these things, plus the fact that "this is a small community," made this a proper case for closure. * * * The court denied the motion to vacate and ordered the trial to continue the following morning "with the press and public excluded." * * * Appellants then petitioned the Virginia Supreme Court for writs of mandamus and prohibition and filed an appeal from the trial court's closure order. On July 9, 1979, the Virginia Supreme Court dismissed the mandamus and prohibition petitions and, finding no reversible error, denied the petition for appeal. * * *

Appellants then sought review in this Court. * * * [W]e grant the petition.

We begin consideration of this case by noting that the precise issue presented here has not previously been before this Court for decision. In *Gannett* Co., *Inc. v. DePasquale*, 443 U.S. 386, * * * (1979), the Court was not required to decide whether a right of access to *trials*, as distinguished from hearings on *pre* trial motions, was constitutionally guaranteed. The Court held that the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor the press an enforceable right of access to a *pre* trial suppression hearing.

* * *

In prior cases the Court has treated questions involving conflicts between publicity and a defendant's right to a fair trial; as we observed in *Nebraska Press Assn. v. Stuart*, * * *, "[t]he problems presented by this [conflict] are almost as old as the Republic." * * * But here for the first time the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure.

The origins of the proceeding which has become the modern criminal trial in Anglo-American justice can be traced back beyond reliable historical records. We need not here review all details of its development, but a summary of that history is instructive. What is significant for present purposes is that throughout its evolution, the trial has been open to all who care to observe.

In the days before the Norman Conquest, cases in England were generally brought before moots, such as the local court of the hundred or the county court, which were attended by the freemen of the community.

* * *

From these early times, although great changes in courts and procedures took place, one thing remained constant: the public character of the trial at which guilt or innocence was decided.

* * *

We have found nothing to suggest that the presumptive openness of the trial, which English courts were later to call "one of the essential qualities of a court of justice," *Daubney v. Cooper*, 10 B. & C. 237, 240, 109 Eng.Rep. 438, 440 (K.B.1829), was not also an attribute of the judicial systems of colonial America. In Virginia, for example, such records as there are of early criminal trials indicate that

they were open, and nothing to the contrary has been cited.

* * *

In some instances, the openness of trials was explicitly recognized as part of the fundamental law of the colony. The 1677 Concessions and Agreements of West New Jersey, for example, provided:

> That in all public courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner. Reprinted in *Sources of Our Liberties* 188 (R. Perry ed. 1959). See also 1 B. Schwartz, *The Bill of Rights: A Documentary History* 129 (1971).

The Pennsylvania Frame of Government of 1682 also provided "[t]hat all courts shall be open * * *," Sources of Our Liberties, *supra*, at 217; 1 B. Schwartz, *supra*, at 140, and this declaration was reaffirmed in section 26 of the Constitution adopted by Pennsylvania in 1776. See 1 B. Schwartz, *supra*, at 271. See also §§ 12 and 76 of the Massachusetts Body of Liberties, 1641, reprinted in 1 Schwartz, *supra*, at 73, 80.

* * *

This is no quirk of history; rather, it has long been recognized as an indispensible attribute of an Anglo-American trial. Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.

* * *

This observation raises the important point that "[t]he publicity of a judicial proceeding is a requirement of much broader bearing than its mere effect on the quality of testimony." 6 J. Wigmore, *Evidence* § 1834, at p. 435 (Chadbourn rev. 1976). The early history of open trials in part reflects the widespread acknowledgement, long before there were behavioral scientists, that public trials had significant community therapeutic value. Even without such experts to frame the concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.

When a shocking crime occurs, a community reaction of outrage and public protest often follows. See H. Weihofen, The Urge to Punish 130–131 (1956). Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers.

* * *

The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." * * *

To work effectively, it is important that society's criminal process "satisfy the appearance of justice," *Offutt v. United States*, 348 U.S. 11, 14 (1954), and the appearance of justice can best be provided by allowing people to observe it.

* * *

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case:

> The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy. 6 Wigmore, *supra*, at 438.

In earlier times, both in England and America, attendance at court was a common mode of "passing the time." See, *e.g.*, 6 Wigmore, *supra*, at 436. * * * With the press, cinema, and electronic media now supplying the representations or reality of the real life drama once available only in the courtroom, attendance at court is no longer a widespread pastime. * * * Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In

a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system * * *."

From the unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice. This conclusion is hardly novel; without a direct holding on the issue, the Court has voiced its recognition of it in a variety of contexts over the years. * * * And recently in *Gannett* Co., *Inc. v. DePasquale*, 443 U.S. 368 * * * (1979), both the majority, 443 U.S., at 384, 386, n. 15 * * *, and dissenting opinions, 443 U.S., at 423 * * *, agreed that open trials were part of the common law tradition.

Despite the history of criminal trials being presumptively open since long before the Constitution, the State presses its contention that neither the Constitution nor the Bill of Rights contains any provision which by its terms guarantees to the public the right to attend criminal trials. Standing alone, this is correct, but there remains the question whether, absent an explicit provision, the Constitution affords protection against exclusion of the public from criminal trials.

The First Amendment, in conjunction with the Fourteenth, prohibits governments from "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." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.

* * *

The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials "before as many of the people as chuse to attend" was regarded as one of "the inestimable advantages of a free English constitution of government." 1 Journals of the Continental Congress, * * * at 106, 107. In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 * * * (1978). Free speech carries with it some freedom to listen. "In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.' " *Kleindienst v. Mandel*, 408 U.S. 753, 762 * * * (1972). What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted.

* * *

It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a "right of access," * * * or a "right to gather information," for we have recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 * * * (1972). The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.

The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press.

* * *

Subject to the traditional time, place, and manner restrictions, * * * a trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.

The State argues that the Constitution nowhere spells out a guarantee for the right of the public to

attend trials, and that accordingly no such right is protected.

* * *

But arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and privacy, the right to be presumed innocent and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights.

* * *

[F]undamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.

We hold that the right to attend criminal trials[17] is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated." *Branzburg, supra*, 408 U.S., at 681.

* * *

Having concluded there was a guaranteed right of the public under the First and Fourteenth Amendments to attend the trial of Stevenson's case, we return to the closure order challenged by appellants. The Court in *Gannett* * * * made clear that although the Sixth Amendment guarantees the accused a right to a public trial, it does not give a right to a private trial. * * * Despite the fact that this was the fourth trial of the accused, the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial. In contrast to the pretrial proceeding dealt with in *Gannett*, * * * there exist in the context of the trial itself various tested alternatives to satisfy the constitutional demands of fairness. * * * There was no suggestion that any problems with witnesses could not have been dealt with by their exclusion from the courtroom or their sequestration during the trial. * * * Nor is there anything to indicate that sequestration of the jurors would not have guarded against their being subjected to any improper information. All of the alternatives admittedly present difficulties for trial courts, but none of the factors relied on here was beyond the realm of the manageable. Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.[18]

Accordingly, the judgment under review is reversed.

Reversed.

Justice BRENNAN, with whom Justice Marshall joins, concurring in the judgment.

* * *

Because I believe that the First Amendment—of itself and as applied to the States through the Fourteenth Amendment—secures such a public right of access, I agree with those of my Brethren who hold that, without more, agreement of the trial judge and the parties cannot constitutionally close a trial to the public.

* * *

Yet the Court has not ruled out a public access component to the First Amendment in every circumstance. Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality. * * *

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17. Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.

18. We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public, *cf.*, *e.g.*, 6 J. Wigmore, *Evidence* § 1835 (Chadbourn rev. 1976), but our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic [see, e.g., *Cox v. New Hampshire*, 312 U.S. 569 * * * (1941)], so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial. "[T]he question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge * * * the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Id.*, at 574. * * * Moreover, since courtrooms have limited capacity, there may be occasions when not every person who wishes to attend can be accommodated. In such situations, reasonable restrictions on general access are traditionally imposed, including preferential seating for media representatives.

But the 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. * * *. Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 * * * (1964), but the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. 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 for the indispensable conditions of meaningful communication.

* * *

An assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded.

This judicial task is as much a matter of sensitivity to practical necessities as it is of abstract reasoning. But at least two helpful principles may be sketched. First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. * * *

Second, the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process.

To resolve the case before us, therefore, we must consult historical and current practice with respect to open trials, and weigh the importance of public access to the trial process itself. * * *

Tradition, contemporaneous state practice, and this Court's own decisions manifest a common understanding that "[a] trial is a public event. What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 * * * (1947). As a matter of law and virtually immemorial custom, public trials have been the essentially unwavering rule in ancestral England and in our own Nation. * * *

Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.

* * *

It follows that the conduct of the trial is preeminently a matter of public interest. * * * More importantly, public access to trials acts as an important check, akin in purpose to the other checks and balances that infuse our system of government.

* * *

Popular attendance at trials, in sum, substantially furthers the particular public purposes of that critical judicial proceeding. In that sense, public access is an indispensable element of the trial process itself. Trial access, therefore, assumes structural importance in our "government of law." * * *

As previously noted, resolution of First Amendment public access claims in individual cases must be strongly influenced by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances. With regard to the case at hand, our ingrained tradition of public trials and the importance of public access to the broader purposes of the trial process, tip the balance strongly toward the rule that trials be open. What countervailing interests might be sufficiently compelling to reverse this presumption of openness need not concern us now, for the statute at stake here authorizes trial closures at the unfettered discretion of the judge and parties. Accordingly, Va.Code 19.2–266 violates the First and Fourteenth Amendments, and the decision of the Virginia Supreme Court to the contrary should be reversed.

Justice BLACKMUN, concurring in the judgment.

My opinion and vote in partial dissent last Term in *Gannett Co. v. DePasquale*, * * *, compels my vote to reverse the judgment of the Supreme Court of Virginia.

The decision in this case is gratifying for me for two reasons:

It is gratifying, first, to see the Court now looking to and relying upon legal history in determining the fundamental public character of the criminal trial. * * * The partial dissent in *Gannett*, * * * took great pains in assembling—I believe adequately—

the historical material and in stressing its importance to this area of the law. * * * Although the Court in *Gannett* gave a modicum of lip service to legal history, * * * it denied its obvious application when the defense and the prosecution, with no resistance by the trial judge, agreed that the proceeding should be closed.

The court's return to history is a welcome change in direction.

It is gratifying, second, to see the Court wash away at least some of the graffiti that marred the prevailing opinions in *Gannett*. No less than 12 times in the primary opinion in that case, the Court (albeit in what seems now to have become clear dicta) observed that its Sixth Amendment closure ruling applied to the *trial* itself. The author of the first concurring opinion was fully aware of this and would have restricted the Court's observations and ruling to the suppression hearing. *Id.*, at 394 * * *. Nonetheless, he *joined* the Court's opinion, *ibid.*, with its multiple references to the trial itself; the opinion was not a mere concurrence in the Court's judgment. And Justice Rehnquist, in his separate concurring opinion, quite understandably observed, as a consequence, that the Court was holding "without qualification," that " 'members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials,' " *id.*, at 403, * * * quoting from the primary opinion, *id.*, at 391 * * *. The resulting confusion among commentators and journalists was not surprising.

* * *

Having said all this, and with the Sixth Amendment set to one side in this case, I am driven to conclude, as a secondary position, that the First Amendment must provide some measure of protection for public access to the trial. * * * It is clear and obvious to me, on the approach the Court has chosen to take, that, by closing this criminal trial, the trial judge abridged these First Amendment interests of the public.

Justice REHNQUIST, dissenting.

In the Gilbert & Sullivan operetta *Iolanthe*, the Lord Chancellor recites:

> The Law is the true embodiment
> of everything that's excellent,
> It has no kind of fault or flaw,
> And I, my lords, embody the law.

It is difficult not to derive more than a little of this flavor from the various opinions supporting the judgment in this case.

* * *

The proper administration of justice in any nation is bound to be a matter of the highest concern to all thinking citizens. But to gradually rein in, as this Court has done over the past generation, all of the ultimate decisionmaking power over how justice shall be administered, not merely in the federal system but in each of the 50 States, is a task that no Court consisting of nine persons, however gifted, is equal to. Nor is it desirable that such authority be exercised by such a tiny numerical fragment of the 220 million people who compose the population of this country.

* * *

However high minded the impulses which originally spawned this trend may have been, and which impulses have been accentuated since the time Justice Jackson wrote, it is basically unhealthy to have so much authority concentrated in a small group of lawyers who have been appointed to the Supreme Court and enjoy virtual life tenure. Nothing in the reasoning of Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803) requires that this Court through ever broadening use of the Supremacy Clause smother a healthy pluralism which would ordinarily exist in a national government embracing 50 States.

* * *

COMMENT

Justice Stevens accurately characterized the case as a watershed in his concurrence: "[F]or the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abrigement of the freedom of speech and of the press protected by the First Amendment." Stevens did not, however, specify what proof was needed to overcome the right of access to information, nor did he say what sort of information the right grants access to. In his decision, Chief Justice Burger was careful to distinguish the right of access to criminal trials from a more generalized right of access.

It is not unusual for the Court's initial opinion on an issue to leave something to be desired in terms of clarity, but the lack of a majority standard was more noticeable given the context of numerous court closings. Burger himself appears hospitable to a "substantial probability" standard but ends his plu-

rality opinion by noting that the interest in closure must be an "overriding" one. Justices Brennan and Marshall appear to support "substantial probability" but also imply that only national security interests should override judicial openness. The "substantial probability" language is suggestive of the lesser proof needed in time, place, and manner analysis to regulate First Amendment interests,[58] while "overriding interest" and reference to national security suggest the nearly insuperable burden of clear and present danger in prior restraint cases.[59] Only Justice Rehnquist advocates a rational basis analysis, the approach least protective of constitutional interests.[60] Absent a First Amendment basis, for Rehnquist the right of access has no special strength.

The press greeted *Richmond* with enthusiasm, interpreting it as creating a general right of access to news.[61] Lawyers and courts, however, tended to see the case as granting only a qualified news-gathering right. Media attorney Bruce Sanford, hoping that *Richmond* was the beginning of many successful access cases, cautioned journalists that, "A Court that can swing from [*Gannett*] to *Richmond Newspapers* within a year does not, after all, inspire a great feeling of confidence about what it may do in the future."[62]

Within two years of *Richmond*, a survey of state and lower federal court standards for dealing with motions to clear courtrooms or to seal records to avoid potential harms to defendants revealed numerous tests being used. Among them were: substantial probability of irreparable harm; reasonable probability; some showing of or likelihood of jeopardy; facts clearly demonstrating jeopardy; substantial likelihood; strong likelihood; serious and imminent threat; clear showing of a serious and imminent threat; irreparable injury; inescapably necessary; clear likelihood of irreparable damage; and magnitude and imminence of threatened harm. Georgia adopted a test using clear and convincing evidence of a clear and present danger,[63] obviously the standard of choice for the press. The various state standards were based on a variety of factors, including state constitutions, state statutes, common law, and interpretation of *Richmond*.

If the variation in access standards represented the fruits of experimentation advocated by Justice Rehnquist in his *Richmond* dissent, the press had little use for such "healthy pluralism." In addition to having standards vary from state to state, closure was more readily ordered in certain proceedings, mainly pretrial ones, than in others.[64]

Richmond and the cases that follow, as it turns out, are an excellent example of the recognition of a legal principle and the slow process of forging specific rules to uphold that principle. In four cases since *Richmond*, the Court has refined its *Richmond* analysis.

The *Globe Newspaper* Case

The second Supreme Court access case appeared unpromising, from a press point of view. Did *Richmond* intend to govern more limited court closures such as those during testimony of minor rape victims? The Supreme Judicial Court of Massachusetts thought not. The United States Supreme Court said yes, in a case hailed by the press but reflecting continuing deep division in the Court on matters of access.

A Massachusetts trial court, relying on a state statute providing for exclusion of the general public from trials of specified sexual offenses involving victims under eighteen, ordered exclusion of press and public from the courtroom during the trial of a defendant charged with the rape of three minor girls. The *Boston Globe* challenged its exclusion, but the highest state court construed the Massachusetts law as requiring, under all circumstances, exclusion of press and public during the testimony of a minor victim in a sex-offense trial.

A divided Court (6–3), managing nevertheless to speak with a single majority voice, reversed. In the

58. *Heffron v. International Society for Krishna Consciousness, Inc.*, 7 Med.L.Rptr. 1489, 452 U.S. 640 (1981).
59. *New York Times v. United States*, 1 Med.L.Rptr. 1031, 403 U.S. 713 (1971).
60. See *Posadas de Puerto Rico Associates v. Tourism Co.*, 13 Med.L.Rptr. 1033, 478 U.S. 328 (1986).
61. American Society of Newspaper Editors & American Newspaper Publishers Association, *Free Press & Fair Trial*, Washington, D.C., 1982.
62. Sanford, *Richmond Newspapers: End of a Zigzag Trail?*, 19 Columbia Journalism Rev. 46 (1980).
63. *Page Corp. v. Lumpkin*, 8 Med.L.Rptr., 292 S.E.2d 815 (Ga. 1982).
64. *State ex rel. Post-Tribune Publishing Co. v. Porter Superior Court*, 6 Med.L.Rptr. 2300, 412 N.E.2d 748 (Ind. 1980), upholding exclusion of press and public from pretrial bail hearing. But see, *Ohio ex rel. Beacon Journal v. McMonagle*, 8 Med.L.Rptr. 1927 (Ohio 1982) where an Ohio appeals court held that a newspaper cannot be prohibited from publishing names of jurors, nor jurors prevented from discussing a trial.

process, Justice Brennan's majority opinion for the first time enunciated a First Amendment standard for access to court cases.

GLOBE NEWSPAPER CO. v. SUPERIOR COURT

8 MED.L.RPTR. 1689, 457 U.S. 596, 102 S.CT. 2613, 73 L.ED.2D 248 (1982).

Justice BRENNAN delivered the opinion of the Court.

Section 16A of Chapter 278 of Massachusetts General Laws, as construed by the Massachusetts Supreme Judicial Court, requires trial judges, at trials for specified sexual offenses involving a victim under the age of 18, to exclude the press and general public from the courtroom during the testimony of that victim. The question presented is whether the statute thus construed violates the First Amendment as applied to the States through the Fourteenth Amendment.

* * *

The Court's recent decision in *Richmond Newspapers* firmly established for the first time that the press and general public have a constitutional right of access to criminal trials. Although there was no opinion of the Court in that case, seven Justices recognized that this right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment.

* * *

Although the right of access to criminal trials is of constitutional stature, it is not absolute. But the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.

* * *

The state interests asserted to support § 16A, though articulated in various ways, are reducible to two: the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner. We consider these interests in turn.

We agree with respondent that the first interest—safeguarding the physical and psychological well-being of a minor—is a compelling one. But as compelling as that interest is, it does not justify a *mandatory*-closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim.

* * *

Section 16A, in contrast, requires closure even if the victim does not seek the exclusion of the press and general public, and would not suffer injury by their presence. In the case before us, for example, the names of the minor victims were already in the public record, and the record indicates that the victims may have been willing to testify despite the presence of the press.

* * *

In short, § 16A cannot be viewed as a narrowly tailored means of accommodating the State's asserted interest: That interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure.

* * *

Nor can § 16A be justified on the basis of the Commonwealth's second asserted interest—the encouragement of minor victims of sex crimes to come forward and provide accurate testimony. The Commonwealth has offered no empirical support for the claim that the rule of automatic closure contained in § 16A will lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities. Not only is the claim speculative in empirical terms, but it is also open to serious question as a matter of logic and common sense. Although § 16A bars the press and general public from the courtroom during the testimony of minor sex victims, the press is not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony. Thus § 16A cannot prevent the press from publicizing the substance of a minor victim's testimony, as well as his or her identity. If the Commonwealth's interest in encouraging minor vic-

tims to come forward depends on keeping such matters secret, § 16A hardly advances that interest in an effective manner.

* * *

The State's argument based on this interest therefore proves too much, and runs contrary to the very foundation of the right of access recognized in *Richmond Newspapers*: namely, "that a presumption of openness inheres in the very nature of a criminal trial under our system of justice." * * *

For the foregoing reasons, we hold that § 16A, as construed by the Massachusetts Supreme Judicial Court, violates the First Amendment to the Constitution. Accordingly, the judgment of the Massachusetts Supreme Judicial Court is

Reversed.

Chief Justice BURGER, with whom Justice Rehnquist joins, dissenting.

* * *

The Court has tried to make its holding a narrow one by not disturbing the authority of state legislatures to enact more narrowly drawn statutes giving trial judges the discretion to exclude the public and the press from the courtroom during the minor victim's testimony. * * * But the Court's decision is nevertheless a gross invasion of state authority and a state's duty to protect its citizens—in this case minor victims of crime. I cannot agree with the Court's expansive interpretation of our decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 * * * (1980), or its cavalier rejection of the serious interests supporting Massachusetts' mandatory closure rule. Accordingly, I dissent.

* * *

Today Justice Brennan ignores the weight of historical practice. There is clearly a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors. * * * Several states have longstanding provisions allowing closure of cases involving sexual assaults against minors.

* * *

Neither the purpose of the law nor its effect is primarily to deny the press or public access to information; the verbatim transcript is made available to the public and the media and may be used without limit. We therefore need only examine whether the restrictions imposed are reasonable and whether the interests of the Commonwealth override the very limited incidental effects of the law on First Amendment rights. * * * Our obligation in this case is to balance the competing interests: the interests of the media for instant access, against the interest of the state in protecting child rape victims from the trauma of public testimony. In more than half the states, public testimony will include television coverage.

* * *

The law need not be precisely tailored so long as the state's interest overrides the law's impact on First Amendment rights and the restrictions imposed further that interest. Certainly this law, which excludes the press and public only during the actual testimony of the child victim of a sex crime, rationally serves the Commonwealth's overriding interest in protecting the child from the severe—possibly permanent—psychological damage.

* * *

The Court rejects the Commonwealth's argument that § 16A is justified by its interest in encouraging minors to report sex crimes, finding the claim "speculative in empirical terms [and] open to serious question as a matter of logic and common sense." * * * It makes no sense to criticize the Commonwealth for its failure to offer empirical data in support of its rule; only by allowing state experimentation may such empirical evidence be produced.

* * *

The Court also concludes that the Commonwealth's assertion that the law might reduce underreporting of sexual offenses fails "as a matter of logic and common sense." This conclusion is based on a misperception of the Commonwealth's argument and an overly narrow view of the protection the statute seeks to afford young victims. * * *

Section 16A is intended not to preserve confidentiality, but to prevent the risk of severe psychological damage caused by having to relate the details of the crime in front of a crowd which inevitably will include voyeuristic strangers. In most states, that crowd may be expanded to include a live television audience, with reruns on the evening news. That ordeal could be difficult for an adult; to a child, the experience can be devastating and leave permanent scars.

* * *

COMMENT

After *Globe Newspaper*, a number of points were clarified. Any state statute or rule mandating closure, in juvenile or other proceedings, was constitutionally suspect.[65] *Per se* closure rules must give way to case-by-case analysis. After all, in *Globe Newspapers* itself, the record suggested that the minor victim "protected" by the compulsory closure statute had little uneasiness about testifying with the press present.

Brennan's adoption of a "compelling interest" test as the standard for judging state attempts to limit access to sensitive information was perhaps the most important portion of his opinion, but he also spent the least space on that portion of the opinion. He cited prior restraint cases,[66] not free press-fair trial cases, to support his position. Chief Justice Burger's dissent argues for a rational basis standard, at least where protection of minors is concerned. He apparently would give controlling weight to the states' long-standing interest in protecting minors' welfare.

The Court's rejection of a blanket closure rule is apparently not meant to discourage enforcement of more narrowly drawn statutes. The recognition of compelling or overriding state interests—perhaps privacy in one of its myriad forms—would allow closure if the interest was documented better. The discretion to close, though, lies with the judge and not with the legislature.

Prior to and even after *Globe Newspaper*, some state courts were quick to protect juvenile victims or witnesses,[67] to protect criminal defendants against revelation of past convictions,[68] and to protect defendants against embarrassment.[69] Others preferred to keep hearings and records open at all costs on state constitutional or common law grounds.[70]

Lower federal courts were the first to take the cue from *Richmond* and *Globe Newspaper* in improving access to court hearings, trials, and records. For example, in *United States v. Brooklier*[71] the Ninth Circuit used Brennan's "structural" argument in *Richmond* to keep *voir dire* hearings open. And in *United States v. Dorfman*[72] the Seventh Circuit used Blackmun's three-part *Gannett* test to assure that all phases of a suppression hearing would be accessible to the public.

The court did hold in *Dorfman* that wiretap material would not be disclosable until admitted into evidence. In other words, for a time at least, privacy would outweigh newsworthiness.

Nevertheless, uncertainties remained. *Richmond* and *Globe Newspaper* both by their terms applied only to the main portion of the trial. That left room for maneuvering by lower courts. More clarification was needed.

The *Press-Enterprise* Cases

The *Press-Enterprise* of Riverside, California was trying to cover the trial of a defendant charged with raping and murdering a teenage girl. The newspaper moved that *voir dire* be open to the press and public. The trial judge closed most of the *voir dire*, which eventually lasted six weeks, citing the need for juror privacy. (Presumably, potential jurors might be asked painfully personal questions.) After *voir dire*, the newspaper filed a motion for the transcript and again was denied.

All nine justices agreed that *voir dire* is part of the trial itself, to which a First Amendment right of access attaches, and that the judge had not properly considered the *Press-Enterprise's* claims. For the third time in as many cases, a different standard was advanced. Only Justice Marshall, who concurred separately, did not join Chief Justice Burger's majority opinion.

65. *Associated Press v. Bradshaw*, 14 Med.L.Rptr. 1566, 410 N.W.2d 577 (S.D. 1987); *Duggan v. Koenig*, 14 Med.L.Rptr. 2242 (Alaska 1987); *Booth Newspapers v. Twelfth District Court Judge*, 15 Med.L.Rptr. 2258 (Mich.Ct.App. 1988).

66. *Brown v. Hartlage*, 456 U.S. 45 (1982); *NAACP v. Button*, 371 U.S. 415 (1963).

67. *Connecticut v. McCloud*, 6 Med.L.Rptr. 1613, 422 A.2d 327 (Conn. 1980); *North Carolina v. Burney*, 7 Med.L.Rptr. 1411, 276 S.E.2d 693 (N.C. 1981).

68. *Capital Newspapers v. Clyne*, 7 Med.L.Rptr. 1536, 440 N.Y.S.2d 779 (1981).

69. *New York v. Jones*, 7 Med.L.Rptr. 2096, 418 N.Y.S.2d 359 (1979), cert. den. 444 U.S. 946 (1979).

70. *Oregonian Publishing Co. v. O'Leary*, 14 Med.L.Rptr. 1019, 736 P.2d 173 (Ore. 1987); *Capital Newspapers v. Moynihan*, 14 Med.L.Rptr. 2262, 525 N.Y.S.2d 24 (N.Y. 1988); *Seattle Times v. Ishikawa*, 8 Med.L.Rptr. 1041, 640 P.2d 716 (Wash. 1982); *Cowles Publishing v. Murphy*, 6 Med.L.Rptr. 2308, 637 P.2d 966 (Wash. 1981). See also, *Lexington Herald Leader v. Tackett*, 6 Med.L.Rptr. 1436, 601 S.W.2d 905 (Ky. 1980) involving a sodomy prosecution.

71. 685 F.2d 1162 (9th Cir. 1982). See also, *United States v. Criden*, 8 Med.L.Rptr. 1297, 675 F.2d 550 (3d Cir. 1982).

72. 690 F.2d 1230 (7th Cir. 1982).

PRESS-ENTERPRISE v. RIVERSIDE COUNTY SUPERIOR COURT

10 MED.L.RPTR. 1161, 464 U.S. 501, 104 S.CT. 819, 78 L.ED.2D 629 (1984).

Chief Justice BURGER delivered the opinion of the court:

We granted certiorari to decide whether the guarantees of open public proceedings in criminal trials cover proceedings for the *voir dire* examination of potential jurors.

Albert Greenwood Brown, Jr., was tried and convicted of the rape and murder of a teenage girl, and sentenced to death in California Superior Court. Before the *voir dire* examination of prospective jurors began, petitioner, Press-Enterprise Co., moved that the *voir dire* be open to the public and the press. Petitioner contended that the public had an absolute right to attend the trial, and asserted that the trial commenced with the *voir dire* proceedings. The State opposed petitioner's motion, arguing that if the press were present, juror responses would lack the candor necessary to assure a fair trial.

The trial judge agreed and permitted petitioner to attend only the "general voir dire." He stated that counsel would conduct the "individual voir dire with regard to death qualifications and any other special areas that counsel may feel some problem with regard to * * * in private. * * *" The *voir dire* consumed *six weeks* and all but approximately three days was closed to the public.

After the jury was empaneled, petitioner moved the trial court to release a complete transcript of the *voir dire* proceedings.

* * *

The court denied petitioner's motion.

* * *

After Brown had been convicted and sentenced to death, petitioner again applied for release of the transcript. In denying this application, the judge stated:

> "The jurors were questioned in private relating to past experiences, and while most of the information is dull and boring, some of the jurors had some special experiences in sensitive areas that do not appear to be appropriate for public discussion."

Petitioner then sought in the California Court of Appeal a writ of mandate to compel the Superior Court to release the transcript and vacate the order closing the *voir dire* proceedings. The petition was denied. The California Supreme Court denied petitioner's request for a hearing. We granted certiorari.

* * *

In *Richmond Newspapers*, the plurality opinion summarized the evolution of the criminal trial as we know it today and concluded that "at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." A review of the historical evidence is also helpful for present purposes. It reveals that, since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown. * * * Public jury selection * * * was the common practice in America when the Constitution was adopted.

For present purposes, how we allocate the "right" to openness as between the accused and the public, or whether we view it as a component inherent in the system benefiting both, is not crucial. No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the *voir dire* which promotes fairness.

The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. * * * Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness. * * *

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 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. We now turn to

whether the presumption of openness has been rebutted in this case.

Although three days of *voir dire* in this case were open to the public, *six weeks* of the proceedings were closed, and media requests for the transcript were denied.[9] The Superior Court asserted two interests in support of its closure order and orders denying a transcript: the right of the defendant to a fair trial, and the right to privacy of the prospective jurors, for any whose "special experiences in sensitive areas * * * do not appear to be appropriate for public discussion." Of course the right of an accused to fundamental fairness in the jury selection process is a compelling interest. But the California court's conclusion that Sixth Amendment and privacy interests were sufficient to warrant prolonged closure was unsupported by findings showing that an open proceeding in fact threatened those interests; hence it is not possible to conclude that closure was warranted. Even with findings adequate to support closure, the trial court's orders denying access to *voir dire* testimony failed to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard. Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*.

The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain. The trial involved testimony concerning an alleged rape of a teenage girl. * * * For example a prospective juror might privately inform the judge that she, or a member of her family, had been raped but had declined to seek prosecution because of the embarrassment and emotional trauma from the very disclosure of the episode. The privacy interests of such a prospective juror must be balanced against the historic values we have discussed and the need for openness of the process.

* * *

By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy. This process will minimize the risk of unnecessary closure. * * * When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's valid privacy interests. Even then a valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment.

The judge at this trial closed an incredible *six* weeks of *voir dire* without considering alternatives to closure. Later the court declined to release a transcript of the *voir dire* even while stating that "most of the information" in the transcript was "dull and boring." Those parts of the transcript reasonably entitled to privacy could have been sealed without such a sweeping order; a trial judge should explain why the material is entitled to privacy.

* * *

Thus not only was there a failure to articulate findings with the requisite specificity but there was also a failure to consider alternatives to closure and to total suppression of the transcript. The trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected.

The judgment of the Court of Appeal is vacated, and the case is remanded for proceedings not inconsistent with this opinion.

Justice BLACKMUN concurring.:

* * *

I write separately to emphasize my understanding that the Court does not decide, nor does this case require it to address, the asserted "right to privacy of the prospective jurors."

Certainly, a juror has a valid interest in not being required to disclose to all the world highly personal or embarrassing information simply because he is called to do his public duty. We need not decide, however, whether a juror, called upon to answer questions posed to him in court during *voir dire*, has

9. We cannot fail to observe that a *voir dire* process of such length, in and of itself undermines public confidence in the courts and the legal profession. The process is to ensure a fair impartial jury, not a favorable one. Judges, not advocates, must control that process to make sure privileges are not so abused. Properly conducted it is inconceivable that the process could extend over such a period.

a legitimate expectation, rising to the status of a privacy right, that he will not have to answer those questions.

* * *

I am concerned that recognition of a juror's privacy "right" would unnecessarily complicate the lives of trial judges attempting to conduct a *voir dire* proceeding. Could a juror who disagreed with a trial judge's determination that he had no legitimate expectation of privacy in certain information refuse to answer without a promise of confidentiality until some superior tribunal declared his expectation unreasonable? Could a juror ever refuse to answer a highly personal, but relevant, question, on the ground that his privacy right outweighed the defendant's need to know? I pose these questions only to emphasize that we should not assume the existence of a juror's privacy right without considering carefully the implications of that assumption.

Nor do we need to rely on a privacy right to decide this case. No juror is now before the Court seeking to vindicate the right.

* * *

More important, as the trial court recognized, the defendant has an interest in protecting juror privacy in order to encourage honest answers to the *voir dire* questions. * * * Thus, there is no need to determine whether the juror has a separate assertable constitutional right to prevent disclosure of his answers during *voir dire*. His interest in this case, and in most cases, can be fully protected through the interests of the defendant and the State in encouraging his full cooperation.

Justice STEVENS, concurring.:

* * *

The focus commanded by the First Amendment makes it appropriate to emphasize the fact that the underpinning of our holding today is not simply the interest in effective judicial administration; the First Amendment's concerns are much broader. The "common core purpose of assuring freedom of communication on matters relating to the functioning of government," that underlies the decision of cases of this kind provides protection to all members of the public "from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch." * * * It follows that a claim to access cannot succeed unless access makes a positive contribution to this process of self-governance. Here, public access cannot help but improve public understanding of the *voir dire* process, thereby enabling critical examination of its workings to take place. It is therefore, I believe, entirely appropriate for the Court to identify the public interest in avoiding the kind of lengthy *voir dire* proceeding that is at issue in this case, *ante*. Surely such proceedings should not be hidden from public view.

* * *

COMMENT

Why did Chief Justice Burger seek to graft a juror privacy exception onto the general presumption of openness? As Justice Blackmun notes in his concurrence, the record does not show that any juror or potential juror in the case expressed concerns about privacy. The privacy analysis has had some effect. One court required a trial judge to devise a procedure to decide if jurors should be questioned *in camera* about child abuse prior to being seated.[73] In another case a court approved closing a civil case file containing material about a man later charged with rape. The court determined that privacy interests allowed closure. That the documents, some of them obtained in discovery, were not traditionally considered public information also influenced the decision.[74] On the whole, however, the exception does not appear to have led to many closures.

The Court concluded that *voir dire* is part of the trial itself, so the *Richmond* case applies. The Chief Justice's review of the history of *voir dire* is far less comprehensive than his review of open trials in the earlier case.

In *Press-Enterprise*, another variation on the *Richmond* test is offered: "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." In addition, a trial judge's explication of the reasons for closure must be specific enough for an appeals court to decide if closure was justified. One can find

73. *Daily Herald v. Knight*, 13 Med.L.Rptr. 2199 (Wash. 1987).
74. *H. S. Gere and Sons, Inc. v. Frey*, 14 Med.L.Rptr. 1791, 509 N.E.2d 271 (Mass. 1987).

in this formula parts of tests advanced earlier by several justices—Brennan, Burger, and Blackmun mainly.

That same term, the Court had occasion to revisit the Sixth Amendment's guarantee of a public trial. In *Waller v. Georgia*, 10 Med.L.Rptr. 1714, 467 U.S. 39 (1984), a trial judge had closed a pretrial evidentiary suppression hearing in a racketeering and gambling case against the objections of the defendant. Holding that "the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right," Justice Powell's opinion for a unanimous Court ordered a new suppression hearing. The defendant had sought a new trial but was told he could get one only if *additional* material was suppressed in the second hearing. The trial judge had relied on a state wiretap law to close the hearing, but the Court, adhering to its analysis abjuring *per se* closures, said that the prosecution must meet the *Press-Enterprise* standards before closure may be had. Proving that the state's interest in secrecy is more compelling than a defendant's right to a public trial would be a difficult if not impossible task.

Waller set the stage for the latest in the Court's cases by applying *Press-Enterprise* in a pretrial context. Although most lower courts had been or had begun applying *Richmond*-style tests to closures of even pretrial proceedings, some courts still interpreted the access right most narrowly. For example, *Midland Publishing v. District Court Judge*, 11 Med.L.Rptr. 1337, 362 N.W.2d 580 (Mich. 1984), involved both pretrial proceedings and a statute mandating closure. Three defendants were arrested on suspicion of criminal sexual conduct with children. Suppression orders pursuant to statute were entered two days later. Comparing the closed documents and closed preliminary proceedings to pleadings in civil cases, the court opted for a statutory and common law approach upholding closure. *Globe Newspaper* and *Press-Enterprise* were distinguished as limited to trials themselves, and the court then considered preliminary hearings as comparable to secret grand jury proceedings, since they had largely taken the place of grand juries under state law. The press and public were held to have neither constitutional nor common law access rights to the hearings or the records.

A similar approach had been accepted by the California Supreme Court, where the preliminary hearing is also used to determine if probable cause exists to bring charges. The preliminary hearing of a nurse thought to have killed a dozen hospital patients using the heart drug lidocaine was closed for forty-one days. When the hearing was over and charges brought, the magistrate in the case refused to release transcripts of the hearing. The deaths and hearing both occurred in Riverside, California, attracting the newsgathering attention of the *Press-Enterprise*, resulting in another landmark case, *Press-Enterprise II*.

PRESS-ENTERPRISE v. RIVERSIDE COUNTY SUPERIOR COURT

13 MED.L.RPTR. 1001, 478 U.S. 1, 106 S.CT. 2735, 92 L.ED.2D 1 (1986).

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to decide whether petitioner has a First Amendment right of access to transcripts of a preliminary hearing growing out of a criminal prosecution.

On December 23, 1981, the State of California filed a complaint in the Riverside County Municipal Court, charging Robert Diaz with 12 counts of murder and seeking the death penalty. The complaint alleged that Diaz, a nurse, murdered 12 patients by administering massive doses of the heart drug lidocaine. The preliminary hearing on the complaint commenced on July 6, 1982. Diaz moved to exclude the public from the proceedings under California Penal Code Ann. § 868 (West 1985), which requires such proceedings to be open unless "exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial." The Magistrate granted the unopposed motion, finding that closure was necessary because the case had attracted national publicity and "only one side may get reported in the media."

The preliminary hearing continued for 41 days. Most of the testimony and the evidence presented by the State was medical and scientific; the remainder consisted of testimony by personnel who worked with Diaz on the shifts when the 12 patients died. Diaz did not introduce any evidence, but his counsel subjected most of the witnesses to vigorous cross-examination. Diaz was held to answer on all charges. At the conclusion of the hearing, petitioner Press-Enterprise Company asked that the transcript of the proceedings be released. The Magistrate refused and sealed the record.

On January 21, 1983, the State moved in Superior Court to have the transcripts of the preliminary hearing released to the public; petitioner later joined in support of the motion. Diaz opposed the motion, contending that release of the transcripts would result in prejudicial pretrial publicity. The Superior Court found that the information in the transcript was "as factual as it could be," and that the facts were neither "inflammatory" nor "exciting" but there was, nonetheless, "a reasonable likelihood that release of all or any part of the transcript might prejudice defendants' right to a fair and impartial trial."

Petitioner then filed a peremptory writ of mandate with the Court of Appeal. That court originally denied the writ but, after being so ordered by the California Supreme Court, set the matter for a hearing. Meanwhile, Diaz waived his right to a jury trial and the Superior Court released the transcript. After holding that the controversy was not moot, the Court of Appeal denied the writ of mandate.

The California Supreme Court thereafter denied petitioner's peremptory writ of mandate, holding that there is no general First Amendment right of access to preliminary hearings. The court reasoned that the right of access to criminal proceedings recognized in *Press-Enterprise* Co. *v. Superior Court*, 464 U.S. 501, 10 Med.L.Rptr. 1161 (1984) *(Press-Enterprise I)*, and *Globe Newspaper* Co. *v. Superior Court*, 457 U.S. 596, 8 Med.L.Rptr. 1689 (1982), extended only to actual criminal trials. 37 Cal.3d 772, 776, 691 P.2d 1026, 1028 (1984). Furthermore, the reasons that had been asserted for closing the proceedings in *Press Enterprise I* and *Globe*—the interests of witnesses and other third parties—were not the same as the right asserted in this case—the defendant's right to a fair and impartial trial by a jury uninfluenced by news accounts. * * * Under the statute, the court reasoned, if the defendant establishes a "reasonable likelihood of substantial prejudice" the burden shifts to the prosecution or the media to show by a preponderance of the evidence that there is no such reasonable probability of prejudice.

* * *

It is important to identify precisely what the California Supreme Court decided:

> "[W]e conclude that the magistrate shall close the preliminary hearing upon finding a reasonable likelihood of substantial prejudice which would impinge upon the right to a fair trial. Penal code section 868 makes clear that the primary right is the right to a fair trial and that the public's right of access must give way when there is conflict."

* * *

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. * * * When the defendant objects to the closure of a suppression hearing, therefore, the hearing must be open unless the party seeking to close the hearing advances an overriding interest that is likely to be prejudiced.

Here, unlike *Waller*, the right asserted is not the defendant's Sixth Amendment right to a public trial since the defendant requested a *closed* preliminary hearing. Instead, the right asserted here is that of the public under the First Amendment. The California Supreme Court concluded that the First Amendment was not implicated because the proceeding was not a criminal trial, but a preliminary hearing. However, the First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, "trial" or otherwise, particularly where the preliminary hearing functions much like a full scale trial.

In cases dealing with the claim of a First Amendment right of access to criminal proceedings, our decisions have emphasized two complementary considerations. First, * * * we have considered whether the place and process has historically been open to the press and general public.

In *Press-Enterprise I*, for example, we observed "that, since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." In *Richmond Newspapers*, we reviewed some of the early history of England's open trials from the day when a trial was much like a "town meeting." * * * Plainly the modern trial with jurors open to interrogation for possible bias is a far cry from the "town meeting trial" of ancient English practice. Yet even our modern procedural protections have their origin in the ancient common law principle which provided, not for closed proceedings, but rather for rules of conduct for those who attend trials.

Second, in this setting the Court has traditionally considered whether public access plays a significant

positive role in the functioning of the particular process in question. Although many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly. A classic example is that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." * * * Other proceedings plainly require public access.

* * *

These considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes. If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches. But even when a right of access attaches, it is not absolute. * * * While open criminal proceedings give assurances of fairness to both the public and the accused, there are some limited circumstances in which the right of the accused to a fair trial might be undermined by publicity. In such cases, the trial court must determine whether the situation is such that the rights of the accused override the qualified First Amendment right of access.

* * *

The considerations that led the Court to apply the First Amendment right of access to criminal trials in *Richmond Newspapers* and *Globe* and the selection of jurors in *Press Enterprise I* lead us to conclude that the right of access applies to preliminary hearings as conducted in California.

First, there has been a tradition of accessibility to preliminary hearings of the type conducted in California. Although grand jury proceedings have traditionally been closed to the public and the accused, preliminary hearings conducted before neutral and detached magistrates have been open to the public.. * * * *United States v. Burr*, 25 F. Cas. 1 (CC Va. 1807) (No. 14,692). From *Burr* until the present day, the near uniform practice of state and federal courts has been to conduct preliminary hearings in open court.[3] As we noted in *Gannett, several states* following the original New York Field Code of Criminal Procedure published in 1850 have allowed preliminary hearings to be closed on the motion of the accused. But even in these states the proceedings are presumptively open to the public and are closed only for cause shown.[4] Open preliminary hearings, therefore, have been accorded " 'the favorable judgment of experience.' "

* * *

The second question is whether public access to preliminary hearings as they are conducted in California plays a particularly significant positive role in the actual functioning of the process. * * * California preliminary hearings are sufficiently like a trial to justify the same conclusion.

* * *

It is true that unlike a criminal trial, the California preliminary hearing cannot result in the conviction of the accused and the adjudication is before a magistrate or other judicial officer without a jury. But these features, standing alone, do not make public access any less essential to the proper functioning of

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3. The vast majority of States considering the issue have concluded that the same tradition of accessibility that applies to criminal trials applies to preliminary proceedings. See, *e.g.*, *Arkansas Television Co. v. Tedder*, 281 Ark. 152, 662 S.E.2d 174, (1983); *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1 (Fla. 1982); *R. W. Page Corp. v. Lumpkin*, 249 Ga. 576, 578–579, 292 S.E.2d 815, 819 (1982); *Gannett Pacific Corp. v. Richardson*, 59 Haw. 224, 580 P.2d 49, 56, (1978); *State ex rel. Post-Tribune Publishing Co.*, 274 Ind. 408, 412 N.E.2d 748, (1980); *Ashland Publishing Co. v. Asbury*, 612 S.W.2d 749, 752 (Ky.App. 1980); *Great Falls Tribune v. District Court*, 186 Mont. 433, 608 P.2d 116 (1980); *Keene Publishing Corp. v. Cheshire County Superior Court*, 119 N.H. 710, 406 A.2d 137, (1979); *State v. Williams*, 9 N.J. 39, 459 A.2d 641, (1983); *Westchester Rockland Newspapers v. Leggett*, 48 N.Y.2d 430, 439, 399 N.E.2d 518, 523, (1979); *Minot Daily News v. Holum*, 380 N.W.2d 347 (ND 1986); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St.2d 457, 351 N.E.2d 127 (1976); *Philadelphia Newspapers, Inc. v. Jerome*, 478 Pa. 484, 503, 387 A.2d 425, 434, (1978); *Kearns-Tribune Corp. v. Lewis*, 685 P.2d 515 (Utah 1984); *Herald Association, Inc. v. Ellison*, 138 Vt. 529, 534, 419 A.2d 323, 326, (1980); *Federated Publications, Inc. v. Kurtz*, 94 Wash.2d 51, 615 P.2d 440 (1980); *State ex rel. Herald Mail Co. v. Hamilton*, 267 S.E.2d 544 (W.Va. 1980); *Williams v. Stafford*, 589 P.2d 322 (Wyo. 1979).

Other courts have noted that some pretrial proceedings have no historical counterpart, but, given the importance of the pretrial proceeding to the criminal trial, the traditional right of access should still apply. See, *e.g.*, *Iowa Freedom of Information Council v. Wifvat*, 328 N.W.2d 920, (Iowa 1983); *Minneapolis Star and Tribune Co. v. Kammeyer*, 341 N.W.2d 550 (Minn. 1983); *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981).

4. See *State v. McKenna*, 78 Idaho 647, 309 P.2d 206 (1957); *Davis v. Sheriff*, 93 Nev. 511, 569 P.2d 402 (1977). Although Arizona, Iowa, Montana, North Dakota, Pennsylvania, and Utah have closure statutes based on the Field Code, see *Gannett*, 443 U.S., at 391, in each of these States the supreme court has found either a common law or state constitutional right of the public to attend pretrial proceedings. See *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966); *Iowa Freedom of Information Council v. Wifvat*, *supra*; *Great Falls Tribune v. District Court*, *supra*; *Minot Daily News v. Holum*, *supra*; *Commonwealth v. Hayes*, 489 Pa. 419, 414 A.2d 318 (1980); *Kearns-Tribune Corp. v. Lewis*, *supra*.

the proceedings in the overall criminal justice process. Because of its extensive scope, the preliminary hearing is often the final and most important in the criminal proceeding. See *Waller v. Georgia*, 467 U.S., at 46–47. As the California Supreme Court stated in *San Jose Mercury-News v. Municipal Court*, * * * the preliminary hearing in many cases provides "the sole occasion for public observation of the criminal justice system."

* * *

Similarly, the absence of a jury, long recognized as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge," *Duncan v. Louisiana* 391 U.S. 145, 156 (1968), makes the importance of public access to a preliminary hearing even more significant.

* * *

Denying the transcripts of a 41-day preliminary hearing would frustrate what we have characterized as the "community therapeutic value" of openness.

* * *

We therefore conclude that the qualified First Amendment right of access to criminal proceedings applies to preliminary hearings as they are conducted in California.

Since a qualified First Amendment right of access attaches to preliminary hearings in California under Cal. Penal Code Ann. §§ 858 *et seq.* (West 1985), the proceedings cannot be closed unless specific, on the record findings are made demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I, supra*, at 510. See also *Globe Newspaper, supra*, 457 U.S., at 606–607. If the interest asserted is the right of the accused to a fair trial, the preliminary hearing shall be closed only if specific findings are made demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.

* * *

The California Supreme Court, interpreting its access statute, concluded "that the magistrate shall close the preliminary hearing upon finding a reasonable likelihood of substantial prejudice." As the court itself acknowledged, the "reasonable likelihood" test places a lesser burden on the defendant than the "substantial probability" test which we hold is called for by the First Amendment. Moreover, that court failed to consider whether alternatives short of complete closure would have protected the interests of the accused.

In *Gannett* we observed that:

> "Publicity concerning pretrial suppression hearings such as the one involved in the present case poses special risks of unfairness. The whole purpose of such hearings is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury."

* * *

But this risk of prejudice does not automatically justify refusing public access to hearings on every motion to suppress. Through *voir dire*, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict. And even if closure were justified for the hearings on a motion to suppress, closure of an entire 41-day proceeding would rarely be warranted. The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of that right. And any limitation " 'must be narrowly tailored to serve that interest.' "

The standard applied by the California Supreme Court failed to consider the First Amendment right of access to criminal proceedings. Accordingly, the judgment of the California Supreme Court is reversed.

Justice STEVENS, with whom Justice Rehnquist joins, (as to Part II) dissenting:

* * *

Although perhaps obvious, it bears emphasis that the First Amendment right asserted by petitioner is not a right to publish or otherwise communicate information lawfully or unlawfully acquired. That right, which lies at the core of the First Amendment and which erased the legacy of restraints on publication against which the drafters of that Amendment rebelled, may be overcome only by a governmental objective of the highest order attainable in no less intrusive way. The First Amendment right asserted by petitioner in this case, in contrast, is not the right to publicize information in its possession, but the right to acquire access thereto.

* * *

I have long believed that a proper construction of the First Amendment embraces a right of access to information about the conduct of public affairs.

* * *

But it has always been apparent that the freedom to obtain information that the Government has a legitimate interest in not disclosing, * * * is far narrower than the freedom to disseminate information, which is "virtually absolute" in most contexts. * * * In this case, the risk of prejudice to the defendant's right to a fair trial is perfectly obvious. For me, that risk is far more significant than the countervailing interest in publishing the transcript of the preliminary hearing sooner rather than later.

* * *

The historical evidence proffered in this case is far less probative than the evidence adduced in prior cases granting public access to criminal proceedings. In those cases, a common law tradition of openness at the time the First Amendment was ratified suggested an intention and expectation on the part of the Framers and ratifiers that those proceedings would remain presumptively open.

* * *

In this case, however, it is uncontroverted that a common law right of access did not inhere in preliminary proceedings at the time the First Amendment was adopted, and that the Framers and ratifiers of that provision could not have intended such proceedings to remain open.

* * *

In the final analysis, the Court's lengthy historical disquisition demonstrates only that in many States preliminary proceedings are generally open to the public. * * * The Court's historical crutch cannot carry the weight of opening a preliminary proceeding that the State has ordered closed; that determination must stand or fall on whether it satisfies the second component of the Court's test.

If the Court's historical evidence proves too little, the "value of openness," on which it relies proves too much, for this measure would open to public scrutiny far more than preliminary hearings "as they are conducted in California" (a comforting phrase invoked by the Court in one form or another more than 8 times in its opinion). In brief, the Court's rationale for opening the "California preliminary hearing" is that it "is often the final and most important step in the criminal proceeding"; that it provides "the sole occasion for public observation of the criminal justice system"; that it lacks the protective presence of a jury; and that closure denies an outlet for community catharsis. The obvious defect in the Court's approach is that its reasoning applies to the traditionally secret grand jury with as much force as it applies to California preliminary hearings.

* * *

In fact, the logic of the Court's access right extends even beyond the confines of the criminal justice system to encompass proceedings held on the civil side of the docket as well. * * * Despite the Court's valiant attempt to limit the logic of its holding, the *ratio decidendi* of today's decision knows no bounds.

By abjuring strict reliance on history and emphasizing the broad value of openness, the Court tacitly recognizes the importance of public access to government proceedings generally.

* * *

The cases denying access have done so on a far lesser showing than that required by a compelling governmental interest/least restrictive-means analysis, and cases granting access have recognized as legitimate grounds for closure interests that fall far short of those traditionally thought to be "compelling." * * * [T]he Court reverses—without comment or explanation or any attempt at reconciliation—the holding in *Gannett* that a "reasonable probability of prejudice" is enough to overcome the First Amendment right of access to a preliminary proceeding. It is unfortunate that the Court neglects this opportunity to fit the result in this case into the body of precedent dealing with access rights generally. I fear that today's decision will simply further unsettle the law in this area.

* * *

COMMENT

The Court's voting lineup changed slightly, with Justice Stevens and Rehnquist dissenting from the majority opinion. Stevens's dissent seemed focused at least in part on what he saw as the Court's implicit

rejection of *Gannett*, at least where the press is concerned.

Chief Justice Burger's majority opinion attracted six other votes, and no separate concurrences were filed, indicating numerically that the Court was now in accord. Nonetheless, Burger's opinion retains a potential for uncertainty. At one point he cites approvingly the "overriding interest" standard of *Press-Enterprise I*, but later applies a test consisting of "substantial probability" and lack of adequate alternatives. Is the result then a weaker right of press access for pretrial proceedings than for trials themselves?

The Court attempts to create a blueprint for future disputes over access to other parts of the judicial process by applying a two-part analysis to determine initially if a First Amendment right of access applies. First, history and tradition must be consulted. If a proceeding has traditionally been open, a presumption of openness should apply. Second, a reviewing court must consider if "public access plays a significant positive role in the functioning of the particular process in question." The second point stems from Justice Brennan's concurrence in *Richmond* and is an application of what he referred to as a "structural" model. Taking its cue from Brennan's argument that what occurs in courts is almost by definition a matter of public interest, this factor requires courts to consider the press's role in informing the public.

Preliminary hearings, at least as they are held in California, are often the beginning and end of the criminal justice process, as Burger noted, with more than 85 percent of cases resolved there. Therefore the community should be aware of what occurs in them. Isn't that precisely the argument made by the press in *Gannett*?

Closures since the two *Press-Enterprise* cases have been the exception rather than the rule. The presumption against closure has been extended to a wide variety of proceedings, including sentencing hearings,[75] plea hearings,[76] mental competency hearings,[77] motion hearings,[78] bail hearings,[79] and judicial disqualification proceedings and records.[80] The cases in which access is most certain are criminal cases.

A growing number of lower courts have begun to recognize access rights to civil proceedings and also to documents, either as a matter of common law,[81] constitutional law,[82] or an apparent combination of both.[83]

The access right was not, however, held applicable to summary jury trials in *Cincinnati Gas and Electric Co. v. General Electric Co.*, 15 Med.L.Rptr. 2020 (6th Cir. 1988). Summary jury trials are recent developments. They substitute for actual trials and are used as an aid to settlement in civil litigation. In *Cincinnati*, a district court ordered the parties to conduct a summary jury trial and ordered the proceeding closed to the press. Finding that the summary jury trial was not directly comparable to a regular trial, the appeals court concluded that no tradition of access applied and neither did *Press-Enterprise II*. Since it is nonbinding and has no effect on the merits of the case should it proceed to trial, it was not a proceeding in the usual sense of the word, despite its use of the courtroom and court facilities. "[I]t is the presence of the exercise of a court's coercive powers that is the touchstone of the recognized right to access * * *," the majority concluded.

THE POST *PRESS-ENTERPRISE* SCENE

The press has focused its attention recently on access issues not directly addressed in the U.S. Supreme Court opinions. First, journalists have attempted to extend the right of access principles of the two *Press-Enterprise* cases to documents filed and part of the judicial process. Second, the press sought access to

75. In re *Washington Post Co.*, 13 Med.L.Rptr. 1793, 807 F.2d 383 (4th Cir. 1986).
76. *United States v. Haller*, 14 Med.L.Rptr. 2166, 837 F.2d 84 (2d Cir. 1988).
77. *Society of Professional Journalists v. Bullock*, 14 Med.L.Rptr. 1737, 743 P.2d 1166 (Utah 1987).
78. *Mississippi Publishers Corp. v. Coleman*, 14 Med.L.Rptr. 2005, 515 So.2d 1163 (Miss. 1987) (closure upheld, however, as comporting with demands of *Press-Enterprise II*).
79. *In re Globe Newspaper Co.*, 10 Med.L.Rptr. 1433, 729 F.2d 47 (1st Cir. 1984) (but standard less than for trial itself).
80. *United States v. Presser*, 14 Med.L.Rptr. 1417 (6th Cir. 1987).
81. *Barron v. Florida Freedom Newspapers*, 15 Med.L.Rptr. 1901, 531 So.2d 113 (Fla. 1988) (access right attaches to divorce actions).
82. *State ex rel. The Repository v. Unger*, 13 Med.L.Rptr. 2119, 504 N.E.2d 37 (Ohio 1986) (Celebrezze, C. J., concurring); *Maryland v. Cottman Transmission Systems, Inc.*, 15 Med.L.Rptr. 1644 (Md.Ct.Spec.App. 1988).
83. *Anderson v. Cryovac*, 13 Med.L.Rptr. 1721, 805 F.2d 1 (1st Cir. 1986).

sources such as parties and attorneys who have often been ordered not to talk with the press. To date the press has met with more successes than failures.

The public's right to inspect and copy official court records is well established at common law. Courts have been divided, however, on whether the common law right extends to records, including sound and videotapes, not admitted into evidence. Whether records were admitted or not, though, access could usually be easily denied on a "reasonable likelihood" of prejudice or harm standard.

In *Nixon v. Warner Communications, Inc.*, 3 Med.L.Rptr. 2074, 435 U.S. 589 (1978), the Supreme Court rejected claims of a Sixth or First Amendment right to make copies of Richard Nixon's tapes that had been introduced into evidence in the Watergate criminal trials of his presidential aides. The Court also determined that the normally applicable common law access right had been superseded by the Presidential Recordings and Materials Preservation Act. Under the act, reporters and the public were allowed only to hear the tapes in court, read their contents in a transcript, or listen to them where they were stored.

Such decisions remained the norm even after *Richmond*. In the ABSCAM and BRILAB tapes cases, the Second, Third, and District of Columbia Circuits all found strong common law but not constitutional arguments for a right to make copies of sound tapes introduced into evidence. However, in *Belo Broadcasting Corp. v. Clark*, 7 Med.L.Rptr. 1841, 654 F.2d 423 (5th Cir. 1981), the Fifth Circuit stuck to a narrow interpretation of *Nixon* and upheld a trial judge's denial of access.

In the case of Former Congressman Michael Myers, *United States v. Myers*, 6 Med.L.Rptr. 1961, 635 F.2d 945 (2d Cir. 1980), the Second Circuit said that the common law access right included a right to copy both visual and aural materials admitted into evidence in open court. Only the strongest showing of prejudice would justify denial. Copying, the court said, advances the interest in open trials identified in *Richmond*.

A similar result was reached by the Third Circuit in *In re Application of NBC (Criden)*, 7 Med.L.Rptr. 1153, 648 F.2d 814 (3d Cir. 1981). The public has a right to see firsthand the impact of evidence, even if that impact extends beyond the courtroom, the court said. Since media are surrogates for the public, media access serves that interest. Arguments that post-trial rebroadcasting of the tapes enhanced punishment or amounted to an invasion of privacy were rejected, as was the risk of prejudicing any retrial, which was seen as an issue based on speculation. Traditional judicial remedies would suffice to protect defendants, the court said.

A third common law case, involving former Congressman Thomas Jenrette, *In re Application of NBC*, 7 Med.L.Rptr. 1193, 653 F.2d 609 (D.C.Cir. 1981), produced mixed results. The Court reversed a trial court limit on access to tapes, noting that the lower court had failed to weigh adequately the strong tradition of public access. The appeals court told the trial judge to exercise discretion in excising portions of tapes that might harm innocent third parties, a practice that does not comport with common law traditions.

These cases and others, among the first to apply the principles of *Richmond*, if not its test, to accesss requests for court documents presaged recent developments.

Lower federal courts have been out front in terms of recognizing a First Amendment right of access to court documents, either in civil or criminal proceedings.[84] In *Rushford v. The New Yorker Magazine, Inc.*, 15 Med.L.Rptr. 1437, 846 F.2d 249 (4th Cir. 1988), the *Washington Post* filed a motion to intervene to obtain copies of pleadings and supporting evidentiary documents that had been relied upon by a trial judge in granting summary judgment to *The New Yorker* in a libel suit. During discovery, the magazine had refused to submit discovery materials unless it obtained a protective order, which was granted and was later extended when the material became part of the record at summary judgment. The Fourth Circuit distinguished *Rhinehart* on the grounds that the earlier case addresses documents acquired by the court prior to any decision of any sort by the court. Once a party seeks court action based on the materials, it is considered evidence in the case.

Rushford explored the weight to be given the First Amendment right of access to judicial documents, not the existence of the right, relying instead on

84. *In re Continental Illinois Securities Litigation*, 10 Med.L.Rptr. 1593, 732 F.2d 1302 (7th Cir. 1984); *Publicker Industries, Inc. v. Cohen*, 10 Med.L.Rptr. 1777, 733 F.2d 1059 (3d Cir. 1984); *In re Washington Post Co.*, 13 Med.L.Rptr. 1793, 807 F.2d 383 (4th Cir. 1986); *Society of Professional Journalists v. Briggs*, 14 Med.L.Rptr. 2273, 675 F.Supp. 1308 (D.Utah 1987).

previous federal court precedents. The court announced that denial of access to documents entered as evidence requires proof "that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest." In addition, the trial court should have held a hearing. The court recognized that a mere common law right of access "does not afford as much substantive protection * * * as does the First Amendment."

Similar results using a heightened standard have been based on common law,[85] state constitutional law,[86] and on the status of documents as public records under state statute.[87] Journalists should not assume that ready access may be had, though. Recall that the Supreme Court itself has not decided, only implied, that judicial records are subject to a First Amendment access right. In spring 1988, the Court denied certiorari in a case that recognized a right to transcripts of juror misconduct hearings but withheld the transcripts for fair trial reasons.[88]

Complications abound when access to records is sought. Getting access may depend on the nature of the records, for example. A number of courts hold to the distinction that records not introduced into evidence are not subject to any form of heightened review, usually on privacy grounds or on the ground that civil litigation is traditionally private.[89] The use to which materials, especially visual or audio records, might be put can also work against access. One court determined that allowing a television station access to a tape of a defendant, even after trial, could prejudice the defendant's right to an appeal.[90] The First Amendment right of access to records was held not to extend a right to copy visual materials.[91] The records of a corporate dissolution were closed to protect trade secrets.[92] Access to juror names from venire lists has been denied based on privacy interests,[93] especially before trial. Litigants' privacy also was relied upon to uphold a restrictive order.[94]

Procedural issues also complicate access. Some courts have held that news organizations do not have standing to intervene in proceedings other than criminal ones to seek access.[95] The method for seeking access varies among jurisdictions. The press has been denied access for having sought a declaratory action rather than an injunction, for example.[96]

The second area in which the press has sought to extend the First Amendment right of access concerns access to people involved in the judicial process. The cases have arisen almost exclusively in the context of criminal trials; it could be argued that in most civil cases no compelling interest exists that would justify a no-comment order against trial participants.[97] Orders directed at trial participants have increased since *Press-Enterprise II*,[98] and with them attempts to overturn have increased. In addition to finding apparent approval for gags on nonpress parties in cases such as *Sheppard* and *Nebraska Press*, many courts have standing no-comment rules based on the ABA's Code of Professional Responsibility.

The press argument here is that the right to gather news is of little value without the chance to interview news sources. For many judges, however, the news-gathering right means nothing more than the right to attend judicial proceedings,[99] and some say journalists have no First Amendment right to challenge

85. *Wilson v. American Motors Corp.*, 11 Med.L.Rptr. 2008, 759 F.2d 1568 (11th Cir. 1985) (applying a "compelling interest" test).

86. *Iowa Freedom of Information Council v. Wifvat*, 9 Med.L.Rptr. 1194, 328 N.W.2d 920 (Iowa 1983).

87. *Daily Gazette v. Withrow*, 14 Med.L.Rptr. 1447, 350 S.E.2d 738 (W.V. 1986).

88. *United States v. Edwards*, 14 Med.L.Rptr. 1399 (5th Cir. 1987). A similar rationale upheld denial of press access, despite a qualified First Amendment right, to materials used to support probable cause for search warrants in an ongoing criminal investigation. The public interest in effective law enforcement was given great weight. *In re Search Warrant*, 15 Med.L.Rptr. 1969, 855 F.2d 569 (8th Cir. 1988).

89. *In re Alexander Grant and Co. Litigation*, 14 Med.L.Rptr. 1370, 820 F.2d 352 (11th Cir. 1987).

90. *In re Pacific and Southern Co.*, 14 Med.L.Rptr. 1764, 361 S.E.2d 159 (Ga. 1987). One federal district court appeared to rely on a federal constitutional interest in physical or bodily privacy in refusing a television station's request to copy videotapes of an actual rape that had been entered into evidence at the defendant's trial. *In re Application of KSTP*, 6 Med.L.Rptr. 2249, 504 F.Supp. 360 (D.Minn. 1980).

91. *State ex rel. KOIN-TV v. Olsen*, 12 Med.L.Rptr. 1625, 711 P.2d 966 (Ore. 1985).

92. *In re Crain Communications*, 14 Med.L.Rptr. 1951, 521 N.Y.S.2D 244 (N.Y.Sup.Ct., App.Div. 1987).

93. *Newsday v. Sise*, 14 Med.L.Rptr. 2140, 524 N.Y.S.2d 35 (N.Y. 1987); *contra*, *In re Baltimore Sun*, 14 Med.L.Rptr. 2379, 841 F.2d 74 (4th Cir. 1988).

94. *Courier-Journal v. Marshall*, 14 Med.L.Rptr. 1561, 828 F.2d 361 (6th Cir. 1987).

95. *Doe v. Roe*, 12 Med.L.Rptr. 1219, 495 A.2d 1235 (Me. 1985); *Booth Newspapers v. Midland Circuit Judge*, 12 Med.L.Rptr. 1519, 377 N.W.2d 868 (Mich.App. 1985); *Times-Picayune v. Ganucheau*, 14 Med.L.Rptr. 1062 (La.App. 1987).

96. *Courier-Journal v. Peers*, 14 Med.L.Rptr. 1248 (Ky.App. 1987).

97. *Hirschkop v. Snead*, 4 Med.L.Rptr. 2599, 594 F.2d 356 (4th Cir. 1979).

98. Lewin, "News Media Battling a Trend of Secrecy in New York's Courts," *New York Times* (Feb. 8, 1988), 13.

99. *KPNX Broadcasting v. Superior Court*, 10 Med.L.Rptr. 1289, 678 P.2d 431 (Ariz. 1984).

gags aimed at others.[100] The difficulty of the press's claiming its rights to gather news based on gags imposed on others is self-evident. The gagged parties themselves are those best situated to assert their own First Amendment rights. Indeed, the courts have looked favorably on challenges from persons subject to restrictive no-comment orders, often opting for a prior restraint analysis.[101]

No general standard for deciding silence order issues has developed in the lower courts. Various courts have used different standards: "reasonable likelihood" of a threat to a fair trial;[102] "substantial likelihood";[103] "serious and imminent threat";[104] and, "clear and imminent threat."[105] One court has adopted a "sliding scale."[106] A sliding scale is an apt term for the analyses in the various cases as well. Whether a substantial interest or clear and imminent threat standard applies may well depend on whether the press or the gagged participant challenges the order.

The U.S. Supreme Court declined in November 1988 to grant certiorari in *In re Dow Jones*, 15 Med.L.Rptr. 1105, 842 F.2d 603 (2d Cir. 1988), although Justices Brennan, Marshall, and White thought resolving conflicts among the circuit courts of appeal merited hearing the case.

In *Dow Jones*, the Second Circuit recognized standing for nonparty news media to challenge restraining orders that had been entered against prosecuting attorneys, defendants, and defense counsel. But since the gag was not directed at the media, it was not considered a prior restraint against the media. "Success on the merits for the news agencies is entirely derivative of the rights of the trial participants to speak," the court said, and the media cannot challenge the order based on another party's rights. "[N]othing prevented the restrained parties * * * from challenging," the court said. That argument may not be convincing to parties who must face in trial the very judge whose restraining order they have challenged. Given that the press was only indirectly involved, the court applied a "reasonable likelihood" test and upheld the orders. The opinion is at direct odds with others that have applied the *Nebraska Press* prior restraint analysis to nonparty media challenges to no-comment orders. In *Connecticut Magazine v. Moraghan*, 14 Med.L.Rptr. 2127, 676 F.Supp. 38 (D.Conn. 1987), the court reasoned that limiting extrajudicial comment by trial participants would impinge upon newsgathering and, ultimately, publication. Therefore, the gag operated like a prior restraint.[107]

While the strength of the ability of the press to challenge no-comment orders is unsettled, the federal circuits seem to be united on the existence of a right to challenge.

THE STATUS OF BROADCAST COVERAGE: CAMERAS IN THE COURTS

In covering crime and the courts, electronic and photojournalism early became victim to its own youthful brashness, raucous commercialism, and intrusive equipment. Bench and bar tended to equate television's power to attract with power to prejudice.

Policemen had posed suspects for the cameras and permitted them to announce their guilt to the world. In 1961 a jury reenacted its deliberations, theorized on the guilt or innocence of the defendant, and discussed the death penalty for a videotape rebroadcast the day before sentencing.[108] The Supreme Court

100. *United States v. Simon*, 14 Med.L.Rptr. 1321, 664 F.Supp. 780 (S.D.N.Y. 1987) (media must show that willing speakers are restrained or that gag order will limit important information to public to establish standing).

101. *Levine v. United States District Court*, 11 Med.L.Rptr. 2289, 764 F.2d 590 (9th Cir. 1985). When a gag order aimed directly at lawyers was appealed, the Seventh Circuit in a significant ruling struck it down because the trial court had used a "reasonable likelihood" test rather than a "clear and present danger" or "clear and imminent danger" test. The court was unconvinced that justice would be served by silenced lawyers, especially those representing the defense, given the fact that public opinion weighs heavily against most defendants after arrest and indictment. While recognizing that restraints on lawyers were sometimes permissible, the court found constitutionally infirm the blanket prohibitions contained in the standing rules recommended by the American Bar Association and the Judicial Conference. Seldom would lawyer comments pose a "clear and present danger" to the administration of justice. *Chicago Council of Lawyers v. Bauer*, 1 Med.L.Rptr. 1094, 522 F.2d 242 (7th Cir. 1975), cert. den., 427 U.S. 912 (1976). See also, *State ex rel. Angel v. Woodahl*, 555 P.2d 501 (Mont. 1976).

102. *In re Russell*, 10 Med.L.Rptr. 1359, 726 F.2d 1007 (4th Cir. 1984).

103. *Society of Professional Journalists v. Martin*, 2 Med.L.Rptr. 2138, 431 F.Supp. 1182 (D.S.C. 1977).

104. *Levine v. United States District Court*, 11 Med.L.Rptr. 2289, 764 F.2d 590 (9th Cir. 1985).

105. *CBS v. Young*, 1 Med.L.Rptr. 1024, 522 F.2d 234 (6th Cir. 1975).

106. *In re San Juan Star*, 7 Med.L.Rptr. 2144, 662 F.2d 108 (1st Cir. 1981).

107. See also, *Journal Publishing Co. v. Mechem*, 13 Med.L.Rptr. 1391, 801 F.2d 1233 (10th Cir. 1986).

108. *United States v. Rees*, 193 F.Supp. 864 (D.Md. 1961).

finally took note of these practices in the case of Wilbur Rideau.

After his arrest on suspicion of bank robbery and murder, Rideau was interviewed in jail by a film crew. A cooperative sheriff stood by posing his prisoner. He confessed, and his confession went out over the airwaves, not once but three times. A change of venue was denied; Rideau was tried, convicted, and sentenced to death.

When the case got to the U.S. Supreme Court, Justice Potter Stewart in his opinion for the Court reversed. "For anyone who has ever watched television," he said, "the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." *Rideau v. Louisiana*, 1 Med.L.Rptr. 1183, 373 U.S. 723 (1963).

There is a strong implication in the Court's opinion that no judicial remedies in either trial or pretrial period would have overcome the prejudicial effects of the broadcasts. Presumably the power of the camera outstrips the power of the pen—an assumption that may no longer be safe.

The case of Billie Sol Estes came to the Court two years later. Estes, an erstwhile Texas financier and former confidant of Lyndon B. Johnson, went to trial in 1962 charged with theft, swindling, and embezzlement. Over Estes's objections, the trial judge permitted television coverage of the pretrial hearing and portions of the trial, as Texas law allowed. Upon conviction Estes appealed partly on the ground that the cameras deprived him of due process of law. By a narrow margin (5–4), the Supreme Court agreed, and courtroom doors closed to cameras throughout the land.

ESTES v. STATE OF TEXAS

1 MED.L.RPTR. 1187, 381 U.S. 532, 85 S.CT. 1628, 14 L.ED.2D 543 (1965).

Justice CLARK delivered the opinion of the Court.

* * *

As has been said, the chief function of our judicial machinery is to ascertain the truth. The use of television, however, cannot be said to contribute materially to this objective. Rather its use amounts to the injection of an irrelevant factor into court proceedings. In addition, experience teaches that there are numerous situations in which it might cause actual unfairness—some so subtle as to defy detection by the accused or control by the judge. We enumerate some in summary:

1. The potential impact of television on the jurors is perhaps of the greatest significance. * * * From the moment the trial judge announces that a case will be televised it becomes a *cause célèbre*. The whole community, including prospective jurors, becomes interested in all the morbid details surrounding it. * * * And we must remember that realistically it is only the notorious trial which will be broadcast, because of the necessity for paid sponsorship. The conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence. * * * Finally, new trials plainly would be jeopardized in that potential jurors will often have seen and heard the original trial when it was telecast. Yet viewers may later be called upon to sit in the jury box during the new trial. These very dangers are illustrated in this case where the court, due to the defendant's objections, permitted only the State's opening and closing arguments to be broadcast with sound to the public.
2. The quality of the testimony in criminal trials will often be impaired. The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization. * * * In most instances witnesses would be able to go to their homes and view broadcasts of the day's trial proceedings, notwithstanding the fact that they had been admonished not to do so. They could view and hear the testimony of preceding witnesses, and so shape their own testimony as to make its impact crucial.

* * *

While some of the dangers mentioned above are present as well in newspaper coverage of any important trial, the circumstances and extraneous influences intruding upon the solemn decorum of court

procedure in the televised trial are far more serious than in cases involving only newspaper coverage.

3. A major aspect of the problem is the additional responsibilities the presence of television places on the trial judge. His job is to make certain that the accused receives a fair trial. This most difficult task requires his undivided attention. Still when television comes into the courtroom he must also supervise it. In this trial, for example, the judge on several different occasions—aside from the two days of pretrial—was obliged to have a hearing or enter an order made necessary solely because of the presence of television.

* * *

4. Finally, we cannot ignore the impact of courtroom television on the defendant. Its presence is a form of mental—if not physical—harassment, resembling a police line-up or the third degree. The inevitable close-ups of his gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him—sometimes the difference between life and death—dispassionately, freely and without the distraction of wide public surveillance. A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena. The heightened public clamor resulting from radio and television coverage will inevitably result in prejudice. Trial by television is, therefore, foreign to our system.

* * *

The State would dispose of all these observations with the simple statement that they are for psychologists because they are purely hypothetical. But we cannot afford the luxury of saying that, because these factors are difficult of ascertainment in particular cases, they must be ignored. * * *

The judgment is therefore reversed.

COMMENT

Justices Black, Brennan, Stewart, and White dissented. Writing for the four, Stewart said, "The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms."

The majority opinion appeared to adopt a rule that television coverage *per se* offended due process and a defendant's right to a fair trial. Justice Clark grants television a degree of influence and power that, if ever true, has certainly waned in the twenty-plus years since *Estes*.

Future changes in television technology and in public reactions to television were what prompted Justice Harlan to concur separately:

Although "mischievous potentialities" had been at work in the *Estes* case, "*the day may come*," said Harlan, "*when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process.*" [Emphasis added.]

Add to these Justice Clark's own qualification—"When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case"—and you have almost an invitation for the camera to enter the courtroom.

Prior to the trial of Bruno Richard Hauptmann for the kidnaping of the Lindbergh baby, camera coverage depended on the presiding judge. Some welcomed it; some banned it. On balance, photographers acquitted themselves well in covering that notorious case, going so far as to pool their resources. Conventional history would have it otherwise. The transgressions of a newsreel crew are all that is remembered.[109]

After that confused and sensational case had concluded and the American Bar Association had time to think about it, the organization added Canon 35 to its statement of judicial ethics, recommending prohibition of all photographic and broadcast coverage of courtroom proceedings. In 1963 Canon 35 was amended to include television. In 1972 the Code of Judicial Conduct superseded the Canons of Judicial Ethics and Canon 3A(7) reaffirmed and replaced Canon 35. Rule 53 of the Federal Rules of Criminal Procedure and strong admonitions from the Judicial Conference of the United States have kept cameras out of federal courtrooms since 1946.

In 1978 the ABA Committee on Fair Trial-Free Press proposed revised standards that would permit camera coverage at a trial judge's discretion. Meanwhile the Conference of State Chief Justices, by a vote of 44 to 1, had in 1978 approved a resolution

109. Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 Judicature 14 (June–July 1979).

recommending that the highest court of each state promulgate standards and guidelines regulating radio, television, and other electronic coverage of court proceedings.

By 1989, forty-four states were permitting video and/or audio coverage on either a permanent or experimental basis, and federal courts have begun experimenting with video recording for record-keeping purposes.[110] Only thirteen require the consent of the defendant to allow coverage, down from about half in 1983. Thirty-seven states allow coverage of any trials, civil or criminal. Most also allow coverage of appellate courts, although appellate oral argument has drawn little interest from broadcast journalists.

States with experimental programs usually later adopt permanent programs. No experimenting state has decided to return to banning coverage, although Ohio and Iowa have adopted less liberal permanent rules.

The rules themselves are diverse. Florida and a handful of states following Florida's lead place the burden of showing a necessity for closure on the party seeking closure. Most states leave closure to the discretion of the judge, who is usually admonished to close only if the fair administration of justice requires. The least broadcast access is available when a party's consent is needed.[111] When Michigan's experimental program, which required consent of *all* parties, resulted in no broadcast or photographic coverage in months, the Michigan Supreme Court amended its order to create a presumption of openness.[112]

Within the rules, specific limitations may be placed on which parties may be pictured. Many programs prohibit photographing juries, for example. Most plans require that media pool resources to avoid intruding on the courtroom with large amounts of equipment. Judges generally have unappealable authority to regulate the time, place, and manner of coverage.

Still many states, including those with some provisions allowing coverage, keep trial proceedings closed to cameras. States often exempt, either by rule or statute, cases involving child custody, divorce, juvenile crimes, police informants, relocated witnesses, undercover agents, sex crimes, and evidentiary suppression hearings.

Texas is one of those states—perhaps still camera-shy after *Estes*—that will not budge to accommodate cameras. It will permit sound recording of appellate proceedings, though.

At the other pole, Colorado never adopted Canon 35 and as far back as 1956 permitted audio and film coverage of a sensational murder trial—the 1956 case, the trial of an accused commercial airline dynamiter.[113] After the trial, the Colorado Supreme Court reviewed the situation and concluded that there was no reason to ban modern camera equipment from the courtroom.[114] After *Estes*, Colorado modified its rule to require defendant's consent as well as the permission of the trial judge, its stated reason being to avoid retrials. Texas and Oklahoma were also permissive regarding camera coverage until the *Estes* ruling.

With Alabama, Georgia, New Hampshire, Texas, Washington, and Colorado, Florida was among the first states to experiment anew with the camera. Its test run began in July 1977.[115] When the pilot program ended, the Florida Supreme Court received and reviewed briefs, reports, letters of comment, and studies. It conducted its own survey of attorneys, witnesses, jurors, and court personnel. A separate survey of judges was taken. The court studied the experience of other states allowing cameras and concluded that "on balance there [was] more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage."[116] The judge would be in control in the interests of the fair administration of justice, and limited quantities of equipment would be placed in fixed positions. Florida soon became the arena for testing the constitutionality of camera coverage.

The first challenge came when Jules Briklod, charged with conspiracy and grand larceny, contended that live camera coverage would deny him a fair and impartial jury, effective assistance of counsel, and due process of law under the Fifth, Sixth,

110. "Official Cameras in U.S. Courts," News Media and the Law (Fall 1988), 53.
111. Dyer and Hauserman, *Electronic Coverage of the Courts: Exceptions to Exposure*, 75 Georgetown L.J. 1633 (1987).
112. *In re Film or Electronic Coverage*, Administrative Order No. 1988–1 (Mich. May 31, 1988).
113. *Graham v. People*, 302 P.2d 737 (Colo. 1956).
114. *In re Hearings Concerning Canon* 35, 296 P.2d 465 (Colo. 1956).
115. *Petition of the Post-Newsweek Stations, Florida, Inc.*, 2 Med.L.Rptr.1832, 347 So.2d 402 (Fla. 1977).
116. *Petition of the Post-Newsweek Stations, Florida, Inc.*, 5 Med.L.Rptr. 1039, 370 So.2d 764 (Fla. 1979).

and Fourteenth Amendments. The state trial court overruled his objections, and he went to a U.S. district court. That court, taking a cue from Justice Harlan's concurring opinion in *Estes*, held that Florida's experiment was not "patently and flagrantly" unconstitutional. Injunctive relief was denied. *Briklod v. Rivkind*, 2 Med.L.Rptr. 2258 (D.Fla. 1977).

Florida's Supreme Court next stipulated that requests to exclude electronic media be supported by evidence that coverage would have substantial and "qualitatively different" effects on the process than other types of coverage.[117] Of course, exclusions could be made where the evidence indicated that an otherwise competent criminal defendant would be rendered incompetent by camera coverage.[118]

But the grand test of constitutionality came when two Miami Beach policemen challenged their convictions on burglary charges because portions of their trials had been televised over their objections.

In a unanimous decision grounded in federalism, the Supreme Court rejected their claim and found no constitutional problem with regulated access for cameras in those states which so chose. But the ruling provided no right of camera access in those states which forbade it or in the federal courts.

It also vindicated the significance of Justice Harlan's concurrence in *Estes* that kept that case from creating a constitutional ban on camera coverage. Calling for further experimentation to evaluate the camera's psychological and other effects, Chief Justice Burger's unanimous majority opinion seemed to be saying that *Chandler* would not be the last word on broadcast coverage. Justices Stewart and White suggested that *Estes* be formally overturned.

CHANDLER v. FLORIDA

7 MED.L.RPTR. 1041, 449 U.S. 560, 101 S.CT. 802, 66 L.ED.2D 740 (1981).

Chief Justice BURGER delivered the opinion of the Court:

* * *

At the outset, it is important to note that in promulgating the revised Canon 3A(7), the Florida Supreme Court pointedly rejected any state or federal constitutional right of access on the part of photographers or the broadcast media to televise or electronically record and thereafter disseminate court proceedings. It carefully framed its holding as follows:

> While we have concluded that the due process clause does not prohibit electronic media coverage of judicial proceedings per se, by the same token we reject the argument of the [Post-Newsweek stations] that the first and sixth amendments to the United States Constitution mandate entry of the electronic media into judicial proceedings. *Petition of the Post-Newsweek Stations, Florida, Inc.*, 370 So.2d, at 774.

* * *

The Florida Supreme Court predicated the revised Canon 3A(7) upon its supervisory authority over the Florida courts, and not upon any constitutional imperative. Hence, we have before us only the limited question of the Florida Supreme Court's authority to promulgate the canon for the trial of cases in Florida courts.

This Court has no supervisory jurisdiction over state courts and, in reviewing a state court judgment, we are confined to evaluating it in relation to the Federal Constitution.

Appellants rely chiefly on *Estes v. Texas*, 381 U.S. 532 * * * (1964), and Chief Justice Warren's separate concurring opinion in that case. They argue that the televising of criminal trials is inherently a denial of due process, and they read *Estes* as announcing a *per se* constitutional rule to that effect.

* * *

Parsing the six opinions in *Estes*, one is left with a sense of doubt as to precisely how much of Justice Clark's opinion was joined in, and supported by, Justice Harlan. * * * [W]e conclude that *Estes* is not to be read as announcing a constitutional rule barring still photographic, radio and television coverage in all cases and under all circumstances. It does not stand as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964, and is, even now, in a state of continuing change. * * * [W]e turn to consideration, as a matter of first impression, of the petitioner's suggestion that we now promulgate such a *per se* rule.

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117. *Florida v. Palm Beach Newspapers*, 7 Med.L.Rptr. 1021, 395 So.2d 544 (Fla. 1981).
118. *Florida v. Green*, 7 Med.L.Rptr. 1025, 395 So.2d 532 (Fla. 1981).

* * *

An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage. A case attracts a high level of public attention because of its intrinsic interest to the public and the manner of reporting the event. The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly. * * *

As we noted earlier, the concurring opinions in *Estes* expressed concern that the very presence of media cameras and recording devices at a trial inescapably give rise to an adverse psychological impact on the participants in the trial. This kind of general psychological prejudice, allegedly present whenever there is broadcast coverage of a trial, is different from the more particularized problem of prejudicial impact discussed earlier. If it could be demonstrated that the mere presence of photographic and recording equipment and the knowledge that the event would be broadcast invariably and uniformly affected the conduct of participants so as to impair fundamental fairness, our task would be simple; prohibition of broadcast coverage of trials would be required.

* * *

Not unimportant to the position asserted by Florida and other states is the change in television technology since 1962, when Estes was tried. It is urged, and some empirical data are presented, that many of the negative factors found in *Estes*—cumbersome equipment, cables, distracting lighting, numerous camera technicians—are less substantial factors today than they were at that time.

It is also significant that safeguards have been built into the experimental programs in state courts, and into the Florida program, to avoid some of the most egregious problems envisioned by the six opinions in the *Estes* case. Florida admonishes its courts to take special pains to protect certain witnesses. * * *

The Florida guidelines place on trial judges positive obligations to be on guard to protect the fundamental right of the accused to a fair trial. The Florida statute, being one of the few permitting broadcast coverage of criminal trials over the objection of the accused, raises problems not present in the statutes of other states. Inherent in electronic coverage of a trial is the risk that the very awareness by the accused of the coverage and the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, yet leave no evidence of how the conduct or the trial's fairness was affected. Given this danger, it is significant that Florida requires that objections of the accused to coverage be heard and considered on the record by the trial court. * * * In addition to providing a record for appellate review, a pretrial hearing enables defendant to advance the basis of his objection to broadcast coverage and allows the trial court to define the steps necessary to minimize or eliminate the risks of prejudice to the accused. Here, the record does not indicate that appellants requested an evidentiary hearing to show adverse impact or injury. Nor does the record reveal anything more than generalized allegations of prejudice.

* * *

Whatever may be the "mischievous potentialities [of broadcast coverage] for intruding upon the detached atmosphere which should always surround the judicial process," *Estes v. Texas*, 381 U.S., at 587, at present no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on that process. * * * The appellants have offered nothing to demonstrate that their trial was subtly tainted by broadcast coverage—let alone that all broadcast trials would be so tainted. * * *

Where, as here, we cannot say that a denial of due process automatically results from activity authorized by a state, the admonition of Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*, 385 U.S. 262, 311 (1932), is relevant:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel

social and economic experiments without risk to the rest of the country.

* * *

This concept of federalism, echoed by the states favoring Florida's experiment, must guide our decision. [Emphasis added.]

* * *

The unanswered question is whether electronic coverage will bring public humiliation upon the accused with such randomness that it will evoke due process concerns by being "unusual in the same way that being struck by lightning" is "unusual." * * *

To say that the appellants have not demonstrated that broadcast coverage is inherently a denial of due process is not to say that the appellants were in fact accorded all of the protections of due process in their trial. As noted earlier, a defendant has the right on review to show that the media's coverage of his case—printed or broadcast—compromised the ability of the jury to judge him fairly. Alternatively, a defendant might show that broadcast coverage of his particular case had an adverse impact on the trial participants sufficient to constitute a denial of due process. Neither showing was made in this case.

To demonstrate prejudice in a specific case a defendant must show something more than juror awareness that the trial is such as to attract the attention of broadcasters. No doubt the very presence of a camera in the courtroom made the jurors aware that the trial was thought to be of sufficient interest to the public to warrant coverage. But the appellants have not attempted to show with any specificity that the presence of cameras impaired the ability of the jurors * * * to decide the case on only the evidence before them or that their trial was affected adversely by the impact on any of the participants of the presence of cameras and the prospect of broadcast.

Although not essential to our holding, we note that at *voir dire*, the jurors were asked if the presence of the camera would in any way compromise their ability to consider the case. Each answered that the camera would not prevent him from considering the case solely on the merits.

* * *

The Florida program is inherently evolutional in nature; the initial project has provided guidance for the new canons which can be changed at will, and application of which is subject to control by the trial judge. The risk of prejudice to particular defendants is ever present and must be examined carefully as cases arise. Nothing of the "Roman circus" or "Yankee Stadium" atmosphere, as in *Estes*, prevailed here, however, nor have appellants attempted to show that the unsequestered jury was exposed to "sensational" coverage, in the sense of *Estes* or of *Sheppard v. Maxwell*, 384 U.S. 333 (1966). Absent a showing of prejudice of constitutional dimensions to these defendants, there is no reason for this Court either to endorse or to invalidate Florida's experiment.

* * *

We hold that the Constitution does not prohibit a state from experimenting with the program authorized by revised Canon 3A(7).

COMMENT

Although many difficult questions remain unanswered, they are not mainly legal questions. How does editing of proceedings affect the perceptions of the audience? Does broadcast coverage actually educate the public about the judicial system, as broadcasters have argued when seeking camera coverage? Does broadcast coverage affect the faimess of trials?[119] Can photojournalists function with quiet dignity? How does the ruling affect sketch artists, who do what the camera does better?[120]

The biggest holdout from camera coverage is the federal court system. While he was Chief Justice, Warren Burger vowed that cameras would never be allowed in federal courts. He was as good as his word. Allowance of broadcast coverage has consist-

119. One researcher has suggested that cameras help make trials fairer, at least marginally. Barber, *The problem of prejudice: a new approach to assessing the impact of courtroom cameras*, 66 Judicature 248 (1983).

120. *KPNX v. Maricopa County Superior Court*, 10 Med.L.Rptr. 1289, 678 P.2d 431 (Ariz. 1984). In *United States v. CBS*, 1 Med.L.Rptr. 1351, 497 F.2d 107 (5th Cir. 1974), the Fifth Circuit applied a clear and present danger test to a trial judge's order evicting Aggie Whelan, a CBS artist, from the courtroom where the "Gainesville Eight" were being tried. She made her sketches from memory in the park across the street and was cited for contempt. The total ban, said the court, was overbroad where the sketching was neither "obtrusive" nor "disruptive." That is basically the test all states use in permitting sketching which, it has been claimed, can be more distractive than photography. Something to do with squeaky pens.

ently been considered as within the discretion of the various state and federal courts in their capacities as rulemakers. The federal courts retain rules against camera coverage[121] that have been repeatedly upheld.[122] It is unlikely that the federal courts can resist forever. In November 1988, three justices of the U.S. Supreme Court participated in a mock hearing under the sponsorship of broadcast media organizations. Can the real thing be far behind?

121. *Westmoreland v.* CBS, 11 Med.L.Rptr. 1013, 752 F.2d 16 (2d Cir. 1984). See also, Mauro, "Justices Keep Out Cameras, Preserve Their Rite of Privacy," *Washington Journalism Review* (Nov. 1988), 20.

122. *Conway v. United States*, 15 Med.L.Rptr. 1967, 852 F.2d 187 (6th Cir. 1988).

SIX

Access to Executive and Legislative Information

THE RIGHT TO GATHER NEWS

In spite of judicial ambivalence about how far a right of access to information ought to extend, *Richmond Newspapers, Inc. v. Virginia* (text, p. 424) did shift the access argument to a First Amendment context. Justice Stevens called the case a "watershed": "[F] or the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedom of speech and of the press protected by the First Amendment."

And so the eighties began with what seemed like a Supreme Court endorsement of what reporters, editors, and interested citizens had long spoken of as freedom of information or, more precariously, the public's right to know. But it would not do to relax. Only three years earlier the liberal bloc leader of the Court, Justice Brennan, had wondered about the scope of a right of access: "The Constitution," he wrote, "does not require all public acts to be done in a town meeting or an assembly of the whole. * * * [T]his Court's 'own conferences [and] meetings of other official bodies gathered in executive session' may be closed to the public without implicating any constitutional rights whatever." [1] A year later in the climax of a series of cases having to do with press access to prisons, then Chief Justice Warren Burger, speaking for the Court, said: "This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control." [2]

When television reporters failed to develop a "pool" coverage plan, the White House Press Office excluded all TV representatives. The three major networks sought and were awarded a preliminary injunction. Even though a post-*Richmond* case, the court could find no more than a "qualified" right of access "subject to limiting considerations such as confidentiality, security, orderly process, spatial limitations, and doubtless many others." [3] Total exclusion of TV, however, did deny public and press their limited right of access to the White House guaranteed by the First Amendment.

For similar reasons, a federal appeals court in Massachusetts rejected a National Transportation Safety Board order that limited press access to an airplane crash site on public property to one hour a day.[4]

1. *City of Madison v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 178 (1976).
2. *Houchins v. KQED*, 438 U.S. 1 (1978).
3. *Cable News Network v. ABC*, 7 Med.L.Rptr. 2053, 518 F.Supp. 1238 (N.D.Ga. 1981).
4. *Westinghouse Broadcasting v. National Transportation Safety Board*, 8 Med.L.Rptr. 1177, 670 F.2d 4 (1st Cir. 1982).

After many years of litigation, the Supreme Court in late 1982 rejected all efforts by Richard M. Nixon to block public access to his infamous White House tapes. The decision applied to thousands of hours of Oval Office conversations unrelated to Watergate and the trials that followed.

In *United States v. Nixon*, 418 U.S. 683 (1974), the Court recognized a constitutionally based privilege of confidentiality for presidential communications to the extent that such a privilege was necessary to the effective discharge of the president's powers. In 1982, the D.C. Circuit Court of Appeals permitted the General Services Administration to segregate private from public material in the tapes and to allow public access to "presidential historical material." *Nixon v. Freeman*, 8 Med.L.Rptr. 1001, 670 F.2d 346 (D.C.Cir. 1982).

Balancing tests? Yes, but with some weight given to press claims of a right of access.

Ultimately, discussion of what information ought to be available to public and press takes place in courtrooms. Courts, sitting as final arbiters, will decide both abstract and concrete questions of access to *all* branches of government.

"A popular government without popular information or the means of acquiring it is but a Prologue to a Farce or Tragedy; or perhaps both," said James Madison.[5]

Of late, an interesting dialogue has centered on whether denials of access constitute prior restraints and whether access and publication are of equal constitutional weight. In the landmark prior restraint cases—*Near*, *Pentagon Papers*, and *Nebraska Press*—the information suppressed by state statute, a court injunction initiated by the federal government, and a judicial order, respectively, was information already in hand. Access may or may not lead a reporter to publishable material. A denial of access is not necessarily a proscription against publication. Yet when access is regularly or systematically denied, the effects on the communication process are the same.

While academics and judges have identified a right of access or a right to know, whereby government is said to have an affirmative constitutional obligation to furnish information to the populace,[6] courts have been slow to expand the doctrine. Others consider the doctrine dangerous, even pernicious, because it derogates the rights of speakers and invites government censorship: the rights of audiences become paramount, and, if the public has a right to know, by definition there are things that it has *no* right to know.[7] In such cases, courts are in the position of deciding what the public has a right to know or not to know,[8] and what the media have a responsibility to provide, functions not intended for government.

Communication lawyers, recognizing the complex interface of prior restraint and access rights, also warn against pushing access too far. Hostile courts in denying access may impose prior restraints, either intentionally or unintentionally. The right to gather information is by no means as sweeping as the right to publish information once gathered.[9]

Professor Steven Helle holds that the dichotomy between newsgathering and publication is specious. Government has a general obligation to provide unrestricted access to information. It has no right *not* to speak. The press should not have to assert the public's right to know to exercise its own right of expression while the government need cite only its own interests as justification for not speaking. The failure of the government to release information that furthers self-government is contrary to the broad command of the First Amendment.

> It is because analysis of governmental expression, which is subject to different limitations and obligations regarding its dissemination, is beginning to control analysis of nongovernment expression through means of the newsgathering artifice that the libertarian foundations of nongovemment speech are imperiled.

In a word, Helle faults the courts for defining press rights in terms of the public's rights:

> By orienting the analysis in terms of the public right rather than the private right, the Court has eschewed resort to a body of law founded on libertarian principles and has given itself great latitude to substitute the judg-

5. 9 *Writings of James Madison* 103 (G. Hunt, ed. 1910). See also, Itzhak Galnoor (ed.), *Government Secrecy in Democracies*, 1977.

6. Emerson, *The Affirmative Side of the First Amendment*, 15 Georgia L.Rev. 795, 805, 828 (Summer 1981). Justice Brennan in *Richmond Newspapers, Inc. v. Virginia*, 6 Med.L.Rptr. 1833, 1846, 448 U.S. 555, 589 (1980). For a contrary view see, O'Brien, *The Public's Right to Know: The Supreme Court and the First Amendment*, 1981.

7. Baldasty and Simpson, *The Deceptive "Right to Know": How Pessimism Rewrote the First Amendment*, 56 Wash.L.Rev. 365, 395 (July 1981).

8. Goodale, *Legal Pitfalls in the Right to Know*, 1976 Wash.U.L.Rev. 29–36 (1976).

9. Abrams, Remarks at Communications Law 1977 program of the Practicing Law Institute, New York City, Nov. 10, 11, 1977.

ment of the [s]tate for that of the individual in deciding the extent to which rights exist.[10]

If it is the natural tendency of government to compile and conceal information, it is the role of the press to dig it out and put it into circulation. The press cannot expect the government to be its handmaiden.

"There is no constitutional right to have access to particular government information, or to require openness from bureaucracy * * *," said Justice Stewart in his Yale Law School address. "The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." [11] Generally, that has been the view of the courts, despite *Richmond Newspapers*. While preserving their own autonomy, except where courts have been made aware of violations of due process or equal protection, Congress and the state legislatures have found ways to open up the executive branches to public scrutiny. Congress did it in 1966 with passage of the Freedom of Information Act.

THE FREEDOM OF INFORMATION ACT

In 1966, section 3 of the Administrative Procedure Act of 1946 was amended to incorporate the Freedom of Information Act, 5 U.S.C.A. § 552. The act became law on July 4, 1967. FOIA was a major blow to the developing doctrine of "executive privilege," a doctrine nurtured by two world wars, by the continuously agglomerating powers of the presidency, and brought to maturity by burgeoning theories and laws of privacy. However short the act may fall in implementing the public's right to know, federal government agencies are no longer able to withhold information on the capricious ground that its release would be contrary to the public interest.

Underlying the act is the premise that federal executive branch and administrative agency records are by definition open to public inspection, to any person for whatever purpose, unless agencies can give specific reasons why they should be closed. Nine exemptions in the act make the protection against disclosure of some categories of information "discretionary" with agencies or the federal courts. The act, then, does not forbid disclosure of exempted categories of information. Nor can promises of confidentiality by an agency in and of themselves defeat the public's right to disclosure. *Petkas v. Staats*, 501 F.2d 887 (D.C.Cir. 1974).

A federal district court expressed well and simply the broad principle of FOIA: *Freedom of information is now the rule and secrecy the exception (Wellford v. Hardin*, 315 F.Supp. 768 (D.D.C. 1970)). Later the United States Supreme Court would say that "these limited exemptions do not obscure the basic policy that disclosure, not secrecy is the dominant objective of the act." Law review editors brought an FOIA lawsuit seeking access to Air Force Academy case summaries of honor and ethics hearings. The U.S. District Court for the Southern District of New York granted the Academy's motion for summary judgment, but the U.S. Court of Appeals for the Second Circuit reversed, and the Supreme Court affirmed.

DEPARTMENT OF THE AIR FORCE v. ROSE

425 U.S. 352, 96 S.CT. 1592, 48 L.ED.2D 11 (1976).

Justice BRENNAN delivered the opinion of the Court.

* * *

Our discussion may conveniently begin by again emphasizing the basic thrust of the Freedom of Information Act, 5 U.S.C. § 552. We canvassed the subject at some length three years ago in *EPA v. Mink*, 410 U.S. 73, 79–80 (1973), and need only briefly review that history here. The Act revises § 3, the public disclosure section, of the Administrative Procedure Act, 5 U.S.C. § 1002 (1964 ed.). The revision was deemed necessary because "Section 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute." *Mink, supra*, at 79. Congress therefore structured a revision whose basic purpose reflected "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." * * * To make crystal clear the congressional objective—in the words of the Court

10. Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 Duke L.J. 1, 3–4, 39, 53, 57, 59 (1982).
11. Stewart, *Or of the Press*, 26 Hastings L.Rev. 631, 636 (1976).

of Appeals, "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny," 495 F.2d, at 263—Congress provided in § 552(c) that nothing in the Act should be read to "authorize withholding of information or limit the availability of records to the public, except as specifically stated. * * *" Consistently with that objective, the Act repeatedly states "that official information shall be made available 'to the public,' 'for public inspection.' " *Mink, supra*, at 79. There are, however, exemptions from compelled disclosure. They are nine in number and are set forth in § 552(b). But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. "These exemptions are explicitly made exclusive, 5 U.S.C. § 552(c) * * *," *Mink, supra*, at 79, and must be narrowly construed. *Vaughn v. Rosen*, 157 U.S.App.D.C. 340, 343, 484 F.2d 820, 823 (1973); 173 U.S.App.D.C. 187, 193, 523 F.2d 1136, 1142 (1975); *Soucie v. David*, 145 U.S.App.D.C. 144, 157, 448 F.2d 1067, 1080 (1971). In sum, as said in *Mink, supra*, at 80:

> "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands. Subsection (b) is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses. As the Senate Committee explained, it was not 'an easy task to balance the opposing interests, but it is not an impossible one either. * * * Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.' "

Mindful of the congressional purpose, we then turn to consider whether mandatory disclosure of the case summaries is exempted by either of the exemptions involved here, discussing, *first*, Exemption 2, and, *second*, Exemption 6.

* * *

[There follows a summary of the legislative history of the FOIA.]

* * *

We agree with the approach and conclusion of the Court of Appeals. The implication for the general public of the Academy's administration of discipline is obvious, particularly so in light of the unique role of the military. What we have said of the military in other contexts has equal application here: it "constitutes a specialized community governed by a separate discipline from that of the civilian," *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953), in which the internal law of command and obedience invests the military officer with "a particular position of responsibility." *Parker v. Levy*, 417 U.S. 733, 744 (1974). Within this discipline, the accuracy and effect of a superior's command depends critically upon the specific and customary reliability of subordinates, just as the instinctive obedience of subordinates depends upon the unquestioned specific and customary reliability of the superior. The importance of these considerations to the maintenance of a force able and ready to fight effectively renders them undeniably significant to the public role of the military. Moreover, the same essential integrity is critical to the military's relationship with its civilian direction. Since the purpose of the Honor and Ethics Codes administered and enforced at the Air Force Academy is to ingrain the ethical reflexes basic to these responsibilities in future Air Force officers, and to select out those candidates apparently unlikely to serve these standards, it follows that the nature of this instruction—and its adequacy or inadequacy—is significantly related to the substantive public role of the Air Force and its Academy. Indeed, the public's stake in the operation of the Codes as they affect the training of future Air Force officers and their military careers is underscored by the Agency's own proclamations of the importance of cadet-administered Codes to the Academy's educational and training program. Thus, the Court of Appeals said, and we agree:

> "[Respondents] have drawn our attention to various items such as newspaper excerpts, a press conference by an Academy officer and a White House Press Release, which illustrate the extent of general concern with the working of the Cadet Honor Code. As the press conference and the Press Release show, some of the interest has been generated—or at least enhanced—by acts of the Government itself. Of course, even without such official encouragement, there would be interest in the treatment of cadets, whose education is publicly financed and who furnish a good portion of the country's future military leadership. Indeed, all sectors of our society, including the cadets themselves, have a stake in the fairness of any system that leads, in many instances, to the forced resignation of some cadets. The very study involved in this case bears ad-

> ditional witness to the degree of professional and academic interest in the Academy's student-run system of discipline. * * * [This factor] differentiate[s] the summaries from matters of daily routine like working hours, which, in the words of Exemption Two, do relate '*solely* to the internal personnel rules and practices of an agency.' " 495 F.2d, at 265 (emphasis in Court of Appeals opinion).

In sum, we think that, at least where the situation is not one where disclosure may risk circumvention of agency regulation, Exemption 2 is not applicable to matters subject to such a genuine and significant public interest. The exemption was not designed to authorize withholding of all matters except otherwise secret law bearing directly on the propriety of actions of members of the public. Rather, the general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest. The case summaries plainly do not fit that description. They are not matter with merely internal significance. They do not concern only routine matters. Their disclosure entails no particular administrative burden. We therefore agree with the Court of Appeals that, given the Senate interpretation, "the Agency's withholding of the case summaries (as edited to preserve anonymity) cannot be upheld by reliance on the second exemption."

Additional questions are involved in the determination whether Exemption 6 exempts the case summaries from mandatory disclosure as "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The first question is whether the clause "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" modifies "personnel and medical files" or only "similar files." The Agency argues that Exemption 6 distinguishes "personnel" from "similar" files, exempting all "personnel files" but only those "similar files" whose disclosure constitutes "a clearly unwarranted invasion of personal privacy," and that the case summaries sought here are "personnel files." On this reading, if it is determined that the case summaries are "personnel files," the Agency argues that judicial inquiry is at an end, and that the Court of Appeals therefore erred in remanding for determination whether disclosure after redaction would constitute "a clearly unwarranted invasion of personal privacy."

The Agency did not argue its suggested distinction between "personnel" and "similar" files to either the District Court or the Court of Appeals, and the opinions of both courts treat Exemption 6 as making no distinction between "personnel" and "similar" files in the application of the "clearly unwarranted invasion of personal privacy" requirement. The District Court held that "[i]t is only the identifying connection to the individual that casts the personnel, medical, and similar files within the protection of [the] sixth exemption." The Court of Appeals stated: "[W]e are dealing here with 'personnel' or 'similar files.' But the key words, of course, are 'a clearly unwarranted invasion of personal privacy.'* * *" 495 F.2d, at 266.

We agree with these views, for we find nothing in the wording of Exemption 6 or its legislative history to support the Agency's claim that Congress created a blanket exemption for personnel files. Judicial interpretation has uniformly reflected the view that no reason would exist for nondisclosure in the absence of a showing of a clearly unwarranted invasion of privacy, whether the documents are filed in "personnel" or "similar" files. See, e.g., *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 135 (CA3 1974); *Rural Housing Alliance v. United States Dept. of Agriculture*, 162 U.S.App.D.C. 122, 126, 498 F.2d 73, 77 (1974); *Vaughn v. Rosen*, 157 US.App.D.C. 340, 484 F.2d 820 (1973); *Getman v. NLRB*, 146 U.S.App.D.C. 209, 213, 450 F.2d 670, 674 (1971). Congressional concern for the protection of the kind of confidential personal data usually included in a personnel file is abundantly clear. But Congress also made clear that nonconfidential matter was not to be insulated from disclosure merely because it was stored by the Agency in "personnel" files. Rather, Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act "to open agency action to the light of public scrutiny." The device adopted to achieve that balance was the limited exemption, where privacy was threatened, for "clearly unwarranted" invasions of personal privacy.

Both House and Senate Reports can only be read as disclosing a congressional purpose to eschew a blanket exemption for "personnel * * * and similar files" and to require a balancing of interests in either case. Thus the House Report states, H. R. Rep. No. 1497, p. 11: "The limitation of a 'clearly unwar-

ranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." Similarly, the Senate Report, S. Rep. No. 813, p. 9 states: "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." Plainly Congress did not itself strike the balance as to "personnel files" and confine the courts to striking the balance only as to "similar files." To the contrary, Congress enunciated a single policy, to be enforced in both cases by the courts, "that will involve a balancing" of the private and public interests. * * *

Congress' recent action in amending the Freedom of Information Act to make explicit its agreement with judicial decisions requiring the disclosure of nonexempt portions of otherwise exempt files is consistent with this conclusion. Thus, 5 U.S.C. § 552(b) (1970 ed., Supp. V) now provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." And § 552(a)(4)(B) (1970 ed., Supp. V) was added explicitly to authorize *in camera* inspection of matter claimed to be exempt "to determine whether such records or *any part* thereof shall be withheld." (Emphasis supplied.) The Senate Report accompanying this legislation explains, without distinguishing "personnel and medical files" from "similar files," that its effect is to require courts

> "to look beneath the label on a file or record when the withholding of information is challenged. * * *
>
> "* * * [W]here files are involved [courts will] have to examine the records themselves and require disclosure of portions to which the purposes of the exemption under which they are withheld does not apply."
>
> The remarks of Senator Kennedy, a principal sponsor of the amendments, make the matter even clearer.
>
> "For example, deletion of names and identifying characteristics of individuals would in some cases serve the underlying purpose of exemption 6, which exempts 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.' " 120 Cong. Rec. 17018 (1974).

In so specifying, Congress confirmed what had perhaps been only less clear earlier. For the Senate and House Reports on the bill enacted in 1966 noted specifically that Health, Education, and Welfare files, Selective Service files, or Veterans' Administration files, which as the Agency here recognizes were clearly included within the congressional conception of "personnel files," were nevertheless intended to be subject to mandatory disclosure in redacted form if privacy could be sufficiently protected. * * *

COMMENT

The Freedom of Information Act has opened up federal files to investigative reporters, scholars, public interest groups, and others. It has put a spotlight on government wrongdoing, unsafe working conditions, noncompliance with antidiscrimination laws, FBI and CIA shadings of the law, and myriad other public matters.

And time has streamlined the act. Amendments in 1974 required agencies to promulgate request procedures, expedited appeal guidelines, uniform search and duplicating costs, and detailed indexes of agency records. Courts were allowed to decide whether escalating duplication or computer costs could be waived (news media pay no search fees and receive copies of the first 100 pages free) as well as to award court costs and attorney's fees where an appeal is shown to be justified. Justice Department guidelines and case law suggest that a general public interest in the documents sought will be the determining factor. Requesters under the guidelines, in addition, ought to have credibility in terms of their knowledge of the subject area and their intention to disseminate material to the public rather than use it for personal advantage, e.g., monetary profit or litigation.[12]

Fee waivers were made more readily available in the Freedom of Information Reform Act of 1986.[13] A federal district court, for example, would not accept the Department of Energy's argument that a fee waiver was not required when the documents

12. Detailed instructions for gaining waivers are contained in Allan Adler (ed.), 1988 Edition of Litigation Under the Federal Freedom of Information Act and Privacy Act, 161–67.

13. Pub.L. 99–570, Title I, §§ 1801–1804. A 1987 Department of Justice memo, "New Fee Waiver Policy Guidance," spells out the policy.

sought were available in the agency's reading room—even though the reading room was 230 miles away. The public's benefit was overriding.[14] The Boston *Globe* won $36,000 in attorney's fees and court costs after prevailing in an FOIA suit to get information from a U.S. pardon attorney. Again, said the court, there was a public interest in disclosure, the case set an important precedent, and the newspaper had had to battle an "overly aggressive" government.

GLOBE NEWSPAPER COMPANY v. JUSTICE DEPARTMENT

11 MED.L.RPTR. 2050 (D.C.MASS. 1985)

KEETON, J.:

* * *

An award of attorneys' fees and costs under the FOIA is a matter for the discretion of the district court. Attorneys' fees are awarded in FOIA cases if the plaintiff meets the threshold burden of showing that he has "substantially prevailed." A plaintiff has substantially prevailed if he can demonstrate that the suit was necessary and that it had a causative effect on the disclosure of the requested information. See *Crooker v. United States Department of Justice*, 632 F.2d 916, 922 (1st Cir. 1980).

Defendants argue that plaintiffs did not substantially prevail in this litigation. The contention is without merit. Even the defendants concede that plaintiffs substantially prevailed against the Pardon Attorney. As noted above, before this litigation began the Pardon Attorney consistently maintained that his responsibilities did not fall within the ambit of the FOIA. The Deputy Attorney General and the Assistant Attorney General also held this view. During these proceedings, I rejected this argument in its entirety. Thus, as a result of this litigation, the Pardon Attorney was ordered to comply with the requirements of the FOIA.

Having conceded that plaintiffs substantially prevailed against the Pardon Attorney, defendants argue that plaintiffs did not substantially prevail against the FBI. The extent to which a party must prevail against all defendants when that party has substantially prevailed against one defendant is unclear. In this case, however, I conclude that plaintiffs have substantially prevailed in the lawsuit as a whole.

Plaintiffs who undertake an FOIA action against one defendant should not be penalized for joining all defendants associated with the requested documents and for advancing colorable arguments against all defendants. Such action is reasonable and efficient in many cases because the incremental litigation costs of joining additional defendants or advancing other theories is minimal. In other cases the joinder is necessary because documents are held by two agencies and the privilege of one agency is often asserted by the other agency. Such was the case here when the FBI refused to release information that originated in the Pardon Attorney's office. Thus, even if plaintiffs had not substantially prevailed against the FBI in other respects, they should not be denied attorneys' fees in this lawsuit.

I find, however, that plaintiffs have substantially prevailed against the FBI in other respects. In reaching this conclusion, I reject the defendants' invitation to look only to the net result of records actually produced as a result of the court's order. Instead, I look to the information disclosures that are causally connected to the filing of this lawsuit. The FBI denied plaintiffs' request because of the pending investigation in the pardon proceedings. Plaintiffs appealed the FBI's decision and one day after the President made his decision to deny the Emprise pardon request, the Deputy Attorney General affirmed the decision of the FBI. One month later on October 28, 1977, plaintiffs filed this lawsuit.

The FBI argues that it was unnecessary for plaintiffs to file this suit because they would have received the information in any event upon the termination of the pardon proceedings. I disagree. At the time of the Deputy Attorney General's decision affirming the decision of the FBI, the pardon proceedings had terminated. Thus, the Deputy Attorney General could have sent the decision of the FBI back for the routine reprocessing because the investigation was over. Instead, the FBI took over one and a half years after the lawsuit was filed to reprocess the plaintiffs' request. I conclude that the filing of the suit had a causal relationship to the FBI's processing of the plaintiffs' request and the extent of the disclosure on that date. To the extent that it took the FBI over one year to process without informing plaintiffs of

14. *Coalition for Safe Power, Inc. v. Department of Energy*, No. 87-1380-PA (D.Ore., June 1, 1988).

their actions, the FBI should incur the costs caused by their delay and lack of candor with the parties. Also, the FBI released only 206 pages out of 392 pages in their files. Subsequent rulings from this court caused the FBI to release additional information. I find that a causal connection exists between the FBI's disclosures, whether voluntary or ordered, and the plaintiffs' filing and prosecution of the lawsuit. Thus, I conclude that plaintiffs have substantially prevailed against the FBI.

Once a court has concluded that the plaintiff has "substantially prevailed," the court determining an award of attorneys' fees under 5 U.S.C. § 552(a)(4)(E) (1982) should examine four factors enumerated during the Senate hearings:

> (1) The benefit to the public, if any, deriving from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding of the records sought had a reasonable basis in law.

S. Rep. No. 854, 93d Cong., 2d Sess. 19 (1974). These factors should be considered in light of the congressional policy in FOIA cases to encourage private persons to assist in furthering the national policy that favors the disclosure of government documents. See *Crooker*, 632 F.2d at 920.

Plaintiff's efforts in this case have caused disclosure of materials relating to the executive function of the pardon process. The power granted to the President to pardon individuals is a very important right, but it is unreviewable except in the broadest sense by the public at large in our political process. Thus, a substantial public interest exists to keep all pardon decisions, the decisionmaking process, and information available to the President at the time of his decision open to public scrutiny. In this case the President denied Emprise's request for a pardon. The only way for the public to develop informed views as to whether that decision was wise and proper is to obtain information available to the President about Emprise. This information included the identity of the individuals involved with the Emprise corporation and their relationship to the ownership of the entity. The disclosure of such information served a substantial public interest, whether or not the disclosure created a public controversy and whether or not plaintiffs actually used the disclosed materials in published news articles or editorial comment. In fact any suggestions that attorneys' fees hinge on the public controversy generated by a disclosure involving the pardon process,or upon actual use in news articles or commentary, are without merit. Congress did not intend to limit the award of fees to instances in which the President is caught in the midst of a controversy involving a pardon decision. The fact that no controversy resulted does not disprove the value of disclosures of the information to the public.

I also find that plaintiff's attempt to obtain information about the pardon process opened the door to future FOIA requests to the Pardon Attorney without the need for litigation about the Pardon Attorney's duties under the FOIA. This litigation therefore provided public benefit in the sense of its precedential effect. The public benefit in resolving the issue was substantial and material as it will expedite future attempts to obtain information about the pardon process.

Plaintiffs in this action are the Boston Globe, Inc. and one of its editors. The company is the publisher of *The Boston Globe*, a daily newspaper distributed in Massachusetts. The commercial benefit that would inure to plaintiffs in this action is not a real factor due to the nature of the newspaper business. Although it is the business of *The Boston Globe* to discover "newsworthy" events, the commercial benefit of a single discovery is minimal. Plaintiffs' interest in acquiring the information is important, however. The plaintiffs' purpose in acquiring the information is the dissemination to the public. This function is at the heart of our democratic process, which heavily depends upon the press to ferret out the facts. As noted in the discussion of the public importance of the disclosures that have occurred in this case, I find that the plaintiffs' interest in the information is a very important one.

Finally, I examine the government's reasonableness in withholding the information from plaintiffs. Defendants argue that they had a reasonable basis for all of their positions. The government's reasonableness with respect to the legal issue that the Pardon Attorney presents is a difficult question. Although it is likely that a reasonable person examining the authorities would conclude that the government would not prevail on the issue of a Pardon Attorney's exemption from the FOIA, the government had an argument that was not frivolous. The District of Columbia Circuit had decided the question against the Pardon Attorney and other authorities were not in their favor. See *Crooker v. Office of the Pardon*

Attorney, 614 F2d 825 (2d Cir. 1980). However, the government had a right to make the argument. Some of the other arguments advanced by the government though did not have a reasonable basis in law. The defendants' positions on the breadth of the FOIA exemptions and their conclusional statements that the information was exempt from disclosure without supporting affidavits were clearly without merit and added considerable delay to the resolution of this action. As stated in the government's memorandum regarding attorneys' fees, the information at stake in this case was not very sensitive or "revealing" in the way that would make it dangerous to disclose. This is a case that should have been settled during the early stages of the litigation. All that was required was a little cooperation from both sides. The lack of cooperation during these early stages delayed resolution of the merits. I conclude that the government's positions contributed to this delay. An example of such overly aggressive advocacy is the government's memorandum in opposition to attorney's fees. The government's attempt to argue that plaintiffs should receive no attorneys' fees for this litigation borders on the frivolous.

Weighing all of the factors, I conclude that plaintiffs should receive attorneys' fees and costs for this litigation.

* * *

COMMENT

Similarly, an FOIA plaintiff who, while acting as counsel for a newspaper, successfully sought Justice Department records concerning an investigation into alleged wrongful acts committed against the newspaper during a strike, won attorney's fees. Again the court noted the public benefit from disclosure of the information and the fact that the government had stalled for four years in producing the documents.[15]

Stalling is one of the great hazards of the FOIA. For this reason media and congressional critics doubt the effectiveness of the fee waiver amendments. Agencies are prepared to doubt the public importance of any information sought. If stalling doesn't work, all the crucial elements of a document may be excised. The Anti-Drug Abuse Act of 1986 (Pub.L. 99-570, 100 Stat. 3748) amended FOIA to authorize the FBI to refuse to acknowledge the existence of records pertaining to foreign intelligence, counterintelligence, or international terrorism for "as long as the existence of records remains classified information."

Agencies have also been criticized for the inconvenience and unfriendly atmospheres of their public reading rooms. The Federal Communications Commission has been among these.

The 1974 amendments to the act did something else of importance: Judges were empowered to review at their discretion *in camera* (in the secrecy of chambers) government documents in order to decide whether one or more of the nine exemptions had been properly applied. This provision was meant to overcome the effects of a Supreme Court decision in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973). There the Court applied Exemption 1 (national security) and Exemption 5 (intra- and interagency memos) to deny Congresswoman Patsy Mink and colleagues access to reports of a divided interdepartmental committee considering the advisability of underground nuclear tests on Amchitka Island in the Aleutians.

What Are Records?

FOIA applies to every agency, department, and government-controlled corporation of the executive branch of the federal government, including cabinet level departments such as State, Defense, Transportation, Interior, Justice, Treasury, etc. Independent regulatory agencies such as FCC, FTC and SEC are covered. Finally, the Post Office, NASA, the Civil Service Commission, and executive offices such as the Office of Management and Budget are also included. FOIA does *not* apply to the president himself or to his immediate staff. Nor does the act apply to Congress, the federal courts, and private corporations, unless their documents are filed with a federal agency. Of course FOIA does not apply to state or municipal records which are covered by state law.

FOIA has to do with agency *records*, material on file, not the opinions of an agency or what a reporter might expect to generate from a news interview. The

15. *Wayland v. Justice Department*, 13 Med.L.Rptr. 1367 (M.D.Tenn. 1986).

Supreme Court held in *Forsham v. Harris*, 445 U.S. 169, 185–86 (1980), that records of a federally funded university research project were not records subject to disclosure under FOIA unless they had been taken over by a government agency for its own review or use.

Nor does the act require an agency to retrieve or create records. A 1980 Supreme Court ruling stands for the proposition that materials created by or in the physical custody of an agency are not always "records" for purposes of FOIA; an agency must have exclusive control of the documents. Courts are also to consider the circumstances surrounding the creation of the documents and their transfer to an agency.[16]

In *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), FOIA requests by the Military Audit Project, the Reporters Committee, and *New York Times* columnist William Safire for copies of transcripts of telephone conversations made by Henry Kissinger while he was assistant to the president for national security and secretary of state were turned down on appeal to the State Department.

After Kissinger left office, the transcripts were donated to the Library of Congress on condition that they not be released for a specified period. A federal district court ordered the Library to return transcripts relating to Kissinger's role as secretary of state to the State Department because they were agency records subject to disclosure and were wrongly removed without permission. In the case of notes prepared in his role as national security adviser to the president, relief was denied. The court of appeals affirmed, and the Supreme Court granted certiorari.

Justice William Rehnquist for the Court found a way to block access to all parties. Courts may devise remedies and enjoin agencies, he said, only if an agency has 1) improperly 2) withheld 3) agency records. Safire sought a presidential adviser's notes, not agency records. MAP and the Reporters Committee sought records that were no longer in the control or custody of the agency, and the agency, in this case the State Department, was not obliged to retrieve documents that had escaped its possession. What Safire sought was in the possession of the State Department but outside of its control as material belonging to the president's immediate personal staff and, therefore, not agency material subject to FOIA. Possession without control was insufficient to make the documents records for purposes of the act.

Brennan and Stevens dissented in part because they disagreed with the majority's definition of "custody or control." Stevens feared that the ruling would encourage outgoing officials to remove damaging information from their files. An agency retains custody over anything it has a legal right to possess.

Others saw in Rehnquist's opinion a reversal of the presumption that the burden under FOIA is on the agency to prove that the withholding of information was justified. It may be very difficult, as a threshold requirement, for an FOIA plaintiff to show that agency records were improperly withheld. And how does a requester prove that records, if indeed they were under agency control in the first place, are subject to the required degree of agency control?

Courts have since ruled that the Council of Economic Advisers, existing solely to assist the president, is not an "agency" subject to FOIA;[17] and that a complete draft manuscript of the Air Force's official history of the Vietnam War was exempt from disclosure since disclosure would reveal the agency's deliberative process in editing and reviewing manuscripts.[18]

On the plus side, voice communications recorded aboard "Challenger" before it exploded and containing no information about the personal lives of the ill-fated astronauts or their families were not exempt from FOIA.[19]

These and hundreds of other cases suggest the complexity and the unpredictability of FOIA cases.

USING THE FOIA

A first step in using the Act might be to subscribe to the Washington-based Reporters Committee for Freedom of the Press handbook, *How to Use the Federal FOIA Act*, a publication of the FOIA Service Center. It provides sample letters for formal requests, appeals, waivers of fee, and federal district court complaints. It also explains how to use the related Privacy Act of 1974 (5 U.S.C.A. § 552a).

16. See also, *Goland v. CIA*, 607 F.2d 339 (D.C.Cir. 1978), cert. den. 445 U.S. 927 (1980).
17. *Rushforth v. Council of Economic Advisers*, 11 Med.L.Rptr. 2075, 762 F.2d 1038 (D.C.Cir. 1985).
18. *Dudman Communications Corp. v. Department of Air Force*, 13 Med.L.Rptr. 2450, 815 F.2d 1565 (D.C.Cir. 1987).
19. *New York Times v. NASA*, 14 Med.L.Rptr. 1487, 679 F.Supp. 33 (D.D.C. 1987), aff'd, 15 Med.L.Rptr. 2112, 852 F.2d 602 (D.C.Cir. 1988).

First try an informal telephone request, being as specific as you can about what you want, why you want it, and who you are. Blanket requests will fail. Each agency, bureau, or department will have an FOIA officer to help you get started. A written request will probably be asked for, and you will make that request by certified mail marked as an FOIA request. Technically the agency has a legal duty to reply within ten working days, but it will very likely extend that period arguing a backlog of requests. You should expect delays from the FBI, CIA, and State and Justice Departments. When you feel the delay has become unreasonably protracted, you may appeal in writing to the agency head who, in turn, is expected to respond within twenty working days. If that doesn't work, you may ask the Office of Information Law and Policy of the Department of Justice, a federal agency responsible for overall administration of the FOIA, for a review of your case. That office could pressure a recalcitrant agency to comply.

If you still have received no response, you are entitled under the act to bring suit in the most convenient federal district court with some expectation of an expedited hearing. The burden of proof for nondisclosure is on the government.

Agencies are authorized to charge reasonable fees for searching and copying, and estimates are available. State your pecuniary limits if funds are in short supply. Fee schedules for the various agencies are published in the *Federal Register*. If they are prohibitive for you and you are a journalist, author, or scholar, indicate your publication plans and ask that fees be waived or at least reduced. FOIA recognizes such requests where a public benefit is being served—although you shouldn't expect any uniformity of response across units of government. Possibly, a trip to inspect documents could be less expensive and more expeditious to your needs than having documents copied.

HOW SUCCESSFUL IS THE FOIA?

Litigation under the Exemptions

FOIA has created new attitudes toward public information in the minds of both record keepers and record seekers. In the beginning, businessmen and their agents and public interest groups, notably those led by Ralph Nader, made more use of the act than individual citizens or the press. That has been changing over the years.

Brief comments on the nine exemptions and the kinds of cases they have generated, particularly those involving the press, may be the key to understanding the act and its significance to media access and the public's right to know.

Exemption 1: National Security

This exemption is designed to prevent disclosure of properly classified records, the release of which would cause at least some "identifiable damage" to the national security, "(a) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (b) are in fact properly classified pursuant to such Executive Order."

An Executive Order on National Security Information, No. 12356, 3 C.F.R. § 166 (1982 Comp.), set out substantive and procedural criteria for withholding of national security information. Essentially the government must show that the information sought has been properly classified. The criteria survived constitutional challenge in a case involving the prior restraint of a former CIA agent's account of his work.[20]

Under the order, information may not be classified "unless its disclosure reasonably could be expected to cause damage to national security. * * * If there is reasonable doubt about the need to classify information, it shall be safeguarded as if it were classified" pending a determination within thirty days "by an original classification authority." If there is a "reasonable doubt" about the appropriate level of classification (top secret, secret, or confidential), the document is to be safeguarded at the highest level of classification—"top secret"—pending a decision within thirty days by the original classification authority.

Initial press interpretation of the order was that it would greatly increase the authority of the executive branch to classify documents where there was only the vaguest threat to national security. One might recall Justice Stewart's admonition in the *Pentagon Papers* case that "when everything is classified, then nothing is classified." A sense of what is or what

20. *McGehee v. Casey*, 718 F.2d 1137 (D.C.Cir 1983). See also, *Goldberg v. United States Department of State*, 818 F.2d 71 (D.C.Cir. 1987).

should be truly secret is lost, and leaks replace honest classification.

Certainly the order eliminates the standard of "identifiable damage" to the national security and the discretionary "public interest" balancing of earlier executive orders. It also retards the declassification process.[21]

The order tracked with congressional passage in June 1982 of the Intelligence Identities Protection Act which, although forsaking prior restraints, makes it a crime to reveal the names of U. S intelligence agents. Broad enough to ensnare unwary journalists, the law does require the showing of a *pattern of activities* "intending to expose covert agents." So keep a paper record of your purpose or intent.

It also tracked with the Supreme Court's holding in *Haig v. Agee.*[22] There the Court upheld the power of the State Department to revoke the passport of a citizen whose travels abroad might damage U. S. policy through exposure of CIA operations and agents. Chief Justice Burger, writing for the Court, placed such information outside the protection of the First Amendment.

"The protection accorded beliefs standing alone," said Burger, "is very different from the protection afforded conduct. Here, beliefs and speech are only part of respondent's campaign, which presents a serious danger to American officials abroad and to the national security."

In spite of strong support from the major networks, news magazines, newspapers, wire services, and professional organizations across a spectrum of media, Samuel Loring Morison's conviction under the Espionage Act for his conduct in passing secret defense information to a British publication, *Jane's Defence Weekly*, was affirmed by the Fourth Circuit Court of Appeals (*U.S. v. Morison*, 15 Med.L.Rptr. 1369, 844 F.2d 1057, 1988).

Speaking for the court Judge Russell said:

> The defendant would deny the application of the statute to his theft because he says that he did not steal the material "for private, covert use in illegal enterprises" but in order to give it to the press for public dissemination and information. He claims that to criminalize his conduct under section 641 would be to invade his first amendments rights. The mere fact that one has stolen a document in order that he may deliver it to the press, whether for money or for other personal gain, will not immunize him from responsibility for his criminal act. To use the first amendment for such a purpose would be to convert the first amendment into a warrant for thievery. As the Supreme Court made clear in *Branzburg*, 408 U.S. 665, the First Amendment may not be used for such a sordid purpose, either to enable the governmental employee to excuse his act of theft or to excuse him, as in *Snepp* and *Marchetti*, from his contractual obligation.
>
> Actually, it may be noted parenthetically that the government contends, and the record affords substantial evidence in support of such contention, that the defendant in this case was not fired by zeal for public debate into his acts of larceny of government property; he was using the fruits of his theft to ingratiate himself with one from whom he was seeking employment. It can be said that he was motivated not by patriotism and the public interest but by self-interest.

Cases involving authors Frank Snepp and Victor Marchetti were based on an earlier executive order requiring officials who handle highly sensitive material to sign an enforceable agreement that even after leaving office they will not say or write anything on national security matters without official clearance. The order applies most directly to intelligence officers, State and Defense Department personnel, and employees of the White House.

Although there was no classified information in Frank Snepp's account of America's shameful flight from Saigon, the Supreme Court, without written or oral arguments, reinstated a federal district court ruling stripping Snepp of $140,000 in royalties from his book, *Decent Interval*, and enjoining further disclosures of his CIA experiences. Snepp, said the Court, had entered into a secrecy agreement with the CIA and had a "fiduciary obligation" to submit his manuscript for prepublication review.[23] Many saw such "censorship for life" as the equivalent of Britain's Official Secrets Act. Former CIA Director Stansfield Turner, at whose direction the agency went after Snepp, found later to his chagrin that the order likewise applied to his own autobiography, *Secrecy and Democracy*. Hundreds of manuscripts have since been reviewed by the CIA alone, and Turner has been moved to write that "there is no check on the arbitrariness of the CIA's censorship process. Giving bureaucrats that kind of power over hundreds of thousands of public servants is dangerous. It could result in a reduced flow of unclassified

21. Peterzell, *The Government Shuts Up*, Columbia J.Rev. (July/August 1982), 31.
22. 453 U.S. 280, 101 S.Ct. 2766 (1981).
23. *Snepp v. United States*, 444 U.S. 507, 100 S.Ct. 763 (1980).

information to Americans that more than offsets any secrets that may be preserved." [24]

There was classified material in the book, *The CIA and the Cult of Intelligence* by Victor Marchetti and John Marks, but before the federal courts could decide what deserved classification and what did not, the book was published with 168 blank spaces.[25] A rather chilling result.

It is clear that the continuing problem with Exemption 1 will be the inescapable deference paid government "expertise" in the national security area. In the ludicrous "Glomar Project," a project jointly financed by the CIA and the late Howard Hughes to raise an obsolete Russian submarine from the ocean floor, but presented to the public as a deep sea mining project, the public was dealt out.

"It is well established," said a federal appeals court in the case, "that summary judgment is properly granted in Exemption 1 cases without an *in camera* inspection or discovery by the plaintiffs when the affidavits submitted by the agency are adequate to the task." [26] The same court had said earlier that in making a *de novo* determination the court must first "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." [27] And "* * * Congress intended reviewing courts to respect the expertise of an agency; for us to insist that the agency's rationale * * * is implausible would be to overstep the proper limits of the judicial role in FOIA review." [28]

The Glomar case gave life to the term "Glomarization," meaning that an agency is permitted to "neither confirm nor deny" the existence of a document, although an agency could have to justify such a response.[29] The government may also have to justify denying an FOIA claimant access to documents when that claimant files a motion for a Vaughn Index,"[30] an item-by-item justification by the government of its withholding decisions.

Exemption 2: Agency Rules

This provision exempts matters "related solely to the internal personnel rules and practices of an agency."

Department of the Air Force v. Rose, 425 U.S. 352 (1976), was an Exemption 2 case. The Court said that it would exempt trivial matters "in which the public could not reasonably be expected to have an interest," and this would relieve an agency of having to maintain unnecessary public files, but where there was "a genuine and significant public interest" disclosure would be compelled—except "where disclosure may risk circumvention of agency regulation." This equivocation is reflected in court decisions. Courts are divided on the extent to which Exemption 2 authorizes the withholding of portions of agency manuals where disclosure would risk divulging the agency's investigative or prosecutorial strategies.

A case in point involved a manual of the Bureau of Alcohol, Tobacco and Firearms—"Raids and Searches (Special Agent Basic Training—Criminal Enforcement)." In *Hardy v. Bureau of Alcohol, Tobacco, and Firearms*, 631 F.2d 653 (9th Cir. 1980) the court made a distinction between "law enforcement" and "administrative materials." " 'Law enforcement' materials," it said, "involve methods of enforcing the laws, however interpreted, and 'administrative' materials involve the definition of the violation and the procedures required to prosecute the offense. All administrative materials, even if included in staff manuals that otherwise concern law enforcement, must be disclosed unless they come under one of the other exemptions of the act. Such materials contain the 'secret law' which was the primary target of the act's broad disclosure provisions."[31] "* * * Materials that solely concern law enforcement are exempt under Exemption 2 if disclosure may risk circumvention of agency regulation."

But a week after *Hardy* was announced, that part of the same training manual dealing with the surveillance of premises and persons was held by the D.C. Circuit Court of Appeals not to be exempt under Exemption 2. "There can be little doubt," said the court, "that citizens have an interest in the manner in which they may be observed by federal agents. * * * Neither exemption (b)(2) nor any other exemption prevents a citizen from satisfying his cu-

24. "Why Secrets Leak From the Government's Censorship Labyrinth," *Minneapolis Star Tribune*, Nov. 1, 1988.
25. *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972).
26. *Military Audit Project v. Casey*, 656 F.2d 724 (D.C.Cir. 1981).
27. *Ray v. Turner*, 587 F.2d 1187 (D.C.Cir. 1978).
28. *Hayden v. National Security Agency*, 608 F.2d 1381 (D.C.Cir. 1979).
29. *Phillippi v. CIA*, 546 F.2d 1009 (D.C.Cir. 1976); *Marrera v. U.S. Department of Justice*, 622 F.Supp. 51 (D.C.Cir. 1985).
30. *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir. 1973), cert. den. 415 U.S. 977 (1974).
31. *Cox v. United States Department of Justice*, 576 F.2d 1302 (8th Cir. 1978).

riosity on these matters. The contents of this document * * * pertaining to surveillance of the public cannot possibly be assimilated to mere 'internal housekeeping' concerns." [32]

Courts, obviously, are trying to find that delicate balance between the genuine needs of government agencies and a legitimate public interest. [33]

Exemption 3: Statutes

Under this exemption, called by the Reporters Committee the "catch-all" exemption and a major access loophole, information need not be disclosed if "specifically exempted from disclosure by statute * * * provided that such statute (a) [clearly] requires that the matters be withheld from the public or (b) establishes particular criteria for [discretionary] withholding or [narrowly specifies] particular types of [informational] matters to be withheld."

The Supreme Court liberally construed Exemption 3 in *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975). There the plaintiff sought FAA reports analyzing the operation and maintenance performance of commercial airlines. Section 1104 of the Federal Aviation Act permitted the administrator to withhold reports if disclosure was not in the public interest and if a person contributing information objected. The Air Transport Association objected, arguing that without confidentiality the performance program would be endangered.

Robertson won at district and appeals court levels, but the Supreme Court reversed. Chief Justice Burger wrote for the Court that the information sought was expressly exempt by statute, and the statute , because it ensured a flow of information to the agency, was not inconsistent with the disclosure policy of FOIA. In a concurring opinion, Justice Stewart said that the only determination "in a district court's *de novo* inquiry is the factual existence of such a statute, regardless of how unwise, self-protective, or inadvertent the enactment might be."

Congress reacted to *Robertson* by amending FOIA in 1976 to narrow the scope of the information it shielded. As amended, Exemption 3 requires that the government show (1) that the requested information falls within the scope of the statute cited, and (2) that the statute either vests no discretion to disclose (that is that it mandates secrecy), or that the information fits criteria delineated to authorize withholding. See *Lessner v. U.S. Department of Commerce*, 827 F.2d 1333 (9th Cir. 1987).

In 1980 a federal district court in New York ruled that the CIA could not use the "intelligence sources and methods" language of its governing statute, 50 U.S.C.A. sec. 403 (d)(3), to protect authors, books, and publishers involved in clandestine propaganda activities from disclosure unless by so doing it would disclose intelligence sources and methods. [34] Five years later, the Supreme Court held that Section 102(d)(3) of the National Security Act, making the director of the CIA "responsible for protecting intelligence sources and methods from unauthorized disclosure," was a statutory exemption pursuant to Exemption 3. The director, the Court added, has broad authority to protect from disclosure all sources of intelligence, not just those sources to which the CIA must guarantee confidentiality in order to obtain information. [35]

Some statutes, however, may not qualify as exempting statutes because they are too broad to meet the requirement for identifying particular matters to be withheld. [36]

Federal agencies have cited more than 100 statutes to justify withholding. Courts have held records exempt under the Consumer Product Safety Act, [37] the Census Bureau Records Act, [38] the Tax Returns law, [39] Patent Applications law, [40] the Postal Service

32. *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 670 F.2d 1051 (D.C.Cir. 1981).
33. *Founding Church of Scientology of Washington v. Smith*, 721 F.2d 828 (D.C.Cir. 1983).
34. *Navasky v. CIA*, 499 F.Supp. 269 (S.D.N.Y. 1980).
35. *Sims v. CIA*, 11 Med.L.Rptr. 2017, 471 U.S. 159 (1985). A 1984 amendment to the National Security Act removes from the ordinary search and review requirements of FOIA sensitive CIA "operational files," dealing mainly with foreign and counterintelligence operations. See *CIA Information Act*, Pub.L.No. 98-477, 98 Stat. 2009 (1984).
36. *Washington Post Company v. U.S. Department of State*, 685 F.2d 698 (D.C.Cir. 1982). *Reporters Committee v. U.S. Department of Justice*, 816 F.2d 730 (D.C.Cir. 1987). According to *CNA Financial Corp. v. Donovan*, 830 F.2d 1132 (D.C.Cir. 1987), the Trade Secrets Act is not an Exemption 3 statute.
37. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).
38. *Seymour v. Barabba*, 559 F.2d 806 (D.C.Cir. 1977).
39. *Zale v. Internal Revenue Service*, 481 F.Supp. 486 (D.D.C. 1979).
40. *Irons & Sears v. Dann*, 606 F.2d 1215 (D.C.Cir. 1979).

Act,[41] and the Rules of Criminal Procedure pertaining to grand jury secrecy.[42] Courts in these cases are faced with the difficult task of weighing one federal law against another and then rationalizing their choice.

Exemption 4: Trade Secrets

Exempted under 4 are "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

Trade secrets would be, for example, secret formulae or customer lists, valuable in day-to-day transactions and not generally known in the trade. Commercial or financial information covered by the Exemption is *confidential* material, the disclosure of which "would be likely to cause substantial harm to the competitive position of the person from whom the information was obtained" or "impair the government's ability to obtain necessary information in the future." *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C.Cir. 1974). In one case exempted information was said to include the results of innovation by a firm or a substantial effort to improve its product, but trade secrets were limited to information relating directly to the production process.[43]

"Specific factual or evidentiary material"[44] must be submitted to sustain the burden of proof under Exemption 4, a burden borne by the federal agency. "Conclusory and generalized allegations are * * * unacceptable as a means of sustaining the burden of nondisclosure under the FOIA, since such allegations necessarily elude the beneficial scrutiny of adversary proceedings, prevent adequate appellate review and generally frustrate the fair assertion of rights under the [a]ct."[45]

Moreover, substantial competitive harm can only be shown by proving that persons from whom documents have been obtained by the government actually face competition.[46]

Before 1979, persons supplying information to the government would frequently sue to block disclosure to third parties. These were called reverse FOIA suits. In *Chrysler Corporation v. Brown*, 4 Med.L.Rptr. 2441, 441 U.S. 281 (1979), the U. S. Supreme Court held that FOIA does not create a private right of action to enjoin or prevent an agency from releasing documents covered by one of the nine exemptions. Information suppliers could, of course, review an agency's decision to release Exemption 4 documents under Section 10(e) of the Administrative Procedures Act, 5 U.S.C. § 706(2)(A). That section authorizes a court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

A decision to assert an FOIA exemption is at the discretion of an agency; it is not mandatory that an agency do so, as a reverse FOIA suit would imply. But it would be an abuse of discretion to release documents covered by the Trade Secrets Act, 18 U.S.C. § 1905. A submitter of confidential business information, such as customer lists, can invoke the Trade Secrets Act to bar disclosure by an agency unless that disclosure is authorized by law or by some agency regulation that is in turn authorized by Congress.

Neither the FOIA nor the Housekeeping Statute, 5 U.S.C. § 301, are congressional grants of authority for an agency to issue regulations exempting materials from the Trade Secrets Act's nondisclosure rule. The Court held essentially that a statute authorizing an agency to collect information is, by definition, authorization to disclose that information.

Justice Rehnquist's opinion for the Court in *Chrysler* is a complex analysis of FOIA's legislative history, especially with reference to Exemption 4, but its essence is probably contained in footnote 12's allusion to a 1965 Senate Report on the bill:

> It is not an easy task to balance the opposing interests [secrecy v. disclosure], but it is not an impossible one

41. *National Western Life Insurance Co. v. United States*, 512 F.Supp. 454 (N.D.Tex. 1980).

42. *Fund for Constitutional Government v. National Archives and Records Service*, 485 F.Supp. 1 (D.D.C. 1978), aff'd in part, rev'd in part, 656 F.2d 856 (D.C.Cir. 1981).

43. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C.Cir. 1983).

44. *Pacific Architects and Engineers, Inc. v. The Renegotiation Board*, 505 F.2d 383 (D.C.Cir. 1974).

45. *National Parks and Conservation Association v. Kleppe*, 2 Med.L.Rptr. 1245, 547 F.2d 673 (D.C.Cir. 1976). See also, *Continental Stock & Transfer Co. v. SEC*, 566 F.2d 373 (2d Cir. 1977).

46. Ibid.

> either. It is not necessary to conclude that to protect one of the interests, the other, must of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, *yet places emphasis on the fullest possible disclosure.* [Emphasis added.][47]

Courts must decide if information falls within an FOIA exemption. If not, it must be disclosed. Courts cannot allow refusals to disclose nonexempt information.

Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), provides that the Commission has power to make public all information it has obtained, except trade secrets and names of customers. In *Interco v. FTC*, 478 F.Supp. 103 (D.D.C. 1979), both district and circuit courts held that § 6(f) was authorization for the FTC to release materials within the scope of FOIA Exemption 4 unless such materials constitute trade secrets or customer lists. The Trade Secrets Act, therefore, does not prevent the FTC from releasing to the public confidential business information other than trade secrets and business lists.

The FTC had defined trade secrets to mean only information with enduring, intrinsic value, primarily secret product formulae, processes, or other secret technical information. The courts in *Interco* accepted that definition.

It should not be surprising that concerted efforts are continually made to exempt business information from the disclosure requirements of FOIA. In the first four years of the act, corporations were by far its largest users. In the fall of 1980, a House-Senate Conference Committee amended the Federal Trade Commission Act to exempt large areas of FTC documents relating to pricing policies, product safety, and truth-in-advertising. In June 1981, another Conference Committee exempted large areas of documents held by the Consumer Product Safety Commission, including information relating to safety and warranty data. In 1986, President Reagan's Executive Order 12600 instructed agency heads to "establish procedures to notify submitters of records containing confidential commercial information * * * when those records are requested." This amended the FOIA by executive fiat. And in July 1981, Congress amended the Omnibus Tax Bill, exempting from disclosure the auditing standards and rules adopted by the Internal Revenue Service.

Exemption 5: Agency Memos

This exemption prevents disclosure of "interagency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency."

As construed in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), Exemption 5 is intended to protect "predecisional communications," but not "communications made after the decision and designed to explain it." The Court reasoned that disclosure of memoranda generated before the deliberative process was complete might diminish the quality of decision making. Advisers might be less candid if their recommendations were subject to public scrutiny.

Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975), also gave the exemption a broad construction. Only the report of an agency vested with the final decisional authority is releasable. Memos, recommendations, opinions, policy statements expressly mentioned in a report may be releasable (barring a legitimate Exemption 7 claim) because they constitute the basis for final decision.

If no memorandum or other document explains the final decision, the agency has no obligation to prepare one under FOIA.

Exemption 5 has been called the "executive privilege" exemption. It protects working papers, studies, and reports circulated among agency personnel prior to the making of a decision. Its purpose is to encourage frank discussion. For example, FOIA requires that university research grant applications and progress reports submitted to the federal government be made public on demand. Letters of evaluation, however, that are part of the peer review process, may be kept secret as intra-agency memoranda.[48] Purely factual information, such as names and addresses of unsuccessful applicants for federal funds, is not exempt from disclosure. Nor are factual portions of predecisional documents generally exempt, unless their disclosure would breach a promise of

47. S.Rep.No. 813, 89th Cong., 1st Sess., 3 (1965).
48. *Washington Research Project v. HEW*, 504 F.2d 238 (D.C.Cir. 1974).

confidentiality and diminish the agency's ability to obtain similar information in the future or unless a compilation of facts would expose the deliberative process itself. A federal court has held that factual or investigative information in the deliberative process, if it can be segregated, is not exempt from disclosure.[49]

Privileges well settled in case law may be part of Exemption 5, especially where civil discovery is involved. For example, confidential unsworn statements made to Air Force crash investigators which were privileged as to pretrial discovery did not have to be disclosed. They were exempt as interagency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency concerned.[50] The Supreme Court has also recognized a qualified privilege for government-generated commercial information, the disclosure of which might put it at a competitive disadvantage in the awarding of contracts.[51]

Federal district courts, *in camera*, may decide whether predecisional policy statements, proposals, and letters between agency officials contain factual material that is not exempt.[52]

The distinction between predecisional and postdecisional material is the key to understanding Exemption 5. A Watergate Special Prosecution Force memorandum, expressly incorporated into the group's required report to Congress recommending that Richard Nixon not be indicted, was held disclosable, Exemption 5 notwithstanding, because it was part of a final opinion. Standing alone, it would have been exempt as a "predecisional intra-agency legal memorandum."[53]

In *Bristol-Myers Co. v. FTC*, 598 F.2d 18 (D.C.Cir. 1978) the court of appeals held that the FTC's "Blue Minutes," which included written explanations by commissioners of their decisions not to include certain charges in a complaint or not to proceed by rulemaking, would have to be disclosed.

But Exemption 5 does protect against disclosure the attorney-client privilege—communications between an agency and its attorney or another agency acting as attorney, such as the U.S. Department of Justice—or an attorney's work-product if disclosure would reveal trial strategies.

National Public Radio reporter Barbara Newman found herself blocked by Exemption 5 when she tried to get information from the Department of Justice concerning its investigation into the mysterious death of Karen Silkwood, employee of a plutonium manufacturer. Silkwood, suspected of being contaminated by plutonium, died in a car accident while on her way to conduct business on behalf of her labor union and to talk with a *New York Times* reporter. There were suspicions that her car had been forced off the highway, and a file of documents she was carrying was never recovered.

Using FOIA, Newman sought access to files marked "death investigation" and "contamination." The former was denied on grounds of Exemption 5, the latter on grounds of Exemption 7.

Portions of the "death investigation" file consisted of the working papers of Department of Justice attorneys, including notes and observations for personal use in analyzing evidence and legal issues, said a federal district court. They were clearly exempt under the *NLRB v. Sears* standard applicable to "memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case, his litigation strategy." *National Public Radio v. Bell*, 431 F.Supp. 509 (D.D.C. 1977).

When *Rolling Stone* magazine tried to find out why so many major news media could be persuaded by the CIA not to publish information about the "Glomar Project"—Jack Anderson was not and broke the story—it was denied access to the full record on the basis of Exemptions 1, 3, 5, and 6. The material was said to contain information properly classified and therefore within the scope of Exemption 1, an argument similar to that pressed in *Military Audit Report v. Casey*. Because release of the information could reasonably be expected to lead to "disclosure of intelligence sources and methods," protected by separate federal statutes, it was also exempt under FOIA Exemption 3. As to Exemption 5, the court explained as follows:

49. *Wolfe v. HHS*, 630 F.Supp. 546 (D.D.C. 1985).
50. *United States v. Weber Aircraft*, 465 U.S. 792 (1984). See also, *Badhwar v. U.S. Department of Air Force*, 829 F.2d 182 (D.C.Cir. 1987).
51. *Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979).
52. *Union of Concerned Scientists v. Atomic Energy Commission*, 2 Med.L.Rptr. 1458, 499 F.2d 1069 (D.D.C. 1974).
53. *Niemeier v. Watergate Special Prosecution Force*, 3 Med.L.Rptr. 1321, 565 F.2d 967 (7th Cir. 1977).

> Having examined these documents, the Court has concluded that they are of the type protected by Exemption 5. The disclosure of these documents would reveal the frank exchange of views among high level government officials and would inhibit the candid expression of ideas crucial to the decisionmaking process. *Mead Data Central, Inc. v. United States Department of the Air Force*, 566 F.2d 242, 256 (D.C.Cir. 1977). While some of the information contained in these documents is of a factual nature, the disclosure of any meaningful parts of the documents would impinge upon policymaking processes within the protection of Exemption 5. *Phillippi v.* CIA, 6 Med.L.Rptr. 1673 (D.D.C. 1980), aff'd, 655 F.2d 1325 (D.C.Cir. 1981).

Exemption 6: Personal Privacy

Exempted are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

In the reports accompanying the original FOIA, Congress explicitly authorized the courts to employ a balancing of interests test. The Supreme Court obliged in *Department of the Air Force v. Rose* where it held that mere storage of information in a personnel or related file did not insulate it. "Rather, Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.' The device adopted to achieve that balance was the limited exemption, where privacy was threatened—for 'clearly unwarranted' invasions of personal privacy." Not all invasions of privacy are meant to be unlawful under FOIA.

Litigation under this exemption thus devolves upon a *de novo* judicial weighing of the public interest served by disclosure against the private interest served by nondisclosure. Several considerations may tip the balance one way or the other:

a. Some courts gauge public interest by the purpose to which information will be put. For example, disclosure which would further the requester's commercial interests has been accorded less weight than disclosure for less materialistic purposes. *Wine Hobby U.S.A., Inc., v. IRS*, 502 F.2d 133 (3d Cir. 1974). The Supreme Court did emphasize in *Rose* that FOIA should be applied evenhandedly "to any purpose." The use in *Wine Hobby* of a "properly and directly concerned" test for disclosure is not supported by the legislative history of FOIA, and it blunts the purpose of the act.

b. "Clearly unwarranted invasions of privacy" have been narrowed to protect only "intimate personal details" in personnel, medical, or related files, and the courts may determine *de novo* whether exempt portions can be segregated.

c. That a promise of confidentiality would be breached by disclosure adds weight to a claim of exemption. But the mere fact that a supplier was assured confidentiality is insufficient in itself, *Ackerly v. Ley*, 420 F.2d 1336 (D.C.Cir. 1969). This is also true in Exemption 4 cases where the issue of confidentiality arises more frequently. See also, *Kurzon v. Health and Human Services*, 649 F.2d 65 (1st Cir. 1981). Names and addresses of unsuccessful research grant applicants are not exempt as "personnel, medical or similar" files.

A 1982 case expanded the scope of the language "personnel, medical and similar files." State Department records indicating whether or not a person holds a U.S. passport were said to be "similar" files and exempt where a privacy interest would outweigh the public interest in disclosure. The *Washington Post* was trying to establish the citizenship of two former Iranian officials. The government, in invoking Exemption 6, said that it was concerned about the safety of the two men. Courts will decide what constitutes a clearly unwarranted invasion of an individual's privacy, and that threat must be real. The balance, the Court added, is heavily in favor of disclosure. *Department of State v. Washington Post*, 456 U.S. 595 (1982).

"* * * Under Exemption 6," said the D.C. Circuit Court of Appeals, "the presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Washington Post Co. v. Department of HHS*, 690 F.2d 252 (D.C.Cir. 1982). "The balance struck under FOIA Exemption six," said the Eleventh Circuit Court of Appeals, "overwhelmingly favors the disclosure of information relating to a violation of the public trust by a governmental official, which certainly includes the situation of a misuse of public funds or facilities by a Major General of the United States Army." *Cochrane v. United States*, 770 F.2d 949 (11th Cir. 1985).

Small Business Administration records that contain the names of noncorporate recipients of funds under one of its programs and that reveal amounts

and balances of noncorporate loans classified as "delinquent," "in liquidation," or "charge off," but are not subject to public legal proceedings, were said *not* to be "similar" files protected against disclosure under Exemption 6. *Miami Herald Publishing Co. v. U.S. SBA*, 670 F.2d 610 (5th Cir. 1982).

In an earlier case involving the Small Business Administration, a federal district court awarded attorney's fees to the *Miami Herald* in view of the public benefit derived from publication of the information and the unreasonableness of the government in trying to withhold it.[54]

The overall purpose of Exemption 6 is to protect information of an intimate nature. Sometimes this can be achieved by deleting names or otherwise identifying data before a document is released. Those applying for government contracts, research funds, or other government benefits are deemed to have waived their rights to privacy.

But information having to do with medical conditions, job evaluation, welfare payments, and the legitimacy of children generally will be protected by Exemption 6.

Since the "clearly unwarranted invasion of personal privacy" language of Exemption 6 is found in the Federal Privacy Act of 1974 and in the language of Exemption 7—except for the word "clearly"—we are not done with it yet. It has been argued that the absence of the word "clearly" in Exemption 7(c), which follows, makes that exemption a better protector of privacy.

Exemption 7: Police Investigations

This exemption protects investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (a) interfere with enforcement proceedings, (b) deprive a person of a right to a fair trial or an impartial adjudication, (c) constitute an unwarranted invasion of personal privacy, (d) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (e) disclose investigative techniques and procedures, or (f) endanger the life or physical safety of law enforcement personnel.

More economical language in the original exemption was expanded in the 1974 amendments to FOIA specifically to override increasingly broad interpretations which were bringing more and more information under the protective umbrella of Exemption 7.

To qualify under this exemption, the government must first show that the record is both "investigatory" and contained in a file "compiled for law enforcement purposes." Law enforcement embraces civil, criminal, administrative, and judicial proceedings. If the material passes this threshold to qualify as exempt, then it must in addition fall within one of the six enumerated categories causing a specified harm. Clauses (a), (c), and (d) have generated the most litigation.

Exemption 7 allows but does not require the withholding of investigatory files, whole or in part, compiled in response to suspicions that there have been violations of federal law or of national security.[55] And the law has been interpreted to apply to all federal, state, and local law enforcement records under the control of the federal government.

While most records having to do with current investigations of specific crimes or administrative enforcement proceedings (interviews, affidavits, agency notes) are exempt, rap sheets, arrest and conviction records, department manuals, personnel rosters, and other routine compilations and records are not.

In 1987, the D.C. Circuit held that "rap sheet" records containing information about arrests, indictments, acquittals, convictions, or sentences, whether state, local, or federal law enforcement or court records held by the U.S. Attorney General, are subject to disclosure under FOIA. *Reporters Committee for Freedom of the Press v. U.S. Dept. of Justice*, 14 Med.L.Rptr. 1908, 831 F.2d 1124 (D.C.Cir. 1987). A CBS reporter had sought information concerning former Congressman Daniel Flood's alleged organized crime associates. The Justice Department denied access claiming Exemptions 6 and 7(c). In arguments before the Supreme Court on December 7, 1988, the government saw "a great potential for mischief" in the reporter's request. The

54. *Miami Herald Publishing Co. v. Small Business Administration*, 6 Med.L.Rptr. 1686 (D.Fla. 1980).
55. *Pratt v. Webster*, 673 F.2d 408 (D.C.Cir. 1982); *Abramson v. FBI*, 566 F.Supp. 1371 (D.D.C. 1983).

Reporters Committee saw a distinct public interest in the criminal record of one selling missile and tank parts to the federal government. Four months later, the Court held that FBI criminal identification records or "rap sheets," containing descriptive information as well as a history of arrests, charges, convictions, and incarcerations, are exempt under 7(C). Such information, said the Court, falls outside the ambit of the public interest protected by FOIA and could constitute an invasion of privacy. *Justice Department v. Reporters Committee*, 16 Med.L.Rptr. 1545 (1989).

In *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), the Supreme Court held that copies of witness statements, which NLRB rules preclude from discovery prior to unfair labor practices hearings, were exempt under FOIA Exemption 7(a).

When a plaintiff in an FTC antitrust suit filed an FOIA request for documents that it had failed to request during discovery, a federal district court, discussing Exemption 7(a) said:

"It is clear that where there is an ongoing administrative enforcement proceeding during which plaintiff has been provided with an opportunity to engage in discovery, plaintiff may not use the FOIA to augment the material produced by discovery." [56] So records on the case in FTC investigatory files were properly exempted from disclosure.

All FBI investigatory records are, for purposes of satisfying FOIA Exemption 7, "compiled for law enforcement purposes." The legality of a particular investigation or the sufficiency of a connection between the investigation and federal law enforcement goals generally do not matter. The FBI, however, must still satisfy Exemption 7's remaining criteria in order to block disclosure. [57]

Clause (a) exemptions generally apply only when an enforcement proceeding has actually begun or when it is clear that an ongoing investigation will lead to an enforcement proceeding. When an enforcement proceeding has concluded, for example, after trial, conviction, and sentencing, the exemption does not apply.

Clause (c) exemptions are designed to prevent unwarranted invasions of personal privacy through disclosure of investigatory records compiled for law enforcement purposes. But the seriousness of the invasion is to be weighed against the public interest to be served by disclosure. [58] For example, the Sixth Circuit approved the redacting or obliteration of information contained in file material collected during the discovery process in civil cases arising out of the 1970 killings by the National Guard of four Kent State University students. The court balanced First Amendment interests against privacy rights and the interests of the law enforcement agencies involved. [59]

Revealing that a third party has been the subject of an FBI investigation would likely prove embarrassing to a person of normal sensibilities. The Seventh Circuit upheld the FBI's refusal to confirm or deny the existence of such a record on the grounds that "merely confirming that a particular file exists and stating the applicable exemption (6 and 7) could reveal too much information. * * *" [60] Highly visible public persons may have less claim to these protections, e.g., candidates for public office, [61] or high level FBI agents "found to have participated deliberately and knowingly in the withholding of damaging information in an important inquiry. * * *" [62]

A hard blow against access was struck by the U.S. Supreme Court in May 1982 when it upheld Exemption 7(c) claims by the FBI against requests of an independent journalist that FBI documents on Nixon Administration critics be made public. The D.C. Circuit, reversing the district court, had held that FBI information on certain public personalities, which was prepared at the request of the White House and which had not been shown to have been compiled for law enforcement purposes, even though invasive of privacy, was not exempt from disclosure under 7(c). A divided Supreme Court in turn reversed the court of appeals.

Among those on the "enemies list" were Kenneth Galbraith, Reinhold Niebuhr, Benjamin Spock, and Cesar Chavez. The crux of the Court's holding seemed

56. *Heublein, Inc. v. FTC*, 457 F.Supp. 52, 55 (D.D.C. 1978).
57. *Abrams v. FBI*, 511 F.Supp. 758 (D.Ill. 1981).
58. *Alirez v. NLRB*, 8 Med.L.Rptr. 1517, 676 F.2d 423 (10th Cir. 1982).
59. *Krause v. Rhodes*, 8 Med.L.Rptr. 1130, 671 F.2d 212 (6th Cir. 1982).
60. *Antonelli v. FBI*, 721 F.2d 615, 618 (7th Cir. 1983).
61. *Common Cause v. National Archives and Records Service*, 628 F.2d 179 (D.C.Cir. 1980).
62. *Stern v. FBI*, 737 F.2d 84 (D.C.Cir. 1984).

to be that material originally exempt under 7(c) doesn't lose that exemption simply because it is transmitted to a second agency in slightly different form. And, of course, the Court assumed that the original compilation was for law enforcement purposes.

"We are of the view," said Justice White for the Court, "* * * that the statutory language is reasonably construable to protect that part of an otherwise non-exempt compilation which essentially reproduces and is substantially the equivalent of all or part of an earlier record made for law enforcement uses. * * * The (1974) amendment requires that the government 'specify some harm in order to claim the exemption' rather than 'affording all law enforcement matters a blanket exemption.' * * * The enumeration of these categories of undesirable consequences indicates Congress believed the harm of disclosing this type of information would outweigh its benefits. There is nothing to suggest, and no reason for believing, that Congress would have preferred a different outcome simply because the information is now reproduced in a non-law enforcement record. * * * No other provision of FOIA could compensate for the potential disruption in the flow of information to law enforcement agencies by individuals who might be deterred from speaking because of the prospect of disclosure." *FBI v. Abramson*, 456 U.S. 615 (1982).

Joined by Justices Blackmun, Brennan, and Marshall, Justice Sandra O'Connor dissented and charged the majority with rewriting FOIA's Exemption 7 to conform to its concept of public policy. The exemption's legislative history, she said, left the Court "no reason for overriding the usual presumption that the plain language of a statute controls its construction." Furthermore, doubts ought to be resolved in favor of full agency disclosure. With her three dissenting colleagues, O'Connor agreed with the district court that the documents in the case had been compiled for political, not "law enforcement," purposes.

Taking umbrage and rejecting the premise that the meaning of the statute was plain, Justice White, in a footnote (fn. 7), called much of Justice O'Connor's dissent "rhetorical and beside the point."

A federal district court was upheld in refusing to grant a television reporter's FOIA request for correspondence between a U.S. Attorney's office and counsel for a former state governor who was seeking reelection. The documents sought constituted an "investigatory record compiled for law enforcement purposes." Disclosure would lead the public to infer a link between the governor and criminal wrongdoing, though no such information appeared in the file, and it would constitute an unwarranted invasion of the governor's privacy.[63]

Not all FOIA suits turn out as badly for access rights. When *Playboy* sued the Justice Department for disclosure of a task force report on Gary Thomas Rowe, an FBI informant within the Ku Klux Klan, the department interposed Exemptions 2, 3, 5, 6, and 7(a–d). The D.C. District Court found that Exemptions 2 (internal rules and practices of an agency) and 6 (unwarranted invasion of personal privacy) did not apply to any portion of the report. Nor would Exemption 5 block full disclosure since factual and informational portions of the report were reasonably segregable from those portions which contained the task force's advice, conclusions, and recommendations. Similarly, Exemption 3 was said to apply only to that information contained in the report which related solely to a grand jury proceeding and could be excised.

In view of the department's failure to show that the report itself was an investigatory record compiled for law enforcement purposes, Exemption 7 could not be invoked. Confidential information obtained solely from confidential sources, however, could be withheld. *Playboy v. United States Dept. of Justice*, 516 F.Supp. 233 (D.D.C. 1981).

In 1986, however, Congress strengthened Exemption 7 in its FOIA Reform Act by substituting for language requiring agencies to show that one of the enumerated harms *would* occur the words "could reasonably be expected" to occur. Some law enforcement records are not included, and an agency need not acknowledge that records exist if they are part of an investigation, identify informants, or constitute information about intelligence or terrorists.[64]

Any information supplied by a confidential source is now exempt, as are records that might endanger the life of "any individual"—not only "law enforcement personnel."

An entirely new subsection exempts from release records on secret investigations of individuals while they are in progress. It would also exempt important

63. *Strassmann v. U.S. Dept. of Justice*, 475, 12 Med.L.Rptr. 2261, 792 F.2d 1267 (4th Cir. 1986).
64. *Freedom of Information Reform Act of 1986*, Pub. L. No. 99–570, §§ 1801–1804, 100 Stat. 3248 (1986).

records that would confirm an informant's identity, and it exempts classified FBI records, as noted above, pertaining to foreign intelligence, counter-intelligence, and international terrorism.

Exemption 8: Banks

This exemption protects federal agency reports about the condition of banks and other federally regulated financial institutions. Specifically it refers to records "contained in or related to examination, operating or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."

In part, Exemption 8 affirms the intention of Congress to protect confidential information similar to that protected by Exemption 4. In one of the few reported Exemption 8 cases, the District of Columbia District Court held that a Securities and Exchange Commission study of a broker-dealer trading problem did not fall within Exemption 8.[65] On the other hand, a New York federal district court noted in *dicta* that correspondence between a bank and the Federal Reserve Board would probably fall under the Exemption.[66]

In writing Exemption 8, Congress was concerned that critical reports made public might result in runs on banks.[67] Protecting communications between banks and their supervising agencies would insure bank cooperation with federal authorities and honest competition. It is possible that Exemption 8 may become a more active section of FOIA in the future.

Exemption 9: Oil and Gas Wells

To inhibit speculation based on information about the location of private oil and gas wells, this exemption incorporates "geological and geophysical information and data, including maps, concerning wells. * * *" The Federal Power Commission used Exemption 9 to deny Ralph Nader access to FPC and American Gas Association estimates of natural gas reserves. Nader contended that the exemption only applied to geological data and maps that could benefit a competitor. The FPC countered that estimates of reserves were based on such data and indeed could be useful to competing firms.[68]

COMMENT

In 1972 Congress passed the Federal Advisory Committee Act, 5 U.S.C.App. 1, to provide access to information exchanges between the executive branch of the federal government and outside interest groups that had proffered advice. Again there are exemptions to public access.[69]

The Family Education Rights and Privacy Act of 1974, 20 U.S.C. 1232g (sometimes referred to as the Buckley Amendments), gives parents and students rights of access to their own educational records maintained by institutions which received federal funds.

Complaints about the efficiency, management, and costs of FOIA go back to the late seventies and the Carter Administration. With the Reagan Administration, complaints from the business community and those concerned with law enforcement and national security escalated. Business noted that as many as 85 percent of requests to FDA, for example, came from industries seeking information about competitors. A very small percentage of requests came from public interest groups or the press. Some government officials doubted whether open government and intelligence services could live together. Felons, intent on finding out who had turned them in, were the largest category of requesters, or so it seemed. Segregating releasable from nonreleasable information took forever.

Media and segments of the public thought the benefits of FOIA well worth the investment. Health, environment, and product safety were among many reasons why the public should have accurate information from public files. Without it, less dependable leaks would fill the vacuum.

Throughout the 1980s, efforts were made to enlist journalists in government surveillance and information-gathering projects or, when the press proved uncooperative, to infiltrate or raid newsrooms. Many agencies tightened their public information policies, FOIA backlogs increased, and leak-

65. *M.A. Schapiro & Co. v. SEC*, 339 F.Supp. 467 (D.D.C. 1972).
66. *Kaye v. Burns*, 411 F.Supp. 897 (S.D.N.Y. 1976).
67. *Consumers Union of the United States v. Heimann*, 589 F.2d 531 (D.C.Cir. 1978).
68. House Committee on Government Operations, *Hearings on U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act*, 92d Cong., 2d Sess., 1972, pt. 6, at 1970–72. See also, *Amerada Hess Corp.*, 50 FPC 1048, 1050–51 (1973).
69. *Food Chemical News, Inc. v. Davis*, 378 F.Supp. 1048 (D.D.C. 1974); *Nader v. Baroody*, 396 F.Supp. 1231 (D.D.C. 1975).

ers were severely dealt with. For example, Michael Pillsbury, assistant undersecretary of defense for policy planning in the Defense Department, was fired in 1986 for allegedly leaking classified information about the supply of missiles to anti-Communist rebels in Angola and Afghanistan to the *Washington Post*. CIA "operational files" were expressly made exempt from FOIA. Also in 1986, Annette Lopez-Munoz, correspondent for the U.S. sponsored Radio Marti, was barred from the White House and threatened with firing for asking questions at a presidential press conference that the National Security Council didn't appreciate about the Administration's Nicaragua policy. Various forms of prior restraint were attempted by White House, Defense, State, and Justice Departments, the IRS, the Secret Service, and the National Security Council.[70]

There were legislative pressures as well. The 1986 FOIA Reform Act, dividing requesters into categories, gave agencies an opportunity to question a requester's qualifications and motivations. This could deter use of the act. Agencies were also permitted to define in their own peculiar, pre-FOIA ways what is or is not in the "public interest." For a review of the recent legislative history of FOIA, see Relyea, *US Freedom of Information Act Reforms—1986*, Journal of Media Law & Practice, 9:1 (March 1988), 6–12.

But it can also be argued that the 1986 amendments to the Act which tightened up the national security and law enforcement exemptions, allayed the fears of those kinds of federal agencies, fears that the United States government was perceived as being unable to protect the identity of its sources, while exacting very little additional burden on the press or the public interest.

THE CONFLICT BETWEEN OPENNESS AND DATA PRIVACY

The Federal Privacy Act of 1974

In 1974 Congress passed a comprehensive federal Privacy Act.[71] Although its drafters did express concern about nongovernmental recordkeeping, the statute deals only with the vast record-creating and computer storage capabilities of federal agencies. The law seeks to protect individual rights against government misuse of personal data by letting citizens know what kinds of files and record systems are being kept and by allowing individuals a right of access to those files so that they can be corrected or challenged if necessary.

Use the FOI Service Center sample Privacy Act request letter in making a request. Unlike FOIA, the Privacy Act does not permit agencies to charge for search time, but you will have to pay for duplication. The agency supervising the administration of the act, the Office of Management and Budget, expects other agencies to acknowledge receipt of your request within ten working days and to provide access, if access is to be granted, within thirty days.

Of special interest is that part of the act which prohibits federal agencies from maintaining any records concerning an exercise of First Amendment rights unless authorized by statute, part of an authorized law enforcement activity, or based upon an individual's own consent. This rule prevented the Internal Revenue Service, for example, from keeping records of its surveillance of speeches made by nuclear war protestors, and all records of that kind already in its keeping had to be expunged.[72] It might be assumed that journalists, authors, scholars, and researchers would be primarily engaged in First Amendment activities. And the rule covers peaceful protesting and pamphleteering.

Unless a record is open to public inspection under FOIA, or under one of the Privacy Act's 11 exemptions, a government agency must have a file subject's written consent before it can disclose that file to a third party. An agency must also notify a file subject if it intends to disclose, and it must keep an accounting of certain kinds of disclosure.

Scores of recommendations have been made for amending the act. While the data-collecting activities of an agency are not limited by the act, failure to comply with its specific provisions on disclosure permits an individual to bring a civil suit in a federal district court. To recover damages, attorney's fees and court costs a plaintiff must show that the agency "acted in a manner which was intentional and willful"—a rather heavy burden.

While FOIA's purpose was to increase *public* access to governmental information, the Privacy Act

70. For details see, *FYI Media Alert 1988, the Reagan Administration & the News Media*, FOI Service Center, March 1988.
71. Pub. L. 93–579, 88 Stat. 1986 (effective, Sept. 27, 1975), 5 U.S.C.A. § 552b.
72. *Clarkson v. IRS*, 678 F.2d 1368 (11th Cir. 1982).

was designed to provide *individuals* more control over the gathering, dissemination, and accuracy of information kept by government about them. The latter is an FOIA for the individual. Surveillance by the government in the name of the public, or surveillance by public and press for its own sake, inevitably collides with personal privacy. How can the two social values be articulated? Can an informed public tolerate insulated officials? A newspaper's demand for arrest records may be motivated by a desire to assess the performance of a police department, but the consequences may be exposure of individual third-party transgression. It is important to know when denials of disclosure are based on the long tradition of official secrecy and suppression of information and when they are based on a genuine concern for a legal or constitutional right of personal privacy.

The Privacy Act of 1974, as has been noted, contains eleven exemptions to its general prohibition of disclosure of personal files. These apply to entire systems of records rather than to specific requests for particular documents as under FOIA. One of the exemptions, (2), provides that a record may be disclosed without written consent of the person about whom the record is kept if disclosure "*would be * * required under Section 552 of this title.*" Section 552 is the Freedom of Information Act.

At the same time, FOIA's Exemption 6 states that FOIA disclosure does not apply to matters that are "personnel and medical files and similar files the disclosure of which would constitute *a clearly unwarranted invasion of personal privacy.*"

If it is required that a document be made public by FOIA, then it cannot be suppressed by the Privacy Act. As Judge David Bazelon of the D.C. Circuit Court of Appeals put it: "We must conclude * * * that section (b)(2) of the Privacy Act represents a Congressional mandate that the Privacy Act *not* be used as a barrier to FOIA access." *Greentree v. Customs Service,* 515 F.Supp. 1145 (D.C.Cir. 1981). Congress endorsed this view in the CIA Information Act (P.L. 98–477, 985 Stat. 2209), amending the Privacy Act. So the Privacy Act is not an exempting statute within the meaning of FOIA Exemption 3.

Privacy defers to openness. Government policy has been to allow individuals access to their own files through both FOIA and the Privacy Act. *Greentree* supported the notion that what is exempt from disclosure to an individual under the Privacy Act is not necessarily exempt from the same person under FOIA.

An agency may not use FOIA exemptions as a technicality to deny citizens access to their own files: the Privacy Act states that "no agency shall rely on any exemption contained [in FOIA] to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section."

Requests for disclosures to third parties are made under FOIA rather than under the Privacy Act. "When the two Acts are read together," said the Privacy Protection Study Commission, "any disclosure of a record about an individual in a system of records as defined by the Privacy Act to any member of the public other than the individual to whom the record pertains is forbidden if the disclosure would constitute a 'clearly unwarranted invasion of personal privacy.' " The reverse obligation also holds: even though a record is about an individual, it cannot be withheld from any member of the public who requests it if the disclosure would *not* constitute a "clearly unwarranted invasion of personal privacy."[73]

There are critics of the way in which the two social interests have been connected. And there is some truth in the words of one that "conflicts between the confidentiality approach of the Privacy Act and the disclosures requirements of the Freedom of Information Act are resolved entirely in favor of the latter."[74]

Openness and privacy represent an almost natural conflict: add to one and you subtract from the other. Courts will have to decide what constitutes a "clearly unwarranted invasion of personal privacy." So far the advantage has gone to openness. This bias was reflected in the Supreme Court's language in Cox *Broadcasting v. Cohn,* although that case dealt with a category of common law privacy rather than data privacy, and the offending information was held in a judicial record:

> Thus even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record. * * * The freedom of the press to publish that information appears to be of critical importance to our type of government in which the citizenry

73. Bushkin and Schaen, *The Privacy Act of 1974; A Reference Manual for Compliance,* 1976.

74. Greenwalt, *Legal Protections of Privacy, Final Report to the Office of Telecommunications Policy,* Washington, D.C.: 1975; O'Brien, *Privacy, Law and Public Policy,* 1979.

is the final judge of the proper conduct of public business.[75]

As has been noted, for file subjects the Privacy Act functions as an FOIA statute. Prior to its passage, access refusals under FOIA Exemption 6 (personnel and medical files) were discretionary, not mandatory. An agency could withhold information the disclosure of which would constitute a "clearly unwarranted invasion of personal privacy," but it was not required to do so. Since passage of the Privacy Act, an agency *must* disclose to a file subject where there is no invasion of personal privacy.

It should be noted that what might be exempt from disclosure under the Privacy Act as "specifically exempted from disclosure by statute," would also be exempt for the same reason under FOIA's Exemption 3.

There is still much confusion about the articulating of both state and federal access and privacy laws, the latter often being cited as authority for withholding information when in fact such withholding is improper.

GOVERNMENT-IN-SUNSHINE: THE FEDERAL OPEN MEETINGS LAW

On March 12, 1977, a Government-In-Sunshine Act requiring some fifty federal agencies, commissions, boards, and councils to hold their deliberative meetings in public became law. Any meeting—formal, regular, or bare quorum—in which business is discussed is presumed to be open. *Ex parte* communications occurring between interested persons and agency members with decision-making power are to be recorded and made part of the public record. Public notice of a meeting is to be made at least one week in advance, preferably with a meaningful agenda.

Since agencies under the new law were permitted to formulate their own rules for open meetings, some extended that process for as long as possible in order to remain tentative about implementation of the law. Even those agencies which were quick to implement the act soon found it more expedient to conduct business between and without regular meetings. Many agencies circumvent open meetings by approving actions through written circulation and approval of tentative decisions.

Closed meetings are permitted under ten exemptions, the first nine of which parallel FOIA's exemptions. Exemption 10, covering an agency's involvement in litigation or adjudication, is invoked often to save a case or a reputation.

The case that follows involved an attempt by the Nuclear Regulatory Commission to close its budget preparation process. In deciding for the plaintiff, Common Cause, the D.C. Circuit Court of Appeals noted that, unlike FOIA, the Sunshine Act was designed to open, not close, the predecisional deliberative process. Here the government unit cited a clause of Exemption 9, an exemption generally closing meetings where disclosure would lead to significant financial speculation or endanger the stability of a financial institution or interfere with a proposed agency action. It also cited Exemptions 2 and 6.

COMMON CAUSE v. NUCLEAR REGULATORY COMMISSION

8 MED.L.RPTR. 1190, 674 F.2D 921 [D.C.Cir. 1982].

WRIGHT, J.:

* * *

The language of the exemption is not self-explanatory; we therefore turn to the legislative history for guidance. The House and Senate committee reports give four concrete examples of Exemption 9(b) situations. First, an agency might consider imposing an embargo on foreign shipment of certain goods; if this were publicly known, all of the goods might be exported before the agency had time to act, and the effectiveness of the proposed action would be destroyed. * * * Second, an agency might discuss whether to approve a proposed merger; premature public disclosure of the proposal might make it impossible for the two sides to reach agreement. * * * Third, disclosure of an agency's proposed strategy in collective bargaining with its employees might make it impossible to reach an agreement. * * * Fourth, disclosure of an agency's terms and conditions for purchase of real property might make the proposed purchase impossible or drive up the price.

We construe Exemption 9(b) to cover those situations delineated by the narrow general principles which encompass all four legislative examples. In each of these cases, disclosure of the agency's pro-

75. 420 U.S. 469 (1975), see p. 294 this text.

posals or negotiating position could affect private decisions by parties other than those who manage the federal government—exporters, potential corporate merger partners, government employees, or owners of real property. The private responses of such persons might damage the regulatory or financial interests of the government as a whole, because in each case the agency's proposed action is one for which the agency takes final responsibility as a governmental entity.

The budget process differs substantially from the examples given by the House and Senate reports. Disclosure of the agency's discussions would not affect private parties' decisions concerning regulated activity or dealings with the government. Rather, the Commission contends that opening budget discussions to the public might affect political decisions by the President and OMB [Office of Management and Budget, which has an oversight responsibility for access laws]. In addition, disclosure would not directly affect "agency action" for which the Commission has the ultimate responsibility. Instead, the Commission fears that disclosure of its time-honored strategies of item-shifting, exaggeration, and fallback positions would give it less leverage in its "arm's length" dealings with OMB and the President, who make the final budget decisions within the Executive Branch. The Commission argues that it would thereby be impaired in its competition with other government agencies—which also serve the public and implement federal legislation—for its desired share of budgetary resources. It is not clear, however, whether the interests of the government as a whole, or the public interest, would be adversely affected.

Moreover, in the budget context the public interest in disclosure differs markedly from its interest in the four situations described in the committee reports. In those cases disclosure would permit either financial gain at government expense or circumvention of agency regulation. In contrast, disclosure of budget deliberations would serve the affirmative purposes of the Sunshine Act: to open government deliberations to public scrutiny, to inform the public "what facts and policy considerations the agency found important in reaching its decision, and what alternatives it considered and rejected," and thereby to permit "wider and more informed public debate of the agency's policies * * *." S.Rep. No. 94–354, at 5–6.

The budget deliberation process is of exceptional importance in agency policy-making. The agency heads must review the entire range of agency programs or projects" and then "decides upon the level of regulatory activities it proposes to pursue * *." * * * These decisions, the government contends, have a significant impact on "the Commission's ability to marshal regulatory powers in a manner which insures the greatest protection of the public health and safety with the most economical use of its limited resources." * * *

If Congress had wished to exempt these deliberations from the Sunshine Act—to preserve the prior practice of budget confidentiality, to reduce the opportunities for lobbying before the President submits his budget to Congress, or for other reasons—it would have expressly so indicated. Absent any such statement of legislative intent, we will not construe Exemption 9(b) of the Sunshine Act to allow budget deliberations to be hidden from the public view.

Thus, the Sunshine Act contains no express exemption for budget deliberations as a whole. Specific items discussed at budget meetings might, however, be exempt and might justify closing portions of commission meetings on an individual and particularized basis.

* * *

Exemption 9(b), as we have discussed, protects agency discussions of material whose premature disclosure could affect the decisions or actions of third parties acting in a nongovernmental capacity, thus causing a significant adverse effect upon the government's financial or regulatory interests. * * * Budget meetings might include discussions of specific topics within the coverage of the exemption. Premature disclosure of possible elimination of a program involving private contracts might make it difficult for the contractor to retain key personnel, frustrating the Commission's ability to implement the program effectively if it is not ultimately eliminated. * * * Premature disclosure of proposed cutbacks in joint research projects with foreign governments might adversely affect the United States government's position in negotiations concerning the foreign government's commitment. Premature disclosure of collective bargaining negotiation strategies might adversely affect labor negotiations with the Commission's own employees.

Even if a budget meeting is likely to discuss these topics, however, it may not be closed under Exemption 9(b) "in any instance where the agency has already disclosed to the public the content or nature

of its proposed action[.]" 5 U.S.C. § 552b(c)(9)(b) (1976). The Senate report explained that the exemption "only applies when an agency feels it must act in secret[.]" S.Rep. No. 94–354, *supra*, at 25. Therefore if the private contractor, foreign government, or labor union has already been informed by the Commission that budget cutbacks are being considered in the programs with which they are concerned, then Exemption 9(b) might no longer apply.

Our *in camera* inspection of the transcripts of the July 27, 1981 and October 15, 1981 Commission meetings leads us to conclude that Exemption 9(b) does not support withholding of any portion of the transcripts.

The Commission also relies on Exemption 2—matters that "relate solely to the internal personnel rules and practices of an agency[,]" 5 U.S.C. § 552b(c)(2) (1976)—to justify closing portions of budget meetings. Under the Commission's interpretation, Exemption 2 includes discussions of allocation of personnel among programs, evaluations of the performance of offices and projects within the Commission, and consideration of more economical schemes of "internal management." * * * This construction is belied by the statutory language and legislative history of Exemption 2.

The language in Exemption 2 to the Government in the Sunshine Act is virtually identical with that in Exemption 2 to the Freedom of Information Act. * * * The conference report on the Sunshine Act expressly adopts the standards of *Department of Air Force v. Rose*, 425 U.S. 352 * * * (1976), the leading Supreme Court decision interpreting Exemption 2 of FOIA. * * * Under this standard, personnel-related discussions at budget meetings fall squarely outside the scope of the exemption.

Budget allocations inevitably impinge on personnel matters, because government cannot implement programs without personnel. Salaries and wages are a sizable proportion of the Commission's budget. But budget decisions regarding personnel cutbacks, and evaluations of the prior performance of offices and programs, do not relate *solely* to "internal personnel rules and procedures." Discussions of possible administrative cost savings through adoption of new "internal management" techniques also fall beyond the narrow confines of Exemption 2, because they deal with the impact of budget cuts on the Commission's ability to carry out its responsibilities.

Throughout this litigation the Commission has emphasized the importance of the budget process. An affidavit submitted by the Commission asserts that budget discussions lead to presidential recommendations reflecting the President's "best judgment of how the nation's fiscal resources should be allocated to meet its future economic and social needs." * * * The affidavit recognizes that "vital policies and billions of dollars [are] at issue every year[.]" The public can reasonably be expected to have an interest in matters of such importance. Exemption 2 does not permit the Commission to close budget discussions relating to personnel cutbacks or performance.

In some budget meetings the exemption might permit the Commission to close specific portions of the discussion relating "solely to internal personnel rules and practices." However, *in camera* inspection shows that Exemption 2 does not apply to any portion of either the July 27, 1981 or the October 15, 1981 meeting.

The government invoked Exemption 6 to justify its decision to close both meetings at issue; it no longer claims that the exemption protects any of the deliberations at the October 15 meeting. Exemption 6 protects information of a personal nature whose disclosure would constitute "an unwarranted invasion of personal privacy[.]" 5 U.S.C. § 552b(c)(6) (1976). The agency contends that this exemption protects discussion of "an individual manager's particular qualifications, characteristics and professional competence in connection with a budget request for that particular manager's program." * * * This contention is unsupported by the legislative history of the Sunshine Act.

Exemption 6 applies to information of a personal nature, including discussions of a person's health, drinking habits, or financial circumstances. It provides greater protection to private individuals, including applicants for federal grants and officials of regulated private companies, and to low-level government employees, than to government officials with executive responsibilities. * * * S.Rep. No. 94–354, *supra*, at 21–22. It was not intended to shelter substandard performance by government executives. The Senate report expressly noted that "if the discussion centered on the alleged incompetence with which a Government official has carried out his duties it might well be appropriate to keep the meeting open, since in that case the public has a special interest in knowing how well agency employees are carrying out their public responsibilities." Exemption 6, the report added, "must not be used by an agency to shield itself from political contro-

versy involving the agency and its employees about which the public should be informed." *Id.* at 21–22. These policy considerations apply to *a fortiori* in the budget process, in which the performance of individual executives may affect the Commission's willingness to allocate budgetary resources to particular regulatory programs.

Given the narrow scope of Exemption 6 as applied to managerial officials, we hold that no portion of the discussion at the July 27, 1981 meeting was covered by Exemption 6. The Commission's discussion of individual performance was limited to managerial officials with executive responsibility.

Our *in camera* inspection of the transcripts of the July 27, 1981 and October 15, 1981 Commission meetings does not show that any portion of either meeting may be withheld from the public under any of the asserted exemptions to the Sunshine Act. We therefore order the Commission to release the transcripts to the public. * * * The transcripts shall be made available in a place readily accessible to the public, and copies shall be furnished to any person at the actual cost of duplication.

If in the future the Commission wishes to close all or any portion of a budget meeting, the statute requires it to announce its intention and to give a brief statement of its reasons. If any person objects to closing of the meeting, he may file a civil action in the District Court to compel the Commission to comply with the statute. He may include an application for interlocutory relief in his complaint, if the meeting has not yet been held. The District Court should act promptly on any motion for interim relief to avoid frustration of the purposes of the Sunshine Act through delay. In its decision on the merits the District Court may examine *in camera* the transcripts of closed agency meetings and may issue such relief as it deems appropriate, with due regard for orderly administration and the public interest. * * *

COMMENT

While the Government-in-Sunshine law helps, it does not assure access to people and places. As to meetings, the Supreme Court decided in 1984 that informal international conferences attended by a quorum of the FCC Telecommunications Subcommittee were not "meetings" of an "agency" within the meaning of the Act. The conferences, said the Court, did not involve FCC members in any deliberations that "determine or result in the joint conduct or disposition of official agency business," and they were not subject to the Commission's control. *FCC v. ITT World Communications*, 10 Med.L.Rptr. 1685, 725 F.2d 732, (D.C.Cir. 1984).

Many places such as government buildings are considered nonpublic-forum public property, notably prisons, correctional institutions, and public hospitals. An instructive case is *Stahl v. Oklahoma*, 665 P.2d 839 (1983), cert. den. 104 S.Ct. 973 (1984). Reporters were arrested for following antinuclear power demonstrators on to plant property. Although private, the heavily regulated company was treated by the court as a government entity. In spite of that, the reporters were fined for criminal trespass. On appeal, their convictions were affirmed on the grounds that the First Amendment does not guarantee access to property "simply because it is owned or controlled by the government," nor does it protect reporters from arrest and prosecution for breaking the law while gathering news.

At the state level, a citizens group was denied access to county jail records showing crimes committed by inmates because the jail commissioner under New Jersey law had the authority to promulgate rules establishing minimum standards of inmate care and these included inmate consent prior to the release of records. Inmate privacy would not be superseded by the public's right to know. *Grass Roots Action Committee v. Shapiro*, 11 Med.L.Rptr. 2377 (N.J. Super.Ct.Law Div. 1985).

But a county sheriff could not exclude one newspaper's reporters from routine notification of newsworthy office business because he didn't like the way he was being covered. To require that newspaper to request in writing what was routinely given other media was a violation of the First Amendment, said a federal district court in Louisiana. *Times-Picayune Publishing Corp. v. Lee*, 15 Med.L.Rptr. 1713 (D.C.E.La. 1988).

And a Florida circuit court recognized a First Amendment right to gather news when a hospital failed to show a compelling reason for restricting access to film a comatose patient whose attorney and guardians had consented to such filming. *North Broward Hospital District v. ABC*, 13 Med.L.Rptr. 1509 (Fla.Cir.Ct. 1986).

First Amendment rights were not violated, however, when contractual arrangements between rock music performers and a public agency forbade in-

dependent photographers from taking pictures. Revenue from concerts and the protection of performers' property rights were legitimate and overriding governmental interests, said a federal district court in Rhode Island. *D'Amario v. Providence Civic Center Authority*, 13 Med.L.Rptr. 1769, 639 F.Supp. 1538, (D.C.RI. 1986).

The First Amendment did not immunize a newspaper reporter from criminal liability for impersonating a county morgue official in order to get an interview with a murder victim's mother. No "heightened standard of review" or proof of actual malice was required of the state. All it had to prove beyond a reasonable doubt was that the defendant intended to induce another to submit to her pretended authority. *New Jersey v. Cantor*, 14 Med.L.Rptr. 2103 (N.J. Super.Ct.App.Div. 1987).

Police-press guidelines, establishing rules of access to scenes of crime and disaster, ought to make a distinction between the press and the public, a distinction the Supreme Court has not always been willing to make.[76] Press passes ought to be liberally available so that law enforcement officials don't play the role of certifying "legitimate" news media. You should insist on being given reasons for being denied access to a news scene and for being denied a press pass.

When the Secretary of Labor excluded press and public from meetings of the Mine Safety and Health Administration looking into the causes of a coal mine fire, the Society of Professional Journalists brought suit. They won when a federal district court ruled that public and press have a constitutional right of access to such hearings subject to reasonable rules of conduct set down by the secretary.[77]

A federal district court's post-trial order prohibiting press interviews with jurors in a civil case was considered impermissibly overbroad by an appeals court because it contained no time or scope limitations and was not supported by compelling reasons.[78]

Exit polling laws have been struck down in a number of states including Florida, Washington, and Minnesota. See, for example, *Clean-up '84 v. Heinrich*, 10 Med.L.Rptr. 2326, 590 F.Supp. 928, (M.D. Fla. 1984).

ACCESS TO LEGISLATIVE BODIES

Access to legislative bodies should never be assumed. After all, legislators write the laws, and they are in a perfect position to exempt themselves from the commotion of public and press. Access here is governed by custom, practice, House and Senate rules, open meeting laws in some states (thirty-one state laws prescribe some level of access to legislative bodies), state constitutions, or well-formed First Amendment arguments.

In the absence of a policy, legislative bodies may make "separation of powers" arguments to keep meetings closed. When pressed by the courts, they may acquiesce. Where there are policies, there will always be exceptions. Protocols must be observed as to dress, positioning, cameras, and credentials. A state-by-state review of the rules is presented in the fall 1988 issue of *The News Media & the Law*, "Access to the Legislatures," pp. 5–15. Two states, Oklahoma and Massachusetts, have no statutory or constitutional rules governing access to their legislatures, but in practice both are open.

When the League of Women Voters and two newspapers protested closed meetings of House and Senate finance committees in violation of Alaska's Open Meetings Act, the state supreme court chose not to interfere without a clear violation of the state constitution. *Abood v. League of Women Voters in Alaska*, 743 P.2d 333 (Alaska 1987).

But a federal district judge in Cleveland thought the First Amendment opened the legislative process to press and public, except where a "compelling public interest" justifies closure. The case involved the city council. *WJW-TV v. City of Cleveland*, 686 F.Supp. 177 (N.D. Ohio, 1988).

Questions of due process and equal protection have arisen where legislative bodies have arbitrarily discriminated against certain reporters but not others. For example, exclusion of a particular reporter and his newspaper from the floor of the Tennessee Senate by a Senate resolution was enjoined.[79] And a federal district court in Massachusetts held that access to city council meetings must be granted equally to all reporters.[80] The mayor of Honolulu was en-

76. For an exception see, *Westinghouse Broadcasting Co. v. National Transportation Safety Board*, 8 Med.L.Rptr. 1177 (D.Mass. 1982).
77. *Society of Professional Journalists v. Secretary of Labor*, 616 F.Supp. 569 (D.Utah 1985).
78. *Journal Publishing v. Mecham*, 13 Med.L.Rptr. 1391 (10th Cir. 1981).
79. *Kovach v. Maddux*, 1 Med.L.Rptr. 2367, 238 F.Supp. 835 (D.Tenn. 1965).
80. *Westinghouse Broadcasting Co. v. Dukakis*, 409 F.Supp. 895 (D.Mass. 1976).

joined from denying a reporter he didn't like access to city hall press conferences.[81] A federal court in Alabama recognized a limited First Amendment right of reasonable access to news of state government and to public galleries, press rooms, and press conferences when it prevented enforcement of a law requiring state house reporters to file a "statement of economic interest" detailing their employment status and promising that they would not work for lobbyists.[82]

The reluctance of courts to interfere with legislative prerogatives was illustrated by a case involving Consumers Union. The Periodical Correspondents' Association, led by a *Time* reporter, voted to deny correspondents for *Consumer Reports* admission to the periodical press galleries. The expressed purpose was to protect Congress from "lobbyists."

Federal Judge Gerhard Gesell was annoyed by what he saw as a violation of Consumers Union's First and Fifth Amendment rights by mainline journalists. "The situation disclosed by this undisputed record," he wrote, "flaunts the First Amendment. It matters not that elements of the press as well as Congress itself appear to have been instruments for denial of constitutional rights in this instance, for those rights limit the actions of legislative agents and instrumentalities as surely as those of Congress itself. A free press is undermined if the access of certain reporters to the facts relating to the public's business is limited merely because they advocate a particular viewpoint. This is a dangerous and self-defeating doctrine." *Consumers Union of the United States, Inc. v. Periodical Correspondents' Association*, 365 F.Supp. 18 (D.D.C. 1973).

Relying in part upon the speech and debate clause of the Constitution, an appeals court reversed. What the periodical correspondents had done was "within the sphere of legislative power committed to Congress and the legislative immunity granted by the Constitution. * * *"[83]

Both houses of the Maryland legislature were upheld in excluding tape recorders from their sessions. While recognizing some First Amendment protection for newsgathering, a Maryland court held that the legislative rule did not interfere with the usual pencil-and-pad duties of reporters. The reporters had based their claim on a speed and accuracy argument and had relied on an earlier case, *Nevens v. City of Chino*, 44 Cal.Rptr. 50 (1965), in which a similar rule had been struck down. The Maryland court said there was no violation of due process in a rule intended to preserve order and decorum, even if at the expense of increased press efficiency. As to equal protection, the court held that the tape recorder ban was against equipment, not a class of persons. *Sigma Delta Chi v. Speaker, Maryland House of Delegates*, 310 A.2d 156 (1973).

OPEN RECORDS AND MEETINGS IN THE STATES

Open Records

All fifty states, the District of Columbia, and the Virgin Islands have open records laws. They vary widely, change frequently, and therefore do not lend themselves easily to summary. State courts may construe them broadly or narrowly. Some are more effective than others. Know the law of the state in which you work.

A model statute would consider the following:

a. *How are public records defined and by whom?* The more expansive the definition, the better for information seekers. State law definitions generally depend on two factors—physical form and the origin of the record. Physical form may be stated in the law or implied. A Minnesota Supreme Court decision held that agency records (state subsidized abortions) stored on computer tapes were public records subject to the law.[84] In an Ohio case, microfilm was similarly defined.[85] As to origin, most state laws and court rulings consider the source of the record and the reason for its being kept. On this point, some laws are expansive,[86] some restrictive, covering, for example, only material "required to be kept by law"[87]or "pursuant to law."[88]

81. *Borreca v. Fasi*, 1 Med.L.Rptr. 2410, 369 F.Supp. 906 (D.Hawaii 1974).
82. *Lewis v. Baxley*, 1 Med.L.Rptr. 2525, 368 F.Supp. 768 (D.Ala. 1973).
83. 515 F.2d 1341 (D.C.Cir. 1975), cert. den. 423 U.S. 1051 (1976).
84. *Minnesota Medical Association v. State*, 4 Med.L.Rptr. 1872, 274 N.W.2d 84 (Minn. 1978).
85. *Lorain County Title Co. v. Essex*, 373 N.E.2d 1261 (Ohio 1976).
86. Iowa Code Ann. § 68A.1 (West 1973); Fla.Stat.Ann. § 119.011 (West Supp. 1974–1980).
87. Ohio Rev. Code Ann. § 149.43 (Page 1980).
88. Mo.Ann.Stat. § 109.180 (Vernon 1966).

As with FOIA, state agencies are not required to create or acquire records in response to a request; they are responsible only for existing, identifiable records in their possession and subject to the law. Agencies subject to the law, governmental or nongovernmental, usually depend upon public funding. A state-created agency that is federally funded and performs federal functions could be subject to both state and federal freedom of information laws.

Of all the exceptions to access to records, the broadest and most troubling may be the "public interest nondisclosure" provision found in some state laws. A review of case law suggests, however, that litigation may open more records than it closes. But differences from state to state are staggering. For example, autopsy reports are public records in Colorado, Indiana, and Massachusetts, but may not be in Ohio and Connecticut. The Texas Open Records Act didn't cover the National Collegiate Athletic Association; Washington's law could not be applied to the State Bar Association.

It is sometimes surprising what is ruled to be a public record: the mayor's appointment calendar in New York, a public school teacher's personnel file in North Dakota, a sheriff's appointment book in Florida, and insurance companies' board meeting minutes in New York.

All records, whether required to be kept or not and for whatever purpose, ought to be included in the definition, and they should be defined as to content as well as to sources, custodial agency, and methods of recording, e.g., computer tapes as well as written records.

b. *Who may use the laws and for what purposes?* In most states the right applies to "any person," as is the case with FOIA. In a minority of states access is limited to citizens of the state. In a few states a commercial purpose may block access. Generally, however, a requestor's purpose is immaterial.

c. *What exemptions are allowed?* Prior statutes may or may not exempt from disclosure certain categories of information. Most state access laws wisely don't contain long lists of excluded records. To do so, while it may serve to protect personal privacy, does some damage to the presumption of access. Excluded categories generally include welfare, medical, child placement or abuse, unemployment compensation, tax, bank, education, and sometimes law enforcement and criminal history records. Some states make disclosure mandatory, some discretionary. Only a few states follow FOIA in making "reasonably segregable" portions of an otherwise secret record available.

d. *Is state agency information indexed and is there a right to copy documents?* Most state laws permit an index; few require them. And few follow FOIA in waiving search and copy costs when it is in the "public interest" to do so.

e. *What procedures must be followed in gaining access to disputed records, and how are state open records law enforced?* Few state laws provide FOIA-type guidelines for a requester. Most state laws say nothing about time limits within which an agency is expected to reply. Some laws outline legal remedies for noncompliance; most do not. Judicial review is provided for in some state laws, and many provide for intermediate appeal from an agency decision to a state attorney general or a state FOI commission. As with FOIA, the burden of proof in justifying an exemption is usually on the agency. Some states provide criminal sanctions for noncompliance, others fines. A substantial number have no penalties at all. A few states provide for a reimbursement of attorneys' fees where there has been an improper denial of access.

Denials of access to records which appear to be illegal should be challenged. The journalist should speak to supervisors, ask for written authority for denial, write down reasons given for denial, and generally do what is necessary to develop a record covering the incident. When exceptions or exemptions are cited, it is expected that they be presented with precision.

In the eighties, state legislators sought to amend or repeal many state open records laws by introducing a Uniform Information Practices Act, brainchild of the National Association of Uniform Laws Commissions. An omnibus records/privacy statute, its effect would be to complicate easily understood records laws and to give almost unlimited discretion to agency heads as to when and when not to release information.

The stated purpose of the law, of course, was to protect the privacy interests of individuals who, in a complex society, increasingly become the subjects of governmental record-keeping systems.

Taking their cue from the Federal Privacy Act of 1974, at least twenty states now have data practices or data privacy laws. In a number of these states older open records statutes have been submerged in the new laws and have lost some of their force. Data

Practices Acts carry a heavy presumption in favor of privacy.

Violations of data privacy resemble the common law privacy offense of intrusion in that both are newsgathering offenses. The difference is that the Federal Privacy Act of 1974 and its state counterparts are designed chiefly to protect the "inviolate personality" from the power of government. Perhaps corporate power, including that of the major media, will match the government in jeopardizing personal privacy.

One final question. Should defining protected records be a legislative or judicial task? The Minnesota legislature, a leader in passing a data practices act, has done so by placing records in three categories: public (open to all); private (open to the person about whom the record is made, and presumably to the recordkeeper); and confidential (open only to the recordkeeper). Some state courts and the federal courts will eventually answer the question by telling us what is meant by a "clearly unwarranted invasion of personal privacy."

Open Meetings

All states, the District of Columbia, and the Virgin Islands have open meetings laws or constitutional provisions guaranteeing some degree of access to public meetings. Again there are substantial differences from state to state, and these laws are frequently amended. An ideal and comprehensive open meetings law would contain the following provisions:

a. *Access* would apply to both houses of the legislature and its committees and to all state agencies, boards, commissions, and other political subdivisions of the state, including county boards and city councils. Some statutes use a "public funds" or "public functions" test.

b. *Executive sessions*, and other evasive techniques involving the transaction of public business, should not be exempted. A rule of reason, however, may attach to *purely* informal or social interactions between members of a public body. A quorum should not be a condition of access. Since preliminary steps in the deliberative process may be important to a final outcome, meetings of advisory committees ought to be included within the law. Minutes ought to be kept, and all votes recorded.

c. *Exemptions* ought to be stated precisely, although many state statutes do not allow them. Where exemptions are not included, state attorneys general and courts have made advisory or judicial determinations that consultations between an agency and its attorney regarding pending litigation, some disciplinary hearings, and public employee collective bargaining sessions are exempt.

d. *Enforcement* procedures must be available to press and public, and they must be expeditious. A few statutes declare null and void any official actions taken in secret sessions. Again, injunction or writ of mandamus is the appropriate recourse, and it should be written into the law.

e. *Sanctions* should be imposed on those officials who violate the law. Most open meetings laws contain a provision making violation of the act a misdemeanor. Others impose a civil fine. Criminal penalties are rare. Minnesota alone makes a third violation of its open meetings law punishable by forfeiture of the right to serve on the public body or in the public agency for a period of time equal to the term of office the person was then serving.

Many problems remain. Some open meetings laws lack definitions and penalties for noncompliance. Unannounced, irregular, or informal meetings are not covered. Other laws are riddled with loopholes or specified exemptions. Courts are frequently reluctant to breach the separation of powers doctrine by interpreting open meetings laws to apply to the legislative branch of government, and courts protect their own prerogatives as well.

Nevertheless, the open meetings situation is decidedly better than it was two decades ago, and a survey of state cases indicates that when secret meetings are challenged by press and public under state laws—and they must be—plaintiffs prevail in a very high proportion of cases. Of course, many closed-door meetings are never challenged.

When denied attendance, ask for reasons and a vote, and try to get it all recorded in the minutes. Be respectful, but do not leave a meeting until ordered to do so. Know what the exceptions are, of course, in your state.

Again, litigation appears to open more meetings than it closes. Meetings between a town council and its attorney to discuss a trash disposal contract was

a public meeting under Massachusetts law.[89] All meetings of the university system's board of trustees, including executive sessions, had to be open in Mississippi.[90] So did meetings of a presidential search committee at the University of Kentucky.[91] Meetings of four members of an eleven-member sewage commission had to be open in Wisconsin because those four members could make budgetary decisions for the whole body.[92]

89. *District Attorney v. Board of Selectmen*, 12 Med.L.Rptr. 1064, 481 N.E.2d 1128 (Mass.Sup.Jud.Ct. 1985).
90. *Board of Trustees v. Mississippi Publishers*, 12 Med.L.Rptr. 1389, 478 S.2d 269 (Miss.Sup.Ct. 1985).
91. *Lexington Herald-Leader Co. v. University of Kentucky Presidential Search Committee*, 14 Med.L.Rptr. 1734, 732 S.W.2d 884 (Ky.Sup.Ct. 1987).
92. *State ex rel. Newspapers Inc. v. Showers*, 14 Med.L.Rptr. 1170, 398 N.W.2d 154 (Wis.Sup.Ct. 1987).

SEVEN

Public Access to the Media

A RIGHT OF ACCESS TO THE PRESS?

Access to the Press—A New First Amendment Right

The press, long enshrined among our most highly cherished institutions, was thought a cornerstone of democracy when its name was boldly inscribed in the Bill of Rights. Freed from governmental restraint, initially by the first amendment and later by the fourteenth, the press was to stand majestically as the champion of new ideas and the watch dog against governmental abuse. Professor Barron finds this conception of the first amendment, perhaps realistic in the eighteenth century heyday of political pamphleteering, essentially romantic in an era marked by extraordinary technological developments in the communications industry. To make viable the time-honored "marketplace" theory, he argues for a twentieth century interpretation of the first amendment which will impose an affirmative responsibility on the monopoly newspaper to act as sounding board for new ideas and old grievances.

There is an anomaly in our constitutional law. While we protect expression once it has come to the fore, our law is indifferent to creating opportunities for expression. Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the "marketplace of ideas" is freely accessible. But if ever there were a self-operating marketplace of ideas, it has long ceased to exist. The mass media's development of an antipathy to ideas requires legal intervention if novel and unpopular ideas are to be assured a forum—unorthodox points of view which have no claim on broadcast time and newspaper space as a matter of right are in poor position to compete with those aired as a matter of grace.

The free expression questions which now come before the courts involve individuals who have managed to speak or write in a manner that captures public attention and provokes legal reprisal. The conventional constitutional issue is whether expression already uttered should be given first amendment shelter or whether it may be subjected to sanction as speech beyond the constitutionally protected pale. To those who can obtain access to the media of mass communications first amendment case law furnishes considerable help. But what of those whose ideas are too unacceptable to secure access to the media? To them the mass communications industry replies: The first amendment guarantees our freedom to do as we choose with our media. Thus the constitu-

tional imperative of free expression becomes a rationale for repressing competing ideas. First amendment theory must be reexamined, for only by responding to the present reality of the mass media's repression of ideas can the constitutional guarantee of free speech best serve its original purposes.

* * * [A]n essentially romantic view of first amendment has perpetuated the lack of legal interest in the availability to various interest groups of access to means of communication.

* * *

The possibility of governmental repression is present so long as government endures, and the first amendment has served as an effective device to protect the flow of ideas from governmental censorship: "Happily government censorship has put down few roots in this country. * * * We have in the United States no counterpart of the Lord Chamberlain who is censor over England's stage." But this is to place laurels before a phantom—our constitutional law has been singularly indifferent to the reality and implications of nongovernmental obstructions to the spread of political truth. This indifference becomes critical when a comparatively few private hands are in a position to determine not only the content of information but its very availability, when the soap box yields to radio and the political pamphlet to the monopoly newspaper. * * * Difficulties in securing access, unknown both to the draftsmen of the first amendment and to the early proponents of its "marketplace" interpretation, have been wrought by the changing technology of mass media.

* * *

Many American cities have become one newspaper towns. * * * The failures of existing media are revealed by the development of new media to convey unorthodox, unpopular, and new ideas. Sit-ins and demonstrations testify to the inadequacy of old media as instruments to afford full and effective hearing for all points of view. Demonstrations, it has been well said, are "the free press of the movement to win justice for Negroes. * * *" But, like an inadequate underground press, it is a communication medium by default, a statement of the inability to secure access to the conventional means of reaching and changing public opinion. By the bizarre and unsettling nature of his technique the demonstrator hopes to arrest and divert attention long enough to compel the public to ponder his message. But attention-getting devices so abound in the modern world that new ones soon become tiresome. The dissenter must look for ever more unsettling assaults on the mass mind if he is to have continuing impact. Thus, as critics of protest are eager and in a sense correct to say, the prayer-singing student demonstration is the prelude to Watts. But the difficulty with this criticism is that it wishes to throttle protest rather than to recognize that protest has taken these forms because it has had nowhere else to go.

The Justices of the United States Supreme Court are not innocently unaware of these contemporary social realities, but they have nevertheless failed to give the "marketplace of ideas" theory of the first amendment the burial it merits. Perhaps the interment of this theory has been denied for the understandable reason that the Court is at a loss to know with what to supplant it. But to put off inquiry under today's circumstances will only aggravate the need for it under tomorrow's.

There is inequality in the power to communicate ideas just as there is inequality in economic bargaining power; to recognize the latter and deny the former is quixotic. The "marketplace of ideas" view has rested on the assumption that protecting the right of expression is equivalent to providing for it. But changes in the communications industry have destroyed the equilibrium in that marketplace. While it may have been still possible in 1925 to believe with Justice Holmes that every idea is "acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth," it is impossible to believe that now. Yet the Holmesian theory is not abandoned, even though the advent of radio and television has made even more evident that philosophy's unreality. A realistic view of the first amendment requires recognition that a right of expression is somewhat thin if it can be exercised only at the sufferance of the managers of mass communications.

* * *

A corollary of the romantic view of the first amendment is the Court's unquestioned assumption that the amendment affords "equal" protection to the various media. According to this view new media of communication are assimilated into first amendment analysis without regard to the enormous differences in impact these media have in comparison with the traditional printed word. Radio and television are to be as free as newspapers and magazines, sound trucks as free as radio and television.

This extension of a simplistic egalitarianism to media whose comparative impacts are gravely disproportionate is wholly unrealistic. It results from confusing freedom of media content with freedom of the media to restrict access. The assumption in romantic first amendment analysis that the same postulates apply to different classes of people, situations, and means of communication obscures the fact, noted explicitly by Justice Jackson in *Kovacs v. Cooper*, that problems of access and impact vary significantly from medium to medium.

* * *

An analysis of the first amendment must be tailored to the context in which ideas are or seek to be aired. This contextual approach requires an examination of the purposes served by and the impact of each particular medium. If a group seeking to present a particular side of a public issue is unable to get space in the only newspaper in town, is this inability compensated by the availability of the public park or the sound truck? Competitive media only constitute alternative means of access in a crude manner. If ideas are criticized in one forum the most adequate response is in the same forum since it is most likely to reach the same audience. Further, the various media serve different functions and create different reactions and expectations—criticism of an individual or a governmental policy over television may reach more people but criticism in print is more durable.

The test of a community's opportunities for free expression rests not so much in an abundance of alternative media but rather in an abundance of opportunities to secure expression in media with the largest impact. * * *

The late Professor Meiklejohn, who has articulated a view of the first amendment which assumes its justification to be political self-government, has wisely pointed out that "what is essential is not that everyone shall speak, but that everything worth saying shall be said"—that the point of ultimate interest is not the words of the speakers but the minds of the hearers. Can everything worth saying be effectively said? Constitutional opinions that are particularly solicitous of the interests of mass media—radio, television, and mass circulation newspapers—devote little thought to the difficulties of securing access to those media. If those media are unavailable, can the minds of "hearers" be reached effectively? Creating opportunities for expression is as important as ensuring the right to express ideas without fear of governmental reprisal.

* * *

Today ideas reach the millions largely to the extent they are permitted entry into the great metropolitan dailies, news magazines, and broadcasting networks. The soap box is no longer an adequate forum for public discussion. Only the new media of communication can lay sentiments before the public, and it is they rather than government who can most effectively abridge expression by nullifying the opportunity for an idea to win acceptance. As a constitutional theory for the communication of ideas, laissez faire is manifestly irrelevant.

The constitutional admonition against abridgment of speech and press is at present not applied to the very interests which have real power to effect such abridgment. Indeed, nongoverning minorities in control of the means of communication should perhaps be inhibited from restraining free speech (by the denial of access to their media) even more than governing majorities are restrained by the first amendment—minorities do not have the mandate which a legislative majority enjoys in a polity operating under a theory of representative government. What is required is an interpretation of the first amendment which focuses on the idea that restraining the hand of government is quite useless in assuring free speech if a restraint on access is effectively secured by private groups. A constitutional prohibition against governmental restrictions on expression is effective only if the Constitution ensures an adequate opportunity for discussion. Since this opportunity exists only in the mass media, the interests of those who control the means of communication must be accommodated with the interests of those who seek a forum in which to express their point of view.

* * *

The potential of existing law to support recognition of a right of access has gone largely unnoticed by the Supreme Court. Judicial blindness to the problem of securing access to the press is dramatically illustrated by *New York Times* Co. *v. Sullivan*, one of the latest chapters in the romantic and rigid interpretation of the first amendment. * * *

The constitutional armor which *Times* now offers newspapers is predicated on 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." But it is paradoxical that although the libel laws have been emasculated for the benefit of defendant newspapers where the plaintiff is a "public official," the Court shows no corresponding concern as to whether debate will in fact be assured. The irony of *Times* and its progeny lies in the unexamined assumption that reducing newspaper exposure to libel litigation will remove restraints on expression and lead to an "informed society." But in fact the decision creates a new imbalance in the communications process. Purporting to deepen the constitutional guarantee of full expression, the actual effect of the decision is to perpetuate the freedom of a few in a manner adverse to the public interest in uninhibited debate. Unless the *Times* doctrine is deepened to require opportunities for the public figure to reply to a defamatory attack, the *Times* decision will merely serve to equip the press with some new and rather heavy artillery which can crush as well as stimulate debate.

* * *

The law of libel is not the only threat to first amendment values; problems of equal moment are raised by judicial inattention to the fact that the newspaper publisher is not the only addressee of first amendment protection. Supreme Court efforts to remove the press from judicial as well as legislative control do not necessarily stimulate and preserve that "multitude of tongues" on which "we have staked * * * our all." What the Court has done is to magnify the power of one of the participants in the communications process with apparently no thought of imposing on newspapers concomitant responsibilities to assure that the new protection will actually enlarge and protect opportunities for expression.

If financial immunization by the Supreme Court is necessary to ensure a courageous press, the public officials who fall prey to such judicially reinforced lions should at least have the right to respond or to demand retraction in the pages of the newspapers which have published charges against them. The opportunity for counterattack ought to be at the very heart of a constitutional theory which supposedly is concerned with providing an outlet for individuals "who wish to exercise their freedom of speech even though they are not members of the press." If no such right is afforded or even considered, it seems meaningless to talk about vigorous public debate.

By severely undercutting a public official's ability to recover damages when he had been defamed, the *Times* decision would seem to reduce the likelihood of retractions since the normal mitigation incentive to retract will be absent.

Although the Court did not foreclose the possibility of allowing public officials to recover damages for a newspaper's refusal to retract, its failure to impose such a responsibility represents a lost opportunity to work out a more relevant theory of the first amendment. Similarly, the Court's failure to require newspapers to print a public official's reply ignored a device which could further first amendment objectives by making debate meaningful and responsive. Abandonment of the romantic view of the first amendment would highlight the importance of giving constitutional status to these responsibilities of the press.

However, even these devices are no substitute for the development of a general right of access to the press. A group that is not being attacked but merely ignored will find them of little use. Indifference rather than hostility is the bane of new ideas and for that malaise only some device of more general application will suffice. It is true that Justice Brennan, writing for the Court in *Times*, did suggest that a rigorous test for libel in the public criticism area is particularly necessary where the offending publication is an "editorial advertisement," since this is an "important outlet for the promulgation of information and ideas by *persons who do not themselves have access to publishing facilities*—who wish to exercise their freedom of speech *even though they are not members of the press*." This statement leaves us at the threshold of the question of whether these individuals—the "non-press"—should have a right of access secured by the first amendment: should the newspaper have an obligation to take the editorial advertisement? As Justice Brennan appropriately noted, newspapers are an important outlet for ideas. But currently they are outlets entry to which is granted at the pleasure of their managers. The press having been given the *Times* immunity to promote public debate, there seems little justification for not enforcing coordinate responsibility to allocate space equitably among ideas competing for public attention. And, some quite recent shifts in constitutional doctrine may at last make feasible the articulation of a constitutionally based right of access to the media.

* * *

The *Times* decision operates on the assumption that newspapers are fortresses of vigorous public criticism, that assuring the press freedom over its content is the only prerequisite to open and robust debate. But if the *raison d'être* of the mass media is not to maximize discussion but to maximize profits, inquiry should be directed to the possible effect of such a fact on constitutional theory. The late Professor V. O. Key stressed the consequences which flow from the fact that communications is big business.[46]

> * * *The networks are in an unenviable economic position. They are not completely free to sell their product—air time. If they make their facilities available to those who advocate causes slightly off color politically, they may antagonize their major customers.

The press suffers from the same pressures—"newspaper publishers are essentially people who sell white space on newsprint to advertisers"; in large part they are only processors of raw materials purchased from others.

Professor Key's conclusion—indifference to content follows from the structure of contemporary mass communications—compares well with Marshall McLuhan's view that the nature of the communications process compels a "strategy of neutrality." For McLuhan it is the technology or form of television itself, rather than the message, which attracts public attention. Hence the media owners are anxious that media content not get enmeshed with unpopular views which will undermine the attraction which the media enjoy by virtue of their form alone.

Whether the mass media suffer from an institutional distaste for controversy because of technological or of economic factors, this antipathy to novel ideas must be viewed against a background of industry insistence on constitutional immunity from legally imposed responsibilities. A quiet truth emerges from such a study: industry opposition to legally imposed responsibilities does not represent a flight from censorship but rather a flight from points of view. Points of view suggest disagreement and angry customers are not good customers.

* * *

The mass communications industry should be viewed in constitutional litigation with the same candor with which it has been analyzed by industry members and scholars in communication. * * *

If the mass media are essentially business enterprises and their commercial nature makes it difficult to give a full and effective hearing to a wide spectrum of opinion, a theory of the first amendment is unrealistic if it prevents courts or legislatures from requiring the media to do that which, for commercial reasons, they would be otherwise unlikely to do. Such proposals only require that the opportunity for publication be broadened and do not involve restraint on publication or punishment after publication. * * * When commercial considerations dominate, often leading the media to repress ideas, these media should not be allowed to resist controls designed to promote vigorous debate and expression by cynical reliance on the first amendment.

* * *

But can a valid distinction be drawn between newspapers and broadcasting stations, with only the latter subject to regulation? It is commonly said that because the number of possible radio and television licenses is limited, regulation is the natural regimen for broadcasting. Yet the number of daily newspapers is certainly not infinite and, in light of the fact that there are now three times as many radio stations as there are newspapers, the relevance of this distinction is dubious. Consolidation is the established pattern of the American press today, and the need to develop means of access to the press is not diminished because the limitation on the number of newspapers is caused by economic rather than technological factors. Nor is the argument that other newspapers can always spring into existence persuasive—the ability of individuals to publish pamphlets should not preclude regulation of mass circulation, monopoly newspapers any more than the availability of sound trucks precludes regulation of broadcasting stations.

The foregoing analysis has suggested the necessity of rethinking first amendment theory so that it will not only be effective in preventing governmental abridgment but will also produce meaningful expression despite the present or potential repressive effects of the mass media. If the first amendment can be so invoked, it is necessary to examine what machinery is available to enforce a right of access and what bounds limit that right.

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46. V. O. Key, *Public Opinion and American Democracy*, 378–79, 387 (1961).

* * *

One alternative is a judicial remedy affording individuals and groups desiring to voice views on public issues a right of nondiscriminatory access to the community newspaper. This right could be rooted most naturally in the letter-to-the-editor column and the advertising section. That pressure to establish such a right exists in our law is suggested by a number of cases in which plaintiffs have contended, albeit unsuccessfully, that in certain circumstances newspaper publishers have a common law duty to publish advertisements. In these cases the advertiser sought nondiscriminatory access, subject to even-handed limitations imposed by rates and space.

Although in none of these cases did the newspaper publisher assert lack of space, the right of access has simply been denied. The drift of the cases is that a newspaper is not a public utility and thus has freedom of action regardless of the objectives of the claimant seeking access.

* * *

The courts could provide for a right of access other than by reinterpreting the first amendment to provide for the emergence as well as the protection of expression. If monopoly newspapers are indeed quasi-public, their refusal of space to particular viewpoints is state action abridging expression in violation of even the romantic view of the first amendment.

* * *

Another, and perhaps more appropriate, approach would be to secure the right of access by legislation. A statute might impose the modest requirement, for example, that denial of access not be arbitrary but rather be based on rational grounds. Although some cases have involved a statutory duty to publish, a constitutional basis for a right of access has never been considered. * * *

* * *

Constitutional power exists for both federal and state legislation in this area. Turning first to the constitutional basis for federal legislation, it has long been held that freedom of expression is protected by the due process clause of the fourteenth amendment. The now celebrated section five of the fourteenth amendment authorizing Congress to "enforce, by appropriate legislation" the provisions of the fourteenth amendment, appears to be as resilient and serviceable a tool for effectuating the freedom of expression guarantee of the fourteenth amendment as for implementing the equal protection guarantee.

If public order and an informed citizenry are, as the Supreme Court has repeatedly said, the goals of the first amendment, these goals would appear to comport well with state attempts to implement a right of access under the rubric of its traditional police power. If a right of access is not constitutionally proscribed, it would seem well within the powers reserved to the states by the tenth amendment of the Constitution to enact such legislation. Of course, if there were conflict between federal and state legislation, the federal legislation would control. Yet, the whole concept of a right of access is so embryonic that it can scarcely be argued that congressional silence preempts the field.

The right of access might be an appropriate area for experimental, innovative legislation. The right to access problems of a small state dominated by a single city with a monopoly press will vary, for example, from those of a populous state with many cities nourished by many competing media. These differences may be more accurately reflected by state autonomy in this area, resulting in a cultural federalism such as that envisaged by Justice Harlan in the obscenity cases. * * *

Utilization of a contextual approach highlights the importance of the degree to which an idea is suppressed in determining whether the right to access should be enforced in a particular case. If all media in a community are held by the same ownership, the access claim has greater attractiveness. This is true although the various media, even when they do reach the same audience, serve different functions and create different reactions and expectations. The existence of competition within the same medium, on the other hand, probably weakens the access claim though competition within a medium is no assurance that significant opinions will have no difficulty in securing access to newspaper space or broadcast time. It is significant that the right of access cases that have been litigated almost invariably involve a monopoly newspaper in a community.

The changing nature of the communications process has made it imperative that the law show concern for the public interest in effective utilization of media for the expression of diverse points of view. Confrontation of ideas, a topic of eloquent affection in contemporary decisions, demands some recognition of a right to be heard as a constitutional prin-

ciple. It is the writer's position that it is open to the courts to fashion a remedy for a right of access, at least in the most arbitrary cases, independently of legislation. If such an innovation is judicially resisted, I suggest that our constitutional law authorizes a carefully framed right of access statute which would forbid an arbitrary denial of space, hence securing an effective forum for the expression of divergent opinions. With the development of private restraints on free expression, the idea of a free marketplace where ideas can compete on their merits has become just as unrealistic in the twentieth century as the economic theory of perfect competition. The world in which an essentially rationalist philosophy of the first amendment was born has vanished and what was rationalism is now romance.

Access and Its Critics

Professor Edwin Baker has argued that access theory advocates really posit a "market failure" model of the First Amendment. Access theorists, in this view, basically support a marketplace of ideas rationale for the First Amendment and are really seeking to improve the functioning of that marketplace. As Professor Baker sees it, these marketplace of ideas dissidents are usually asking for govemment intervention to make the marketplace of ideas work better. Their heresy is not that a marketplace of ideas model for the First Amendment is mistaken, but rather that presently the marketplace of ideas does not work and should be improved. Professor Baker is critical of these melioristic efforts. See generally, Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L.Rev. 964 at 986–987 (1978):

> The correction of market failures requires criteria to guide the state in its intervention. If provision of *adequate* access is the goal, the lack of criteria for "adequacy" undermines the legitimacy of government regulation. For the government to determine what access is adequate involves the government implicitly judging what is the correct resolution of the marketplace debates—or, more bluntly, allows the government to define truth. If a purpose of the first amendment is to protect unpopular ideas that may eventually triumph over the majority's established dogma, then allowing the government to determine adequacy of access stands the first amendment on its head. (In other versions, where equality of input provides the criterion, the parallel problem will be defining equality.)

Is it possible (or desirable) to have access without having equal access?

A distinction has been made for First Amendment purposes between message composers and media owners. The former, in this view, enjoy a greater measure of protection. This distinction and a consequent novel response to the problem of encouraging access to the media is found in Nadel, *A Unified Theory of the First Amendment: Divorcing the Medium from the Message*, 2 Fordham Urban L. Journ. at 183 (1983):

> The theory of the first amendment discussed above distinguishes between the rights of the two groups comprising our system of communication: "hardware" medium owners and "software" message producers. First amendment rights belong solely to the latter—those who edit software messages which are normally entitled to copyrights. The amendment absolutely protects their thinking and editing (inclusion and exclusion of messages). If the expression of their message does not conflict with some other constitutional value then the government may not impose unreasonable restrictions on their access to media.
>
> The owners of the media are not entitled to any direct first amendment protection, although they may assert rights of inclusion on behalf of those who use their media. The owner's rights to include and exclude messages are solely economic property rights. These permit them to select which messages will gain access to their media. If, however, their economic power becomes great enough to enable them to censor messages and/or the advantages of permitting them to exercise discretion is minimal, then the government may regulate access and even impose common carrier obligations upon them.

Professor Nadel makes a case for greater protection for the editor of the copyrightable software message. If a newspaper were to publish an editorial reply, the reply would have been copyrightable. Why shouldn't this theory protect the access seeker as well as the editor? Why should there be special protection for editors as compared to other writers or speakers?

Other writers believe that the access concept is fundamentally at war with the First Amendment and believe that the defect in the existing law is precisely that it makes distinctions. In this view, *Red Lion* and *Tornillo* are inconsistent from a First Amendment point of view. Furthermore, in this view, the only way this inconsistency can be reconciled is to apply the rationale of the *Tornillo* case to broadcasting as well. In short, proponents of this view

would ask the court to reverse *Red Lion*. See *Red Lion v.* FCC, text, p. 795:

> The requirement that a licensee devote *any* portion of his broadcast time to issues or to subjects not of his own selection perforce restricts his own freedom of speech in a way that cannot be reconciled with *Tornillo*. The additional requirement that he ventilate views that would undermine the force of his own view, or such views as he alone prefers to present on his station, is a similar restriction equally repugnant to *Tornillo*. That he must yield his station for the presentation of such matters at his own expense and that he must also supply a free forum for personal replies by those whom he has permitted to be criticized, is more of the same: they all directly abridge the licensee's "editorial control and judgment," and are inconsistent with *Tornillo*. See Van Alstyne, *The Mobius Strip Of The First Amendment: Perspectives on Red Lion*. 29 S.C.L.Rev. 539 at 560–561 (1978).

Professor Van Alstyne disclaims any intention to say that *Red Lion* was "plainly wrong." But it is his basic theme to suggest that "Tornillo is a case that represents a fundamentally different and more confident view of the First Amendment."

Access to the Print Press—The *Tornillo* Case

On June 7, 1971, the Supreme Court, in a further extension of the *New York Times* doctrine in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), discussed in connection with the libel materials in this text, p. 203, justified further increasing the significant protection against libel newspapers already enjoyed by urging the establishment by the states of a right of access to the press. Justice William Brennan, speaking for the Court, said in an opinion joined by Chief Justice Burger and Justice Blackmun:

> If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in a stifling public discussion of matters of public concern.

The Court, in footnote 15 of its opinion, accompanied this remark with a sympathetic discussion of the argument for the creation of a right of access to the press:

> Some States have adopted retraction statutes or right of reply statutes. See Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 Va.L.Rev. 867 (1984); Note, *Vindication of the Reputation of a Public Official*, 80 Harv.L.Rev. 1730 (1967). Cf. *Red Lion Broadcasting Co. v.* FCC, 395 U.S. 367 (1969).
>
> One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion. Barron, *Access to the Press—A New First Amendment Right*, 80 Harv.L.Rev. 1641, 1666–1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly.

The Court's observations on access in *Rosenbloom* raised some intriguing questions. The Court said "constitutional adjudication" should take account of the individual's interest in access to the press. The Court's remarks in *Rosenbloom* appeared to *assume* the constitutionality of right to reply legislation which would have a much wider scope than merely to provide a response to defamation. Finally, the state action problem which has loomed so large in the lower courts is not mentioned at all.

In May 1973 in *CBS v. Democratic National Committee*, 412 U.S. 94 (1973), the Supreme Court dealt a blow to the view that the force of the First Amendment was sufficient in itself to require the broadcast networks to abandon their policy of refusing to sell time to political groups and parties for the dissemination of views about ideas. See text, p. 511. The Supreme Court took the position that so long as the FCC neither forbade nor required the networks to take any particular position with regard to the sale of political time, what the networks did was private action and therefore removed from the realm of constitutional obligation.

In the much-publicized *Tornillo* case the tantalizing question was squarely presented for consideration: Was it consistent, under the First Amendment, for a state to provide by statute in certain specified circumstances for compelled publication by a daily newspaper of general circulation?

A provision of the Florida Election Code, F.S. 104.38, enacted in 1913, provided that where the publisher of a newspaper assails the personal character of any political candidate or charges him with malfeasance or misfeasance in office, such newspaper shall upon request of the political candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for the reply:

> F.S. § 104.38—Newspaper assailing candidate in an election; space for reply. If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

The statute had been slumbering in the Florida sun for more than half a century. The rise of the idea that the First Amendment might suggest positive duties for the press as well as new immunities had breathed new life into the statute in the late sixties, and at least three lawsuits involving this little-known provision of the Florida Election Code had been brought.

The most controversial came to involve a lawsuit by one Pat Tornillo, leader of the Dade County Classroom Teachers Association. In 1972, Tornillo ran as Democratic candidate for the Florida legislature.

In 1968, the Dade County Classroom Teachers Association had gone on strike. Under Florida law at the time, a strike by public school teachers was illegal. Tornillo had led the strike in Miami.

The *Miami Herald* on September 20, 1972, published an editorial calling Tornillo a "czar" and a lawbreaker. The *Herald* said in an editorial that "it would be inexcusable of the voters if they sent Pat Tornillo to the legislature."

Tomillo demanded an opportunity to reply to both these attacks under the Florida right of reply statute. The *Herald* refused to print the reply, and Tornillo filed a suit against the *Herald* and sought, on the strength of the statute, a mandatory injunction requiring the printing of his replies.

The *Tornillo* case required a direct judicial consideration of the validity of affirmative implementation of First Amendment values.

The Florida lower court in the *Tornillo* case held that the right of reply statute was unconstitutional. But the Supreme Court of Florida in a 6–1 decision reversed that court and, in the first test of the validity under the First Amendment of a newspaper right of reply statute, held it to be constitutional. *Tornillo v. Miami Herald*, 287 So.2d 78 (Fla. 1973).

The Supreme Court of Florida strongly relied on the endorsement of right of reply legislation contained in the opinion for the Court in *Rosenbloom*, see text, p. 203. The idea expressed in *Rosenbloom* and the state supreme court decision in *Tornillo* may be outlined as follows: If damages are not to be a remedy for libel, perhaps a right of reply can perform that task. Damages won in a libel action are perhaps a burden on the information process. But a right of reply statute aids the information process in the sense that it provides for access for the person attacked.

MIAMI HERALD PUB. CO. v. TORNILLO

418 U.S. 241, 94 S.CT. 2831, 41 L.ED.2D 730 (1974).

Chief Justice BURGER delivered the opinion of the Court.

The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper, violates the guarantees of a free press.

In the fall of 1972, appellee, Executive Director of the Classroom Teachers Association, apparently a teachers' collective-bargaining agent, was a candidate for the Florida House of Representatives. On September 20, 1972, and again on September 29, 1972, appellant printed editorials critical of appellee's candidacy. In response to these editorials appellee demand that appellant print verbatim his replies, defending the role of the Classroom Teachers Association and the organization's accomplishments for the citizens of Dade County. Appellant declined to print the appellee's replies, and appellee brought suit in Circuit Court, Dade County, seeking declaratory and injunctive relief and actual and punitive

damages in excess of $5,000. The action was premised on Florida Statute § 104.38, a "right of reply" statute which provides that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute constitutes a first-degree misdemeanor.

Appellant sought a declaration that § 104.38 was unconstitutional. After an emergency hearing requested by the appellee, the Circuit Court denied injunctive relief because, absent special circumstances, no injunction could properly issue against the commission of a crime, and held that § 104.38 was unconstitutional as an infringement on the freedom of the press under the First and Fourteenth Amendments to the Constitution. *Tornillo v. Miami Herald Pub. Co.*, 38 Fla.Supp. 80 (1972). The Circuit Court concluded that dictating what a newspaper must print was no different from dictating what it must not print. The Circuit Judge viewed the statute's vagueness as serving "to restrict and stifle protected expression." 38 Fla.Supp., at 83. Appellee's cause was dismissed with prejudice.

On direct appeal, the Florida Supreme Court reversed holding that § 104.38 did not violate constitutional guarantees. *Tornillo v. Miami Herald Pub. Co.*, 287 So.2d 78 (1973). It held that free speech was enhanced and not abridged by the Florida right of reply statute, which in that court's view, furthered the "broad societal interest in the free flow of information to the public." 287 So.2d, at 82. It also held that the statute was not impermissibly vague; the statute informs "those who are subject to it as to what conduct on their part will render them liable to its penalties." 287 So.2d, at 85. Civil remedies, including damages, were held to be available under this statute; the case was remanded to the trial court for further proceedings not inconsistent with the Florida Supreme Court's opinion.

* * *

The challenged statute creates a right to reply to press criticism of a candidate for nomination or election. The statute was enacted in 1913 and this is only the second recorded case decided under its provisions.

Appellant contends the statute is void on its face because it purports to regulate the content of a newspaper in violation of the First Amendment. Alternatively it is urged that the statute is void for vagueness since no editor could know exactly what words would call the statute into operation. It is also contended that the statute fails to distinguish between critical comment which is and is not defamatory.

The appellee and supporting advocates of an enforceable right of access to the press vigorously argue that Government has an obligation to ensure that a wide variety of views reach the public.[8] The contentions of access proponents will be set out in some detail.[9] It is urged that at the time the First Amendment to the Constitution was enacted in 1791 as part of our Bill of Rights the press was broadly representative of the people it was serving. While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers. A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.

Access advocates submit that although newspapers of the present are superficially similar to those of 1791 the press of today is in reality very different from that known in the early years of our national existence. In the past half century a communications revolution has seen the introduction of radio and television into our lives, the promise of a global community through the use of communications satellites, and the spectre of a "wired" nation by means of an expanding cable television network with two-way capabilities. The printed press, it is said, has not escaped the effects of this revolution. Newspapers have become big business and there are far fewer

8. See generally Barron, *Access to the Press—A New First Amendment Right*, 80 Harv.L.Rev. 1641 (1967).

9. For a good overview of the position of access advocates see Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L.Rev. 1, 8–9 (1973) (hereinafter "Lange").

of them to serve a larger literate population. Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. Major metropolitan newspapers have collaborated to establish news services national in scope. Such national news organizations provide syndicated "interpretative reporting" as well as syndicated features and commentary, all of which can serve as part of the new school of "advocacy journalism."

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion.[15] Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretative analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership.

> This concentration of nationwide news organizations—like other large institutions—has grown increasingly remote from and unresponsive to the popular constituencies on which they depend and which depend on them. Report of the Task Force, *The Twentieth Century Fund Task Force Report for a National News Council*, A *Free and Responsive Press* 4 (1973).

Appellees cite the report of the Commission on Freedom of the Press, chaired by Robert M. Hutchins, in which it was stated, as long ago as 1947, that "The right of free public expression has * * * lost its earlier reality." Commission on Freedom of the Press, A *Free and Responsible Press* 15.

The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers,[16] have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be "surrogates for the public" carries with it a concomitant fiduciary obligation to account for that stewardship.[17] From this premise it is reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the "marketplace of ideas" is today a monopoly controlled by the owners of the market.

Proponents of enforced access to the press take comfort from language in several of this Court's decisions which suggests that the First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press from government regulation. In *Associated Press v. United States*, 326 U.S. 1, 20 (1945), the Court, in rejecting the argument that the press is immune from the antitrust laws by virtue of the First Amendment, stated:

> The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the

15. "Local monopoly in printed news raises serious questions of diversity of information and opinion. What a local newspaper does not print about local affairs does not see general print at all. And, having the power to take initiative in reporting and enunciation of opinions, it has extraordinary power to set the atmosphere and determine the terms of local consideration of public issues." B. Bagdikian, *The Information Machines* 127 (1971).

16. The newspapers have persuaded Congress to grant them immunity from the antitrust laws in the case of "failing" newspapers for joint operations. 15 U.S.C.A. § 1801 et seq.

17. "Freedom of the press is a right belonging, like all rights in a democracy, to all the people. As a practical matter, however, it can be exercised only by those who have effective access to the press. Where the financial, economic, and technological conditions limit such access to a small minority, the exercise of that right by that minority takes on fiduciary or quasi-fiduciary characteristics." A. MacLeish in W. Hocking, *Freedom of the Press*, 99 n. 4 (1947).

> public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. [Footnote omitted.]

In *New York Times* Co. *v. Sullivan*, 376 U.S. 254, 270 (1964), the Court spoke of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." It is argued that the "uninhibited, robust" debate is not "wide-open" but open only to a monopoly in control of the press. Appellee cites the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 47 & n. 15 (1971), which he suggests seemed to invite experimentation by the States in right to access regulation of the press.

Access advocates note that Justice Douglas a decade ago expressed his deep concern regarding the effects of newspaper monopolies:

> Where one paper has a monopoly in an area, it seldom presents two sides of an issue. It too often hammers away on one ideological or political line using its monopoly position not to educate people, not to promote debate, but to inculcate its readers with one philosophy, one attitude—and to make money. * * * The newspapers that give a variety of views and news that is not slanted or contrived are few indeed. And the problem promises to get worse. * * * *The Great Right* (Ed. by E. Cahn) 124–125, 127 (1963).

They also claim the qualified support of Professor Thomas I. Emerson, who has written that "[a] limited right of access to the press can be safely enforced," although he believes that "[g]overnment measures to encourage a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a preferable course of action." T. Emerson, *The System of Freedom of Expression* 671 (1970).

However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that amendment developed over the years.[20]

The Court foresaw the problems relating to government enforced access as early as its decision in *Associated Press v. United States, supra*. There it carefully contrasted the private "compulsion to print" called for by the Association's Bylaws with the provisions of the District Court decree against appellants which "does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published." 326 U.S., at 20 n. 18. In *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), we emphasized that the cases then before us "involve no intrusions upon speech and assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." In *Columbia Broadcasting System, Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 117 (1973), the plurality opinion noted:

> The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers.

An attitude strongly adverse to any attempt to extend a right of access to newspapers was echoed by several Members of this Court in their separate opinions in that case. 412 U.S., at 145 (Stewart, J., concurring); 412 U.S. at 182 n. 12 (Brennan, J., dissenting). Recently, while approving a bar against employment advertising specifying "male" or "female" preference, the Court's opinion in *Pittsburgh Press* Co. *v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 391 (1973), took pains to limit its holding within narrow bounds:

> Nor, *a fortiori*, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial.

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20. Because we hold that § 104.38 violates the First Amendment's guarantee of a free press we have no occasion to consider appellant's further argument that the statute is unconstitutionally vague.

Dissenting in *Pittsburgh Press*, Justice Stewart joined by Justice Douglas expressed the view that no "government agency—local, state or federal—can tell a newspaper in advance what it can print and what it cannot." Id., at 400. See *Associates & Aldrich* Co. *v. Times Mirror* Co., 440 F.2d 133, 135 (9th Cir. 1971).

We see the beginning with *Associated Press*, supra, the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which " 'reason' tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the *Miami Herald* from saying anything it wished" begs the core question. Compelling editors or publishers to publish that which " 'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant from publishing specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. *Grosjean v. American Press* Co., 297 U.S. 233, 244–245 (1936). The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right of access statute, editors might well conclude that the safe course is to avoid controversy and that, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government enforced right of access inescapably "dampens the vigor and limits the variety of public debate," *New York Times* Co. *v. Sullivan*, *supra*, 376 U.S., at 279. The Court, in *Mills v. Alabama*, 384 U.S. 214, 218 (1966), stated that

> there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussion of candidates. * * *

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.

It is so ordered.

Justice WHITE, concurring.

The Court today holds that the First Amendment bars a State from requiring a newspaper to print the reply of a candidate for public office whose personal character has been criticized by that newspaper's editorials. According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. *New York Times* Co. *v. United States*, 403 U.S. 713 (1971). A newspaper or magazine is not a public utility subject to "reasonable" governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. Cf. *Mills v. Alabama*, 384 U.S. 214, 220 (1966). We have learned, and continue to learn, from what we

view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

* * *

Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed. The press would be unlicensed because, in Jefferson's words, "[w]here the press is free, and every man able to read, all is safe." Any other accommodation—any other system that would supplant private control of the press with the heavy hand of government intrusion—would make the government the censor of what the people may read and know.

To justify this statute, Florida advances a concededly important interest of ensuring free and fair elections by means of an electorate informed about the issues. But prior compulsion by government in matters going to the very nerve center of a newspaper—the decision as to what copy will or will not be included in any given edition—collides with the First Amendment. Woven into the fabric of the First Amendment is the unexceptionable, but nonetheless timeless, sentiment that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." 2Z. Chafee, Jr., *Government and Mass Communications* 633 (1947).

The constitutionally obnoxious feature of § 104.38 is not that the Florida legislature may also have placed a high premium on the protection of individual reputational interests; for, government, certainly has "a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). Quite the contrary, this law runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor. Whatever power may reside in government to influence the publishing of certain narrowly circumscribed categories of material, see e.g., *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376 (1973); *New York Times Co. v. United States*, *supra*, at 730 (concurring opinion), we have never thought that the First Amendment permitted public officials to dictate to the press the contents of its news columns or the slant of its editorials.

But though a newspaper may publish without government censorship, it has never been entirely free from liability for what it chooses to print. Among other things the press has not been wholly at liberty to publish falsehoods damaging to individual reputation. At least until today, we have cherished the average citizen's reputation interest enough to afford him a fair chance to vindicate himself in an action for libel characteristically provided by state law. He has been unable to force the press to tell his side of the story or to print a retraction, but he has had at least the opportunity to win a judgment if he can prove the falsity of the damaging publication, as well as a fair chance to recover reasonable damages for his injury.

Reaffirming the rule that the press cannot be forced to print an answer to a personal attack made by it, however, throws into stark relief the consequences of the new balance forged by the Court in the companion case also announced today. *Gertz v. Robert Welch, Inc.* goes far towards eviscerating the effectiveness of the ordinary libel action, which has long been the only potent response available to the private citizen libeled by the press. Under *Gertz*, the burden of proving liability is immeasurably increased, proving damages is made exceedingly more difficult, and vindicating reputation by merely proving falsehood and winning a judgment to that effect are wholly foreclosed. Needlessly, in my view, the Court trivializes and denigrates the interest in reputation by removing virtually all the protection the law has always afforded.

Of course, these two decisions do not mean that because government may not dictate what the press is to print, neither can it afford a remedy for libel in any form. *Gertz* itself leaves a putative remedy for libel intact, albeit in severely emaciated form; and the press certainly remains liable for knowing or reckless falsehoods under *New York Times* and its progeny, however improper an injunction against publication might be.

One need not think less of the First Amendment to sustain reasonable methods for allowing the average citizen to redeem a falsely tarnished reputation. Nor does one have to doubt the genuine decency, integrity and good sense of the vast majority of professional journalists to support the right of any individual to have his day in court when he has been falsely maligned in the public press. The press is the servant, not the master, of the citizenry, and its freedom does not carry with it an unrestricted hunting license to prey on the ordinary citizen.

> 'In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. * * *
>
> * * * Without * * * a lively sense of responsibility a free press may readily become a powerful instrument of injustice. *Pennekamp v. Florida*, 328 U.S. 331, 356, 365 (1946) (Frankfurter, J., concurring).

To me it is a near absurdity to so deprecate individual dignity, as the Court does in *Gertz*, and to leave the people at the complete mercy of the press, at least in this stage of our history when the press, as the majority in this case so well documents, is steadily becoming more powerful and much less likely to be deterred by threats of libel suits.

Justice BRENNAN, with whom Justice Rehnquist joins, concurring.

I join the Court's opinion which, as I understand it, addresses only "right of reply" statutes and implies no view upon the constitutionality of "retraction" statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction. See generally Note, *Vindication of the Reputation of a Public Official*, 80 Harv.L.Rev. 1730, 1739–1747 (1967).

COMMENT

In the context of the public law of libel in *Rosenbloom v. Metromedia*, text, p. 203, Justice Brennan had expressed sympathy for the enactment of right to reply legislation. Yet he had joined in the opinion for the Court in *Tornillo*. Furthermore, in *Gertz v. Welch*, text, p. 208, decided the same day as *Tornillo*, Brennan dissented from the Court's rejection of the *Rosenbloom* "public issue" approach to the public law of libel. If the *Gertz* Court was concerned that the "public issue" standard would make it too difficult for a libel plaintiff to vindicate his reputation by securing a judgment that the publication was false, Justice Brennan had just the remedy: "the possible enactment of statutes, not requiring proof of fault, which provide for an action for retraction or for publication of a court's determination of falsity if the plaintiff is able to demonstrate that false statements have been published concerning his activities."

But after the *Tornillo* decision, can a newspaper be compelled to publish a retraction against its will? Suppose a statute required a paper to publish the fact that a libel plaintiff had been vindicated in a suit against the paper in that the offending publication had been adjudicated as false? Wouldn't the newspaper challenge the statute and rely on the *Tornillo* case for the proposition that the "choice of material to go into the newspaper" is an editorial and not a legislative decision? Note that in *Tornillo*, Justice Brennan wrote a special concurrence to point out that the question of the constitutional validity of retraction statutes is not addressed by the decision of the Court in *Tornillo*. From a First Amendment point of view, how can the retraction statute be distinguished from the right of reply statute? Is it relevant that in the retraction situation the content of the retraction is composed by the newspaper, while in the reply situation it is the person attacked who dictates the contents of the reply?

The Ohio Supreme Court has taken the position that its retraction statute is invalid under *Tornillo*. See *Beacon Journal v. Lansdowne*, 11 Med.L.Rptr. 1094 (1984). The Ohio retraction statute, like those of many other states, permitted a retraction to be used in mitigation of libel damages. To secure this benefit, the Ohio retraction statute required a newspaper to print a demanded retraction of any "false statement, allegation or rumor" within forty-eight hours of the demand. An unusual feature of the law was that it required the offending newspaper to publish a reply written by the defamed party. See Sack, *Libel, Slander and Related Problems* 378 (1980). Usually, the newspaper writes the retraction.

Relying on *Tornillo*, the Ohio Supreme Court held that Ohio's newspaper retraction statutes were unconstitutional:

> Involved herein is the fundamental principle that the coerced publication of particular views, as much as their suppression, violates the First Amendment guar-

> antees of free speech and press. In this context, Ohio's retraction statutes clearly result in the coerced publication of particular views and thus violate the First Amendment. Indeed, when faced with the penalties that would accrue to any newspaper that refused to print a proffered retraction, a staff of editors might well conclude that the safe course is simply to avoid controversial material.

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), Justice White in a concurring opinion blasted the *New York Times v. Sullivan* rule and spoke sympathetically of the merits, as an alternative to libel damages, of a vindication statute:

> We entrust to juries and the courts the responsibility of decisions affecting the life and liberty of persons. It is perverse indeed to say that these bodies are incompetent to inquire into the truth of a statement of fact in a defamation case. I can therefore discern nothing in the Constitution which forbids a plaintiff from obtaining a judicial decree that a statement is false—a decree he can then use in the community to clear his name and to prevent further damage from a defamation already published.

Can right of reply (or even a mandatory vindication statute) be used constitutionally as an alternative to libel damages? On the right of reply alternative, one commentator has suggested:

> One possible alternative is to provide a right of reply only for plaintiffs who prove they were defamed. Assuming a plaintiff meets this burden, the defendant would then have an option to respond in damages or to publish a reply authored by the successful libel plaintiff. In considering whether the "right" of reply, in such circumstances, coerces the defendant, it should be noted that the defendant must elect the reply course of action. The defendant's motive, reasonably enough, is to avoid damages. See Barron, *The Search for Media Accountability*, 19 Suffolk Univ.L.Rev. 789 at 805 (1985).

Has the defendant who elects to use the right of reply remedy been coerced? Or is she, instead, freely exercising a choice to forego damages in order to have a chance to correct misstatements?

The *Tornillo* decision has been criticized for setting forth the access arguments but not really answering them. One commentator, in an influential work on access, suggested what might have proved to be a more reasoned and discriminating approach to the problem of access. See Schmidt, *Freedom of the Press v. Public Access* (1976).

Professor Schmidt said the access problem arises out of a conflict between a First Amendment historical tradition of editorial autonomy and an interpretation of the First Amendment which conceives as its function achievement of "the utilitarian goal of diversity of expression." Schmidt thought resolution of the access problem should involve reconciliation of the "values of autonomy and diversity."

How would such a resolution proceed? Professor Schmidt outlines the following mode of analysis:

> The aim of analysis would be to determine which "publishers" should be protected from access so that the values of autonomy can be best preserved. And, conversely, analysis would have to determine which other "publishers" should be made accessible to serve the goals of diversity. Rights of access would have to be allocated to particular publishing units in such a way that the aim of diversity would be served to the maximum, but jeopardy to the values of autonomy would be kept to a minimum. See Schmidt, 36.

For a more appreciative response to the *Tornillo* case, see Abrams, *In Defense of Tornillo*, 86 Yale L.J. 361 (1976). For a more critical commentary, see *The Supreme Court, 1973 Term*, 88 Harv.L.Rev. 174, 177 (1974).

In Chatzky and Robinson, *A Constitutional Right of Access to Newspapers: Is There Life After Tornillo?*, 16 Santa Clara L.Rev. 453 at 491 (1976), the suggestion is made that a narrowly circumscribed right of access to the press statute might be permissible even after *Tornillo*:

> Congress may well conclude that the "scarcity of frequencies" consideration which prompted enactment of the Radio Act and the Communications Act are paralleled in the modern newspaper industry. Where the Newspaper Preservation Act has "licensed" the merger of publishing resources by exempting certain newspapers from federal antitrust laws, Congress may decide that at least these "licensees" should conform to some standard of public trusteeship.

For some, the declaration in *Tornillo* that mandating the press to print something is the same thing as mandating that the press not print something remains unconvincing: "Viewed from the vantage of the public, a 'right of reply' gives John Citizen two sides of a question while suppression or prohibitions give him none." See Lewin, *What's Happening to Free Speech?*, The New Republic (July 27, 1974), 13.

From a legal point of view, the most remarkable aspect of the *Tornillo* decision is that it is innocent of any reference to the *Red Lion* decision. Is this a defensible omission? Perhaps the Court was reluctant to have to say that editorial decision making was less protected in the electronic media than in the print media, and yet, at the same time, it was unwilling to alter the *Red Lion* decision.

The aftermath of *Tornillo* has been an increase in voluntary opportunities for access by the public to newspapers. One study of the *Tornillo* case points to such developments as "op-ed pages, allocating more space to the letters to the editor column" and creation of press ombudsmen: "The solutions are not perfect, but with an intractable problem they could not be. Furthermore, as voluntary responses to a widely perceived problem, changes can be made as experience dictates. These attempts, even if imperfect, beat the potential errors of legislation, a possibility always lurking within *Tornillo*." See Powe, *Tornillo*, 1987 Sup.Ct.Rev. 345 at 394–395.

How important to the result in *Tornillo* was the concern that compulsory access might deter or chill speech? In *Pacific Gas & Electric v. Public Utilities Commission of California*, 475 U.S. 1 (1986), the Supreme Court concluded that it was central to *Tornillo*. *Pacific Gas & Electric* confronted the Supreme Court with the following question: Could the California Public Utilities Commission require Pacific, Gas & Electric, a privately owned utility company, to include in the envelope with its newsletter, "Progress," accompanying its monthly billings statements of a third party, a ratepayers organization—Toward Utility Rate Normalization (TURN)—with which the utility disagreed? TURN's message was not required to be placed in PG & E's newsletter; instead, TURN'S message was required to be placed in PG & E's billing envelopes four months out of the year. The Court, per Justice Powell, relying on *Tornillo*, held that, the California Public Utilities Commission order violated the First Amendment on two grounds. First, the compulsory access order deterred the utility from saying things that might trigger an adverse response. Second, the order might cause the utility to respond to subjects about which it might otherwise prefer to remain silent.

The view of *Tornillo* taken in *Pacific Gas & Electric* sees concerns about deterrence of speech and compelling speech as central to that decision. *Pacific Gas & Electric* does concede, however, that editorial autonomy was an "independent ground for invalidating the statute." The Court in *Pacific Gas & Electric* used a strict scrutiny standard to judge the First Amendment impact of the utility's compulsory access order.

In dissent, Justice Rehnquist objected to applying the strictest standard of review to the utility's access order on the basis of an unsubstantiated prophecy that the order would necessarily deter the utility's speech. Justice Rehnquist thought such a result unlikely: "TURN or any other group eventually given access will likely address the controversial subjects in spite of PG & E's silence. Accordingly, the right of access should not be held to trigger heightened scrutiny on the ground that it might somehow deter PG & E's right to speak."

ACCESS FOR ADVERTISING TO THE PRIVATELY OWNED DAILY PRESS

What is the status of a First Amendment-based right of access to the advertising columns of the privately owned press?

Has the *Tornillo* case, with its emphasis on unfettered editorial decision making, foreclosed all claims of access for advertising? Or is the advertising section of the paper more susceptible to access claims? See *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376 (1973). Moreover, *Tornillo* dealt with a statute compelling a newspaper to publish a reply to editorial attack, i.e., with the essential editorial product of the paper rather than with the traditionally open "advertising" section. The First Amendment-based access for advertising cases which follow illustrate the range of issues which occur in this area. See also Chapter 8, text, p. 523.

What is the significance of discrimination in deciding whether there is any legal duty to accept advertisements? In *Bloss v. Federated Publications*, 145 N.W.2d 800 (Mich. 1966), the plaintiff, a theater owner, wanted the Battle Creek *Enquirer and News*, the only daily newspaper in Battle Creek, Michigan, to publish certain advertisements concerning adult movies in the city. The paper had informed the theater owner that it did not wish to "accept advertising for theaters concerning suggestive or prurient material." Although the Michigan Court of Appeals declared that a newspaper is "a business affected with a public interest," it was held that the plaintiff's case failed to survive a motion for summary judgment

because the "essential element of discrimination is lacking."

On appeal to the Supreme Court of Michigan, that court affirmed. *Bloss v. Federated Publications*, 157 N.W.2d 241 (Mich. 1968).

The case of *Uhlman v. Sherman*, 22 Ohio N.P., N.S., 225, 31 Ohio Dec. 54 (1919), was discussed in the *Bloss* litigation. It was heavily relied on by the theater owner since it is the only American case which has recognized a right of access to the press. *Uhlman* concerned discrimination against a *commercial* advertiser.

Associates & Aldrich v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971), presented this question: "May a federal court compel the publisher of a daily newspaper to accept and print advertising in the exact form submitted?" The court answered: "No." A motion picture producer had brought suit to prevent the *Los Angeles Times* from censoring its advertising copy. The court said it could find no legal basis to empower a court "to compel a private newspaper to publish advertisements without editorial control of their content merely because such advertisements are not legally obscene or unlawful."

Should the Ninth Circuit in *Associates & Aldrich* have distinguished between the exercise of editorial discretion in the news columns of newspapers and the exercise of editorial discretion in an "open" section of the paper such as the advertising columns?

See generally Barron, *Freedom of the Press for Whom?* (1973), 270–87.

Efforts to compel a First Amendment-based right of access to the advertising pages of the privately owned daily press persist but have yet to succeed. *Wisconsin Association of Nursing Homes, Inc. v. The Journal* Co., 285 N.W.2d 891 (Wisc. 1979) is illustrative. When the Milwaukee *Journal* published a series of investigative reports dealing with the quality of care in Milwaukee area nursing homes, the Wisconsin Association of Nursing Homes prepared a full-page ad to respond to what it contended were "false and erroneous" allegations. The *Journal* refused to publish the ad, asserting that it contained possibly libelous material.

Plaintiffs sought an order compelling publication of the ads from the Wisconsin courts. Plaintiffs contended that the *Journal* had a " 'monopoly' over all newspapers of general coverage in the Milwaukee metropolitan area, and that without access to defendant's newspapers, plaintiffs are deprived of any right to present their views to the public." The courts refused to issue an order compelling publication of the ad. The Wisconsin Supreme Court conceded that the "right of a publisher to refuse advertising in certain instances involving a claim of monopoly" is qualified in some circumstances. But the court said that there was no evidence of "any contracts, combinations, or conspiracies in restraint of trade"on the part of the defendant Milwaukee *Journal*.

Some compulsory publication cases have been won but not on First Amendment grounds. Significant in this regard is *Fitzgerald v. National Rifle Association*, 383 F. Supp. 162 (D.N.J. 1974). Fitizgerald, a candidate for the Board of Directors of the National Rifle Association, submitted an advertisement, urging his candidacy, to *The American Rifleman*, official journal of the National Rifle Association. But the NRA refused to publish.

Although recognizing the "general right of a newspaper or magazine to decide what advertisements it will and will not accept," the court cautioned that the rule was not "absolute in all circumstances," as prior cases demonstrated. For example, the publisher's right to refuse advertisement had been subordinated to the policies of the antitrust laws in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), text, pp. 547, 548. Judge Whipple summarized *Lorain Journal* in *Fitzgerald* as follows: "The Court concluded that when balanced against the Congressional policy of preventing monopoly, the right of publishers to refuse advertisements must yield."

The *Fitzgerald* case did not view the right not to publish as absolute. A familiar need to balance competing interests was the tack advocated in *Fitzgerald*:

> In the instant case, this Court must decide whether the publisher's right must give way when balanced against the fiduciary duty of corporate directors to insure fair and open corporate elections. This duty of course extends only to the association membership.

In *Fitzgerald*, it was held that "the traditional right of a magazine to refuse publication of an advertisement" had to yield for two reasons: (1) the equitable requirements of decency and fair dealing imposed on the NRA by state law, and (2) the unique relationship between *The American Rifleman* and the election process of the NRA. In short, the court ordered *The American Rifleman* to publish the advertisement originally submitted by the plaintiffs.

The Antitrust Laws and Access to the Press

Paradoxically, the antitrust laws rather than the First Amendment may turn out to be the breeding ground

for a right of access to the press. Illustrative of this principle is *Home Placement Service v. Providence Journal*, 8 Med.L.Rptr. 1881, 682 F.2d 274 (1st Cir. 1982), see text, p. 548, which held that the refusal of a newspaper to accept classified advertising from a rental referral service which charges a fee violates the antitrust laws. Such conduct constituted "strangulation of a competitor."

Currently, a newspaper is free not to publish advertisements. But a newspaper was not free not to publish in circumstances where the rental referral business which seeks to place an ad is in competition with the newspaper. The newspaper's action was in violation of the Sherman Act. The newspaper was unlawfully using its control of the newspaper advertising market to preclude competition of the market seeking information about housing facts. The court of appeals in *Home Placement Service* remanded the case to the United States District Court for the District of Rhode Island for a determination of whether injunctive relief was appropriate and for an award of damages and attorney's fees.

Does the award suggest some reluctance by the court of appeals to order a newspaper to accept an ad? Is the suggestion that the appropriate relief in lieu of an order to publish is monetary damages?

Home Placement Service should be contrasted with *Homefinders of America v. Providence Journal*, 6 Med.L.Rptr. 1018, 621 F.2d 441 (1st Cir. 1980), see text, p. 548, where the First Circuit held that the Sherman Act was not violated by refusing to publish false and misleading advertisements which had been submitted by a rental referral firm which charged fees to prospective renters. Judge Aldrich said for the First Circuit in *Homefinders*:

> Even when it might lack proof of actual fraud, we would hesitate long before holding that a newspaper, monopoly or not, armed with both the First Amendment and a reasonable business justification, can be ordered to publish advertising against its will. * * * In the present case, we see no question. The antitrust laws are not a shield for deceptive advertising.

Homefinders was distinguished from *Home Placement Service* on the ground that in *Homefinders* the advertisements were deceptive and misleading and, therefore, the refusal to publish them was reasonable. The contention by the newspaper in *Home Placement Service* that the public should not have to pay to find rental housing was rejected by the court as an unacceptable "paternal judgment."

The Chicago Newspaper Case: A Union's Fight for Access to the Daily Press

A union was involved in a dispute with the large Chicago department store, Marshall Field and Company. The union objected to the sale by Marshall Field of imported clothing on the ground that the sale of imported clothing jeopardized the jobs of American clothing workers. The union said it would protest such sales until the countries of origin agreed to voluntary quotas on the amount of clothing to be sent into the United States. The union sought to place an ad explaining its position in each of the then four Chicago daily newspapers. None of the Chicago dailies would publish the ad. The union, the Chicago Joint Board, Amalgamated Clothing Workers of America, AFL–CIO, sued the papers on an access theory to enjoin them to publish the ads and to pay compensatory and exemplary damages.

The Chicago papers moved for summary judgment on the ground that newspapers had a right to reject advertisements and that the newspapers had not violated the First Amendment since that Amendment applied only to government. The latter argument, that there was no state action, in this situation was the winning argument for the press. Federal Judge Abraham Marovitz granted the newspaper defendants motion for summary judgment. *Chicago Joint Board, Amalgamated Clothing Workers of America, AFL–CIO v. Chicago Tribune Co.*, 307 F.Supp. 422 (N.D.Ill. 1969).

In Judge Marovitz's view the First Amendment is sort of the obverse of the Eighteenth Amendment. Just as the Eighteenth Amendment tried to destroy the liquor industry forever in the United States, so the First Amendment is a constitutional attempt to protect permanently the newspaper industry.

If the plaintiffs had dwelled on the fact that some of the newspapers involved in the *Chicago Joint Board* case also owned television stations, might that have helped the plaintiffs to hurdle the state action barrier? Why?

The union appealed the district court determination only to stumble again on a familiar obstacle, the state action problem. The appeals decision reveals the efforts of the union to show the interdependence between the Chicago daily newspapers and government in the hope that newspaper restraints on expression would be seen as quasi public. Among the fascinating examples of state involvement in the Chicago daily press unearthed by union lawyers—particularly with regard to the newspaper defendants

in the *Chicago Joint Board* case—was a Chicago ordinance which restricted newsstands on public streets to the sale of daily newspapers printed and published in the city of Chicago. Also, counsel for the union argued that legal imposition of a duty to publish was not the foreign conception represented by newspaper lawyers, since Illinois, like most states, requires newspaper publication of certain legal notices by the press. It was all to no avail; the appeals court affirmed the district court. The decision of the court of appeals, per Judge Castle, in *Chicago Joint Board*, unlike the celebrated *Red Lion* decision, text, p. 795, was a victory for the view that freedom of the press has as its primary focus the freedom of the publisher. See *Chicago Joint Board, Amalgamated Clothing Workers of America, AFL–CIO v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970).

Judge Castle in the *Chicago Joint Board* decision rejected the union argument that "monopoly power in an area of vital public concern" is the equivalent of governmental action: the Chicago daily newspaper market was not a monopoly. This, of course, is true, but wasn't the union position really that in access terms the Chicago newspapers were functionally monopolistic? Since none of the papers would print the union's ad, for First Amendment purposes it was irrelevant that there was more than one daily newspaper in Chicago.

The court of appeals decision in *Chicago Joint Board* is a good statement of the traditional *laissez-faire* approach to freedom of expression which has long dominated American law. Under this view, is the possession of property rights a precondition to the exercise of freedom of the press? Judge Castle states the *laissez-faire* view as follows:

> The union's right to free speech does not give it the right to make use of the defendants' printing presses and distribution systems without defendants' consent.

The Seventh Circuit also decided one other important access case in 1970. In *Lee v. Board of Regents*, the court decided that spokesmen for differing political and social viewpoints on the campus of the Wisconsin State University at Whitewater had a right of access to the advertising pages of the campus newspaper, the *Royal Purple*. The difference between the two cases? The Chicago newspapers are privately owned and therefore are not bound by a constitutional duty not to restrain expression. Wisconsin State University, on the other hand, is a public, tax-supported institution which is bound by constitutional limitations.

A RIGHT OF ACCESS TO THE PUBLIC PRESS—THE CASE OF THE STATE-SUPPORTED CAMPUS PRESS

In *Avins v. Rutgers, State University of New Jersey*, 385 F.2d 151 (3d Cir. 1967), the plaintiff, Alfred Avins, alleged that he had submitted to the *Rutgers Law Review* an article which reviewed the legislative history of the Civil Rights Act of 1975 insofar as it was intended to affect school desegregation. The articles editor of the *Rutgers Law Review* rejected the article and stated that "approaching the problem from the point of view of legislative history alone is insufficient." Avins contended that a law review published by a state-supported university is a public instrumentality in whose columns all must be allowed to present their ideas: The editors are without discretion to reject an article because in their judgment its nature or ideological approach is not suitable for publication.

The federal district court had dismissed the suit, and the federal court of appeals affirmed. Judge Maris, for the court of appeals, rejected plaintiff's contentions:

> [O]ne who claims that his constitutional right to freedom of speech has been abridged must show that he has a right to use the particular medium through which he seeks to speak. This the plaintiff has wholly failed to do. He says that he has published articles in other law reviews and will sooner or later be able to publish in a law review the article here involved. This is doubtless true. Also, no one doubts that he may freely at his own expense print his article and distribute it to all who wish to read it. However, he does not have the right, constitutional or otherwise, to commandeer the press and columns of the *Rutgers Law Review* for the publication of his article, at the expense of the subscribers to the *Review* and the New Jersey taxpayers, to the exclusion of other articles deemed by the editors to be more suitable for publication. On the contrary, the acceptance or rejection of articles submitted for publication in a law school law review necessarily involves the exercise of editorial judgment and this is in no wise lessened by the fact that the law review is supported, at least in part by the [s]tate.

The struggle for access to the press has met with the most success in the high school and college press, and for a reason: the party denying access was acting pursuant to public authority, and therefore a public restraint on expression was involved. The Wisconsin State University case, which follows, nevertheless, is significant for access theory generally because it recognizes, almost without comment, that which

was formerly not recognized in American law at all: the First Amendment demands opportunity for expression. Prohibition against censorship does not, therefore, exhaust the meaning of the First Amendment; the Amendment has an affirmative dimension.

A ground-breaking case at the high school level was *Zucker v. Panitz*, 299 F.Supp. 102 (S.D.N.Y. 1969), which upheld the right of high school students to publish a paid ad in their high school newspaper which opposed the war in Vietnam.

A similar case having to do with paid advertisements in college papers was decided in 1969 in a federal district court in Wisconsin. *Lee v. Board of Regents of State Colleges*, 306 F.Supp. 1097 (1969).

The United States Court of Appeals affirmed the lower court determination that the Board of Regents of the Wisconsin State Colleges had denied the freedom of speech of the plaintiffs who sought to publish editorial advertisements in the *Royal Purple*. Notice that the Seventh Circuit expressly avoided deciding "whether there is a constitutional right of access to the privately-owned press."

LEE v. BOARD OF REGENTS OF STATE COLLEGES

441 F.2D 1257 (7TH CIR. 1971).

FAIRCHILD, Circuit Judge.

It is conceded that the campus newspaper is a state facility. Thus the appeal does not present the question of whether there is a constitutional right of access to press under private ownership.

The substantive question is whether the defendants, having opened the campus newspaper to commercial and certain other types of advertising, could constitutionally reject plaintiffs' advertisements because of their editorial character. The case does not pose the question whether defendants could have excluded all advertising nor whether there are other conceivable limitations on advertising which could be properly imposed.

The student publications board had adopted the following policy:

"Types of Advertising Accepted.

"*The Royal Purple* will accept advertising which has as its main objective the advertising of

1. A Commercial Product.
2. A Commercial Service.
3. A Meeting. The pitch of an advertisement of this type must clearly be 'come to the meeting'. The topic may be announced, but may not be the main feature of the ad.
4. A Political Candidate whose name will appear on a local ballot. Political advertising must deal solely with the platform of the advertised person. Such copy cannot attack directly opponents or incumbents. Such advertising must contain the following: This advertisement authorized and paid for by (*name of person or organization.*)
5. A Public Service. Advertising of a public service nature will be accepted if it is general in nature, in good taste, and does not attack specific groups, institutions, products, or persons.

"*The Royal Purple* has the right to refuse to publish any advertisement which it may deem objectionable."

Plaintiff Riley submitted an advertisement describing the purposes of a university employees' union and announcing a meeting on safety regulations. It was rejected under the policy because part of it dealt with the business of the meeting.

Plaintiff Scharmach's advertisement was entitled "An Appeal to Conscience." It was signed by nine ministers and proclaimed the immorality of discrimination on account of color or creed.

Plaintiff Lee submitted an advertisement to be signed by himself and stating as follows:

> " 'You shall love your neighbor as yourself.' (*Matthew 19:19*)
>
> "This verse should mean something to us all who are concerned with race relations and the Vietnam War."

The rejection stated in part, "Your ad could possibly come under the public service ad, but it deals with political issues, and is therefore not a public service."

Decisions cited by the district court support the proposition that a state public body which disseminates paid advertising of a commercial type may not reject other paid advertising on the basis that it is editorial in character. Other decisions condemn other facets of discrimination in affording the use of newspaper and other means of expression on public campuses.

* * *

Defendants point out that the campus newspaper is a facility of an educational institution and itself provides an academic exercise. They suggest that the advertising policy is a reasonable means of protecting the university from embarrassment and the staff from the difficulty of exercising judgment as to material which may be obscene, libelous, or subversive. In *Tinker*, the Supreme Court, albeit in a somewhat

different context, balanced the right of free expression against legitimate considerations of school administration. *Tinker* demonstrates how palpable a threat must be present to outweigh the right to expression. The Court said, in part, "But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." * * *

The problems which defendants foresee fall far short of fulfilling the *Tinker* standard.

* * *

The judgment is affirmed.

COMMENT

The Wisconsin State University case involved state-financed print media. Does this case and others like it have any significance for the privately owned mass circulation daily newspaper?

Denial of a right of access for political advertising to public facilities has been upheld. See *Lehman v. City of Shaker Heights*, text, p. 53.

In *Radical Lawyers Caucus v. Pool*, 324 F.Supp. 268 (W.D.Tex. 1970), the federal district court held that since the official journal of the Texas state bar association, an agency of the state, had accepted commercial ads and published editorials and passed resolutions on political subjects, the journal could not decline to publish the advertisement submitted by an association of radical lawyers. Such a denial, the court ruled, constituted a denial of free speech and violated equal protection of the laws.

The *Mississippi Gay Alliance* Case—Access to the Public Press After *Tornillo*

The foregoing cases dealing with access to the tax-supported, state university campus press or with some form of public press involve the only area where a right of access has been recognized. What is the status of cases like *Zucker* and *Lee v. Board of Regents* in light of the Supreme Court decision in *Miami Herald Publishing Co. v. Tornillo*? A case arising after *Tornillo* and raising this issue was *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976). The controversy occurred when the chairwoman of the Mississippi Gay Alliance (MGA) submitted an ad to *The Reflector*, the student newspaper at Mississippi State University (MSU). The contents of the ad were as follows:

> Gay Center—open 6:00 to 9:00 Monday, Wednesday and Friday nights.
>
> We offer—counseling, *Legal aid*, and a library of homosexual literature.
>
> Write to—The Mississippi Gay Alliance, P.O. Box 1328, Mississippi State University, Ms. 39762.

The editor of *The Reflector* refused to publish the ad even though it was a paid advertisement. MGA, alleging a First Amendment violation, then brought suit to compel the editor to publish the ad. The federal district court refused to order publication. The federal court of appeals affirmed and distinguished cases like *Lee v. Board of Regents* and *Zucker* by contending that in the MGA case there was no state action since university officials did not control publishing decisions. A student editor rather than a state university official had declined to publish the ad.

The court of appeals speculated that if a state university official had ordered the newspaper not to publish such an order, it would still have been constitutionally impermissible. The reason for this conclusion, however, did not derive from the premise of *Lee v. Board of Regents* and *Zucker* that a state-sponsored press could not favor one idea and disfavor another. This conclusion derived instead from an idea purportedly set forth in *Miami Herald Publishing Co. v. Tornillo*—the inviolability of editorial autonomy. Courts could not review editorial decision making undertaken under either private or public auspices. Protection of editorial autonomy, however, was only one component of the rationale of the decision in MGA. Since state law made sodomy a crime, the student editor was obliged not to publish an ad which had a connection, albeit peripheral, with such activity. Or as the court put it gingerly: "[S]pecial reasons were present for holding that there was no abuse of discretion by the editor of *The Reflector*."

In a long and thoughtful dissent, Judge Goldberg denied that a state-sponsored newspaper could, for example, refuse to print a statement on the ground that "it expressed a political view contrary to that of the Governor."

Furthermore, Goldberg thought the principle of equal access to state student publications received implicit support from *CBS v. DNC*, text, p. 511:

> The Supreme Court has never passed on a claim of equal access to a state publication. The suggestion that the Court would recognize the rights found in *Lee*, *Zucker*, and *Radical Lawyers* is not undermined by,

and indeed receives implicit support from *Columbia Broadcasting System v. Democratic National Committee.* * * *

Judge Goldberg reasoned that since a "state" newspaper could not publish ads on one side of a public issue and reject ads taking the opposite point of view, it should also be assumed that it would be unconstitutional for a state newspaper to take advertisements dealing with public issues generally but arbitrarily and selectively to exclude advertisements on certain public issues.

For Goldberg, student editorial autonomy, a student right to edit even a state-sponsored press had to be recognized. At the same time the principle of nondiscriminatory access to state publications also had to be recognized. Judge Goldberg suggested accommodation between the two competing interests involved.

The "open" parts of the newspaper—the announcements, the briefs, and unedited advertising sections—were not involved in *Tornillo.* Is it correct to conclude that *Tornillo's* recognition of a "right to edit" is not appropriate in these sections of a state-sponsored press? Others beside Judge Goldberg have made the same distinction between the propriety of a claim for access to the advertising section but not to the news and editorial columns of a public press. See Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting,* 52 Tex.L.Rev. 1123 at 1133–1134 (1974). A difficulty with Judge Goldberg's distinction between the "news and editorial columns" and advertising columns, for example, is that the distinction is not as precise as it should be if it is to be workable. Where would a tendered reply to an "editorial advertisement" fit in Judge Goldberg's scheme if the paper involved didn't wish to publish the reply?

The Supreme Court denied review in the *MGA* case. As a result, the question of the Supreme Court's reaction to claims for a right of access to the advertising columns of the state-supported press remains an open one. What is the impact of *Tornillo* on the preexisting cases recognizing a right of access to the public student press? It would appear that these cases are still intact and are unaffected by the *Tornillo* decision. In other words, in *Zucker, Lee,* and *Radical Lawyers Caucus,* state action was present, and, therefore, unlike the *Miami Herald* in *Tornillo,* the papers in the state publication cases were bound by the constitutional principle of equal access. The *MGA* case can be distinguished from these earlier public press cases because state action was not present as it was in the *Lee* case because in *MGA* a student editor and not a university official had rejected the tendered ad.

Whether or not the opinion for the court in *MGA* can be distinguished from the older access to the state campus press cases, the philosophy of the court in *MGA* clearly reflects the impact of the *Tornillo* decision. The implicit theme of the *MGA* decision—even though the court of appeals is careful to say that state action is not present—is that when an editor's decision not to publish comes into a conflict with a claim for entry from outside the publication, the claims of unfettered editorial decision making have First Amendment primacy even in a public or state-supported press. The case, in fact, suggests a final question: if editorial decision making is to be considered judicially unreviewable, isn't the presence or absence of state action irrelevant?

ACCESS TO THE BROADCAST MEDIA

One immediate result of the *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969), which validated the fairness doctrine, see text, p. 795, decision was the release of a pent-up demand for individual and group access to television. A manifestation of dissatisfaction with complete broadcaster control over entry to broadcasting for political groups, indeed for political ideas, was the request made to the FCC made by the Democratic National Committee in May 1970 that the FCC prohibit broadcasters from refusing to sell time to groups like the DNC for the solicitation of funds and for comment on public issues. The controversy which ensued from this request eventually found its way to the Supreme Court. One of the questions the case raised was whether there was a First Amendment right of access to the electronic media.

CBS v. DEMOCRATIC NATIONAL COMMITTEE

412 U.S. 94, 93 S.CT. 2080, 36 L.ED.2D 772 (1973).

Chief Justice BURGER delivered the opinion of the Court: * * *

* * *

In two orders announced the same day, the Federal Communications Commission ruled that a

broadcaster who meets his public obligation to provide full and fair coverage of public issues is not required to accept editorial advertisements. A divided court of appeals reversed the commission, holding that a broadcaster's fixed policy of refusing editorial advertisements violates the First Amendment; the court remanded the cases to the commission to develop procedures and guidelines for administering a First Amendment right of access.

The complainants in these actions are the Democratic National Committee (DNC) and the Business Executives' Move for Vietnam Peace (BEM), a national organization of businessmen opposed to United States involvement in the Vietnam conflict. In January 1970, BEM filed a complaint with the commission charging that radio station WTOP in Washington, D.C., had refused to sell its time to broadcast a series of one-minute spot announcements expressing BEM views on Vietnam. WTOP, in common with many but not all broadcasters, followed a policy of refusing to sell time for spot announcements to individuals and groups who wished to expound their views on controversial issues. WTOP took the position that since it presented full and fair coverage of important public questions, including the Vietnam conflict, it was justified in refusing to accept editorial advertisements. WTOP also submitted evidence showing that the station had aired the views of critics of our Vietnam policy on numerous occasions. BEM challenged the fairness of WTOP's coverage of criticism of that policy, but it presented no evidence in support of that claim.

Four months later, in May 1970, the DNC filed with the commission a request for a declaratory ruling:

> That under the First Amendment to the Constitution and the Communications Act, a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues.

DNC claimed that it intended to purchase time from radio and television stations and from the national networks in order to present the views of the Democratic Party and to solicit funds. Unlike BEM, DNC did not object to the policies of any particular broadcaster but claimed that its prior "experiences in this area make it clear that it will encounter considerable difficulty—if not total frustration of its efforts—in carrying out its plans in the event the commission should decline to issue a ruling as requested." DNC cited *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) as establishing a limited constitutional right of access to the airwaves.

In two separate opinions, the commission rejected respondents' claim that "responsible" individuals and groups have a right to purchase advertising time to comment on public issues without regard to whether the broadcaster has complied with the Fairness Doctrine. The commission viewed the issue as one of major significance in administering the regulatory scheme relating to the electronic media, one going "to the heart of the system of broadcasting which has developed in this country. * * *" 25 FCC2d at 221. After reviewing the legislative history of the Communications Act, the provisions of the act itself, the commission's decisions under the act and the difficult problems inherent in administering a right of access, the commission rejected the demands of BEM and DNC. [The] commission did, however, uphold DNC's position that the statute recognized a right of political parties to purchase broadcast time for the purpose of soliciting funds. The commission noted that Congress has accorded special consideration for access by political parties, see 47 U.S.C.A. § 315(a), and that solicitation of funds by political parties is both feasible and appropriate in the short space of time generally allotted to spot advertisements.[1]

A majority of the court of appeals reversed the commission, holding that "a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted." 450 F.2d at 646. Recognizing that the broadcast frequencies are a scarce resource inherently unavailable to all, the court nevertheless concluded that the First Amendment mandated an "abridgeable" right to present editorial advertisements. The court reasoned that a broadcaster's policy of airing commercial advertisements but not editorial advertisements constitutes unconstitutional discrimination. The court did not, however, order that either BEM's or DNC's proposed announcements must be accepted by the broadcasters; rather it remanded the cases to the commission to develop "reasonable procedures and reg-

1. The commission's rulings against BEM's Fairness Doctrine complaint and in favor of DNC's claim that political parties should be permitted to purchase airtime for solicitation of funds were not appealed to the court of appeals and are not before us here.

ulations determining which and how many 'editorial advertisements' will be put on the air." Ibid.

* * *

* * * [W]e next proceed to consider whether a broadcaster's refusal to accept editorial advertisements is governmental action violative of the First Amendment.

* * * The Court has not previously considered whether the action of a broadcast licensee such as that challenged here is "governmental action" for purposes of the First Amendment. The holding under review thus presents a novel question, and one with far-reaching implications. See L. Jaffe, *The Editorial Responsibility of the Broadcaster*, 85 Harv.L.Rev. 768, 782–787 (1972).

The court of appeals held that broadcasters are instrumentalities of the government for First Amendment purposes, relying on the thesis, familiar in other contexts, that broadcast licensees are granted use of part of the public domain and are regulated as "proxies" or "fiduciaries of the people." 450 F.2d, at 652. These characterizations are not without validity for some purposes, but they do not resolve the sensitive constitutional issues inherent in deciding whether a particular licensee action is subject to First Amendment restraints.

* * *

The tensions inherent in such a regulatory structure emerge more clearly when we compare a private newspaper with a broadcast licensee. The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers. A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper. A licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a "public trustee." To perform its statutory duties, the commission must oversee without censoring. This suggests something of the difficulty and delicacy of administering the Communications Act—a function calling for flexibility and the capacity to adjust and readjust the regulatory mechanism to meet changing problems and needs.

The licensee policy challenged in this case is intimately related to the journalistic role of a licensee for which it has been given initial and primary responsibility by Congress. The licensee's policy against accepting editorial advertising cannot be examined as an abstract proposition, but must be viewed in the context of its journalistic role. It does not help to press on us the idea that editorial ads are "like" commercial ads for the licensee's policy against editorial spot ads is expressly based on a journalistic judgment that 10 to 60 second spot announcements are ill suited to intelligible and intelligent treatment of public issues; the broadcaster has chosen to provide a balanced treatment of controversial questions in a more comprehensive form. Obviously the licensee's evaluation is based on its own journalistic judgment of priorities and newsworthiness.

Moreover, the commission has not fostered the licensee policy challenged here; it has simply declined to command particular action because it fell within the area of journalistic discretion. The commission explicitly emphasized that "there is of course no commission policy thwarting the sale of time to comment on public issues." 25 FCC 2d, at 226. The commission's reasoning, consistent with nearly 40 years of precedent, is that so long as a licensee meets its "public trustee" obligation to provide balanced coverage of issues and events, it has broad discretion to decide how that obligation will be met. We do not reach the question whether the First Amendment or the Act can be read to preclude the commission from determining that in some situations the public interest requires licensees to reexamine their policies with respect to editorial advertisements. The commission has not yet made such a determination; it has, for the present at least, found the policy to be within the sphere of journalistic discretion which Congress has left with the licensee.

Thus, it cannot be said that the government is a "partner" to the action of broadcast licensee complained of here, nor is it engaged in a "symbiotic relationship" with the licensee, profiting from the invidious discrimination of its proxy. The First Amendment does not reach acts of private parties in every instance where the Congress or the commission has merely permitted or failed to prohibit such acts.

Our conclusion is not altered merely because the commission rejected the claims of BEM and DNC and concluded that the challenged licensee policy is not inconsistent with the public interest.

Here, Congress has not established a regulatory scheme for broadcast licensees. More important, as

we have noted, Congress has affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard.

More profoundly, it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on government. Application of such standards to broadcast licensees would be antithetical to the very ideal of vigorous, challenging debate on issues of public interest. Every licensee is already held accountable for the totality of its performance of public interest obligations.

The concept of private, independent broadcast journalism, regulated by government to assure protection of the public interest, has evolved slowly and cautiously over more than 40 years and has been nurtured by processes of adjudication. That concept of journalistic independence could not co-exist with a reading of the challenged conduct of the licensee as governmental action. Nor could it exist without administrative flexibility to meet changing needs and the swift technological developments. We therefore conclude that the policies complained of do not constitute governmental action violative of the First Amendment. * * *

By minimizing the difficult problems involved in implementing such a right of access, the court of appeals failed to come to grips with another problem of critical importance to broadcast regulation and the First Amendment—the risk of an enlargement of government control over the content of broadcast discussion of public issues. This risk is inherent in the court of appeals remand requiring regulations and procedures to sort out requests to be heard—a process involving the very editing that licensees now perform as to regular programming. Although the use of a public resource by the broadcast media permits a limited degree of government surveillance, as is not true with respect to private media, the government's power over licensees as we have noted, is by no means absolute and is carefully circumscribed by the act itself.

Under a constitutionally commanded and government supervised right-of-access system urged by respondents and mandated by the court of appeals, the commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy for the ailment respondents complain of.

Under the Fairness Doctrine the commission's responsibility is to judge whether a licensee's overall performance indicates a sustained good faith effort to meet the public interest in being fully and fairly informed. The commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who should be heard and when. Indeed, the likelihood of government involvement is so great that it has been suggested that the accepted constitutional principles against control of speech content would need to be relaxed with respect to editorial advertisements. To sacrifice First Amendment protections for so speculative a gain is not warranted, and it was well within the commission's discretion to construe the act so as to avoid such a result.

The commission is also entitled to take into account the reality that in a very real sense listeners and viewers constitute a "captive audience." * * * It is no answer to say that because we tolerate pervasive commercial advertisement we can also live with its political counterparts.

* * *

The judgment of the court of appeals is reversed.

Justice Stewart, concurring.

* * *

Justice Blackmun, with whom Justice Powell joins, concurring.

Justice DOUGLAS.

While I join the Court in reversing the judgment below, I do so for quite different reasons.

My conclusion is that the TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines. * * *

If a broadcast licensee is not engaged in governmental action for purposes of the First Amendment, I fail to see how constitutionally we can treat TV and the radio differently than we treat newspapers. It would come as a surprise to the public as well as to publishers and editors of newspapers to be in-

formed that a newly created federal bureau would hereafter provide "guidelines" for newspapers or promulgate rules that would give a federal agency power to ride herd on the publishing business to make sure that fair comment on all current issues was made. * * *

* * *

* * * The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends. * * *

* * *

Justice BRENNAN, with whom Justice Marshall concurs, dissenting.

As the Court of Appeals recognized, "the general characteristics of the broadcast industry reveal an extraordinary relationship between the broadcasters and the federal government—a relationship which puts that industry in a class with few others." More specifically, the public nature of the airwaves, the governmentally created preferred status of broadcast licensees, the pervasive federal regulation of broadcast programming, and the Commission's specific approval of the challenged broadcaster policy combine in this case to bring the promulgation and enforcement of that policy within the orbit of constitutional imperatives.

Thus, given the confluence of these various indicia of "governmental action"—including the public nature of the airwaves, the governmentally created preferred status of broadcasters, the extensive Government regulation of broadcast programming, and the specific governmental approval of the challenged policy—I can only conclude that the Government "has so far insinuated itself into a position" of participation in this policy that the absolute refusal of broadcast licensees to sell air time to groups or individuals wishing to speak out on controversial issues of public importance must be subjected to the restraints of the First Amendment.

"[S]peech concerning public affairs * * * is the essence of self-government," *Garrison v. Louisiana*, and the First Amendment must therefore safeguard not only the right of the public to *hear* debate, but also the right of individuals to *participate* in that debate and to attempt to persuade others to their points of view. And, in a time of apparently growing anonymity of the individual in our society, it is imperative that we take special care to preserve the vital First Amendment interest in assuring "self-fulfillment [of expression] for each individual." For our citizens may now find greater than ever the need to express their own views directly to the public, rather than through a governmentally appointed surrogate, if they are to feel that they can achieve at least some measure of control over their own destinies.

In light of these considerations, the Court would concede, I assume, that our citizens have at least an abstract right to express their views on controversial issues of public importance. But freedom of speech does not exist in the abstract. On the contrary, the right to speak can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency. For in the absence of an effective means of communication, the right to speak would ring hollow indeed. And, in recognition of these principles, we have consistently held that the First Amendment embodies, not only the abstract right to be free from censorship, but also the right of an individual to utilize an appropriate and effective medium for the expression of his views. Indeed, unlike the streets, parks, public libraries, and other "forums" that we have held to be appropriate for the exercise of First Amendment rights, the broadcast media are dedicated *specifically* to communication. And, since the expression of ideas—whether political, commercial, musical, or otherwise—is the exclusive purpose of the broadcast spectrum, it seems clear that the adoption of a limited scheme of editorial advertising would in no sense divert that spectrum from its intended use.

Moreover, it is equally clear that, with the assistance of the Federal Government, the broadcast industry has become what is potentially the most efficient and effective "marketplace of ideas" ever devised. Indeed, the electronic media are today "the public's prime source of information," and we have ourselves recognized that broadcast "technology * * * supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news. * * *" *Red Lion Broadcasting Co. v. FCC*. Thus, although "full and free discussion" of ideas may have been a reality in the heyday of political pamphleteering, modern technological developments in the field of communications have made the soapbox orator and the leafleteer virtually

obsolete. And, in light of the current dominance of the electronic media as the most effective means of reaching the public, any policy that *absolutely* denies citizens access to the airwaves necessarily renders even the concept of "full and free discussion" practically meaningless.

Regrettably, it is precisely such a policy that the Court upholds today. And, since effectuation of the individual's right to speak through a limited scheme of editorial advertising can serve only to further, rather than to inhibit, the public's interest in receiving suitable exposure to "uninhibited, robust, and wide-open" debate on controversial issues, the challenged ban can be upheld only if it is determined that such editorial advertising would unjustifiably impair the broadcaster's assertedly overriding interest in exercising *absolute* control over "his" frequency. Such an analysis, however, hardly reflects the delicate balancing of interests that this sensitive question demands. Indeed, this "absolutist" approach wholly disregards the competing First Amendment rights of all "non-broadcaster" citizens, ignores the teachings of our recent decision in *Red Lion Broadcasting Co. v. FCC*, and is not supported by the historical purposes underlying broadcast regulation in this Nation.

The First Amendment values of individual self-fulfillment through expression and individual participation in public debate are central to our concept of liberty. If these values are to survive in the age of technology, it is essential that individuals be permitted at least *some* opportunity to express their views on public issues over the electronic media. Balancing those interests against the limited interest of broadcasters in exercising "journalistic supervision" over the mere allocation of *advertising* time that is already made available to some members of the public, I simply cannot conclude that the interest of broadcasters must prevail.

COMMENT

A major portion of the Court's opinion in *CBS* is devoted to the question of whether private censorship is subject to constitutional sanction or obligation. The issue, said Chief Justice Burger, is "whether the action of a broadcast licensee such as that challenged here is 'governmental action' for purposes of the First Amendment."

When constitutional lawyers speak of the necessity that state action be present in order to invoke constitutional protection, what is meant is that constitutional limitations do not apply unless it is government which has restrained freedom. Since the First Amendment speaks to Congress and the Fourteenth Amendment speaks to the states, the argument is that if a nongovernmental source infringes freedom of expression, such an infringement does not rise to the dignity of a constitutional violation. In this respect, the fundamental issue of state action cuts across constitutional law generally. Should private power, specifically corporate power as reflected in the three corporations, CBS, NBC, and ABC, ever be constitutionalized, i.e., subject to constitutional obligation?

The Court, per Chief Justice Burger, answered this question, at least on the basis of the facts presented in the *CBS* case, in the negative.

Contrast the *CBS* case with *Miami Herald Publishing Co. v. Tornillo* where the Supreme Court invalidated the Florida right of reply to the press law.

Scholarly criticism of cases like *Red Lion* and *CBS v. DNC* has taken quite divergent directions depending on whether the critic takes an instrumental or classic libertarian approach to free speech theory. Professor Scott Powe has taken the classic libertarian position: the First Amendment prevents any regulation of the media whether print or broadcast. In his view, the whole broadcast licensing scheme carries with it the danger of being used by government "to further impermissible agendas." See Powe, *American Broadcasting and the First Amendment* (1987), 161. For him, the First Amendment exists to keep government out of the opinion process. Any government regulation that would be impermissible if applied to the press is impermissible if applied to broadcasting. Is this the theory of *CBS v. DNC*?

Professor Owen Fiss, on the other hand, has criticized this public-private distinction as a touchstone of First Amendment analysis: "CBS is neither a state actor nor a private citizen but something of both. CBS is privately owned and its employees do not receive their checks directly from the state treasury. It is also true, however, that CBS's central property—the license—has been created and conferred by the government. It gives CBS the right to exclude others from its segment of the airwaves. CBS is thus a composite of the public and the private. The same is true of the print media, as it is of all corporations,

unions, universities, and political organizations." Because of the intermixed public and private character of basic institutions such as big media, Fiss thinks that the "classificatory game of deciding whether CBS" is really private or really public is pointless. Professor Fiss concludes: "Just as it is no longer possible to assume that the private sector is all freedom, we can no longer assume that the state is all censorship." See Fiss, *Free Speech and Social Structure*, 71 Iowa L.Rev. 1405 at 1414–1415 (1986).

CBS, INC. v. FCC

453 U.S. 367, 101 S.CT. 2813, 69 L.ED.2D 706 (1981).

[EDITORIAL NOTE In CBS, Inc. v. FCC, *the question of whether the "reasonable access for federal political candidates" provision of the Federal Communications Act, Sec. 312(a)(7), violated the First Amendment was considered by the Supreme Court. This provision authorizes the FCC to revoke a license for "willful or repeated failure to allow reasonable access" or "purchase of reasonable amounts of time by a legally qualified candidate." Carter unsuccessfully sought time from the three major television networks for a thirty-minute program in early December 1979.*

Relying on Sec. 312(a)(7), the Carter-Mondale Presidential Committee filed a complaint with the FCC; the FCC ruled that the networks had violated Sec. 312(a)(7), and the Court of Appeals affirmed. The Supreme Court in turn affirmed the Court of Appeals and held that Sec. 312(a)(7) required broadcasters "to respond to the individualized situation of a particular candidate" and was valid under the First Amendment. CBS had contended that since the statute, Sec. 312(a)(7), afforded candidates a modified right of access, it violated the First Amendment in light of Tornillo *and* CBS v. DNC. *The portion of the opinion dealing with these contentions follows.]*

Chief Justice BURGER delivered the opinion of the Court:

* * *

Finally, petitioners assert that § 312(a)(7) as implemented by the commission violates the First Amendment rights of broadcasters by unduly circumscribing their editorial discretion. * * * Petitioners argue that the commission's interpretation of § 312(a)(7)'s access requirement disrupts the "delicate balanc[e]" that broadcast regulation must achieve. We disagree.

A licensed broadcaster is "granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *Office of Communication of the United Church of Christ v. FCC.* * * *This Court has noted the limits on a broadcast license:

> A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a * * *frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others * * *. *Red Lion Broadcasting Co. v. FCC, supra.* * * *

Although the broadcasting industry is entitled under the First Amendment to exercise "the widest journalistic freedom consistent with its public [duties]," *CBS, Inc. v. Democratic National Committee,* * * * the Court has made clear that:

> *It is the right of the viewers and listeners, not the right of the broadcasters which is paramount.* It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market. * * *. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experience which is crucial here. *Red Lion Broadcasting Co. v. FCC, supra.* * * *

The First Amendment interests of candidates and voters, as well as broadcasters, are implicated by § 312(a)(7). We have recognized that "it is of particular importance that candidates have the * * * opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." *Buckley v. Valeo.* * * * Section 312(a)(7) thus makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process.

Petitioners are correct that the Court has never approved a *general* right of access to the media. See, *e.g, FCC v. Midwest Video Corp.* * * *; *Miami Herald Publishing Co. v. Tornillo* * * *; *CBS, Inc. v. Democratic National Committee.* Nor do we do so today. Section 312(a)(7) creates a *limited* right to "reasonable" access that pertains only to legally qualified federal candidates and may be invoked by them only for the purpose of advancing their candidacies once a campaign has commenced. The commission has stated that, in enforcing the statute, it will "pro-

vide leeway to broadcasters and not merely attempt *de novo* to determine the reasonableness of their judgments.

Section 312(a)(7) represents an effort by Congress to assure that an important resource—the airwaves—will be used in the public interest. We hold that the statutory right of access, as defined by the commission and applied in these cases, properly balances the First Amendment rights of federal candidates, the public, and broadcasters.

The judgment of the court of appeals is

Affirmed.

COMMENT

It has been argued that *Red Lion* and *Tornillo* "cannot be reconciled because the distinctions which have been drawn between them are constitutionally insignificant." But it is contended that "unlike *Red Lion*, *CBS v. FCC* can be reconciled with *Tornillo*." See, Shelledy, *Note, Access to the Press: Teleological Analysis of a Constitutional Double Standard*, Geo.Wash.L.Rev. 430 (1982). How? *CBS v. FCC* distinguished the right of access sought there from the Florida right of reply statute which was considered in *Tornillo*. The "identity of the medium" was not the critical factor. *Tornillo* is often distinguished from *Red Lion* on the ground that in a newspaper case the restraint which can be imposed under the First Amendment is far more severe in nature than that imposed upon the electronic media.

The George Washington note distinguishes *Tornillo* from *CBS v. FCC* as follows:

> Only one of the limiting characteristics of section 312(a)(7), the reasonableness standard, distinguishes it from the Florida right of reply on a level of constitutional significance: an editor's decision not to broadcast another's message is left undisturbed so long as the decision has been reached reasonably. The Florida statute the *Tornillo* Court invalidated constrained editorial discretion far more severely than section 312(a)(7). Once a triggering editorial vested the Florida right of reply, the editor lost all control over the decision of whether to publish a response, what length to allot to the response, and placement and choice of typeset—notwithstanding reasonable alternatives the editor could have chosen. Had the Florida statute been limited by the reasonableness standard, as is Section 312(a)(7), it would not have transgressed the Court's command in *Tornillo* that any "compulsion to publish that which "reason" tells [editors] should not be published is unconstitutional."

Do you agree?

In *CBS v. Democratic National Committee*, 412 U.S. 94 (1973), the Supreme Court held that an "arbitrary" blanket network policy refusing to sell time to political groups for the discussion of social and political issues did not violate the First Amendment. Yet, in *CBS v. FCC*, the Court held that an "arbitrary" blanket ban by the networks on the use by a candidate of a particular length of time in a particular period could not be considered reasonable under § 312(a)(7). A blanket network ban on a certain category of programming was deemed permissible in one instance and impermissible in the other. Why? The difference is that in *CBS v. FCC* a *statute* conferred particular rights on individual political candidates. The FCC's construction of the statute made the candidate's "desires as to the method of conducting his or her campaign" a matter to be considered by the licensee in determining whether to grant reasonable access under the statute.

In short, the second *CBS* case involved a limited statutorily conferred right, whereas the first *CBS* case would have required a decision by the Supreme Court that the First Amendment itself was a barrier to the exercise of broadcast editorial judgment.

In an influential essay, Professor Owen Fiss has argued that joining the general attack on the activist state "would expose us to an even greater danger: politics dominated by the market." See Fiss, *Why the State?*, 100 Harv.L.Rev. 781 at 792 (1987). In the course of the essay, Professor Fiss makes these observations: "The powers of the FCC and CBS differ, one regulates while the other edits, but there is no reason for believing that one kind of power will be more inhibiting or limiting of public debate than the other. The state, like any other institution, can act either as friend or enemy of speech and, without falling back on the libertarian presumption, we must learn to recognize when it is acting in one capacity rather than another."

In *CBS v. FCC*, was the state acting as "friend or enemy of speech"?

Candidates for public office also gain access under § 315(a) of the Federal Communications Act. See text, p. 760.

ACCESS TO CABLE

In *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), the court, per Chief Judge Markey, struck down as beyond the FCC's jurisdiction the 1976 Cable Report, Report and Order in Docket

No. 20508, 59 FCC2d 399 (1976), which required cable operators to make available four channels for public access on a first-come, nondiscriminatory basis. The Eighth Circuit's decision in *Midwest Video II* was affirmed by the Supreme Court in *FCC v. Midwest Video Corp.*

FCC v. MIDWEST VIDEO CORP.

4 MED.L.RPTR. 2345, 440 U.S. 689, 99 S.CT. 1435, 59 L.ED.2D 692 (1979).

Justice WHITE delivered the opinion of the Court.

In May 1976, the Federal Communications Commission promulgated rules requiring cable television systems that have 3,500 subscribers and carry broadcast signals to develop, at a minimum, a 20-channel capacity by 1986, to make available certain channels for access by third parties, and to furnish equipment and facilities for access purposes. Report and Order in Docket No. 20528, 59 FCC2d 294 (1976) (1976 Order). The issue here is whether these rules are "reasonably ancillary to the effective performance of the commission's various responsibilities for the regulation of television broadcasting," *United States v. Southwestern Cable Co.* * * *, and hence within the commission's statutory authority.

Under the rules, cable systems must possess a minimum capacity of 20 channels as well as the technical capability for accomplishing two-way, nonvoice communication. 47 CFR § 76.252 (1976). Moreover, to the extent of their available activated channel capacity, cable systems must allocate four separate channels for use by public, educational, local governmental, and leased access users, with one channel assigned to each. § 76.254(a). Absent demand for full-time use of each access channel, the combined demand can be accommodated with fewer than four channels but with at least one. § 76.254(b)–(c). When demand on a particular access channel exceeds a specified limit, the cable system must provide another access channel for the same purpose, to the extent of the system's activated capacity. § 76.254(d). The rules also require cable systems to make equipment available for those utilizing public access channels. § 76.256(a).

Under the rules, cable operators are deprived of all discretion regarding who may exploit their access channels and what may be transmitted over such channels. System operators are specifically enjoined from exercising any control over the content of access programming except that they must adopt rules proscribing the transmission on most access channels of lottery information and commercial matter. §§ 77.256(b), (d). The regulations also instruct cable operators to issue rules providing for first-come, nondiscriminatory access on public and leased channels. §§ 77.256(d)(1), (3).

Finally, the rules circumscribe what operators might charge for privileges of access and use of facilities and equipment. No charge may be assessed for the use of one public access channel. § 76.256(c)(2).

On petition for review, the Eighth Circuit set aside the commission's access, channel capacity, and facilities rules as beyond the agency's jurisdiction. 571 F.2d 1025 (1978). The court was of the view that the regulations were not reasonably ancillary to the commission's jurisdiction over broadcasting, a jurisdictional condition established by past decisions of this Court. The rules amounted to an attempt to impose common-carrier obligations on cable operators, the court said, and thus ran counter to the statutory command that broadcasters themselves may not be treated as common carriers. See Communications Act of 1934, § 3(h), 47 U.S.C. § 153(h). Furthermore, the court made plain its belief that the regulations presented grave First Amendment problems. We granted certiorari, and we now affirm.

The holding of the Court in [*CBS v. DNC*] was in accord with the view of the commission that the act itself did not require a licensee to accept paid editorial advertisements. Accordingly, we did not decide the question whether the act, though not mandating the claimed access, would nevertheless permit the commission to require broadcasters to extend a range of public access by regulations similar to those at issue here. The Court speculated that the commission might have flexibility to regulate access and that "[c]onceivably at some future time Congress or the commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable." But this is insufficient support for the commission's position in the

14. Whether less intrusive access regulation might fall within the commission's jurisdiction, or survive constitutional challenge even if within the commission's power, is not presently before this Court. Certainly, our construction of § 3(h) does not put into question the statutory authority for the fairness doctrine obligations sustained in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 * * * (1969). The fairness doctrine does not require that a broadcaster provide common carriage; it contemplates a wide range of licensee discretion.

present case. The language of § 3(h) is unequivocal; it stipulates that broadcasters shall not be treated as common carriers. As we see it, §3(h), consistently with the policy of the act to preserve editorial control of programming in the licensee, forecloses any discretion in the commission to impose access requirements amounting to common-carrier obligations on broadcast systems.[14] The provision's background manifests a congressional belief that the intrusion worked by such regulation on the journalistic integrity of broadcasters would overshadow any benefits associated with the resulting public access. It is difficult to deny, then, that forcing broadcasters to develop a "nondiscriminatory system for controlling access * * * is precisely what Congress intended to avoid through § 3(h) of the Act." *Id.*, at 140 n. 9. * * *

In light of the hesitancy with which Congress approached the access issue in the broadcast area, and in view of its outright rejection of a broad right of public access on a common-carrier basis, we are constrained to hold that the commission exceeded those limits in promulgating its access rules. The commission may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters. We think authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress.[19]

Affirmed.

COMMENT

Since its holding invalidating the public access rules was based on the lack of FCC jurisdiction to issue them, the court of appeals, per Judge Markey, declined to base its holding on constitutional grounds.

> Despite the Court's guidance in *Miami Herald*, the commission has attempted here to require cable operators, who have invested substantially to create a private electronic "publication"—a means of disseminating information—to open their "publications" to all for use as *they* wish. * * * Though we are not deciding that issue here, we have seen and heard nothing in this case to indicate a constitutional distinction between cable systems and newspapers in the context of the government's power to compel public access.

Cable *can* be described as a technology of abundance, as compared with VHF television, a technology of scarcity. Should the First Amendment model applied to cable be the same as that applied to the newspaper press? *Tornillo*, rather than *Red Lion*, governs the public access obligations of the newspaper press, should *Tornillo*, rather than *Red Lion*, provide the appropriate First Amendment model for cable?

Are cable systems and newspapers equivalent? One commentator has suggested there is a difference between newspapers and cable operators:

> There are some important differences, however, that tend to make the decision process in cable more like an economic activity and render the editorial aspects almost entirely theoretical. For the most part, cable personnel do not review any of the material provided by cable networks. Unlike expression originated by the cable operator, cable systems have no conscious control over program services provided by others. Conscious control does not operate uniformly in all other media either, but the tradition in newspaper editing is that the editor reviews all published material. See Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L. J. 329 at 339.

This does not mean, however, that the cable operator should never be considered a communicator for First Amendment purposes. Brenner proposes this test: "The key to cable's first amendment regime lies in distinguishing as reasonably as possible, among the expressive and nonexpressive activities of operators. That regime should provide first amendment protection when content-related expressive activities are involved and pull back that protection when such activities are not." Id. at 331. In which of these categories do mandatory access rules fall?

PUBLIC ACCESS AND MUNICIPAL FRANCHISE AGREEMENTS

The controversy about a right of access is very much alive in the field of cable television. A common feature of cable franchise agreements between a cable operator and a municipality is a provision imposing some public access obligations on the cable operator. The question of the First Amendment va-

19. The court below suggested that the commission's rules might violate the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on that question, save to acknowledge that it is not frivolous and to make clear that the asserted constitutional issue did not determine or sharply influence our construction of the statute. The court of appeals intimated, additionally, that the rules might effect an unconstitutional "taking" of property or, by exposing a cable operator to possible criminal prosecution for offensive cablecasting by access users over which the operator has no control, might affront the Due Process Clause of the Fifth Amendment. We forego comment on these issues as well.

lidity of these provisions has divided the federal courts. Some courts have concluded that mandatory access rules for cable are governed by *Tornillo* and are invalid; others have felt that such rules are governed by *Red Lion* and are valid. Thus in *Erie Telecommunications, Inc. v. City of Erie*, 659 F.Supp. 580 (W.D.Pa. 1987), access requirements such as providing training and funding for public use of thirteen public channels were upheld as consistent with the First Amendment.

The court in *Erie* upheld the access requirements:

> These thirteen access channels are to be part of a cable system comprising a minimum capacity of eighty-four downstream channels. Although the record reveals that the number of cable channels in active use is less than the required minimum capacity, the Court finds it of critical importance that [Erie] maintains complete editorial control over a substantial majority of its potential cable system. The instant mandatory access regulations produce only a minimal intrusion on Erie's exercise of first amendment rights. Accord *Berkshire Cablevision*, 571 F.Supp. at 979 [where no more than seven of fifty or more channels are set aside for public access, the requirement's restriction on first amendment freedoms was found to be no greater than essential to further the substantial governmental interest]. Accordingly, in consideration of the standards set forth in *United States v. O'Brien*, the Court holds that the City of Erie's access requirements do not violate the first amendment.

Relying on *Red Lion* rather than *Tornillo*, the court in *Erie* upheld the city's mandatory access requirements on the basis that the First Amendment authorized the impositions of affirmative obligations on cable operators: "The Court is convinced that access requirements further secure the foundation upon which the first amendment is grounded—promotion of a marketplace of ideas."

Contrasting sharply with *Erie* is *Group W Cable, Inc. v. Santa Cruz*, 669 F.Supp. 954, 14 Med.L.Rptr. 1769 (N.D.Cal. 1987), where franchise provisions imposing a variety of access obligations on the cable operator were struck down on First Amendment grounds. The cable operator was required to operate separate access channels without fee to public, governmental, and institutional users. The court in the *Group W* case relied on *Tornillo* to invalidate the access obligations:

> Santa Cruz attempts to distinguish *Miami Herald* and *Pacific Gas* on the ground that the access regulations in those cases were triggered by the newspapers' content, while the right of access called for [by the city of Santa Cruz] is not contingent on the content of the operator's statements. On closer scrutiny, however, the access requirements cannot be characterized as content-neutral. Access does not, as Santa Cruz claims, come "automatically"; rather, access is meted out by a government agency that enjoys unlimited discretion to devise rules governing the use of access time and facilities and to schedule the use of such time and facilities. Santa Cruz has thus reserved to itself broad power to designate the speakers entitled to package their messages using the franchisee's production facilities and to air their views using the franchisee's cable system. In practice, Santa Cruz can turn the access channels and facilities into forums for attacks on the editorial views expressed by the franchisee. Like the newspapers in *Miami Herald* and *Pacific Gas*, a cable operator in Santa Cruz may be deterred from airing its views for fear that this will trigger—indeed, force it to produce and fund—the response of an opposing group. Furthermore, this access scheme potentially grants the incumbent government a free platform from which to advance its own views and candidates.

The heart of the *Group W* court's objections to the access requirements envisioned by Santa Cruz was that such obligations, if imposed on newspapers, would violate the First Amendment and cable operators were entitled to no less First Amendment protection than newspapers would be.

In *Century Federal, Inc. v. City of Palo Alto, California*, 63 RR2d 1736 (1987), municipal requirements that cable franchisees provide three public access educational channels and two governmental channels were held to violate the First Amendment rights of cable operators. Relying on *Tornillo* and *Pacific Gas*, the court, as in *Group W*, concluded that forcing access channels on a cable operator presented "the inherent risk that a franchisee's speech will be chilled." This would have the "direct, undeniable impact of intruding into the franchisee's editorial control and judgment of what to cablecast and what not to cablecast." Is the mere possibility of chilling the expression of a cable operator enough to invalidate a city's cable franchising scheme? *Century Federal* answered this question in the affirmative: "The Supreme Court has never required an actual showing of such an influence or chilling effect on the primary speaker's content. There was no such showing in either *Miami Herald* or *Pacific Gas*; it is the mere risk of such a chilling effect that is inconsistent with the First Amendment."

Consider, in contrast to *Century Federal*, the views expressed by Judge Richard Posner in *Omega Sat-*

ellite Products v. City of Indianapolis, 694 F.2d 119 at 128 (7th Cir. 1982): "There is, however, a big difference between the danger of an abuse and the abuse itself; and it is a fair question how far the courts should go in making municipalities rewrite their cable ordinances to prevent dangers that may be largely theoretical."

The Cable Communications Policy Act of 1984 requires that cable systems with thirty-six or more channels must reserve 10 percent of their channel capacity for leased commercial use by persons who are not affiliated with the cable operator. Cable systems with fifty-five or more channels must reserve 15 percent of their channel capacity for leased use. See 47 U.S.C.A. sec. 532(a) (Supp. III 1985).

In the 1984 Cable Act, Congress also permitted municipalities to require cable operators to reserve channels for public, educational, and governmental use. See 47 U.S.C.A sec. 531 (supp. III 1985). A cable operator has no editorial control over an access channel. On the other hand, he is not liable for what is transmitted on such a channel. Are these access provisions valid under the First Amendment? Does it depend on whether one uses a *Tornillo* standard or a *Red Lion* standard? Can some other standard be applied?

EIGHT

Selected Problems of Media Law

SECTION ONE
ADVERTISING AND THE LAW

Advertising and the First Amendment

Under the First Amendment, advertising is referred to as commercial speech. In a series of cases starting in 1975[1] and continuing to the present,[2] the Supreme Court has granted this formerly unprotected type of message a measure of protection.

The "commercial speech doctrine" dates from *Valentine v. Chrestensen*, 1 Med.L.Rptr. 1907, 316 U.S. 52 (1942),[3] in which the Court said that speech promoting goods and services was not deserving of constitutional protection. The opinion devoted a mere sentence to drawing its conclusion.

The case was influential. In later cases, a city ordinance barring sex-specific help wanted classified advertisements was upheld.[4] In another case, the Fifth Circuit flatly asserted that commercial reports lack the general public interest needed for First Amendment protection.[5]

Change came in 1976 when a citizens group challenged a state ban on advertising of prices for prescription drugs. *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 1 Med.L.Rptr. 1930, 425 U.S. 748 (1976). Because it is a focal case, it deserves review (text, p. 135). The Court declared that advertising messages have some measure of protection. The exact degree of protection was not announced. It was apparent that it would be a lesser protection; the opinion's footnote 24 specified that commercial speech is hardier, making it more amenable to government regulation than other content. But, *Virginia Pharmacy* is known best for what it says about the value of commercial speech.

In 1980, the Court created a four-part test that outlined the protection available to commercial speech. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 6 Med.L.Rptr. 1497, 447 U.S. 557 (1980). The Court invalidated a state regulation prohibiting advertising that promoted the use of electricity. The Court used a four-part test in assessing the constitutionality of regulation:

1. The commercial speech must concern a lawful activity;
2. it must not be false or misleading;

1. *Bigelow v. Virginia*, 1 Med.L.Rptr. 1919, 421 U.S. 809 (1975).
2. *Shapero v. Kentucky Bar Ass'n*, 108 S.Ct. 1916 (1988) (ban on direct mail advertising by lawyers violates First Amendment).
3. Fuller versions of *Valentine* and other commercial speech cases are found in Chapter 1.
4. *Pittsburgh Press v. Pittsburgh Commission on Human Relations*, 1 Med.L.Rptr. 1908, 413 U.S. 376 (1973).
5. *Hood v. Dun and Bradstreet*, 486 F.2d 25 (5th Cir. 1973).

3. the state must prove the existence of a substantial interest to be served by regulation;
4. the regulation must in fact serve the government interest and be narrowly drawn.

In *Central Hudson*, the state's interest in conserving energy could have been accomplished in numerous ways less intrusive on First Amendment values than banning advertising. The substantial interest formula adopted by the Court provided a middle level of protection much akin to that accorded broadcasting, see *Red Lion Broadcasting Co. v. FCC* (text p. 795), but certainly less than that accorded print media or news content generally.

The potential for the first two parts of the test to result in an undervaluing of speech that appears to be misleading, but which is not proved to be, was apparently rectified in *In re R.M.J.*, 7 Med.L.Rptr. 2545, 455 U.S. 191 (1982). An attorney's advertising prominently mentioned his specialization in an unusually large number of areas of legal practice. The state bar's attempts to regulate the message were declared invalid.

More recently, the Court applied the *Central Hudson* test to uphold a Puerto Rico provision which prohibited advertisement of casino gambling directed at residents, within the commonwealth. The government, however, was eager that casinos be advertised to nonresidents. The Court, in an opinion by Justice Rehnquist, said that the interest in protecting residents from the evils of gambling was substantial. Further, the Court said that the partial ban on advertising was valid, since Puerto Rico could have banned casino advertising altogether. *Posadas de Puerto Rico Associates v. Tourism Co.*, 13 Med.L.Rptr. 1033, 478 U.S. 328 (1986). Justice Brennan wrote a heated dissent. He thought the majority had turned the test on its head. The *Posadas* analysis has not been well received among scholars.[6]

The limited protection afforded commercial speech has fueled debate over the First Amendment's role regarding advertising messages. On one side are those who think that the Court should go farther and provide the same level of protection as news messages receive. After all, if commercial information is as important to audiences as *Virginia Pharmacy* asserts, why should government be allowed to decide even on a limited basis which messages should be allowed?[7] On the other side are those, far more numerous, who argue that commercial speech should have little or no First Amendment protection. Echoing the Court in *Virginia Pharmacy*, authors have argued that advertising is genuinely hardier than other speech because of the unavoidable need for businesses to advertise. In addition, some worry that protecting commercial messages, which are normally far removed from "core" political speech that the Court protects most zealously, will have the effect of watering down protection for more important types of speech.[8]

Free speech theory aside, the practical effect of the cases protecting commercial speech has been to make it difficult for states to regulate commercial messages, both before[9] and after[10] *Posadas*. The rel-

6. See, e.g., Richards, *Clearing the Air About Cigarettes: Will Advertisers' Rights Go Up In Smoke?*, 19 Pacific L.J. 1, 23–30 (1987); Nutt, *Trends in First Amendment Protection of Commercial Speech*, 41 Vanderbilt L.Rev. 173 (1988); Kurland, *Posadas de Puerto Rico v. Tourism Company: 'Twas Strange, 'Twas Passing Strange, 'Twas Pitiful. 'Twas Wondrous Pitiful*, 1986 Supreme Court Rev. 1.

7. See, e.g., Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 45 Brooklyn L.Rev. 437 (1980); Coase, *Advertising and Free Speech*, 6 J. Legal Stud. 1 (1977).

8. See, e.g., Baker, *Press Rights and Government Power to Structure the Press*, 34 U. of Miami L. Rev. 785, 822 (1980); Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Northwestern U. L.Rev. 1212 (1983); Farber, *Commercial Speech and First Amendment Theory*, 74 Northwestern U. L.Rev. 372 (1979).

9. *Consumers Union of United States, Inc. v. American Bar Association*, 427 F.Supp. 506 (E.D.Va. 1976); *Jacoby v. The State Bar of California*, 138 Cal.Rptr. 77, 562 P.2d 1326 (1977).

Health Systems Agency of Northern Virginia v. Virginia State Board of Medicine, 2 Med.L.Rptr. 1107, 424 F.Supp. 267 (E.D.Va. 1976). In 1979 the commission voted to require the American Medical Association to cease restricting physician advertising beyond "reasonable-ethical guidelines" applicable to deceptive advertising including unsubstantiated claims and solicitation of vulnerable patients. The commission was upheld with minor modifications. *American Medical Association v. FTC*, 638 F.2d 443 (2d Cir. 1980). A law prohibiting the advertising of prescription eyeglasses was held "patently unconstitutional," *Wall & Ochs, Inc. v. Hicks*, 469 F.Supp. 873 (E.D.N.C. 1979). A city ordinance banning advertising by clinical laboratories was struck down in *Metpath, Inc. v. Imperato*, 3 Med.L.Rptr. 2284, 450 F.Supp. 115 (S.D.N.Y. 1978) and *Metpath, Inc. v. Meyers*, 4 Med.L.Rptr. 1884, 462 F.Supp. 1104 (N.D.Cal. 1978).

Horner-Rausch Optical Co. v. Ashley, 547 S.W.2d 577 (Tenn. 1976).

Courts are divided on the constitutionality of laws restricting the advertising of drug paraphernalia. See *Record Revolution No. Six, Inc. v. City of Parma*, 638 F.2d 916 (6th Cir. 1980), cert. den., 451 U.S. 1013 (1981) and *High Ol' Times, Inc. v. Busbee*, 4 Med.L.Rptr. 1721, 456 F.Supp. 1035 (N.D.Ga. 1978), affirmed 6 Med.L.Rptr. 1617, 621 F.2d 141 (5th Cir. 1980), Cf. *Gasser v. Morgan*, 498 F.Supp. 1154 (N.D.Ala. 1980). In *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982), the Court held that on-site advertising for drug-related materials could be banned because it was so closely related to the underlying illegal activity.

10. See, e.g., *News & Sun-Sentinel v. Board of County Commissioners*, 14 Med.L.Rptr. 1477 (S.D.Fla. 1987); *Hornstein v. Hartigan*, 15 Med.L.Rptr. 1769 (C.D.Ill. 1988).

ative handful of cases in which regulation has been upheld have involved promotion of products that were illegal in whole or part [11] or promotion of products or services that have traditionally been heavily regulated, including alcoholic beverages,[12] lotteries[13], and the gambling in *Posadas*.

The Regulation of Advertising

Advertising regulation, formerly a source of considerable litigation, appears far less rigorous than in the past. The First Amendment's protection of commercial speech is one reason for a rather quiet regulatory front. Some have argued that it casts doubt over the constitutionality of the long-accepted authority of the Federal Trade Commission (FTC) to regulate advertising.[14] See *Warner-Lambert Co. v. FTC*, text, p. 533.

A second reason for relative quiet on the advertising regulation scene is the political climate of deregulation. The Reagan administration placed little emphasis on advertising regulation. Indeed, in 1983 the FTC itself adopted a test for deception that makes FTC intervention less likely. Still, the FTC continued to bring enforcement actions during the 1980s, and its role in nonadversarial regulation, as in promulgation of trade regulations and in pursuing informal agreement on rule violations, remained a strong one.[15]

However subject to challenge a specific enforcement action of the FTC may be in potential litigation under the commercial speech doctrine, the agency's legal authority under enabling legislation seems secure. Its authority to interpret its mandate freely has been the subject of a prolonged political battle with Congress, however.[16] The technical viability of advertising regulation remains, and the winds of political change may yet see a return to a tougher regulatory posture. In that light, review of advertising regulation by the FTC is in order.

The regulation of advertising grew out of a general assault at the turn of the century on the excesses of *laissez-faire* capitalism and the cynical doctrine of *caveat emptor* (let the buyer beware). Stimulated by the writing of the muckrakers, notably Samuel Hopkins Adams's 1906 *Colliers* series on patent medicines, "The Great American Fraud," the regulatory movement took root in passage of the Pure Food and Drug Act in 1906 and the creation in 1914 of the Federal Trade Commission.

Congress in 1914 was primarily concerned with reinforcing the antitrust provisions of the Sherman and Clayton Acts. The FTC Act declared unfair methods of competition in commerce unlawful. Its purpose was to promote the "preservation of an environment which would foster the liberty to compete." In its early years the act was used by the courts to protect competitors against false and deceptive advertising; the protection of consumers was incidental.

In 1922, for example, Justice Louis Brandeis, in an opinion for the United States Supreme Court, upheld the FTC in a ruling against a manufacturer who had mislabeled underwear as wool when in fact it contained as little as 10 percent wool.

Although Brandeis did recognize a public interest in prohibiting mislabeling, his main argument was that "the practice constitutes an unfair method of competition as against manufacturers of all wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. * * *" *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922). See also, *FTC v. Beech-Nut*, 257 U.S. 441 (1921).

That consumer rights in this period were peripheral to the welfare of competitors is best illustrated by the 1931 Supreme Court ruling in the *Raladam* case. Here the Court declared flatly through Justice George Sutherland that the FTC Act would not protect consumers against the phony advertising of an "obesity cure" unless competitive businesses were being hurt. *FTC v. Raladam Co.*, 283 U.S. 643 (1931).

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11. Id.; *Princess Sea Industries v. State*, 635 P.2d 281 (Nev. 1981) (prostitution).
12. See, e.g., *Oklahoma Telecasters Ass'n. v. Crisp*, 699 F.2d 490 (10th Cir. 1983), rev. on other grounds 104 S.Ct. 2694 (1984); *S&S Liquor Mart v. Pastore*, 12 Med.L.Rptr. 1236, 497 A.2d 729 (R.I. 1985).
13. *Minnesota Newspaper Ass'n., Inc. v. Postmaster General*, 15 Med.L.Rptr. 1292, 677 F.Supp. 1400 (D.Minn. 1987).
14. Reich, *Consumer Protection and the First Amendment: A Dilemma for the FTC?*, 61 Minnesota L.Rev. 705 (1977); Note, *Commercial Speech and the FTC: A Point of Departure From Traditional First Amendment Analysis Regarding Prior Restraint*, 16 New England L.Rev. 793 (1981); Thompson, *Antitrust, the First Amendment, and the Communication of Price Information*, 56 Temple L.Rev. 939 (1983).
15. Ford and Calfee, *Recent Developments in FTC Policy on Deception*, 50 J. of Marketing 82 (1986).
16. Id. at 84.

Three years later, however, the Court repudiated *Raladam* in a case involving the deceptive use of a lottery in marketing candy to children (*FTC v. R.F. Keppel & Brother, Inc.*, 291 U.S. 304, 1934); and after *Keppel* unfair competitive practices were not limited to those violative of the antitrust laws. In 1937 Justice Hugo Black overruled an opinion by district court Judge Learned Hand which had struck down an FTC order against deceptive sales practices in selling encyclopediae. Black wrote, for the Court:

> The fact that a false statement may be obviously false to those who are trained and experienced does not change its character nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception. *FTC v. Standard Education Society*, 302 U.S. 112 (1937).

Congress legitimized this golden rule in 1938 by adding Section 5(b) to the FTC Act: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." 15 U.S.C.A. § 45. And to Section 12 was added language that declares false advertising of food, drugs, cosmetics, or devices to be an unfair or deceptive act and, as such, a violation of law.

Known as the Wheeler-Lea Amendments, these changes in the act made "false" and "deceptive" advertising the keystones of the FTC's authority to protect consumers as well as competitors. The amendments provided the FTC with broad authority to prevent what it considered false, deceptive, or unfair. Only in the 1970s was that authority brought into question under the commercial speech rationale.

In *Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir. 1976), for example, the court, relying on *Virginia Pharmacy*, refused to enforce an FTC order on the ground that the First Amendment requires the commission to bear the burden of proof and to use the least restrictive remedy available. The court then recommended substitute language for an advertisement confusing an ordinary loan with a federal tax refund in lieu of litigation.

The goals of regulation remain fairness and efficiency in the marketplace and a lessening of competitor and consumer injury depending, in part, upon an increase in the flow of truthful information to the public. The statutory definition of unfairness, as shall be noted, has fallen into disuse.

FALSE, DECEPTIVE, AND UNFAIR ADVERTISING. Public and private agencies since at least the early 1960s[17] have shown a resolute interest in consumer rights. Ralph Nader's incalculable contributions to the consumer movement have been accompanied by state and federal laws and regulations protecting buyers in such marketplaces as packaging and labeling, credit, land purchases, warranties, insulation, and a broad range of product safety areas, including cigarettes and hair implantation processes.

False and deceptive advertising is regulated under Sections 5 and 12 of the Federal Trade Commission Act[18] and Section 43(a) of the Lanham Trademark Act.[19] The Federal Trade Commission also enforces ten or more consumer protection laws. Each permits consumers to sue for civil damages and attorney's fees.[20]

The commission will issue formal opinions where there is a substantial question of law and no clear precedent, a proposed merger or acquisition is in-

17. Cox, Fellmuth and Schulz, *The Nader Report on the Federal Trade Commission*, 1969; *The Report of the American Bar Association Committee to Study the Federal Trade Commission*, 1969; Howard and Hulbert, *Advertising and the Public Interest, A Staff Report to the Federal Trade Commission*, 1973.

18. 15 U.S.C.A. § 45; 15 U.S.C.A. § 52. Under Section 5(a)(1) it is unfair or deceptive to fail to disclose any safety risk in the use of a product for the purpose for which it is sold, which would not be immediately apparent to a casual purchaser or user. Particularly it is an unfair or deceptive act or practice to fail to disclose latent safety hazards relating to flammability. Where human safety is involved and the buyer must rely on a manufacturer's technical knowledge to assure the validity of its claims, it is an unfair and deceptive act or practice to make a specific advertising claim without supporting data from scientific tests. A scientific test is one in which persons with skill and expertise in the field conduct the test and evaluate its results in a disinterested manner using testing procedures generally accepted in the profession and which best insure accurate results. See *Firestone Tire and Rubber Co.*, 81 FTC 398, 451, 463 (1972), aff'd 481 F.2d 246 (6th Cir. 1973), cert. den. 414 U.S. 1112. Disclosures are to be made in ways that arrest the eye or attract the attention of an average purchaser or user of the product.

19. 15 U.S.C.A. § 1125(a).

20. For example, Truth in Lending Act, 15 U.S.C.A. §§ 1601–1667e; Fair Credit Reporting Act, 15 U.S.C.A. §§ 1681–1681t; Magnuson-Moss Warranty Act, 15 U.S.C.A. §§ 2301–2312; Energy Policy and Conservation Act, 42 U.S.C.A. §§ 6201–6422; Hobby Protection Act, 15 U.S.C.A. §§ 2101–2106.

volved, or a matter of significant public interest is before it.

Congressional support of the FTC appears to by cyclical. Congressional action in the eighties sought to make the agency, a creature of Congress, more sensitive to business and political trends and to the economic consequences of its rulings. Some businessmen would have the FTC avoid regulating low-cost consumer products and concentrate instead upon validated deception in health and safety fields. Sellers and advertisers have thought the unfairness standard vague and amorphous. Much debate has focused on its meaning.

Unfair methods of competition, even when they do not violate antitrust laws directly and are not deceptive, were condemned in *FTC v. The Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

"[L]egislative and judicial authorities alike convince us," said Justice Byron White for the Court, "that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."

In broadening the authority of the commission the Court spoke of practices which "offend public policy" because they are "immoral, unethical, oppressive or unscrupulous" and cause "substantial injury to consumers or competitors or other businessmen." The language is from "Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking," 29 Fed.Reg. 8355 (1964).

In 1978, the FTC extended the unfairness doctrine to include a cost-benefit analysis of social and economic factors to be considered in a rulemaking proceeding. See "Advertising and Ophthalmic Goods and Services, Statement of Basis and Purpose," 43 Fed.Reg. 23992, 24000–01 (1978). As one might infer from their titles, FTC industry guides and trade regulations are detailed and specific.

Several FTC Magnuson-Moss rulemaking proceedings in the early 1980s, for example, used car sales, insurance, and funeral home practices, were criticized by business as attempts to stretch the meaning of unfairness beyond the unconscionability limits of public policy. Perhaps the best example of this alleged overreach was the "Kid-Vid" rulemaking proceedings which examined, under the promise of a trade regulation rule, the effects of television advertising on presumably vulnerable children,[21] notably the advertising of sugared cereals and toys. The proceedings were abruptly terminated on September 30, 1981, and for two years Congress temporarily withdrew from the commission authority to base trade regulation rules on *unfair* as opposed to false and deceptive advertising.

This action had been preceded by the 1980 FTC Improvements Act (Public Law 96–252) which required the agency to drop its "Kid-Vid" concerns and give business and industry advance notice of contemplated rulemaking, and thereby an opportunity to lean on regulators.

The 1980 act also required the FTC to submit all final rules to Congress. Rules can be vetoed by concurrent resolutions of both Houses of Congress if they act within ninety days. Under these conditions does the FTC remain an *independent* regulatory agency?

A circuit court said no and found Congress's attempt to run the agency by legislation unconstitutional as a violation of separation of powers.[22]

It is well established that under FTCA Section 5 the commission can challenge practices that violate the Sherman and Clayton Acts. This has been construed as giving the agency unrestrained authority to define "unfair methods of competition" and to condemn any conduct believed to be potentially anticompetitive or economically objectionable. Recommendations have therefore been made to limit the FTC's remedial rulemaking and adjudicative powers in the antitrust field as well and to remind Congress of its oversight role.[23]

First Amendment issues are inherent in the regulatory process. Should the FTC apply a "reason-

21. 46 FR 48710.1. See *Summary and Recommendation: Federal Trade Commission Staff Report on TV Advertising to Children*, summarized in Advertising Age, Feb. 27, 1978. The commission subsequently said that it could not resolve the factual issues and the remedies to be applied on legal and policy grounds in the "Kid-Vid" proceedings without an inordinate commitment of its resources.

22. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983); see also, *Consumers Union, Inc. v. FTC*, 691 F.2d 575 (D.C.Cir. 1982).

23. *Report of the Section of Antitrust Law, American Bar Association, Concerning Federal Trade Commission Structure, Powers and Procedure* (February 7, 1980); and *Federal Trade Regulation Rulemaking Procedures Pursuant to the Magnuson-Moss Act* (February 7, 1980).

able" or "ignorant" person standard in evaluating advertising claims? In the absence of evidence of intentional deception, the "reasonable person" standard comports with the common law and tends to discourage broad assaults on the First Amendment. It also legitimizes *puffery:* the exaggerated use of superlatives and hyperbole to describe goods and services, a form of expression defying objective measurement. Courts and commission have held words like "stupendous" to be romantic characterizations not to be read literally. So while a toothpaste may be said to "beautify the smile,"[24] a cigarette manufacturer may not safely say that his product is "less irritating." *Liggett & Myers Tobacco Co.*, 55 FTC 354 (1958).

In *Carlay v. FTC*, 153 F.2d 493 (7th Cir. 1946), the court noted:

> What was said [Ayds candy mints will make weight reducing easy] was clearly justifiable * * * under those cases recognizing that such words as "easy," "perfect," "amazing," "prime," "wonderful," "excellent," are regarded in law as mere puffing or dealer's talk upon which no charge of misrepresentation can be based.

The trick seems to be to avoid factual or material claims or misrepresentation, but the distinction is vague and subjective. Puffery therefore has its articulate enemies who argue that the law has been systematically wrong in finding these falsities to be nondeceptive.[25]

Neither the FTC Act nor its legislative history defines "unfair," "false," or "deceptive." Courts generally deferred to the experience and expertise of the FTC. The commission required no proof of actual deception. A capacity or tendency to deceive an average person or a significant percentage of the public might have been sufficient. The burden of proof was on the government.

"In the early 1980s, a new working definition of deception gave the appearance of being substantially different. Chairman Miller, leading a three-person majority of five commissioners, suggested that: (1) the criterion should be 'likeliness to mislead' rather than the "capacity" to do so, (2) the 'likeliness' should be defined in terms of 'reasonable' consumers rather than the traditional 'substantial portion' of consumers, and (3) deceptiveness should be held 'material' only when actual consumer injury occurs rather than when a claim merely can affect detrimentally a consumer's purchase decision." [26]

It has been argued that the test will both make regulation harder and will result in partial protection for some misleading advertising.[27] Proving deception under the new standard would appear to require hard evidence rather than testimony.

Higher standards may be set for advertising to children (especially nutritional and toy performance claims)[28] and to other vulnerable groups.[29]

Courts and commission have been sensitive to misleading demonstrations, testimonials, and endorsements. The classic case began in 1959 when Colgate-Palmolive and its advertising agency Ted Bates presented TV ads suggesting by means of a mock-up that a shaving cream product could shave sandpaper. Seeing its case as having preventive as well as punitive purposes, the FTC stuck by its claim that viewers would be misled into thinking they were seeing an actual experiment all the way to the U.S. Supreme Court. There, in an opinion written for the Court by Chief Justice Warren, it was upheld:[30]

> We agree with the [c]ommission that the undisclosed use of plexiglass in the present commercials, was a material deceptive practice, independent and separate from the other misrepresentation found. We find unpersuasive respondents' other objections to this conclusion. Respondents claim that it will be impractical to inform the viewing public that it is not seeing an actual test, experiment or demonstration, but we think it inconceivable that the ingenious advertising world will be unable, if it so desires, to conform to the [c]ommission's insistence that the public be not misinformed.

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24. *Bristol-Myers Co.*, 46 FTC 162 (1949), aff'd 185 F.2d 58 (4th Cir. 1950).

25. Preston, *The Great American Blow-Up: Puffery in Advertising and Selling* (1975); Shimp, *Do Incomplete Comparisons Mislead?*, 18 J. of Advertising 21 (1978).

26. Preston, "A Review of the Literature on Advertising Regulation," in *Current Issues and Research in Advertising* (1988), 297–325.

27. Dahringer and Johnson, *The Federal Trade Commissioners' Redefinition of Deception and Public Policy Implications: Let the Buyer Beware*, 18 J. of Consumer Affairs 326 (1984).

28. *Topper*, FTC C–2073, and *Mattel*, FTC C–2071, 1973 CCH Transfer Binder ¶ 19,735 (1971); *Hudson Pharmaceutical Corp.*, 3 CCH Trade Reg.Rptr. ¶ 21,191 (1976), the "Spider Man" vitamins case.

29. *Doris Savitch*, 50 F.T.C. 828 (1954), *Savitch v. FTC*, affirmed per curiam 218 F.2d 817 (2d Cir. 1955), women who fear they may be pregnant; *S.S.S. Co. v. FTC*, 416 F.2d 226 (6th Cir. 1969), poor people.

30. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

There have been few mock-up complaints since *Colgate-Palmolive*, and the commission has indicated that it will not go after smaller priced items unless public health or safety is involved. In *Bristol-Meyers Co.*, CCH 1973–76, Transfer Binder, ¶ 20,900, the 1975 "Dry Ban" case, the commission was perceived as being unwilling to pursue such supertechnical and inconsequential cases.

In *United States v. Reader's Digest*, 4 Med. L. Rptr. 2258, 464 F. Supp. 1037 (D. Del. 1978), the court proscribed "simulated checks" as a promotional device and found the governmental interest in preventing deception outweighing *Reader's Digest*'s free speech rights because regulation affected only the form of the message, not its content. The court imposed a civil penalty of $1,750,000 on *Reader's Digest*. The Third Circuit affirmed in 7 Med. L. Rptr. 1921, 662 F.2d 995 (3d Cir. 1981), and the Supreme Court let it stand, cert. den. 455 U.S. 908.

Claims of uniqueness have run afoul of the agency. When Wonder Bread implied in its advertising that it could cause dramatic growth in children, its makers were challenged. *ITT Continental Baking*, 3 Trade Reg. Rptr. 20, 464 (1973).

Merck & Co. and its advertising agency were ordered to discontinue false germ-killing and pain-relieving claims for Sucrets in 1966. "A false impression can be made by words and sentences which are literally and technically true but framed in such a setting as to mislead or deceive," said the Sixth Circuit Court of Appeals in affirming the commission's order, "and as one writer has pointed out 'The skillful advertiser can mislead the consumer without misstating a single fact. The shrewd use of exaggeration, innuendo, ambiguity and half-truth is more efficacious from the advertiser's standpoint than factual assertions.' " The court would not permit the advertising agency to pass the buck to Merck because, said the court, "This is an area in which the agency has expertise. Its responsibility for creating deceptive advertising cannot be shifted to the principal who is liable in any event." *Merck & Co. v. FTC*, 392 F.2d 921 (6th Cir. 1968).

The commission had *Sperry & Hutchinson* in mind when it decided its landmark *substantiation* case. Involved were advertisements for an ointment purporting to anesthetize nerves in sunburned skin on the basis of systematic scientific research, claims which were unsubstantiated. Affirming the decision of a hearing examiner that the commission's staff counsel had failed to establish with conclusive evidence that a cease-and-desist order should issue, FTC Chairman Miles Kirkpatrick nevertheless set the ground rules for future substantiation requirements:

> Given the imbalance of knowledge and resources between a business enterprise and each of its customers, economically it is more rational and imposes far less cost on society, to require a manufacturer to confirm his affirmative product claims rather than impose a burden upon each individual consumer to test, investigate, or experiment for himself. The manufacturer has the ability, the knowhow, the equipment, the time and the resources to undertake such information by testing or otherwise—the consumer usually does not. * * * Absent a reasonable basis for a vendor's affirmative product claims, a consumer's ability to make an economically rational product choice, and a competitor's ability to compete on the basis of price, quality, service or convenience are materially impaired and impeded. * * * The consumer is entitled, as a matter of marketplace fairness, to rely upon the manufacturer to have a "reasonable basis" for making performance claims. * * * A sale made as a result of unsupported advertising claims deprives competitors of the opportunity to have made that sale for themselves. *Pfizer, Inc.*, 81 FTC 23 (1972). This ruling remains the regulatory standard in substantiation cases. The court held in *Jay Norris, Inc. v. FTC*, 598 F.2d 1244 (2d Cir. 1979), cert. den. 444 U.S. 980 (1979), that substantiation was "a reasonable remedy for past violations of the Act" and not an unconstitutional prior restraint. Affirmative disclosure remains central to FTC initiatives in rule making. * * *

"Substantial scientific test data," then, was required to support a claim that "involves a matter of human safety * * * which consumers themselves cannot verify since they have neither the equipment nor the knowledge to undertake the complicated * * * tests required [and therefore] must rely on the technical expertise of the manufacturers to assure the validity of its claims." *Firestone Tire & Rubber Co. v. FTC*, 81 FTC 398, 451 (1972), aff'd 481 F.2d 246 (6th Cir. 1972), cert. den. 414 U.S. 1112 (1973).

The Regulatory Process and Rulemaking. Federal Trade Commission consumer protection rules are promulgated under Section 18 of the FTC Act (15 U.S.C. 57a), as amended by the Magnuson-Moss Warranty—FTC Improvement Act of 1975, authorizing the commission to issue rules which "de-

fine with specificity" unfair or deceptive acts or practices proscribed by the Act.

In a pre-rulemaking investigative phase, the FTC staff gathers data to assess the seriousness of the problem. A proposal to move on to a formal investigation which may lead to a rulemaking proceeding must be approved by an evaluation committee of the Bureau of Consumer Protection and by that Bureau's director. The investigation then fans out to seek information from industry, state and local government officials, and knowledgeable persons generally. The FTC's Bureau of Economics is consulted. Subpoenas, with commission approval, and investigatory hearings are available in this stage, but voluntary information is preferred.

These efforts result in an initial staff report which includes findings and recommendations concerning the form of any proposed rule. This must be accompanied by a cost projection, an environmental impact assessment where needed, and a proposed initial notice of rulemaking—all approved by the Bureau of Economics—before forwarding to the commission.

An Initial Notice of proposed rulemaking includes (1) the terms or substance of the proposal or a description of the subjects and issues involved, (2) the legal authority under which the rule is proposed, (3) particular reasons for the rule, and (4) an invitation to all interested persons to propose issues within the framework of the proposal. A rulemaking proceeding begins with this invitation for comments and potential issues of disputed facts. These must be submitted within sixty days of the Initial Notice, and written comments are accepted until forty-five days before an informal hearing takes place.

A hearing officer then designates the disputed issues in a final notice, together with the hearing schedule, and deadlines for filing written comments and indications of interest to engage in examination, cross-examination, and rebuttal of witnesses. Ten days after publication of the final notice, interested persons may petition the commission for addition to, deletion, or modification of a designated issue. An additional ten days are set aside for more submissions.

Hearings are held. A final staff report and a report by the presiding officer, who may be an administrative law judge and who has broad powers to make findings and conclusions, are forwarded to the commission. Both are open to public comment for a period of sixty days. After digesting these public comments, the commission may hold an open meeting at which interested parties are given a final limited opportunity to make oral presentations to the commission. Beyond this, the staff may add specialized memoranda, and counterproposals could come from the Bureau of Consumer Protection. The commission then deliberates and decides whether or not a rule shall issue.

Rule Violations. Federal Trade Commission actions against rule violations begin either with complaints from members of the public or, more frequently, out of a commission investigation. The agency has broad investigatory powers and authority to enforce its own subpoenas. At an early point, the FTC may waive its right to bring a court action against a violator in return for consumer redress provisions in a *consent agreement*, provisions that could go beyond the statutory authority of the courts. The commission has noted that voluntary compliance through a consent agreement does not constitute an admission by respondents that they have violated the law. When issued by the commission on a final basis, a consent order carries the force of law with respect to future actions. It has the same effect as an FTC adjudication. Violation of such an order could result in a civil penalty of up to $10,000 per violation per day. Each broadcast of an advertisement may constitute a separate violation.

Adverse publicity and high litigation costs assure that more than 75 percent of cases will end this way. Since 1977, however, the FTC has had the power to ask an advertiser or his agency, during the sixty-day comment period, for documentary material related to the published consent order if releasable under the Freedom of Information Act. This may make consent agreements less attractive to advertisers in the future.

Consent Agreements. Consent agreements, incorporating refunds or other forms of equitable relief, are a major enforcement result of the Magnuson-Moss Act. Under the act, consumer protection rules can be vigorously enforced. Formerly, if the commission had reason to believe that the FTC Act or another federal consumer statute had been violated, a complaint would initiate a *cease-and-desist* order. The order might require of an advertiser an *affirm-*

ative disclosure of what had been omitted from a prior claim.[31]

A respondent then had the right to appear before an administrative law judge and show cause why such an order should not be made. If unsuccessful, that party would have sixty days to challenge a commission order in a federal court of appeals. A cease-and-desist order would not become effective until all avenues of opinion had been exhausted. This could take a long time. It took the commission sixteen years to get the "Liver" out of Carter's Little Pills,[32] and in 1959, the year that case was concluded, the FTC began an investigation of Geritol. A complaint was issued in 1962, a cease-and-desist order in 1964; the Sixth Circuit Court of Appeals upheld the commission in 1967,[33] but two years later, finding the company in noncompliance, the commission turned the case over to the Department of Justice. Justice filed a $1 million suit against the company and in 1973 fined it and its advertising agency $812,000. In the intervening fourteen years Geritol had spent an estimated $60 million on television advertising.

Under Magnuson-Moss, consumer protection rules can be more vigorously enforced. In lieu of cease-and-desist orders, rules are now directly enforceable in a United States district court with civil penalties of up to $10,000 per day per violation, and consumer redress. Industry-wide Trade Regulation Rules may be enforced in the same manner. Dishonest or fraudulent trade practices—more serious than those unfair or deceptive but less serious than those constituting criminal fraud—seem to require administrative proceedings leading to a final cease-and-desist order prior to court action. As well as consumers, persons, partnerships, and corporations may seek redress; individuals as well as companies may be required to give it.

Violations of cease-and-desist orders or other final orders of the commission empower district courts to grant temporary restraining orders or preliminary injunctions. An administrative complaint must follow within twenty days. In some cases the commission may seek and, after proof, a court may issue a permanent injunction. Injunctions are more common in antitrust cases than in consumer protection cases.

Congress amended Section 13 of the FTC Act in 1973[34] to permit courts to grant temporary *injunctions* only "upon proper showing" by the commission that an action against an advertiser would be in the public interest and that the commission would likely succeed in such an undertaking. That standard for invoking the injunctive power was challenged in a federal district court in 1974. *FTC v. National Commission on Egg Nutrition*[35] held that advertising stating that "there is no evidence that eating eggs, even in quantity, increases the risk of heart attacks or heart disease" could continue during a cease-and-desist proceeding and that an injunction would restrict useful public debate on the cholesterol issue and damage the financial interests of respondents.

On the basis of an earlier ruling, *FTC v. Rhodes Pharmacal* Co., 191 F.2d 744 (7th Cir. 1951), a case approving the lesser standard of "reason to believe" that an ad is false or misleading, the court of appeals in *Egg Nutrition* reversed the district court and permitted the injunction to stand. (517 F.2d 485 (7th Cir. 1975)).

Two years later the same court decided that the advertisement's no-harm statement concerning cholesterol was a misrepresentation affecting the contract of sale, a breach of express warranty, and therefore regulable commercial speech. The same statement made at a Food and Drug Administration hearing would not be commercial speech at all since contractual promises would be involved.

The Ninth Circuit, however, also citing an earlier case—*FTC v. National Health Aids, Inc.*, 108 F.Supp. 340 (D.Md. 1952)—but one requiring the higher standard of "falsity" in the exercise of the extraordinary remedy of injunction, affirmed the denial of an injunction in *FTC v. Simeon Management Corp.*, 391 F.Supp. 697 (D.Cal. 1975), aff'd 532 F.2d 708 (9th Cir. 1976). Whether "reason to believe" or a higher standard was what Congress intended may never be resolved. The new deception formula *is* a higher standard.

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31. *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F.2d 18 (5th Cir. 1960).
32. *Carter Products, Inc. v. FTC*, 268 F.2d 461 (9th Cir. 1959), cert. den. 361 U.S. 884.
33. *J. B. Williams Co., Inc. v. FTC*, 381 F.2d 884 (6th Cir. 1967).
34. The amendment to Section 13 was adopted as Section 408(f) of the Trans-Alaska Pipeline Authorization Act of 1973, 15 U.S.C.A. § 53(b).
35. 1975-1 Trade Cas. ¶ 60,246 (N.D.Ill. 1974). See *National Commission on Egg Nutrition v. FTC*, 3 Med.L.Rptr. 2196, 570 F.2d 157 (7th Cir. 1977), cert. den. 439 U.S. 821 (1978).

Injunctions and other FTC actions are more likely to be triggered when foods, drugs, medical devices, and cosmetics are involved and where a violation is clear and immediately harmful. The Food and Drug Administration has authority over the labeling of these kinds of products under the Food, Drug and Cosmetic Act of 1938 *(21 U.S.C.A. §§ 301–392)*.

In all, some twenty federal agencies regulate advertising in specifically defined areas. These include the Securities and Exchange Commission, the Alcohol and Tobacco Tax Division of the Internal Revenue Service, the Civil Aeronautics Board, the Interstate Commerce Commission, and the Federal Power Commission.

State Regulation. Most states except Alabama and the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have "Little FTC" acts, paralleling to some degree the federal statute's Section 5 proscription against unfair or deceptive trade practices. Some are as broad as Section 5 itself. Others reach unfair or deceptive acts or practices but not unfair methods of competition. Still others reach only a specific list of prohibited practices.

Remedies vary also. A number of states grant rule-making power to a state official, often the attorney general, who may bring suit to stop violations of the state law. By this route, consumers may gain restitution in most jurisdictions, the state additional civil penalties in others.

The laws of nearly all of these jurisdictions authorize the use of subpoenas in civil investigations and the use of cease-and-desist orders or court injunctions to halt anticompetitive, unfair, unconscionable, or deceptive practices. Class actions are permitted in some jurisdictions, *private actions by consumers* in most.

Private actions are generally not allowed under FTCA's Section 5. They nevertheless should be attempted as a complement to FTC actions and will undoubtedly be more frequent in federal litigation as FTC powers are curtailed. Most state laws have been influenced by federal law, and the demise of the "unfairness doctrine" in federal law will probably be reflected in state laws. In the meantime, the paucity of state court interpretations of these relatively recent state statutes insure that guidance will be sought from administrative and judicial decisions under the federal act. Nearly half of state laws specifically encourage this. For example, the intent to deceive is not a necessary element of proof under some state laws. Nor does a plaintiff actually have to have been deceived. It is enough that a defendant's conduct would have a capacity or a tendency to deceive. Together with the possibility of double or treble actual damages, punitive damages, and some attorney's fees and costs, there is an incentive to litigate under state laws. Expectations are that state courts will eventually adopt the standards of the FTC Trade Practice Rules, the Trade Regulation Rules, and the concepts of other federal protection statutes enforced by the FTC. At least thirty-five states use federal standards in enforcing state food and drug laws.[36]

Media are not liable for unlawful advertisements or injuries resulting from defective products,[37] and they have no duty to investigate each advertiser, even when placed on notice as to potential danger.[38] There can be a problem if a publication plays an active role in a false and deceptive ad or specifically endorses a product. Indemnification clauses are now common in rate cards and advertising contracts, especially with regard to errors or omissions in ads, but they probably wouldn't protect a publication in the negligent preparation of an ad.

In the absence of regulatory activity at either the state or federal level, many competitors are filing private civil lawsuits on non-FTCA grounds in an attempt to restrain activities of competitors.[39]

Corrective Advertising. *Corrective advertising*, a powerful regulatory device, first came to the attention of the FTC in May 1970 when a group called SOUP (Students Opposing Unfair Practices) inter-

36. Federal Trade Commission Fact Sheet, State Legislation to Combat Unfair Trade Practices (September 1979, Rev.), and Paul R. Peterson, "The Use of FTC Programs as a Basis for Suit Under State FTC Acts," (April 1, 1980), both reprinted, with a complete list of "Little FTC" state laws in Christopher Smith and Christian S. White, cochairmen, *FTC Consumer Protection Law Institute*, Vol. II, New York: Practising Law Institute, 1980.

37. *Goldstein v. Garlick*, 318 N.Y.S.2d 370 (1971); *Suarez v. Underwood*, 426 N.Y.S.2d 208 (1980).

38. *Hernandez v. Underwood*, 7 Med.L.Rptr. 1535 (N.Y.Sup.Ct. 1981); *Pressler v. Dow Jones & Co., Inc.*, 8 Med.L.Rptr. 1680, 450 N.Y.S.2d 884 (N.Y.Sup.Ct., App.Div. 1982).

39. For a discussion of the cases, see Best, *Monetary Damages for False Advertising*, 49 University of Pittsburgh L.Rev. 1 (1987); Pompeo, *To Tell the Truth: Comparative Advertising and Lanham Act Section 43(a)*, 36 Catholic University L.Rev. 565 (1987); Plevan and Siroky, "The Procter & Gamble Litigation: Much Ado About Nothing?", National L. J. (August 20, 1984), 18; Plevan and Ziff, "Scope of Damage Recovery Clarified In 2 Recent Lanham Act Decisions," National L. J. (March 18, 1985), 22.

vened in an action against the Campbell Soup Company in a situation reminiscent of the *Colgate-Palmolive* sandpaper case. Campbell had used marbles in its video advertising to make its soup appear thicker than it was. No order requiring corrective advertising was issued for lack of a significant public interest, but the commission made its point. *Campbell Soup*, 3 Trade Reg.Rptr. ¶ 19,261 (FTC May 25, 1970).

The FTC first sought corrective advertising in late 1970 in actions charging Coca-Cola with misrepresenting the nutritional value of Hi-C and Standard Oil of California with falsely claiming that its gasoline reduced air pollution.[40] Both complaints were later dropped.

In August 1971 the FTC issued its first final corrective advertising order against Profile Bread, which was promoted as having fewer calories per slice. It did, but only because it was sliced thinner. The order required that ITT Continental Baking Co. and its advertising agency Ted Bates cease and desist for a period of one year from disseminating any advertisements for the product "unless not less than 25 percent of the expenditure (excluding production costs) for each medium in each market be devoted to advertising in a manner approved by authorized representatives of the Federal Trade Commission that Profile is not effective for weight reduction, contrary to possible interpretations of prior advertising." *ITT Continental Baking* Co., 1973 CCH Transfer Binder, ¶ 19,681 (1971).

The company agreed to devote 25 percent of its advertising expenditure for one year to FTC-approved corrective ads. Its only alternative was not to advertise the product at all.

The difference between a traditional order for affirmative disclosure and one for corrective advertising is that the corrective ad order refers to past rather than current advertising and is designed to dispel misconceptions the consumer may have gained from earlier ads. Although the commission may not impose criminal penalties or award compensatory damages for past acts, it does have a mandate to prevent illegal practices in the future.[41] A corrective order may remind consumers that a particular advertiser is a hard-core offender.

Profile corrective ads, read by actress Julia Mead, were so well received by the public that the company contemplated spending more than the required 25 percent of its ad budget on their presentation. But the ads, ignoring the fact that the FTC had found deception in earlier ads, gave the company a credibility it didn't deserve. Later corrective orders specified the wording more precisely.

After a flurry of cases a hiatus occurred in corrective advertising partly because the somewhat ponderous process could not keep up with the fluid and ingenious advertising industry: ads would be challenged long after they had served the purposes of advertisers. Then in 1975 an administrative law judge, in the first litigated corrective advertising case, was upheld by the full commission in forbidding Warner-Lambert, the makers of Listerine, to advertise unless each ad included the following language: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity." *Warner-Lambert* Co., 86 FTC 1938 (1975). The corrective advertising was to continue until the company had spent $10 million on Listerine advertising, an amount roughly equal to the annual Listerine budget for 1962 to 1974. The D.C. Circuit Court of Appeals affirmed the commission decision in the opinion which follows with the words "contrary to prior advertising" deleted.

WARNER-LAMBERT CO. v. FEDERAL TRADE COMMISSION

2 MED.L.RPTR. 2303, 562 F.2D 749 (D.C.CIR. 1977), CERT. DEN. 435 U.S. 950 (1978).

WRIGHT, Circuit Judge:

* * *

The first issue on appeal is whether the Commission's conclusion that Listerine is not beneficial for colds or sore throats is supported by the evidence. The Commission's findings must be sustained if they are supported by substantial evidence on the record viewed as a whole. We conclude that they are.

Both the ALJ [Administrative Law Judge] and the Commission carefully analyzed the evidence. They gave full consideration to the studies submitted by petitioner. The ultimate conclusion that Listerine is not an effective cold remedy was based on six specific findings of fact.

* * *

40. *Coca-Cola Co.*, 3 Trade Reg.Rptr. ¶ 19,351 (FTC 1970); *Standard Oil Co. of California*, 3 Trade Reg.Rptr. ¶ 19,352 (FTC 1970).
41. *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952).

Petitioner contends that even if its advertising claims in the past were false, the portion of the Commission's order requiring "corrective advertising" exceeds the Commission's statutory power. The argument is based upon a literal reading of Section 5 of the Federal Trade Commission Act, which authorizes the Commission to issue "cease and desist" orders against violators and does not expressly mention any other remedies. The Commission's position, on the other hand, is that the affirmative disclosure that Listerine will not prevent colds or lessen their severity is absolutely necessary to give effect to the prospective cease and desist order; a hundred years of false cold claims have built up a large reservoir of erroneous consumer belief which would persist, unless corrected, long after petitioner ceased making the claims.

The need for the corrective advertising remedy and its appropriateness in this case are important issues which we will explore. But the threshold question is whether the Commission has the authority to issue such an order. We hold that it does.

Petitioner's narrow reading of Section 5 was at one time shared by the Supreme Court. In *FTC v. Eastman Kodak Co.*, 274 U.S. 619, 623 (1927), the Court held that the Commission's authority did not exceed that expressly conferred by statute. The Commission has not, the Court said, "been delegated the authority of a court of equity."

But the modern view is very different. In 1963 the Court ruled that the Civil Aeronautics Board has authority to order divestiture in addition to ordering cessation of unfair methods of competition by air carriers. *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963). The CAB statute, like Section 5, spoke only of the authority to issue cease and desist orders. * * * "Authority to mold administrative decrees is indeed like the authority of courts to frame injunctive decrees. * * * [The] power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority. * * *"

Later, in *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966), the Court applied *Pan American* to the Federal Trade Commission. In upholding the Commission's power to seek a preliminary injunction against a proposed merger, the Court held that it was not necessary to find express statutory authority for the power. Rather, the Court concluded, "It would stultify congressional purpose to say that the Commission did not have the * * * power * * *. * * * Such ancillary powers have always been treated as essential to the effective discharge of the Commission's responsibilities."

Thus it is clear that the Commission has the power to shape remedies which go beyond the simple cease and desist order. Our next inquiry must be whether a corrective advertising order is for any reason outside the range of permissible remedies. Petitioner and *amici curiae* argue that it is because (1) legislative history precludes it, (2) it impinges on the First Amendment, and (3) it has never been approved by any court.

Petitioner relies on the legislative history of the 1914 Federal Trade Commission Act and the Wheeler-Lea amendments to it in 1938 for the proposition that corrective advertising was not contemplated. In 1914 and in 1938 Congress chose not to authorize such remedies as criminal penalties, treble damages, or civil penalties, but that fact does not dispose of the question of corrective advertising.

Petitioner's reliance on the legislative history of the 1975 amendments to the Act is also misplaced. The amendments added a new Section 19 to the Act authorizing the Commission to bring suits in federal District Courts to redress injury to consumers resulting from a deceptive practice. The section authorizes the court to grant such relief as it "finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice," including, but not limited to,

> Rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice. * * * 15 U.S.C.A. § 576(b).

Petitioner and *amici* contend that this congressional grant *to a court* of power to order public notification of a violation establishes that the Commission by itself does not have that power.

* * *

[P]etitioner's construction of the section runs directly contrary to the congressional intent as expressed in a later subsection: "Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law."

* * *

We conclude that this legislative history cannot be said to remove corrective advertising from the class of permissible remedies.

Petitioner and *amici* further contend that corrective advertising is not a permissible remedy because it trenches on the First Amendment. *Petitioner is correct that this triggers a special responsibility on the Commission to order corrective advertising only if the restriction inherent in its order is no greater than necessary to serve the interest involved.* [Emphasis added.] But this goes to the appropriateness of the order in this case, an issue we reach [later in] this opinion. *Amici curiae* go further, arguing that, since the Supreme Court has recently extended First Amendment protection to commercial advertising, mandatory corrective advertising is unconstitutional.

A careful reading of *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council* compels rejection of this argument. For the Supreme Court expressly noted that the First Amendment presents "no obstacle" to government regulation of false or misleading advertising. The First Amendment, the Court said,

> as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely.

The Supreme Court clearly foresaw the very question before us, and its statement is dispositive of *amici's* contention.

According to petitioner, "The first reference to corrective advertising in Commission decisions occurred in 1970, nearly fifty years and untold numbers of false advertising cases after passage of the Act." In petitioner's view, the late emergence of this "newly discovered" remedy is itself evidence that it is beyond the Commission's authority. This argument fails on two counts. First the fact that an agency has not asserted a power over a period of years is not proof that the agency lacks such power. Second, and more importantly, we are not convinced that the corrective advertising remedy is really such an innovation. The label may be newly coined, but the concept is well established. It is simply that under certain circumstances an advertiser may be required to make affirmative disclosure of unfavorable facts.

One such circumstance is when an advertisement that did not contain the disclosure would be misleading. For example, the Commission has ordered the sellers of treatments for baldness to disclose that the vast majority of cases of thinning hair and baldness are attributable to heredity, age, and endocrine balance (so-called "male pattern baldness") and that their treatment would have no effect whatever on this type of baldness. It has ordered the promoters of a device for stopping bedwetting to disclose that the device would not be of value in cases caused by organic defects or diseases. And it has ordered the makers of Geritol, an iron supplement, to disclose that Geritol will relieve symptoms of tiredness only in persons who suffer from iron deficiency anemia, and that the vast majority of people who experience such symptoms do not have such a deficiency.

Each of these orders was approved on appeal over objections that it exceeded the Commission's statutory authority. The decisions reflect a recognition that, as the Supreme Court has stated,

> If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. *FTC v. Ruberoid* Co., 343 U.S. 470, 473 (1952).

In another case the Waltham Watch Company of Massachusetts had become renowned for the manufacture of fine clocks since 1849. Soon after it stopped manufacturing clocks in the 1950's, it transferred its trademarks, good will, and the trade name "Waltham" to a successor corporation, which began importing clocks from Europe for resale in the United States. The imported clocks were advertised as "product of Waltham Watch Company since 1850," "a famous 150-year-old company."

The Commission found that the advertisements caused consumers to believe they were buying the same fine Massachusetts clocks of which they had heard for many years. To correct this impression the Commission ordered the company to disclose in all advertisements and on the product that the clock was not made by the old Waltham company and that it was imported. The Seventh Circuit affirmed, relying on "the well-established general principle that the Commission may require affirmative disclosure for the purpose of preventing future deception." *Waltham Watch Co. v. FTC*, 318 F.2d 28 (7th Cir. 1963), cert. den. 375 U.S. 944.

It appears to us that the orders in *Royal* and *Waltham* were the same kind of remedy the Commission has ordered here. Like Royal and Waltham, Lister-

ine has built up over a period of many years a widespread reputation. When it was ascertained that the years a widespread reputation. When it was ascertained that the reputation no longer applied to the product, it was necessary to take action to correct it. Here, as in *Royal* and *Waltham*, it is the accumulated impact of *past* advertising that necessitates disclosure in *future* advertising. * * *

Having established that the Commission does have the power to order corrective advertising in appropriate cases, it remains to consider whether use of the remedy against Listerine is warranted and equitable. We have concluded that part 3 of the order should be modified to delete the phrase "Contrary to prior advertising." With that modification, we approve the order.

Our role in reviewing the remedy is limited. * * *

The Commission has adopted the following standard for the imposition of corrective advertising:

> [I]f a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be averted by merely requiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisement.

We think this standard is entirely reasonable. It dictates two factual inquires: (1) did Listerine's advertisements play a substantial role in creating or reinforcing in the public's mind a false belief about the product? and (2) would this belief linger on after the false advertising ceases? It strikes us that if the answer to both questions is not yes, companies everywhere may be wasting their massive advertising budgets. Indeed, it is more than a little peculiar to hear petitioner assert that its commercials really have no effect on consumer belief.

For these reasons it might be appropriate in some cases to presume the existence of the two factual predicates for corrective advertising. But we need not decide that question, or rely on presumptions here, because the Commission adduced survey evidence to support both propositions. * * *

We turn next to the specific disclosure required: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity." Petitioner is ordered to include this statement in every future advertisement for Listerine for a defined period. In printed advertisements it must be displayed in type size at least as large as that in which the principal portion of the text of the advertisement appears and it must be separated from the text so that it can be readily noticed. In television commercials the disclosure must be presented simultaneously in both audio and visual portions. During the audio portion of the disclosure in television and radio advertisements, no other sounds, including music, may occur.

These specifications are well calculated to assure that the disclosure will reach the public. It will necessarily attract the notice of readers, viewers, and listeners, and be plainly conveyed. Given these safeguards, we believe the preamble "Contrary to prior advertising" is not necessary. It can serve only two purposes: either to attract attention that a correction follows or to humiliate the advertiser. * * * While we do not decide whether petitioner proffered its cold claims in good faith or bad, the record compiled could support a finding of good faith. On these facts, the confessional preamble to the disclosure is not warranted.

Finally, petitioner challenges the duration of the disclosure requirement. By its terms it continues until respondent had expended on Listerine advertising a sum equal to the average annual Listerine advertising budget for the period April 1962 to March 1972. That is approximately ten million dollars. Thus if petitioner continues to advertise normally the corrective advertising will be required for about one year. We cannot say that is an unreasonably long time in which to correct a hundred years of cold claims.

* * *

The formula settled upon by the Commission is reasonably related to the violation it found.

Accordingly, the order, as modified, is

Affirmed.

COMMENT

Judge Robb dissented because he believed the FTC had been conferred power only to prevent future deceptions or to impose a prospective remedy. Corrective advertising constituted a retrospective remedy, a remedy for past claims.

It has been urged that corrective orders not be confined to obvious cases such as *Warner-Lambert* where the proof presented to the commission of the success of a deceptive campaign is so striking. Noting the long history of a deceptive claim uniquely asserted for Listerine, the absence of consumer confusion as to which mouthwash was said to be effective against colds, and the persuasive evidence that this claim was believed by consumers after the false advertising had ceased, one commentator observed that "comparable proof of deception-perception-memory influence would be virtually impossible in most advertising cases. * * * If the commission is to do an effective job in regulating deceptive advertising, corrective advertising must apply to more than the one-in-a-million type of ad campaign present in *Warner-Lambert*." See Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv.L.Rev. 661, 698 (1977).

What evidence establishes whether false claims about product characteristics create persistent misimpressions or other continuing effects and of what strength and duration? And what forms of corrective advertising would correct misimpressions? Answers to these kinds of factual questions should precede legal and policy considerations. Too often they do not.

An analysis of FTC decisions from its beginning until 1973 found that only 10.5 percent used some form of external evidence including such things as the testimony of experts, consumer testimony, and consumer surveys. However, in later years during this period, use of empirical evidence increased sharply to 32.8 percent of all cases from 1955 to 1973 and 63.6 percent of all cases from 1970 to 1973.[42]

In May 1978 the FTC for the first time was able to get a product endorser to be personally accountable for advertising claims. Using its injunctive, complaint, and consent powers to challenge the alleged unfair or deceptive marketing practices of an acne "treatment," the commission got celebrity Pat Boone to agree to pay part of any restitution to consumers that would be ordered in the case and to make a reasonable inquiry before endorsing products in the future.

"Unless the endorser is an expert on the subject," said Albert Kramer, then director of the FTC Bureau of Consumer Protection, "the endorser must look to independent reliable sources to validate claims, tests or studies supplied by the advertiser. * * * The endorser may profit from a false advertisement just as much as the manufacturer and thus it is not unreasonable to obligate him to ascertain the truthfulness of the claims he is being paid to make."[43]

Counteradvertising. In early 1972 the Federal Trade Commission in a unanimous brief filed with the Federal Communication Commission urged broadcast support for the concept of counteradvertising or "countercommercials" as "a suitable approach to some of the present failings of advertising which are beyond the FTC's capacity." FTC Dkt. ¶ 19,260, Jan. 6, 1972.

Commercial time would be available to those who could pay, free to those who could not, to reply to ads (1) asserting performance and other explicit claims raising controversial issues of current public importance, for example, pollution or automobile safety; (2) stressing broad recurrent themes affecting purchasing decisions, for example, nutrition, drug, and detergent claims; (3) resting on controversial "scientific" statements; and (4) ads silent about possibly negative aspects of a product.

The proposal was undoubtedly influenced by the D.C. Circuit's ruling in the *Banzhaf* case which, for the first time, had applied the Fairness Doctrine to broadcast advertising, specifically cigarette advertising. *Banzhaf v. FCC*, 1 Med.L.Rptr. 2037, 405 F.2d 1082 (D.C.Cir. 1968).

The FTC felt the counter ad would go well beyond the corrective ad or the affirmative disclosure because it would not be buried in the advertiser's own message but would come from vigorous advocates of converse points of view. It was suggested that the FCC would retain substantial discretion in deciding what commercials would raise Fairness Doctrine claims and what time frames would be suitable.

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42. Brandt and Preston, *The Federal Trade Commission's Use of Evidence to Determine Deception*, 41 J. of Marketing 54 (1977). A proposed systematic approach to assessing such evidence was suggested in Richards and Preston, "Quantitative Research: A Dispute Resolution Model for FTC Advertising Regulation," paper presented to the Law Division, Association for Education in Journalism and Mass Communication convention, Norman, Oklahoma, August 1986.

43. *FTC News Summary*, No. 20, May 19, 1978. See *FTC Guidelines—Endorsements and Testimonials*, 16 C.F.R. § 255, and 45 Fed.Reg. 3870 (Jan. 18, 1980).

Advertisers, broadcasters, and the Nixon administration came down hard on the FTC proposal, partly on First Amendment grounds. More important, perhaps, they predicted economic chaos, a bankrupt broadcast industry, and a public hopelessly confused by an "incredible babble of claim and counter claim."[44]

Proponents, on the other hand, were surprised to learn that the broadcast industry was so fragile that counteradvertising could destroy it, and they argued that public reply to advertising was more sensitive to First Amendment rights than government challenge, litigation, and penalty. *Advertising Age*, a leading trade publication, agreed in its March 13, 1972 issue that counteradvertising might curtail the FTC's intervention in advertising, and it saw no reason why ads were less appropriate subjects for discussion on television than other public matters.

The D.C. Circuit, however, a year before the FTC proposal was issued, had already refused to extend the *Banzhaf* ruling to product advertising generally because, it said, to do so would undermine the present system which is based on product commercials, many of which have *some* adverse ecological effects. The case, *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C.Cir. 1971), involved a complaint about the ecological effects of advertising big cars and high-test gasolines. On its facts, however, the case represented an expansion of *Banzhaf*. In remanding, the court declared that controversial issues of public importance might be involved in the commercial and held that the FCC would have to decide whether the licensee had afforded an opportunity for the presentation of contrasting views.

By 1974 the same court had decided that comparative efficiency of gasoline engines was not a controversial issue of public importance as long as commercials "made no attempt to glorify conduct or products which endangered public health or contributed to pollution." *Neckritz v. FCC*, 502 F.2d 411 (D.C.Cir. 1974).

The demise of counteradvertising seemed assured when in July 1974 the FCC rejected the FTC's proposal as "antithetical to this country's tradition of uninhibited dissemination of ideas."[45] At the same time the FCC issued a statement of policy concerning the Fairness Doctrine and advertising which essentially removed product advertising from the requirements of the Fairness Doctrine unless the advertising itself raised an important controversial issue.[46]

Comparative Advertising. If there is anything that consumers deserve under either classical or contemporary theories of the First Amendment, it is fair and truthful comparative advertising.[47] Courts have held it to be "in harmony with the fundamental objectives of free speech and free enterprise in a free society."[48] The Federal Trade Commission endorsed it.[49]

The "aspirin war" was a case in point. Besides providing information of little use to the consumer, comparisons may slip into defamation, disparagement, or unfair competition, and thus into lawsuits.[50] If Tylenol, Anacin, and Bayer are what comparative advertising comes down to, consumers will have to look elsewhere for product information.

Self-Regulation. Spearhead of self-regulation in advertising is the National Advertising Review Board which acts on consumer and industry complaints about truth and accuracy in national advertising. Thirty national advertisers, ten delegates from advertising agencies, and ten representatives of the public comprise the Board's membership. It is sponsored by the American Advertising Federation, the American Association of Advertising Agencies, the Association of National Advertisers, and the Council of Better Business Bureaus. Complaints are handled initially by an investigating staff of the BBB Council called the National Advertising Division. A query from NAD can lead major national advertisers to

44. Elton Rule, president of ABC, in *Advertising Age* (May 1, 1972), 1.
45. 671 ATRR A–16, July 9, 1974.
46. 39 Fed.Reg. 26372 (July 18, 1974).
47. Defined by Leonard Orkin, Practising Law Institute, Legal and Business Problems of the Advertising Industry 1978, p. 304 as "Advertisements which direct the prospective customer's attention to similarities or differences between the advertised product and one or more competitors either explicitly or implicitly."

See also, Sterk, *The Law of Comparative Advertising: How Much Worse is "Better" Than "Great."* 76 Columbia L.Rev. 80 (1976).

48. *Triangle Publications v. Knight-Ridder Newspapers*, 3 Med.L.Rptr. 2086, 445 F.Supp. 875 (S.D.Fla. 1978).
49. FTC recommended comparative advertising on August 13, 1979 in 44 Fed.Reg. 4738. Note that Section 43(a) of the Lanham Trademark Act prohibits *false* disparagement of a competitor's product. See also *FTC News Summary*, August 3, 1979.
50. *American Home Products Corp. v. Johnson and Johnson*, 3 Med.L.Rptr. 1097, 436 F.Supp. 785 (S.D.N.Y. 1977), aff'd 577 F.2d 160 (2d Cir. 1978).

modify or discontinue unsubstantiated advertising claims. NAD monitors and advises and, in unresolved cases, carries appeals to the National Advertising Review Board. If an advertiser remains recalcitrant after an NARB panel reaches an adverse decision, NARB will notify the appropriate government agency.

Individual newspapers and broadcast stations and the three networks have their own advertising acceptability or broadcast standards departments. Network standards previously were considered higher than those of the legal regulators. However, standards and practices divisions of all three networks had large staff cutbacks in the late 1980s.[51] Given late-1980s network fare, some would say standards themselves have been cut back.

Much of interest and importance is omitted from this brief account of some of advertising's legal problems. The Practising Law Institute's *Advertising Compliance Handbook* (1988) by Plevan and Siroky is an invaluable comprehensive reference. So too is Rosden and Rosden, *The Law of Advertising (1987)*. PLI's *Legal and Business Aspects of the Advertising Industry* (1989) is a broad view of all types of legal issues affecting advertising.

Legal or Public Notice Advertising

The major premise of public notice advertising is that citizens ought to have an opportunity to know what the laws are, to be notified when their rights or property are to be affected, and to be apprised of how the administration of their government is being conducted. State laws define the classifications of information requiring promulgation. These may include statutes and ordinances, governmental proceedings, articles of incorporation, registration of titles, probate matters, notices of election, appropriation of public funds, tax notices, bids for public works, and judicial orders—the list is by no means exhaustive.

State laws also define the qualifications a newspaper must possess to carry public notices and how legally qualified and/or "official" newspapers are to be selected. See *New Jersey Suburbanite v. State*, 384 A.2d 831 (N.J. 1978). Here the state supreme court denied review when a free distribution shopper challenged a state law restricting legal advertising to newspapers with a paid circulation, average news content of 35 percent, and a second-class mailing permit in effect for at least two years. The number of times a public notice is to be published and how publication is to be certified and paid for are generally statutory matters. Publications will make great efforts to qualify as the sort of newspaper allowed to carry public notice advertisements under state law. In one case, a paper that was inserted into another publication, then circulated, sought qualification and was refused.[52] Omission by a publication of legal notices it had agreed to run cannot result in liability, at least where the omission was inadvertent.[53]

"Official" and legally qualified newspapers are usually required to be stable publications of general and paid-for circulation, of general news coverage and general availability, printed in English, appearing frequently and regularly, and meeting specified minimum conditions of technical excellence. Close interpretation of state statutes has led to certain exceptions being made for specialized urban publications known as commercial newspapers designed to deal with the large volume of legal advertising which typical daily newspapers would find unprofitable. These interpretations have not gone unchallenged. See *King County v. Superior Court in and for King County*, 92 P.2d 694 (Wash. 1939); *In re Sterling Cleaners & Dyers, Inc.*, 81 F.2d 596 (7th Cir. 1936).

The Supreme Court has held that publication by newspaper will not constitute adequate notice to parties in litigation and will thus deny due process unless the notice is reasonably calculated to actually reach all the parties.[54] The rule of the case has been extended to many situations in which an individual might stand to lose something of value.[55]

Finally, a newspaper does not have to accept public notice advertising; *Wooster v. Mahaska County*, 98 N.W. 103 (Iowa 1904); *Commonwealth v. Boston Transcript Co.*, 144 N.E. 400 (1924), but if it does, it must comply with the statutory requirements of publication. *Belleville Advocate Printing Co. v. St. Clair County*, 168 N.E. 312 (Ill. 1929).

51. "Television Networks Censured for 'Censor' Cutbacks," *Broadcasting* (September 19, 1988), 60.
52. *Gulf Coast Media v. Mobile Press Register*, 11 Med.L.Rptr. 2347, 470 So.2d 1211 (Alabama 1985).
53. *Indiana Construction Corp. v. Chicago Tribune*, 13 Med.L.Rptr. 1863, 648 F.Supp. 1419 (N.D.Ind. 1986).
54. *Mullane v. Central Hanover Bank & Trust Co.*, Trustee, 339 U.S. 306 (1950).
55. See, *Walker v. City of Hutchinson*, 352 U.S. 112 (1956) (condemnation proceeding).

Media Rights to Refuse and Control the Conditions of Advertising

In spite of First Amendment victories for commercial speech, the media have compromised none of their rights of control over access and display of advertising. They may refuse advertising and dictate the conditions of its sale.

In 1965 a Florida appeals court held that, "in the absence of any statutory provisions to the contrary, the law seems to be uniformly settled by the great weight of authority throughout the United States that the newspaper publishing business is a private enterprise and is neither a public utility nor affected with the public interest. The decisions appear to hold that even though a particular newspaper may enjoy a virtual monopoly in the area of its publication, this fact is neither unusual nor of important significance. The courts have consistently held that in the absence of statutory regulation on the subject, a newspaper may publish or reject commercial advertising tendered to it as its judgment best dictates without incurring liability for advertisements rejected by it." *Approved Personnel, Inc. v. Tribune* Co., 177 So.2d 704 (Fla. 1965).

An exception to the rule may be newspapers or periodicals which, because they can be defined as publicly supported channels, raise the issue of "state action." See *Zucker v. Panitz*, 299 F.Supp. 102 (D.N.Y. 1969); *Lee v. Board of Regents of State Colleges*, 306 F.Supp. 1097 (E.D.Wis. 1969), aff'd 1 Med.L.Rptr. 1947, 441 F.2d 1257 (7th Cir. 1971). But see *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), cert. den. 430 U.S. 982 (1977).

A state university newspaper's refusal to run advertisements in which a person's sexual orientation was stated was permissible since the paper was not a public forum. The refusal was protected as an editorial decision. *Sinn v. Daily Nebraskan*, 12 Med.L.Rptr. 2340, 638 F.Supp. 143 (D.Neb. 1986).

Tornillo, text, p. 497, was relied on when a plaintiff whose "tombstone advertisements" announcing an offer of shares in a pending lawsuit were rejected by a newspaper and he was denied an injunction which would have required the newspaper either to publish the ad or to refrain from publishing all such ads in the future. Such a restraint, said the court, "runs squarely against the wall of freedom of the press. * * * That commercial advertising is involved makes no difference. * * * [A]ny such compulsion to publish that which 'reason' tells [a newspaper] should not be published" is unconstitutional. *Person v. New York Post*, 2 Med.L.Rptr. 1666, 427 F.Supp. 1297 (L.E.D.N.Y. 1977), aff'd without opinion, 3 Med.L.Rptr. 1784, 573 F.2d 1294 (2d Cir. 1977).

Newspapers may allocate their advertising space as they see fit,[56] and statutory requirements to the contrary will have difficulty passing constitutional muster. The Fifth Circuit affirmed a federal district court ruling in Florida that the First Amendment was violated by a provision of Florida's campaign financing law requiring newspapers to offer advertising to political candidates at the lowest available rate.[57]

And a Florida law that restricted candidates for public office from making any use of advertising media except in a specified "political season" was held by the Florida Supreme Court to violate the First Amendment since it was primarily designed to limit the quantity of political speech.[58]

If a refusal to accept advertising is in breach of contract or an attempt to monopolize interstate commerce, an injunction may issue. In *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), a publisher was prohibited from refusing to accept local advertisements from anyone who advertised on a competitive radio station.

The Sherman Act was not violated, the Second Circuit held in *Homefinders v. Providence Journal*, 6 Med.L.Rptr. 1018, 621 F.2d 441 (1st Cir. 1980), by a newspaper's refusal to publish false and misleading advertisements submitted by a rental referral firm. Where the advertising was honest and aboveboard and the metropolitan daily, the only newspaper of its kind in town, was in direct competition with the advertiser, the result could be a Sherman Act violation. *Home Placement Service, Inc. v. Providence Journal Co.*, 8 Med.L.Rptr. 1881, 682 F.2d 274 (1st Cir. 1982).

But once a newspaper signs a contract to publish an ad, it has given up the right not to publish unless that right is specifically reserved in the contract or some other equitable defense is available to it. *Herald-Telephone v. Fatouros*, 8 Med.L.Rptr. 1230, 431 N.E.2d 171 (Ind. 1982).

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56. *National Tire Wholesale v. Washington Post*, 3 Med.L.Rptr. 1520, 441 F.Supp. 81 (D.D.C. 1977).
57. *Gore Newspapers v. Shevin*, 2 Med.L.Rptr. 1818, 397 F.Supp. 1253 (S.D.Fla. 1975), aff'd 2 Med.L.Rptr. 1818, 550 F.2d 1057 (5th Cir. 1977).
58. *Sadowski v. Shevin*, 2 Med.L.Rptr. 1822, 345 So.2d 330 (Fla. 1977).

By the same token, advertisers may not conspire to withdraw advertising from a newspaper by waging an advertising boycott without violating federal antitrust laws. A conglomerate corporation under single ownership, however, may withdraw all its advertising from a newspaper, as Howard Hughes did with the *Las Vegas Sun*, without violating federal law.[59]

But a newspaper may not conspire with a segment of its advertisers to refuse space to a competitive advertiser.[60]

Generally courts have recognized that newspapers have a strong economic self-interest in limiting the kinds of advertising they will accept, since "in the minds of readers, a newspaper's advertising may be every bit as reflective of the policy of a newspaper as its editorial page." *Adult Film Association of America v. Times Mirror Co.*, 5 Med.L.Rptr. 1865, 97 Cal. App. 3d 77, 158 Cal.Rptr. 547 (1979).

Although the broadcast media are under much more direct and stringent governmental supervision than other media, the U.S. Supreme Court in *CBS v. Democratic National Committee*, 1 Med.L.Rptr. 1855, 412 U.S. 94 (1973), was unwilling to grant a First Amendment right of access to editorial advertising on network television. A second group, Business Executives' Move for Vietnam Peace, had also been denied the opportunity to buy broadcast time.

SECTION TWO
ANTITRUST LAW AND THE MEDIA

The intent of federal and state antitrust law is to preserve and promote vigorous, fair, economic competition. Since most U.S. media participate actively in the economic life of the nation, antitrust law is clearly an important part of communications law. Indeed, if anything, antitrust law is more important in the 1990s than ever before. Intermedia competition is increasing. While newspapers once competed only with newspapers, radio stations only with radio stations, magazines only with other magazines, etc., the trend now is toward intense intermedia competition, both for the attention of readers, listeners, and viewers and for advertising dollars. Local radio is now probably the greatest competitor to the local daily newspaper; publications like USA *Today* compete with cable services such as "Cable Network News (CNN)," and, as an advertising medium, direct mail competes against almost everyone. As competition increases, the role of antitrust law increases. The stronger the competitive forces, the more likely media organizations (like other businesses) are to resort to unlawful means of competition, and the more significant antitrust protections of competition become.

In broadcasting at least, substantial recent FCC deregulation has been premised on the belief that FCC regulations aren't needed because "competitive marketplace forces" can adequately protect the public interest. When deregulation is based on assumptions about competitive benefits, antitrust laws—which protect that competitive environment—become surrogates for communications policy and increase in importance. A few examples can demonstrate the increasing importance of antitrust law. In an era of merger mania it is not surprising that something like 73 percent of America's 1,650 daily newspapers are chain owned. At the same time, the number of chains has declined, according to *Editor & Publisher*, from 169 in 1978 to 127 in 1986. This suggests the acquisition of chains by chains, usually national chains buying regional chains, and a concurrent increase overall in absentee ownerships. The four largest chains control 25 percent of all daily circulation; the twelve largest are approaching 50 percent. The largest chain, Gannett, alone controls about 10 percent of total daily circulation. Head-to-head daily newspaper competition remains in a few cities, including New York, Los Angeles, Chicago, Dallas, Houston, Denver, San Antonio, and Boston, but the condition of weaker newspapers in some of these communities is guarded.

All components of the mass communication industry are being consolidated—magazines, record companies, movie theaters, newsprint plants, book publishers, retail bookstores, wire services, broadcast stations, broadcast networks, cable television systems, and cable television program services. In the late 1980s, ownership of all three major commercial broadcast networks changed hands. ABC was snapped up by a much smaller enterprise, Capital Cities,

59. *Las Vegas Sun v. Summa Corp.*, 5 Med.L.Rptr. 2073, 610 F.2d 614 (9th Cir. 1979).
60. *Greenspun v. McCarran*, 105 F.Supp. 662 (D.Nev. 1952).

Inc. NBC (along with its parent, RCA) was acquired by General Electric (which, in the 1920s, had been forced out of RCA because of antitrust concerns). CBS did not technically change control (as far as the FCC was concerned in making licensing decisions), but it nonetheless came under radically different supervision as conglomerate enterpreneur Lawrence Tisch (and his Lowes Corporation) effectively took over the company and oriented CBS more toward asset management and away from its traditional concern for broadcasting in the public interest. Rupert Murdoch started Fox Broadcasting Company—an attempt at a fourth network—by buying UHF stations in many of the nation's largest television markets and then purchasing the Fox studios as a production arm. In doing this, Murdoch combined production and distribution (a type of vertical concentration) in a way currently prohibited by antitrust consent decrees to ABC, CBS, and NBC. Trends toward concentration of control in cable television also became pronounced, as very large cable Multiple System Operators (MSO's), like Tele-Communications, Inc. (TCI) and American Cable Television (ACT, a part of Time, Inc.), acquired more and more cable systems and, simultaneously, purchased ever larger stakes in the cable program services (such as those started by cable entrepreneur Ted Turner) that provide them with content. Powerful members of Congress, such as Senator Howard Metzenbaum (D-Ohio), warned the cable industry in 1988 and 1989 that these trends toward concentration of control worried Congress (even if they didn't worry the direct enforcers of antitrust law), and cautioned the cable industry that scrutiny of economic trends in their industry could be forthcoming. The effects of the changing patterns of ownership of media systems on society are not yet clear, but it seems wise to recognize that the First Amendment prefers diversity and competition over monopolization or the abuse of monopoly power. Federal and state antitrust laws stand as counterforces to these trends.

The Statutory Background

It's difficult to summarize antitrust law. More than many areas of the law, antitrust cases often turn on minute factual differences. Being a combination of law and microeconomics, cases are often difficult for the uninitiated to differentiate. The antitrust statutes declare very broad principles, but enforcement of those principles develops in a case-by-case fashion guided by multiple decisionmakers (the U.S. Department of Justice, the Federal Trade Commission, and courts—with all of the above subject to congressional second-guessing). Often cases don't end in clear judicial decisions but, instead, culminate in compromises—negotiated "consent decrees." As a consequence of these characteristics of antitrust law, the best this section can do is to (1) state general principles and (2) provide examples of how those principles have been applied in media cases. Several major federal statutes set the statutory background.

The Sherman and Clayton Acts are our basic federal antitrust statutes. The former, enacted in 1890, is essentially an antimonopoly law. It prohibits contracts, combinations, trusts, and any conspiracies in restraint of trade. Section 1 of the Sherman Act prohibits "[e]very contract, combination * * * or conspiracy in restraint of trade or commerce." Section 2 basically prohibits monopolization, attempts to monopolize and conspiracies to monopolize any part of interstate trade or commerce. It can be applied against the actions of a single enterprise.

The 1914 Clayton Act includes among its categories of illegal activities: anticompetitive corporate mergers, interlocking directorates, discriminatory pricing, and tying (the connecting of the sale of one product or service to the purchase of a second product or service). Unlike the Sherman Act, the Clayton Act primarily addresses anticompetitive activities involving two or more enterprises. Section 7 of the Clayton Act is aimed specifically at mergers:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share of capital * * * of another corporation engaged also in commerce, where, in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly. 15 U.S.C.A. sec. 18.

These relatively old antitrust statutes have been amended many times since their adoption. The Celler-Kefauver Act of 1950, for example, amended section 7 of the Clayton Act to arrest "a trend toward concentration in its incipience."[61] While many of these amendments are important to media interests,

61. *United States v. Von's Grocery*, 384 U.S. 270 (1966).

a most crucial one is the Robinson-Patman Act. That act prohibits price discrimination

> * * * between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition, tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. 15 U.S.C.A. sec. 13 (1976).

The act must especially be taken into account when advertising rates are set, since media often charge different advertisers different rates for what appears, on the surface, to be the same advertising time or space. (As will be noted later, however, advertising is usually viewed as a service rather than a commodity and hence often escapes Robinson-Patman review).

Enforcement of these statutes hinges on many factors. What is a market? What is monopolization of that market? Are "commodities" different than services? In most antitrust cases, the answers to these questions are not simple but often determine the outcome of cases. Markets are actually defined in two ways: as product markets and as geographic markets. Things fall in the same "product market" if they are substitutes for each other in the eyes of purchasers. For example, advertising on one local radio station and advertising on another station in the same area would probably be ruled to be in the same product market. The geographic market represents the area in which a particular producer or vendor sells a particular product. The metropolitan area in which a newspaper circulates would be its geographic market. Monopolization of a product or geographic market is not necessarily bad; it can happen accidentally (say, for example, if your only competitor leaves the market) or it can be the fair result of business success. What's really wrong, under antitrust laws, is to abuse "monopoly power"—generally defined as "the power to control prices or exclude competition." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

How a market is defined, obviously, determines whether monopoly power is present or not and, of course, whether or not it's abused. It's not as easy as it might seem. Some mass media display the characteristics of a "natural monopoly" in their market. Take daily newspapers, for example. Most dailies occupy a local monopoly or a "natural monopoly" position. Because of their capital intensive economic characteristics, most communities don't support more than one daily, metropolitan newspaper. Just because they may be "natural" (hence allowable) monopolies, daily newspapers are not immune from antitrust actions. Like "unnatural" monopolies, they can be prosecuted for abusing their "monopoly" power. The newspaper, then, runs the risk of being readily accused of abusing its monopoly power if, for example, it takes certain steps against competitors such as shoppers or weeklies. In some instances, however, the newspaper might defend by arguing that it's part of a larger and more competitive market—say, the market for local advertising dollars. How antitrust cases in such circumstances might come out depends a lot on how the market is defined (as a daily newspaper market or as a broader market including other media). Courts, so far, have tended to define media markets in media-specific ways, meaning that newspapers have to recognize that they often do have monopoly power, but in the multimedia market of the 1990s, there's a chance that future definitions of media markets may cross media boundaries. If so, the level of daily newspaper "monopolization" might "decrease" in antitrust terms. Local television markets tend to be oligopsonistic; local radio markets, where there are sometimes dozens of stations in a single community, tend to be highly competitive—in antitrust law terms.

The Robinson-Patman Act applies only to commodities. Under federal law, advertising is usually viewed more as a service than as a commodity. Thus, most antitrust cases involving alleged anticompetitive acts surrounding advertising tend to focus on alleged Clayton or Sherman Act rather than Robinson-Patman Act violations. In addition to federal law, there is state antitrust law also to be concerned about. Much state law parallels federal principles. Some state statutes, however, have adopted slightly different language blurring, for example, the differences between commodities and services. Media personnel need to consider these variations as well as keep their eye on federal principles.

Why Care? How Antitrust Law is Enforced

There are good reasons to be concerned with antitrust laws, for the penalties for violating them can be severe. Violation of sections 1 or 2 of the Sherman Act is a felony, with prison terms up to three

years and/or a fine of up to $100,000 for individuals. Corporate criminal fines can go to $1 million. Civil actions are possible, including suits for injunctive relief. The U.S. government can seek civil damages if its interests are harmed and, perhaps most significantly, private parties injured in their business or property through violations of the antitrust laws can seek treble damages plus "reasonable attorney's fees." Criminal enforcement of the antitrust laws is handled by the Antitrust Division of the U.S. Department of Justice. Civil matters are also handled by that division but may also result from Federal Trade Commission investigation into alleged antitrust law violations. The FTC also has the power to seek cease-and-desist orders against violators. Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 [15 U.S.C.A. sec. 16A (1976)], the Department of Justice and the Federal Trade Commission must be given advance notice of many impending mergers or acquisitions and the affected parties must wait until a government investigation is completed before consumating the deal. Convicted antitrust law violators may be prohibited from holding federal licenses or privileges—a substantial concern to broadcasters where FCC licenses are required. Finally, there is simply the cost of legal defense. Antitrust cases are complex and often very lengthy. Antitrust lawyers are legal specialists who command high fees. Similar costs and risks affect state antitrust litigation.

As a consequence of the severe potential penalties, and the high costs of defense, it should not be surprising that many antitrust cases don't go to trial and end before decisions are reached. The most common resolution to these disputes is a consent agreement or decree. Under such a bargain, the alleged antitrust violator agrees to do something to remove the antitrust concerns (cease certain activities, sell off assets, etc.) without admitting to a violation of the law. In exchange, the government submits the decree to the supervising court and urges its adoption in settlement of the case. The alleged violator escapes possible conviction for an antitrust law violation (and cuts the legal bill) but, in turn, agrees to be bound by the terms of the consent agreement—often for years. Many media companies operate under such agreements and must take pains to observe them. Violation of the agreement constitutes contempt of court and may allow the government to reopen the underlying antitrust law prosecution.

A Basic Issue: Can Antitrust Law be Applied at all to the Media?

A threshold question to enforcement, of course, is whether antitrust laws can be applied to media corporations at all. In 1946, the U.S. Supreme Court put that question essentially to rest when it held that media corporations enjoyed no special immunity to antitrust law enforcement under the First Amendment.

The Constitutionality of Antitrust Laws

ASSOCIATED PRESS ET AL. v. UNITED STATES

326 U.S. 1, 65 S.CT. 1416, 89 L.ED. 2013 (1945).

[EDITORIAL NOTE In the early forties, Marshall Field's Chicago Sun, *founded to compete with the* Chicago Tribune, *was denied AP membership, a service thought necessary for survival. The government brought suit under the Sherman Act.*

Judge Learned Hand, speaking for the district court in this case, United States v. Associated Press, 52 F.Supp. 362 (S.D.N.Y. 1943), *stated that the objectives of the antitrust laws and the interests protected by the First Amendment come very close to converging. This is a radical observation that carries with it some rather original implications. To begin with, the First Amendment guarantee of freedom of the press is not to be read as creating an immunity from all government regulation. Second, the real addressees of the First Amendment protection may not be the newspaper industry but the American public and its stake in as free a flow of information as possible. Judge Hand treats the AP as performing a quasi-public function and relies on this status to justify government regulation to secure First Amendment objectives. The following passage from the district court opinion is often quoted as an eloquent restatement of libertarian theory:*

> *However, neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from many different sources, with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment;* it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than any kind of authoritative selection. To many this

is, and always will be folly; but we have staked upon it our all. *[Emphasis added.]*

What assumptions are made in this passage? One of Hand's major premises appears to be that the more newspapers there are, the more varied and untrammelled debate will be. But newspapers for all but local news rely heavily on wire services and feature syndicates. If the pressures that operate on editorial and news decisions presumably are the same commercial pressures that are found throughout the nation, does it matter much whether the newspapers are owned by a chain or individually? Whether a community has one newspaper or two or three?

In other words, does it follow that the antitrust policy of a "multitude of tongues" necessarily works toward First Amendment objectives?

There is an implication in Hand's opinion that the government may act to guarantee access to divergent ideas that would otherwise be unexpressed. See Barron, Access to the Press—A New First Amendment Right, *80 Harv.L.Rev. 1641 at 1655 (1967). This acknowledgment that such governmental action is consistent with the First Amendment is of great importance.*

Reflect on Judge Hand's statement of these issues as you read the opinion of the U.S. Supreme Court which follows.]

Justice BLACK delivered the opinion of the Court.

* * *

The United States filed a bill in a Federal District Court for an injunction against AP and other defendants charging that they had violated the Sherman Anti-Trust Act, 26 Stat. 209, 15 U.S.C.A. §§ 1–7, 15, in that their acts and conduct constituted (1) a combination and conspiracy in restraint of trade and commerce in news among the states, and (2) an attempt to monopolize a part of that trade.

The heart of the government's charge was that appellants had by concerted action set up a system of By-Laws which prohibited all AP members from selling news to non-members, and which granted each member powers to block its nonmember competitors from membership. These By-Laws to which all AP members had assented, were, in the context of the admitted facts charged to be in violation of the Sherman Act. A further charge related to a contract between AP and Canadian Press, (a news agency of Canada, similar to AP) under which the Canadian agency and AP obligated themselves to furnish news exclusively to each other. The District Court, composed of three judges, held that the By-Laws unlawfully restricted admission to AP membership, and violated the Sherman Act insofar as the By-Laws' provisions clothed a member with powers to impose or dispense with conditions upon the admission of his business competitor. Continued observance of these By-Laws was enjoined. The court further held that the Canadian contract was an integral part of the restrictive membership conditions, and enjoined its observance pending abandonment of the membership restrictions.

Member publishers of AP are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. All are alike covered by the Sherman Act. The fact that the publisher handles news while others handle food does not, as we shall later point out, afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices. * * *

The District Court found that the By-Laws in and of themselves were contracts in restraint of commerce in that they contained provisions designed to stifle competition in the newspaper publishing field. The court also found that AP's restrictive By-Laws had hindered and impeded the growth of competing newspapers. This latter finding, as to the *past* effect of the restrictions, is challenged. We are inclined to think that it is supported by undisputed evidence, but we do not stop to labor the point. For the court below found, and we think correctly, that the By-Laws on their face, and without regard to their past effect, constitute restraints of trade. Combinations are no less unlawful because they have not as yet resulted in restraint. An agreement or combination to follow a course of conduct which will necessarily restrain or monopolize a part of trade or commerce may violate the Sherman Act, whether it be "wholly nascent or abortive on the one hand, or successful on the other." For these reasons the argument, repeated here in various forms, that AP had not yet achieved a complete monopoly is wholly irrelevant. Undisputed evidence did show, however, that its By-Laws had tied the hands of all of its numerous publishers, to the extent that they could not and did not sell any part of their news so that it could reach any of their non-member competitors. In this respect the Court did find, and that finding cannot possibly

be challenged, that AP's By-Laws had hindered and restrained the sale of interstate news to nonmembers who competed with members.

Inability to buy news from the largest news agency, or any one of its multitude of members, can have most serious effects on the publication of competitive newspapers, both those presently published and those which but for these restrictions, might be published in the future. This is illustrated by the District Court's finding that in 26 cities of the United States, existing newspapers already have contracts for AP news and the same newspapers have contracts with United Press and International News Service under which new newspapers would be required to pay the contract holders large sums to enter the field. The net effect is seriously to limit the opportunity of any new paper to enter these cities. Trade restraints of this character, aimed at the destruction of competition, tend to block the initiative which brings newcomers into a field of business and to frustrate the free enterprise system which it was the purpose of the Sherman Act to protect. * * *

Finally, the argument is made that to apply the Sherman Act to this association of publishers constitutes an abridgment of the freedom of the press guaranteed by the First Amendment. * * * It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. *Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.* [Emphasis added.] The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.

* * *

Affirmed

COMMENT

Obviously the most significant aspect of the *Associated Press* case is the Supreme Court's determination that newspapers are subject to the antitrust laws. The newspaper industry relied on the theories that newspapers were not in interstate commerce, and therefore not covered by the Sherman Antitrust Act, and that the First Amendment guarantee of freedom of the press provided a constitutional exemption from the antitrust laws. The interstate commerce argument came rather late since many areas of economic life had been held to be in interstate commerce by 1946. But the argument that government application of the antitrust laws to the press abridged freedom of the press was a more serious one. What was the nature of the AP's argument on this point? How did Justice Black deal with it in his opinion?

Both Justice Roberts and Justice Murphy made the point in dissents that news, after all, is not hoarded by the AP, the news is *there* and the AP had the right to go and get it. If others envy their prowess at this endeavor and wish to do the same, they may. A short but still quite accurate statement by way of rebuttal to this position is found in Comment, *Press Associations and Restraint of Trade*, 55 Yale L.J. 428 at 430 (1946):

> Pressures of time render it literally impossible for any newspaper singlehandedly to secure rapid, reliable and efficient coverage and transmission service from all parts of the world. Thus, unless possessed of a sizable independent fortune an entrepreneur simply will not launch a newspaper without assurance of access to the requisite news-gathering facilities.

Note that Justice Black did not base his opinion for the Court in the *AP* case on the public interest in the news. He declined to view the press as performing the public or quasi-public function which Judge Hand had ascribed to it in the district court. A later rejection of the view that private property should be considered quasi-public for First Amendment purposes was found in *Hudgens v. NLRB*, 424 U.S. 507 (1976), this text, p. 69.

Justice Frankfurter's concurrence, on the other hand, clearly recognized that the untrammeled flow of news may be frustrated by "private restraints no less than by public censorship." Since Justice Black wrote the opinion for the Court which applies the antitrust laws to the AP, should we conclude that he agreed that private restraints on freedom of expression are as destructive as public ones and as subject to regulatory control? Or is Justice Black's analysis that, absent discriminatory bylaws such as those struck down in AP, private restraints on or by the press are generally not subject to legal control?

As a result of the Supreme Court's directing the AP to frame new rules of admission, the membership of the AP expanded.

Behavioral Aspects of Antitrust Law

It is possible to divide antitrust cases broadly into two categories. Cases that involve how one company treats its competitors can be defined as "behavioral" cases—the question in such cases is usually whether or not a particular competitive practice violated antitrust law. Cases involving mergers, acquisitions, and like matters can be described as "structural" cases. Although they result from a behavior (e.g., the acquisition of an actual or potential competitor), the fundamental question at issue is whether or not the resulting restructured corporation or corporations are consistent with antitrust principles. Although structural cases are important, and common, behavioral cases are probably of greater day-to-day concern to the media. Of forty-five antitrust claims made against newspapers between 1980 and 1986, most were private claims brought under state antitrust laws for predatory advertising pricing.[62] Following are brief discussions of this and other common kinds of behavioral antitrust law problems for the media.

1. *Predatory Pricing* is to set ad rates below cost to harm a competitor. Difficulty in measuring costs makes enforcement difficult. Moreover, major advertisers in the remaining competitive daily newspaper cities prefer to buy space only in the dominant newspaper. This bodes ill for weaker newspapers. When the dominant newspaper raises ad rates, it would appear that advertisers cut back on money spent for space in the secondary newspaper, further weakening it.[63]

2. *Forced Combination Rates and Refusals to Deal* violate section 2 of the Sherman Act prohibiting the use of monopoly power in one market to gain advantage in a second. A unit advertising rate compelling advertisers to use both a monopoly newspaper and an affiliated broadcast station was held unlawful in *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir. 1957), cert. den. 354 U.S. 923 (1957). Market dominance was blatantly evident in the fact that the *Star*, delivered to 96 percent of all homes in the Kansas City metropolitan area, accounted for 94 percent of all available advertising revenues. The newspaper used its dominance to discourage competition, or what was left of it. In addition to threatening advertisers with rejection of their ads if they advertised in competitive publications, or burying the ads of those who did, the *Star*, for example, threatened to drop news coverage of a baseball player whose partner in a florist shop advertised in a competitive paper. The *Star* owned WDAF-TV, the only television station in the city at that time. Advertisers could not buy television time unless they advertised in the *Star*.

The holding in the *Star* case was consistent with the Supreme Court's ruling in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). A publisher's practice of refusing to accept advertising from local businesses which advertised on an independent radio station, WEOL, was held by Justice Harold Burton, writing for the Court, to constitute an attempt to monopolize interstate commerce in violation of the Sherman Act. The radio station derived 16 percent of its advertising income from outside of Ohio. The *Lorain Journal*, on the other hand, reached 99 percent of all families in the city and enjoyed a virtual monopoly in mass dissemination of news and advertising. Loss of local advertising jeopardized the very existence of the radio station. The publisher claimed the right as a private business to select its customers and refuse advertising.

62. Bustema, *Antitrust in the 1980s* 9:2 Newspaper Research Journal (Winter 1988).
63. Shumadine, Kelley and Bryant, *Antitrust and the Media*, Communication Law 1988 (New York: Practising Law Institute), 594.

"The right claimed by the publisher," said Burton, "is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act. The operator of the radio station, equally with the publisher of the newspaper, is entitled to the protection of the act." The antitrust laws did not violate freedom of the press because they applied to all.

Earlier, the *Mansfield Journal*, jointly owned with the *Lorain Journal*, was denied a license to construct AM and FM radio stations in Mansfield, Ohio, because it had engaged in similar illegal practices and refused to print the schedules of other radio stations. The D.C. Circuit Court of Appeals upheld the Federal Communications Commission in *Mansfield Journal Co. v. FCC*, 180 F.2d 28 (D.C.Cir. 1950).

Combination rates for morning and afternoon papers that simply reflect a reduced cost of publication in more than one edition were legally acceptable in *The News, Inc. v. Lindsay Newspapers, Inc.*, 1962 Trade Cas. (CCH) ¶ 70,398 (S.D.Fla. 1962).

An agreement between a newspaper and an advertiser not to sell space to that advertiser's competitor is a Sherman Act violation, although proof of such a conspiracy may be difficult.[64]

Unilateral refusals to deal, if they look like an attempt to maintain a monopoly, violate the Sherman Act, as well as section 5 of the Federal Trade Commission Act, although courts are divided on whether the latter is germane. A newspaper's refusal to publish ads from an "escort" service, however, was not an unfair trade practice.[65]

In *Homefinders of America, Inc. v. Providence Journal Co.*, 6 Med.L.Rptr. 1018, 621 F.2d 441 (1st Cir. 1980), a newspaper found it challengable to refuse even misleading advertising, although the court concluded that not even a monopoly newspaper could be ordered to publish advertising against its will. And in *Newspaper Printing v. Galbreath*, 5 Med.L.Rptr. 1065, 580 S.W.2d 777 (Tenn. 1979), it was held that a newspaper's refusal to publish an ad that contained abbreviations did not constitute "predatory pricing or practice." Nor did it violate the First Amendment since newspapers, even when they enjoy monopolies in their areas of publication, have a right either to refuse publication of ads or to condition them on compliance with stated company rules.

First Amendment questions were raised, however, when in *Home Placement Service, Inc. v. Providence Journal Co.*, 8 Med.L.Rptr. 1881, 682 F.2d 274 (1st Cir. 1982), a court held that a newspaper could not reject advertising that had not been found deceptive. Was the court dictating a newspaper's content in conflict with *Tornillo?* See text, p. 496. (*Homefinders* and *Home Placement* are discussed from an access point of view in this text, p. 506.)

3. *Tying*, a practice almost indistinguishable from combination rates, is legal if two newspapers are separately available to an advertiser on a basis as favorable as the proposed tie-in. In *United States v. Wichita Eagle Publishing Co.*, 1959 Trade Cas. (CCH) ¶ 69,400 (D.Kan. 1959), a newspaper was allowed to offer substantial discounts, if the combination or tie-in was voluntary. Cost savings to an advertiser should reflect savings in production costs.

4. *Volume Discounts* are permitted. However, federal courts and the FTC have disagreed over the proper interpretation of the Robinson-Patman Act, a 1936 amendment to section 2 of the Clayton Act intended to prohibit price discrimination (although it may have limited rather than enhanced competition). A majority of courts now consider volume discounts permissible.

5. *An Ad Rate Differential for National and Retail Advertising* of 30 percent was considered an unfair business practice in *Motors, Inc. v. Times-Mirror Co.*, 102 Cal.App.3d 735, 162 Cal.Rptr. 543 (1980).

6. *Conscious Parallelism* is a conspiracy across media to set advertising rates. Proof of this illegal practice has to be substantial and beyond the fact that different media use similar calculations in setting ad rates and engage in similar procedures in selling ads—the traditional 15 percent discount given to ad agencies by major media [see *Ambook Enterprises v. Time, Inc.*, 612 F.2d 604 (2d Cir. 1979), cert den. 448 U.S. 914 (1980)]; and in producing programs—news programs are less expensive to produce at home than they would be to farm out to independent documentarists [see *Levitch v. Columbia Broadcasting System, Inc.*, 495 F.Supp. 649 (S.D.N.Y. 1980), aff'd per curiam in 1982–83 Trad. Cas. (CCH) ¶ 65,153 (2d Cir. 1983)].

7. *Zoned Editions* have to be prepared with care. It is assumed that monopolists may from time to time innovate or improve a product. What must be avoided

64. Oppenheim & Shields, *Newspapers and the Antitrust Laws*, § 38 (1981).
65. *PMP Associates, Inc. v. Globe Newspaper Co.*, 321 N.E.2d 915 (Mass. 1975).

are indications of anticompetitive motives—secret payments to advertisers, disparaging remarks, or, more directly, the establishment of a shopper by a monopolist to draw advertisers away from a suburban newspaper [see *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735 (9th Cir. 1985), cert den. 106 S.Ct. 1471 (1986)].

To remain competitive with burgeoning new technologies, newspapers both distribute and/or prepare preprinted advertising inserts or what are sometimes called Total Market Coverage (TMC) products. These are targeted to special audiences that the daily newspaper may no longer reach. Weeklies have charged dailies with predatory pricing or with tying the sale of a TMC product to the sale of advertising in the newspaper itself.

One such case was *RFD Publications, Inc. v. Oregonian Publishing Co.*, 749 F.2d 1327 (9th Cir. 1984), in which the only daily in Portland inserted a food advertising supplement in its Wednesday edition and mailed it to all nonsubscribers. A shopper firm charged predatory pricing. The court held that the newspaper's additional service was not a separate service and was therefore not obliged to recover its own costs. Nor was there an illegal tie between the newspaper and the TMC product. Such a decision aids a dominant or monopolist daily, but it spells doom for competing shoppers. To price a TMC product consistently below costs, however, would suggest anticompetitive intentions.

8. *Blanketing*, or giving free copies to every residence in a certain geographical area, should not last longer than a good promotional campaign would dictate. Where the purpose and effect is to drive a weaker competitor out of a market, a dominant newspaper is in trouble. [*See Morning Pioneer, Inc. v. Bismarck Tribune*, 342 F.Supp. 1138 (D.N.D. 1972), aff'd 493 F.2d 383 (8th Cir. 1974), cert. den. 419 U.S. 836 (1974), fn.7]. These two North Dakota newspapers on opposite sides of the Missouri River have since merged.

9. *Independent Distributors* who buy newspapers for resale will attempt to maximize their middleman profits by selling their papers at as high a price as possible. The parent newspapers, on the other hand, will try to keep their costs as low as possible in order to maximize circulation for advertisers. See *Northwest Publications, Inc. v. Crumb*, 752 F.2d 473 (9th Cir. 1984).

Trouble begins when newspapers attempt to coerce distributors into keeping their prices down. Vertical price fixing violates section 1 of the Sherman Act. See *Albrecht v. The Herald Co.*, 390 U.S. 145 (1968) and *Auburn News Co. v. Providence Journal Co.*, 659 F.2d 273 (1st Cir. 1981).

A newspaper may suggest a resale price for its product [*Dunn v. Phoenix Newspapers, Inc.*, 735 F.2d 1184 (9th Cir. 1984)]. Even friendly persuasion will be tolerated [*Belfiore v. New York Times, Co.*, 654 F.Supp. 842 (D. Conn. 1986), aff'd 826 F.2d 177 (2d Cir. 1987)]. But no threats, surveillance, or economic sanctions are permitted under the law.

Of course, exclusive distribution contracts may cripple a competitor newspaper and thereby violate section 3 of the Clayton Act [*Chelson v. Oregonian Publishing Co.*, 715 F.2d 1368 (9th Cir. 1983)], but courts have allowed them in the interests of service, efficiency, and company reputation when they are intended merely to make unnecessary the simultaneous distribution of another publication, insert, or circular. [*Negebauer v. A. S. Abel Co.*, 474 F.Supp. 1053 (D.Md. 1979)].

Newspapers may choose to avoid all these complexities by having their own employees distribute their product. They may also use delivery agents who deliver the paper at the newspapers' set price.[66]

10. *Feature Syndicates.* In 1970 a federal district court upheld a Justice Department claim that the *Boston Globe*'s exclusive feature syndicate contracts violated section 1 of the Sherman Act by assuring that the syndicates would not "license the features to any other newspaper published within an arbitrary and unreasonably broad territory surrounding the contracting newspaper's city of publication." *United States v. Chicago Tribune-New York News Syndicate, Inc.*, 309 F.Supp. 1301 (S.D.N.Y. 1970). *Globe* appealed.

The case was subsequently settled by consent decree. The *Globe* agreed not to contest the challenge to its exclusivity where its penetration was less than 20 percent and its circulation less than 5,000. *United States v. Chicago Tribune-New York News Syndicate, Inc.*, 1975–1 Trade Cas (CCH) ¶ 60,185 (S.D.N.Y. 1975). The case has set the standard.

66. Hovenkamp, *Vertical Integration by the Newspaper Monopolist*, 69 Iowa L.Rev. 451 (1984), and *Paschall v. Kansas City Star, Co.*, 727 F.2d 692 (8th Cir. 1984).

In 1985, however, a federal district court in New Jersey held that circulation alone should not be conclusive. Local news and feature coverage should also be considered. *Woodbury Daily Times, Co., Inc., v. Los Angeles Times-Washington Post News Service*, 616 F.Supp. 502 (D.N.J. 1985), aff'd without opinion, 791 F.2d 924 (3d Cir. 1986). Certainly diversity is served by the latter ruling.

CAUTION

In an earlier review of antitrust law (Communication Law 1982, 287–448), Shumadine, Ives and Kelley noted that juries in antitrust cases seldom understand the technicalities of antitrust law, so they operate on the principle of "good guys v. bad guys." Since the question of intent is paramount in antitrust litigation, media managers should avoid putting anything on paper that suggests an intent to monopolize. Zoned editions and shoppers should contain news. Forced combination rates should be avoided. Antitrust Compliance Rules, that everyone in the organization understands and that will help managers recognize antitrust thresholds, should be posted.

Structural Aspects of Antitrust Laws

Mergers and acquisitions are the most common business deals raising structural antitrust issues. They are closely scrutinized by both the Antitrust Division of the Department of Justice and by the Bureau of Competition of the Federal Trade Commission. Mergers and acquisitions may be *vertical* [for example, if a newspaper buys a papermill supplier (known technically as backward vertical) or if a newspaper buys a distribution company (technically an example of forward vertical integration)] or they may be horizontal (for example, purchase of one newspaper by another in the same product and geographic market). Acquisition of shoppers and weeklies in a single county, for example, could also be an example of horizontal integration provided that these journals were in the same product market as the newspaper.[67] Adding newspapers to a chain or a group (to use a term less grating on the ears of the industry) is another form of horizontal merger. These are also called market extension mergers. A conglomerate merger is where a metro daily, for example, buys a printing firm with direct mail capabilities.[68] Perhaps a better example of conglomeration would be where the tycoon adds newspapers, magazines, or broadcast stations to a diverse industrial empire.

The "natural monopoly" that most daily newspapers enjoy is due in part to the economies of scale: fixed first issue costs (paper, ink, labor) diminish as circulation increases, especially for small or medium-sized dailies. This militates against more than one newspaper serving similar audiences in a single community, unless that city is large enough to provide segmented audiences for both news and advertising. Subscriber and advertiser demands are interdependent. When advertising sales drop, circulation drops, and the result is what James Rosse describes as a downward spiral.[69] As the spiral descends, the economies of scale dictate that single issues of the newspaper cost more. This leads to lower profitability which can only be countered by higher advertising and subscription rates, or by cutting costs and presumably quality. Either course accelerates the downward spiral.

It is difficult to demonstrate that chain acquisition of a local monopoly newspaper is going to have any effect on competition in that market. A majority of courts consider the daily newspaper a line of commerce separate from other publications and the broadcast media in spite of claims by newspaper organizations that dailies compete for advertising with all other forms of media in their areas.[70]

In typical section 7 litigation, the government defines the product and its geographic market, calculates the percentage of the market to be controlled by the merged firm, and decides whether that figure is sufficient to create a "reasonable probability" of lessened competition.

The offense of monopoly under section 2 of the Sherman Act begins with the possession of monopoly power in the relevant market but goes on to include "the wilful acquisition or maintenance of that power as distinguished from growth or devel-

67. *United States v. Tribune Company and Sentinel Star Co.*, No. 82–260 (M.D. Fla., May 26, 1982).

68. *Sun Newspapers, Inc. v. Omaha World-Herald Co.*, No. CV82–6–627, Slip op. at 19–24 (D. Neb.) aff'd 1983–2 Trade Cas. (CCH), sec. 65,538 (8th Cir. 1983).

69. Rosse, The Evolution of One Newspaper Cities (a discussion draft prepared for the FTC Media Symposium), Washington, D.C., December 14–15, 1978. For a counter perspective see, Busterna, *Daily Newspaper Chains and the Antitrust Laws*, Journalism Monographs 110 (March 1989).

70. *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 326 (8th Cir. 1982), vacated on other grounds, 727 F.2d 692 (8th Cir. 1984) (en banc).

opment as a consequence of a superior product, business acumen, or historic accident."[71] "Dailies may constitute a 'natural monopoly,' but to violate section 2 it is necessary to prove (1) a specific intent to monopolize; (2) an overt act or acts; and (3) a dangerous probability of monopolization of a specific product market in a particular geographic market."[72]

If few newspapers are subject to antitrust laws because they don't compete for either advertisers or subscribers in a single market, perhaps chains compete with one another in their desire to expand. Are Gannett, Knight-Ridder, Newhouse, Murdoch, and Thomson rather than their individual newspapers, a line of commerce that could initiate section 7 actions to protect independent newspapers or smaller chains? So far the courts have said no.

A key case establishing principles for newspaper acquisition arose in 1964 when the Times-Mirror Co., publisher of the *Los Angeles Times*, acquired newspapers in nearby San Bernardino.

UNITED STATES v. TIMES MIRROR CO.

274 F.SUPP. 606 (C.D.CAL. 1967), AFF'D PER CURIAM, 390 U.S. 712 (1968).

[EDITORIAL NOTE A United States District Court in California held that the acquisition of The Sun Company by the Times Mirror Company was a violation of section 1 of the Sherman Act and section 7 of the Clayton Act and issued an order of divestiture requiring the Times to sell The Sun Company. The Court ruled that the determinative issue of liability was whether the effect of the merger was to lessen substantially competition within the relevant geographic and product markets; competition between the two newspapers was not required. As another federal district court said in Union Leader v. Newspapers of New England, Inc., *180 F.Supp. 125 (D.Mass. 1954), modified on other grounds, 284 F.2d 582 (1st Cir. 1960), cert. den. 365 U.S. 833 (1961), it is the purpose of the antitrust laws to protect competitors. There is nothing to prevent a publisher from competing, even if that competition leads to monopoly.*

The Union Leader *court did not have the benefit of a Supreme Court ruling a year later emphatically stating that the antitrust laws are designed to protect competition, not individual competitors.* *Brown Shoe Co. v. United States, 370 U.S. 294 (1962).*

Yet another federal district court seemed to be protecting neither competition nor competitors when it permitted the purchase of two competing daily newspapers, one at a time, in Greenville, Texas, by a chain that engaged in predatory pricing to effect its purposes. An indictment charged violation of sections 1 and 2 of the Sherman Act, but the court couldn't see it and the government chose not to appeal, perhaps on the assumption that the Texas city could never economically support two daily papers. United States v. Harte-Hanks Newspapers, Inc., *170 F.Supp. 227 (N.D. Tex. 1959).*

The Times Mirror Company publishes the Los Angeles Times, *a newspaper of national import and California's circulation leader. In 1964 the Times Mirror purchased the Sun Company, publishers of the morning* Sun, *the* Evening Telegram, *and the* Sunday Telegram *located in San Bernardino County adjoining Los Angeles County. The Sun Company dominated the daily newspaper business in its county and was the largest independent publishing company in Southern California.*

Times Mirror *is important in part for its support of the notion that competition among newspapers is interlayer rather than intralayer. That is, competition between newspapers of similar size and scope is less common than competition between different categories of newspapers—suburbans and metropolitans, for example. The court in* Times Mirror *prevented a newspaper in one layer from acquiring a newspaper in another layer.*

The argument that the Times *and the* Sun *did not compete with each other and for that reason there could be no antitrust violation had lost all its validity since 1950 amendments to the Clayton Act (the Celler-Kefauver amendments). The fact that two merging companies presently do or do not compete is no longer the issue. Congress directed that the court must look to the effect and impact of the merger. If the effect is anticompetitive, there is a violation.]*

FERGUSON, District Judge:

* * *

The Supreme Court, in *Brown Shoe Co. v. United States*, 370 U.S. 294, (1962), pointed out in setting forth the legislative history of the 1950 amendment to § 7 of the Clayton Act that:

"The dominant theme pervading congressional consideration of the 1950 amendments was a fear

71. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

72. *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383 (8th Cir. 1974).

of what was considered to be a rising tide of economic concentration in the American economy. * * * Other considerations cited in support of the bill were the desirability of retaining 'local control' over industry and the protection of small businesses. Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose." 370 U.S. 295 at 315–16.

The Court declared:

Congress made it plain that § 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country. 370 U.S. at 317.

* * *

In actions under § 7 of the Clayton Act, a finding of the appropriate "product market" is a necessary predicate to a determination of whether a merger has the requisite anticompetitive effects. In *Brown Shoe Co. v. United States, supra*, it is set forth:

"Thus, as we have previously noted, '[d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act. * * * *"*

* * *

In some of the services which they provide, daily newspapers compete with other media, such as radio and television, both for news and advertising. This does not mean, however, that all competitors of any service provided by a daily newspaper must be lumped into the same line of commerce with it. * * *

The defendant argues that each daily newspaper is so unique as to occupy a product market of its own. This argument stems more from pride of publication than from commercial reality. The contention is made that if a reader in Southern California wants depth in international, national and regional news, he buys the *Times* and if he wants depth in the local news of his own community, he buys his small local paper. In effect, it is claimed that the *Times* and the surrounding local daily newspapers are complementary toward each other. As set forth previously, the concept of two products being complementary toward each other is not a barrier to § 7 if the effect of the merger may have anticompetitive effects.

It is now firmly established that products need not be identical to be included in a § 7 analysis of the product market. Furthermore, in *Union Leader Corp. v. Newspapers of New England, Inc.*, the court of appeals recognized that numerous papers published all over New England could comprise a relevant daily newspaper market for both Clayton and Sherman Act purposes.

Finally, when a merger such as here results in a share of from 10.6% to 54.8% of total weekday circulation, from 23.9% to 99.5% of total morning circulation and from 20.3% to 64.3% of total Sunday circulation in the relevant geographic market, the acquisition constitutes a prima facie violation of the Clayton Act. As set forth in *United States v. Continental Can Co.:*

"Where a merger is of such a size as to be inherently suspect, elaborate proof of market structure, market behavior and probable anticompetitive effects may be dispensed with in view of § 7's design to prevent undue concentration." 378 U.S. at 458.

The *Times* competed with the *Sun* for advertising. The largest share of the revenue of a daily newspaper comes from its advertisements, and advertising is its lifeblood.

* * *

* * * After the acquisition, the advertising campaign that both papers waged against each other ceased.

It is necessary after defining the product market to determine the geographic market (the "section of the country") in order to determine the anticompetitive effect of the merger.

In 1964, the year of the acquisition, the *Times* had a weekday daily circulation of 16,650 and a Sunday circulation of 31,993 within San Bernardino County. This amounted to 10.6% of the total weekday circulation for both morning and evening newspapers, 23.9% of total morning circulation and 20.3% of the total Sunday circulation.

The *Sun* had its entire circulation, except for a very few copies, within the limits of San Bernardino County. The county therefore encompasses virtually the entire area of circulation and home delivery overlap between the *Times* and the *Sun*. * * *

The defendant contends that the County of San Bernardino is not commercially realistic because

county boundaries do not define the boundaries of a newspaper market. It claims that counties are political and administrative boundaries, not necessarily market boundaries. This contention may be true as a generalized statement. * * * However, as stated previously, the newspaper industry has recognized San Bernardino County as a daily newspaper market. Most important of all, the *Times* itself, in evaluating the acquisition, used the daily newspaper business in the entire San Bernardino County as the relevant market.

* * *

At the time of the acquisition, there was already a heavy concentration of daily newspaper ownership in the ten counties of Southern California. * * *

There has been a steady decline of independent ownership of newspapers in Southern California. A newspaper is independently owned when its owners do not publish another newspaper at another locality. In San Bernardino County as of January 1, 1952, six of the seven daily newspapers were independently owned. On December 31, 1966, only three of the eight dailies published there remained independent.

* * *

In the ten-county area of Southern California in the same period of time, the number of daily newspapers increased from 66 to 82, but the number independently owned decreased from 39 to 20. In 1952, 59% of Southern California dailies were independent; in 1966 only 24% were independent.

The acquisition of the *Sun* by the Times was particularly anticompetitive because it eliminated one of the few independent papers that had been able to operate successfully in the morning and Sunday fields. * * *

The acquisition has raised a barrier to entry of newspapers in the San Bernardino County market that is almost impossible to overcome. The evidence discloses the market has now been closed tight and no publisher will risk the expense of unilaterally starting a new daily newspaper there.

An acquisition which enhances existing barriers to entry in the market or increases the difficulties of smaller firms already in the market is particularly anticompetitive.

* * *

The acquisition by The Times Mirror Company of The Sun Company on June 25, 1964, resulted in a violation of § 7 of the Clayton Act. It is an acquisition by one corporation (The Times Mirror Company) of all the stock of another corporation (The Sun Company), both corporations being engaged in interstate commerce, whereby in the daily newspaper business (the relevant product market) in San Bernardino County, California (the relevant geographic market), the effect is substantially to lessen competition.

The government seeks an order of divestiture and an injunction prohibiting the defendant from acquiring any other daily newspaper in the relevant geographic market.

Divestiture has become the normal form of relief when acquisitions have been found to violate § 7 of the Clayton Act. * * *

Complete divestiture here is the practical solution to correct the § 7 violation.

However, the request for a perpetual injunction must be denied. * * *

While it is recognized that injunctive relief has been granted in antitrust cases, the court is not able to predict the future of the daily newspaper business in San Bernardino County. * * * Based upon the evidence before it, the court cannot prejudge the newspaper business with sufficient certainty to grant the injunction. The dangers that could result from it outweigh any possible advantage that it may have.

* * *

COMMENT

Economic pressures toward group ownership are almost overwhelming. Tax laws stimulate the investment of accumulated reserves. Undistributed earnings are not taxed as personal or corporate income if used in the acquisition of additional newspaper properties. And those who already own newspapers generally know how to manage new ones. At the same time, estate taxes are such that few aging publishers can resist the grossly inflated prices offered by newspaper groups.

In addition there are in mergers the advantages of joint venture risk sharing in new technologies, centralized management, pooled editorial services, and higher standing in the financial market.

With newspaper competition more and more a rarity, diversity must be sought in cross-channel

competition. And when cross-channel patterns of ownership threaten that remaining diversity, group and conglomerate mergers seem, in contrast, more attractive.[73]

The Newspaper Preservation Act: A Major Exception to Structural Antitrust Law

A huge qualification must now be made to the earlier statement that newspapers are not immune to antitrust laws. They are, in part, under the Newspaper Preservation Act. As has already been noted, courts will permit a newspaper to acquire even its direct competitor if the geographic market will not support two papers[74] or if there is no apparent intent to monopolize.[75] Group acquisition and conglomerate merger are also partially protected by the "failing company" defense originating with *International Shoe* Co. *v. FTC*, 280 U.S. 291 (1930). The theory of the failing company defense in section 7 Clayton Act cases is that there's nothing wrong with one company acquiring a competitor that would otherwise go out of business. In *Citizen Publishing* Co. *v. United States*, 394 U.S. 131 (1969), the U.S. Supreme Court put two important glosses on the failing company defense. First, the acquired company had to be so close to failing that reorganization was almost impossible. Second, the proposed merger had to be the only way to save the failing firm and the proposed purchaser the only prospective purchaser. *Citizen Publishing* Co. established that it would be difficult to apply the "failing company" defense in instances where one newspaper (usually a healthy morning paper) sought to acquire its weaker competitor (usually the struggling evening paper). Faced with this strict application of the failing company defense, newspaper interests lobbied Congress into adopting the Newspaper Preservation Act of 1970, Pub.L. 91–353, 84 Stat. 466 [codified at 15 U.S.C.A. secs. 1801–04].

However ideal the image of two economically viable community newspapers locked in editorial combat, or of that hometown newspaper remaining forever home-and independently owned, the image is an exercise in nostalgia. For economic reasons already cited, "one newspaper" towns are highly predictable except in the largest of cities.

The Newspaper Preservation Act assumes that there is social benefit (again the notion of editorial diversity) in permitting competitors in a natural monopoly setting to share rather than duplicate technical and business facilities.[76] Under the "failing company" defense, acquiring companies have to show that (1) the resources of the acquiring or acquired firm are about to be depleted; (2) prospects of rehabilitation are remote; (3) after strenuous efforts have been made, no potential purchaser has come forward; and (4) reorganization of the firm would make no difference to its survival. The act was an attempt in part to undo the work of the United States Supreme Court in *Citizen Publishing* Co. *v. United States*, 394 U.S. 131 (1969), by allowing the conditions of the "failing company" defense to be circumvented with the written prior consent of the attorney general. Publishers entering into this special kind of merger arrangement, a Joint Operating Agreement (JOA), were, in effect, exempted from the antitrust laws.

JOAs began in Albuquerque, New Mexico in 1933, and by 1966 twenty-two cities had them. The Antitrust Division overlooked their Sherman and Clayton Act implications until *Citizen Publishing* Co. was initiated in 1964. While the case was in progress, a Failing Newspaper Act was introduced in Congress in 1967. After the Court's 1969 holding in *Citizen Publishing* Co., the bill was refashioned and reintroduced as the euphemistically-named Newspaper Preservation Act. Despite opposition from many quarters, including community newspapers through their national organization, the National Newspaper Association, the bill passed both houses of Congress in 1970 by wide margins. The act grandfathered all existing JOAs.

Citizen Publishing Co. involved two newspapers in Tucson, Arizona that had entered into a JOA in 1940. Under the terms of their agreement, the news

73. Sullivan, *Handbook of the Law of Antitrust* (1977), 598.

74. *Union Leader v. Newspapers of New England, Inc.*, 180 F.Supp. 125 (D. Mass. 1959), modified on other grounds, 284 F.2d 582 (1st Cir. 1960), cert. den. 365 U.S. 833 (1961).

75. *United States v. Harte-Hanks Newspapers, Inc.*, 170 F.Supp. 227 (N.D. Tex. 1959).

76. Bruce Owen in *Economics and Freedom of Expression* (1975) would expand access to production facilities to all prospective competitors, and such facilities would become a public utility.

and editorial departments of the two newspapers remained separate while a new corporation operated the merged advertising, circulation, and printing departments. Profits were pooled, and it was agreed that the two would not compete in any other publishing venture.

When a buyer appeared for the dominant *Star*, its partner, the *Citizen*, quickly bought it and became publisher of both newspapers through a holding company. At this point the Department of Justice intervened charging that the JOA violated both the Clayton and Sherman Acts. In *United States v. Citizen Publishing* Co., 280 F.Supp. 978 (D.Ariz. 1968), a federal district court agreed that the arrangement constituted price fixing, profit pooling, and a market allocation scheme, all illegal *per se* under the Sherman Act. With their news departments again separated, the two newspapers were allowed to continue to share their mechanical and advertising departments.

In *Citizen Publishing* Co. the U.S. Supreme Court affirmed that the kind of agreement entered into here was a violation of the antitrust laws. Moreover, the acquired company had not met the preconditions of the "failing company" defense, i.e., it was not on the brink of collapse. The Newspaper Preservation Act, with strong support from metropolitan publishers, sought to ameliorate the effects of the Supreme Court ruling. Under the act, if one of the newspapers is in "probable danger of financial failure," they may combine their business facilities (advertising sales, printing, and distribution) provided that they maintain separate editorial staffs.

A number of questions immediately come to mind. How long will the editorial policies of JOA newspapers remain different or competitive? And, if local competition is economically unfeasible or improbable anyway, are there alternatives to the kind of mergers condemned by the Court in *Citizen Publishing* Co. and condoned by Congress in the Newspaper Preservation Act? Where will buyers for "failing" newspapers be found? Why would a profitable newspaper want to merge with a company that is truly failing? Is a semblance of editorial competition, no matter how it is accomplished, preferable to a single daily newspaper voice in a community?

Twenty-one JOAs were in place in 1989. One of these, a hotly contested merger in Seattle, was accomplished over great opposition. The Antitrust Division of the Department of Justice and several ad hoc groups, notably the Committee for an Independent *P-I*, opposed the merger on grounds that the parent Hearst Corporation had not made a good faith effort to sell one of two Seattle newspapers, the *Post-Intelligencer*. Comprising the Committee were *P-I* employees, advertisers, and the publishers of smaller newspapers who feared the power of a metropolitan monopoly.

Nevertheless an administrative law judge and the U.S. attorney general approved the merger. The ALJ argued that the financial health of the newspaper could be considered apart from the condition of the chain to which it belonged. *In re Seattle Newspapers*, 7 Med.L.Rptr. 2173 (1981), 8 Med.L.Rptr. 1080 (1982). The attorney general, whose prior consent must be procured for antitrust exemptions, agreed and added that under the Newspaper Preservation Act there was no requirement to prove the absence of qualified buyers before being designated a "failing newspaper." *In re Seattle Newspapers*, 8 Med.L.Rptr. 1666 (1982).

Rejecting those decisions, the Committee and other groups filed suit against the attorney general, Hearst, and the second daily, the *Seattle Times*. A federal district judge vacated the attorney general's order on grounds that he had overlooked one of the administrative law judge's findings of fact, to wit, the *Post-Intelligencer* had not been offered for sale and purchase inquiries had been rebuffed; the "correct definition of a 'failing newspaper' must include consideration of the existence of willing buyers," and the parent corporation must "carry the burden of demonstrating that none of those buyers could continue to operate the *P-I* as an independent daily."

At the same time, the trial court disagreed with plaintiffs that the Newspaper Preservation Act violated the First Amendment by jeopardizing the future of smaller newspapers in competition with the JOA. Citing *City & County of Honolulu v. Hawaii Newspaper Agency, Inc.*, 7 Med.L.Rptr. 2495 (D.Hawaii 1981) and *Bay Guardian* Co. *v. Chronicle Publishing* Co., 344 F.Supp. 1155 (N.D.Cal. 1972), the court denied a direct correlation between market structure and freedom of content. The act, said the Hawaii court, can only be said to offend the First Amendment if it in some way restrains the freedom of the press. In the California case, the court observed that, regardless of the economic or social wisdom of the act, it did not violate freedom of the press. Nor was the delegation of authority to

the attorney general vague or overbroad. *Committee for an Independent P-I v. Hearst Corp.*, 8 Med.L.Rptr. 2162, 549 F.Supp. 985 (W.D.Wash. 1982).

All parties sought an expedited appeal before the Ninth Circuit Court of Appeals, and on April 21, 1983 that body reversed the Washington federal district court on the main issue and allowed the Joint Operating Agreement to proceed. The critical question in determining whether a newspaper is "failing," said the appeals court, is whether it is "suffering losses which more than likely cannot be reversed," despite reasonable management by either present or projected staff.

The court rejected Antitrust Division arguments that an "incremental analysis" would show net tax benefits to the parent Hearst Corporation, despite the *P-I*'s weekly losses of $200,000. The paper was in a "downward spiral."

Under the act, the appeals court held, a JOA applicant should be analyzed as a "free-standing entity," although a "failing newspaper" achieved by "creative bookkeeping" would not be tolerated.

Finally, the appeals court agreed with the district court that no violation of the First Amendment right of smaller newspapers in the Seattle area was found, although the court found the allegation "imaginative." *Committee for an Independent P-I v. Hearst Corp.*, 9 Med.L.Rptr. 1489, 704 F.2d 467 (9th Cir. 1983).

In the meantime, a battle of behemoths was brewing in Detroit. Gannett and Knight-Ridder, the no. 1 and no. 2 newspaper groups in the nation, applied for a JOA in 1986. Knight-Ridder claimed losses of $35 million over a five-year period for its *Free Press*, the second newspaper in the Detroit market and eighth largest in the country; Gannett claimed losses of $20 million for its *News*, the seventh largest U.S. daily. Part of these losses, perhaps a substantial amount, were due to a struggle for dominance that saw subscription and advertising rates at levels far below those of comparable newspapers.

Knight-Ridder promised to close the *Free Press* if the JOA were disallowed, raising a number of significant questions: Can Detroit support two profitable dailies? Would the *Free Press* die if left to its own resources or the resources of its affluent parent? Did the newspapers in Detroit, or in other JOA cities for that matter, cooperate in any way to assure a legal joint venture by promising failure and, as a consequence, a net loss to the public welfare? Would advertisers and subscribers pay higher prices either to keep the *Free Press* alive or to meet what surely would be rate demands of a JOA? How long after a JOA do two editorial departments truly compete? And is there evidence that JOAs simply prolong the inevitable demise of the weaker partner? Finally, is it safe to assume, as do some JOA critics, that in the absence of a JOA new publications or a new owner for the failing newspaper would enter the market?

Answers to these and other questions will be a long time in coming. An assistant U.S. attorney general initially said no to the Detroit JOA. In December 1987 an administrative law judge agreed, believing that the *Free Press* was not a failing newspaper and that the downward spiral would reverse itself if the ruinous competition ceased. On August 8, 1988, however, former Attorney General Edwin Meese approved the request for the JOA. Meese concluded that the *Free Press* had "satisfactorily demonstrated that the danger of its financial failure has moved well within the zone of 'probability'," and that it could do nothing to reverse "the unbroken pattern of operating losses." Because the *News* planned to continue "its depressed pricing practices," Meese concluded it was highly probable that the *Free Press* would eventually fail. *Attorney General's Decision and Order in Application by Detroit Free Press, Inc. and The Detroit News, Inc. for Approval of a Joint Newspaper Operating Agreement*, 55 Antitrust & Trade Regulation Report 257 (1988).

After a brief stay sought by a committee of advertisers, readers, and employees (Michigan Citizens for an Independent Press) eventually to be joined by a Washington, D.C. public interest group, Public Citizen, Judge George H. Revercomb of the U.S. District Court for the District of Columbia issued a decision allowing the JOA to go into effect. Revercomb agreed with Meese's conclusion that the *Free Press* was a "failing newspaper" under the act. It was not unreasonable to believe that it was in "probable danger of financial failure" and suffering losses "not likely to be reversed." He rejected claims that a "downward spiral" in circulation and advertising revenue was a prerequisite of a failing newspaper. *Michigan Citizens for an Independent Press v. Attorney General of the United States*, 695 F.Supp. 1216 (D.D.C. 1988). Judge Revercomb's decision would have allowed the JOA to go into effect September 17, 1988. Shortly before that date, however, the U.S. Court of Appeals for the D.C. Circuit stayed the JOA indefinitely pending appeal of Judge

Revercomb's decision. There things stood until early 1989.

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, ET AL., v. RICHARD THORNBURGH, UNITED STATES ATTORNEY GENERAL, ET AL.

16 MED.L.RPTR. 1065, 868 F.2D 1285 (D.C.CIR. 1989).

SILBERMAN, *Circuit Judge:* This case presents a challenge to a decision and order of the Attorney General, pursuant to the Newspaper Preservation Act ("NPA"), 15 U.S.C. § 1801–1804 (1982), approving a joint operating arrangement between the *Detroit Free Press* and *Detroit News* newspapers. Appellants, which include Michigan Citizens For An Independent Press,[1] seven individuals,[2] and the interest group Public Citizen, brought suit against the Attorney General and the two newspapers in the district court alleging that the Attorney General's decision violates the NPA and the Administrative Procedure Act, 5 U.S.C. § 706 (1982), because it is not based on substantial evidence, is arbitrary and capricious, and is otherwise in violation of law. The district court granted summary judgment in favor of defendants, and plaintiffs appealed to this court. We conclude that the Attorney General's decision was based on a permissible construction of the statute, and that his application of the legal standard to the facts of this case was not arbitrary, capricious, or an abuse of discretion. We therefore affirm the judgment of the district court.

* * *

Appellants allege that the Attorney General's determination is invalid both because it is based on an impermissible interpretation of the statute and is arbitrary or capricious. As is not unusual in appeals from agency actions, the claims are interrelated. At the core of appellants' case is the assertion that the Attorney General could not legally grant approval for a JOA because the *Detroit Free Press* was not in a tough enough spot to qualify as "in probable danger of financial failure." Whether the Attorney General legally decided that the *Free Press* did meet the statutory standard in turn depends to a large extent on whether his prediction of the newspaper's future course (if he did not approve the JOA) was reasonable. The Attorney General's interpretation of the probable danger of financial failure test draws content from the factual showing that he requires to meet that test. See *INS v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1221 (1987) (ambiguous statutory terms "can only be given concrete meaning through a process of case-by-case adjudication"). And there is no question in our mind that if the Attorney General's statutory interpretation is reasonable, it is entitled to deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984), because we are certainly unable to discern a specific congressional intent governing this case.

* * *

To be sure, the Attorney General had not previously faced a case such as this. Prior approvals of JOAs had always involved at least one newspaper that had actually entered the downward spiral, whereas the *Detroit Free Press* could be said to be poised on the brink of the spiral, its future dependent on the competitive behavior of the *News*. Still, the only prior case reviewing an Attorney General's approval of a JOA—the pre-*Chevron* decision of the Ninth Circuit in *Hearst*—phrased the question before the Attorney General in broader terms than whether one of the newspapers had entered a downward spiral. The court asked: "Is the newspaper suffering losses which more than likely cannot be reversed?" This interpretation of the statutory language, which the court called a "commonsense construction," *id.* at 478, was explicitly adopted by the Attorney General in this case, and thus made his own interpretation entitled to *Chevron* deference. Only for cogent reasons would we reject as unreasonable an interpretation of a statute that a sister circuit had considered a commonsense construction.

The Ninth Circuit thought implicit in its inquiry was an examination of alternative forms of relief for the putatively failing newspaper. Was there, for example, a group of interested buyers or a potential for improved management? Congress' reference to

1. At the time this suit was filed, Michigan Citizens For An Independent Press had twenty members who either read, purchase classified advertising in, or are employed by one of the newspapers.

2. The seven individual plaintiffs include persons who purchase advertising in the papers and allege that advertising prices will rise if the JOA is approved.

the *Third National Bank* case in the legislative history of the statute suggested to the Ninth Circuit that Congress intended the Attorney General to consider alternatives to a JOA before approving an application. We quite agree, but so apparently did the Attorney General. He concluded that if no form of relief was within the control of the sick newspaper—its survival depended only on improbable behavior by its competitor—the statutory test was satisfied. Appellants artificially construe the Attorney General's decision to permit a JOA without regard to consideration of the competitor's behavior, but that is not what the Attorney General said.

* * *

In this type of case * * * the Attorney General is called upon to balance two legislative policies in tension: The pro-consumer direction of the antitrust laws and a congressional desire embodied in the Newspaper Preservation Act that diverse editorial voices be preserved despite the unique economics of the newspaper industry. This is precisely the paradigm situation *Chevron* addressed. If the agency's choice "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845 (quoting *United States v Shimer*, 367 U.S. 374, 383 (1961)). To invoke the normal canon of construction is merely to say that the Attorney General put too much weight on the policy of preserving editorial diversity. We are not now after *Chevron*—if we ever were—permitted to accept such an argument.

Appellants argue that the Attorney General should receive less deference than *Chevron* requires, because "his interpretation of the statute was different from that of the Antitrust Division, where the Justice Department's expertise on the Newspaper Preservation Act resides." We have previously rejected the notion that *Chevron* deference is based solely on agency expertise. *Public Citizen v. Burke*, 843 F.2d 1473, 1477 (D.C.Cir. 1988); *Cablevision Systems Dev. Co. v. Motion Picture Ass'n of America*, 836 F.2d 599, 608–09 (D.C.Cir. 1988). The rationale of *Chevron* is also grounded in the principle that the political branches of government, rather than the judiciary, should make policy choices. *Chevron*, 467 U.S. at 865–66.

* * *

The only specific challenge, as far as we can determine, to the Attorney General's appraisal of the respective competitive strengths of the two newspapers is based on the different opinion of the ALJ (and the Antitrust Division's brief to the ALJ). It is true that the Attorney General's crucial conclusions that the *Free Press* "has no realistic prospect of outlasting the *News* given the latter's substantial advertising and persistent circulation lead" and that the *News* "undoubtedly has the ability * * * to outlast the *Free Press*" was predicated on the ALJ's findings recounting the *News*' lead in all major indices. It is also true that the ALJ went on to offer a somewhat different conclusion: that the *Free Press* was still within "striking distance" of the *News* and the latter's lead was "vulnerable." The Attorney General would not, however, be legally obliged to conform his judgment to that of a statutorily-required ALJ, much less this one, who was employed as a matter of discretion rather than law. * * * Both men relied on the very same facts to make different evaluations of the competitive strength of the *Free Press*. But, it is only the Attorney General's conclusions that have legal significance, and we cannot say that his determination is unreasonable. It is undisputed, after all, that the *News* has maintained the lead for a long time and that the *Free Press* had suffered extensive losses. Debatable, the Attorney General's appraisal may well be, but hardly unreasonable.

Similarly, appellants rely on the ALJ's contrary prediction to dispute the Attorney General's conclusion that the *News* would *not* release the pressure on the *Free Press* by raising prices if the JOA were disapproved. Gannett officials testified that they had no intention of raising prices regardless of the Attorney General's decision. The ALJ refused to credit this testimony, not on account of the witnesses' demeanor, but because he, the ALJ, thought that course would only cause more losses for the *News* and was therefore irrational. The Attorney General's judgment of the *News*' likely future behavior was premised on his determination, which we have already found reasonable, that the *News* had the competitive strength to outlast the *Free Press*. The ALJ never squarely found otherwise, and if the *News* had such strength, we do not see how the Attorney General's projection can be deemed unreasonable. Under those circumstances, Gannett's refusal to raise prices, as the Attorney General said, "hardly reflects unsound business judgment."

* * *

It may well be, as appellants argue and the ALJ found, that under ideal circumstances, Detroit could support two newspapers. The same could also be true of many cities that have lost competing newspapers and are now one newspaper monopoly towns. It is not at all clear whether the newspaper business in some cities is a natural monopoly, and, if so, in cities of what size. This sort of speculation, it seems to us, as it did to the Attorney General, is hardly conclusive. That an omniscient Detroit newspaper czar could set circulation and advertising prices that would permit both papers to return to profitable status is not a useful observation in this context. The Attorney General is required to determine what will actually happen in Detroit if his approval is withheld. It would, moreover, be anomalous for those responsible for enforcing the antitrust laws to try to guide and calibrate the competitive zeal of the two newspapers so as to reach that level of competition at which both newspapers could be profitable.

Appellants might also be understood to complain that the Attorney General did not provide a reasoned explanation for his decision, because his only citations to the record at certain crucial points were to portions of the ALJ's opinion that reached different conclusions based on the same facts. Of course, the decision of the ALJ is part of the record and must be considered by the court when it determines whether the Attorney General's ruling is supported by substantial evidence or, in this case, arbitrary or capricious. We have said that an agency must both express an awareness that it is disagreeing with an ALJ and set forth the basis of the disagreement. * * * To reverse the Attorney General, however, for failure to state at the exact point of the citations the obvious nature of his disagreement with the ALJ would be excessive judicial nitpicking. His difference with the ALJ is clear throughout the opinion, and although "[t]he explanation may have been curt, * * * it surely indicated the determinative reason for the final action taken." *Camp v. Pitts*, 411 U.S. 138, 143 (1973).

* * *

The real difficulty with this case—the factor that quite plainly underlies the ALJ's discomfort as well as appellants' quarrel with the Attorney General's decision—is the effect that the prospect of a JOA has on the behavior of competing newspapers. It is feared that the statute authorizing a JOA creates a self-fulfilling prophecy. Newspapers in two newspaper towns will compete recklessly because of a recognition that the loser will be assured a soft landing.

Appellants argue that the Attorney General inadequately considered whether or not "critical aspects of the newspapers' conduct were influenced by the prospect of obtaining a JOA." But his opinion addressed this "dual motive" concern at some length; he observed that this was not the classic case that had worried Congress, where a newspaper had "brought itself to the brink of financial failure through improper marketing practices or culpable management." Instead, the record of years of fierce competitive and consequent losses to both papers led the Attorney General reasonably to conclude that both papers were principally pursuing market domination and that their strategies had been followed before any mutual discussion of a JOA. Nevertheless, the Attorney General implicitly recognized that it would be impossible completely to preclude competing newspapers from factoring into their business strategy the prospect of a JOA. As he laconically put it, "newspapers cannot be faulted for considering and acting upon an alternative that Congress has created."

We can envision a perfectly rational different policy, one that would require a showing that the weaker paper was more bloodied before approving a JOA and therefore *might* discourage the sort of competition we saw in Detroit. Congress, however, delegated to the Attorney General, not to us, the delicate and troubling responsibility of putting content into the ambiguous phrase "probable danger of financial failure." We cannot therefore say that his interpretation of that phrase as applied to this case, with all of its obvious policy implications, was unreasonable. The judgment of the district court therefore is *affirmed*.

GINSBURG, RUTH B., Circuit Judge, dissenting:

* * *

Just as there is no dispute that the *Free Press* and the *News* have both incurred significant losses on an operating basis, so it is undisputed that neither paper has experienced any "downward spiral" effect. On the contrary, in the relevant time period, 1976 to 1986, the *Free Press* share of daily circulation was never less than 49%; its competitive position has remained essentially stable; the *News*, though retaining a "leading" edge, is not "dominant." Anti-

trust Division Brief at 7–11. In other words, the two papers, each now maintained by a "deep pocket," the *News* by Gannett, the *Free Press* by Knight-Ridder, have fought to a draw. Neither has achieved supremacy. The competition today "is as close, or closer, than it was a decade ago."

Gannett, it is also conceded, acquired the *News* only after obtaining expression of Knight-Ridder's willingness to consider a JOA. The nearly equal profit split for the *Free Press* under the JOA indicates the "standoff" that existed; it reflects "a recognition on Gannett's part that the *Free Press* was not likely to exit the market in the near future." No "failing" paper in Newspaper Preservation Act history, it appears, has emerged so advantageously under an approved JOA. In these circumstances, I believe it incumbent on the Attorney General to recall—as our sister court observed—the legislature's "primary" concern "to prevent newspapers from allowing or encouraging financial difficulties in the hope of reaping long-term financial gains through a JOA." *Hearst*, 704 F.2d at 478.

* * *

The Newspaper Preservation Act's legislative history confirms that the "probable danger" standard was meant to have bite, to be "far more stringent" than the "not financially sound" test, 116 CONG.REC. 23,146 (statement of Rep. Kastenmeier), and thus "limited only to those situations where a joint newspaper operating arrangement is demonstrably essential to prevent a newspaper failure." *Id.* at 23,148 (statement of Rep. McCulloch). Given the congressional design, approval of a proposed JOA requires an affirmative answer to this question: "Is the [allegedly failing] newspaper suffering losses which more than likely cannot be reversed?" *Hearst*, 704 F.2d at 478.

The Attorney General's readiness to say "Yes" to a JOA for *Free Press-Detroit News* now, despite the view of the Antitrust Division and the ALJ that such a judgment remains premature, seems to me problematic on two counts. First, the Decision affords no assurance that the Attorney General has found a "middle ground" firmer than the pliant "not likely to * * * become financially sound" ground Congress thought inadequate for new agreements. The Decision never suggests any separate content for the "probable danger" standard to distinguish it from the more accommodating one. Second, the demonstration that satisfied the Attorney General allows parties situated as Gannett and Knight-Ridder are artificially to generate and maintain the conditions that will yield them a passing JOA. I remain unpersuaded that, with passage of the Newspaper Preservation Act, Congress opened the door to this sort of self-serving, competition-quieting arrangement. *Cf.* Attorney General's Decision at 12 (maintaining that "Congress opened the door to just this sort of response with passage of the Newspaper Preservation Act").

* * *

Detroit, as the Attorney General said, "is a highly prized $300 million dollar market." Attorney General's Decision at 4. That market could sustain two profitable newspapers. *Id.* at 9 n. 3. Market dominance is now beyond the grasp of the News as well as the Free Press. *Id.* at 13. The Attorney General has not cogently explained why, on the facts thus far found, the proposed JOA has become "an available option." *Id.* Making the JOA an option now, in the situation artificially created and maintained by the *Free Press* and the *News*, moves boldly away from the "frame of reference [Congress] essentially embraced"—"the scenario of a strong newspaper poised to drive from the market a weaker competitor," a newspaper experiencing, "due to extemal market forces," a decline in revenues and circulation "that in all probability cannot be reversed." *Id.* at 6, 13–14. I therefore dissent from the majority's disposition approving instanter [without delay] the giant stride the Attorney General has taken.

COMMENT

Hours after the D.C. Circuit's panel opinion came down, the JOA was again stayed and its future clouded. On Feb. 24, 1989, the full court declined to review the panel's finding, but the Supreme Court further stayed the merger until it could consider the question in conference. Finally on May 1, 1989, as the merger issue approached its fourth year, the Supreme Court agreed to hear the case, the first case of its kind to go to the High Court.

Antitrust Activities in Other Areas of Mass Communication

MOTION PICTURES. In spite of antitrust assaults on the motion picture business since the twenties, the industry remains highly oligopolistic. What it

might have become without antitrust intervention can only be imagined. The Sherman Act was first applied to the movies in *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923), in order to free theater owners from having to show pictures foisted on them by a conspiracy of distributors. And in *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930), a take-it-or-get-nothing contract was held anticompetitive.

Over the years, independent exhibitors were protected from various anticompetitive practices of distributors[77] and large theater circuits,[78] whether intentional or not.[79]

United States v. Crescent Amusement Co., 323 U.S. 173 (1944), was an important divestiture case. Crescent, a monopoly theater chain in many towns, pressured distributors to give it monopoly rights in communities where it had competition. The Supreme Court upheld an order to divest and required the company to demonstrate that it would not restrain trade with any of its future acquisitions. Theater chains and distributors were also prohibited from conspiring to concentrate the movie market in *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948). In yet another case, independent exhibitors were unable to show certain producers' films until they had been shown in studio-owned theaters. The Court in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), condemned such producer-distributor-exhibitor combines.

In a very significant case, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), major film studios were required to divest their theaters, "the most significant change in the structure of a mass medium to be achieved to date under the antitrust laws."[80] Five leading motion pictures studios were required to sell 1,197 theaters to independent companies.

Finally in *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), the Court considered the legality of *block booking* copyrighted motion pictures for television use. No conspiracy was alleged among defendants, but the courts challenged the manner in which each defendant had marketed its product. Television stations were required to sign up for potboiler films in order to get the classics. Relying on *Paramount Pictures*, the Supreme Court held this form of tying to be a violation of the Sherman Act.

Electronic Media

The electronic media—broadcasting, cable, and telephony—have engendered substantial antitrust litigation and case law. Most of the principles already discussed, such as those setting lawful advertising practices and merger and acquisition standards, apply with equal force to the print and electronic media. In some instances, however, electronic media have raised special problems or put common problems in a special context.

BROADCASTING. In the 1950s, the Federal Communication Commission permitted the exchange of an NBC station in Cleveland for a Westinghouse station in Philadelphia. The Justice Department learned that NBC and its parent company RCA had conspired to force the exchange in order to upgrade their holdings. When the government sought review, a district court dismissed on grounds that FCC approval precluded antitrust action. On appeal, the U.S. Supreme Court ruled that the FCC did not have authority to decide antitrust issues, although it could consider antitrust behavior relative to antitrust policy when measuring a broadcaster's compliance with the "public interest" standard of the Communications Act of 1934. *United States v. Radio Corporation of America*, 358 U.S. 334, 79 S.Ct. 457, 3 L.Ed.2d 354 (1959). The exchange was eventually undone.

Some years later, in 1966, the FCC approved the acquisition of ABC by International Telephone and Telegraph Co. ABC-ITT Merger Case, 7 FCC 2d 245 (1966). The antitrust division asked the FCC to reconsider, which it did, but on review the Commission approved the acquisition again. ABC-ITT Merger Case, 9 FCC 2d 546 (1967). Continued Department of Justice antitrust objections, however, led the parties to cancel the sale in January 1968. Times and attitudes had changed by the 1980s. The Department of Justice raised no significant objections in the late 1980s when Capital Cities Broad-

77. *United States v. First National Pictures, Inc.*, 282 U.S. 44 (1930).
78. *Interstate Circuit v. United States*, 306 U.S. 208 (1939).
79. *United States v. Griffith*, 334 U.S. 100 (1948).
80. Lee, *Antitrust Enforcement, Freedom of the Press, and the "Open Market": The Supreme Court on the Structure and Conduct of Mass Media*, 32 Vanderbilt L.Rev. 1249 (1979).

casting acquired ABC and, perhaps more significantly, when manufacturing giant General Electric (at the time still a minor broadcasting power) acquired RCA and with it, NBC.

A few antitrust cases affect broadcast station programming. In December 1974 the Department of Justice accused ABC, CBS, and NBC with violating section 2 of the Sherman Act. The department believed the networks had monopolized the selection of prime time entertainment television programming by combining with their affiliates and controlling all access to network air time. The litigation dragged on until November 1977 when a consent judgment was entered against NBC. CBS agreed to a nearly identical judgment in July 1980. ABC became the last network to settle, reaching an agreement in August 1980. The agreements limited network control over evening entertainment programming in several ways: (1) they restricted the amount of programming each network could produce for itself, (2) they prohibited the networks from demanding certain conditions of independent program producers before airing shows on the network—such as giving the network control over subsequent program syndication—, (3) they limited the network's ability to contract for exclusive use of a show, (4) prohibited the networks from having a financial interest in programs produced for network exhibition, (5) barred network involvement in domestic syndication and limited their involvement in foreign syndication, (6) limited the ability of the network to restrict the rights of talent to offer their services to other networks, and (7) prohibited each network from buying program rights from the others subject to reciprocal terms. See 979 *ATRR* A–12 (August 28, 1980). In many respects, the agreements simply duplicated the terms of the FCC's financial interest and syndication rules. Unlike those rules, however, most elements of the consent agreements self-destruct after ten years—in 1990. If, at that time, the FCC has repealed or modified its financial interest and syndication rules, the ability of the networks to move back into the program production or syndication market could be substantially less constrained, a prospect many Hollywood interests view with alarm and many network interests, given their competitive environment at the end of the 1980s, view with relief.

Antitrust law was largely responsible for ending more than fifty years of broadcast self-regulation under the guidance of the National Association of Broadcasters. The NAB first promulgated a code of good broadcasting practice in 1929. When television came along, the Radio Code was complemented with the NAB Television Code. Both codes exhorted broadcasters toward "good" broadcast practices in advertising and programming. By the 1970s, however, the codes were under legal attack from two directions.

On the one coast, Writers Guild of America, West had attacked the codes under the theory that they were government regulations in disguise and not just self-regulatory standards of an enlightened industry. Focusing on the role FCC Chairman Richard Wiley (and the Congress) had played in stimulating the NAB to add a "family viewing" policy to the TV code, the writers argued that the code should be viewed as "state action" amounting to a violation of their First Amendment rights. The policy stipulated that the first hour of prime time and the proceeding hour should contain only programs fit for "general family viewing." The writers initially won, in a way. A federal district judge bought the state action argument but ruled that the policy most offended the First Amendment rights of broadcast licensees. *Writers Guild of America, West, Inc. v. FCC*, 423 F.Supp. 1064 (C.D.Cal. 1976). Subsequently, a federal court of appeals ruled that the district court lacked primary jurisdiction in the dispute and vacated the district judge's ruling. *Writers Guild of America v. American Broadcasting*, 609 F.2d 355 (1979). For the three years that the district court decision stood, however, it put the NAB in an embarrassing position. A federal district judge had ruled that a trade association had violated the First Amendment rights of its members, hardly a public relations bonanza for the NAB. See G. Cowan, *See No Evil* (1979).

Adding to the troubles of the Writers Guild case were problems coming from the opposite coast: an antitrust lawsuit was filed against the NAB by the Department of Justice in 1979. The Department claimed that three provisions in the TV code violated the Sherman Act. The code: (1) limited the amount of "commercial matter" per hour, (2) the number of commercials that could be strung together in a "commercial pod," and (3) prohibited advertising more than two products in a commercial less than sixty seconds long. The NAB saw this as good for the public; controlling advertising clutter. The Department of Justice saw it as a conspiracy among the NAB and its member broadcasters to

restrict the availability of advertising time and drive up its price.

After several years, U.S. District Judge Harold Greene (who at the same time was trying an antitrust case against AT&T described below) ruled that the limit on number of products per spot was a *per se* violation of the Sherman Act. *United States v. National Assn. of Broadcasters*, 536 F.Supp. 149 (D.D.C. 1982). Faced with a trial on the other two allegations, the probability of private antitrust lawsuits from advertisers who had paid "too much" for television advertising, and the possibility of license renewal difficulties for NAB licensee/members who were participants in the anticompetitive "conspiracy," the NAB in July 1982 struck a deal with the Justice Department. The NAB agreed to drop the challenged code provisions, if the Department of Justice would bring a halt to the litigation and attempt to get Judge Greene to accept a consent judgment settling the case and vacate his earlier order that the Association had violated the antitrust laws. Justice accepted, and in November 1982 Judge Greene approved. *United States v. National Assn. of Broadcasters*, 553 F.Supp. 621 (1982). Faced with both the antitrust and the "family viewing" debacles, the NAB in 1983 abandoned its Radio and Television Codes altogether. Somewhat ironically, the 100th Congress, in 1987 and 1988, considered the Television Violence Act of 1988 (S. 844, H.R. 1885). The act would have created an exemption to the antitrust laws so that television broadcasters could come together to adopt a self-regulatory code limiting violence on television. The 100th Congress, however, did not adopt the proposed statute.

A final example of the impact of antitrust law on programming comes from the Supreme Court of the United States. As previously noted, many media antitrust lawsuits end in consent judgments or settlement agreements of some form. One that did not involved the question of whether the television contracts negotiated by the National Collegiate Athletic Association violated section 1 of the Sherman Act. A tenacious NCAA fought this one all the way to the U.S. Supreme Court which, in 1984, concluded that the association had monopolized the market for college football television and violated the act. The only dissenter was Justice Byron "Whizzer" White—once an All-American running back for the University of Colorado and a professional player for the Pittsburgh Steelers and Detroit Lions. *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984). The result of the ruling was a dramatic expansion in the amount of college football on both broadcasting and cable television, as colleges signed contracts of their own or banded together in smaller regional or national associations.

CABLE TELEVISION. As the 1980s came to a close, the cable television industry faced some fascinating but frequently unresolved antitrust problems. To start with, cable systems operate under governmentally granted franchises. The franchising system became the object of antitrust review. Could municipalities be held liable for violations of antitrust laws if they granted exclusive franchises? When the U.S. Supreme Court suggested that they might be, in *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982), panic swept through the cable industry and, especially, franchising municipalities. The concern of the municipalities was substantially eased by adoption of the Local Government Antitrust Act, 15 U.S.C.A. secs. 34–36 (Supp. 1985) and by parts of the Cable Communications Policy Act of 1984, 47 U.S.C.A. secs. 521–551 which offered some protection to franchising bodies from antitrust actions.

For system operators, however, things were different. The problem was cable television's nebulous legal status. As the decade closed, it was unclear whether cable was most like a newspaper—which, of course, operates without a government franchise—or like a broadcaster—which operates under an FCC license—or some sort of a natural monopolist, or what. Cable wanted to be as "unregulated" as possible; that made it difficult for the industry to share the immunity from antitrust prosecutions that municipalities gained. Cable systems wanted, if they could somehow get it, protection against "overbuilds." They wanted something as close as possible to an exclusive franchise. Finally, given the substantial value of cable systems, operators fought hard, but some argued unfairly, to retain them at franchise renewal time. The ambiguity over cable's media status clouded review of cable antitrust matters.

An unsuccessful cable television franchise applicant in Houston, Texas, Affiliated Cable Corp. was awarded $3.1 million, trebled to $6.3 million, after it proved that Houston business leaders, the mayor, and the ultimately successful applicants conspired to violate section 1 of the Sherman Act and prevent

Affiliated from having a fair shot at a Houston cable television franchise area. The mayor and the city of Houston were ultimately found not liable for damages, but the private companies, notably Gulf Coast Cable Television Co., remained liable. The U.S. Supreme Court refused to review the decision. See *Affiliated Capital Corp. v. City of Houston*, 519 F.Supp. 991 (S.D.Tex. 1981), rev'd n.o.v., 700 F.2d 226 (5th Cir., 1983), vacated and decided *en banc*, 735 F.2d 1555 (5th Cir. 1984), rehearing *en banc* den., 741 F.2d 766 (5th Cir., 1984), cert. den. sub nom *Gulf Coast Cable Television Co. v. Affiliated Capital Corp.*, 106 S.Ct. 788 (1986).

The nation's largest multiple cable system operator, TCI, Inc. got into even bigger trouble in Jefferson City, Missouri. After managing the state capital city's cable system for five years and then purchasing it in 1978, TCI elected not to participate in a comparative refranchising proceeding in 1981–1982. TCI argued it had a First Amendment right to continue to operate. In April 1982 the city council selected another applicant but could not muster the votes to override the mayor's veto of its selection. When the council subsequently tied on an ordinance proposing to renew TCI's franchise, the mayor cast a tie-breaking vote to renew TCI and deny the applications of competitors.

The competitors sued. The jury and appellate courts concluded that TCI had conspired with the mayor and other city officials to retain its franchise, in violation of section 1 of the Sherman Act. It held that TCI had violated section 2 of the same act through anticompetitive actions in order to retain its Jefferson City monopoly and that it had tortiously interfered with the business expectancy rights of its competitors, in violation of Missouri law. After trebling civil antitrust damage awards, the court entered a judgment of $32.4 million on those claims and, alternatively, $35.4 million on the state law claim. *Central Telecommunications v. TCI Cablevision*, 610 F.Supp. 891 (WD Mo. 1985). The U.S. Court of Appeals for the 8th Circuit affirmed, *Central Telecommunications v. TCI Cablevision*, 800 F.2d 711 (1986), and the U.S. Supreme Court denied certiorari, *TCI Cablevision, Inc. v. Central Telecommunications*, 107 S.Ct. 1358 (1987).

As the decade ended, the cable industry faced many unanswered questions. Both horizontal and vertical integration of the industry were increasing. Multiple System Operators (MSO's) bought more and more systems—a problem of horizontal integration. In addition, the major MSO's bought into many of their sources of programming (TCI, ATC, and others, for example, came to occupy a powerful ownership position in the cable programming empire built by Atlanta entrepreneur Ted Turner)—a problem of vertical integration. Finally, at the local level, cable began to look to many like a natural monopoly. The construction of competing systems was uncommon. Most customers could receive service from only one cable system, to some a troubling situation since the Cable Communications Act of 1984 had largely deregulated cable rates and programming. In March of 1988, Senator Howard Metzenbaum (D-Ohio), chairman of the Senate Judiciary Committee's Subcommittee on Antitrust, Monopolies and Business Rights, warned the cable industry of his (and other's) concern about concentration and possible abuse of monopoly power. See 54 *ATRR* 636 (April 7, 1988). It was clear that cable's antitrust position would remain contentious for years to come.

TELEPHONY. The impact of antitrust law is surely nowhere more apparent than in the recent history of U.S. telephony. Through a consent judgment, antitrust law in 1984 broke up what was then the largest company on earth—AT&T. Under an earlier consent decree, agreed to in 1956, AT&T had established itself as *the* national telephone company, providing both local and long distance service to nearly all Americans. The 1956 decree had been premised on some simple assumptions. AT&T would accept government supervision of its rates and conditions of service but, in turn, would not face serious competition. AT&T would offer only "regulated telecommunications services." By the 1970s, those assumptions were breaking down. The FCC had allowed limited competition to AT&T; you could buy a phone at your local department store instead of having to get it from AT&T and, if you were willing to dial a bunch of extra numbers, you could get long distance service from alternative providers such as MCI. Furthermore, there was a whole new world of potentially profitable services (largely computer-based) out there that the 1956 consent decree seemed to keep AT&T from because they were not regulated telecommunications service.

In November 1974 the Justice Department instituted a new antitrust lawsuit against AT&T, Western Electric, and Bell Labs, Inc. As is often the case in antitrust litigation, especially when it involves a company the size of AT&T, the parties sparred for years. In the trial, the government presented its case, and AT&T began its defense. Then, on January 8, 1982, the Department of Justice and AT&T announced that they had reached a settlement.

The settlement meant a major change in U.S. telecommunications. AT&T would give up its control over local telephone service—that would be transferred to seven divested regional holding companies. AT&T would retain its "long distance" operations but had to accept competition from companies like MCI and U.S. Sprint. AT&T would be free to enter new, nonregulated, businesses. The whole deal would become effective January 1, 1984.

Under the Tunney Act, 15 U.S.C.A. sec. 16(e) (1982), however, it could be argued that the bargain had to undergo judicial review. That the Tunney Act really applied was never decided, but all parties eventually agreed to let U.S. District Judge Harold Greene "supervise" the agreement. The result was that Greene became almost the "czar" of American telecommunications.

Many issues were raised in Greene's court. The most important to mass communications were pressed upon the court by the newspaper industry. Newspaper interests feared the entry of AT&T and, for that matter, the seven divested operating companies into the "electronic information services" market—i.e., videotex or "electronic yellow pages." They urged Judge Greene to block the entry of both AT&T and the divested Bell operating companies into this market. In his final decision, Greene agreed. Greene viewed the electronic information services market of "electronic publishing" as an emerging one—and one that AT&T and the divested regional companies could unfairly dominate given that they controlled all the equipment needed to deliver such services. Greene decided that AT&T should be forbidden from entering the electronic publishing market for seven years from the date of entry of the consent decree and that the divested regional companies, generally, should not be allowed to enter that market for an indefinite period of time. His idea was to protect the right of the public to receive electronic information from diverse sources. He feared that AT&T and the divested operating companies could use their control over facilities to stifle an emerging electronic publishing industry. See *United States v. American Tel. and Tel.* Co., 552 F.Supp. 131, esp 180–186 (D.D.C., 1982). Aff'd sub. nom. *Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983).

The divestiture occurred on schedule, on January 1, 1984. Since then, Judge Greene has been asked to let the divested operating companies into information services. He has generally declined to do so. At the moment, they may acquire and operate the facilities necessary for others to transmit information services, but they can not do so themselves—even outside of their operating areas. See *United States v. Western Elec. Co., Inc.*, 673 F.Supp. 525 (D.D.C., 1987) and *United States v. Western Elec. Co., Inc.*, 690 F.Supp. 22 (D.D.C., 1988). AT&T appears content to await the end of the seven-year prohibition built into the decree—presumably ending in 1989. Although Congress has considered stripping Judge Greene of his supervisory powers over the decree and transferring it to the Federal Communications Commission, it's not done that yet and Greene remains in control. The result is that a very large communications company, AT&T, cannot—even if it wanted to do so—provide electronic information over its own facilities, and several quite substantial electronic communications companies, the divested operating companies, cannot really enter the field at all. Greene's goal in 1982, to open the electronic information services field to others, in hopes of providing electronic services to many before the early telephone players came to dominate, seems unfulfilled because few other companies have stepped forward to experiment in the market.

SECTION THREE
THE MEDIA AND LABOR LAWS

A Free Press and the Journalist's Rights Under Federal Labor Laws

A beginning to understanding the relationship of labor law to the press is a 1937 Supreme Court case, *Associated Press v. NLRB*, which established that labor laws may be applied to the press without violating the First Amendment.

Morris Watson, an editorial writer for AP, was fired for engaging in union activity. The American Newspaper Guild filed a charge with the National Labor Relations Board alleging that Watson's discharge violated section 7 of the National Labor Relations Act (NLRA)[81] and that the AP had engaged in unfair labor practices as defined in the act.[82] The act forbids employers from interfering with employee attempts to "form, join, or assist labor organizations * * * for the purpose of collective bargaining. * * *"

AP first challenged the validity of the act itself, alleging that Congress had overstepped its powers to regulate interstate commerce. It also argued that the specific dispute had no implications for interstate commerce. The Court dismissed the challenge, upholding what is now considered Congress's almost plenary authority over interstate commerce.[83] The Court reasoned that, "* * * it is obvious that strikes or labor disputes amongst this class of employees would have as direct an effect upon the activities of [AP] as similar disturbances amongst those who operate the teletype machines or as a strike amongst the employees of the telegraph lines over which [AP's] messages travel."

The wire service's First Amendment argument was based on the assertion that "* * * it must have absolute and unrestricted freedom to employ and discharge those who, like Watson, edit the news, that there must not be the slightest opportunity for bias or prejudice personally entertained by an editorial employee to color or distort what he writes." The act, AP said, was therefore a direct invasion of the freedom of the press. AP appeared to rely on the earlier decision in *Grosjean v. American Press* Co.[84] (text, p. 122), which had invalidated a state tax statute.

The Court in *AP* was not persuaded. There was no evidence that Watson's activities had resulted in any news bias, nor was there reason to expect bias from Watson in the future. The Court reasoned that the act could only violate the First Amendment if it somehow interfered with the editorial judgment of management.

ASSOCIATED PRESS v. NATIONAL LABOR RELATIONS BOARD

1 MED.L.RPTR. 2689, 301 U.S. 103, 57 S.CT 650, 81 L.ED. 953 (1937).

Justice ROBERTS delivered the opinion of the Court.

* * * The act does not compel [AP] to employ any one; it does not require that [AP] retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. The restoration of Watson to his former position in no sense guarantees his continuance in petitioner's employ. The [AP] is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible.

The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the antitrust laws. Like others he must pay equitable and nondiscriminatory taxes on his business. The regulation here in question has no relation whatever to the impartial distribution of news. The order of the Board in nowise circumscribes the full freedom and liberty of the [AP] to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the [AP] is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it might adopt.

81. 29 U.S.C.A. § 157.

82. 29 U.S.C.A. §158(a).

83. The case was one of several Depression-era disputes that pressed challenges to New Deal legislation passed pursuant to the Commerce Clause, U.S. CONST. art. I, sec. 8, cl. 3. Congressional authority to regulate any activities that are either *in* interstate commerce or *have an effect upon* interstate commerce has been consistently upheld since. *See*, Nowak, Rotunda and Young, *Constitutional Law* 3d ed. (1986), pp. 144–179.

84. 1 Med.L.Rptr. 2685, 297 U.S. 233 (1936).

Justice SUTHERLAND, dissenting.

Justice Van Devanter, Justice McReynolds, Justice Butler, and I think the judgment below should be reversed.

* * *

For many years there has been contention between labor and capital. * * * Such news is not only of great public interest; but an unbiased version of it is of the utmost public concern. To give a group of employers on the one hand, or a labor organization on the other, power of control over such a service is obviously to endanger the fairness and accuracy of the service. Strong sympathy for or strong prejudice against a given cause or the efforts made to advance it has too often led to suppression or coloration of unwelcome facts. It would seem to be an exercise of only reasonable prudence for an association engaged in part in supplying the public with fair and accurate factual information with respect to the contests between labor and capital, to see that those whose activities include that service are free from either extreme sympathy or extreme prejudice one way or the other.

* * *

COMMENT

The dissenting justices as a group had considered most of the New Deal legislation based on the commerce clause unconstitutional. Their dissents were consistently favorable to ownership and management. In the *Associated Press* case, however, the dissent argues in addition that a threat to unbiased reporting, presumably a tilt toward labor, exists with unionization. If there is a threat of biased news coverage, does it not also exist if management is able to prevent coverage of labor issues? Apparently it did not occur to the dissenters that ownership might be equally susceptible to the point of view of capital.

The case makes clear that the press is subject to the labor laws, just as it is subject to antitrust. The premise that the "publisher of a newspaper has no special immunity from the application of the general laws" has become the guideline by which subsequent issues involving business regulation of the press have been assessed. The continuing importance of *Associated Press* was stressed in the recent *Minneapolis Star* decision (text, p. 124), which invalidated a use tax on the costs of paper and ink products used in producing newspapers. In that case, Justice O'Connor said that *Associated Press* suggested the following:

> [A] regulation that singled out the press might place a heavier burden of justification on the [s]tate, and we now conclude that the special problems created by differential treatment do indeed impose such a burden.

Is Justice O'Connor's interpretation and application an extension of the *Associated Press* decision?

The holding that journalists have the same rights as other workers to collective bargaining has significant implications for the legal status of the press generally. Freedom of the press guaranteed under the First Amendment appears limited to matters of editorial judgment. Other interests and values may outweigh the usual freedom of publishers to act as they please.

Morris Watson was fired a short time after the case was decided, for "incompetency." Did the Court's decision effectively invite that result?

Key questions following *Associated Press* have concerned specific application of the act. Who is protected? What activities are so tied to the exercise of editorial judgment that they are solely the province of the publisher? When will management's actions be considered an unfair labor practice?

The act does not apply to "professional" employees or to management employees. Similarly, the federal Fair Labor Standards Act,[85] which sets standards for working conditions, exempts "professionals" from its coverage. A professional employee is defined as someone whose work is "predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work."[86] A natural conflict has developed, therefore, concerning who may claim the protection of the labor laws. Reporters and editors, it might be argued, are a far cry from the factory workers who were the primary targeted beneficiaries of the acts. That is

85. 29 U.S.C.A. §§ 213, 216.
86. 29 U.S.C.A. § 153(12).

precisely the argument the *Washington Post* used in opposing a claim for overtime pay filed by ninety-nine staff reporters, editors, and photographers.

SHERWOOD v. THE WASHINGTON POST

15 MED.L.RPTR. 1692, 677 F.SUPP. 9 (D.D.C. 1988).

GESELL, J.:

Ninety-nine plaintiffs including reporters, editors or photographers presently employed by The Washington Post ("Post") have invoked Section 13(a)(1) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 213(a)(1) (1982), claiming they have been improperly denied time and a half pay for their overtime work.

* * *

Under longstanding practice, periodically re-examined in collective bargained agreements, The Washington Post since 1945 has paid time and a half wages for overtime work to all reporters/editors earning a salary of less than a stated amount per week. This complaint was filed after the last collectively bargained agreement failed to be renewed and negotiations for renewal had come to an apparent stalemate. There are 236 reporters and 160 editors who work full time out of the paper's Washington, D.C. newsroom. The approximately 60 reporters/editors who are plaintiffs earned an average of $50,000 per year with annual salaries ranging from $30,000 up to $60,000 at time of suit. Under the newspaper's system of compensation, few reporters/editors fall below the overtime cutoff wage and receive time and a half pay.

The FLSA provides an exemption from the Act's overtime pay requirements for employees working in a "bona fide executive, administrative or professional capacity." 29 U.S.C. § 213(a)(1). The individual plaintiffs each deny he or she is a professional within the meaning of this overtime exemption. Since they frequently gather information, write or edit outside the paper's 9:00 a.m. to 6:00 p.m. hours, they seek to be paid time and a half wages for this work regardless of the amount of salary received or any arrangement included in a collectively bargained agreement.

The Washington Post contends that all of its reporters/editors, including the plaintiffs, are professionals within the meaning of the FLSA and therefore are exempt from the Act's time and a half overtime pay requirement. More specifically, it urges that the reporter/editor plaintiffs should be recognized as journalistic writers whose principal duty is to develop and write "original and creative" material and that, as such, they must be treated as members of an artistic profession within the meaning of the Department of Labor regulations found at 29 C.F.R. § 541.303 (1987) and other relevant interpretations of the FLSA. The Post has the burden of proof on this issue.

* * *

The Washington Post is not an entry-level employer of reporters/editors. It employs only reporters and editors with proven experience who have acquired demonstrable newspaper writing skills that meet the particular, exacting needs of the Post. The paper does not rely heavily on other news services. Once hired, its reporters/editors may be based at a desk located in its newsroom or at the Capitol or at city hall, or at a Washington Post bureau in Maryland or Virginia, or sent to locations in South America, Central America, the Far East, Africa or Europe, as well as throughout the United States. Management desires to meet the highest ethical standards that have been developed by journalism societies and teachers. Ample financial and advertising resources exist to support a successful, thorough newspaper venture utilizing computer systems and other modern communication and production technology and providing its reporters/editors with expense accounts and backup support personnel.

* * *

To this end, reporters are generally assigned a specific, broadly defined beat, general subject or institution. Thus, they are expected to become immersed in a particular field of activity and to be able to discern the significance of events as they occur and even to anticipate developments. Reporters write their own stories as semi-specialists, assisted by input from senior editors who aid in conceptualizing areas of interest to the newspaper as well as by other reporters in related fields.

* * *

Reporters/editors at the skill level of these 13 men and women are usually identified to the public by a by-line when their stores are printed. Their expertise becomes known and they are consulted by

outsiders as well as colleagues. They may do a bit of teaching, free-lancing and/or talk show appearances on TV and radio on the side, always holding out their association with The Washington Post. By reason of their expertise they may also belong to professional societies or appear as speakers before such groups. The combination of these factors serves to individualize their work product as well as magnify their influence within and without the paper.

Reporters have no set hours and their work may involve long hours; they are not generally required to be physically present at the Washington Post newsroom; they gather information at business or social encounters at any time of day and apparently are on call if the need arises.

Reporters/editors are regularly appraised and their progress in pay and responsibility depends on their performance as measured by well-defined criteria. They are not appraised in terms of the number of stories printed or hours worked. Rather, they are appraised by criteria that will determine whether or not they are performing the broader, more creative role for which they were hired. Their work is measured in terms of initiative, creativity, judgment, ability to handle multiple assignments, ability to complete daily assignments and projects, ability to help other reporters grow, use of language, ability to satisfy various exacting writing standards, ability to translate complicated situations into lucid prose, knowledge of subject covered, ability to expand their own knowledge, etc. * * *

The 13 reporters/editors under review here were hired at various times between 1967 and 1983 and they have had a wide variety of changing assignments. Most of them have college degrees, a long-term commitment to journalism, and all have well-tested newswriting skills gained through prior experience.

Following their employment by The Washington Post, most of them have won news awards and many have benefited from fellowships or full-time study at various universities, such as Duke for public policy, Harvard for law, etc. In the course of their employment many have supervised other reporters at a Washington Post branch office. Most write under their own by-line. Some have also written purely analytical pieces in an occasional column or on the newspaper's Op-Ed page. A few have been foreign correspondents for a considerable period in places such as Argentina, Chile, China and Europe. Others have had spot assignments abroad. On the way up, several have served as bureau chiefs. All have rotated through various assignments. They have developed stories without assignment; some have written special series exploring a particular topic in depth. The group includes a number of highly experienced political reporters who report in depth on all aspects of an entire state or federal legislative session or cover national election campaigns.

* * *

When Congress enacted the FLSA in 1938, it was in response to President Roosevelt's call for legislation to establish minimum standards for free labor. The President sought a law to protect those receiving the bare necessities of life whose health was injured by long hours of toil. He spoke for those in the lowest income brackets, the underpaid and destitute receiving sub-standard pay. These are still the basic objectives of the statute.

No effort was made to list the precise jobs covered by the enactment. This was left to the Secretary of Labor to define and delineate; but bona fide professionals were exempted from the start. This imprecise term was also left undefined. However, the status of reporters under the legislation was considered prior to enactment. Indeed, the legislative history throws considerable light on whether Congress ever intended to include newspaper reporters within the Act.

The Supreme Court had recently dealt with the interstate status of the Associated Press and congressmen were conscious of how the legislation might affect the press. Assistant Attorney General Robert Jackson was responsible for articulating the Roosevelt Administration's position on the Hill. He was questioned concerning the status of reporters. After acknowledging that The Boston Globe would be in the flow of interstate commerce if it sold newspapers in New Hampshire that had originated in Massachusetts, he then expressed the view that its employees would be subject to the Act. As the colloquy between Jackson and a sponsor of the legislation continued he indicated, however, that reporters "can come under the group of professionals" and went on to draw a distinction between workers in machine jobs, such as printers, and reporters. He concluded by advising the committee that, while it would be a matter of interpretation, he "would not think that the newspapermen would be included, because [he] would regard them as a profession." This view was not disputed.

Shortly after the Act became law, the Department of Labor was obliged to recognize that the professional exemption could not be limited to the learned professions such as law and medicine, and regulations were promulgated. Without designating other specific jobs as professional, it has developed a broad exemption for artistic professions and suggested how this general exemption category might be applied to various areas of work, including jobs in the field of journalism. The professional exemption for artistic professions is stated, in relevant part, as follows:

> Work of this type is original and creative in character in a recognized field of endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee.

29 C.F.R. § 541.303(a). Writing is specifically defined as a field of artistic endeavor at § 541.303(b). The regulations then proceed at § 541.303(f) to consider newspaper writers and reporters and to emphasize that the exemption is available within this group for those doing written work which is "predominantly original and creative"; whether written work is "creative" is to be determined by its analytical, interpretative and individualized character. The work of columnists, cartoonists and editorial writers is apparently considered to be at the top of the scale measuring originally and creativity, the work of legmen at the bottom and a wide area of uncertainty left in between.

* * *

Each situation must be judged on its merits. It is not a question of making an exception for all reporters at this or any other newspaper but rather of determining whether or not these 13 individuals while working for The Washington Post fall within or without the expanding concept accepted for identifying professional work that has evolved through individual administrative actions and the general regulations themselves.

Plaintiffs insist that the work they do is far more routine than original and creative. They give great credit for the end result to a handful of editors, who are clearly professionals, and tend to deprecate the quality of their own written work. To be sure, some reporting of straight, quick, factual news is routine and does not require the full range of talent that led to the reporters being hired in the first place. All professions, including the learned professions, however, entail such more routine work and this is recognized by the Department of Labor. But this does not alter the primary, dominant, written work of these 13 reporters/editors and the artistry expected to go into it. Moreover, the collaborative editor does not take the responsibility for writing from the reporter's hands unless he or she fails to perform up to standard on a specific, occasional assignment. Nor does the fact the process may involve an element of training affect the professional status of the reporter.

The Court is wholly satisfied that The Washington Post has met its burden and is entitled on the undisputed facts summarized above to treat each of the 13 reporters/editors as professionals exempted from the overtime pay requirements of the FLSA. They produce original and creative writing of high quality within the meaning of the regulations; they have far more than general intelligence; they are thoroughly trained before employment; their performance as writers is individual, interpretative and analytical both in the writing itself and in the process by which the writing must be prepared; and their performance is measured and paid accordingly. A special talent is necessary to succeed.

* * *

Plaintiffs' motion for summary judgment is denied; defendant's motion for summary judgment is granted; and the complaint of the 13 reporter/editor plaintiffs is dismissed with prejudice.

* * *

COMMENT

The district court's grant of the newspaper's motion for summary judgment was the focus of the District of Columbia Circuit Court of Appeals when it overturned the decision. The appeals court noted that it was inappropriate for the trial judge to reach legal conclusions on the basis of facts that were still hotly contested. In other words, the appeals court thought the case should go to trial and be decided by a jury rather than by a judge in pretrial. Garneau, "Overtime pay lawsuit kept alive by appeals court," *Editor & Publisher*, (April 29, 1989), 43. It will be interesting to see if a jury agrees or disagrees with the district court judge.

Although decided under the FLSA, the interpretation of the district court in the *Sherwood* case would

appear to apply as well to determinations under the NLRA. It is important to note that the decision is at odds with a long line of cases under the NLRA which determined that editorial employees are not considered professionals[87] or supervisors ordinarily part of management.[88] Newspaper management has long sought to have journalists considered professionals.[89]

Another federal district court expressly rejected the reasoning of *Sherwood* in a dispute between a television station and general assignment reporters, producers, directors, and assignment editors. In deciding for the employees, the court emphasized that the burden of proving an FLSA exemption lies with the employer. It is otherwise assumed the act applies to employees. The station emphasized the specialized activities of the various jobs. The court described the duties of each position in detail, concluding that the job duties did not describe exempt "creative" activities, but rather, "* * * depends primarily on intelligence, diligence, and accuracy * * * There is a well-established format and sameness * * * Their work * * * is not predominantly original and creative because they do not produce analytical, interpretative, or highly individualized reporting." *Dalheim v. KDFW-TV*, 15 Med.L.Rptr. 2393 (N.D.Tex. 1988). The station also claimed that the positions called for advanced or specialized education, which would exempt the employees from FLSA as "learned" professionals. The court concluded that preferring employees with journalism degrees was significantly different from requiring degrees:

> The evidence adduced at trial demonstrates that many aspects of broadcast journalism are now professional in nature. There are, throughout the country, numerous undergraduate and several graduate degree programs devoted either to broadcast journalism/mass communications alone or to journalism generally, with a concentration in broadcast journalism. Many broadcast journalists now obtain undergraduate degrees before seeking fulltime employment. Broadcast journalists attempt to conform their work to established standards of ethics.
>
> Nevertheless, the record also reflects that broadcast journalism does not customarily require a knowledge of a field of science or learning. An advanced academic degree is not a standard or universal prerequisite. Some of the plaintiffs, and members of KDFW news department management, have not graduated from college or have a college degree in an unrelated field. KDFW management prefers to hire persons with college degrees for the positions in question here, but does not require a degree. The evidence reflects, moreover, that the performance of a reporter, producer, or director is primarily enhanced by work experience (starting in smaller television markets and advancing to larger ones). This is more akin to "an apprenticeship and . . . training" rather than "intellectual instruction and study." The court finds and concludes that the plaintiffs are not exempt as "learned" professionals.

The cases suggest that to be considered a manager or a professional, the employee must have discretion *and* authority to act as an agent of the organization somewhat greater than is involved in telling a news source that one is a reporter from a particular newspaper or television station.

Employees who participate in formulation of editorial policy will likely be considered management without regard to their lack of authority over other employees. In one case, the court held that staffers who write editorials have the essential characteristics of managerial employees and are properly excluded from collective bargaining: "To hold that a person who was involved in the formulation of editorial content of a newspaper is not aligned with the newspaper's management would come perilously close to infringing upon the newspaper's First Amendment guarantee of freedom of the press." *Wichita Eagle & Beacon Publishing Co. v. NLRB*, 480 F.2d 52 (10th Cir. 1973), cert. den. 416 U.S. 982 (1974).

An employee preparing the editorials which serve as the voice of the newspaper is indeed closely aligned with management, since an editorial writer is quite

87. See, e.g., *Express News*, 223 N.L.R.B. 223 (1976). In this case, the NLRB expressly refused to alter many prior decisions that journalists were not considered professionals. The board determined that recent changes in communication had not changed the essential nature of the jobs involved. A key to the decision was evidence that most news employees had not received advanced training in journalism. Advanced or specialized training is considered a major indicator of professional status under the NLRA. News organizations today report that up to 85 percent of new editorial hires have degrees from journalism and mass communication programs. American Newspaper Publishers Ass'n., *Facts About Newspapers* (1987).

88. See, e.g., *Passaic Daily News v. NLRB*, 736 F.2d 1543 (D.C.Cir. 1984) (bureau chief who lacked authority to hire, fire, or evaluate employees not a supervisor); *NLRB v. Medina County Publications*, 735 F.2d 199 (6th Cir. 1984) (sports editor who exercised authority in disciplining employee and in authorizing overtime pay considered a supervisor); *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273 (5th Cir. 1986) (directors, producers, and assignment editors who lacked authority over employees not supervisors).

89. "ANPA urges labeling reporters as professionals," *Presstime* (April 1986), 64.

literally the "mouthpiece" of management. Referring to *Associated Press*, the court noted that while including editorial writers in the collective bargaining unit might not have an effect on the impartial dissemination of news, "* * * it does infringe upon the newspaper's freedom to determine the content of its editorial voice in an atmosphere of free discussion and exchange of ideas."

In labor law generally, unfair labor practices specified in the NLRA prohibit employer interference with attempts to unionize; discrimination between employees based on union activity; attempts to dominate a recognized collective bargaining agent; discharge of employees after an employee files charges; and refusal to bargain.[90] When the *Passaic Daily News* pulled Mitchell Stoddard's weekly column after Stoddard participated in union organization activity, the court decided that the paper had canceled the column in an attempt to discourage membership in the union, an unfair labor practice. *Passaic Daily News v. NLRB*, 10 Med.L.Rptr. 1905, 736 F.2d 1543 (D.C.Cir. 1984). The court agreed with an administrative law judge that the action constituted an unfair labor practice. The court affirmed that the paper's action was retaliatory and discriminatory in nature and that Stoddard was effectively demoted following the union election. The newspaper argued that the First Amendment shields the decision from NLRB review. The court held that *Associated Press* indicates otherwise. If the newspaper had made a showing that its decision to cancel the column was based on editorial judgment rather than retaliation, the court said, its result might be different. Stoddard had obtained an order from the NLRB requiring the newspaper to resume publication of the column. On the strength of *Miami Herald Publishing Co. v. Tornillo*,[91] the court reversed the order as infringing upon a publisher's right to make editorial decisions.

When the *Pottstown Mercury* management adopted and began enforcing a newsroom code of ethics without consulting with or bargaining with the Newspaper Guild chapter, the Guild asserted that the imposition of the code in such a fashion was a change in the terms and conditions of employment and an unfair labor practice. A federal district court disagreed, determining that "the editorial integrity of a newspaper lies at the very core of publishing control." Provisions of the code not related to the "core," however, might be appropriate for collective bargaining. *Newspaper Guild v. NLRB*, 6 Med.L.Rptr. 2089, 636 F.2d 550 (D.C.Cir. 1980). Other policy decisions less directly affecting editorial content, such as smoking policies or drug testing, would appear to require collective bargaining.[92] A newspaper's refusal to bargain over penalty provisions in a code of ethics, rather than the code itself, was considered an unfair labor practice, however. The decision to enhance editorial integrity with a code of ethics was not considered an economic decision that triggers mandatory bargaining. Penalties, though, directly affect job security. *The Capital Times Co. and Newspaper Guild of Madison, Local 64*, 223 NLRB No. 87 (1976).

The Fair Labor Standards Act, discussed earlier, was the subject of constitutional attack by newspapers shortly after its passage. In two cases in 1946, the Supreme Court upheld application of the FLSA to the press and upheld the authority of the Department of Labor to subpoena records for FLSA enforcement.

In the first case, *Mabee v. White Plains Publishing Co.*, the Court held that discrimination on the basis of circulation is a permissible method of classification to determine whether a newspaper will be regulated under the Fair Labor Standards Act. A total of forty-five out-of-state subscribers was considered enough to place a newspaper in interstate commerce.

The Fair Labor Standards Act of 1938 established a minimum wage and maximum number of hours for employees engaged in interstate commerce unless specifically exempted. [29 U.S.C.A. § 216(b)] The act specifically provided that weekly or semiweekly newspapers with circulations of less than 3,000 were not covered. Daily newspapers, no matter how small their out-of-state circulation, were apparently covered under the statute.

White Plains Publishing Co. contended that an out-of-state circulation of forty-five out of 9,000 to 11,000 copies published was too weak a foundation

90. 29 U.S.C.A. § 158.

91. 1 Med.L.Rptr. 1898, 418 U.S. 241 (1974).

92. Rothstein, *Screening Workers for Drugs: A Legal and Ethical Framework*, 2 Employee Relations L.J. 422 (1985–1986); *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad*, (unpublished opinion) (D.Mont. 1985).

on which to support a conclusion that the newspaper was in interstate commerce. Moreover, White Plains Publishing Co. contended that the statutory exemption for small weekly newspapers was discriminatory. In *Grosjean v. American Press*, 297 U.S. 233 (1936), the Louisiana legislature had placed a tax on large circulation papers but not on small circulation newspapers. A duty to comply with the Fair Labor Standards Act likewise was placed on some newspapers but not others. Therefore White Plains Publishing Co. argued that the statutory exemptions for small circulation newspapers (weekly and semiweekly) represented discriminatory regulation.

MABEE v. WHITE PLAINS PUBLISHING CO.

327 U.S. 178, 66 S.CT. 511, 90 L.ED. 607 (1946).

Justice DOUGLAS delivered the opinion of the Court.

* * *

* * * Volume of circulation, frequency of issue, and area of distribution are said to be an improper basis of classification. Moreover, it is said that the Act lays a direct burden on the press in violation of the First Amendment. The Grosjean case is not in point here. There the press was singled out for special taxation and the tax was graduated in accordance with volume of circulation. No such vice inheres in this legislation. As the press has business aspects it has no special immunity from laws applicable to business in general. *Associated Press v. NLRB*, 301 U.S. 103, 132–133. And the exemption of small weeklies and semi-weeklies is not a "deliberate and calculated device" to penalize a certain group of newspapers. *Grosjean v. American Press Co.* As we have seen, it was inserted to put those papers more on a parity with other small town enterprises. 83 Cong.Rec. 7445. The Fifth Amendment does not require full and uniform exercise of the commerce power. Congress may weigh relative needs and restrict the application of a legislative policy to less than the entire field. * * *

COMMENT

The act had previously been challenged on the grounds that it might drive financially weak newspapers out of business entirely. *Sun Publishing Co. v. Walling*, 140 F.2d 445 (6th Cir. 1944). The court rejected the unusual proposition that the First Amendment grants publishers a guarantee of economic security.

The exemption of certain small newspapers was upheld, although discriminatory, because it was not designed to penalize other newspapers. Would the exemption survive under the *Minneapolis Star* test?

In the second case, the Court held that provisions of the Fair Labor Standards Act requiring submission of pertinent records pursuant to a court order do not violate the First and Fourth Amendment rights of a newspaper publisher.

In this companion case to *Mabee*, a Department of Labor Administrator sought judicial enforcement of *subpoenas duces tecum* issued in the course of investigations conducted pursuant to § 11(a) of the Fair Labor Standards Act, 29 U.S.C.A. § 211(a). The subpoenas sought records to determine whether Oklahoma Press was violating the Fair Labor Standards Act.

The Court quickly rejected the arguments of *Oklahoma Press* that application of the act to the publishing business and the classification method (circulation) used to determine whether a newspaper may be regulated under the act was in violation of its First Amendment rights.

Instead, the Court examined the contention that enforcement of the subpoenas would permit a general fishing expedition into the newspaper's records, without a prior charge, in violation of the Fourth Amendment's search and seizure provisions.

OKLAHOMA PRESS PUBLISHING CO. v. WALLING

327 U.S. 186, 66 S.CT. 494, 90 L.ED. 614 (1946).

Justice RUTLEDGE.

What petitioners seek is not to prevent an unlawful search and seizure. It is rather a total immunity to the act's provisions, applicable to all others similarly situated, requiring them to submit their pertinent records for the Administrator's inspection under every judicial safeguard, after and only after an order of court made pursuant to and exact compliance with authority granted by Congress. This broad claim of immunity no doubt is induced by petitioners' First Amendment contentions. But beyond them

it is rested also upon conceptions of the Fourth Amendment equally lacking in merit.

* * *

The matter of requiring the production of books and records to secure evidence is not as one-sided, in this kind of situation, as the most extreme expressions of either emphasis would indicate. With some obvious exceptions, there has always been a real problem of balancing the public interest against private security.

* * *

* * * Whatever limits there may be to congressional power to provide for the production of corporate or other business records, therefore, they are not to be found, in view of the course of prior decisions, in any such absolute or universal immunity as petitioners seek.

* * *

The only records or documents sought were corporate ones. No possible element of self-incrimination was therefore presented or in fact claimed. All the records sought were relevant to the authorized inquiry, the purpose of which was to determine two issues, whether petitioners were subject to the act and, if so, whether they were violating it. * * * It is not to be doubted that Congress could authorize investigation of these matters. * * *

On the other hand, *[Oklahoma Press's]* view if accepted would stop much if not all investigation in the public interest at the threshold of inquiry and, in the case of the Administrator, is designed avowedly to do so. This would render substantially impossible his effective discharge of the duties of investigation and enforcement which Congress has placed upon him. And if his functions could be thus blocked, so might many others of equal importance. * * *"

COMMENT

One quaint holdover in the FLSA and in various state statutes is an exemption for newspaper carriers, who are entitled neither to bargain collectively nor to a minimum wage.[93] At a time when the switch from afternoon to morning publication continues apace, and adults have begun to outnumber adolescents in the newspaper delivery force, the exemptions have little practical application today. Circulation workers, so long as they can show they qualify as employees, may be protected. The states routinely exempt carriers from application of minimum age to work laws.[94] The "newsboy" may be the only exemption so strictly designed to benefit a specific industry.

The NLRA also stipulates that a labor organization may be found to engage in unfair labor practices in various circumstances. One such instance occurs when an employee prefers not to engage in collective bargaining activities.

In *Buckley v. American Federation of Television and Radio Artists*, 496 F.2d 305 (2d Cir. 1974), the court of appeals held that a union shop agreement requiring television commentators to pay union dues as a condition of employment is not an infringement of their First Amendment right of free speech. The court found that a restraint on the right of free speech was not a violation of the First Amendment where there is a proper governmental purpose for imposing that restraint and where the restraint is imposed so as not unwarrantedly to abridge acts normally comprehended within the First Amendment.

William F. Buckley, Jr., and M. Stanton Evans, television and radio commentators expressing a conservative point of view on public issues, brought suit in federal court for a declaratory judgment challenging the constitutionality of § 8(a)(3) of the National Labor Relations Act [29 U.S.C.A. § 158(a)(3)], as it applied to their relations with the American Federation of Television and Radio Artists (AFTRA). The main thrust of their complaint was that this provision of the act allowed AFTRA to require them to join in AFTRA strikes or work stoppages against the television and radio networks and to subject them to union discipline (fines or cancellation of membership) for continuing to broadcast their commentary in the face of AFTRA's orders to strike.

Both Buckley and Evans had joined AFTRA under protest and asserted that their continued membership under these conditions had a chilling effect on their exercise of the First Amendment rights of free press and free speech as commentators.

Against the constitutional rights asserted by plaintiffs, the Court balanced the legislative purpose underlying the "union shop" provision of the act:

93. See, e.g., West's Rev. Code Wash. Ann. § 49.46.010(f) (Supp. 1986); Pa. Stat. Ann. tit. 43 § 333.105(3) (Purdon Supp. 1985).
94. See, e.g. Mass Ann. Laws ch. 149 § 69 (Michie/Law. Co-op. 1976).

> Moreover, we find that the means adopted to achieve this proper purpose of reducing industrial strife are reasonable and do not "unwarrantedly abridge" free speech. The dues here are not flat fees imposed directly on the exercise of a federal right. To the contrary, assuming *arguendo* that government action is involved here, the dues more logically would constitute the employee's share of the expenses of operating a valid labor regulatory system which serves a substantial public purpose. If there is any burden on [plaintiffs'] free speech it would appear to be no more objectionable than a "nondiscriminatory [form] of general taxation" which can be constitutionally imposed on the communication media.

Buckley and Evans did not attack on constitutional grounds the general application of the National Labor Relations Act to the broadcast industry. The NLRB assumed jurisdiction over labor disputes in broadcasting at an early date. *Los Angeles Broadcasting* Co., 4 NLRB 443 (1937). The major problem the NLRB faced was in determining whether local stations were engaged in interstate commerce as defined in the act since the NLRB had no jurisdiction if the labor dispute did not involve interstate commerce. See *AP v. NLRB*, 301 U.S. 103 (1937).

The history of the NLRB's solutions to this problem reflects the growth and development of the broadcast industry. Early cases relied for their rulings on the fact that local stations were in interstate commerce depending upon electricity purchased out of state, FCC licensing, and the fact that the station's signals could be picked up in other states. *Los Angeles Broadcasting, KMOX Broadcasting*, 10 NLRB 479 (1938). Later the board relied upon such factors as network affiliation, subscription to the AP news service, advertising of nationally distributed products, and payment of copyright royalties to ASCAP or Broadcast Music, Inc. (BMI) in New York City or Chicago.

What is important to note about this history is that broadcasters fought the NLRB on jurisdictional grounds. Constitutional arguments, like those made in *AP v. NLRB*, were apparently rarely raised.

The AFTRA agreement with the networks originally covered only "entertainers and artists." Does this help to explain part of Buckley's and Evans's difficulties with union membership? Have broadcasters always considered themselves part of the press?

Could this case have been brought by the broadcast stations employing Buckley and Evans on a freedom of the press theory? Their argument would be that a news commentator's job is equivalent to that of the editorial writer in *Wichita Eagle*. Could Buckley and Evans have argued the same theory on their own behalf?

The court in *Buckley* distinguished between the levying of mandatory dues which serve a substantial public interest and flat fees imposed directly on the exercise of free speech. Is this distinction adequate?

A year later the Supreme Court denied review of *Buckley v. AFTRA*. Justice Douglas dissented from the denial of certiorari:

> There is a substantial question whether the union dues requirement imposed upon these petitioners should be characterized as a prior restraint or inhibition upon their free speech rights. In some respects, the requirement to pay dues under compulsion can be viewed as the functional equivalent of a "license" to speak. 419 U.S. 1093 (1975).

AFTRA's disciplinary code allows disciplinary measures against a member who does not conform to orders. If expelled from the union, the employee can no longer be hired by a broadcaster with a union shop agreement. Fulton Lewis III, a radio commentator, asserted that he was threatened with discipline, causing him to suspend broadcasts during a strike. The court of appeals of New York did not find an impermissible restraint on free speech since Lewis was free to resign from the union and seek another job where there was no union agreement. Is the court being realistic? Economic and family considerations may make it difficult for a person to change jobs.

The court noted that the union had not retaliated against other members who did not join the strike. Consider the unofficial pressure brought to bear by coworkers and union officials. See *Lewis v. AFTRA*, 357 N.Y.S.2d 419, 313 N.E.2d 735, cert.den. 419 U.S. 1093 (1974).

Isn't the rationale for union representation the need for equality of bargaining power? Do Dan Rather, Barbara Walters, or William F. Buckley, Jr., need a union to represent them? Perhaps the question misses the point. The rest of the AFTRA membership needed members like Buckley in order to have equality of bargaining power.

Are private labor agreements under the NLRA infused with sufficient "governmental action" to give rise to a cause of action under the First Amendment? Constitutional guarantees of free expression embrace only abridgements by the government. Whether union shop agreements like that in *Buckley* actually con-

stitute governmental rather than individual action is a matter of conflicting interpretation. In *Buckley*, the Second Circuit avoided this issue, holding only that "if there were a burden on free speech it would appear to be no more objectionable than a 'nondiscriminatory [form] of general taxation' which can constitutionally be imposed on the communications media." See *Jensen v. Farrel Lines, Inc.*, 625 F.2d 379 (2d Cir. 1980).

The AFTRA Code netted Muhammad Ali attorney fees, court costs, and related expenses when Ali was sued for libel following his appearance as a commentator for ABC. Ali had criticized the performance of a referee during one of his fights. The libel trial resulted in a jury verdict for Ali, who then claimed he was entitled to reimbursement under the code. Under the code, a program producer indemnifies performers against claims arising out of "acts done or words spoken by Performer at Producer's request." Interviewer Howard Cosell's vigorous pursuit of Ali's observations on the quality of officiating may have played a role in meeting the "Producer's request" portion of the code. *ABC v. Ali*, 6 Med.L.Rptr. 1415, 489 F.Supp. 123 (S.D.N.Y. 1980).

A Note on Blacklisting

When a labor union forbids its members to accept employment from a specified list of employers, this practice is called "blacklisting," and it constitutes an unfair labor practice.

AFTRA has had some problems with what it calls its "unfair list." AFTRA went to LK Productions, Inc., producer of a syndicated television show in Houston, Texas, and requested that LK sign AFTRA's "letter of adherence" which set forth the terms and conditions for the appearance of artists on the "Larry Kane Show," produced by LK. When LK refused to sign, AFTRA placed it on the Unfair List. This list, explained an AFTRA publication, "represents employers who have refused to sign the AFTRA codes of fair practice. * * * Accepting employment from any producer on the Unfair List is a violation of AFTRA rules * * * and could result in disciplinary action by the local board, which could mean fines or other penalties." AFTRA also informed theatrical agents and recording companies who dealt with AFTRA artists, warning them that they would face AFTRA sanctions if they dealt with LK Productions.

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C.A. 158(b)(4)(i)(ii)(B) (1970), states that it is an unfair labor practice for a labor organization or its agents "to threaten or coerce or restrain any person engaged in commerce or in an industry affected by commerce, * * * where the object thereof is—(B) forcing or requiring any person * * * to cease doing business with any other person." Courts have called this a prohibition against "secondary boycotts," action or threatened action taken against a neutral employer with whom the union has no dispute in order to bring pressure on the primary employer. Secondary boycotts are proscribed in order to prohibit pressure tactically directed at a neutral employer in a labor dispute not his own and to restrict the field of combat in labor disputes by declaring "off limits" to union pressure those employers who are powerless to solve the dispute.

An NLRB administrative law judge ruled that AFTRA's unfair list constituted a secondary boycott, in that agents and recording companies were being pressured into not dealing with LK, and that the unfair list was thus a clear violation of the National Labor Relations Act. *American Federation of Television and Radio Artists (LK Productions, Inc.), before the NLRB Division of Judges, Judge Lloyd Buchanan*, Case No. 23–CC–463, October 31, 1973.

One comment suggested that since there has only been one national strike by AFTRA, the national labor policy of allowing union shops has been effective in keeping the channels of electronic communications open: union security devices may thus further First Amendment values in the context of the national media. Do you agree? See *Are Television and Radio Commentators Exempt from Union Membership?*, 53 B.U.L.Rev. 745 (1973).

Protection of Employee Rights in Contract Law

Many recent disputes between management and employees are a result of interpretation of specific contract provisions rather than of direct application of federal labor laws. Unless a condition or term of employment is specifically covered by federal or state statute or by collective bargaining, the contract of employment will be the basis for determining the relationship between employee and employer.

Traditionally, at common law, employment agreements were considered subject to the doctrine of employment at will. Under that rule, it was assumed that both parties freely entered into the employment relationship, and it was further assumed that either party could freely terminate the relationship for any or no reason. That rule still applies in the absence of evidence to the contrary. Contrary evidence may be found in a variety of places—employee handbooks, written statements of policy, even in ethics codes. On occasion, even verbal agreements will be considered sufficient to overcome the presumption of employment at will.

Recent cases in many states have restricted the discretion of employers under the employment at will doctrine when an employee is able to show explicit employment terms have been violated by the employer, or that the employer has somehow violated established public policy.[95] Claims that the First Amendment, as a statement of public policy, prevents management from interfering with the editorial discretion of journalists are almost certain to fail, however.

A public policy exception was rejected in a case flowing from the dismissal of Julianne Agnew from her job as lifestyle editor of the *Duluth Herald and News-Tribune*. When Agnew filed as a candidate for city council in 1978, she was discharged pursuant to the paper's conflict of interest policy. The state brought an action against the newspaper based on a Minnesota statute forbidding anyone from paying a person to induce them to become or refrain from becoming a political candidate. The court ordered that an indictment be dismissed because the prosecution was based on a "serious misunderstanding of both the First Amendment" and the corrupt practices statute. *Minnesota v. Knight-Ridder*, 5 Med.L.Rptr. 1705 (Minn.Dist.Ct. 1979). The court implicitly upheld the ethics provisions as an integral part of Agnew's employment contract.

Patrick Sheehan's case against his former employer also shows that contract provisions freely bargained for by the employee are difficult to set aside. Sheehan, a news anchor, signed a noncompetition clause when he began working for WFSB-TV in Hartford, Connecticut. He was told in July 1979 that his contract would not be renewed, although it ran until November. He was no longer performing any work for the station when he began appearing for WTNH, in New Haven. WFSB never invoked the noncompetition clause, rather common in broadcast employment contracts, and Sheehan signed a new contract in New Haven, again with a noncompetition clause. When he jumped stations once more, returning to Hartford, WTNH invoked its clause and sought an injunction. Sheehan eventually prevailed, but only because the clause had been written too broadly, limiting him from employment even in another state. A sharper definition of "market" would likely have made the clause enforceable. *Capital Cities Communications v. Sheehan*, 9 Med.L.Rptr. 2172 (Ct.Super.Ct. 1983).

When Ron Hunter was removed as anchor at a Louisiana television station, he sued for an injunction to reinstate him. Hunter argued that the removal was a violation of his "personal services contract." A lower court had granted a temporary restraining order reinstating Hunter. An appeals court reversed. *Hunter v. Gaylord Broadcasting Co.*, 12 Med.L.Rptr. 1591 (La.App. 1985). Being removed from the air was not the sort of immediate and irreparable injury needed for such an order, the court said. Hunter would receive his compensation for time remaining on the contract. Requiring that the station place him on air would interfere with its editorial judgment, the court added.

Many disputes of the last two decades have resulted from reductions in the number of production employees as a result of rapid technological change and of consolidation in the newspaper business. A case brought by dismissed production workers represented by the International Typographical Union following the closing of the *Cleveland Press* is illustrative.

The employees had negotiated a guarantee of employment in exchange for concessions on job duties. The contract, however, provided that the employment guarantee was terminated for a given paper's employees if either of the two Cleveland newspapers closed. The dismissed employees filed suit, claiming violations of federal labor law, antitrust law, and Ohio common law. *Province v. Cleveland Press Publishing Co.*, 787 F.2d 1047 (6th Cir. 1986).

The plaintiffs lost on all claims. No antitrust violation was proved because there was no evidence that the *Press* and the *Cleveland Plain Dealer* had

95. Taylor, *Newspaper Ethics Codes and the Employment-at-Will Doctrine*, paper presented to the Law Division, Association for Education in Journalism and Mass Communication, Portland, Oregon, July 1988.

conspired to terminate the agreement. The common law action was based on tortious interference with contract. Plaintiffs argued that the two newspapers' managements had worked together to destroy the employment guarantee. That claim also relied on proof of intent to cause harm, so it was dismissed. The express terms of the contract were held binding. The allegation that the *Press*, after years of losses delineated by the court, would conspire to cease publication primarily to avoid employment guarantees seems a bit strained.

For a case discussing a newspaper union's concern about the effect of new technology "on the bargaining unit, the extent of potential job displacement, and the result of new unit employees to operate the new equipment," see *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956 at 959 (10th Cir.1980). The case also discusses the rise of the video display terminal in the newsroom. See Jaske, *Collective Bargaining Issues in Newspapers*, 4 Comm/Ent 595 at 596 (1982). See generally, Ganzglass, *Impact of New Technology on Existing Bargaining Units in the Newspaper Industry*, 4 Comm/Ent 605 (1982).

The *Cincinnati Post* arranged to combine operations with the *Cincinnati Enquirer* on the ground that the *Post* was "a failing newspaper" under the provisions of the Newspaper Preservation Act, 15 U.S.C.A. § 1801 (1976). After the joint operating agreement was approved and the agreement between the Cincinnati newspapers was deemed to be exempt from the antitrust laws under the act, the *Cincinnati Post* closed its composing room and fired all the printers. However, these printers earlier had been guaranteed that they would be continuously employed for the remainder of their working lives by the *Post*. The *Post*, however, sought, after the approval of the joint operating agreement, to abrogate the lifetime job guarantee. Is the agreement still enforceable? In *Heheman v. Scripps*, 6 Med.L.Rptr. 2089, 661 F.2d 1115 (6th Cir. 1981), Judge Merritt ruled as follows:

> In this case we are called upon to decide what effect should be given to an agreement in the newspaper industry guaranteeing lifetime job security for printers. The newspaper terminated the workers covered by the agreement following a partial reorganization and merger. We reverse the decision of the District Court which declined to give full effect to the job security agreement.

In a recent analysis of the case it was pointed out that the question of whether a lifetime job guarantee specifies "a particular rate of pay" was left unresolved by the court. Could *Scripps*, the publisher of the *Cincinnati Post*, take the position that, although it would adhere to its job guarantee, "its wage proposal would be minimum wage or even zero." See Jaske, *Collective Bargaining Issues in Newspapers*, 4 Comm/Ent 595 at 599 (1982). Jaske, Vice-President for Labor Relations of the Gannett Company, made the following general observations about the issues presented by *Scripps*:

> It is not believed that the union's victory in *Scripps* will necessarily preclude management, which is desperate for relief from overstaffing, from negotiating changes or attempting to eliminate "lifetime" job guarantees. The outcome of such a challenge will undoubtedly turn on the wording of the guarantee. These questions will continue to dominate negotiations between newspapers and the ITU.

Union jurisdictional disputes resulting in labor strife such as strikes and picketing occur in the electronic as well as the print media. Illustrative is *American Broadcasting Companies, Inc. v. Writers Guild of America, West, Inc.*, 437 U.S. 411 (1978), involving three cases decided together by the Supreme Court. Among the antagonists were the Motion Picture and Television Producers, Inc., and the three television networks, NBC, CBS, and ABC, versus the Writers Guild.

Some employees perform various tasks which come within the jurisdiction of more than one union. The employee can be caught in a conflict between pressures from different unions and managements. When one union goes on strike, the other labor organizations may require that employees honor no-strike pledges in their contracts, and management may demand that employees perform duties which are not within the jurisdiction of the striking union. *American Broadcasting Companies* involved disciplinary proceedings brought by the Writers Guild against a union member, who was a supervisory employee with limited writing duties, for crossing the union's picket line during a strike and performing only his regular supervisory duties which included acting as the employer's grievance representative.

The Supreme Court held that union action in issuing rules prohibiting producers, directors, and story editors from performing their supervisory duties during the course of the strike and imposing sanctions on those who did perform such duties was unlawful. The union violated the National Labor

Relations Act, which prohibits union attempts to coerce employers in the selection of their representatives for grievance adjustment purposes.

Four justices dissented contending that "The Court holds today that a labor union locked in a direct economic confrontation with an employer is powerless to impose sanctions on its own members who choose to pledge their loyalty to the adversary."

Other statutes may effectively modify an employment agreement as a matter of public policy. For example, federal and state civil rights provisions prohibiting discrimination based on race, sex, or age, as laws of general application, surely may be enforced against the media. Although dismissed news anchor Christine Craft lost her sex discrimination claim against her former employer, the court never doubted that the statutes may apply to the media.[96] Black reporters at the New York *Daily News* filed a race discrimination suit against the paper that attracted considerable adverse attention to the industry's record in minority hiring and promotion.[97] Much as in the case of an unfair labor practice charge, an employer who has made an employment decision on the conclusion that the plaintiff was less qualified will generally be upheld; it is the pretext that hides discrimination which may result in liability.[98]

Another common statutory concern is with workmen's compensation and disability provisions. In *Mulcahey v. New England Newspapers, Inc.*, the Rhode Island Supreme Court held that a widow was entitled to compensation benefits after her husband, the sports editor of the *Pawtucket Evening Times*, died of a cerebral hemorrhage spurred by the pressures and stress of his job.[99] In order to qualify for such benefits, an individual must qualify as an employee. Qualification has been an issue where part-time employees, stringers, and newspaper carriers are involved.[100]

SECTION FOUR

TAXATION AND LICENSING OF THE PRESS

Constitutional Background

First Amendment analysis of restraints on the press is dramatically different today from what the framers first envisioned. Threats against the press are seldom as direct as during the colonial period when the government formally licensed newspapers or used tax provisions to limit or hinder press activities.[101] Threats against the press are likely to be subtler, involving disputes over the placement of newsracks, over application of state and federal tax laws, or over enforcement of laws regulating public solicitation or distribution of materials.

The constitutional basics are clear. Under *Grosjean v. American Press*,[102] tax statutes passed with the intent of hindering the press are invalid; it follows that other statutes aimed at punishing or hindering the press are invalid. Under *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*,[103] any statute which singles out the press from other businesses for differential treatment, even if beneficial, is suspect and likely invalid. Under *Associated Press v. NLRB*,[104] however, laws of general application that are applied evenly to all businesses will be valid when applied to the press. The general principle from these cases, taken together, is the traditional rule that government actions which affect media content will only be valid if justified by evidence of an extremely strong government interest.[105] A similar analysis will apply when government treats some publishers or speakers differently from others.

The First Amendment's primary concern that government not be allowed to regulate content is implicated less directly, but implicated nonetheless,

96. *Craft v. Metromedia, Inc.*, 766 F.2d 1205 (8th Cir. 1985) (court determined that reliance on audience surveys by employer avoided claim of sex discrimination); see Note, *Sex Discrimination in Newscasting*, 84 Michigan L.Rev. 443 (1985).

97. Cook, "In New York City, the 'News' Faces Reporters' Bias Charges," National L. J. (March 9, 1987), 6; see Stevens, *Discrimination in the Newsroom: Title VII and the Journalist*, Journalism Monographs, No. 94, September 1985.

98. *Walter v. KFGO Radio*, 518 F.Supp. 1309 (D.N.D. 1981).

99. Breton, "R.I. Newspaper Held Liable in Job-Related Stress Death," National L. J. (March 18, 1985), 10.

100. *Gittrich v. Dispatch Printing Co.*, 14 Med.L.Rptr. 1317 (Ohio App. 1987) (carriers independent contractors); Radolf, "Philadelphia NLRB says stringers are employees," Editor & Publisher (August 13, 1988), 28.

101. Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 William & Mary L.Rev. 439 (1987).

102. 1 Med.L.Rptr. 2685, 297 U.S. 233 (1936).

103. 9 Med.L.Rptr. 1369, 460 U.S. 575 (1983).

104. 1 Med.L.Rptr. 2689, 301 U.S. 103 (1937).

105. *Consolidated Edison v. Public Service Comm'n*, 6 Med.L.Rptr. 1518, 447 U.S. 530 (1980) (compelling interest test applies when government attempts to regulate on the basis of content).

when regulation is addressed initially to business aspects of the media rather than editorial aspects.

Cases involving taxation or licensing-type issues take two main forms: disputes involving assertions that government is picking and choosing from different media in allowing privileges or benefits, and claims that laws or rules applied to the press directly violate the First Amendment although the same laws might be valid if applied to other parties.

Regulation of Media Distribution

The 1980s saw a spate of cases in which newspapers have challenged the authority of municipalities to regulate the placement of newsracks.[106] The interests government has asserted include aesthetics, pedestrian traffic safety, and potential liability for injuries. In many cities, concern over congestion on sidewalks is merited. With racks featuring various national, regional, local, and specialized newspapers, there may not be a lot of room left. The sidewalk adjacent to one Washington, D.C. subway station recently sported sixteen newsracks.

In *Southern Connecticut Newspapers v. Greenwich*, 11 Med.L.Rptr. 1051 (D.Ct. 1984), the city passed an ordinance regulating newsracks. First, a newspaper must obtain a permit prior to placing a newsrack. To avoid liability for injuries, a certificate proving insurance for more than $1 million is required. The city's interest was apparently traffic safety, although no study was undertaken showing any danger to traffic safety. The ordinance placed discretion with the chief of police to prohibit newsracks whenever it appeared the rack could pose a danger to auto or pedestrian traffic. Under the traditional rules of analysis for time, place, and manner regulations, Greenwich's law was a virtual blueprint for invalidity.

The city of Keene, New Hampshire went too far, a court said, when it used boltcutters to remove *Brattleboro Reformer* newsracks that had been chained to parking meters on Main Street. The city had no newsrack ordinance. The removal took place because the city attorney concluded the racks were improperly situated. In court, the city argued public safety as its interest, but there was little to indicate danger from newsracks on the sidewalks or streets of the small city. The city failed the time, place, and manner test. *Miller Newspapers v. Keene*, 9 Med.L.Rptr. 1234, 546 F.Supp. 831 (D.N.H. 1982). The newspaper obtained an injunction preventing additional removals.

When Lakewood, Ohio, a suburb of Cleveland, attempted to enforce a newsrack ordinance against the *Cleveland Plain Dealer*, a newsrack case finally made its way to the Supreme Court. In a 4–3 case (Chief Justice Rehnquist and Justice Kennedy did not participate), Justice Brennan's opinion invoked the spectre of prior restraint. (See text, page 40). The opinion concluded that the standards applicable to regulation of the distribution of leaflets and pamphlets should be applied to regulation of vending boxes. The city's attempt to distinguish the ordinance as a business regulation of general application failed. *Lakewood v. Plain Dealer Publishing Co.*, 15 Med.L.Rptr. 1481, 108 S.Ct. 2138 (1988).

The opinion focuses almost exclusively on the issue of official discretion. Since that issue is enough to declare the ordinance unconstitutional, the Court, as it typically does, leaves other issues alone. But would the result be any different if the Court had more closely considered time, place, and manner factors, or had assessed the city's asserted interest?

The *Lakewood* decision appears consistent with *Minneapolis Star* and *Associated Press*. A newsrack ordinance can never be of general application because it is aimed directly at the press, triggering greater scrutiny from the Court. Still, Brennan declined to cite *Minneapolis Star* in the case, perhaps indicating that the earlier case's compelling interest approach does not apply with full force in newsrack disputes.

The rule of *Lakewood* that an ordinance will be invalid if there is too much room for discretion by city officials was the basis for validating a Des Moines, Iowa ordinance less than a month after the Supreme Court decision. Limiting the opinion to the proposition that an ordinance will be valid if it assures decisions are not based on the content of speech, the court denied a motion for a preliminary injunction. *Jacobsen v. Crivaro*, 15 Med.L.Rptr. 1958 (8th Cir. 1988). The court also determined that a ten dollar annual license fee, which covered administrative costs, did not amount to an unconsti-

106. *Providence Journal v. Newport*, 14 Med.L.Rptr. 1545, 665 F.Supp. 107 (D.R.I. 1987); *Gannett Satellite Information Network v. Metropolitan Transit Authority*, 10 Med.L.Rptr. 2424, 745 F.2d 767 (2d Cir. 1984); *Miami Herald v. City of Hallandale*, 10 Med.L.Rptr. 2049, 734 F.2d 666 (11th Cir. 1984).

tutional attempt to license the press. The ordinance required the city director of traffic and transportation to issue a permit if the technical provisions were complied with.

In contrast, an ordinance which left significant discretion in the hands of a city manager was declared unconstitutional in *Chicago Newspaper Publishers Ass'n. v. Wheaton*, 15 Med.L.Rptr. 2297 (N.D.Ill. 1988). Although the ordinance specified factors for the city manager to consider when reviewing a permit request, in the last analysis it vested final discretion to decide if there was a health or safety hazard or a sidewalk obstruction with the city manager.

Do the same principles apply when a different method of distribution is used? The Third Circuit said yes when Doylestown, Pennsylvania enforced an ordinance banning door-to-door delivery of advertising materials. Plaintiff Ad World was the publisher of *Piggy Back*, a tabloid that was primarily advertising—a free "shopper"—but also carried a few pages of consumer and community information. The city claimed that the ordinance was backed by interests in preventing litter and vandalism and in protecting residents from receiving materials they had not asked for. The court determined that the shopper, however little news it carried, was entitled to full First Amendment protection like other newspapers. *Ad World v. Doylestown*, 8 Med.L.Rptr. 1073, 672 F.2d 1136 (3d Cir. 1982). Since the ordinance was not narrowly drawn and no reasonable alternatives were available to the *Piggy Back*, the ordinance was declared unconstitutional.

A similar problem was faced by the *Chicago Tribune* when it ran into the Downers Grove solicitation ordinance. The law provided that commercial solicitors must obtain a permit and pay a fee. Then there was a minimum five-day waiting period. Finally, no more than fifteen commercial permits were allowed at any one time. *Tribune* solicitors without permits were stopped by Downers Grove police. No limit was placed on the number of permits for noncommercial solicitation, which included charitable, religious, and political groups. In addition, commercial permits were good only from 9 a.m. to 6 p.m., but noncommercial ones from 9 a.m. to 8 p.m. The court had little difficulty deciding that the ordinance was fatally overbroad. *Chicago Tribune v. Downers Grove*, 15 Med.L.Rptr. 2459 (Ill. 1988). Even if narrowly tailored, the court said, the ordinance was still objectionable because of its questionable discrimination between kinds of solicitation. There was no evidence that commercial solicitors posed more problems or greater dangers than noncommercial ones. The court concluded that only evidence of a compelling interest would validate the ordinance.

Cases involving municipal regulation of media distribution never involve situations where the city has undertaken licensing of the press in any formal sense. The courts, however, consistently refer to cases warning of the dangers of licensing in invalidating regulations. Much of the rationale applied seems related to the "slippery slope" argument—if any regulation or licensing is allowed, how much more will government seek?

Closely related to distribution is ownership. Newspapers have generally not been subject to as much regulation concerning ownership as have broadcast or cable. The authority of federal and even state government to place restrictions on broadcast and cable solely on the basis of ownership has been upheld repeatedly. For example, state requirements that cable franchisees provide access channels, a practice inapplicable to newspapers under *Tornillo*, have withstood challenge.[107] A congressional continuing budget resolution prohibits extensions of waivers to the FCC's cross-ownership rules, which prohibit owning a daily newspaper and broadcast station in the same city, but the resolution essentially limits only one owner, Rupert Murdoch. Rupert Murdoch's *Boston Herald* had attacked Senator Edward Kennedy aggressively in news stories and editorials. At the time, Murdoch owned the *Post* and a television station in New York City. The resolution was passed essentially at the senator's behest. The resolution failed to even meet "mimimum rationality," a court said. Even if it had met that test, the court indicated that the *Minneapolis Star* standard would likely apply. *News America Publishing v. FCC*, 15 Med.L.Rptr. 1161, 844 F.2d 800 (D.C.Cir. 1988).

The Media and Taxation

Following *Minneapolis Star*, in which the Court declared unconstitutional a sales and use tax plan

107. *Berkshire Cablevision v. Burke*, 9 Med.L.Rptr. 2321, 571 F.Supp. 976 (D.R.I. 1983).

that affected only the press, there has been a great deal of activity in the lower courts. On one side, the media attempt to extend the *Minneapolis Star* rule against statutes that single out the press for differential treatment to other contexts. And governments, reminded that tax laws of general application are valid when enforced on the media, have considered broadening tax provisions to include the press where it had not been taxed before.

For example, most states exempt newspapers from sales tax. A major reason behind the exemptions is to encourage citizens to buy newspapers. It is also difficult to enforce a sales tax efficiently on such small transactions. Both points were raised in the Minnesota case. Following the *Star* case, it could be argued that the test used was equally able to invalidate laws favoring the press as those disfavoring it, and states might see the case as an occasion for changing their laws.[108] One of the first provisions reconsidered was sales tax exemption.[109] Other states began to consider taxing sales of services as well as goods.[110] Florida's advertising sales tax was controversial. Publishers and broadcasters argued that it violated the First Amendment, but it was upheld by the state supreme court. The media's argument appeared to be that a tax on advertising "singles out" the press in much the same way a newsrack ordinance does. The state's response was that selling advertising is just one of thousands of service transactions currently left untaxed. Most states do not impose a sales tax on services, although the temptation to do so grows as the service portion of the economy grows. In any event, the Florida statute was rescinded before the challenge could go far.[111]

Most states' sales tax statutes exempt from taxation purchases of materials that will themselves be incorporated into a product for sale. In this fashion, double taxation of the same material is avoided. Newspapers have traditionally benefited from such exemptions. For example, in *McClure Newspapers v. Vermont Department of Taxes*, 315 A.2d 452 (Vt. 1974), purchases of reporters' notebooks and even flashbulbs were held exempt as component parts of the final product.[112] Some states will hold that virtually anything, including preprinted inserts, are a component part of the final product,[113] while others read the exemption narrowly as applying to materials such as newsprint and ink only.[114] A free circulation publication, *Neighbor*, sought exemption from the sales tax provisions in Florida but was denied because it did not meet the administrative rule definition of a newspaper. One of the requirements is that the publication be sold and not given away. The court held that the provision was nonetheless not discriminatory because the sales tax "is widely applicable to businesses of all kinds. * * *" *North American Publications, Inc. v. Department of Revenue*, 436 So.2d 954 (Fla.App. 1983). The court said that *Star* was inapplicable because the Florida statute was not similar to a penalty. Did the court read *Star* correctly? A North Carolina court similarly upheld a sales and use tax that treated unpaid and paid circulation publications differently.[115]

Westinghouse Broadcasting v. Commissioner of Revenue, 7 Med.L.Rptr. 1066, 416 N.E.2d 191 (Mass. 1981), appeal dismissed 452 U.S. 933 (1981), involved a claim that the Massachusetts sales tax exemption for manufacturing should apply to the creation of television signals, and that to the extent the exemption favored newspapers, it violated the First Amendment. The court, in a pre-*Star* analysis, applied the traditional tax law rule that legislation may "make narrow distinctions without running into trouble on a constitutional level." Westinghouse sought review in the Supreme Court, advancing arguments remarkably similar to those used by the Court two years later in *Star*.

Media companies have attempted to extend *Star* with little success. The recent Supreme Court decision in *Arkansas Writers' Project v. Ragland*[116] (text,

108. Simon, *All the News That's Fit to Tax: First Amendment Limitations on State and Local Taxation of the Press*, 21 Wake Forest L.Rev. 59 (1985).

109. *Legislatures chip away at newspapers' tax exemptions*, Presstime (August 1986), 40.

110. For a complete listing of state sales and use taxes affecting newspapers, see *Six states now tax some form of advertising, but the number taxing newsprint and ink declines*, Presstime (February 1986), 42.

111. See Weber, *Florida's Fleeting Sales Tax on Services*, 15 Florida State University L.Rev. 613 (1987).

112. But see, *Bodenstein v. Vermont*, 12 Med.L.Rptr. 2101, 510 A.2d 1314 (Vt. 1986) (materials used in producing newspaper advertisements not considered part of eventual product).

113. See, e.g., *In re Appeal of K-Mart*, 12 Med.L.Rptr. 1579 (Kan. 1985); *Allentown v. Call-Chronicle*, 13 Med.L.Rptr. 2329 (Pa.Ct.Common Pleas 1987).

114. *Sears, Roebuck & Co. v. Woods*, 12 Med.L.Rptr. 1897, 708 S.W.2d 374 (Tenn. 1986).

115. *Matter of Assessment of Additional North Carolina and Orange County Use Taxes*, 322 S.E.2d 115 (N.C. 1984).

116. 13 Med.L.Rptr. 2313, 107 S.Ct. 1722 (1987).

p. 128) was an exceptionally straightforward application of the test, since Arkansas's statute taxed some magazines but not others. *Texas Monthly v. Bullock*, 16 Med.L.Rptr. 1177, ___ S.Ct. ___ (1989) involves a similar provision. Texas exempted from sales tax religious periodicals but not others. *Texas Monthly* sought to have the statute declared unconstitutional and get a tax refund of about $150,000. The Texas Court of Appeals upheld the discriminatory provision on the ground that the state had a rational basis, and no more was needed. At oral argument before the Supreme Court, the state argued that the exemption serves the compelling interest of avoiding an entanglement with religion, also a First Amendment violation.[117] How the exemption avoids entanglement when a state official must grant the exemption is problematic. In the lower court, the state said it granted the exemption to any group claiming it was a bona fide religious group. The Supreme Court, in an opinion by Justice Brennan, determined that the Texas law violated the First Amendment's establishment clause. The indirect tax subsidy for religious organizations had the effect of "endorsing" those organizations. Only Justice White, concurring, thought the press taxation cases dictated the result.

The limits of *Star* are suggested by *City of Alameda v. Premier Communications Network, Inc.*, 202 Cal.Rptr. 684 (Cal.App. 1984). In *Premier*, a cable television operator succeeded in having declared invalid a city business license fee that applied to cable, but not to newspapers. The provision, however, contained so many exceptions that Premier became one of only four categories of businesses actually taxed. The court noted that the city's only asserted interest was raising revenue, never enough under *Star*. On the other hand, by such analysis a cable operator might effectively escape taxation. Newspapers, as manufacturers, will likely be liable for use taxes if not sales taxes, but use or sales taxes are generally inapplicable as applied to a cable system. The potential reach of *Premier* was limited in a subsequent case which upheld a city business tax that applied to all businesses in the community. *Times Mirror Co. v. Los Angeles*, 14 Med.L.Rptr. 1289, 237 Cal.Rptr. 346 (Cal.App. 1987). *Premier* was apparently limited to its specific facts. The court concluded that the business tax neither resembled a penalty nor operated like one. The court furthermore upheld different methods of computing taxes of media companies. "The inherent difference between these various forms of media is patent," the court said. As long as the effective tax burden was equal and nondiscriminatory, legislative classification would be allowed on a rational basis standard.

Is the result in *Times-Mirror* a necessary limitation? Would *Star* otherwise provide the basis for challenges to any tax program applied to the media? The California court seems to think so. Consider this case. In Chicago, the licensed cable franchise is exempt from the amusement tax. A provider of microwave-transmitted subscription movie services is not exempt. But the cable company pays a franchise fee. An Illinois appeals court said the difference was an unconstitutional one. The franchise fee was considered payment for the value of using public rights of way, etc. No attempt was made to assess the relative economic impact on the two.[118]

Regulation of Tax-Exempt Media

More than 600,000 groups or organizations qualify as exempt from taxation under the federal Internal Revenue Code. If a group also qualifies as educational or cultural, it may receive donations which are deductible from the donees' personal income taxes.[119] Thousands of tax-exempt organizations produce publications, operate broadcast stations, or otherwise engage in creation of media content. University student newspapers, scholarly journals, and educational broadcasters are all typically considered tax-exempt, nonprofit educational organizations under the Code. Does the grant of tax-exempt status allow the government greater regulatory authority than it would have over other media?

The District of Columbia Circuit, in a pair of apparently contradictory decisions, answered both yes and no. Each case deals with the doctrine of unconstitutional conditions that stems from *Hannegan v. Esquire* (text, p. 115). Under that analysis, government may not condition receipt of a benefit or privilege upon the waiver of a constitutional right. But unless the IRS takes steps and passes regulations

117. "Court Hears Argument on Texas Tax Exemption," Media Law Reporter, News Notes, vol. 15, No. 31, Nov. 8, 1988.
118. *Statellink of Chicago, Inc. v. City of Chicago*, 523 N.E.2d 13 (Ill.App. 1988).
119. Internal Revenue Code § 501(c)(3).

to assure that media produced by tax-exempt groups satisfy the purposes of providing educational or cultural benefits, how can the government avoid a severe drain on tax revenues? Tax exemption, after all, represents an indirect subsidy in the form of tax revenues foregone by government. The subsidy is therefore paid by elevated taxes for everyone else. When reading the excerpts from the two cases that follow, ask which party—government or the publisher—is best serving the public's interests.

BIG MAMA RAG, INC. v. UNITED STATES

631 F.2D 1030 (D.C.CIR. 1980).

MIKVA, Circuit Judge:

Plaintiff, Big Mama Rag, Inc. (BMR, Inc.), appeals from the order of the court below granting summary judgment to defendants and upholding the IRS's rejection of plaintiff's application for tax-exempt status. Specifically, BMR, Inc. questions the finding that it is not entitled to tax exemption as an educational or charitable organization under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3) (1976), and Treas.Reg. § 1.501(c)(3) 1(d)(2) & (3) (1959). Appellant also challenges the constitutionality of the regulatory scheme, arguing that it violates the First Amendment and the equal protection component of the Fifth Amendment and that it unconstitutionally conditions tax exempt status on the waiver of constitutional rights.

Because we find that the definition of "educational" contained in Treas. Reg. § 1.501(c)(3) 1(d)(3) is unconstitutionally vague in violation of the First Amendment, we reverse the order of the court below.

BMR, Inc. is a nonprofit organization with a feminist orientation. Its purpose is "to create a channel of communication for women that would educate and inform them on general issues of concern to them." App. 76. To this end, it publishes a monthly newspaper, *Big Mama Rag (BMR)*, which prints articles, editorials, calendars of events, and other information of interest to women. BMR, Inc.'s primary activity is the production of that newspaper.

* * *

BMR, Inc. has a predominantly volunteer staff and distributes free approximately 2100 of 2700 copies of *Big Mama Rag's* monthly issues. Moreover, the organization has severely limited the quantity and type of paid advertising. As the district court found, BMR, Inc. neither makes nor intends to make a profit and is dependent on contributions, grants, and funds raised by benefits for over fifty percent of its income. 494 F.Supp. 473, 476 (D.D.C. 1979).

Because of its heavy reliance on charitable contributions, BMR, Inc. applied in 1974 for tax-exempt status as a charitable and educational institution. That request was first denied by the IRS District Director in Austin, Texas, on the ground that the organization's newspaper was indistinguishable from an "ordinary commercial publishing practice." After BMR, Inc. filed a protest and a hearing was held in the IRS National Office, the denial of tax-exempt status was affirmed on three separate grounds:

1. the commercial nature of the newspaper;
2. the political and legislative commentary found throughout; and
3. the articles, lectures, editorials, etc., promoting lesbianism.

* * *

Appellant then brought a declaratory judgment action in the District Court for the District of Columbia. On cross-motions for summary judgment, the judge granted appellees' motion. Although the court rejected appellees' argument that BMR, Inc. was not entitled to tax-exempt status because it was a commercial organization, it agreed that appellant did not satisfy the definitions of "educational" and "charitable" in Treas.Reg. § 1.501(c)(3)–1(d)(2) & (3). The court found no constitutional basis for disturbing the IRS's decision.

Tax exemptions are granted under section 501(c) of the Internal Revenue Code to a variety of socially useful organizations, including the charitable and the educational. The Code forbids exemption of an organization if any part of its net earnings inures to the benefit of private persons or if it is an "action organization"—one that attempts to influence legislation or participates in any political campaign.

* * *

The Treasury regulations also define some of the exempt purposes listed in section 501(c)(3) of the Code, including "charitable" and "educational." The definition of "educational" is the one at issue here:

> The term "educational," as used in section 501(c)(3), relates to—

(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or
(b) The instruction of the public on subjects useful to the individual and beneficial to the community.

An organization may be educational even though it advocates a particular position or viewpoint *so long as it presents a sufficiently full and fair exposition* of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.[Emphasis added.]

Treas.Reg. § 1.501(c)(3)–1(d)(3)(i) (1959).

The district court found that BMR, Inc. was not entitled to tax-exempt status because it had "adopted a stance so doctrinaire" that it could not meet the "full and fair exposition" standard articulated in the definition quoted above.

* * *

Even though tax exemptions are a matter of legislative grace, the denial of which is not usually considered to implicate constitutional values, tax law and constitutional law are not completely distinct entities. In fact, the First Amendment was partly aimed at the so-called "taxes on knowledge," which were intended to limit the circulation of newspapers and therefore the public's opportunity to acquire information about governmental affairs. * * *

Thus, although First Amendment activities need not be subsidized by the state, the discriminatory denial of tax exemptions can impermissibly infringe free speech. *Speiser v. Randall*, 357 U.S. 513, 518, 78 S.Ct. 1332, 1338, 2 L.Ed. 1460 (1958). Similarly, regulations authorizing tax exemptions may not be so unclear as to afford latitude for subjective application by IRS officials. We find that the definition of "educational," and in particular its "full and fair exposition" requirement, is so vague as to violate the First Amendment and to defy our attempts to review its application in this case.

Vague laws are not tolerated for a number of reasons, and the Supreme Court has fashioned the constitutional standards of specificity with these policies in mind. First, the vagueness doctrine incorporates the idea of notice—informing those subject to the law of its meaning. * * * A law must therefore be struck down if " 'men of common intelligence must necessarily guess at its meaning.' " *Hynes v. Mayor of Oradell*, 425 U.S. 610.

Second, the doctrine is concerned with providing officials with explicit guidelines in order to avoid arbitrary and discriminatory enforcement. * * * To that end, laws are invalidated if they are "wholly lacking in 'terms susceptible of objective measurement.' " *Keyishian v. Board of Regents*, 385 U.S. 589. * * *

These standards are especially stringent, and an even greater degree of specificity is required, where, as here, the exercise of First Amendment rights may be chilled by a law of uncertain meaning. * * * Vague laws touching on First Amendment rights, noted the Supreme Court * * *

> require [those subject to them] to "steer far wider of the unlawful zone," than if the boundaries of the forbidden areas were clearly marked, . . . by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.
>
> * * *

Measured by any standard, and especially by the strict standard that must be applied when First Amendment rights are involved, the definition of "educational" contained in Treas.Reg. § 1.501(c)(3)–1(d)(3) must fall because of its excessive vagueness.

We do not minimize the difficulty and delicacy of the task delegated to the Treasury by Congress under section 501(c)(3) of the Code. Words such as "religious," "charitable," "literary," and "educational" easily lend themselves to subjective definitions at odds with the constitutional limitations we describe above. Treasury bravely made a pass at defining "educational," but the more parameters it tried to set, the more problems it encountered. * * *

We find similar problems inherent in the "full and fair exposition" test, on which the district court based affirmance of the IRS's denial of tax-exempt status to BMR, Inc. That test lacks the requisite clarity, both in explaining which applicant organizations are subject to the standard and in articulating its substantive requirements.

The initial question, however, is whether or not BMR, Inc. is an advocacy group at all. What appellant turns to Treas.Reg. § 1.501(c)(3)–1(d)(2) for is the definition of "advocacy," not for the appropriate standard to be applied to advocacy organizations seeking tax-exempt status. The district court did not deal with that question, and, indeed, it is difficult to ascertain from the language of the regulation defining "educational" exactly what organizations are intended to be covered by the "full and

fair exposition" standard and whether or not the definitions of advocacy groups are the same for both educational and charitable organizations.

The uncertainty of the coverage of the "full and fair exposition" standard is evidenced by its application over the years by the IRS. The Treasury Department's Exempt Organizations Handbook has defined "advocates a particular position" as synonymous with "controversial." Such a gloss clearly cannot withstand First Amendment scrutiny. It gives IRS officials no objective standard by which to judge which applicant organizations are advocacy groups—the evaluation is made solely on the basis of one's subjective notion of what is "controversial." And, in fact, only a very few organizations, whose views are not in the mainstream of political thought, have been deemed advocates and held to the "full and fair exposition" standard.

The Treasury regulation defining "educational" is, therefore, unconstitutionally vague in that it does not clearly indicate which organizations are advocacy groups and thereby subject to the "full and fair exposition" standard. And the latitude for subjectivity afforded by the regulation has seemingly resulted in selective application of the "full and fair exposition" standard—one of the very evils that the vagueness doctrine is designed to prevent.

The Treasury definition of "educational" may also be challenged on the ground that it fails to articulate with sufficient specificity the requirements of the "full and fair exposition" standard. The language of the regulation gives no aid in interpreting the meaning of the test.

What makes an exposition "full and fair"? Can it be "fair" without being "full"? Which facts are "pertinent"? How does one tell whether an exposition of the pertinent facts is "sufficient . . . to permit an individual or the public to form an independent opinion or conclusion"? And who is to make all of these determinations?

The regulation's vagueness is especially apparent in the last clause quoted above. That portion of the test is expressly based on an individualistic—and therefore necessarily varying and unascertainable—standard: the reactions of members of the public.

* * *

An additional source of unclarity lies in the relationship between the two sentences comprising the "full and fair exposition" test. Appellant argues that the two should be read as counter-examples—an organization fails to satisfy the test only if "its principal function is the mere presentation of unsupported opinion." The Government, on the other hand, contends that tax-exempt status must be denied BMR, Inc. if a substantial portion of its newspaper consists of unsupported opinion. Again, the language of the regulation does not resolve this issue.

One of the five examples cited by the Government as evidence of *BMR's* failure to meet the "full and fair exposition" test may be used to illustrate our point. Most of the article, discussing Susan Saxe's 1975 plea of guilty to charges stemming from a bank robbery in Philadelphia, is simple journalistic reporting. It discusses the terms of the plea bargain, the reaction of local feminists, the differential treatment accorded Saxe supporters and white men who went to observe the pretrial hearing, and police questioning of women in Philadelphia. In return for Saxe's plea, the Government apparently agreed, among other things, to "call off its investigation of the women's and lesbian communities" in the area and not to ask Saxe to testify against "anyone she has known or know [*sic*] about in the last five years." By forcing Saxe to choose between her own interests and those of other women, the article continues, "the Government has clarified for us, once again, that we, as women, are inextricably bound up with each other in the struggle."

* * *

Certainly, the author's viewpoint is not disguised in the last sentence. But is the statement one of fact or opinion? If the latter, is the author's description of the terms of the guilty plea sufficient to inform readers of the basis underlying her opinion? Or is further proof of the existence of "the struggle" necessary? If so, would the article satisfy the "full and fair exposition" test without that final statement? Neither the Treasury regulation nor the proposed fact/opinion distinction is responsive to these questions. And one's answers will likely be colored by one's attitude towards the author's point of view.

The futility of attempting to draw lines between fact and unsupported opinion is further illustrated by the district court's application of that test. The court did not analyze the contents of *BMR* under its proposed test but merely stated, without further explication, that the publication was not entitled to tax-exempt status because it had "adopted a stance so doctrinaire that it cannot satisfy this standard."

494 F.Supp. at 479. * * * We can conceive of no value-free measurement of the extent to which material is doctrinaire, and the district court's reliance on that evaluative concept corroborates for us the impossibility of principled and objective application of the fact/opinion distinction.

Appellees suggest that the Treasury regulation at issue here embodies a related distinction—between appeals to the emotions and appeals to the mind. Material is educational, they argue, if it appeals to the mind, that is, if it reasons to a conclusion from stated facts. Again, the required line-drawing is difficult, a problem which is compounded if the difference between the two relies on the aforementioned fact/opinion distinction.

Moreover, the Treasury regulation does not support such a narrow concept of "educational" and we cannot approve it. Nowhere does the regulation hint that the definition of "educational" is to turn on the fervor of the organization or the strength of its language. As the Supreme Court has recognized in another context, the emotional content of a word is an important component of its message. See *Cohen v. California*, 403 U.S. 15, 26, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971).

* * *

Even if one could in fact differentiate fact from unsupported opinion, or emotional appeals from appeals to the mind, these proposed distinctions would be inadequate definitions of "educational" because material often combines elements of each. In such cases, appellees suggested at oral argument, a quantitative test would be appropriate. But the Treasury regulation makes no mention of such a test.

* * *

The history of appellant's application for tax-exempt status attests to the vagueness of the "full and fair exposition" test and evidences the evils that the vagueness doctrine is designed to avoid. The district court's decision was based on the value-laden conclusion that *BMR* was too doctrinaire. Similarly, IRS officials earlier advised appellant's counsel that an exemption could be approved only if the organization "agree[d] to abstain from advocating that homosexuality is a mere preference, orientation, or propensity on par with heterosexuality and which should otherwise be regarded as normal." App. 1030. Whether or not this view represented official IRS policy is irrelevant. It simply highlights the inherent susceptibility to discriminatory enforcement of vague statutory language.

We are sympathetic with the IRS's attempt to safeguard the public * * * by closing revenue loopholes. And we by no means intend to suggest that tax-exempt status must be accorded to every organization claiming an educational mantle. Applications for tax exemption must be evaluated, however, on the basis of criteria capable of neutral application. The standards may not be so imprecise that they afford latitude to individual IRS officials to pass judgment on the content and quality of an applicant's views and goals and therefore to discriminate against those engaged in protected First Amendment activities.

We are not unmindful of the burden involved in reformulating the definition of "educational" to conform to First Amendment requirements. But the difficulty of the task neither lessens its importance nor warrants its avoidance. * * *

This case is accordingly reversed and remanded for further proceedings consistent with this opinion.

NATIONAL ALLIANCE v. UNITED STATES

710 F.2D 868 (D.C.CIR. 1983).

FAIRCHILD, Senior Circuit Judge:

On July 28, 1977, National Alliance applied to the IRS for a tax exemption as a charitable and educational institution under 26 U.S.C. § 501(c)(3). The IRS District Director in Arlington, Virginia denied the corporation's application on March 31, 1978, concluding that National Alliance was neither "charitable" nor "educational" as those terms are applied by Treas.Reg. § 1.501(c)(3)–(1)(d)(2) & (3).

National Alliance, a Virginia corporation, publishes a monthly newsletter and membership bulletin, organizes lectures and meetings, issues occasional leaflets, and distributes books; all for the stated purpose of arousing in white Americans of European ancestry "an understanding of and a pride in their racial and cultural heritage and an awareness of the present dangers to that heritage."

* * *

Having exhausted its available administrative remedies, National Alliance filed suit in federal district court for declaratory judgment pursuant to 26 U.S.C. § 7428.

The parties filed cross-motions for summary judgment.

This court had then recently decided *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C.Cir. 1980). This court there reversed a judgment upholding a denial of tax exemption, and held the IRS regulation defining the term "educational" unconstitutionally vague. The regulation in effect at the time of the IRS National Alliance decision was the same regulation held unconstitutional in *Big Mama*. In argument before the district court, the IRS presented four criteria which it designated the Methodology Test, contended the Methodology Test was an explanatory gloss to the "full and fair exposition" test held vague in *Big Mama*, and argued that National Alliance material was not "educational" under the Methodology Test.

The district court concluded that the Methodology Test was itself vague and would not cure the faults of the regulation found in *Big Mama*. * * *

Both parties appealed. The government argues that the district court should have declared National Alliance not tax-exempt. National Alliance contends the district court should have declared it exempt.

* * *

In large measure the parties, particularly the government, have argued the appeals as if the issue were whether reading the Methodology Test into the regulation would cure the vagueness found in *Big Mama*.

* * *

We think, however, that the appropriate first step is to examine the National Alliance materials to determine whether they could in any event qualify as "educational" within the exemption statute.

In response to an IRS request, National Alliance supplemented its application for exemption with back copies of its monthly newsletter, *Attack!*, and its membership bulletin, *Action*. It is these materials that IRS found noneducational.

The nature of these publications may be summarized as follows. *Attack!* is the organization's principal publication; it contains stories, pictures, feature articles and editorials in a form resembling a newspaper. The general theme of the newsletter is that "non-whites"—principally blacks—are inferior to white Americans of European ancestry ("WAEA"), and are aggressively brutal and dangerous; Jews control the media and through that means—as well as through political and financial positions and other means—cause the policy of the United States to be harmful to the interests of WAEA. A subsidiary proposition is that communists have persuaded "neo-liberals" of equality among human beings, the desirability of racial integration, and the evil of discrimination on racial grounds.

* * *

In sum, National Alliance repetitively appeals for action, including violence, to put to disadvantage or to injure persons who are members of named racial, religious, or ethnic groups. It both asserts and implies that members of these groups have common characteristics which make them sufficiently dangerous to others to justify violent expulsion and separation.

Even under the most minimal requirement of a rational development of a point of view, National Alliance's materials fall short. The publications before us purport to state demonstrable facts—such as the occurrence of violent acts, perpetrated by black persons, the presence of Jews in important positions, and other events consistent with National Alliance themes. The real gap is in reasoning from the purported facts to the views advocated; there is no more than suggestion that the few "facts" presented in each issue of *Attack!* justify its sweeping pronouncements about the common traits of non-whites and Jews or the need for their violent removal from society. It is the fact that there is no reasoned development of the conclusions which removes it from any definition of "educational" conceivably intended by Congress. The material may express the emotions felt by a number of people, but it cannot reasonably be considered intellectual exposition.

* * *

We recognize the inherently general nature of the term "educational" and the wide range of meanings Congress may have intended to convey. * * * We do not attempt a definition, but we are convinced that the National Alliance material is far outside the range Congress could have intended to subsidize in the public interest by granting tax exemption.

Aside from vagueness, it is clear that in formulating its regulation, IRS was attempting to include as educational some types of advocacy of views not generally accepted. But in order to be deemed "educational" and enjoy tax exemption some degree of intellectually appealing development of or founda-

tion for the views advocated would be required. * * * It is clear that the National Alliance material is not educational under that test.

One of the concerns in this area, because of First Amendment considerations, is that the government must shun being the arbiter of "truth." Material supporting a particular point of view may well be "educational" although a particular public officer may strongly disagree with the proposition advocated. Accordingly IRS has attempted to test the method by which the advocate proceeds from the premises he furnishes to the conclusion he advocates rather than the truth or accuracy or general acceptance of the conclusion.

Thus the Methodology Test presented in this proceeding contains the following four criteria:

1. Whether or not the presentation of viewpoints unsupported by a relevant factual basis constitutes a significant portion of the organization's communications.
2. To the extent viewpoints purport to be supported by a factual basis, are the facts distorted.
3. Whether or not the organization makes substantial use of particularly inflammatory and disparaging terms, expressing conclusions based more on strong emotional feelings than objective factual evaluations.
4. Whether or not the approach to a subject matter is aimed at developing an understanding on the part of the addressees, by reflecting consideration of the extent to which they have prior background or training.

Joint Appendix at 12.

Nothing in these criteria would suggest that the National Alliance material could be deemed educational.

* * *

We assume that the court in *Big Mama* viewed the activity of BMR, Inc. as falling within the range of reasonable interpretation of "educational" as used in the statute, or at least not clearly outside such range. Thus the vague test posed a real risk that BMR, Inc. might have been denied exemption under the test while others not distinguishable on any principled objective basis might be granted exemption.

* * *

We have no doubt that publication of the National Alliance material is protected by the First Amendment from abridgement by law. * * * But it does not follow that the First Amendment requires a construction of the term "educational" which embraces every continuing dissemination of views.

* * *

Based on a careful review of National Alliance's publications in the record before us, we are convinced that the IRS denial of exemption was not arbitrary or discriminatory, and was consistent with any reasonable interpretation of the statutory term "educational."

We observe that, starting from the breadth of terms in the regulation, application by IRS of the Methodology Test would move in the direction of more specifically requiring, in advocacy material, an intellectually appealing development of the views advocated. The four criteria tend toward ensuring that the educational exemption be restricted to material which substantially helps a reader or listener in a learning process. The test reduces the vagueness found by the *Big Mama* decision.

The government does argue that the Methodology Test goes about as far as humanly possible in verbalizing a line separating education from non-educational expression.

* * *

We need not, however, and do not reach the question whether the application of the Methodology Test, either as a matter of practice or under an amendment to the regulation would cure the vagueness found in the regulation by the court in *Big Mama*.

The judgment appealed from is reversed and the cause remanded with directions to enter judgment declaring National Alliance not tax-exempt.

COMMENT

In *National Alliance*, the court said that the vagueness which plagued the regulations had been addressed if not solved by applying the "Methodology Test." But doesn't that test necessarily require a government inquiry into the integrity of the publisher, the sort of inquiry the Supreme Court has often said is the exclusive province of publishers and editors? One must have some sympathy with the IRS in its quest to assure that exempt groups serve the intended statutory purpose. Among the dubious groups that have sought exemption as educational groups have

been dog training schools, drag racing schools, and dance schools.[120] The IRS's actions in *Big Mama Rag* and *National Alliance*, along with other tax disputes that never went to court, alarmed the press.[121]

First Amendment purists would argue that the IRS should never be in the business of deciding whether a publication's content is "educational." But the resolution under *Star*, to achieve constitutional equality, might be to eliminate tax exemption for such groups altogether. As govemment becomes more involved in encouraging free expression directly or indirectly, the sorts of issues addressed in these cases will be more critical.[122]

SECTION FIVE
POSTAL LAWS AND THE PRESS

The Tradition of Press Subsidy

Preferential treatment of the press in the form of lower postal rates is older than the United States itself. As colonial postmaster general, Benjamin Franklin instituted a system under which printers were able to exchange newspapers through the mails at no charge. As a printer, publisher, and postmaster, Franklin's motives might be doubted, but he anticipated the eventual role of the press. Free exchange remained the dominant method of nonlocal distribution of news until the spread of the telegraph in the nineteenth century.[123]

Statutory recognition of a special postal status for the press began with the earliest postal acts in the late 1700s. The argument then, as now, was that a lower rate for newspapers would encourage citizens to stay informed on public issues and current events. Congress, and later the Post Office Department and the Postal Service, set rates for newspapers far below the cost of mailing personal or business letters. Magazines, books, and even sound recordings are among the media that have benefited from special postal rates.[124]

From a press perspective, the key classifications in today's rate system are second-class and third-class mail. Second-class is the traditional subsidy for newspapers. To receive second-class status, a publication must have paid subscribers and must presort by zip code and bundle copies. In return, publishers receive "red tag" service—expedited delivery. Over the years, second-class mail has accounted for up to 11 percent of mail volume but paid as little as 3 percent of postal revenues.

The fastest growing type of mail in recent years has been third-class. Third-class was formerly the province of nonprofit groups. In 1985, there were about 305,000 nonprofit organizations with third-class permits.[125] Most permit holders are religious, educational, or charitable groups. Political group mailings represent less than a third of 1 percent of volume. When third-class was made available to bulk mailers, mailers willing to do most of the sorting, bundling, etc., that would otherwise be performed by postal workers, the direct mail advertising industry was born.[126] Publishers are concerned over any subsidy for materials that are purely advertising and have formally opposed reduced rates for third-class bulk direct mail advertising.[127]

The amount of subsidy for both classes has declined since the Postal Reorganization Act of 1970,[128] which turned the Post Office Department into the U.S. Postal Service. The act set a requirement that "each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class. * * *" The Postal Service was to become a self-supporting and partly independent entity. In practice, however, subsidized rates have remained in effect. Congress has continued to appropriate funds to make up the difference in revenues so that subsidized classes of mail may remain. The funds so

120. Hopkins, *The Law of Tax-Exempt Organizations* 4th ed. (1983), 149–61.

121. MacKenzie, "When auditors turn editors," Colum. Journalism Rev. (November–December 1981), 29; Caneff, "The Auditor as Editor," *Quill* (April 1985), 20; English, "Journalism: The Little Chill," *Mother Jones* (November 1984), 6.

122. For a general discussion of government involvement in encouraging expression, see Emerson, *The Affirmative Side of the First Amendment*, 15 Georgia L.Rev. 795 (1981); Yudof, *When Government Speaks* (1983).

123. Folkerts and Teeter, *Voices of a Nation* (1989), 92.

124. Cullinan, *The United States Postal Service* (1973), 234–59; Kielbowicz, *Origins of the Second-Class Mail Category and the Business of Policymaking*, Journalism Monographs, No. 96 (April 1986).

125. U.S. Postal Service, "Third Class Nonprofit Permits and Volume by Type of Qualifying Organization" (1986).

126. Cullinan, 246.

127. Rambo, "Newspapers and the Postal Service," *Presstime* (January 1986), 20; Rambo, "Direct Mail's Challenge," *Presstime* (January 1989), 18.

128. 39 U.S.C.A. § 3622(b)(3).

appropriated are referred to as "revenue foregone subsidies," an interesting euphemism. Still, rates have been creeping up as the service attempts to meet its statutory mandate. For national publications circulated by mail, an increase of just a few pennies can mean hundreds of thousands of dollars in increased costs. Still, the subsidy remains considerable.

Postal rates are set after recommendation by the Postal Rate Commission, an independent body, reports to the Postal Service's Board of Governors, which may accept, reject, or modify the recommendation. Almost any rate increase adopted is likely to be challenged in court. In *Direct Marketing Ass'n. v. Postal Service*, 12 Med.L.Rptr. 1497, 778 F.2d 96 (2d Cir. 1985), it seemed as though every major print organization joined in the challenge. Among the parties and intervenors were *Newsweek*, Dow Jones & Co., the American Newspaper Publishers Association, the Direct Marketing Association, and *Reader's Digest*. Even the Recording Industry Association of America joined in. The primary issue in the case was whether or not a rate increase was properly adopted. The court, applying a "substantial evidence" test, found that the Postal Rate Commission's economic analysis of postal rates amply supported the rate increase. A secondary issue raised by the news organizations was that the rates for third-class bulk mail (BRR) were too low and would effect a discriminatory, competitive harm. That claim also failed. It should be noted that media challenges to postal rate increases have been consistently futile. Judge Pierce, in his opinion for the court, provides some sense of the competition underlying rate increase decisions:

> Three parties join in the attack on the BRR rates set by the PRC. Petitioner Direct Marketing Association (DMA) is an organization of mailers and takes the position that the cost coverage assigned to BRR mail is too high and that therefore the BRR rates are too high. Petitioner ANPA is an association representing more than 90 percent of the daily newspapers published throughout the United States. They are heavy users of the Postal Service, but also compete with the Postal Service for the business of advertisers who may utilize either newspapers or BRR mail for the saturation distribution of advertising circulars. The thrust of ANPA's arguments regarding BRR is that the BRR rates are too low; higher rates would discourage advertisers from using the mail and, presumably, would encourage them to use the distribution services of ANPA's members instead. Finally, the Coalition of Non-Postal Media (CNPM) is an association of private delivery companies and weekly newspapers that compete with the Postal Service and with ANPA's members for the carriage of hard-copy advertising and which, like ANPA's members, believe themselves competitively disadvantaged by BRR rates that are too low. In sum, DMA seeks to lower the BRR rates, while ANPA and CNPM, being competitors of the Postal Service (as well as of each other), seek to raise postal rates in an effort to gain some of the Postal Service's business.

Ironically, the efficiency of advertising direct mailers appears to result in such reduced cost to the Postal Service that it largely pays its own way in any event. Attributable costs are naturally much higher for publications, which are larger, weigh more, and consequently require extra effort or expense to deliver.

Mailing Classes and the Constitution

The doctrine of unconstitutional conditions adopted in *Hannegan v. Esquire* (text, p. 115) has apparently worked. Constitutional issues raised in cases where a postal rate classification is disputed no longer feature government's refusal to grant classification status directly on the basis of a publication or group's content. But many issues have arisen nonetheless. Two major ones are qualification requirements for second-class or third-class status.

To qualify as a third-class nonprofit mailer, a group must meet the general test of being religious, educational, philanthropic, etc.,[129] categories which track the tax code. If a substantial portion of a group's activity consists of lobbying, by publicity or in person, it is termed an "action" organization and cannot qualify. The Postal Service withdrew permits from the Sierra Club[130] and the National Rifle Association[131] for attempts to influence public policy. For the Sierra Club, such activities at the time were somewhat unusual, but the National Rifle Association was seen primarily as an "action" organization. Both revocations were upheld as not violating the First Amendment. The court in the case involving the Sierra Club reasoned: "The Postal Service has

129. United States Postal Service, *Domestic Mail Manual* § 623.21.
130. *Sierra Club v. United States Postal Service*, 549 F.2d 1199 (9th Cir. 1976).
131. *National Rifle Ass'n. v. United States Postal Service*, 407 F.Supp. 88 (D.D.C. 1976).

not, however, terminated the Sierra Club's right to use the mails for its communications. It has merely required that the Sierra Club pay the same rates as others who use the mails."

In addition, where political speech is concerned, the 1980 Postal Service Appropriation Act mandated that only national, state, or congressional political committees of a major or minor party could qualify for third-class rates.[132] The provision was so narrow it could be read as applying to only the Democratic and Republican parties. The provision became the object of First Amendment challenges by minor political parties and candidates. Several of the cases, all federal district court opinions, declared the provision unconstitutional because it restricted political expression in a discriminatory fashion.[133] The plaintiffs were therefore entitled to permits. If Congress wishes to avoid subsidizing some political mailings, it apparently must subsidize none.

In the absence of a constitutional issue, the courts will overturn a Postal Service decision only if the decision was arbitrary, capricious, or an abuse of discretion, the standard of the federal Administrative Procedure Act. Initial decisions to grant or deny a permit are normally made locally.

The requirement that a publication have a paid subscriber list indicating that at least half the persons receiving the publication paid for it was the subject of a First Amendment challenge. The *Enterprise*, a weekly newspaper mailed at no charge to more than 18,000 rural Tennessee homes, argued that the rule discriminated against nontraditional newspapers. The Postal Service does provide an alternative. A newspaper may qualify for second-class rates by having readers fill out "requester" cards, which would substitute for payment as evidence that an audience wanted to receive the publication. The *Enterprise* said it was an unreasonable alternative. The Sixth Circuit upheld the rules.

ENTERPRISE, INC. v. UNITED STATES

14 MED.L.RPTR. 2153, 833 F.2D 1216 (6TH CIR. 1987).

GUY, Circuit Judge:

Initially, the petitioner, The Enterprise, Inc. (Enterprise), publisher of a free publication mailed without request to over 18,000 homes in several rural counties in Tennessee, filed suit in federal district court challenging the constitutionality of two USPS regulations (commonly known as the paid subscriber rule) which set eligibility requirements for subsidized second-class mailing privileges.

* * *

The case was submitted * * * on stipulated facts, which were that the Enterprise is a weekly newspaper and is mailed free of charge to approximately 18,000 homes in several rural counties in Tennessee. Prior to initiating these proceedings, the Enterprise was mailed at third-class bulk rates. Its publisher was told by the local postmaster that an application for second-class rates would be futile since the publication is mailed free of charge to its recipients without request. One of the requirements for a publication's entry to second-class mail status is that it have a "legitimate list of subscribers." This requirement has been refined and clarified in postal regulations as requiring that over fifty percent (50%) of the copies of a periodical be sent to persons paying or promising to pay at a rate above nominal for a stated period of time. Second-class rates are generally available for periodical publications meeting this and other requirements. The rate is complex, varying by weight, destination, level of presortation, and proportion of nonadvertising matter. In general, for most publications, the second-class rate is less costly than alternative first and third-class rates.

Throughout its history, second-class rates have been subsidized. Since the Postal Reorganization Act of 1970, this subsidy is being phased out, but it remains in effect for certain limited categories, including publications mailed for delivery within the county of publication. However, even for publications not qualifying for this "in-county" subsidy, the second-class rate is typically more favorable than first or third class.

* * *

The paid-circulation requirement was first established by Congress in 1879. In that year, Congress repealed all laws relating to the classification of mail matter and established a comprehensive postal classification system. The Act of March 3, 1879, ch. 180, § 7,20 Stat. 355, divided all mailable matter

132. 39 U.S.C.A. § 3626(e).

133. *Greenberg v. Bolger*, 497 F.Supp. 756 (E.D.N.Y. 1980); *Spencer v. Herdesty*, 571 F.Supp. 444 (S.D. Ohio 1983); *Spencer v. United States Postal Service*, 613 F.Supp. 990 (S.D. Ohio 1985).

into four classes: written matter, periodical publications, miscellaneous printed matter, and merchandise. The purpose of the second-class mail matter (periodical publications) was to facilitate the "dissemination of information of a public character." Act of March 3, 1879, ch. 180, § 14, 20 Stat. 355.

Section 14 of the statute established four requirements for mail matter of the second class. The "Fourth Condition" was that a publication

> must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers; provided, however, that nothing herein contained shall be so construed as to admit to the second class rate regular publications, designated primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.
>
> * * *

Congress thus differentiated between second-class publications, distributed in response to subscriber demand at the bargain rate of two cents per pound, and all other printed matter.

* * *

The purpose of the Fourth Condition for second-class entry was to reserve favorable second-class postage rates to periodicals designed for the dissemination of public information in response to reader demand, but to refuse those rates to other printed matter generally circulated free and devoted to * * * commercial advertising.

* * *

Thus, to distinguish between second-class publications and third-class printed matter, Congress settled upon objective criteria such as the evidence of public demand shown by a publication's subscriber list and paid circulation. At the same time, it chose not to entrust the registration of publications to the judgment of postal officials. The deletion of the annual registration requirement from the Act of March 3, 1879, reflected fears of placing unchecked power in the hands of postal officials and of multiplying the ranks of the federal bureaucracy. *See* remarks of Representatives Cannon, Blunt, and Springer, 8 Cong. Rec. 2135–2137 (1879). In contrast, Congress viewed the paid subscriber requirement and the prohibition against free circulation in the Fourth Condition of section 14 as an objective method of distinguishing second-class publications from other printed matter on a basis that would not permit government censorship.

* * *

The DMCS [Domestic Mail Classification Schedule] and the related provisions of the DMM [Domestic Mail Manual] still retain the general outline of the classification system established by Congress in 1879. Specifically, the DMCS states:

> 200.0105 Second-class matter must have a legitimate list of persons who have subscribed by paying or promising to pay at a rate above a nominal rate for copies to be received during a stated time * * *
>
> * * *
>
> 200.012 Publications designed primarily for advertising purposes, free circulation, or circulation at nominal rates * * * do not qualify for second-class privileges * * *
>
> * * *
>
> 200.0122 Designed primarily for free circulation is defined as distribution of 50 percent or more of the copies of a publication for free or at a nominal rate. Copies mailed to persons who are not on a legitimate list of subscribers * * * are free copies.

The Enterprise advances two arguments on appeal, both of which were raised and decided adversely to them in the administrative proceedings:

> (1) the USPS's regulatory scheme is not a rational method under the first amendment of accomplishing the legislative purpose of favoring publications disseminating information in the public interest;
> (2) the applicable regulations unduly burden legitimate newspapers under the equal protection clause of the fifth amendment.

While "the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), it has been recognized that, as the institution of the press has evolved into large publishing empires, it has been legitimately subjected to "extensive regulatory legislation." *Pittsburgh Press* Co. *v. Human Relations Commission*, 413 U.S. 376, 382–83. Expression, whether oral or written, may be subject to reasonable time, place, and manner restrictions. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Such restrictions are valid "provided that they are justified without reference to the

content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.* Accord *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984); see also *Wheeler v. Commissioner of Highways*, No. 86–5423 (6th Cir. June 22, 1987) (upholding provisions of the Kentucky Billboard Act against first and fourteenth amendment challenges). We find that the paid-subscriber rule meets this three-part test.

* * *

The Enterprise makes much of the fact that the USPS has admitted that it is a "legitimate" newspaper, which presumably means that its primary purpose is the education/information of the public on public issues, with limited local advertising being secondary to that purpose. It contends that the difficult decisions regarding whether or not a certain publication qualifies as a legitimate newspaper "should be left to another court at another time," since they are not applicable to the case *sub judice*. However, this argument overlooks not only the authority of the USPS but its need to make classification decisions which will apply to literally thousands of differing publications in a relatively simple, expeditious, and content-neutral manner. The first amendment is not violated merely because a content-neutral regulation raises the cost of one avenue of communication, or prevents the use of one mode of communication where others exist. This is especially true where the cost of the desired mode is artificially reduced through government subsidies.

An analogous situation involving Congressional denial of tax-exempt status under 26 U.S.C.A. § 501(c)(3) to organizations which engage in substantial lobbying activities was addressed in *Regan v. Taxation With Representation* (TWR), 461 U.S. 540 (1983). The Court rejected a claim that the denial of tax-exempt status for this reason violated the first amendment, emphasizing that the denial of a subsidy places no affirmative burden on the exercise of these rights.

* * *

The governmental interest furthered by the paid-subscriber rule is that of limiting the second-class subsidy to material of demonstrable value to the recipients and not primarily designed for advertising purposes. Congress's decision to subsidize the dissemination of information designed to educate and inform the public, but not that which directly or indirectly serves the financial interests of the publisher, by way of content-neutral regulation has been approved by the federal courts. In *Hannegan v. Esquire*, 327 U.S. 146. (1946), the Supreme Court overturned the revocation of a publisher's second-class privileges where the Postmaster General had ruled that the magazine's contents, although not obscene, did not "contribute to the public good and the public welfare." *Id.* at 149–50. In so holding, the Court stated, "[w]e may assume that Congress has broad power of classification and need not open second-class mail to publications of all types." *Id.* at 155. The Court contrasted the disapproved practice of content-based censorship with the implicitly-approved objective standards for second-class entry.

* * *

Finally, mailing privileges have not been denied to the Enterprise by operation of the paid-subscriber rule. The alternatives of third-class bulk rate or the more favorable second-class "requester" status are open to the paper. Because we find that these alternatives constitute ample substitute avenues for communication, we discern no first amendment violation.

Although a regulation implementing a legislative classification generally will be found constitutional if it is rationally related to a legitimate governmental purpose, see *Zobel v. Williams*, 457 U.S. 55, 60 (1982), a higher level of scrutiny is applicable in cases involving suspect classifications or classifications which burden fundamental rights, see *Clements v. Fashing*, 457 U.S. 957, 963 (1982). The Supreme Court has explained that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *TWR*, 461 U.S. at 549. Since we have found the regulations at issue here to be content-neutral and narrowly drawn, strict scrutiny is inapplicable.

The Supreme Court has also recognized that Congress may establish postal categories "with the generality of cases in mind," without making them depend on "all of the variations" that might appear in individual cases. *United States Postal Service v. Council of Greenburgh Civil Associations*, 453 U.S. 114, 132–33 (1981). The government's interest in an educated public is undeniable and is served by subsidized in-county second-class rates, 39 U.S.C.

§ 3626(a)(1), and provisions which direct the PRC to consider the value of mail matter to recipients in its rate and classification decisions, 39 U.S.C. §§ 3622(b)(8), 3623(c)(2). It is equally legitimate and important for government to ensure that subsidized mailing privileges are not abused; i.e., that publications having little or no demonstrable value to their recipients are not mailed at public expense.

We find that the paid-subscriber rule is rationally related to the objective of limiting subsidized second-class mailing privileges to publications which can objectively be determined to have value to their recipients. The rule reflects the judgment of Congress that a publication distributed to paid subscribers is more likely to be desired and read by its recipients than an unsolicited publication, and the Enterprise has failed to point out any error of constitutional dimension in this judgment.

Affirmed.

COMMENT

Consider the court's conclusion that the paid subscriber rule is a content-neutral, narrowly drawn plan to assure the subsidy is limited to material of "demonstrable value to the recipients." If circulation figures were the measure, the *National Enquirer's* paid circulation would indicate greater value to recipients than will be found in the *New York Times* or *Boston Globe*. Isn't the requirement that readers demonstrate an interest in the publication simply a substitute for proof that a "publication positively contributes to the public good * * *" which was forbidden in *Hannegan*?[134]

The American Newspaper Publishers Association, among other groups, joined the case as intervenors to support the paid subscriber rule. The number of free-circulation newspapers has grown rapidly in recent years. Many of those newspapers do not belong to the state or national press associations. Might competition from the free newspapers help explain the ANPA position? Or, is it more likely that ANPA saw invalidation of the rule as the first step toward elimination of or reduction in the second-class subsidy?

The opinion is notable for what it leaves out. The *Minneapolis Star* decision is not cited, much less distinguished. The court relied instead on non-press cases upholding denial of tax exemptions and tax benefits. The court found the tax cases remarkably similar to the case at hand.

SECTION SIX
LOTTERIES

A *lottery*, or what is sometimes called a gift enterprise, is a scheme in which there is distribution of a *prize* by *chance* for a *consideration* or a "price." All three elements must be present; absent any one, and there is no lottery.

Prize has been defined as anything of value.

Chance is a condition of winning over which the participant has no control, as when winning entries are drawn randomly or contestants must guess the outcome or the sum of the scores of a sports event. Under federal law, chance is present even when the lottery is only partly based on chance, as in word games or "expert" predictions of sports results. Chance is clearly present in raffles, bingo, punch boards, and football pools, for example.

Consideration generally means that an expenditure in time, effort, or money must be made by the participant. Often there is a monetary price: something has to be purchased or done to make one eligible for the prize—a ticket, a box top, registration, or attendance.

Regulation of lotteries is a concern for the media in two ways. First, newspapers or broadcast stations often run contests. These contests can run afoul of state law. Second, federal and state laws restrict the freedom to disseminate information about lotteries.

The first type of situation, as well as the effects of regulation, can be seen in a Missouri case. *Reader's Digest* was promoting sales of magazines and merchandise by mailing notices of its "Ninth Annual $400,000 Sweepstakes." The magazine challenged the state's authority to regulate it. The contest was legal under federal law. As a nationwide publisher, *Reader's Digest* would be greatly inconvenienced if it was forced to meet the requirements of each state. The court applied standard rules of jurisdictional analysis. The magazine, by doing business in the state, had impliedly agreed to abide by

134. See Gorman, *The First Amendment and the Postal Service's Subscriber Requirement: Constitutional Problems With Denying Equal Access to the Postal System*, 21 University of Richmond L. Rev. 541 (1987).

state laws. The court found consideration because it appeared entering the contest may have required some effort by recipients. The court said that deleting Missouri addresses would be easy with computers, so the inconvenience would actually be slight. [135]

A grocery chain fared better in Utah with its "Double Cash Bingo" promotion, which was advertised in the media but conducted on store premises. To play, customers picked up cards in the store. Disks with hidden letters were also distributed. Anyone whose letters fit into a winning pattern won. There was no charge, and customers were not required to buy anything. The court said the game lacked the element of consideration essential for a lottery. [136]

A Washington state court ruled similarly in 1972 that football forecasting contests run by newspapers were prohibited lotteries under both state law and the state constitution. Consideration was found in the time and attention one would have to devote to the game and in the fact that someone would have to purchase at least one copy of the newspaper. Although some skill was involved in assessing the merits of football teams, chance was the dominant factor in picking correct outcomes for fifteen teams against 900 to 1 odds. [137]

Missouri, in keeping with increasing permissiveness and an air of resignation toward gambling in America, amended its constitution in 1978 and 1980 to liberalize the definition of *consideration* and to allow charities and nonprofit organizations to operate bingo games. There is now about the land a rash of business promotional games, especially pyramid sales schemes, which flourish in spite of their illegality in Missouri and elsewhere. Promotional contests, drawings, and games are now permitted in a majority of states.

At the federal level, games of chance in the retail food and gasoline industries are regulated to prohibit the misrepresentation of the odds of winning and any form of rigging, but they are not prohibited. [138]

Earlier, however, the United States Supreme Court in an important ruling held that consideration was absent from the radio-TV name-the-tune shows in which the only effort required for participation was listening and answering one's telephone in the remote possibility that it should ring. In reversing a ruling by the Federal Communications Commission, the Court noted that, "To be eligible for a prize on the 'give-away' programs involved here ['Stop the Music,' 'What's My Name,' and 'Sing It Again'], not a single home contestant is required to purchase anything or pay an admission price or leave his home to visit the promoter's place of business; the only effort required for participation is listening." *FCC v. ABC, NBC and CBS*, 347 U.S. 284 (1954). Chance also might have been absent had any of the shows required a listener to recall the name of a tune, although the issue did not arise in this case.

The fact of gambling in America has far outdistanced any Puritan proclivities against it. A 1976 federal commission report on gambling concluded that Americans gamble in massive numbers and that "legalized gambling is a healthy recognition of reality." [139] Nevertheless there has been ambivalence from the beginning. While the thirteen original colonies and some of our most renowned universities were largely financed by lotteries and Thomas Jefferson endorsed the lottery as "a salutary instrument wherein the tax is laid on the willing only," [140] the Supreme Court in 1850 saw lotteries as a "widespread pestilence" * * * "infesting the whole community," * * * preying "upon the hard earnings of the poor," plundering "the ignorant and simple." [141]

Gambling today is seen more as a self-inflicted wound than a moral deficiency, a victimless crime at worst, as the continued spread of state-sponsored lotteries indicates.

Although the FCC, FTC, and Postal Service have done much over the years to discourage lotteries, the feds have been quite unsuccessful in influencing the states. And federal laws which had stood a great deal of pressure since the late nineteenth century and before began to crumble in the mid-seventies.

Sections 1302–1306 of Title 18 of the U.S.Code, first passed by Congress in 1868, prohibited use of the mails to promote or advertise lotteries. Later

135. *Danforth v. Reader's Digest Ass'n.*, 527 S.W.2d 355 (Mo. 1975).
136. *Albertson's, Inc. v. Hansen*, 600 P.2d 982 (Utah 1979).
137. *Seattle Times v. Tielsch*, 495 P.2d 1366 (Wash. 1972).
138. *Marco Sales Co. v. FTC*, 453 F.2d 1, 5 (2d Cir. 1971); 16 C.F.R. § 419.1 (1980).
139. "Gambling in America: Final Report of the Commission on the Review of the National Policy Toward Gambling," 1976, discussed in "Gambling Goes Legit," *Time* (December 6, 1976), 54–64.
140. Ibid. p. 56.
141. *Phalen v. Commonwealth of Virginia*, 12 L.D. 1030 (1850).

statutes prohibited broadcasting of lottery information or advertising. In 1969 the FCC demonstrated its resolve in enforcing these laws by taking a broadcaster challenge to them to the Second Circuit Court of Appeals. Upholding the FCC, the court ruled that broadcast announcements of New York state lottery winners was prohibited by federal law as enforced by the commission. Exceptions would be "ordinary news reports concerning legislation authorizing the institution of a state lottery, or of public debate on the course state policy should take"—for example, an editorial for or against the continuation of the lottery or a news story specifying the number of schools that had been built with lottery funds. Although such information might "encourage" the conduct of a lottery, it would not promote it directly as would a plea to buy tickets or information on where to buy them.

It must be emphasized that *newsworthiness* has always been a defense against application of anti-lottery laws, even though the distinction between "news" and "promotion" is sometimes fine. Broadcasting the names of a list of winners would be "promotion," said the court: an interview with an excited winner would be "news." *New York State Broadcasters Association v. United States*, 414 F.2d 990 (2d Cir. 1969).

When the Third Circuit in *New Jersey State Lottery Commission v. United States*, 491 F.2d 219 (D.C. Cir. 1974), disagreed that announcing winning numbers in the state lottery in a newscast offended the law, the FCC petitioned the Supreme Court.

Before the Court could act, Congress intervened to rewrite the law. In January 1975 the new law exempted from earlier prohibitions all information concerning a state lottery (1) contained in a newspaper published in that state, and (2) broadcast by a radio or television station licensed in that state or an adjacent state which conducts such a lottery. 18 U.S.C.A. § 1307. The law favored broadcasters because newspapers were permitted to carry lottery information only if they were published in a state conducting a state lottery. The *New York Times*, for example, could not publish the results of the New Jersey or Pennsylvania state lotteries, although it could report the results of the New York state lottery.

In October 1976, section 1307 was amended to allow newspapers, as well as broadcasters, in lottery states to publish information about state lotteries in adjacent states. P.L. 94–525; 90 Stat. 2478. The statute was further amended in 1979 when mailings to foreign countries of lottery information were permitted so long as the foreign countries permitted it. P.L. 96–90, 93 Stat. 698 (1979).

Federal law was continued to prohibit the mailing of information promoting or advertising a lottery. The provision of the postal laws[142] making it a crime to attempt mailing of newspapers containing advertisements for lotteries or lists of prizes was challenged. An additional nearly identical punitive provision was also challenged.[143] A newspaper association argued that the prohibition violated the First Amendment. It also asserted that the government's stated interest in protecting residents of states without lotteries was undermined by the many exceptions given in yet another provision.[144] The challenge, then, was that the regulatory scheme was either unconstitutional or contradictory and irrational. The court disagreed. *Minnesota Newspaper Ass'n., Inc. v. Postmaster General*, 15 Med.L.Rptr. 1292, 677 F.Supp. 1400 (D.Minn. 1987). It applied the Supreme Court's four-part commercial speech test to the publication of lottery advertisements or listing of prizes. The association's claim that the statutes treat various media differently was rejected. The difference, the court said, is consistent with the traditional distinctions between regulated broadcast media and nonregulated print media. The court agreed that barring publication of lists of prizes, to the extent that information was general news or editorial content, violated the First Amendment and said the statutes must be interpreted and enforced with that limitation in mind.

The Supreme Court noted probable jurisdiction to hear an appeal in the case and in a companion case, *Frank v. Minnesota Newspaper Ass'n*, but ultimately decided that the case was moot and vacated the decision of the lower court.[145] The newspaper association had initially said the cases raised significant issues concerning regulation of advertising about lawful activities under the commercial speech doctrine. But the Court essentially faced an issue in a vacuum because of new legislation. In addition, the

142. 18 U.S.C.A. § 1302.
143. 39 U.S.C.A. § 3005.
144. 18 U.S.C.A. § 1307.
145. *Frank v. Minnesota Newspaper Ass'n*, 16 Med.L.Rptr. 1511 (U.S. 1989). For factual background on the issues raised but not decided, see Med.L.Rptr., "News Notes," 15: 27 (October 11, 1988).

parties agreed to drop some issues from the case. The Charity Games Advertising Clarification Act of 1988 was passed by Congress shortly after the Court agreed to hear the case. The act, effective in May 1990,[146] expands the exemption for newspapers, apparently overturning the Minnesota cases by legislation.

The end for strict regulation of information about lotteries appears close. When a subscription telephone service that reported results of lotteries in various states was established, Florida claimed that the activity violated its lottery statute, which prohibited promotion of any lottery. The court concluded that "promotion" could apply only to those who operate lotteries or have a direct economic interest in them.[147] In the meantime, regulations remain on the books. Questions about the status of federal law may be addressed to the Office of the General Counsel, Mailability Division, of the Postal Service in Washington, D.C. Various state agencies, including banking commissions, liquor boards, insurance departments, consumer protection agencies, and many others supervise sweepstakes, contests, and lotteries in the states. A radio station licensed in North Carolina that gets more than 90 percent of its listeners and advertising revenues from southeastern Virginia filed suit against the FCC for prohibiting it from running ads for or information about the recently begun Virginia state lottery. The limits apply because the station is in a nonlottery state.[148]

SECTION SEVEN

LOBBYING AND POLITICAL CAMPAIGN REGULATION

Lobbying: Problems of Definition and Discrimination

The constitutionality of laws regulating lobbying, especially those requiring that reports be filed or that some sort of public disclosure be made, has long been upheld.

In *United States v. Harriss*, 347 U.S. 612 (1954), the Court in a complex interpretation, which the dissenting justices thought was a rewriting of the law, upheld the constitutionality of provisions of the Federal Regulation of Lobbying Act, 60 Stat. 812, 839, 2 U.S.C.A. §§ 261–270, which require designated reports to Congress from every person "receiving any contributions or expending any money" (2 U.S.C.A. § 264) for the purpose of influencing the passage or defeat of any legislation by Congress; and which require any person "who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation" to register with Congress and to make specified disclosures. 2 U.S.C.A. § 267.

The Court noted in *Harriss* that many states had enacted legislation regulating lobbying. But the most important aspect of the *Harriss* case was that it made clear that some government regulation of lobbying was permissible. See *United States v. Rumely*, 345 U.S. 41 (1953). As construed, the Federal Regulation of Lobbying Act was constitutional.

Arguably, the guidance which journalists, speakers, publicists, pressure groups, and organizations needed was provided by a very precise definition which the Court gave of what could be regulated under the Federal Regulation of Lobbying Act in *Harriss*.

The effort of the Court in *Harriss* to rewrite the Lobbying Act received academic as well as judicial criticism. For example, the Court in *Harriss* took the position that the Federal Regulation of Lobbying Act did not apply to persons or organizations which spent their own funds to help defeat or support proposed legislation. Similarly, the Court held that the act did not "affect persons soliciting or expending money unless the principal purpose thereof is to influence legislation."

What relationship does removing from the scope of regulation organizations which spend their own funds, or fund expenditures for purposes not principally designed to influence legislation, have to safeguarding the "right to petition"? What difference does it make whether the organization spends its own or other people's funds to support or defeat legislation? See *United States v. International Union, United Automobile Aircraft and Agricultural Implement Workers of America*, 352 U.S. 567 (1957), where the Court upheld an indictment charging a union with having used union dues to sponsor commercial television broadcasts designed to promote the election of certain candidates. That case in-

146. P.L. 100–625, 102 Stat. 3205.
147. *Megaphone Co. v. Southern Bell Telephone & Telegraph Co.*, 643 F.Supp. 1386 (S.D.Fla. 1986).
148. "Not in Virginia," National L. J. (October 24, 1988), 7.

volved consideration of the Federal Corrupt Practices Act. See generally, Comment, *The Regulation of Union Political Activity: Majority and Minority Rights and Remedies*, 126 U.Pa.L.Rev. 386 (1977).

A landmark case holding that lobbying is an activity protected by the First Amendment is *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). It should not be concluded that since government may not interfere with lobbying that government is somehow obliged to encourage it. For example, lobbying expenses of a business have not been considered deductible from income tax.[149] And certain tax-exempt organizations may lose their exemptions if they engage in "substantial" lobbying activities;[150] funds attributable to lobbying might be considered taxable. Generally, members of organizations, such as labor union members, cannot be compelled to have a portion of their dues used for lobbying and political activities.[151]

An important case recognizing that Congress may make distinctions among organizations that lobby vis-a-vis subsidies is *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). In the case, Taxation With Representation (TWR), a group created as part of a larger group devoted to analysis of tax policy issues, applied for exemption under section 501(c)(3) of the Internal Revenue Code. The IRS denied the application because a large part of TWR's activities involved attempts to influence legislation—lobbying. TWR argued that section 170 of the code was discriminatory, since it allowed individual taxpayers to "deduct contributions for veterans groups under § 501(c)(19)." The veterans groups were allowed to lobby. The Court, in an opinion by Justice Rehnquist, rejected the contention.

REGAN v. TAXATION WITH REPRESENTATION

461 U.S. 540, 103 S.CT. 1997, 76 L.ED.2D 129 (1983).

Justice REHNQUIST delivered the opinion of the Court.

The Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public monies. This Court has never held that the Court must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right. * * *

This aspect of the case is controlled by *Cammarano v. United States*, 358 U.S. 498 (1959), in which we upheld a Treasury Regulation that denied business expense deductions for lobbying activities. We held that Congress is not required by the First Amendment to subsidize lobbying. *Id.*, at 513. In this case, like in *Cammarano*, Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying. We again reject the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the [s]tate."

The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to "aim[] at the suppression of dangerous ideas." * * * But the veterans' organizations that qualify under § 501(c)(19) are entitled to receive tax-deductible contributions regardless of the content of any speech they may use, including lobbying. We find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect.

The sections of the Internal Revenue Code here at issue do not employ any suspect classification. The distinction between veterans' organizations and other charitable organizations is not at all like distinctions based on race or national origin.

* * *

Congressional selection of particular entities or persons for entitlement to this sort of largesse "is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find."

* * *

We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny. *Buckley v. Va-*

149. *Cammarano v. United States*, 358 U.S. 498 (1959).

150. Internal Revenue Code § 501(c)(3); Treas. Reg. § a.501(c)(3)-1(c)(3)(ii),(iii) (1959). See generally, Note, *The Tax Code's Differential Treatment of Lobbying Under Section 501(c)(3): A Proposed First Amendment Analysis*, 66 Virginia L.Rev. 1513 (1980).

151. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

leo, 424 U.S. 1 (1976), upheld a statute that provides federal funds for candidates for public office who enter primary campaigns, but does not provide funds for candidates who do not run in party primaries. We rejected First Amendment and equal protection challenges to this provision without applying strict scrutiny. *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), considered legislative decisions not to subsidize abortions, even though other medical procedures were subsidized. We declined to apply strict scrutiny and rejected equal protection challenges to the statutes.

The reasoning of these decisions is simple: "although government may not place obstacles in the path of a [person's] exercise of * * * freedom of [speech], it need not remove those not of its own creation." *Harris, supra*. Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id.*, at 318. As we said in *Maher*, "[c]onstitutional concerns are greatest when the [s]tate attempts to impose its will by force of law. * * *" Where governmental provision of subsidies is not "aimed at the suppression of dangerous ideas," *Cammarano, supra*, its "power to encourage actions deemed to be in the public interest is necessarily far broader." *Maher supra* at 476.

We have no doubt but that this statute is within Congress' broad power in this area. TWR contends that § 501(c)(3) organizations could better advance their charitable purposes if they were permitted to engage in substantial lobbying. This may well be true. But Congress—not TWR or this Court—has the authority to determine whether the advantage the public would receive from additional lobbying by charities is worth the money the public would pay to subsidize that lobbying, and other disadvantages that might accompany that lobbying. * * * It is not irrational for Congress to decide that tax exempt charities such as TWR should not further benefit at the expense of taxpayers at large by obtaining a further subsidy for lobbying.

It is also not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will subsidize lobbying by veterans' organizations. Veterans have "been obliged to drop their own affairs and take up the burdens of the nation * * * subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life." *Johnson v. Robison*, 415 U.S. 361, 380 (1974). Our country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages. This policy has "always been deemed to be legitimate." *Personnel Administrator v. Feeney*, 442 U.S. 256, 279, n. 25 (1979).

The issue in this case is not whether TWR must be permitted to lobby, but whether Congress is required to provide it with public money with which to lobby. For the reasons stated above, we hold that it is not. Accordingly, the judgment of the court of appeals is reversed.

COMMENT

The decision was rendered at almost exactly the same time as *Minneapolis Star*. Do the the two cases appear consistent? In *TWR*, the Court gave considerable weight to the government's asserted interest in preventing other taxpayers from subsidizing the group's lobbying with higher tax bills. The Court used a rational basis test, the usual standard when analyzing legislative tax law classifications. Why was TWR's claim that its First Amendment rights were infringed unable to trigger a tougher standard of review?

State lobbying regulation provisions typically require any individual or organization spending a specified minimum amount of money in a given period, usually a calendar year, to file financial reports. The reports must include details of any expenditures spent on dealing with state officials for the purpose of influencing legislative or administrative actions.[152] When a statute was proposed in Massachusetts's legislature to require yearly financial reports from journalists who "regularly or ordinarily" were assigned to cover the legislature, the commonwealth's Supreme Judicial Court, in an advisory opinion, warned that the statute would violate the First Amendment.[153]

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152. See, e.g., Mich. Comp. Laws Ann. § 4.411 (1981).
153. *Opinion of the Justices*, 5 Med.L.Rptr. 2059, 392 N.E.2d 849 (Mass. 1979).

Regulation of Political Campaigns and the Press

Government attempts to regulate or affect content during campaigns or on specific political issues have usually failed, despite the strong state interest in assuring the integrity of campaigns and elections. When pitted against the First Amendment right of editorial autonomy, provisions aimed at assuring fairness or balance in political news coverage fare poorly. As in other contexts, the state cannot regulate the press to achieve its purposes. The leading case arose under the Alabama Corrupt Practices Act, which made it a crime to engage in "electioneering" or to solicit votes on election day.

MILLS v. ALABAMA

1 MED.L.RPTR. 1334, 384 U.S. 214, 86 S.CT. 1434, 16 L.ED.2D 484 (1966).

Justice BLACK delivered the opinion of the Court.

The question squarely presented here is whether a State, consistently with the United States Constitution, can make it a crime for the editor of a daily newspaper to write and publish an editorial *on election day* urging people to vote a certain way on issues submitted to them.

On November 6, 1962, Birmingham, Alabama, held an election for the people to decide whether they preferred to keep their existing city commission form of government or replace it with a mayor-council government. On election day the Birmingham *Post-Herald*, a daily newspaper, carried an editorial written by its editor, appellant, James E. Mills, which strongly urged the people to adopt the mayor-council form of government. Mills was later arrested on a complaint charging that by publishing the editorial *on election day* he had violated § 285 of the Alabama Corrupt Practices Act, Ala.Code, 1940, Tit. 17, §§ 268–286, which makes it a crime "to do any electioneering or to solicit any votes * * * in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held." * * *

We come now to the merits. * * * The question here is whether it abridges freedom of the press for a State to punish a newspaper editor for doing no more than publishing an editorial on election day urging people to vote a particular way in the election. We should point out at once that this question in no way involves the extent of a State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there. The sole reason for the charge that Mills violated the law is that he wrote and published an editorial on election day urging Birmingham voters to cast their votes in favor of changing their form of government.

Whatever differences may exist about interpretations of the First Amendment there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, see *Lovell v. City of Griffin*, 303 U.S. 444, to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press.

Admitting that the state law restricted a newspaper editor's freedom to publish editorials on election day, the Alabama Supreme Court nevertheless sustained the constitutionality of the law on the ground that the restrictions on the press were only "reasonable restrictions" or at least "within the field of reasonableness." The court reached this conclusion because it thought the law imposed only a minor limitation on the press–restricting it only on election days—and because the court thought the law served a good purpose. * * * This argument, even if it were relevant to the constitutionality of the law, has a

fatal flaw. The state statute leaves people free to hurl their campaign charges up to the last minute of the day before election. The law held valid by the Alabama Supreme Court then goes on to make it a crime to answer those "last-minute" charges on election day, the only time they can be effectively answered. Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate "from confusing last-minute charges and countercharges." We hold that no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election.

The judgment of the Supreme Court of Alabama is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Judgment reversed and case remanded.

Justice Douglas, with whom Justice Brennan joins, concurring.

* * *

COMMENT

The Alabama statute, the Court noted, fails to meet its purpose of protecting the voters from confusing last-minute charges, because even charges the day before will go without a response. Would it make a difference if the act was amended to provide an exception for last-minute charges that would allow charges to be answered in the press even on election day? The purpose would be to make the provisions a "reasonable" restriction on the press. Would Justice Black have acquiesced if the act provided for a two-week moratorium preceding all state elections?

Narrow construction of the term "lobbying" in *Rumely* and *Harriss* minimized the investigative scope of the legislative investigation in *Rumley* and the regulatory scope of the act in *Harriss*. Would a limited construction technique have sufficed in Mills? Suppose electioneering and vote solicitation were read by the Court as simply not meant to apply to the press?

Brown v. Hartlage, 456 U.S. 45 (1982), used a rationale similar to that in *Mills* to invalidate a portion of the Kentucky Corrupt Practices Act which makes it a crime for any candidate to "promise, agree or make a contract with any person to vote for or support" any particular measure. During the campaign for Jefferson County commissioner, one candidate promised at a news conference to lower commissioners' salaries. An opponent filed suit alleging violation of the act. Proof of violation costs the candidate the office if elected. The promise was widely reported in the press. The Court said that, "When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported not only by a legitimate state interest, but a compelling one * * *." The Court drew an analogy to libel law, announcing that candidate statements required breathing space. The Kentucky law allowed none.

The Texas Election Code provision requiring broadcasters to charge low rates for political advertising and also requiring identification of sponsors was challenged in *KVUE v. Moore*, 9 Med.L.Rptr. 2334, 709 F.2d 922 (5th Cir. 1983). The court held that the advertising rates provision was preempted by section 315 of the Federal Communications Act but that the requirement of sponsor identification was upheld because it applied generally to all broadcasters and effectuated the state's compelling interest in the integrity of elections. Can the case be squared with decisions such as *Minneapolis Star* or *Associated Press*, which require uniform treatment?

The antiabortion group, Massachusetts Citizens for Life (MCFL), found itself in conflict with the Federal Election Commission (FEC) after it published a special election edition of its newsletter. The group expanded its usual circulation from 6,000 to 100,000 for the special edition. Its coverage of candidates was overtly biased toward those candidates who opposed abortion. The FEC brought an action against the group for violation of a provision of the Federal Election Campaign Act which bars corporations from using their treasury funds to make expenditures "in connection with" any federal election.[154] Under the statute, "bona fide" newspapers are exempt from the prohibition. MCFL asserted that its publication of the advocacy newsletter did not constitute an expenditure within the meaning of the act and that it qualified for the newspaper

154. 2 U.S.C.A. § 441b.

exemption. The Court dismissed both arguments—MCFL spent money to help candidates, and its irregular publishing practices prevented its being considered a bona fide newspaper. The group also argued that the statute as applied to corporations was a facial violation of the First Amendment. The Court agreed.

FEDERAL ELECTION COMMISSION v. MASSACHUSETTS CITIZENS FOR LIFE

479 U.S. 238 (1986).

Justice BRENNAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–B, and III–C * * *

The questions for decision here arise under § 316 of the Federal Election Campaign Act (FECA or Act), 90 Stat. 490, as renumbered and amended, 2 U. S. C. § 44lb. The first question is whether appellee Massachusetts Citizens for Life, Inc. (MCFL), a nonprofit, nonstock corporation, by financing certain activity with its treasury funds, has violated the restriction on independent spending contained in § 44lb. That section prohibits corporations from using treasury funds to make an expenditure "in connection with" any federal election, and requires that any expenditure for such purpose be financed by voluntary contributions to a separate segregated fund. If appellee has violated § 44lb, the next question is whether application of that section to MCFL's conduct is constitutional as applied to the activity of which Federal Election Commission (FEC or Commission) complains.

* * *

MCFL began publishing a newsletter in January 1973. It was distributed as a matter of course to contributors, and, when funds permitted, to noncontributors who had expressed support for the organization. The total distribution of any one issue has never exceeded 6,000. The newsletter was published irregularly from 1973 through 1978; three times in 1973, five times in 1974, eight times in 1975, eight times in 1976, five times in 1977, and four times in 1978.

* * *

In September 1978, MCFL prepared and distributed a "Special Edition" prior to the September 1978 primary elections. While the May 1978 newsletter had been mailed to 2,109 people and the October 1978 newsletter to 3,119 people, more than 100,000 copies of the "Special Edition" were printed for distribution.

* * *

To aid the reader in selecting candidates, the flyer listed the candidates for each state and federal office in every voting district in Massachusetts, and identified each one as either supporting or opposing what MCFL regarded as the correct position on three issues.

* * *

The "Special Edition" was not identified on its masthead as a special edition of the regular newsletter, although the MCFL logotype did appear at its top. The words "Volume 5, No. 3, 1978" were apparently handwritten on the Edition submitted to the FEC, but the record indicates that the actual Volume 5, No. 3, was distributed in May–June 1977. The corporation spent $9,812.76 to publish and circulate the "Special Edition," all of which was taken from its general treasury funds.

A complaint was filed with the Commission alleging that the "Special Edition" was a violation of § 44lb. The complaint maintained that the Edition represented an expenditure of funds from a corporate treasury to distribute to the general public a campaign flyer on behalf of certain political candidates. The FEC found reason to believe that such a violation had occurred, initiated an investigation, and determined that probable cause existed to believe that MCFL had violated the Act. After conciliation efforts failed, the Commission filed a complaint in the District Court under § 437g(a)(6)(A), seeking a civil penalty and other appropriate relief.

Both parties moved for summary judgment. The District Court granted MCFL's motion, holding that: (1) the election publications could not be regarded as "expenditures" under § 44lb(b)(2); (2) the "Special Edition" was exempt from the statutory prohibition by virtue of § 431(9)(B)(i), which in general exempts news commentary distributed by a periodical publication unaffiliated with any candidate or political party; and (3) if the statute applied to MCFL, it was unconstitutional as a violation of the First Amendment. 589 F.Supp. 646, 649 (Mass. 1984).

On appeal, the Court of Appeals for the First Circuit held that the statute was applicable to MCFL,

but affirmed the District Court's holding that the statute as so applied was unconstitutional. 769 F.2d 13 (1985). We granted certiorari, 474 U.S. 1049 (1986), and now affirm.

[The Court determined that MCFL is covered by § 44lb.]

* * *

MCFL argues that it is entitled to the press exemption under 2 U. S. C. § 431(9)(B)(i) reserved for

> "any news story, commentary, or editorial distributed through the facilities by any . . . newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."

* * *

MCFL maintains that its regular newsletter is a "periodical publication" within this definition, and that the "Special Edition" should be regarded as just another issue in the continuing newsletter series. * * * [T]he House of Representatives' Report on this section states merely that the exemption was designed to

> "make it plain that it is not the intent of Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press or of association. [The exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." H. R. Rep. No. 93–1239, p. 4 (1974).

We need not decide whether the regular MCFL newsletter is exempt under this provision, because, even assuming that it is the "Special Edition" cannot be considered comparable to any single issue of the newsletter. It was not published through the facilities of the regular newsletter, but by a staff which prepared no previous or subsequent newsletters. It was not distributed to the newsletter's regular audience, but to a group 20 times the size of that audience, most of whom were members of the public who had never received the newsletter. No characteristic of the Edition associated it in any way with the normal MCFL publication. The MCFL masthead did not appear on the flyer, and, despite an apparent belated attempt to make it appear otherwise, the Edition contained no volume and issue number identifying it as one in a continuing series of issues.

MCFL protests that determining the scope of the press exemption by reference to such factors inappropriately focuses on superficial considerations of form. However, it is precisely such factors that in combination permit the distinction of campaign flyers from regular publications. We regard such an inquiry as essential, since we cannot accept the notion that the distribution of such flyers by entities that happen to publish newsletters automatically entitles such organizations to the press exemption. A contrary position would open the door for those corporations and unions with inhouse publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, thereby eviscerating § 44lb's prohibition.

Independent expenditures constitute expression " 'at the core of our electoral process and of the First Amendment freedoms.' " We must therefore determine whether the prohibition of § 44lb burdens political speech, and, if so, whether such a burden is justified by a compelling state interest.

The FEC minimizes the impact of the legislation upon MCFL's First Amendment rights by emphasizing that the corporation remains free to establish a separate segregated fund, composed of contributions earmarked for that purpose by the donors, that may be used for unlimited campaign spending. However, the corporation is *not* free to use its general funds for campaign advocacy purposes. While that is not an absolute restriction of speech, it is a substantial one. Moreover, even to speak through a segregated fund, MCFL must make very significant efforts.

If it were not incorporated, MCFL's obligations under the Act would be those specified by § 434(c), the section that prescribes the duties of "(e)very person (other than a political committee)."

* * *

Because it is incorporated, however, MCFL must establish a "separate segregated fund" if it wishes to engage in any independent spending whatsoever. §§ 44lb(a),(b)(2)(C). Since such a fund is considered a "political committee" under the Act, § 431(4)(B), all MCFL independent expenditure activity is, as a result, regulated as though the organization's major purpose is to further the election of candidates. This means that MCFL must comply with several requirements in addition to those mentioned.

* * *

[The opinion details fourteen record-keeping and filing requirements.]

Thus, while § 441b does not remove all opportunities for independent spending by organizations such as MCFL, the avenue it leaves open is more burdensome than the one it forecloses. The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize § 441b as an infringement on First Amendment activities. In *Freedman v. Maryland*, 380 U.S. 51 (1965), for instance, we held that the absence of certain procedural safeguards rendered unconstitutional a State's film censorship program. Such procedures were necessary, we said, because, as a practical matter, without them "it may prove too burdensome to seek review of the censor's determination." *Id.*, at 59.

* * *

When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest. *Williams v. Rhodes*, 393 U.S., at 31; *NAACP v. Button*, 371 U.S. 415, 438 (1963). The FEC first insists that justification for § 441b's expenditure restriction is provided by this Court's acknowledgment that "the special characteristics of the corporate structure require particularly careful regulation." *National Right to Work Committee*, 459 U.S., at 209–210. The Commission thus relies on the history of regulation of corporate political activity as support for the application of § 441b to MCFL.

* * *

Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace. Political "free trade" does not necessarily require that all who participate in the political marketplace do so with exactly equal resources.

* * *

By requiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending, § 441b seeks to prevent this threat to the political marketplace. The resources available to *this* fund, as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee.

* * *

Regulation of corporate political activity thus has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes. Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace. While MCFL may derive some advantages from its corporate form, those are advantages that redound to its benefit as a political organization, not as a profit-making enterprise. In short, MCFL is not the type of "traditional corporatio[n] organized for economic gain," that has been the focus of regulation of corporate political activity.

* * *

The Commission maintains that, even if contributors may be aware that a contribution to appellee will be used for political purposes in general, they may not wish such money to be used for electoral campaigns in particular. That is, persons may desire that an organization use their contributions to further a certain cause, but may not want the organization to use their money to urge support for or opposition to political candidates solely on the basis of that cause. This concern can be met, however, by means far more narrowly tailored and less burdensome than § 441b's restriction on direct expenditures: simply requiring that contributors be informed that their money may be used for such a purpose.

* * *

Finally, the FEC maintains that the inapplicability of § 441b to MCFL would open the door to massive undisclosed political spending by similar entities, and to their use as conduits for undisclosed spending by business corporations and unions. We see no such danger. Even if § 441b is inapplicable, an independent expenditure of as little as $250 by MCFL will trigger the disclosure provisions of § 434(c). * * * These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions. The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act.

Furthermore, should MCFL's independent spending become so extensive that the organization's

major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. See *Buckley*, 424 U.S., at 79. As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns.

* * *

Thus, the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL. The dissent is surely correct in maintaining that we should not second-guess a decision to sweep within a broad prohibition activities that differ in degree, but not kind. It is not the case, however, that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all. Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form. Given this fact, the rationale for restricting core political speech in this case is simply the desire for a bright-line rule. This hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom. While the burden on MCFL's speech is not insurmountable, we cannot permit it to be imposed without a constitutionally adequate justification. In so holding, we do not assume a legislative role, but fulfill our judicial duty—to enforce the demands of the Constitution.

* * *

It may be that the class of organizations affected by our holding today will be small. That prospect, however, does not diminish the significance of the rights at stake. Freedom of speech plays a fundamental role in a democracy; as this Court has said, freedom of thought and speech "is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). Our pursuit of other governmental ends, however, may tempt us to accept in small increments a loss that would be unthinkable if inflicted all at once. For this reason, we must be as vigilant against the modest diminution of speech as we are against its sweeping restriction. Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation. In enacting the provision at issue in this case, Congress has chosen too blunt an instrument for such a delicate task.

* * *

COMMENT

The Court failed to address the thorny "bona fide" newspaper issue in any detail. Surely the exemption as interpreted by the Court discriminates between publications solely on the basis of ownership or content. Is the source of a publication, its length, or its irregular publishing schedule a legitimate basis for granting some publications greater rights than others? The First Circuit had said the newsletter's contents could not even be considered news stories, commentaries, or editorials because the special edition was not prepared by the usual newsletter staffers. 12 Med.L.Rptr. 1041, 769 F.2d 13 (2d Cir. 1985). Lower federal courts had read the newspaper exemption broadly in earlier cases to assure minimum conflict between First Amendment and campaign regulation interests.[155]

Chief Justice Rehnquist wrote for four dissenters. He thought the majority's approach gave too little weight to the government's interest in preventing corporations from corrupting the electoral process. The majority had argued that MCFL was not the sort of corporation Congress was worried about when it passed the act. "These distinctions among corporations, however, are 'distinctions in degree' that do not amount to 'differences in kind'," Rehnquist wrote. Differences in treatment between corporations and other types of organizations were justified, he said, based on concern over the years with corporations' role in the electoral process. He believed the Court should defer to the legislative judgment behind the act.

Regulation of Corporate Speech and Campaign Financing Regulation

The *MCFL* case, while it addresses issues relevant to the press, also spills over into the topics of regulation of corporate speech and of campaign finance

155. See, e.g., *FEC v. Phillips Publishing, Inc.*, 517 F.Supp. 1308 (D.D.C. 1981); *Reader's Digest Ass'n. v. FEC*, 509 F.Supp. 1210 (S.D.N.Y. 1981).

regulation. The concern over the role of corporations during campaign times evinced in *MCFL* has been the basis for many statutes and regulations. Recall the 5–4 decision of the Supreme Court in *First National Bank of Boston v. Bellotti* (text, p. 156), involving a state law that prohibited corporations from making efforts to influence elections much like the federal rule in *MCFL*.

Massachusetts had attempted by a criminal statute to prohibit the efforts of banks and business corporations to make expenditures for the purpose of influencing state elections on referendum proposals. The Supreme Court invalidated the Massachusetts statute in an opinion that was widely publicized as extending free speech rights to business corporations. Just as media corporations were able to claim free press rights under the First Amendment, said the Court, so ordinary business corporations should be able to assert free speech rights under the First Amendment as well.[156]

Is the thrust of the *Bellotti* case an effort by the Court to accord equivalent First Amendment clout to business corporations to make them sufficiently effective contenders with media corporations for purposes of influencing the political process?

The opinion appears to encourage pluralism in the opinion process among various power aggregates but not between individuals and the same power aggregates. Note that the old Warren Court liberals, Marshall and Brennan, were allied in dissent with Justice White.

Justice White attempted to sketch a different kind of First Amendment hierarchy—between individuals and corporations (whether the corporation is a media or nonmedia corporation is irrelevant in this theory). In this hierarchy, ideas that are the product of "individual choice" have the higher claim to First Amendment protection. Justice Powell rejected this hierarchy because "it would apply to newspaper editorials and every other form of speech created under the auspices of a corporate body."

Justice White sympathized with state efforts to make the opinion process more egalitarian. In his view, the Massachusetts legislation was designed to prevent dislocations in the marketplace of ideas engendered by the corporate form.

In the aftermath of Watergate with its disclosures of misbehavior in the financing of political campaigns, new interest was directed to legislative efforts to clean up the whole process of campaign financing. Accordingly, in 1974 Congress enacted some significant amendments to the Federal Election Campaign Act of 1971. The amendments set forth complex provisions requiring the reporting and disclosure of political contributions to Congress. Further, in an innovative step, Congress set up a scheme for allocating subsidies to candidates in presidential elections. Congress also set forth new and stringent limitations on contributions to candidates and on expenditures by or on behalf of candidates.

The new legislation soon became the subject of major constitutional litigation. In 1976, the Supreme Court in *Buckley v. Valeo*,[157] a 200-page *per curiam* decision, took something of a middle road with respect to the massive congressional intervention into the federal election process represented by the new legislation. The Court ruled that the limitations on political contributions to candidates in federal elections were constitutional. But the new legislation's limitations on expenditures by contributors or by groups on behalf of a clearly identified candidate were not valid. The Court said that the legislation's limitation on political contributions could be justified on the basis of its underlying purpose—prevention of the actuality and appearance of corruption which resulted from large individual financial contributions. The governmental interest in the integrity of the political process in this regard justified the incidental infringement on political association which accompanied the limitation on political contributions. The expenditure limitations, however, were deemed to fall into a different category and were hence invalid. The expenditure limitations were held to constitute a direct and substantial infringement on the ability of individuals, candidates, and organizations not under a candidate's control to conduct political activities.

In a masterful analysis of *Buckley v. Valeo*, Professor Laurence Tribe argued that if the case is seen in context, it is just another in a series of cases issued by the Supreme Court in the 1970s in which the Court attempts "to secure for the wealthy the advantages of their position" even in the face of legislative efforts "to move in a more egalitarian direction." Professor Tribe commented on the Court's reaction to the expenditure and contribution pro-

156. 435 U.S. 765 (1978).
157. 424 U.S. 1 (1976).

visions of the 1974 amendments to the Federal Campaign Election Act of 1971:

> Whether or not one regards government as responsible for the distribution of wealth underlying this distortion, it is hard to deny that the contribution and expenditure limitations redress it and to that extent increase freedom of speech. If the net effect of the legislation is to enhance freedom of speech, the exacting review reserved for abridgements of free speech is inapposite.

See Tribe, *American Constitutional Law* 803–805 (1978).

Tribe's analysis would certainly seem applicable in light of the recent cases. In 1985, the Court said that the portion of the FECA which prohibited expenditures on behalf of candidates for president or vice-president by political committees not affiliated with a candidate violated the First Amendment. *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985). In an opinion written by Justice Rehnquist, the Court held that the political messages produced by independent committees were at the "core" of the First Amendment. Further, the fact that the committees were independent helped assure that impropriety or the appearance of impropriety in campaigns would be avoided. Finally, the statute conflicted with the freedom of association guaranteed by the First Amendment. As a result, both the limits on making expenditures and the amount of the limit, $1,000 on any single message, were declared unconstitutional. For many, donating to a political action committee was their only way of engaging in political speech. For such people, in effect, money *is* speech.[158] NCPAC organized the expenditure of millions of dollars for independent advertisements in support of President Reagan's 1984 reelection campaign. In assessing the potential for corruption, Rehnquist could find none, since there was no *quid pro quo*, or promise, obtained from or expected from the candidate in exchange for support. In a key passage, the opinion notes:

> It is contended that, because the PACs may by the breadth of their organizations spend larger amounts than the individuals in *Buckley*, the potential for corruption is greater. But precisely what the "corruption" may consist of we are never told with assurance. The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.

Does Rehnquist's explanation in *MCFL* that the anti-abortion group could form an independent committee as in *NCPAC* justify the distinction he draws between corporations and political committees?

Regardless of rationale, the raw results of the two cases appear to support Tribe's argument. Justice Brennan's assertion that the expenditure limitations cannot constitutionally be applied to organizations like MCFL does not explain what will be considered similar to MCFL in the future. One thing is clear: for a candidate, it is better to be supported by a wealthy organization than a poor one, regardless of the election laws. *MCFL* and *NCPAC* would appear to establish ground rules that will detract from the major FECA goal of creating fair and equal campaigns.

With respect to the FECA disclosure provisions, note that the Court in *Buckley* did not give them an indefinite constitutional bill of health. While the Court validated the disclosure requirements for the moment even as to minor parties, it did leave open the possibility that proof of injury by minor parties in a concrete case might cause the invalidation of the disclosure provisions as to them. Here the concern was that disclosure of one's support for an unpopular political party might fatally sap that party's potential for growth. Minor parties are presumably more likely to stand for unpopular causes, and, therefore, compelled exposure of an individual's support for such a party may well raise First Amendment issues of governmental infringement on associational freedom.

The Court in *Buckley v. Valeo* upheld legislation providing for funding presidential elections on the ground that these provisions facilitated and enlarged public discussion and participation in the political process and did not abridge or restrict speech. But a governmental apparatus to subsidize candidates would appear to involve enhancing "the relative voice of others" in the sense that such subsidies benefit the less wealthy candidates. The first part of the

158. Professor Powe has observed: "An individual choice to have a message with which he agrees prepared by professionals is no less speech. Proxy speech is simply a pejorative name for a political commercial. It is still speech." See Powe, *Mass Speech And The Newer First Amendment*, 1982 Sup.Ct.Rev. 243 at 258–259. See also, Garramone and Smith, *Reactions to Political Advertising: Clarifying Sponsor Effects*, 61 Journalism Quarterly 771 (1984) (advertisements prepared by independent entities appear to have more credibility with the public than those prepared by a candidate's organization).

Buckley decision, it will be recalled, had declared that enhancement of the "relative voice of others" is "foreign to the First Amendment."

It was argued to the Court in *Buckley* "by analogy" to the "no-establishment clause" of the First Amendment that "public financing of election campaigns, however meritorious, violates the First Amendment." The Court rejected the analogy and ruled that the subsidy provisions furthered First Amendment values:

> Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, 47 U.S.C. §§ 390–399, and preferential postal rates and antitrust exemptions for newspapers, 39 CFR 132.2 (1975); 15 U.S.C. §§ 1801–1804.

The subsidy provisions of the Federal Campaign Finance Act withheld public funding from candidates without significant public support. The Court ruled that Congress could legitimately require that a candidate be able to make an initial showing "of a significant modicum of support" as a requirement for eligibility for subsidy. Such a requirement, said the Court, furthers the goal and "serves the important public interest against providing artificial incentives to 'splintered parties and unrestrained factionalism'." How do these remarks affect the question of whether it is a First Amendment mandate that government be careful to maintain ideological neutrality?

California Medical Association v. Federal Election Commission (CALPAC), 453 U.S. 182 (1981), rejected a constitutional assault on the validity of 2 U.S.C.A. § 441a(1)(c) which prohibits individuals and unincorporated associations from contributing more than $5,000 per year to any multicandidate political committee. A plurality opinion by Justice Marshall, joined by Justices Brennan, White, and Stevens, accepted the notion that "proxy speech," or speech emanating from a political committee rather than the contributor himself, was different from direct political speech and deserving of less First Amendment protections. The plurality followed the contribution/spending dichotomy of *Buckley*, holding that limitations on contributions to multicandidate political committees was a valid exercise of government authority.

Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981), dealt with a local California ordinance that limited contributions to political referenda committees to $250 while imposing no restrictions on personal spending on the same issue. The ordinance also afforded similar treatment to corporations and individuals. Although the ordinance appeared to be consistent with the mandates of *Buckley* and *Bellotti*, the Court invalidated the ordinance under *NAACP v. Alabama*, 357 U.S. 449 (1958), as an impermissible restraint on the "freedom of association." The Court reasoned that "[t]o place a spartan limit—or indeed any limit—on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association."

In a unanimous opinion, the Court rejected as an intrusion on "core" speech a Colorado statutory provision which prohibited paying persons to circulate constitutional amendment initiative petitions. Plaintiffs were members of a group closely allied to the trucking industry that hoped to have motor carriers removed from the jurisdiction of the Colorado Public Utilities Commission. *Meyer v. Grant*, 108 S.Ct. 1886 (1988). Since the speech was at the "core," strict scrutiny applied, and the state could not meet the compelling interest test. Colorado argued that its interest was to assure that an initiative had sufficient support to justify placing it on the ballot and that signatures acquired through efforts of paid volunteers lacked genuineness. The state also argued the standby position, that paid volunteers presented a risk of corruption. The Court dismissed the argument as based on "speculation." It will apparently be very difficult for government to limit First Amendment activities of individuals, voluntary-membership groups, or the press where campaigns and elections are involved. The right to speak about elections has prevailed in general over the interest in assuring that debate on elections be fair and that candidates be on roughly equal footing.

SECTION EIGHT

COPYRIGHT, UNFAIR COMPETITION, AND FAIR USE IN PRINT AND ELECTRONIC MEDIA

Copyright

Article 1, Section 8(8) of the United States Constitution stipulates that "The Congress shall have Power * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and

Inventors the exclusive Right to their respective Writings and Discoveries. * * *"

Its purpose is akin to that of the First Amendment: protect the property rights of authors in their creations and in the end you will enhance the flow of information to the people.

The first copyright law was enacted in 1790. The most recent became law on January 1, 1978,[159] and it superseded the copyright law of 1909 and its patchwork amendments. In general terms the new law makes the author, the creative person, the focal point of protection.

a. Duration of a copyright is now the author's life plus fifty years. If a copyright is in its first twenty-eight-year term under the old law, it may be renewed in the twenty-eighth year for an additional forty-seven years or a total copyright term of seventy-five years. Works in their second twenty-eight-year term are automatically extended to seventy-five years from date of original copyright. Joint or co-authored works are protected for fifty years after the last author dies. For works made for hire the new term is seventy-five years from publication or 100 years from creation, whichever is shorter. In such cases the employer becomes the "author."

b. A work is now protected from the moment of its creation, in a "fixed" or tangible form, the author being the first owner of all rights of copyright in every case.

c. An author need not sell all of his or her rights to a single publisher in order to obtain a copyright; under the new law any rights not specifically transferred in writing remain with the author. Copyright is now divisible. What may be copyrighted for newspaper or magazine purposes may be recopyrighted for book publishing or movie adaptation purposes.

d. A transfer of rights to a publisher may be terminated and renegotiated after thirty-five years, and the right to terminate may not be waived in advance. Any transfer of an author's rights must be validated by a signed contract. Without a written agreement, copyright remains with the creator.

A subsisting copyright may be reclaimed and renegotiated after fifty-six years for an additional nineteen years.

e. Magazine publishers, or other publishers of collected works, acquire only first serial and limited reprint rights to articles or photographs. All other rights are retained by the author.

f. Sound recordings, including those played through jukeboxes, are protected, as are nondramatic literary works such as works of nonfiction, works of the performing arts such as musical compositions, television programs and motion pictures, and works of the visual arts such as photographs and advertisements. Public broadcasters must pay for noncommercial transmissions of published musical and graphic works. Cable systems must also pay for transmission of copyrighted works.

To Apply for a Copyright. One fills out a form supplied by the Copyright Office, Library of Congress, Washington, D.C. 20559. For a nominal fee and a specified number of copies of each separate work (usually one copy of unpublished and two copies of published works), you receive a certificate of registration valid from the day on which your application, your copies to be deposited, and your fee reach and are found acceptable by the Copyright Office. There are criminal penalties for failing to deposit copies, but no loss of copyright.

A notice of copyright may confidently be placed on all publicly distributed copies of the work in one of the following forms: the symbol © (the letter c in a circle), or the word "Copyright," or the abbreviation "Copr."; the year of the first publication of the work; and the name of the owner of the copyright: for example, © 1990 Peter Reiter. Consult the act for differences in symbolization dictated by the form of the work for which copyright is sought and for other details of the registration procedure. Mistakes made during registration and even an omission of notice can be corrected within time limits. Negligence by author or publisher does not necessarily forfeit copyright, but publication without notice may provide a defense to an innocent infringer. Registration is no longer a condition of copyright protection, nor is placing a notice of copyright on published or unpublished works, but it is prerequisite to a copyright infringement suit seeking damages and attorney fees, and is therefore advantageous. Notice is particularly important for pre-1978 works, and any work without notice may be presumed to have found its way into the public domain.

159. 17 U.S.C.A. § 101 et seq.

All works now receive federal statutory protection from the moment of creation (the act of an author), without regard to whether or not they are published. All common law or state copyright protection is preempted by the new uniform federal system,[160] unless the right in intellectual property at stake is not covered by the federal statute. But the new law is not retroactive. Works already in the public domain remain there, including anything published before September 19, 1906.

Works made for hire are works created at the behest of an employer. The new Copyright Act specifies two made-for-hire situations:

1. works "prepared by an employee within the scope of his or her employment," and
2. works "specially ordered or commissioned" and agreed to in writing to be works made for hire. In these circumstances the publisher may be considered the "author" and first copyright owner. These rights are nevertheless limited and divisible: an author may transfer part of a copyright to a publisher while retaining other parts.

Under the definition of works made for hire in § 101 of the 1976 act, a newspaper publisher would be "author" of everything copyrightable in each issue of the newspaper; only by special agreement would a news reporter or a columnist retain rights in his or her copyrightable work. A columnist, for example, would have to make an agreement with a publisher in advance that future book publication rights remain with the column writer.

When such questions are litigated, courts consider the creative role played by the employer in guiding, supervising, or directing the work of an employee or an independent contractor—writers, filmmakers, translators, text and test makers. A court ruled for example, that a university professor holds copyright to his own lecture notes since the institution employing him played only an indirect role in their creation.[161] Likewise, Admiral Rickover, not the Navy, owned the copyright in his speeches on public education because the Admiral had not "mortgaged all the products of his brain to his employer."[162] And a local merchant, not the newspaper in which his ad appeared, owned the copyright to an advertisement because the merchant had directed what the ad should contain. On the other hand, a pamphlet written by a company chemist was clearly a project within the scope of his employment, and so the copyright remained with the company.[163]

All the cases just referred to predate the 1976 Act. The Supreme Court held that the new law strengthens the interest of the creators of works. While the creations of employees will be presumed to be works made for hire unless there is written agreement to the contrary, creations of persons commissioned or contracted with are assumed to remain the property of the creator.[164] Apparently any intent by the parties that the party commissioning a work retain ownership must be stated unequivocally in writing. In a 1989 case, *Community for Creative Non-Violence v. Reid*, 16 Med.L.Rptr. 1769 (U.S. 1989), the Court decided in favor of a sculptor who had created a statue at the urging of a community group. Both claimed ownership. In a unanimous opinion written by Justice Marshall, the Court announced that the 1976 provisions superseded prior judicial interpretations. The net effect, in all likelihood, is to improve the relative bargaining position of freelancers and other self-employed creators of works when negotiating a commissioned work. Especially for writers, future rights pale in comparison to getting desirable initial compensation. Reason may dictate exceptions. Work related to one's employment but done after business hours and for purposes outside the scope of that employment may be excepted.[165] For independent contractors, such as illustrators, songwriters, free-lancers, textbook authors, the fine print of the initial agreement or contract is important.

What some have called the "artistic-effort-invested" philosophy of copyright is reflected in cases decided

160. Ringer, *Finding Your Way Around in the New Copyright Law*, Practising Law Institute, Communications Law 1977, p. 114, reprinted from 22 New York Law School L.Rev. 477–495 (1976).

161. *Williams v. Weisser*, 273 Cal. App. 726, 78 Cal.Rptr. 542 (1969). The continuing strength of the case, based on preempted state common law copyright, is in doubt. See, Simon, *Faculty Writings: Are They "Works Made for Hire" Under the 1976 Copyright Act?*, 9 J. College & University L. 485, 495–500 (1982–83).

162. *Public Affairs Associates v. Rickover*, 268 F.Supp. 444 (D.D.C. 1967).

163. *Brattleboro Publishing Co v. Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966) (advertisements); *U.S. Ozone Co. v. United States Ozone Co. of America*, 62 F.2d 881 (7th Cir. 1932 pamphlet).

164. "High Court Clarifies 'Work for Hire Standard," Med.L.Rptr., News Notes vol. 16, No. 19 (June 13, 1989); Greenhouse, "Freelance Artists' Copyright Strengthened by High Court," The New York Times, June 6, 1989, 11.

165. *Franklin Mint v. National Wildlife Art Exchange*, 3 Med.L.Rptr. 2169, 575 F.2d 62 (3d Cir. 1978).

both before and after passage of the 1976 Act. Anything authored, created, performed, or produced and fixed or transcribed in a tangible or permanent way, rather than improvised, with a few exceptions, is copyrightable. Print, videotape, audiotape, film, television when taped at the time of transmission, computer programs, data bases, art works, choreographies, musical compositions, maps, news programs, compilations like annotated bibliographies, newsletters, singly or in single-year groups are included. Sedition, some classifications of pornography, names, titles, slogans, standard symbols and emblems (although these may be protected as trademarks), and official works, both published and unpublished, of the United States and state governments cannot be copyrighted, although the government may protect its "physical" property.

There has been an interesting debate for some time as to whether the copyright law ought to have anything to say about content, for example sedition or pornography. The prevailing view appears to be that it should not and does not.

"There is nothing in the Copyright Act," said the Ninth Circuit Court of Appeals in *Belcher v. Tarbox*, 486 F.2d 1087 (9th Cir. 1973), "to suggest that the courts are to pass upon the truth or falsity, the soundness or unsoundness, of the views embodied in a copyrighted work. The gravity and immensity of the problems, theological, philosophical, economic and scientific that would confront a court if this view were adopted are staggering to contemplate."

The Ninth Circuit relied on *Belcher* when in 1982 it held that the obscenity of a copyrighted film was not a valid defense against a claim of copyright infringement. Since *Miller v. California* made obscenity a matter of community definition, acceptance of an obscenity defense, said the court in *Clancy v. Jartech*, 8 Med.L.Rptr. 1404, 666 F.2d 403 (9th Cir. 1982), would fragment copyright enforcement, protecting registered material in a certain community while, in effect, authorizing pirating in another locale.

The *Clancy* court also cited an important Fifth Circuit ruling, involving the same plaintiffs, for the proposition that both old and new copyright laws, using the inclusive language "all writings of an author" and "original works of authorship" respectively, were intended to be content-neutral. The case, *Mitchell Brothers v. Cinema Adult Theater*, 5 Med.L.Rptr. 2133, 604 F.2d 852 (5th Cir. 1979), cert. den. 445 U.S. 917 (1980), has been called "the most thoughtful and comprehensive analysis of the issue." [166]

By contrast, the Lanham Act prohibits registration of any trademark that "consists of or comprises immoral, deceptive or scandalous matter," 15 U.S.C.A. § 1052(a), and inventions must be shown to be "useful" before a patent is issued, 35 U.S.C.A. § 101. No such language occurs in the 1909 or 1976 copyright laws.

A score of works that are today held in high esteem were listed by the Fifth Circuit as having been adjudged obscene in earlier times. On the question of the copyrightability of allegedly obscene creations, the court made the following points.

MITCHELL BROTHERS v. CINEMA ADULT THEATER

5 MED.L.RPTR. 2133, 604 F.2D 852 (5TH CIR. 1979).

GODBOLD, Circuit Judge:

* * *

Some courts have denied legal redress in infringement suits to holders of copyrights on immoral or obscene works by applying judicially-created doctrines. Two of these doctrines are largely vestiges of a bygone era and need be addressed only briefly. The theory that judges should act as conservators of the public morality was succinctly summarized by the court in *Shook v. Daly*, 49 How.Pr. 366, 368 (N.Y.Sup.Ct. 1895): "The rights of the writer are secondary to the rights of the public to be protected from what is subversive of good morals." Application of this theory by the English courts in the nineteenth century led to the suppression of works because they were inconsistent with Biblical teachings or because they were seditious. * * * Although this theory has been relied on as recently as 1963, see *Dane v. M. & H. Co.*, 136 U.S.P.Q. (BNA) 426, 429 (N.Y.Sup.Ct. 1963) (common law copyright protection denied striptease because it did not "elevate, cultivate, inform, or improve the moral or intellectual natures of the audience"), it is evident to us that it is inappropriate for a court, in the absence

166. *Nimmer on Copyright* § 2.17 (1980), 2-194.2.

of some guidance or authorization from the legislature, to interpose its moral views between an author and his willing audience.

A second judicially-created doctrine, the theory that a person can have no property in obscene works, merely expresses by means of a legal fiction the underlying judicial moral conclusion that the work is not worthy of protection. The doctrine has not been adopted in this country, * * * and should not be. * * *

The third judicially created doctrine, that of unclean hands, has seldom been relied upon by courts that have denied copyright to obscene or immoral works. For the most part, only English courts have relied on this theory. See generally Chafee, [*Coming into Equity with Clean Hands* 47 Mich.L.Rev. 1065–70 (1947)]. Of the various American cases allowing obscenity as a defense to a copyright infringement action, few even mention the doctrine of unclean hands. * * * Nevertheless, since the district court permitted obscenity to be asserted as a defense through the medium of the unclean hands rubric, the concept of unclean hands requires more extended discussion.

Assuming for the moment that the equitable doctrine of unclean hands has any field of application in this case, it should not be used as a conduit for asserting obscenity as a limit upon copyright protection. Creating a defense of obscenity—in the name of unclean hands or through any other vehicle—adds a defense not authorized by Congress that may, as discussed above, actually frustrate the congressional purpose underlying an all-inclusive copyright statute. It will discourage creativity by freighting it with a requirement of judicial approval. Requiring authors of controversial, unpopular, or new material to go through judicial proceedings to validate the content of their writings is antithetical to the aim of copyrights. If the copyright holder cannot obtain financial protection for his work because of actual or possible judicial objections to the subject matter, the procreativity purpose of the copyright laws will be undercut.

The Supreme Court and this court have held that equitable doctrines should not be applied where their application will defeat the purpose of a statute. * * * Because the private suit of the plaintiff in a copyright infringement action furthers the congressional goal of promoting creativity, the courts should not concern themselves with the moral worth of the plaintiff.

Furthermore, the need for an additional check on obscenity is not apparent. Most if not all states have statutes regulating the dissemination of obscene materials, and there is an array of federal statutes dealing with this subject, as well. * * * As Professor Chafee concluded, the difficulty inherent in formulating a workable obscenity defense to copyright is sufficient reason not to allow such a defense unless the other criminal and civil statutes dealing with the obscenity problem are shown to be plainly ineffective:

> Sometimes the legislature has expressly entrusted questions of obscenity to the courts, as in criminal statutes, and then judges have to do the best they can, but the results have been quite erratic. This should be a warning against rushing into new obscenity jobs which no legislature has told them to undertake.
>
> The penalties for obscenity are defined by statute. Why should the courts add a new penalty out of their own heads by denying protection to a registered copyright which complies with every provision of the copyright act? * * * I think that the added penalty is justifiable only if there is a serious need for extra pressure to induce obedience to the criminal law. In the obscenity situation, this need is not obvious. Chafee, *supra*, at 1068–69.

The effectiveness of controlling obscenity by denying copyright protection is open to question. The district court thought that on the whole the long-term discouragement of the creation of obscene works would outweigh the short-term increase in the dissemination of obscene works caused by the refusal of an injunction. This theory, reached without empirical evidence or expert opinion, is at least doubtful. Many commentators disagree and are of the view that denial of injunctions against infringers of obscene materials will only increase the distribution of such works. The existence of this difference of view, which we need not resolve, makes clear that the question of how to deal with the relationship between copyrights and obscenity is not best suited for case-by-case judicial resolution but is instead most appropriately resolved by legislatures. Congress has not chosen to refuse copyrights on obscene materials, and we should be cautious in overriding the legislative judgment on this issue.

Finally, permitting obscenity as a defense would introduce an unmanageable array of issues into routine copyright infringement actions. It was for this reason that the Ninth Circuit rejected the defense of fraudulent content in copyright infringement cases. * * *

Now, we turn to examine our momentary assumption that the unclean hands doctrine can be invoked at all in this case. For reasons that we have set out, obscenity is not an appropriate defense in an infringement action, whether piggybacked on the unclean hands rubric or introduced in some other manner. But even if obscenity were not objectionable as a defense, the unclean hands doctrine could not properly be used as the vehicle for that defense.

The maxim of unclean hands is not applied where plaintiff's misconduct is not directly related to the merits of the controversy between the parties, but only where the wrongful acts "in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication." *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 * * * (1933). The alleged wrongdoing of the plaintiff does not bar relief unless the defendant can show that he has personally been injured by the plaintiff's conduct. *Lawler v. Gillam*, 569 F.2d 1283, 1294 (4th Cir. 1978). The doctrine of unclean hands "does not purport to search out or deal with the general moral attributes or standing of a litigant." *NLRB v. Fickett-Brown Mfg. Co.*, 140 F.2d 883, 884 (CA5, 1944). Here it is clear that plaintiffs' alleged wrongful conduct has not changed the equitable relationship between plaintiffs and defendants and has not injured the defendants in any way.

* * *

Reversed and Remanded.

COMMENT

The Fifth Circuit Court of Appeals also made it clear in *Miller v. Universal City Studios*, 7 Med.L.Rptr. 1785, 650 F.2d 1365 (5th Cir. 1981), that copyright protection extends only to the expression of facts or ideas and not to facts themselves or to the research involved in obtaining them. A *Miami Herald* reporter who covered the kidnapping of a wealthy businessman's daughter and her being buried alive and rescued after five days collaborated with the victim to write a book about that terrifying experience. Titled *83 Hours Till Dawn*, the work was copyrighted, as was a condensed version of it in *Reader's Digest* and a serialization in *Ladies Home Journal*. Without the author's agreement, the book was turned into a television script, *The Longest Night*, and sold to ABC. A jury found infringement and awarded the reporter $200,000 in damages and profits.

"Obviously," said the appeals court in reversing and remanding, "a fact does not originate with the author of a book describing the fact. Neither does it originate with one who 'discovers' the fact." The discoverer merely finds and records. He may not claim that the facts are "original" with him although there may be originality and hence authorship in the manner of reporting, i.e., the "expression," of the facts.' Nimmer, *Nimmer on Copyright* § 2.03(E), at 2–34 (1980). Thus, since facts do not owe their origin to any individual, they may not be copyrighted and are part of the public domain available to every person." The distinction between facts and copyrightable forms of expressing them is not always as clear as the foregoing statements would suggest.

Nor is historical research copyrightable. In *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), cert. den., 385 U.S. 1009 (1967), the court said that it could not "subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material. * * * It is just such wasted effort that the proscription against the copyright of ideas and facts, and to a lesser extent the privilege of fair use, are designed to prevent." Defendant's biography was said to infringe the copyright on a series of *Look* magazine articles about Howard Hughes.

Similar litigation arose over books and films about the mysterious disaster involving the German dirigible Hindenburg with similar results. Interpretations of historical fact were not copyrightable. Nor were specific facts or the personal research behind them.[167] Said the court:

> The copyright provides a financial incentive to those who would add to the corpus of existing knowledge by creating original works. Nevertheless, the protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis. The rationale for this doctrine is that the cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past. Accordingly, the scope of copyright in historical accounts is narrowed indeed, embracing no more than

167. *Hoehling v. Universal City Studios, Inc.*, 6 Med.L.Rptr. 1053, 618 F.2d 972 (2d Cir. 1980).

the author's original expression of particular facts and theories already in the public domain.

Works that become part of a federal agency's records, however, even though copyrighted by a third person, are public records under the Freedom of Information Act and cannot be withheld simply because they are copyrighted, said the D.C. Circuit in *Weisberg v. United States Department of Justice*, 6 Med.L.Rptr. 1401, 543 F.2d 308 (D.C.Cir. 1976). The case involved photographs in the government's possession that were taken at the scene of the assassination of Dr. Martin Luther King. Time, Inc., the copyright holder, would permit the photos to be viewed but not copied.

While authorship and a modicum of originality is assumed, there are no tests of quality or merit for copyright purposes. The owner of a copyright has the exclusive right to reproduce, to develop derivative works from that which is copyrighted, to distribute, to record, to perform, and to display. Limitations on these rights are twofold: (1) only the expression of an idea, for example, a particular pattern of words or prose elements, is copyrightable—the idea itself is not; and (2) copyright is limited by the *doctrine of fair use*.

In 1988, Congress moved to join the Berne Convention, the major international copyright convention. Doing so will better protect U.S. copyright interests globally. Berne Convention Implementation Act of 1988, 102 Stat. 2853 (1988).

Fair Use

Fair use is another aspect of copyright designed to balance encouragement of creativity with the interest of assuring a free flow of information to the public. Fair use is governed by the Copyright Act of 1976.[168] The doctrine of fair use was first created by the courts, however, and past decisions are a guide to interpretation. Limited reproduction of another's work is allowed for the purposes of "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." Fair use provides a defense against a copyright infringement charge.

For the defense of fair use to work, the copier must have photocopied reasonably. At the urging of publishers and others with an interest in protecting the economic value of copyrighted materials, Congress appended a set of "Fair Use Guidelines" to the legislative history of the act.[169] These guidelines were never enacted into law but are used by many as a general indicator. In a lawsuit, eventually settled out of court, brought against New York University for extensive photocopying of materials, the university agreed to abide by similar rules. Many other universities have chosen to follow them too, but there is no legal requirement to do so.

Whether or not a use will be considered fair will be determined by looking at four factors specified in the statute: (1) the purpose and character of the use; (2) the nature of the work copied; (3) the amount used in relation to the size of the full work; and, (4) the effect of the use on the market for the work.[170] None of the factors alone is considered dispositive. As a general rule, copying is permitted when it does not substitute for purchase of a work and the use does not profit the copier financially.

The key modern fair use case arose when *Nation* magazine obtained proofs of former President Gerald Ford's memoirs. The magazine published a few paragraphs. But they were the paragraphs that explained Ford's pardon of Richard Nixon, arguably the most intriguing sentences in the entire book. Ford's publisher, which had entered into a serialization agreement that was lost after the *Nation* story, claimed copyright infringement, arguing that the copying also cost book sales. The *Nation* claimed fair use; the copying had been done as part of reporting the news.

HARPER & ROW v. NATION ENTERPRISES

11 MED.L.RPTR. 1969, 471 U.S. 539, 105 S.CT. 2218, 85 L.ED.2D 588 (1985).

Justice O'CONNOR delivered the opinion of the Court.

* * *

In March 1979, an undisclosed source provided the *Nation* magazine with the unpublished manuscript of "A Time to Heal: The Autobiography of Gerald R. Ford." Working directly from the pur-

168. 17 U.S.C.A. § 107.

169. Johnston, *Copyright Handbook* (1978), 217.

170. The factors were delineated in *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct.Cl. 1973), aff'd without opinion, 420 U.S. 376 (1975). The case involved copying of medical journal articles by the Department of Health, Education, and Welfare and the National Library of Medicine to be used in research.

loined manuscript, an editor of the *Nation* produced a short piece entitled "The Ford Memoirs—Behind the Nixon Pardon." The piece was timed to "scoop" an article scheduled shortly to appear in *Time* magazine. *Time* had agreed to purchase the exclusive right to print prepublication excerpts from the copyright holders, Harper & Row Publishers, Inc. (hereinafter Harper & Row) and Reader's Digest Association, Inc. (hereinafter Reader's Digest). As a result of the *Nation* article, *Time* canceled its agreement. Petitioners brought a successful copyright action against the *Nation*. On appeal, the Second Circuit reversed the lower court's finding of infringement, holding that the *Nation*'s act was sanctioned as a "fair use" of the copyrighted material.

* * *

In February 1977, shortly after leaving the White House, former President Gerald R. Ford contracted with petitioners Harper & Row and The Reader's Digest, to publish his as yet unwritten memoirs. The memoirs were to contain "significant hitherto unpublished materials" concerning the Watergate crisis, Mr. Ford's pardon of former President Nixon and "Mr. Ford's reflections on this period of history, and the morality and personalities involved." In addition to the right to publish the Ford memoirs in book form, the agreement gave petitioners the exclusive right to license prepublication excerpts, known in the trade as "first serial rights." Two years later, as the memoirs were nearing completion, petitioner negotiated a prepublication licensing agreement with *Time*, a weekly news magazine. *Time* agreed to pay $25,000, $12,500 in advance and an additional $12,500 at publication, in exchange for the right to excerpt 7,500 words from Mr. Ford's account of the Nixon pardon. The issue featuring the excerpts was timed to appear approximately one week before shipment of the full length book version to bookstores. Exclusivity was an important consideration; Harper & Row instituted procedures designed to maintain the confidentiality of the manuscript, and *Time* retained the right to renegotiate the second payment should the material appear in print prior to its release of the excerpts.

Two or three weeks before the *Time* article's scheduled release, an unidentified person secretly brought a copy of the Ford manuscript to Victor Navasky, editor of the *Nation*, a political commentary magazine. * * * He hastily put together what he believed was "a real hot news story" composed of quotes, paraphrases and facts drawn exclusively from the manuscript. Mr. Navasky attempted no independent commentary, research or criticism, in part because of the need for speed if he was to "make news" by "publish[ing] in advance of publication of the Ford book." * * * As a result of the *Nation*'s article, *Time* canceled its piece and refused to pay the remaining $12,500.

* * *

We agree with the Court of Appeals that copyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave insufficient deference to the scheme established by the Copyright Act for fostering the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

* * *

This principle applies equally to works of fiction and nonfiction. The book at issue here, for example, was two years in the making, and began with a contract giving the author's copyright to the publishers in exchange for their services in producing and marketing the work. In preparing the book, Mr. Ford drafted essays and word portraits of public figures and participated in hundreds of taped interviews that were later distilled to chronicle his personal viewpoint. It is evident that the monopoly granted by copyright actively served its intended purpose of inducing the creation of new material of potential historical value.

* * *

[T]he *Nation* has admitted to lifting verbatim quotes of the author's original language totaling between 300 and 400 words and constituting some 13% of the *Nation* article. In using generous verbatim excerpts of Mr. Ford's unpublished manuscript to lend authenticity to its account of the forthcoming memoirs, the *Nation* effectively arrogated to itself the right of first publication, an important marketable subsidiary right. For the reasons set forth below, we find that this use of the copyrighted manuscript, even stripped to the verbatim quotes conceded by the *Nation* to be copyrightable expression, was not a fair use within the meaning of the Copyright Act.

Fair use was traditionally defined as "a privilege in others than the owner of the copyright to use the

copyrighted material in a reasonable manner without his consent." H. Ball, Law of Copyright and Literary Property 260 (1944) (hereinafter Ball). The statutory formulation of the defense of fair use in the Copyright Act of 1976 reflects the intent of Congress to codify the common-law doctrine. 3 Nimmer § 13.05. Section 107 requires a case-by-case determination whether a particular use is fair, and the statute notes four nonexclusive factors to be considered. This approach was "intended to restate the [pre-existing] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. Rep. No. 94-1476, p. 66 (1976) (hereinafter House Report).

"[T]he author's consent to a reasonable use of his copyrighted works ha[d] always been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of science and the useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus * * * frustrate the very ends sought to be attained." Ball 260. Professor Latman, in a study of the doctrine of fair use commissioned by Congress for the revision effort, see *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S., at 462–463, n. 9 (dissenting opinion), summarized prior law as turning on the "importance of the material copied or performed from the point of view of the reasonable copyright owner. In other words, would the reasonable copyright owner have consented to the use?" * * *

Perhaps because the fair use doctrine was predicated on the author's implied consent to "reasonable and customary" use when he released his work for public consumption, fair use traditionally was not recognized as a defense to charges of copying from an author's as yet unpublished works. Under common-law copyright, "the property of the author * * * in his intellectual creation [was] absolute until he voluntarily part[ed] with the same."

* * *

Though the right of first publication, like the other rights enumerated in § 106 is expressly made subject to the fair use provision of § 107, fair use analysis must always be tailored to the individual case. * * * The nature of the interest at stake is highly relevant to whether a given use is fair. From the beginning, those entrusted with the task of revision recognized the "overbalancing reasons to preserve the common law protection of undisseminated works until the author or his successor chooses to disclose them." Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess., 41 (Comm. Print 1961). The right of first publication implicates a threshold decision by the author whether and in what form to release his work. First publication is inherently different from other § 106 rights in that only one person can be the first publisher, as the contract with *Time* illustrates, * * * the commercial value of the right lies primarily in exclusivity. Because the potential damage to the author from judicially enforced "sharing" of the first publication right with unauthorized users of his manuscript is substantial, the balance of equities in evaluating such a claim of fair use inevitably shifts.

* * *

We conclude that the unpublished nature of a work is "[a] key, though not necessarily determinative, factor" tending to negate a defense of fair use.

* * *

Respondents, however, contend that First Amendment values require a different rule under the circumstances of this case. The thrust of the decision below is that "[t]he scope of [fair use] is undoubtedly wider when the information conveyed relates to matters of high public concern." *Consumers Union of the United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1050 (CA2 1983). * * * Respondents advance the substantial public import of the subject matter of the Ford memoirs as grounds for excusing a use that would ordinarily not pass muster as a fair use—the piracy of verbatim quotations for the purpose of "scooping" the authorized first serialization. Respondents explain their copying of Mr. Ford's expression as essential to reporting the news story it claims the book itself represents. In respondents' view, not only the facts contained in Mr. Ford's memoirs, but "the precise manner in which [he] expressed himself was as newsworthy as what he had to say." Brief for Respondents 38–39. Respondents argue that the public's interest in learning this news as fast as possible outweighs the right of the author to control its first publication.

* * *

Respondents' theory, however, would expand fair use to effectively destroy any expectation of copyright protection in the work of a public figure. Ab-

sent such protection, there would be little incentive to create or profit in financing such memoirs and the public would be denied an important source of significant historical information. The promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use "news report" of the book.

* * *

In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.

* * *

It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. Such a notion ignores the major premise of copyright and injures author and public alike.

* * *

In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright. Whether verbatim copying from a public figure's manuscript in a given case is or is not fair must be judged according to the traditional equities of fair use.

Fair use is a mixed question of law and fact. * * * Where the District Court has found facts sufficient to evaluate each of the statutory factors, an appellate court "need not remand for further factfinding * * * [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyrighted work." Thus whether the *Nation* article constitutes fair use under § 107 must be reviewed in light of the principles discussed above. The factors enumerated in the section are not meant to be exclusive: "[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." House Report, at 65. The four factors identified by Congress as especially relevant in determining whether the use was fair are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect on the potential market for or value of the copyrighted work.

* * *

In evaluating character and purpose we cannot ignore the *Nation*'s stated purpose of scooping the forthcoming hardcover and *Time* abstracts. The *Nation*'s use had not merely the incidental effect but the *intended purpose* of supplanting the copyright holder's commercially valuable right of first publication.

* * *

The fact that a work is unpublished is a critical element of its "nature." 3 Nimmer § 13.05[A]; Comment, 58 St. John's L.Rev., at 613. Our prior discussion establishes that the scope of fair use is narrower with respect to unpublished works. While even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech that had been delivered to the public or disseminated to the press, see House Report, at 65, the author's right to control the first public appearance of his expression weighs against such use of the work before its release. The right of first publication encompasses not only the choice whether to publish at all, but also the choices when, where and in what form first to publish a work.

* * *

Next, the Act directs us to examine the amount and substantiality of the portion used in relation to the copyrighted work as a whole. In absolute terms, the words actually quoted were an insubstantial portion of "A Time to Heal." The district court, however, found that "[t]he *Nation* took what was essentially the heart of the book." 557 F.Supp., at 1072. We believe the Court of Appeals erred in overruling the district judge's evaluation of the qualitative nature of the taking. * * * A Time editor described the chapters on the pardon as "the most interesting and moving parts of the entire manuscript." The portions actually quoted were selected by Mr. Navasky as among the most powerful passages in those chapters. He testified that he used verbatim excerpts because simply reciting the information could not adequately convey the "absolute certainty with which [Ford] expressed himself," or show that "this comes from President Ford," or carry

the "definitive quality" or the original. In short, he quoted these passages precisely because they qualitatively embodied Ford's distinctive expression.

* * *

Stripped to the verbatim quotes, the direct takings from the unpublished manuscript constitute at least 13% of the infringing article. See *Meeropol v. Nizer*, 560 F.2d 1061, 1071 (CA2 1977) (copyrighted letters constituted less than 1% of infringing work but were prominently featured). The Nation article is structured around the quoted excerpts which serve as its dramatic focal points. See Appendix, *infra* [omitted]. In view of the expressive value of the excerpts and their key role in the infringing work, we cannot agree with the Second Circuit that the "magazine took a meager, indeed an infinitesimal amount of Ford's original language." 723 F.2d, at 209.

Finally, the Act focuses on "the effect of the use upon the potential market for or value of the copyrighted work." This last factor is undoubtedly the single most important element of fair use. See 3 Nimmer § 13.05[A], at 13–76, and cases cited therein. "Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied." 1 Nimmer § 1.10[D], at 1–87. The trial court found not merely a potential but an actual effect on the market. *Time*'s cancellation of its projected serialization and its refusal to pay the $12,500 were the direct effect of the infringement. The Court of Appeals rejected this fact finding a causal relation between *Time*'s nonperformance and respondents' unauthorized publication of Mr. Ford's *expression* as opposed to the facts taken from the memoirs. We disagree. Rarely will a case of copyright infringement present such clear cut evidence of actual damage. Petitioners assured *Time* that there would be no other authorized publication of *any* portion of the unpublished manuscript prior to April 23, 1979. Any publication of material from Chapters 1 and 3 would permit *Time* to renegotiate its final payment.

* * *

The borrowing of these verbatim quotes from the unpublished manuscript lent the *Nation*'s piece a special air of authenticity—as Navasky expressed it, the reader would know it was Ford speaking and not the *Nation*. Thus it directly competed for a share of the market for prepublication excerpts. The Senate Report states:

> "With certain special exceptions * * * a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." Senate Report, at 65.

Placed in a broader perspective, a fair use doctrine that permits extensive prepublication quotations from an unreleased manuscript without the copyright owner's consent poses substantial potential for damage to the marketability of first serialization rights in general. "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." *Ibid.*

* * *

Because we find that the *Nation*'s use of these verbatim excerpts from the unpublished manuscript was not a fair use, the judgment of the Court of Appeals is reversed and remanded for further proceedings consistent with this opinion.

COMMENT

As Justice O'Connor emphasizes, the determination of whether the fair use defense applies will always be a matter of context. In *Harper & Row* the last factor, harm to market, is determinative. That is undoubtedly because the case has undertones of unfair competition in addition to copyright law. The *Nation* was not merely copying a work to inform the public—it was "scooping" the work.[171] Had the memoirs been published already, there would never have been a case.

The opinion is a departure from traditional fair use analysis concerning materials copied for use in news stories. Generally, the public interest in being informed has held up against infringement claims based on limited and in some cases unlimited copying.

But it has had an effect. When videotapes of his speech to the 1988 Democratic Convention began appearing for sale, Jesse Jackson claimed copyright

171. See, Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 University of Chicago L.Rev. 411 (1983); Abramson, *How Much Copying Under Copyright? Contradictions, Paradoxes, Inconsistencies*, 61 Temple L.Rev. 133 (1988).

infringement. The defendant claimed fair use and also argued that Jackson's speech, visible to all, contained no copyright notice and that any interest in the work was therefore abandoned. Jackson's original written copy of the speech was delivered to the Democratic National Committee without any copyright notice, and the speech was widely distributed by the party without apparent complaint from Jackson. Relying largely upon *Harper & Row*, a federal district court issued an injunction and temporary restraining order. The court said that defendant's marketing, aimed to profit from Jackson's work, was unlikely to be found a fair use when the actual trial began. The court indicated that arguments based on lack of copyright notice and abandonment might succeed for defendant at trial. *Jackson v. MPI Home Video*, 15 Med.L.Rptr. 2065 (N.D.Ill. 1988). The court hinted that Jackson might have an additional claim that the sale of the tape implied endorsement.

The *Jackson* case is troubling. Its implication that a politician may have exclusive rights to control subsequent uses of a speech originally delivered to an immense national and international audience trims too much from the arena of public debate. When unpublished letters obtained from public sources of reclusive author J. D. Salinger were used in an unauthorized biography, Salinger was able to get an injunction against the publisher. The unpublished nature of the letters, protected as a matter of common law copyright because they predated the 1976 act, was the major factor. *Salinger v. Random House*, 13 Med.L.Rptr. 1954, 811 F.2d 90 (2d Cir. 1987). As noted, earlier cases were usually more kind to a news-based fair use defense.

The *Miami Herald*, in promoting a new television supplement, used the cover of *TV Guide* in comparative advertising for its new service. Relying on Nimmer on Copyright § 14.4 at 62, a federal district court in Florida concluded that the cover of *TV Guide* "was encompassed within the protections afforded by the copyright registered for that magazine." Moreover there was no "fair use" justification in using the plaintiff's cover for promotional purposes. But a First Amendment purpose was being served in light of judicial recognition of increased constitutional protection for commercial speech.

"Such comparative advertising, when undertaken in the serious manner that defendant did herein," said the court, "represents an important source of information for the education of consumers in a free enterprise system." Since *TV Guide* had not demonstrated irreparable injury and since the First Amendment outweighs any act of Congress, the magazine was denied an injunction against the *Herald*'s competitive promotional activities.[172]

Similarly, when *Time* magazine refused an author the use of certain frames of its copyrighted Zapruder film for a scholarly book on the Kennedy assassination and the author used sketches of the frames instead, *Time* failed in a copyright suit because, said the court, there was a *public interest* in the subject and the book would be purchased, not alone for its pictures, but for the author's "theories."[173]

It was not fair use for the *Chicago Record-Herald* to reprint an almost identical version of a story on submarine warfare which had appeared in the rival *Chicago Tribune* after turning down an offer to buy it. The *Tribune*'s story bore the mark of individual enterprise and literary style. Giving the *Tribune* a credit line simply compounded the damage by presenting the plaintiff in a false light.[174]

It was not fair use for a school of modeling to benefit from *Vogue* magazine's prestige by using the magazine's covers in its advertising brochures. *Vogue*'s covers were included in its overall copyright protection. "No one," said a federal district court, "is entitled to save time, trouble, and expense by availing himself to another's copyrighted work for the sake of making an unearned profit."[175]

Parody has also been protected under fair use. In *Elsmere Music, Inc. v. NBC*,[176] "Saturday Night Live's" use of New York's public relations song "I Love New York" did not violate fair use because it was used as parody.

When *Screw* magazine portrayed the trade characters "Poppin Fresh" and "Poppie Fresh" in a compromising pose, the Pillsbury Company was understandably upset. A federal district court ruled,

172. *Triangle Publications v. Knight-Ridder*, 3 Med.L.Rptr. 2086, 445 F.Supp. 875 (S.D.Fla. 1978), aff'd 6 Med.L.Rptr. 1734, 626 F.2d 1171 (5th Cir. 1980).

173. *Time, Inc. v. Bernard Geis Associates*, 293 F.Supp. 130 (S.D.N.Y. 1968).

174. *Chicago Record-Herald v. Tribune Association*, 275 Fed. 797 (7th Cir. 1921).

175. *Conde Nast Publications, Inc. v. Vogue School of Fashion Modeling, Inc.*, 105 F.Supp. 325 (S.D.N.Y. 1952).

176. 5 Med.L.Rptr. 2455, 482 F.Supp. 741 (S.D.N.Y. 1980), aff'd 6 Med.L.Rptr. 1457, 623 F.2d 252 (2d Cir. 1980).

however, that the magazine's use of the copyrighted trade characters, while more pornographic than it needed to be, was intended as a social commentary and thereby protected. Since it did not cause significant economic harm to the company, the portrayal was fair use.[177]

There was no fair use, however, when a religious group presented what it called a "nonperverted" version of "Jesus Christ Superstar" using, with sanctimonious modification, the plaintiff's original music and libretto.[178]

A case that reflects the "artistic-effort-invested" philosophy of the new act is *Gilliam v. American Broadcasting Companies, Inc.*, 538 F.2d 14 (2d Cir. 1976). Interesting in part because it involved the irrepressible "Monty Python's Flying Circus," the case began when ABC bought from the BBC the right to show six Python episodes, then cut them to fit the commercial television format in an apparently prudish manner. The Pythons sued for copyright infringement and unfair competition, asking for a permanent injunction against ABC.

In what was by all accounts an entertaining trial, a federal district court, while recognizing a plaintiff's right to protect the artistic integrity of his creation (the film here had lost its "iconoclastic verve," said the judge), denied the injunction on grounds that it was not clear who owned the copyright. Also there was a question as to whether the BBC and Time-Life—the latter had purchased the rights—should have been parties to the litigation. Further, ABC might suffer irreparable harm in its relationships with affiliates, public, and government if it were to withdraw the programs.

The trial judge suggested a disclaimer instead: "The members of Monty Python wish to disassociate themselves from this program, which is a compilation of their shows edited by ABC without their approval." ABC thought this distasteful, a dangerous precedent with respect to other artists and technicians, and a violation of its First Amendment rights. The best Monty Python could get was "Edited for Television by ABC."

A Second Circuit Court of Appeals panel subsequently reversed and remanded the lower court's denial of a preliminary injunction. Seeing Monty Python rather than ABC the greater loser, the court held that "unauthorized editing of the underlying work, if proven, would constitute an infringement of copyright in that work similar to any other use of a work that exceeded the license granted by the proprietor of the copyright." Since BBC itself had no right to make unilateral changes in the script, it could not grant such rights to Time-Life or ABC.[179]

"Our resolution of these technical arguments," said the court somewhat in anticipation of the 1976 Copyright Act, "serves to reinforce our initial inclination that the copyright law should be used to recognize the important role of the artist in our society and the need to encourage production and dissemination of artistic works by providing adequate legal protection for one who submits his work to the public. * * * To deform his work is to present him to the public as the creator of a work not his own, and thus makes him subject to criticism for work he has not done. In such a case, it is the writer or performer, rather than the network, who suffers the consequences of the mutilation, for the public will have only the final product by which to evaluate his work."

The decision to join the Berne Convention will likely lead to increased debate about the moral rights of those who create materials. A Congressional report prior to joining the convention indicated that, while the U.S. has no specific moral rights statute, moral rights are presently protected by the accumulated rights within other areas of intellectual property law. The assertion that rights under U.S. law are comparable to those in continental law is doubtful for a variety of reasons, but most obviously in that U.S. law grants rights to owners rather than to creators of material. In a related development, Congress passed the Film Preservation Act, which was signed into law September 27, 1988. The act created a National Film Preservation Board that was empowered to designate twenty-five films each year as "national treasures." The purpose of the act was to prevent material alteration of films, especially the practice of colorizing old black-and-white films, unless those films are labeled. The act does not, how-

177. *The Pillsbury Co. v. Milky Way Productions*, 3 Med.L.Rptr. 2328 (N.D.Ga. 1978); *The Pillsbury Co. v. Milky Way Productions*, 8 Med.L.Rptr. 1016 (N.D.Ga. 1981).

178. *Robert Stigwood Group Ltd. v. O'Reilly*, 346 F.Supp. 376 (D.Conn. 1972).

179. The *Monty Python* case has led to considerable discussion of creation of a "moral rights" doctrine in U.S. law. See Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 Vanderbilt L.Rev. 1 (1985).

ever, create any specific enforceable moral rights for directors, actors, or cinematographers. Public Law 100–466, 102 Stat. 1782. If anything, the act appears to adopt copyright law's works made for hire doctrine in considering members of the creative team on a motion picture as employees or as specifically commissioned to produce a work. U.S. Congress, House Subcommittee on Technology and the Law, *Legal Issues That Arise When Color is Added to Films Originally Produced, Sold and Distributed in Black and White*, Hearing on HR 2400, 100th Cong., 1st sess., May 12, 1987, p. 111. See, Beyer, "Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights," 82 *Northwestern Univ.L.Rev.* 1011 (1988).

Sometimes the question is simply how much is too much use of a copyrighted work. When the Board of Cooperative Educational Services began making 10,000 videotapes a year of copyrighted motion pictures, a federal district court said that was too much. Applying *Williams & Wilkins* the court held that, while the purpose was educational and noncommercial, the effect on the copyright holder's market would be devastating. Entire films were reproduced, and the reproductions were interchangeable with the originals. Since this was not a fair use, an injunction against further copying was made permanent.[180]

Copyright protection was first extended to advertising in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), a case involving a copyrighted circus poster. In *Ansehl v. Puritan Pharmaceutical Co.*, 61 F.2d 131 (8th Cir. 1932), the court, granting relief to the creator of a cosmetic ad, recognized protected property rights in the particular wording used and in the arrangement of the elements of the advertisement, beyond the more general consideration of artistic value.

Advertising created and composed solely by the newspaper or its employees is included in copyright protection for the entire newspaper. Where advertising is created partly by the newspaper and partly by the advertiser or his agent, the newspaper may secure copyright interest by written contract. Otherwise the advertisements remain the property of the advertiser.

Unfair Competition

Unfair competition is prohibited under federal law by the Lanham Act[181] and by common law or statute in the states.[182] The cause of action is essentially a modern-day derivative from the common law actions of deceit and fraud.[183] The essence of the action is the unauthorized taking from another of an intangible asset of value, then presenting it to the buying public as if it was one's own. The act is typically referred to as "passing off" another's material as your own. The primary area for application of unfair competition principles is disputes between competing businesses. Typically, a competitor takes an attribute of another's product or business hoping to capitalize on it. For example, a manufacturer might put a product in a package that looks astonishingly like a competitor's.[184] A flood of imitative goods in recent years has sparked controversy.[185]

For the media, unfair competition issues arise when one organization takes and uses the product of another, or when advertising or editorial materials incorporate an attribute of a person or organization.

The protection of news as "quasi property" against unfair competition was recognized in a broad and influential ruling by the United States Supreme Court in 1918. International News Service was alleged to have "pirated" news from the Associated Press for redistribution to its own customers. No direct question of fraud was raised, and the misappropriated material had not been copyrighted. In the absence of statutory protection, AP relied on the common law doctrine of unfair competition.

The Court considered three major legal issues: (1) whether there is any property in news; (2) whether, if there be property in news collected for the purpose of being published, it survives the instant of its publication in the first newspaper to which it is communicated by the newsgatherer; and (3) whether INS's admitted course of conduct in appropriating for commercial use material taken from bulletins or

180. *Encyclopedia Britannica v. Crooks*, 3 Med.L.Rptr. 1945, 447 F.Supp. 243 (W.D.N.Y. 1978).
181. 15 U.S.C.A. § 1125(a). The provision is commonly referred to as Section 43(a), its designation in the original of the act.
182. Miller and Davis, *Intellectual Property* (1983), 250–54.
183. McManis, *The Law of Unfair Trade Practices* (1983), 105–7.
184. *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186 (2d Cir. 1980).
185. See Symposium, *Piracy and Gray Market Imports: Knocking out the Knock-offs*, 10 Comm/Ent L.J. 1045 (1988).

earlier editions of Associated Press newspapers constitutes unfair competition in trade. Each question was answered in favor of the Associated Press. *International News Service v. Associated Press*, 248 U.S. 215 (1918).[186]

News, being part of the public domain and like ideas "as free as the air," [187] is excluded from specific copyright protection, but the doctrine of *INS v. AP* does apply to newsgathering and news presentation activities. Using one's competitor for news "tips" is an acceptable practice, but bodily appropriation of another's news copy is unfair competition subject to injunctive relief.

The *INS* case is more properly considered a common law action for misappropriation than one for unfair competition. INS did not attempt to pass off its product in a way that buyers might think it was AP's. There is more of theft and less of deception in a misappropriation claim. In other respects the actions are alike, especially the factor of intending to benefit from another's efforts.

Where plaintiff's rights depend on copyright, there may be a suit for copyright infringement. A suit was filed when a business newspaper appropriated almost verbatim the most creative and original elements of copyrighted research reports on financial and industrial matters. Rejecting defendant's fair use arguments and finding the tantalizing question of whether copyright laws violate the First Amendment absent from the case, the court nevertheless clarified the relationship between copyright and factual news reports:

> But in considering the copyright protections due a report of news events or factual developments, it is important to differentiate between the substance of the information contained in the report, i.e., the event itself, and "the particular form of collocation of words in which the writer has communicated it." [Citing *INS v. AP and Chicago Record-Herald.*] What is protected is the manner of expression, the author's analysis or interpretation of events, the way he structures his material and marshals facts, his choice of words, and the emphasis he gives to particular developments. *Wainwright Securities Inc. v. Wall Street Transcript Corp.*, 2 Med.L.Rptr. 2153, 558 F.2d 91, 95–96 (2d Cir. 1977).

Since news itself is not copyrightable but only the style or pattern of words found in a story, copyright notices used by many newspapers when major news stories are broken cannot prevent others from using the facts within the story.

In *Associated Press v. KVOS*, 80 F.2d 575 (9th Cir. 1935), reversed on other grounds 299 U.S. 269 (1936), the appeals court ruled that appropriation for broadcast of the AP wire before neighboring AP newspapers could reach their subscribers—while the news was still "hot"—was enjoinable. An injunction was also granted to a Sitka, Alaska newspaper whose AP stories were being read verbatim by a radio station even before the newspaper hit the streets. Instead of joining its member newspaper in the suit, AP sold the offending radio station an associate membership. Still preferring to read the newspaper's edited AP copy, the broadcaster found himself in a second suit. Nominal damages were awarded, and the radio station agreed to cease pirating news.[188]

In an unreported case, a Kentucky circuit court ruled that a defendant, who had without permission used plaintiff's news stories sixteen to eighteen hours before the newspaper could be delivered to all its subscribers, would in future have to wait twenty hours after publication before engaging in his piracy.[189]

In 1963 the Supreme Court of Pennsylvania left no doubt that the broadcasting of news stories from a newspaper in a competitive situation was unfair competition and an invasion of a property right in uncopyrighted news. The court articulated a doctrine that had been expressed in earlier cases:

> Competition in business is jealously protected by the law and the law abhors that which tends to diminish or stifle competition. While a competitor may, subject to patent, copyright and trademark laws, imitate his rival's business practices, process and methods, yet the protection which the law affords to competition does not and should not countenance the usurpation of a competitor's investment and toil. *Pottstown Daily News Publishing Co. v. Pottstown Broadcasting Co.*, 192 A.2d 657, 663 (Pa. 1963).

Although consistently declared a type of unfair competition, the rip 'n' read practice of using local

186. For a discussion of this case and the whole question of news piracy, unfair competition, and misappropriation, see Sullivan, *News Piracy: Unfair Competition and the Misappropriation Doctrine*, 56 Journalism Monographs, May 1978.

187. *Desney v. Wilder*, 46 Cal.2d 715, 299 P.2d 257 (1956), a case dealing with the writing of a play from news stories and quoting Justice Brandeis.

188. *Veatch v. Wagner*, 109 F.Supp. 537 (Alaska 1953) and 116 F.Supp 904 (Alaska 1953).

189. *Madison Publishing Co., Inc. v. Sound Broadcasters, Inc.* (unreported 1966). In a 1956 case involving the *Toledo Blade* and radio station WOHO, the time period was set at twenty-four hours.

newspaper stories remains common at many radio stations.

In a 1966 case involving two business publications, defendant had appropriated information from the plaintiff's wire service in order to publish bond market news contemporaneously with his competitor and without expense or effort.

"It is no longer subject to question," said a New York appeals court, "that there is a property in the gathering of news which may not be pirated. Plaintiff's rights do not depend on copyright; they lie rather in the fact that the information has been acquired through an expenditure of labor, skill and money." [190]

A newspaper has the protection of common law trademark in its name. But after eight years of nonpublication and in the absence of a trademark registration for its name, a newspaper plaintiff was said to have no business, property, or goodwill interest which could be damaged by another.[191] Broadcast stations may protect call letters by registering them as trademarks.

Ten years after it folded, the *New York Herald Tribune*'s successor corporation failed to block the fledgling and now defunct New York daily, *The Trib*, from using that nameplate in a suit for common law trademark infringement, unfair competition, and misappropriation. The original *Tribune* was denied a preliminary injunction absent a showing of irreparable injury. Only 550 copies of the *International Herald Tribune* circulated in new York City, and there appeared to be no direct competition for advertising. There were also doubts as to whether the original trademark represented goods or services still in use in commerce and as to whether the mark had not been abandoned. The court noted that there were 250 "Tribunes" in the United States and at least two—Chicago and Oakland—were commonly referred to as the "Trib." [192]

After a period of some uncertainty, *INS v. AP* was reaffirmed by the 1973 ruling of the U.S. Supreme Court in *Goldstein v. California*, 412 U.S. 546 (1973). The case, involving record piracy, assures the validity of the misappropriation doctrine and the use of state unfair competition laws.

A case with important implications for source-reporter relations is *Sinatra v. Wilson*.[193] There a federal district court held that what a celebrity says to a columnist in an interview may be protected by common law copyright. Frank Sinatra said that he planned to publish an autobiography, but columnist Earl Wilson "scooped" him with a "boring" and unauthorized biography alleged to contain Sinatra's "private thoughts, statements, impressions and emotions." Action for a false-light invasion of privacy was also permitted on the basis of what plaintiff alleged to be false and fabricated statements. The issues could only be decided, said the court, after discovery and trial.

The *Sinatra* case illustrates the uncertain relationships between unfair competition and other areas of the law. Sinatra today would likely file a claim for invasion of his right of publicity. If the thing taken was his image or distinctive singing style, he might be able to claim instead violation of a service mark—essentially the same as a trademark. If Wilson had taken Sinatra's *written* comments and used them verbatim, there might be an action for plagiarism. The interest at stake in each is comparable to the notion of "moral rights" drawn from continental law.[194] The complicated strands of argument surrounding claims like these find courts struggling to separate claims. See *Carson v. Here's Johnny Portable Toilets*, 9 Med.L.Rep. 1153, 698 F.2d 831 (6th Cir. 1983), where the court initially said that plaintiff's unfair competition claim was inappropriate but decided for plaintiff based on the right of publicity.

The 1976 Cable Television Copyright Legislation

The Background of the Cable Copyright Problem. One of the most significant new extensions of copyright protection is in the area of cable television. One function of cable television systems is to pick

190. *Bond Buyer v. Dealers Digest Publishing Co.*, 267 N.Y.S.2d 944 (1966).
191. *Duff v. Kansas City Star Co.*, 299 F.2d 320 (8th Cir. 1962).
192. *I.H.T. Corp. v. Saffir Publishing Corp. v. International Herald Tribune*, 3 Med.L.Rptr 1907, 444 F.Supp. 185 (S.D.N.Y. 1978).
193. 2 Med.L.Rptr. 2008 (S.D.N.Y. 1977).
194. An interesting exploration of the mix of issues is found in Verbit, *Moral Rights and Section 43(a) of the Lanham Act: Oasis or Illusion?*, 9 Comm/Ent L.J. 383 (1987).

up broadcasts of programs originated by others and retransmit them to paying subscribers. A minimal cable system consists of a central antenna system, which receives and amplifies television signals, and a network of cable through which the signals are carried to the television sets of individual subscribers.

In its early period, cable television was often known by the acronym CATV, which originally referred to "Community Antenna Television," but today the term "cable television" is usually used. At its inception, community antenna television systems facilitated the reception of local television broadcasts which subscribers could not satisfactorily receive directly from the local station because of mountainous terrain, tall buildings, or other physical conditions. Recently, cable television has made use of sophisticated technology to retransmit signals from broadcasters in distant communities by use of microwave relay or space satellite which subscribers could not otherwise receive.

Until January 1, 1978, the liability of cable television operators for the retransmission of copyrighted broadcast programs was governed by the 1909 Copyright Act. Section 1(e) of the act indicated that it is an infringement of the owner's copyright "to perform the copyrighted work publicly for profit if it be a musical composition. * * *" 17 U.S.C.A. § 1(e).

What was the relationship of the federal copyright statute to cable television? Did CATV as it operated constitute a copyright infringement? These questions were raised and decided in a Supreme Court case, *Fortnightly Corp. v. United Artists.*

The advent of cable technology is not the first occasion where the application of the 1909 Act to the new electronic media had arisen. The question of whether retransmission of a radio broadcast constituted a "performance" of the copyrighted work had been considered in *Buck v. Jewell-LaSalle Realty* Co., 283 U.S. 191 (1931). In *Jewell-LaSalle*, the owner of a copyrighted song sued the management of a Kansas City hotel for distributing a program from a central radio to all public and private rooms by means of a wire distribution system. The federal district court dismissed the case, a result which was affirmed by the federal court of appeals. The Supreme Court reversed and held that the hotel was liable under the Copyright Act on a "multiple performance" theory: "[A] single rendition of a copyrighted selection [can result] in more than one public performance for profit."

When broadcasters sought to challenge the cable industry's asserted exemption from copyright liability, broadcasters not surprisingly contended that cable systems were in the same relationship to broadcasters as the hotel had been in the *Jewell-LaSalle* case. Accordingly, broadcasters argued that when cable operators retransmitted their signals without permission, they infringed the Copyright Act.

In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), the first Supreme Court case specifically examining the question of copyright liability of cable systems, United Artists Television brought suit against Fortnightly, an owner and operator of cable television systems in two West Virginia towns, for copyright infringement based on the retransmission of several motion pictures to which plaintiff owned the copyrights. The federal district court applied the *Jewell-LaSalle* "multiple performance" doctrine and found the cable systems liable under the Copyright Act. The Court of Appeals for the Second Circuit affirmed.

The Supreme Court reversed and held that the functions of a cable television system did not constitute a "performance" within the meaning of the 1909 Act. This *Fortnightly* decision has been justly described as a "surprisingly unsophisticated analysis of the functions of the cable television system." [195] The Court's analysis turned on the question of whether cable television acted as "broadcasters" or "viewers." At a time when cable systems mainly performed the functions of a community antenna, the Court reasoned as follows: "Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set." For the Court the copyright issue was easily resolved: "Broadcasters perform. Viewers do not perform." The *Jewell-LaSalle* precedent was referred to as "a questionable 35-year-old decision that in actual practice has not been applied outside its own factual context. * * *"

The *Fortnightly* case concerned cable television retransmission of local broadcast signals and left open

195. See S. C. Greene, *The Cable Provisions of the Revised Copyright Act*, 27 Cath.Univ.L.Rev. 263 at 270 (1978).

the question of copyright liability when the cable systems imported distant signals to viewers who could not otherwise have received them.

The question of copyright liability for cable television continued to simmer, and the failure to resolve it satisfactorily for all the parties concerned undoubtedly served to retard the development of the full potential of cable. But the continued exploitation of valuable copyrighted programming properties by cable operators, permitted by *Fortnightly*, provoked a new legal fight to reconsider the copyright question in cable.

In *CBS v. Teleprompter*, the creators and producers of various television programs brought suit in the federal district court for copyright infringement against owners and operators of cable television systems for retransmitting the programs. Relying on *Fortnightly*, the federal district court dismissed. See *CBS, Inc. v. Teleprompter*, 355 F.Supp. 618 (S.D.N.Y. 1972).

On appeal, the federal appeals court discerned two distinct categories of viewers and determined that a cable system that distributes distant signals which are beyond the capabilities of any local antenna should be held to have "performed" the copyrighted works within the meaning of the 1909 Copyright Act, but that *Fortnightly* was controlling with regard to local signals which could be received by either a community antenna or standard rooftop antenna belonging to the owners of the television sets. *CBS v. Teleprompter Corp.*, 476 F.2d 338 (2d Cir. 1973), distinguished *Fortnightly* as follows:

> [I]n this case, the new audience is one that would not have been able to view the programs even if there had been available in its community an advanced antenna such as that used by a CATV system. The added factor in such a case is the signal transmitting equipment, such as microwave links, that is used to bring the programs from the community where the system receives them into the community in which the new audience views them.

The Supreme Court rejected this reasoning and held that the distance between the broadcast station and the ultimate viewer is irrelevant to the determination of whether the retransmission is a broadcaster or viewer function. *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974).

Speaking for the Court, Justice Stewart declared:

> By importing signals that could not normally be received with current technology in the community it serves, a CATV system does not, for copyright purposes, alter the function it performs for its subscribers. When a television broadcaster transmits a program, it has made public for simultaneous viewing and hearing the contents of that program. The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so. The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer.

In a 6–3 decision, the Supreme Court affirmed in part and reversed in part the judgment of the court of appeals in *Teleprompter*. The Court agreed with the court of appeals that use of new developments in cable such as program origination, sale of commercials, and interconnection, did not convert the entire cable operation, regardless of distance from the broadcasting station, into a "broadcast function." Such new uses of cable did not subject the cable system to copyright infringement liability.

Barbara A. Ringer, then Register of Copyrights, told the House Judiciary Committee that the Supreme Court decision in *Teleprompter* gave new impetus to the need for final congressional resolution of the cable television copyright issue:

> Meanwhile, as the 1967 legislative momentum began to slow more and more, it was increasingly apparent that cable television had become the make-or-break issue for copyright revision. * * * By 1971, it was apparent that the bill was completely stymied over the CATV issue, and even the issuance of comprehensive FCC rules in 1972, governing the carriage of signals and programing by cable systems, failed to break the impasse. * * * There may have been other reasons, but certainly the most immediate cause of the new momentum for the proposed copyright provision was the Supreme Court's decision in *Teleprompter v. CBS*, in March 1974, holding that under the 1909 statute, cable systems are not liable for copyright infringement when they import distant signals.
>
> The decision was followed quickly by favorable actions in the Senate Judiciary Subcommittee and full committee, and after a brief referral to the Commerce Committee by passage in the Senate on September 9, 1975, by a vote of 70 to 1.[196]

196. Testimony of Hon. Barbara A. Ringer, Register of Copyrights, May 7, 1975, *House Comm. on the Judiciary, Copyright Law Revision*, H.R.Rep.No.2223, 94th Cong., 1st Sess. 105 (1976).

The Copyright Act of 1976

In 1976, after more than twenty years of legislative effort, Congress passed the first complete revision of the federal copyright law since 1909. The new law, which became effective on January 1, 1978, sought to accommodate the technological changes which had taken place since the 1909 act. For the first time, photocopying, computer and information systems, audio and videotape recording, and cable television systems were brought within the ambit of intellectual property rights afforded protection.

Rather than place cable system owners in the impractical and burdensome position of negotiating with the copyright holder of each retransmitted program, Congress established a "compulsory license" mechanism for distant signals under which each cable operator could avoid copyright liability by paying royalties set by statute to the Register of Copyrights. 17 U.S.C.A. § 111(c) (d). The Copyright Royalty Tribunal was established to collect and distribute the royalties, periodically review and adjust the statutory royalty rates, and resolve disputes over the distribution of royalties. 17 U.S.C.A. § 801. Cable system royalties are computed on the basis of specified percentages of the system's gross receipts for each distant signal non-network program. 17 U.S.C.A. § 111(d)(2)(B). A value referred to as a "distant signal equivalent" is assigned to each distant signal television station carried by a cable system. 17 U.S.C.A. § 111(f); House Comm. on the Judiciary, Report on Copyright Law Revision, H.R. Rep. No. 1476, 94th Cong. 2d Sess. 100 (1976). A value of one is given to each independent (non-network) station, and a value of one-quarter is assigned to each network and noncommercial educational station for any non-network programming retransmitted by the cable system. The number of distant signal equivalents are totaled and multiplied by declining percentages of the cable system's gross receipts during the six-month reporting period to determine the amount due to the Register of Copyrights. 17 U.S.C.A. § 111(d)(2)(B)(i)–(iv). A minimum compulsory license fee is required whether or not distant signal non-network programming is retransmitted. 17 U.S.C.A. § 111(d)(2)(C,D). In order to lighten the burden on small cable systems, a reduced royalty fee is computed. 17 U.S.C.A. § 111(d)(2)(C)(D). The compulsory license system does not apply to transmissions by cable networks such as HBO or ESPN. The network owner negotiates for the rights.

In sum, the relationship between copyright owners and cable system users of copyrighted material has been radically changed by the 1976 Copyright Act. The copyright holder of a retransmitted distant signal non-network program has no control over its use by a cable system or the royalty fee received. Material carried on local or network programs can be retransmitted without liability for the most part. In addition, the burden is placed on the copyright holder to apply to the Copyright Royalty Tribunal for the distribution of royalties. 17 U.S.C.A. § 111(d)(4)(5).

In 1988, as a result of changes in the FCC's cable television rules, the FCC recommended that Congress reconsider the compulsory license system. The commission and broadcasters believed that a mature cable industry should negotiate for and pay for the intellectual property it uses.

The Copyright Royalty Tribunal and the Courts

The Copyright Royalty Tribunal's distributions of cable royalty fees have occasioned some litigation. *NAB v. Copyright Royalty Tribunal*, 675 F.2d 367, 8 Med.L.Rptr. 1433 (D.C.Cir. 1982), provided a helpful insight into the workings of the new Copyright Royalty Tribunal. Judge Mikva explained the court's decision to affirm the Tribunal's allocation of cable royalty fees:

> These consolidated cases present challenges to the first distribution of cable royalty fees under the 1976 Copyright Act, 17 USC 101 et seq. Section 111 of the act requires cable operators to pay royalties to the creators of copyrighted program material that is used by the cable systems. Recognizing the impracticability of requiring every cable operator to negotiate directly with every copyright owner, the act sets up a two step process. First, cable operators are required to obtain a copyright license and periodically pay royalty fees into a central fund. Second, the Copyright Royalty Tribunal distributes those fees among claimants. The tribunal's first royalty distribution concerned royalties paid for 1978. The distribution was broken down into two phases, with phase one determining the allocation of cable royalties to specific groups of claimants, and phase two allocating royalties to individual claimants within each group. Under phase one, the $15 million fund was distributed in the following manner: program syndicators and movie producers, 75 percent; sports leagues, 12 percent; television broadcasters, 3.25 percent; public television, 5.25 percent; and music claimants, 4.5 percent. Radio claimants were denied any award. The

tribunal observed that movies, syndicated programs, and sports events constitute the largest and most profitable segment of programming transmitted by cable systems, and therefore deserved commensurate compensation.

The challenges to the tribunal's distribution seem motivated essentially by each petitioner's feeling that it deserved a larger share of the fund. Such reactions flow naturally from the not insignificant consequences of changing one or two percentage points in the distribution of $15 million, and the size of the fund is expected to grow enormously in future years as cable systems become more widespread. Claims of this sort are generally well beyond the expertise or authority of courts, however, and review is limited to determining whether the tribunal's actions were arbitrary or capricious, and whether they are supported by substantial evidence.

* * *

It may be observed that agitation over the tribunal's initial apportionment has been somewhat overstated. The allocation of the 1978 fund will not displace the operation of relevant market forces in the future. Now that the tribunal's methods are known, for example, broadcasters will bargain more knowledgeably with sports teams about telecasts of sports events, and representatives of music, programs, and movies may contract accordingly with television broadcasters. In any event, as the size of the fund grows, the dispute over how to slice the pie may be more vigorous but it will also be more structured. The umpire has established precedents on which the players may rely in submitting their claims. The tribunal's decision has achieved an initial allocation of the fund that is well within the metes prescribed by Congress.

Students should note in Judge Mikva's ruling that judicial review of the allocation of cable royalty fees by the Copyright Royalty Tribunal is limited to determining whether "the tribunal's actions were arbitrary or capricious, and whether they are supported by substantial evidence."

This is a somewhat abiguous statement because in administrative law the "arbitrary and capricious" standard of review and the "substantial evidence" standard are considered to be separate and distinct standards of review. Generally, an administrative agency will have an easier time showing that its action was not arbitrary or capricious than it will have in showing that its findings were supported by substantial evidence. Later cases used a reasonableness standard, which requires proof that a decision was arbitrary and capricious. *Cablevision Systems Development Co. v. Motion Picture Ass'n. of America*, 14 Med.L.Rptr. 2113, 836 F.2d 599 (D.C.Cir. 1988).

Sanctions in the New Cable Copyright Law

What are the sanctions of the new cable provision of the revised copyright law? If the terms of the compulsory license[197] are violated, the injured local radio and television broadcaster, as well as the copyright holder, may sue offending cable systems. 17 U.S.C.A. §§ 501–505. One commentator has analyzed these provisions as follows:

> The broadcasters need not show direct injury from the cable system's alteration of their signals. Thus, copyright provides a device through which broadcasters can protect themselves and stem illegal importations by acting as "private attorneys general."[198]

The compulsory licensing scheme, it should be emphasized, is only applicable if the programming of television stations which is retransmitted by cable systems has been authorized by the FCC in the first place.

In the 1970s and early 1980s the FCC relaxed limitations in place in 1978 on cable system use of broadcast signals. The result, at least in theory, was easier cable system importation of broadcast channels. Broadcasters argued that easier importation undercut the compromise supporting compulsory licensing. In practice, few cable systems increased distant signal importation. The Copyright Royalty Tribunal substantially increased the fees for new imported channels and in 1989 the FCC reimposed

197. For a helpful explanation of how the compulsory licensee fees are computed, see *Nimmer on Copyright* (1978), § 818, p. 212, et seq.

198. E. Noreika, *Communications Law*, 1977 Annual Survey of American Law 577, at 583 (This material as well as other passages from the article referred to in this section is reprinted with permission of the 1977 Annual Survey of American Law and New York University). 17 U.S.C.A. §§ 501–505; see also House Report, p. 159. Injunction, impoundment of illegal copies, actual or statutory damages as well as allowance of costs and reasonable attorney's fees are among the panoply of remedies afforded the legal or beneficial holder of a copyright under the new act. See §§ 502–505. Criminal penalties of a fine of not more than $10,000 or imprisonment for not more than one year, or both, are also provided for a willful act of infringement, whether for purposes of commercial advantage or private financial gain. 17 U.S.C.A. § 506. In addition, any willful alteration of the retransmitted program by a cable system can subject the cable system to being deprived by the court of its compulsory license for one or more distant signals for up to thirty days. 17 U.S.C.A. § 510(b).

syndicated exclusivity rules that will require cable operators to block out imported programming if rights to a show are held by local broadcasters. See § 111(c)(1).

If a cable system undertakes a retransmission which is not authorized by the FCC regulations, the cable system is subject to an action for infringement of copyright. The ability of a broadcaster to invoke the sanctions of the new copyright act against a cable operator who is violating FCC cable regulations thus gives a new enforcement dimension to those regulations.

Cable System Liability Under § 111

Formerly, under the *Fortnightly* and *Teleprompter* interpretations of the 1909 Copyright Act, cable system operators had usually been able to avoid royalty payments to copyright holders based on cable's retransmission of broadcast signals. The 1976 Copyright Act adopted the reasoning of the federal court of appeals in *Columbia Broadcasting System, Inc. v. Teleprompter Corp.*, 476 F.2d 338 (2d Cir. 1973), and generally made cable systems subject to copyright liability for the retransmission of distant signal non-network programming. 17 U.S.C.A. § 111(d)(2)(B). Thus, those who hold local broadcast rights do not benefit from the royalties which flow from the compulsory licensing features of the new act.

Section 111 of the Copyright Act focuses on cable system liability for the retransmission of copyrighted works. Bear in mind that the pertinent words of art are in § 111 "primary transmission" and "secondary transmission." The "primary" transmitter is the one whose signals are being picked up and further transmitted by a "secondary" transmitter which must be someone engaged in "the further transmitting of a primary transmission simultaneously with the primary transmission." § 111(f); House Report, p. 98. "Under section 111, secondary transmissions may be of three kinds. They may be completely exempt from any liability under the copyright law [§ 111(a)], subject to a compulsory license [§ 111(c)(1), (d)] or fully subject to copyright liability [§ 111(b), (c)(2–(4), (e)(1)(2)] and, in this latter case, if unauthorized by the copyright owner, actionable as an infringement." G. Meyer, *The Feat of Houdini or How the New Act Disentangles the CATV Copyright Knot* 22 N.Y.L.Sch.L.Rev. 545, at 553.

Congress determined that the retransmission of local broadcast signals or network programming does not injure the copyright owner, while the "transmission of distant non-network programming by cable systems causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed." House Report, *supra*, p. 90. The philosophy of the new act in this regard has been very clearly stated by one commentator:

> The basic principle adopted by the statute is that royalties under the compulsory licenses are payable only for the retransmission of distant signals, not for the retransmission of any local signals or any network programs whether local or distant. The retransmissions which give rise to the payment of royalties are therefore those which pertain to the programs of distant independent stations and of non-network programs telecast by distant network affiliated stations which beside network programs also telecast programs originated in their studios.[199]

A "network station" is considered to be "one or more of the television networks in the United States providing nationwide transmissions." 17 U.S.C.A. § 111(f). A network affiliated station which mainly transmits network programming comes within the definition, which is intended to be strictly construed.[200] Since network station broadcasts are nationwide, the copyright holder's royalty fee has already been calculated on a nationwide basis. Therefore, no payment is required for the retransmission of network programs by a cable system. What is the reason for this? The following rationale has been offered:

> Cable retransmission of a purely local signal is similar to the distant network programming. If the cable retransmission is to the same market audience for which the copyright owner is compensated by the primary transmitter, there is no economic injury to the copyright owner. C. S. Greene, 27 Cath.L.R. 263, at 289.[201]

Certain Secondary Transmissions Exempted. Cable television transmissions which do not qualify for the exemptions within § 111(a) are subject to full

199. See Meyer at 558.

200. See House Report, p. 98.

201. (This material, as well as other passages from the article referred to in this section, is reprinted with permission from the Catholic University Law Review.)

copyright liability, which can only be avoided by obtaining a compulsory license. For the exemptions to apply, the primary transmission must have been made to be viewed by the general public. § 111(b); House Report, *supra*, p. 92. Clause (1) of subsection (a) exempts from copyright liability an antenna system constructed "by the management of a hotel, apartment house or similar establishment," for the purpose of relaying a transmission to rooms used as living quarters or for private parties, and does not include such meeting places as dining rooms and ballrooms. This clause is important as it overrules the *Buck v. Jewell-LaSalle* holding insofar as private rooms are concerned.

An exemption for the use of an ordinary radio or television set in a public room is contained in § 110(5). It has been perceptively observed that the "distinction between this exemption [§ 110(5)] and the liability provided in section 111(a)(1) appears to be principally predicated on the sophistication of the receiving equipment. * * *". Greene at 284.[202] Thus, a retransmission to a public room in a hotel by a cable system or a radio system as described in *Jewell-LaSalle* is still considered an infringing act.

Clause (2) exempts any systematic instructional programming of "a governmental body or a nonprofit educational institution * * *" as described in § 110(2): "On the other hand, the exemption does not cover the secondary transmission of a performance on educational television or radio of a dramatic work or a dramatic musical work such as an opera or musical comedy, or of a motion picture."[203] Clause (3) exempts secondary transmissions made by a passive carrier who has no direct or indirect control over the content or selection of the primary transmission.[204] Clause (4) exempts secondary transmitters which operate on a nonprofit basis.[205]

Exempt Secondary Transmissions and § 111(a)(3)

A case involving a significant interpretation of what constitutes a secondary transmission made by a passive carrier which is exempt from copyright liability under 17 U.S.C. § 111(a)(3) was *Eastern Microwave v. Doubleday Sports*, 8 Med.L.Rptr. 2353 (2d Cir. 1982). Eastern Microwave, a common carrier, had been retransmitting the original signals of WOR-TV, a New York City television station, to cable television systems outside WOR's service area.

Judge Markey described the retransmission process in his opinion for the Second Circuit:

> Retransmission is accomplished by converting broadcast signals into microwave signals and relaying the microwave signals via satellite or a string of line-of-sight terrestrial microwave repeater stations. Retransmitted signals are delivered by EMI to the headends of the customers of its transmitting services, cable television (CATV) systems, which then reconvert the microwave signals to television signals for distribution to and viewing by the CATV system's subscribers.

Eastern Microwave, Inc. (EMI) exercised no control over content or the selection of the transmissions. Doubleday Sports, Inc., owner of the New York Mets, contracted with WOR-TV to broadcast approximately 100 Mets games each season. The Mets "owns the copyright in the audiovisual work represented by the Mets games."

EMI did not ask permission of Doubleday to retransmit WOR-TV's signals. In March 1981, Doubleday notified EMI that it considered retransmission of WOR-TV Mets game broadcasts to constitute an infringement of Doubleday's copyright. EMI then sought relief in the federal courts for a "declaratory judgment that it was a passive carrier exempt from copyright liability under 17 U.S.C.A. § 111(a)(3)." The United States Court of Appeals for the Second Circuit ruled that "EMI is not in law infringing Doubleday's exclusive right to display its copyrighted work by passively retransmitting the entirety of its customer WOR-TV's broadcast signal to the headends of its customer CATV systems."

Similarly in 1985, the U.S. Court of Appeals for the Eighth Circuit decided that special WTBS feeds to its microwave carrier, Southern Satellite Co.—not including Atlanta, Georgia commercials or pro-

202. One commentator interprets § 110(5) and 111(a)(1) to mean that "* * * a single television set or even several loudspeakers placed in a lobby, bar" or restaurant of a hotel, apartment house or similar establishment would be exempt * * * if they transmit local broadcasts of copyrighted works. * * * Meyer at 555. But the House Report, p. 87, notes that "The Committee * * * accepts the traditional * * * interpretation of the *Jewell-LaSalle* decision, under which public communication by means other than a home receiving set, or further transmission of a broadcast to the public is considered an infringing act."

203. Meyer at 555–56.

204. House Report, p. 92.

205. See Greene at 285.

gramming—are permissible secondary transmissions under section 111. *Hubbard Broadcasting v. Southern Satellite Systems*, 12 Med.L.Rptr. 1476, 777 F.2d 393 (8th Cir. 1985).

The Compulsory License. Compulsory copyright licensing is the most controversial aspect of the new Copyright Act because the copyright owner loses control over the use and price of his product. While all cable systems which retransmit primary transmissions made by an FCC-licensed broadcast station are subject to compulsory licensing [§ 111(c)], royalties are only paid for distant signal non-network programming [§ 111(d)(2(B)].

Transmissions Fully Liable under the Copyright Act. The compulsory license does not protect the cable system operator in all instances. A cable operator exposes himself to liability for copyright infringement if he retransmits a program originally transmitted to a limited audience rather than the public at large. § 111(b). Full copyright liability also results from the "willful or repeated" retransmission of signals not permissible under the rules and regulations of the FCC, § 111(c)(2)(A). The House Report points out that the "words 'willful or repeated' are used to prevent a cable system from being subjected to severe penalties for innocent or casual acts." See House Report, *supra*, p. 93.

Further, the cable system is liable if it has not recorded the compulsory license notice, deposited the statement of account, or paid the royalty fee. § 111(c)(2)(B). Cable system operators must be careful not to alter the primary transmission in any way in order to avoid copyright liability. Any willful change whatsoever in the program content or commercial advertising messages "significantly alters the basic nature of the cable retransmission service, and makes its function similar to that of a broadcaster." House Report, p. 93; § 111(c)(3).

Copyright, Television, and the Advent of the Home Video Recorder

Just as the emergence of cable has changed the existing structure of commercial television, so the advent of the home video recorder is changing both broadcast and cable television. More than half of all households thwart the scheduling schemes of the wizards of Madison Avenue. With the development of the home video recorder, finely tuned calculations about audience flow may all go for naught. But if a viewer at home decides to videorecord off a home TV screen, does that violate the copyright laws?

The question of whether sales of VCR's for at-home use violated copyright was the central question in a case that ultimately reached the U.S. Supreme Court.

SONY CORPORATION OF AMERICA v. UNIVERSAL CITY STUDIOS, INC.

464 U.S. 417, 104 S.CT. 774, 78 L.ED.2D 574 (1984).

Justice STEVENS delivered the opinion of the Court.

Petitioners manufacture and sell home video tape recorders. Respondents own the copyrights on some of the television programs that are broadcast on the public airwaves. Some members of the general public use video tape recorders sold by petitioners to record some of these broadcasts, as well as a large number of other broadcasts. The question presented is whether the sale of petitioners' copying equipment to the general public violates any of the rights conferred upon respondents by the Copyright Act.

* * *

An explanation of our rejection of respondents' unprecedented attempt to impose copyright liability upon the distributors of copying equipment requires a quite detailed recitation of the findings of the District Court. In summary, those findings reveal that the average member of the public uses a VTR principally to record a program he cannot view as it is being televised and then to watch it once at a later time. This practice, known as "time-shifting," enlarges the television viewing audience. For that reason, a significant amount of television programming may be used in this manner without objection from the owners of the copyrights on the programs. For the same reason, even the two respondents in this case, who do assert objections to time-shifting in this litigation, were unable to prove that the practice has impaired the commercial value of their copyrights or has created any likelihood of future harm. Given these findings, there is no basis in the Copyright Act upon which respondents can hold petitioners liable for distributing VTR's to the general public. The Court of Appeals' holding that respondents are entitled to enjoin the distribution of VTR's,

to collect royalties on the sale of such equipment, or to obtain other relief, if affirmed, would enlarge the scope of respondents' statutory monopolies to encompass control over an article of commerce that is not the subject of copyright protection. Such an expansion of the copyright privilege is beyond the limits of the grants authorized by Congress.

* * *

As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.

From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection. Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary. Thus, long before the enactment of the Copyright Act of 1909, 35 Stat. 1075, it was settled that the protection given to copyrights is wholly statutory. * * * The remedies for infringement "are only those prescribed by Congress." * * *

The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. * * * Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests. In doing so, we are guided by Justice Stewart's exposition of the correct approach to ambiguities in the law of copyright:

> "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. 'The sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.' * * * When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose." * * *

The two respondents in this case do not seek relief against the Betamax users who have allegedly infringed their copyrights. * * * To prevail, they have the burden of proving that users of the Betamax have infringed their copyrights and that Sony should be held responsible for that infringement.

The Copyright Act does not expressly render anyone liable for infringement committed by another. In contrast, the Patent Act expressly brands anyone who "actively induces infringement of a patent" as an infringer, 35 U.S.C. § 271(b), and further imposes liability on certain individuals labeled "contributory" infringers, § 271(c). The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity. For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.

* * *

If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material. There is no precedent in the law of copyright for the imposition of vicarious liability on such a theory. The

closest analogy is provided by the patent law cases to which it is appropriate to refer because of the historic kinship between patent law and copyright law.

In the Patent Act both the concept of infringement and the concept of contributory infringement are expressly defined by statute. The prohibition against contributory infringement is confined to the knowing sale of a component especially made for use in connection with a particular patent. There is no suggestion in the statute that one patentee may object to the sale of a product that might be used in connection with other patents. Moreover, the Act expressly provides that the sale of a "staple article or commodity of commerce suitable for substantial noninfringement use" is not contributory infringement.

* * * Unless a commodity "has no use except through practice of the patented method," * * * the patentee has no right to claim that its distribution constitutes contributory infringement. "To form the basis for contributory infringement the item must almost be uniquely suited as a component of the patented invention."

* * *

We recognize there are substantial differences between the patent and copyright laws. But in both areas the contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible. The staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.

The question is thus whether the Betamax is capable of commercially significant noninfringing uses. In order to resolve that question, we need not explore *all* the different potential uses of the machine and determine whether or not they would constitute infringement. Rather, we need only consider whether on the basis of the facts as found by the District Court a significant number of them would be noninfringing. Moreover, in order to resolve this case we need not give precise content to the question of how much use is commercially significant. For one potential use of the Betamax plainly satisfies this standard, however it is understood: private, noncommercial time-shifting in the home. It does so both (A) because respondents have no right to prevent other copyright holders from authorizing it for their programs, and (B) because the District Court's factual findings reveal that even the unauthorized home time-shifting of respondents' programs is legitimate fair use.

* * *

The District Court's conclusions are buttressed by the fact that to the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits. In *Community Television of Southern California v. Gottfried*, * * * we acknowledged the public interest in making television broadcasting more available. Concededly, that interest is not unlimited. But it supports an interpretation of the concept of "fair use" that requires the copyright holder to demonstrate some likelihood of harm before he may condemn a private act of time-shifting as a violation of federal law.

When these factors are all weighed in the "equitable rule of reason" balance, we must conclude that this record amply supports the District Court's conclusion that home time-shifting is fair use. In light of the findings of the District Court regarding the state of the empirical data, it is clear that the Court of Appeals erred in holding that the statute as presently written bars such conduct.

In summary, the record and findings of the District Court lead us to two conclusions. First, Sony demonstrated a significant likelihood that substantial numbers of copyright holders who license their works for broadcast on free television would not object to having their broadcasts time-shifted by private viewers. And second, respondents failed to demonstrate that time-shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works. The Betamax is, therefore, capable of substantial noninfringing uses. Sony's sale of such equipment to the general public does not constitute contributory infringement of respondents' copyrights.

* * *

One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.

It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written. Applying the copyright statute, as it now reads, to the facts as they have been developed in this case, the judgment of the Court of Appeals must be reversed.

It is so ordered.

COMMENT

The Betamax case was extremely narrow. The court refused to consider the interests of copyright holders who were not parties to the case. In its adherence to a strict interpretation of the monopoly grant under the statute, the Court also kept the case narrow by not allowing equitable claims similar to those in unfair competition to be posed.

The Court concluded, narrowly, only that Sony had not contributorily infringed on copyrights. That result implies that the audience members actually copying at home might be infringing. The fair use holding prevents that implication from maturing. However, home copying of broadcast programs has *some* effect on the copyright owners of those programs. The Court demanded proof of harm, refusing to assume harm. The fair use holding is unusual, since the practice of time shifting does not meet the usual four criteria for fair use specified in the Copyright Act. Might the Court have been accepting the reality of how difficult an enforcement plan would be? Similarly, the Court's fair use result can be seen as allowing free use of any materials sent via electromagnetic waves into the home, so long as the copies are used privately rather than for profit.

Since the case by its terms applied only to private home copying of broadcast programs, the copyright and fair use issues remain unresolved when copying is from cable television or when copies are used for commercial purposes. Copying for profit is likely an infringement via videotape just as in any other medium. Whether fair use protection should extend to copying of cable programs, especially pay cable fare such as on Home Box Office, is less clear.

SECTION NINE

STUDENTS AND THE FIRST AMENDMENT

Nearly every case discussed so far has involved adult journalists and, usually, corporate, for profit, journalistic organizations. Schools and colleges, however, also practice and teach journalism and communications, and courts have sometimes been asked to decide how the First Amendment applies to students and minors. It has not been easy. While a 1969 U.S. Supreme Court decision, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), suggested that the free expression rights of students were not vastly dissimilar to those of adults, a subsequent ruling, *Hazelwood School District v. Kuhlmeier*, 14 Med.L.Rptr. 2081, 484 U.S. 260 (1988), reflected clear unwillingness to equate student and adult press rights. Unlike *Tinker*, *Hazelwood* is a student press rather than a student symbolic speech case and has raised substantial questions about the current willingness of the Court to recognize First Amendment press rights of students and/or minors.

A number of important issues, however, remain unresolved. Will the Court pursue a "sliding scale" of student rights, with elementary school students at the bottom of the scale, secondary school students slightly higher, and post-secondary students higher still? What is the major concern of the courts: student status or age? If, as *Hazelwood* suggests, student press rights are limited when the journalistic activity is part of a curriculum, what rights do students enjoy if they somehow manage to engage in press-like expression outside of a classroom context?

Black armbands worn by school children on behalf of their parents' opposition to the Vietnam War led in 1969 to *Tinker*, the first major U.S. Supreme Court decision in the area of student freedom of expression.

The rule set forth in *Tinker* was that student First Amendment rights may not be abridged unless school authorities can convince the courts that expression would "materially and substantially interfere with

the requirements of appropriate discipline in the operation of the school."[206]

"It can hardly be argued," the Court went on to say, "that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." And, citing a reference to boards of education in the landmark flag salute case, the Court reaffirmed what may be the foundational concept in this line of cases:

> That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[207]

The *Tinker* Court used the words "enclaves of totalitarianism" to characterize what public schools might become. While overly harsh perhaps, surveys of scholastic journalism do indicate that censorship and punishment for constitutionally protected student expression are common and that some school administrators are insensitive to constitutional values.[208] It is not uncommon for college editors to be required to submit copy for review to a faculty adviser. In high schools, administrators are often the censors.

"Censorship is the fundamental cause of the triviality, innocuousness, and uniformity that characterize the high school press," a national study by the Robert F. Kennedy Memorial concluded. "It has created a high school press that in most places is no more than a house organ for the school administration."[209]

Although only a miniscule number of cases of censorship and punitive action reach the courts, even a brief look at Student Press Law Center Reports documents the problem. In Torrance, California, the high school newspaper adviser was required to adhere to the standards of Rotary International rather than the standards of the First Amendment or appropriate state law in passing upon news and editorial material—assurance of a pollyannish publication. And an adviser who refused to submit articles to the administration for prior review was fired. A Linden, New Jersey principal ordered the entire edition of a high school newspaper burned because he feared the consequences of an innocuous editorial on community affairs. Wisconsin administrators confiscated an entire monthly issue of a student newspaper because it contained a harmless report on a school board meeting.

Little wonder that the Kennedy study could add to its conclusions that "self-censorship, the result of years of unconstitutional administration and faculty censorship, has created passivity among students and made them cynical about the guarantee of free press under the First Amendment."

The Student Press Law Center estimates that at least 300 cases of censorship and constitutionally suspect punishment for publication occur each year on high school and college campuses. No less distressing are book-banning cases. In *Board of Education Island Trees Union Free School District No. 26 v. Pico*, 102 S.Ct. 2799 (1982), a divided Supreme Court upheld the Second Circuit Court of Appeals[210] in remanding for trial a lawsuit challenging the right of a school board to remove books from high school libraries. In a plurality opinion for the Court, Justice Brennan, joined by Justices Marshall and Stevens, declared that books cannot be removed simply because school authorities object to their philosophical themes. The plurality would have extended to students a First Amendment right to receive information, especially in the context of a school library. Chief Justice Burger, joined by Justices Powell, Rehnquist, and O'Connor, dissented

206. The language is from *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966), a case in which school authorities were enjoined from enforcing a regulation forbidding students to wear "freedom buttons."

A year later, a federal district court in *Dickey v. Alabama State Board of Education*, 273 F.Supp. 613 (D.Ala. 1967), recognized the constitutional rights of the student press when a student editor's suspension for writing an editorial critical of Alabama's governor was reversed. The court relied on the "material and substantial interference" rule of *Burnside v. Byars*.

207. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943).

208. Inglehart, *Freedom for the College Student Press*, 1985; Stevens and Webster, *Law and the Student Press*, 1973; Trager, *Student Press Rights*, 1974; Trager and Dickerson, *College Student Press Law*, 1976; Arnold and Krieghbaum, *Handbook for Student Journalists*, 1976; Nat Hentoff, *The First Freedom*, 1980, chapters 1–4. Student Press Law Center, Law of the Student Press; and Student Press Law Center Report. For examples of how college administrators interpret First Amendment freedoms, see: Ivan Holmes, Elizabeth A. Minden and John E. Getz, *Censorship of the Campus Press: A Study of 18 University Newspapers*, 1987; Fraser, *Fallout from* Hazelwood, Columbia J.Rev. May–June, 1988.

209. Jack Nelson(ed)., *Captive Voices: The Report of the Commission of Inquiry into High School Journalism*, 1974.

210. *Pico v. Board of Education*, 638 F.2d 404 (2d Cir. 1980).

because they didn't wish to interfere with the authority of school officials.

Although the Court provided no constitutional guidelines for school actions of this kind, the case may have a deterrent effect on book banning. The Island Trees school board chose to drop the case rather than go back to trial.

Illustrative of encouraging case law was a ruling that the First Amendment was violated by a school board decision to remove all issues of *Ms.* magazine from a high school library without any showing of a countervailing and legitimate governmental interest, except the political and social views of individual board members. *Salvail v. Nashua Board of Education*, 5 Med.L.Rptr. 1096, 469 F.Supp. 1269 (N.H. 1979). See also, *Right to Read Committee v. Chelsea*, 4 Med.L.Rptr. 1113, 454 F.Supp. 703 (D.Mass. 1978).

And in *Pratt v. Independent School District, No. 831*, 670 F.2d 771 (8th Cir. 1982), the Eighth Circuit Court of Appeals held that a "school board cannot constitutionally ban . . . films because a majority of its members object to the films' religious and ideological content and wish to prevent the ideas contained in the material from being expressed in the school."

A California school board which permitted placement of military service ads in the school paper but prohibited ads promoting alternatives to military service was said to have violated the First Amendment. *San Diego Committee v. Grossmont Union High School*, 12 Med.L.Rptr. 2329, 790 F.2d 1471 (9th Cir. 1986).

Despite this generally encouraging pattern recognizing student press rights, lower federal courts occasionally found the tendency toward "disruption" that *Tinker* had said could justify restricting student freedoms.

Where the superintendent's motives were pure, black armbands in protest of the Vietnam War could be prohibited.[211] A protest by black students against the playing of "Dixie" at pep rallies was held to be disruptive.[212] So was a white student wearing a Confederate flag patch.[213] Fraudulent notices announcing the closing of a university seemed more arguably disruptive,[214] as did leaflets calling for a boycott of registration and the disrupting of campus meetings.[215]

Overall, however, by 1987 only six cases out of sixty had upheld censorship or punishment after distribution on the basis of physical disruption. Despite the poor showing of school administrators, there seemed to be a dramatic increase in the number of student cases. The Student Press Law Center in Washington, D.C. counted 371 high school and college cases in 1985, 551 in 1986, and 224 in the first three months of 1987.

Where courts have allowed prior restraints or a denial of the use of college facilities, they have insisted upon due process—clear, unequivocal, and publicized rules as to what is restricted and under what conditions of time, manner, and place of distribution. And to whom is material submitted for review, and how long should a review take? In addition, federal appellate courts will look for precise and intelligible definitions of "disruption" and criteria for predicting it, with the burden of proof on school authorities, and for timely opportunities for appeal.

A leading case in this field is *Healy v. James*, 408 U.S. 169 (1972), in which a unanimous Court saw no facts supporting contentions of a Connecticut college president that "disruption" would be caused by recognizing an SDS (Students for a Democratic Society) chapter on the campus. The First Circuit Court of Appeals relied on *Healy* when it ruled in *Gay Students of University of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974), that although a topic may infuriate the community, it is nevertheless protected by the First Amendment. Even indirect restrictions, said the court, may be constitutionally impermissible if they impinge upon basic First Amendment guarantees. "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."

And specifically on the point was *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975), in which the court held that, even after four rewrites, a school board's prior review policy was still vague and overbroad as to the meaning of "disruption." A prediction of disruption and nothing more is not enough to warrant

211. *Butts v. Dallas*, 306 F.Supp. 488 (N.D. Texas, 1969).
212. *Tate v. Board of Education of Jonesboro, Arkansas*, 453 F.2d 975 (8th Cir. 1972).
213. *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972).
214. *Speake v. Grantham*, 317 F.Supp. 1253 (S.D. Miss. 1970).
215. *Jones v. State Board of Education*, 407 F.2d 834 (6th Cir. 1969).

prior restraint, said the Second Circuit in *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977).

In accordance with Justice Stewart's *Tinker* statement that the "First Amendment rights of children are not co-extensive with those of adults," courts have distinguished the First Amendment rights of college and high school students and of higher and lower grades in secondary schools. The Second Circuit upheld school authorities who refused to allow a school newspaper to distribute a sex survey questionnaire to students in grades nine through twelve.[216]

If school administrators take away a publication's subsidy or fire or suspend its editor, it must not be in a context protected by the First Amendment. Although a college president may have authority to distribute student fees, he or she is not the ultimate authority for what is printed in the campus newspaper. "We are well beyond the belief," said a federal district court in *Antonelli v. Hammond*, 308 F.Supp. 1329 (D.Mass. 1970), "that any manner of state regulation is permissible simply because it involves an activity which is part of the university structure and is financed with funds controlled by the administration."

"The state is not necessarily the unrestrained master of that which it creates and fosters," said the Fourth Circuit Court of Appeals in *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973). "It may well be that a college need not establish a campus newspaper, or, if a paper has been established, the college may permanently discontinue publication for reasons wholly unrelated to the First Amendment. But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment. * * * Censorship of constitutionally protected expression cannot be imposed by * * * withdrawing financial support, or asserting any other form of censorial oversight based on the institution's power of the purse." [217]

This ruling would be recalled when the *Minnesota Daily*, a highly competent and independent college newspaper, temporarily exchanged its maturity for a tasteless "finals edition" that attacked religion, race, and reason. Half the state seemed to recoil in horror. Churches, business organizations, doctors, lawyers, editors, legislators, the governor, and outraged citizens sent more than 550 letters to the University's Board of Regents and the administration demanding punishment (one letter writer thought thirty days in solitary confinement appropriate) or censorship.

Supporting the First Amendment principle that the case had raised were a few prominent faculty members (who would later win a Ball State University award for their support of the student press), three newspapers in the state (most of those who editorialized were opposed), the Newspaper Guild, the Minnesota Press Club, and a few student and faculty organizations.

Against the advice of his attorney, a harried president proposed to the Regents that a mandatory student fee, assigned by students themselves and accounting for about 14 percent of the newspaper's income, be made refundable. Upon adoption of this proposal, the *Daily* filed a lawsuit against the president and the board that would occupy the federal courts for the next five years.

In late 1983 the newspaper got the news it had been waiting for. "Our study of the record," said a unanimous appeals court panel, "leaves us with the definite and firm conviction that this change in funding would not have occurred absent the public hue and cry that the *Daily's* offensive contents provoked. Reducing the revenues available to the newspaper is therefore forbidden by the First Amendment, as made applicable to the states by the Fourteenth, and the *Daily* is entitled to an injunction restoring the former system of funding." [218]

The case was not complex. University of Minnesota President Magrath, the court noted, was on record as supporting the refund because "the threat of losing financial support from students would promote responsible journalism." Regents had testified that the funding was changed because the *Daily* "takes stands on controversial issues" or, unlike other campus newspapers created "animosity . . . because of its contents."

A district court ruling was reversed, the mandatory fee reinstated, and the withheld funds returned together with attorneys' fees—a total of $182,000. Seeing

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216. *Eisner v. Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971); *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971).

217. See also, *Thomas v. Board of Education, Granville Central School District*, 607 F.2d 1043 (2d Cir. 1979). Note that in *Harris v. McRae*, 448 U.S. 297 (1980) the Court said that refusal to fund a constitutionally protected activity, without more, could not be equated with imposition of a "penalty" on that activity.

218. *Stanley v. Magrath*, 719 F.2d 279, 280 (8th Cir. 1983). See also, *Arrington v. Taylor*, 380 F.Supp. 1348 (M.D.N.C. 1974), aff'd 526 F.2d 587 (4th Cir. 1975), cert. den. 424 U.S. 913 (1976), a similar case involving the *Daily Tar Heel* of the University of North Carolina.

the administration left with the option of taking an appeal that lacked any judicial novelty to the United States Supreme Court, a magnanimous *Daily* proposed and the University agreed to a constructive settlement of the protracted interfamilial dispute. The administration contributed $5,000, the *Daily* $10,000 and the *Daily's* law firm $5,000 to a First Amendment fund dedicated to exploring publicly issues of press freedom *and* responsibility on the campus.

Kate Stanley, the first of five editors involved in the case, best caught its spirit:

> I've come to think that student newspapers are the First Amendment's best defenders. Who else is willing to test the amendment's boundaries so regularly and so vigorously? A good student newspaper is invariably eccentric. Objectivity and fairness are not its first concerns, nor should they be. It has a larger task: mocking the mighty, questioning convention, challenging orthodoxy. It takes risks no professional newspaper would take. Its obstinacy is a reminder that press responsibility is not a precondition for press freedom.[219]

Punitive actions by school administrators against scholastic publications ought to be *content free*, except in those areas such as libel, obscenity, and disruptive speech (fighting words?) where clear and constitutionally acceptable guidelines have been set down. Campuses may be thought of as *speech forums*. "[O]nce having established such a forum," said a New York court, "the authorities may not then place limitations upon its use which infringe upon the right of the students to free expression as protected by the First Amendment unless it can be shown that the restrictions are necessary to avoid material and substantial interference with the requirements of appropriate discipline on the operation of the school." [220]

The trend toward greater freedom and respect for the scholastic press took a new turn when in early 1988 the United States Supreme Court decided its first high school press case, *Hazelwood School District v. Kuhlmeier*. Hints that secondary school student expression rights might be treated differently than college rights had come from the Court two years earlier, in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), when the Court permitted restrictions on what it characterized as "vulgar," "lewd," and "plainly offensive" sexual references and allusions used in a speech endorsing a candidate for student office during a student assembly.

In *Hazelwood v. Kuhlmeier*, a suburban St. Louis, Missouri high school principal, without consulting student staff, removed two pages from the *Spectrum*, the school newspaper, while it was in production. Those pages contained six articles: four admittedly unobjectionable but one dealing with student pregnancy and abortion and the other discussing the impact of divorce on students. One problem with identification of persons in the stories had already been resolved; the others might have been but the principal chose not to wait.

The principal's stated reason for lifting the articles was identification as well as his belief that references to sexual activities and birth control were inappropriate for younger students.

In its 5–3 decision the Court left no doubt that there is a clear distinction between high school students and adults for First Amendment purposes. As to college students, the Court left the question open. A second distinction the Court seemed to be making was that the *Spectrum* was part of a journalism class, funded in large part by the Board of Education. The newspaper therefore was something less than an open forum protected by the First Amendment. It was part of the instructional process of the school.

"A school," said Justice Byron White writing for the Court, "need not tolerate speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school."

White distinguished *Tinker* by characterizing the black armbands as personal expression that happened to occur on school premises and the newspaper in *Hazelwood* as the school's own channel of communication, one of its educational resources to be used as the school sees fit. School officials across the country seemed to be given a broad mandate to control expressions in their institutions.

In a strong dissent, Justice William Brennan would have adhered to the "substantial interference with school work or discipline" standard of *Tinker*. He could find no distinction in precedents between school-sponsored and incidental student expression. This ruling, he predicted, would lead to "brutal censorship." Brutal though it might be on occasion, it was more likely to be insidiously subtle, even

219. Quoted in Gillmor, *The Fragile First*, 8 Hamline L.Rev. 277 (May 1985).
220. *Panarella v. Birenbaum*, 327 N.Y.S.2d 755 (1971).

unconscious. A measure of this was the response of the then-current editor of the *Spectrum* to a question asked her on the January 13, 1988 broadcast of CBS Evening News: the paper, she said, has no problems now; it just avoids controversial subjects. It is difficult to imagine a comment more supportive of Brennan's dissent.

HAZELWOOD SCHOOL DISTRICT v. KUHLMEIER

14 MED.L.RPTR. 2081, 484 U.S. 260, 108 S.Ct. 562, 98 L.ED. 2D 592 (1988).

Justice WHITE delivered the opinion of the Court in which Rehnquist, Stevens, O'Connor, and Scalia joined.

* * *

The District Court [607 F.Supp. 1450 (E.D.Mo. 1985)] concluded that school officials may impose restraints on students' speech in activities that are " 'an integral part of the school's educational function' "—including the publication of a school-sponsored newspaper by a journalism class—so long as their decision has " 'a substantial and reasonable basis.' " * * * The Court found that Principal Reynolds' concern that the pregnant students' anonymity would be lost and their privacy invaded was "legitimate and reasonable," given "the small number of pregnant students at Hazelwood East and several identifying characteristics that were disclosed in the article." * * * The court held that Reynolds' action was also justified "to avoid the impression that [the school] endorses the sexual norms of the subjects" and to shield younger students from exposure to unsuitable material. The deletion of the article on divorce was seen by the court as a reasonable response to the invasion of privacy concerns raised by the named student's remarks. Because the article did not indicate that the student's parents had been offered an opportunity to respond to her allegations, said the court, there was cause for "serious doubt that the article complied with the rules of fairness which are standard in the field of journalism and which were covered in the textbook used in the Journalism II class." Furthermore, the court concluded that Reynolds was justified in deleting two full pages of the newspaper, instead of deleting only the pregnancy and divorce stories or requiring that those stories be modified to address his concerns, based on his "reasonable belief that he had to make an immediate decision and that there was no time to make modifications to the articles in question."

The Court of Appeals for the Eighth Circuit reversed. 795 F.2d 1368 (1986). The court held at outset that Spectrum was not only "a part of the school adopted curriculum," but also a public forum, because the newspaper was "intended to be and operated as a conduit for student viewpoint." The court then concluded that Spectrum's status as a public forum precluded school officials from censoring its contents except when " 'necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others.' " [quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969)].

The Court of Appeals found "no evidence in the record that the principal could have reasonably forecast that the censored articles or any materials in the censored articles would have materially disrupted classwork or given rise to substantial disorder in the school." School officials were entitled to censor the articles on the ground that they invaded the rights of others, according to the court, only if publication of the articles could have resulted in tort liability to the school. The court concluded that no tort action for libel or invasion of privacy could have been maintained against the school by the subjects of the two articles or by their families. Accordingly, the court held that school officials had violated respondents' First Amendment rights by deleting the two pages of the newspaper.

We granted certiorari, and we now reverse.

Students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." * * * They cannot be punished merely for expressing their personal views on the school premises—whether "in the cafeteria, or on the playing field, or on the campus during the authorized hours." * * * unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students."

We have nonetheless recognized that the First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings," *Bethel School District No. 403 v. Fraser*, 478 U.S. ____ (1986), and must be "applied in light of the special characteristics of the school environment." * * * A school need not tolerate student speech that is inconsistent with its "basic

educational mission," * * * even though the government could not censor similar speech outside the school. Accordingly, we held in *Fraser* that a student could be disciplined for having delivered a speech that was "sexually explicit" but not legally obscene at an official school assembly, because the school was entitled to "disassociate itself" from the speech in a manner that would demonstrate to others that such vulgarity is "wholly inconsistent with the 'fundamental values' of public school education." We thus recognized that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," rather than with the federal courts. It is in this context that respondents' First Amendment claims must be considered.

We deal first with the question whether *Spectrum* may appropriately be characterized as a forum for public expression. The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." * * * Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," *Perry Education Assn. v. Perry Local Educators' Assn*, 460 U.S. 37, 47 (1983), or by some segment of the public, such as student organizations. *Id.*, at 46, n. 7. * * * If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. * * *

The policy of school officials toward *Spectrum* was reflected in Hazelwood School Board Policy 348.51 and the Hazelwood East Curriculum Guide. Board Policy 348.51 provided that "[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities." The Hazelwood East Curriculum Guide described the Journalism II course as a "laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I." The lessons that were to be learned from the Journalism II course, according to the Curriculum Guide, included development of journalistic skills under deadline pressure, "the legal, moral, and ethical restrictions imposed upon journalists within the school community," and "responsibility and acceptance of criticism for articles of opinion." Journalism II was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course.

School officials did not deviate in practice from their policy that production of *Spectrum* was to be part of the educational curriculum and a "regular classroom activit[y]." The District Court found that Robert Stergos, the journalism teacher during most of the 1982–1983 school year, "both had the authority to exercise and in fact exercised a great deal of control over *Spectrum*." * * * The District Court * * * found it "clear that Mr. Stergos was the final authority with respect to almost every aspect of the production and publication of *Spectrum*, including its content." Moreover, after each Spectrum issue had been finally approved by Stergos or his successor, the issue still had to be reviewed by Principal Reynolds prior to publication. Respondents' assertion that they had believed that they could publish "practically anything" in *Spectrum* was therefore dismissed by the District Court as simply "not credible." * * *

The evidence relied upon by the Court of Appeals in finding *Spectrum* to be a public forum, * * * is equivocal at best. For example, Board Policy 348.51, which stated in part that "[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism," also stated that such publications were "developed within the adopted curriculum and its educational implications." One might reasonably infer from the full text of Policy 348.51 that school officials retained ultimate control over what constituted "responsible journalism" in a school-sponsored newspaper. Although the Statement of Policy published in the September 14, 1982, issue of Spectrum declared that "*Spectrum*, as a student-press publication, accepts all rights implied by the First Amendment," this statement, understood in the context of the paper's role in the school's curriculum, suggests at most that the administration will not interfere with the students' exercise of those First Amendment rights that attend the publication of a school-sponsored newspaper. It does not reflect an intent to expand those rights by converting a curricular newspaper into a public forum. Finally, that students were permitted to exercise some authority over the contents of *Spectrum* was fully con-

sistent with the Curriculum Guide objective of teaching the Journalism II students "leadership responsibilities as issue and page editors." A decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity. In sum, the evidence relied upon by the Court of Appeals fails to demonstrate the "clear intent to create a public forum" * * * that existed in cases in which we found public forums to have been created. * * * School officials did not evince either "by policy or by practice" * * * any intent to open the pages of *Spectrum* to "indiscriminate use," by its student reporters and editors, or by the student body generally. Instead, they "reserve[d] the forum for its intended purpos[e]," as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of *Spectrum* in any reasonable manner. It is this standard, rather than our decision in *Tinker*, that governs this case.

The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.[3]

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself," * * * not only from speech that would "substantially interfere with [its] work * * * or impinge upon the rights of other students," *Tinker*, 393 U.S., at 509, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.[4] A school must be able to set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world—and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order," * * * or to associate the school with any position other than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school

3. The distinction that we draw between speech that is sponsored by the school and speech that is not is fully consistent with *Papish* v. *Board of Curators*, 410 U.S. 667 (1973) (*per curiam*), which involved an off-campus "underground" newspaper that school officials merely had allowed to be sold on a state university campus.

4. The dissent perceives no difference between the First Amendment analysis applied in *Tinker* and that applied in *Fraser*. We disagree. The decision in *Fraser* rested on the "vulgar," "lewd," and "plainly offensive" character of a speech delivered at an official school assembly rather than on any propensity of the speech to "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others." 393 U.S., at 513. Indeed, the *Fraser* Court cited as "especially relevant" a portion of Justice Black's dissenting opinion in *Tinker* "disclaim[ing] any purpose * * * to hold that the Federal Constitution compels the teachers, parents and elected school officials to surrender control of the American public school system to public school students." 478 U.S., at ——(citing 393 U.S., at 522). Of course, Justice Black's observations are equally relevant to the instant case.

may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

We also conclude that Principal Reynolds acted reasonably in requiring the deletion from the May 13 issue of *Spectrum* of the pregnancy article, the divorce article, and the remaining articles that were to appear on the same pages of the newspaper.

The initial paragraph of the pregnancy article declared that "[a]ll names have been changed to keep the identity of these girls a secret." The principal concluded that the students' anonymity was not adequately protected, however, given the other identifying information in the article and the small number of pregnant students at the school. * * * Reynolds * * * could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students. In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents, who were discussed in the article but who were given no opportunity to consent to its publication or to offer a response. The article did not contain graphic accounts of sexual activity. The girls did comment in the article, however, concerning their sexual histories and their use or nonuse of birth control. It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters.

The student who was quoted by name in the version of the divorce article seen by Principal Reynolds made comments sharply critical of her father. The principal could reasonably have concluded that an individual publicly identified as an inattentive parent—indeed, as one who chose "playing cards with the guys" over home and family—was entitled to an opportunity to defend himself as a matter of journalistic fairness. * * *

Principal Reynolds testified credibly at trial that, at the time that he reviewed the proofs of the May 13 issue during an extended telephone conversation with (the printer), he believed that there was no time to make any changes in the articles, and that the newspaper had to be printed immediately or not at all. It is true that Reynolds did not verify whether the necessary modifications could still have been made in the articles, and that (the printer) did not volunteer the information that printing could be delayed until the changes were made. We nonetheless agree with the District Court that the decision to excise the two pages containing the problematic articles was reasonable given the particular circumstances of this case. * * *

In sum, we cannot reject as unreasonable Principal Reynolds' conclusion that neither the pregnancy article nor the divorce article was suitable for publication in *Spectrum*. Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community" that includes adolescent subjects and readers. Finally, we conclude that the principal's decision to delete two pages of *Spectrum*, rather than to delete only the offending articles or to require that they be modified, was reasonable under the circumstances as he understood them. Accordingly, no violation of First Amendment rights occurred.

The judgment of the Court of Appeals for the Eighth Circuit is therefore

Reversed.

Justice BRENNAN, with whom Justice Marshall and Justice Blackmun join, dissenting.

When the young men and women of Hazelwood East High School registered for Journalism II, they expected a civics lesson. *Spectrum*, the newspaper they were to publish, "was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a * * * forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution * * * ." 795 F.2d 1368, 1373 (CA8 1986). "[A]t the beginning of each school year," the student journalists published a Statement of Policy—tacitly approved each year by school authorities—announcing their expectation that "*Spec-*

trum, as a student-press publication, accepts all rights implied by the First Amendment. * * * Only speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore prohibited." The school board itself affirmatively guaranteed the students of Journalism II an atmosphere conducive to fostering such an appreciation and exercising the full panoply of rights associated with a free student press. "School sponsored student publications," it vowed, "will not restrict free expression or diverse viewpoints within the rules of responsible journalism." (Board Policy § 348.51). * * *

In my view the principal broke more than just a promise. He violated the First Amendment's prohibitions against censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose.

Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic. * * * The public school conveys to our young the information and tools required not merely to survive in, but to contribute to, civilized society. It also inculcates in tomorrow's leaders the "fundamental values necessary to the maintenance of a democratic political system. * * *" *Ambach v. Norwick*, 441 U.S. 68, 77 (1979). All the while, the public educator nurtures students' social and moral development by transmitting to them an official dogma of " 'community values.' " *Board of Education v. Pico*, 457 U.S. 853, 864 (1982).

* * *

Free student expression undoubtedly sometimes interferes with the effectiveness of the school's pedagogical functions. Some brands of student expression do so by directly preventing the school from pursuing its pedagogical mission: The young polemic who stands on a soapbox during calculus class to deliver an eloquent political diatribe interferes with the legitimate teaching of calculus. And the student who delivers a lewd endorsement of a student-government candidate might so extremely distract an impressionable high school audience as to interfere with the orderly operation of the school. See *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. ___ (1986). Other student speech, however, frustrates the school's legitimate pedagogical purposes merely by expressing a message that conflicts with the school's, without directly interfering with the school's expression of its message: A student who responds to a political science teacher's question with the retort, "Socialism is good," subverts the school's inculcation of the message that capitalism is better. Even the maverick who sits in class passively sporting a symbol of protest against a government policy, * * * or the gossip who sits in the student commons swapping stories of sexual escapade could readily muddle a clear official message condoning the government policy or condemning teenage sex. Likewise, the student newspaper that, like *Spectrum*, conveys a moral position at odds with the school's official stance might subvert the administration's legitimate inculcation of its own perception of community values.

If mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations in the foregoing hypotheticals, converting our public schools into "enclaves of totalitarianism," that "strangle the free mind at its source" * * *. The First Amendment permits no such blanket censorship authority. While the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," * * * students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

* * *

The mere fact of school sponsorship does not, as the Court suggests, license such thought control in the high school, whether through school suppression of disfavored viewpoints or through official assessment of topic sensitivity. The former would constitute unabashed and unconstitutional viewpoint discrimination, see *Board of Education v. Pico*, * * * as well as an impermissible infringement of the students' " 'right to receive information and ideas.' " * * * Just as a school board may not purge its state-funded library of all books that " 'offen[d] [its] social, political and moral tastes,' " * * * school officials may not, out of like motivation, discriminatorily excise objectionable ideas from a student publication. The State's prerogative to dissolve the student newspaper entirely (or to limit its subject matter) no more entitles it to dictate which viewpoints students may express on its pages, than the State's prerogative to close down the schoolhouse entitles it to prohibit

the nondisruptive expression of antiwar sentiment within its gates. * * *

The case before us aptly illustrates how readily school officials (and courts) can camouflage viewpoint discrimination as the "mere" protection of students from sensitive topics. Among the grounds that the Court advances to uphold the principal's censorship of one of the articles was the potential sensitivity of "teenage sexual activity." * * * Yet the District Court specifically found that the principal "did not, as a matter of principle, oppose discussion of said topi[c] in *Spectrum*." 607 F.Supp., at 1467. That much is also clear from the same principal's approval of the "squeal law" article on the same page, dealing forthrightly with "teenage sexuality," "the use of contraceptives by teenagers," and "teenage pregnancy." If topic sensitivity were the true basis of the principal's decision, the two articles should have been equally objectionable. It is much more likely that the objectionable article was objectionable because of the viewpoint it expressed: It might have been read (as the majority apparently does) to advocate "irresponsible sex." * * *

The sole concomitant of school sponsorship that might conceivably justify the distinction that the Court draws between sponsored and nonsponsored student expression is the risk "that the views of the individual speaker [might be] erroneously attributed to the school." Of course, the risk of erroneous attribution inheres in any student expression, including "personal expression" that, like the Tinkers' armbands, "happens to occur on the school premises." Nevertheless, the majority is certainly correct that indicia of school sponsorship increase the likelihood of such attribution, and that state educators may therefore have a legitimate interest in dissociating themselves from student speech.

But " '[e]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." * * * Dissociative means short of censorship are available to the school. It could, for example, require the student activity to publish a disclaimer, such as the "Statement of Policy" that *Spectrum* published each school year announcing that "[a]ll * * * editorials appearing in this newspaper reflect the opinions of the *Spectrum* staff, which are not necessarily shared by the administrators or faculty of Hazelwood East," or it could simply issue its own response clarifying the official position on the matter and explaining why the student position is wrong. Yet, without so much as acknowledging the less oppressive alternatives, the Court approves of brutal censorship.

* * *

Finally, even if the majority were correct that the principal could constitutionally have censored the objectionable material, I would emphatically object to the brutal manner in which he did so. Where "[t]he separation of legitimate from illegitimate speech calls for more sensitive tools" * * * the principal used a paper shredder. He objected to some material in two articles, but excised six entire articles. He did not so much as inquire into obvious alternatives, such as precise deletions or additions (one of which had already been made), rearranging the layout, or delaying publication. Such unthinking contempt for individual rights is intolerable from any state official. It is particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees.

* * *

The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.

COMMENT

The minority in *Pico*, a case referred to in Brennan's dissent, argued for a community standards test, already familiar to media law. Elected school boards, not federal judges or teenage pupils, would decide what books were appropriate for the school library—assuming their motives were not suspect. By *Hazelwood's* time that minority had fashioned a majority.

The situation may not be much better, and indeed may be worse, when it comes to student broadcasting, as the Trustees of the University of Pennsylvania discovered between 1976 and 1979. Like a modest number of high schools and a substantial number of colleges, Penn was the licensee for a noncommercial, educational FM station, WXPN. In 1976, the FCC began a formal investigation into whether or not renewal of the license was justified, after receiving numerous complaints about offensive (indeed, it was argued, obscene) programming.

On October 19, 1978 the FCC voted six to one not to renew the license. So far as the FCC was

concerned the major problem was not the programming of the station; it was, instead, that the licensee—the Trustees of the University—had lost control over its operation. In *Trustees of the University of Pennsylvania*, 69 FCC 2d 1384 (1978), the FCC traced control of the station through a dizzying University bureaucracy; from the forty-two trustees (the formal licensees), through an Executive Board, then the University president, followed by the dean of students, the director of student activities, the Student Activities Council, and the FM Program Board. In addition, an Undergraduate Assembly, a student-comprised station board, and the University Judicial System also seemed to exercise control over the station.

The FCC concluded, "In sum, the daily operation of WXPN(FM) was in the hands of student-run organizations and was considered by the licensee to be just one of many 'student' activities supervised by the Student Activities Council."

This was not enough for the FCC. The problem was that the station was licensed to the trustees, yet they exercised little effective control over what the students (and even nonstudents also involved in the station) did. The commission concluded that "[i]f our licensing policy is to have meaning, the licensee must exercise control and supervision over the operations of its station." This, the FCC concluded, the trustees had not done. It probably did not help the trustees' case when Penn's own Undergraduate Affairs Court concluded that "[t]here is no one who is ultimately responsible for operations of WXPN."

The commission emphasized that it did not "mean to imply that extensive delegation of authority by a licensee—commercial or educational—is in itself unworkable. Nor do we wish to discourage University licensees from operating student-run stations. We do emphasize, however, that a licensee, educational or otherwise, may not delegate and subdelegate authority over a broadcast facility and thereby insulate itself from the ultimate responsibility for the operation of the station." (*supra*. at 1420). Concluding that what the trustees had done "did not meet any meaningful standard of supervision and control, its abdication was total and cannot be tolerated if licensing and operation of broadcast stations in the public interest is to have any meaning," the FCC stripped Penn of the WXPN license.

But not for long. By June 1979, the FCC was willing to let the trustees reapply, despite a normal FCC rule that someone who has lost a license can not reapply for a year. *Trustees of the University of Pennsylvania*, 45 RR 2d 1384 (1979). Four months later (October 10, 1979), in a four-paragraph, never officially published order, the FCC voted to award the trustees a new license—but only after they had promised not to run the station as a student activity. As the FCC explained:

> In 1978, the President of the University appointed a committee of inquiry. This committee refused to endorse the concept of a radio station operated purely as a student activity. Instead, it recommended that the University operate a public radio station providing programming commensurate with the academic standing of the University. As a consequence, the University is proposing a five-person professional staff and manager, in addition to the volunteer staff. It also proposes to affiliate with National Public Radio. The President of the University and a Board of Governors will be responsible for the operation of the station. Thus, it appears that the lack of supervision and control which led directly to the loss of license has been remedied and, since the applicant is otherwise fully qualified, we find that a grant would serve the public interest. Accordingly, it is ordered that the * * * application is hereby granted. *Trustees of the University of Pennsylvania*, 46 RR 2d 565 (1979).

Cases like *Hazelwood* and *Trustees of the University of Pennsylvania* are troublesome. If we are indeed educating our youth for citizenship, these holdings breed cynicism: free expression is not a right to be taken seriously. They assume that scholastic journalism has little role in making schools safer, healthier, and better places to be. Another message sent is that student newspapers and broadcast stations, if they are to be free even in a limited sense, must be independent of course work, credit, grades and, in the case of broadcasting, licensed to student groups rather than to underlying educational organizations. Unfortunately, because of their ever-changing (always graduating) nature, it is hard for student groups, as contrasted with boards of trustees, to qualify for FCC licenses. Sadly, given these cases, administrators can find "legitimate pedagogical" reasons for censoring student activities. High school newspapers, especially, will find it nearly impossible to achieve a reasonable level of independence. There are alternatives, although some of them may not be fully compatible with the FCC's current licensing standards.

All scholastic publications should be supervised by a board of student publications, acting as publisher, and comprising a majority of students, rep-

resentatives of the administration, faculty and school board, and the adviser. Let the adviser screen potentially libelous, obscene, or disruptive words with the advice of the school district's attorney, and let the publications board make final decisions as to the limits of controversial content. This model of shared responsibility is closer to the goal of a free press than a principal with oligarchical power. Responsible citizenship is not easily learned in a dictatorship.

Some constraint on authority is necessary to avoid inculcating values contrary to our constitutional experience. There will always be tension between the interests of teachers and administrators on the one hand and individual constitutional rights on the other. Too often the school as an agent of government sends reverse constitutional messages to students when it represses dissent or unorthodox views.[221]

Students in private schools cannot plead state action, but they can look to state constitutions, statutes, and precedents for help, as well as to the rules of their institutions for whatever promises or contracts were made upon enrollment.[222]

All of this, of course, ought to be preceded by written school rules incorporating the substance and the procedures of free expression. Disciplinary proceedings must comport with due process and a right of appeal. Unofficial publications and less conventional forms of expression such as pamphlets, buttons, and signs are protected by the First Amendment,[223] however irritating they may be on occasion.

In the past, courts have defended underground newspapers on high school campuses where minimum rules of due process were abrogated.[224] And on a major university campus, the U.S. Supreme Court held that, "Mere dissemination of ideas, no matter how offensive to good taste on a state university campus may not be shut off in the name alone of the 'conventions of decency'."[225]

The extent to which freedom of the student press will be constricted by *Hazelwood* remains to be seen, but it is difficult to be optimistic about a ruling that will be broadly interpreted by school officials to condone censorship. Principals, superintendents, and advisers may not make the fine distinctions drawn by the Court between curricular and open forum publications. And college presidents may overlook the Court's postponement of judgment on the limits of college journalism.

SECTION TEN
OBSCENITY AND THE LAW

A Semantic Tangle

Obscenity is not normally a concern of the professional journalist. Its control or prohibition, however, engages the First Amendment and the constitutional notion of free and open channels of communication. Cultural schizophrenia about sex will inexorably manifest bizarre symptoms in the body politic. Lawmaking and judicial rulings in the realm of sex expression reflect this social malaise.

Religious convictions alone do not account for sex censorship. Its suppression is pervaded by poorly disguised efforts to regulate human behavior through the political and ideological control of imagery. Educational Research Analysts, an organization certified and supported by the Right, has developed sixty-seven categories under which a textbook may be banned. They include "trash," "books with suggestive titles," and "works of questionable writers."

Groups normally more comfortable on the Left also support censorship. Feminists see *Hustler*, *Penthouse*, and *Playboy* as exuding a peculiarly virulent kind of woman hatred.* Blacks protest their depiction in film, fiction, and history; homosexuals have been sensitive to their portrayal on television; and concerns about pornoviolence cut across social strata. Textbook publishers are ever alert to the ed-

221. Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 Yale L. J. 1647 (July 1986).

222. Stevens, *Contract Law, State Constitutions and Freedom of Expression in Private Schools*, 58 Journalism Quarterly 613 (Winter 1981).

223. *Sullivan v. Houston Independent High School District*, 307 F.Supp. 1328 (S.D.Tex. 1969).

224. *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), cert. den., 368 U.S. 930 (1961).

225. *Papish v. Board of Curators, University of Missouri*, 410 U.S. 667 (1973).

* Feminists are divided on the level of risk that should be taken in modifying the First Amendment to combat pornography. And there is less than perfect agreement on the effects of pornography. See for example, MacKinnon, *Feminism Unmodified*, 1987; Tong, *Women, Pornography, and the Law*, Academe (September/October 1987). See also, Kaminer, *Pornography and the First Amendment*, in Lederer (ed.) Take Back the Night: Women on Pornography, 1980; Brownmiller, Against Our Will: Men, Women and Rape, 1975; and Hunter and Law, *Amici Curiae* brief of Feminist Anti-Censorship Task Force, et. al. to United States Court of Appeals for the Seventh Circuit, *American Booksellers Association v. Hudnut* (7th Cir. April 18, 1985).

ucational proclamations of the Gablers of Texas, Phyllis Schlafly's Eagle Forum, and the rest.[226]

While America may or may not be afflicted with a plague of pornography or obscenity, treatment of sexual content seems to depend on a confluence of censorships. Conservatives condone it. Liberals legitimize it. And extremists on both sides demand it for their special causes.

Prodigious problems of definition result. Most attempts to distinguish good erotica from bad pornography have failed, due in large part to the incredible diversity in human response to infinitely replaceable sexual stimuli.[227] There is a neat contradiction in a capitalist economic system depending on sexual exploitation to sell its products at the same time as its governmental agencies pass and enforce laws to punish slightly more vulgar versions of identical themes. One is reminded of the proper Victorians who, while considering sex a topic unfit for polite conversation, kept vast repositories of erotica in the libraries of their mansions.[228]

Censors traditionally have never feared for their own moral demise. Only their peers seem vulnerable to corruption. Time makes a fool of the censor. The obscenities of today have a perverse proclivity for becoming the irrelevancies—or the classics—of tomorrow.

Obscenity came into the common law in *Curl's* case[229] in eighteenth-century England when a tasteless tract titled, in part, "Venus in the Cloister or the Nun in Her Smock" was held by a court to jeopardize the general morality. The time was ripe. Obscenity, and vice societies bent on stamping it out, were both gaining momentum. By the beginning of the nineteenth century, England had entered a period of sexual explicitness.

In a vain attempt to suppress sexual material, Lord Campbell's Act of 1857 made the sale and distribution of obscene libel a crime. A decade later, an anti-Catholic diatribe, "The Confessional Unmasked * * *," came to the Court of Queen's Bench on appeal in the landmark case *R. v. Hicklin*, L.R. 3 Q.B. 360 (1868).

Lord Chief Justice Cockburn announced, in deference to the most feeble-minded and susceptible persons in the community, the following long-influential test for obscenity: "*Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort may fall.*" The book at issue was held obscene on the basis of the effect isolated passages would have on the most intellectually and emotionally defenseless readers.

America imported *Hicklin*. It seemed consistent with the Tariff Act of 1842, our first obscenity law, prohibiting importation into the United States of obscene literature, and with other laws that were defining freedom of speech as freedom for "clean" speech only.

America's first reported obscenity case may have involved *John Cleland's Memoirs of a Woman of Pleasure*, better known as *Fanny Hill*, a novel written in England about 1750. The fictitious Fanny Hill, convicted in Massachusetts in 1821, would become a constitutional celebrity in 1966.

In 1873, a peculiar grocer's clerk named Anthony Comstock somehow manipulated an omnibus anti-obscenity bill through Congress with help from his lobby, the Committee (later Society) for the Suppression of Vice, an offspring of the YMCA. Substantial portions of that federal law are still in effect. State legislatures have mimicked it.

Congress revised the Comstock Act in 1876 to make obscene publications nonmailable. The Post Office, with the grocer's clerk serving as its special agent, gradually developed a system of administrative censorship and confiscation so formidable that the courts seemed reluctant to intervene.

Using the *Hicklin* test, the federal obscenity statute survived constitutional challenge in a number of early cases.[230] Not until 1913 was its validity questioned by Judge Learned Hand in the case of a publisher charged with selling Daniel Goodman's creditable novel of economic blight and social degradation, *Hagar Revelly*.[231] Another crack appeared in *Hicklin* in 1920 when a New York appellate court ruled in favor of a bookstore clerk who had been arrested for

226. Noah, *Censors Left and Right*, The New Republic (February 28, 1981), 12. For a more tempered view of book-banners see, Nocera, *The Big Book-Banning Brawl*, The New Republic (September 13, 1982), 20. See also, Craig, *Suppressed Books*, 1963.

227. Sontag, See the concept of "The Pornographic Imagination," an excerpt from *Styles of Radical Will* in D. A. Hughes (ed.), *Perspectives On Pornography*, 1970.

228. Marcus, *The Other Victorians*, 1966.

229. 2 Strange 788, 93 Eng.Rep. 849 (K.B. 1727).

230. *Ex parte Jackson*, 96 U.S. 727 (1877); *United States v. Bennett*, 24 Fed.Cas. 1093 (S.D.N.Y. 1879); *United States v. Harmon*, 45 Fed. 414 (D.C.Kan. 1891), reversed 50 F. 921 (C.C.D.Kan. 1892).

231. *United States v. Kennerley*, 209 Fed. 119 (S.D.N.Y. 1913).

selling a copy of *Mademoiselle de Maupin* by Theophile Gautier. The court held that a book must be judged as a whole and that the opinions of qualified critics as to its merits are important in reaching a decision.[232]

But *Hicklin* was still the governing rule in 1929 when a New York City court declared Radclyffe Hall's sophisticated story of lesbian love, *The Well of Loneliness*, obscene.[233] A year later Theodore Dreiser's *An American Tragedy* was banned in Boston under a *Hicklin* test.[234]

There were countercurrents. Federal Appeals Judge Augustus Hand wrote an opinion in 1930 reversing the obscenity conviction of Mary Ware Dennett for publication of her pamphlet, *The Sex Side of Life*, a sensitive piece written primarily for her own children, not obscene, but a serious presentation of an important topic.[235]

[The world hadn't changed much by 1977. In November of that year, New York officials were enjoined by a U.S. district court from enforcing the state's new child pornography law against the publisher and sellers of *Show Me*, a book designed for use by parents in educating their children about sex.[236]]

Hicklin finally crumbled in 1933 when Judge John M. Woolsey delivered his elegantly literate decision in *United States v. One Book Called "Ulysses,"* 5 F.Supp. 182 (D.N.Y. 1933). A better test than *Hicklin*, said Woolsey, would be the impact or dominant effect of the whole book on the average reader of normal sensual responses and an evaluation of the author's intent—which this judge had taken intellectual pains to probe. Woolsey's opinion, remarkable for its time, was upheld by Augustus Hand in the United States Court of Appeals. 72 F.2d 705 (2d Cir. 1934). By 1936, Judge Learned Hand, cousin of Augustus, could say bluntly in *United States v. Levine*, 83 F.2d 156 (2d Cir. 1936), that *Hicklin* was out and that an accused book must be taken as a whole. If old, its accepted place in the arts must be regarded. If new, the opinions of competent critics must be taken into account. And what matters, said the judge, is the book's effects upon all whom it is likely to reach.

Federal Censorship

The Post Office and Customs Bureau, federal censors since 1865 and 1842 respectively, began applying a *Ulysses* test, or what came to be known as the "community standards" test, to a wide range of books, pamphlets, and photographs. Because they could effectively block the movement of such material, these government officials became the nation's chief censors, the arbiters of community tastes. The expense and time requirements of litigation generally meant that the courts were avoided.

In 1943 Postmaster General Frank C. Walker revoked *Esquire's* second-class mailing privilege—and the privilege of scores of other periodicals—because the magazine did not appear to be making "the special contribution to the public welfare" that the Postmaster presumed Congress intended. The United States Court of Appeals reversed a district court ruling in favor of Walker in *Esquire, Inc. v. Walker*, 151 F.2d 49 (D.C. Cir. 1945), and a unanimous Supreme Court affirmed. Justice Douglas wrote for the Court:

> It is plain * * * that the favorable second-class rates were granted periodicals meeting the requirements of the Fourth condition, so that the public good might be served through a dissemination of the class of periodicals described. But that is a far cry from assuming that Congress had any idea that each applicant for the second-class rate must convince the Postmaster General that his publication positively contributes to the public good or public welfare. Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. * * * The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted. But Congress has left the Postmaster General with no power to prescribe standards for the literature or the art which a mailable periodical disseminates. * * *" *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946). See also this text, p. 115.

After *Esquire*, the revocation power was almost abandoned as an anti-obscenity sanction. By 1945

232. *Halsey v. New York Society for the Suppression of Vice*, 180 N.Y.S. 836 (1920).
233. *People v. Friede*, 233 N.Y.S. 565 (1929).
234. *Commonwealth v. Friede*, 171 N.E. 472 (Mass. 1930).
235. *United States v. Dennett*, 39 F.2d 564 (2d Cir. 1930).
236 *St. Martin's Press v. Carey*, 3 Med.L.Rptr. 1598, 440 F.Supp. 1196 (S.D.N.Y. 1977).

the entire Post Office procedure had been branded illegal by the D.C. Circuit Court of Appeals in a ruling that Dr. Paul Popenoe's booklet, "Preparing for Marriage," was not unmailable obscenity. Judge Thurman Arnold, who had spoken for the appeals court in *Esquire*, condemned summary seizure of mail as an interference with both liberty and property without due process of law as required by the Fifth Amendment. *Walker v. Popenoe*, 149 F.2d 511 (D.C. Cir. 1945).

The Post Office was prepared to ignore the decision, but a year later, in the Administrative Procedure Act, Congress moved to require a hearing and the use of established legal procedures in all such cases. The courts subsequently held that interim mail blocks prior to a hearing were illegal. The act also prohibited the government from being judge in its own case, that is, a case which it had investigated and prosecuted.

The power of the Post Office to censor the mails in the application of its particular definitions of obscenity would be challenged again. In 1962, for example, Justice John Marshall Harlan, in an opinion for the Supreme Court, ruled that the Post Office could not bar a magazine from the mails without proof of the publisher's knowledge that the advertisements in it promoted obscene merchandise. The "merchandise" here was pictures of near-nude male models. *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962).

In 1968 Congress passed the Pandering Advertisement Act[237] which permitted individual householders to define obscenity for themselves. If a person swears that he or she has been sexually aroused by unsolicited mail, the Post Office orders the sender to strike the name from the sender's mailing lists. Penalties for not doing so are substantial. The problem is that the Post Office has received as many as 300,000 complaints in a single year based on the sexually stimulating effects of advertisements for goods or services such as the *Christian Herald*, automobile seat covers, and electronics magazines—to suggest only a minute number of the complained about "turn ons."

The constitutionality of the act was upheld in *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970). Chief Justice Warren Burger, in an opinion for the Court that emphasized privacy as a right to be protected against obscenity, said that "the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailing from that mailer."

"Nothing in the Constitution," Burger added, "compels us to listen to or view any unwanted communication, whatever its merit. * * * Congress provided this sweeping power not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official."

Despite all this activity in Congress, federal agencies, and lower federal courts, the U.S. Supreme Court stayed largely out of the obscenity law thicket until 1957.

Roth: A Landmark Case

ROTH v. UNITED STATES

354 U.S. 476, 77 S.CT. 1304, 1 L.ED.2D 1498 (1957).

[EDITORIAL NOTE The first substantial U.S. Supreme Court decision in this vexing area came in 1957 with the Roth *case. Roth, a purveyor of decidedly distasteful material, had been convicted under federal law. The court of appeals had affirmed, with Judge Jerome Frank concurring in a remarkable opinion which asked the Supreme Court to resolve the long-standing confusion. See* United States v. Roth, 237 F.2d 796, 801, 804 (2d Cir. 1956).

Roth *came to the Supreme Court supported by four major arguments: (1) the federal obscenity statute (Comstock Act) violated the First Amendment; (2) the statute was too vague to meet the requirements of the due process clause of the Fifth Amendment; (3) it improperly invaded the powers reserved to the states and the people by the First, Ninth, and Tenth Amendments; and (4) it did not consider whether the publications as a whole were obscene.*

The Court, in a 5–4 decision upheld the conviction of Roth, but in doing so adopted standards generally protective of sexual expression.

In upholding the constitutionality of the Comstock Acts for the majority, Justice Brennan declared obscene speech unprotected by the First

237. 39 U.S.C.A. § 3008. Section 3010 of the same title allows one to tell the Post Office that no sexually oriented advertising is wanted. Mailers must buy lists of such names from the Post Office so as to be forewarned.

Amendment, distinguished obscenity from other types of sexual expression, and articulated a legal test based on the American Law Institute's model statute and earlier decisions of lower courts:

> *Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.*

The test, as Brennan would recognize in a landmark 1973 case,[238] *put the Court on the path to a quagmire. But for the moment, at least, sex and obscenity were no longer to be synonymous.*

The elusiveness of a term like "prurient interest" was revealed by a Manhattan jury in 1977. It acquitted a wholesaler of films depicting bestiality because his wares were too disgusting to appeal to normal sexual urges. Going back to Roth *for a definition, the Court said prurient interest meant "lustful thoughts * * * itching * * * longing * * * lascivious desire." So to be obscene, films would have to arouse healthy sexual responses in average ordinary jurors. Since "Man's Best Friend" and "Every Dog Has His Day" didn't do that, they were not obscene. Were normal sex and obscenity again synonymous?*[239]

Decided with Roth *in 1957 was the case of David Alberts who had been convicted by a Beverly Hills judge of selling and promoting obscene and indecent books, a misdemeanor under the California Penal Code.]*

Justice BRENNAN delivered the opinion of the Court.

The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press. * * *

In light of * * * history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press.

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. * * *

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. *But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.* This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. * * * *We hold that obscenity is not within the area of constitutionally protected speech or press.* [Emphasis added.]

It is strenuously urged that these obscenity statutes offend the constitutional guaranties because they punish incitation to impure sexual *thoughts*, not shown to be related to any overt antisocial conduct which is or may be incited in the persons stimulated to such *thoughts*. In *Roth*, the trial judge instructed the jury: "The words 'obscene, lewd and lascivious' as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts*."

* * *

However, sex and obscenity are not synonymous. [Emphasis added.] Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.

* * *

The fundamental freedoms of speech and press have contributed greatly to the development and

238. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), dissenting opinion.

239. *Bestiality Found of Little Appeal, Jury Acquits Movie Wholesaler*, New York Times, December 18, 1977.

well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.

The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina v. Hicklin*, [1868] L.R. 3 Q.B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: *whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest*. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.

Both trial courts below sufficiently followed the proper standard. Both courts used the proper definition of obscenity.

* * *

It is argued that the statutes do not provide reasonably ascertainable standards of guilt and therefore violate the constitutional requirements of due process. * * * The federal obscenity statute makes punishable the mailing of material that is "obscene, lewd, lascivious, or filthy * * * or other publication of an indecent character." The California statute makes punishable, *inter alia*, the keeping for sale or advertising material that is "obscene or indecent." The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere.

Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. * * *

In summary, then, we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited.

Affirmed.

COMMENT

Chief Justice Warren concurred in *Roth* but thought that a person rather than a book ought to be on trial. "The conduct of the defendant is the central issue," he wrote, "not the obscenity of a book or picture. * * * The defendants in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect."

Dissenting in one case and concurring in the other, Justice Harlan distinguished state and federal laws. "I do not think it follows," he said, "that state and federal powers in this area are the same, and that just because the State may suppress a particular utterance, it is automatically permissible for the Federal government to do the same."

Justices Black and Douglas dissented in both cases.

Justice Brennan would regret his *Roth* opinion. The ambiguities raised by the decision were never resolved. Who is this average person? The contemporary standards of what community? And who will testify to being sexually aroused so that a jury can measure prurient interest? Although these difficult questions were never to be answered satisfactorily, the case would provide the elements of a futile but sometimes stimulating debate for the next twenty years.

For its time *Roth* did have some progressive results. A unanimous Court in 1957 struck down a Michigan statute that prohibited distribution to the general reading public of material "containing obscene, immoral, lewd or lascivious language. * * * tending to incite *minors* to violent or depraved or immoral acts [or] manifestly tending to the corruption of the morals of youth. * * *"

"The incidence of this enactment," said Justice Frankfurter, "is to reduce the adult population of Michigan to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380 (1957).

Also in the 1957 term, the Court in *per curiam* opinions overruled four U.S. Courts of Appeals decisions that had upheld obscenity convictions of a French motion picture,[240] imported collections of student art,[241] a homosexual magazine,[242] and two nudist magazines.[243]

Two years later, in *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959), the Court considered "ideological obscenity"—depictions in conflict with social norms—in a French movie based on D. H. Lawrence's *Lady Chatterley's Lover*. Conviction of the film distributor was reversed because, said the Court, the applicable state statute violated the First Amendment's basic guarantee of freedom to advocate ideas, even ideas as hateful and as immoral to some as adultery.

Guilty knowledge was made a precondition of punishment for the crime of selling obscene books in *Smith v. California*, 361 U.S. 147 (1959), and for dispensing twenty-five-cent pieces for peep-show machines in *Commonwealth v. Thureson*, 2 Med.L.Rptr. 1351, 357 N.E.2d 750 (Mass. 1976). The Court in *Smith* reasoned that if the bookseller is criminally liable, whether or not he knows what is in the books on his shelves, he will restrict the books he sells to those he has inspected, and the public will end up with a limited choice.

In an important 1962 case, *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962), referred to earlier, the Court reached for a definition of "hard-core" pornography. "Patent offensiveness," "self-demonstrating indecency," and "obnoxiously debasing portrayals of sex" were the best the Court could do. What was "patently offensive," of course, would by definition appeal to "prurient interest." Although Justice Harlan, in his opinion for the Court, found the male-model magazines "dismally unpleasant, uncouth and tawdry" and appealing only "to the unfortunate persons whose patronage they were aimed at capturing," he could not label them "obscene."

Bantam Books v. Sullivan, 372 U.S. 58 (1963), a landmark prior restraint case, came as a result of Rhode Island's creation of a Commission to Encourage Morality in Youth to educate the public on literature tending to corrupt the young. Without public hearings, lists of objectionable books were prepared, and distributors were threatened with prosecution. "Under the Fourteenth Amendment," said the Court, "a state is not free to adopt whatever procedure it pleases for dealing with obscenity * * * without regard to the possible consequences for constitutionally protected speech." Clearly this was a system of prior censorship depending upon extra-legal sanctions.

It is important to note that the language of *Bantam Books* later formed the central proposition of the ruling of the Court in the *Pentagon Papers* case: "*Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.*" [Emphasis added.]

An analogous case came to the Court in *Southeastern Promotions, Limited v. Conrad*, 1 Med.L.Rptr. 1140, 420 U.S. 546 (1975). There the Court held that a Chattanooga municipal board's refusal to permit the rock musical "Hair" to use a city auditorium because of what board members had heard about the presentation constituted a prior restraint under a system lacking in constitutionally required minimal procedural safeguards.

Laws having substantially the same effects in Kansas [*A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964)] and in Missouri [*Marcus v. Search Warrant*, 367 U.S. 717 (1961)] had been struck down for interfering with distribution prior to an adversary hearing on the issue of obscenity.

By 1964 Henry Miller's *Tropic of Cancer*—tame by contemporary standards—had become the most litigated book in the history of literature. It had faced as many as sixty criminal actions in at least nine states. Some courts found it obscene; others did not.[244] In 1964, *Tropic of Cancer* finally found constitutional protection when five members of the United States Supreme Court voted to reverse a Florida court's conviction of the book. *Grove Press v. Gerstein*, 378 U.S. 577 (1964).

The Court's grounds for reversal are found in a companion case, *Jacobellis v. State of Ohio*, 378 U.S. 184 (1964), decided on the same day but involving a motion picture rather than a book. Writing for the Court, Justice Brennan expanded upon his *Roth* ruling.

Obscenity is excluded from constitutional protec-

240. *Times Film Corp. v. City of Chicago*, 355 U.S. 35 (1957).
241. *Mounce v. United States*, 355 U.S. 180 (1957).
242. *One, Inc. v. Olesen*, 355 U.S. 371 (1958).
243. *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958).
244. Hutchison, *Tropic of Cancer on Trial* (1968).

tion, said Brennan, only because it is "*utterly* without redeeming social importance." Sex could be portrayed in art, literature, or scientific works without fear of punishment. Whatever the material, Brennan added, it must go "substantially beyond customary limits of candor," that is, "beyond society's standards of decency."

Were the "contemporary community standards" of *Roth*, then, local or national? Relying on Learned Hand's 1913 *Kennerley* ruling (see fn. 231) in which the judge spoke of "general notions about what is decent," Brennan concluded in *Jacobellis* that "society at large * * * the public or people in general" would define community standards. The federal Constitution would not permit the concept of obscenity to have a varying meaning from county to county or town to town.

"It would be a hardy person," wrote Brennan, "who would sell a book or exhibit a film anywhere in the land after this Court had sustained the judgment of one 'community' holding it to be outside the constitutional protection. * * * We thus reaffirm the position taken in *Roth* to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. *It is, after all, a national Constitution we are expounding.*" [Emphasis added.]

Chief Justice Warren emphatically disagreed. Years later his view prevailed. He said:

> It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to "community standards," it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable "national standard" and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It is said that such a "community" approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. But communities throughout the (n)ation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals.

Jacobellis is also remembered for Justice Stewart's plunge into pragmatic logic. In a concurring opinion, he declared that, although he couldn't define obscenity, "I know it when I see it."

Film Censorship

Although no distinctions have been made so far between print and film, it should be noted that not until 1952 was film brought into the protective custody of the First Amendment—and then equivocally. In what came to be known as the *Miracle* case, a sensitive and quite respectful Italian film was banned as sacrilegious by the New York Board of Regents, until 1966 the state's censorship agency.

A unanimous United States Supreme Court held that the New York law, under which the ban was permitted, was an unconstitutional abridgement of free speech and press of which film communication was a legitimate part. But it was the vagueness of the term "sacrilegious" that bothered the Court; a clear implication of the Court's ruling was that censorship would be allowable for other reasons. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). See also, de Grazia and Newman, *Banned Films: Movies, Censors and the First Amendment*, 1983.

Many states and local communities have had film censorship boards. By 1965 state agencies had survived only in New York, Virginia, Kansas, and Maryland. Maryland, for a time the lone hold-out, abolished its film censorship board in 1981. Two dozen communities, including Chicago, Dallas, Detroit, Memphis, and Atlanta, had been strict about the distribution of films.

A 1965 challenge to Maryland's motion picture censorship statute had left its law intact, but the U.S. Supreme Court set down strict procedural guidelines for film review. This important ruling may have hastened the demise of all state and local film censorship bodies.

FREEDMAN v. STATE OF MARYLAND

380 U.S. 51, 85 S.CT. 734, 13 L.ED.2D 649 (1965).

Justice BRENNAN delivered the opinion of the Court.

Appellant sought to challenge the constitutionality of the Maryland motion picture censorship statute and exhibited the film "Revenge at Daybreak" at his Baltimore theatre without first submitting the picture to the State Board of Censors. * * * The

State concedes that the picture does not violate the statutory standards and would have received a license if properly submitted, but the appellant was convicted of a * * * violation despite his contention that the statute in its entirety unconstitutionally impaired freedom of expression. The Court of Appeals of Maryland affirmed, 197 A.2d 232 (Md. 1964). * * * We reverse.

* * *

[A]ppellant argues that [the law] constitutes an invalid prior restraint because, in the context of the remainder of the statute, it presents a danger of unduly suppressing protected expression. He focuses particularly on the procedure for an initial decision by the censorship board, which, without any judicial participation, effectively bars exhibition of any disapproved film, unless and until the exhibitor undertakes a time-consuming appeal to the Maryland courts and succeeds in having the Board's decision reversed. Under the statute, the exhibitor is required to submit the film to the Board for examination, but no time limit is imposed for completion of Board action. If the film is disapproved, or any elimination ordered [the law] provides that "the person submitting such film * * * for examination will receive immediate notice of such elimination or disapproval, and if appealed from, such film * * * will be promptly reexamined, in the presence of such person by two or more members of the Board, and the same finally approved or disapproved promptly after such re-examination, with the right of appeal from the decision of the Board to the Baltimore City Court of Baltimore City. There shall be a further right of appeal from the decision of the Baltimore City Court to the Court of Appeals of Maryland, subject generally to the time and manner provided for taking appeal to the Court of Appeals."

Thus there is no statutory provision for judicial participation in the procedure which bars a film, nor even assurance of prompt judicial review. Risk of delay is built into the Maryland procedure, as is borne out by experience; in the only reported case indicating the length of time required to complete an appeal, the initial judicial determination has taken four months and final vindication of the film on appellate review, six months.

* * *

Although the Court has said that motion pictures are not "necessarily subject to the precise rules governing any other particular method of expression," *Joseph Burstyn, Inc. v. Wilson*, it is as true here as of other forms of expression that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*. "* * * [U]nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity * * * without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant*, 367 U.S. 717, 731. The administration of a censorship system for motion pictures presents peculiar dangers to constitutionally protected speech. Unlike a prosecution for obscenity, a censorship proceeding puts the initial burden on the exhibitor or distributor. Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final.

Applying the settled rule of our cases, we hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor. As we said in *Speiser v. Randall*, 357 U.S. 513, 526, "Where the transcendent value of speech is involved, due process certainly requires * * * that the State bear the burden of persuasion to show that the appellants engaged in criminal speech." Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. * * * To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. *Any restraint imposed in advance of a final judicial*

determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. [Emphasis added.] Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

* * *

It is readily apparent that the Maryland procedural scheme does not satisfy these criteria. First, once the censor disapproves the film, the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted. Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity of the film. Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination. We hold, therefore, that appellant's conviction must be reversed. The Maryland scheme fails to provide adequate safeguards against undue inhibition of protected expression, and this renders the requirement of prior submission of films to the Board an invalid previous restraint.

COMMENT

Since 1973 [*Heller v. New York*, 413 U.S. 483 (1973)], police with a warrant signed by a judge who has viewed a film can seize that film. Pending the results of an adversary hearing, the film may be shown, but the exhibitor may have to pay the costs of making a copy.

Chicago's censorship ordinance was also upheld by the U.S. Supreme Court in the notable 1961 case *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961). That case, according to facts revealed in Chief Justice Warren's dissent, illustrated the tendency of censorship to engulf everything in its spreading ooze. Chicago licensers had banned newsreels of Chicago policeman shooting at labor pickets, films criticizing Nazi Germany, motion pictures containing the words "rape" and "contraceptive," and a scene from Walt Disney's *Vanishing Prairie* depicting the birth of a buffalo.

A member of the Chicago censor board reinforced an earlier contention of this chapter when she explained that she rejected a film because "it was immoral, corrupt, indecent, against my religious principles." A police sergeant attached to the censor board said, "Coarse language or anything that would be derogatory to the government—propaganda" is ruled out of foreign films. "Nothing pink or red is allowed." Chicago's law fell into disuse when it was found to be incompatible with *Freedman*.

The Motion Picture Association of America and individual states, cities, and theater owners have over the years developed classification systems to warn adults and to protect children. The X designation has often served as free advertising for the shabby producer whose numbers are now legion.

"Redeeming Social Value": The *Roth-Memoirs* Standard

In *Jacobellis*, decided seven years after *Roth*, Justice Brennan explained that obscene works, in addition to meeting the *Roth* test, had to be "utterly without redeeming social importance." The phrase soon became the primary standard against which censurable obscenity would be measured. The emergence of this test and its reformulation into a broader and more liberal "social value" rule are recounted in a delightfully literate book by Charles Rembar, the attorney who represented John Cleland's heroine, "Fanny Hill," on the final leg of her long and perilous journey to the United States Supreme Court.[245]

That journey began in 1821 when "Fanny's" conviction in a Massachusetts court may have been America's first obscenity case. Court appearances followed many years later in New York, New Jersey, and again in Massachusetts. In Massachusetts the book itself, *Memoirs of a Woman of Pleasure*, was put on trial in an equity suit brought by the state's attorney general. Rembar, attorney for publisher G. P.

245. Rembar, *The End of Obscenity* (1968).

Putnam's Sons, focused his efforts on getting expert witnesses to testify on the "social value" of the work.

Gerald Gardiner had done the same for "Lady Chatterley" in England. Defense witnesses there included Dame Rebecca West, the Bishop of Woolwich, Lord Francis Williams, E. M. Forster, C. D. Lewis, Dilys Powell, and Norman St. John-Stevas. "Lady Chatterley" was acquitted.[246]

It was Rembar's intention and his legal strategy to get the Court to substitute "social value" for "social importance." "Social value" would be a less restrictive test. "Importance," Rembar argued, has other meanings—not synonymous with value—that would impose a tougher standard. "Some value" might not be too hard to show; "some importance" would be something else again.

Rembar sought to replace the "prurient interest" test of *Roth* with his more meaningful "social value" standard. "Social value," he explained in his brief to the Court, "provides a criterion that can be objectively applied, and by a process familiar to the law. Judges and jurors are no longer committed to a total reliance on their individual responses. Traditional judicial techniques come into play. There is evidence to be considered." [247]

The measure of Rembar's success in influencing the Court is found in Justice Brennan's plurality opinion in the "Fanny Hill" case, *A Book, Etc. v. Attorney General of Commonwealth of Mass.*, 383 U.S. 413 (1966).

Literati testified as to the value of Cleland's novel. The Court applied but modified the *Roth* test and reversed the highest court of Massachusetts. Under the revised *Roth-Memoirs* standard, said the Court, three elements must coalesce: It must be established that *(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value*—all this according to the standards of an average person.

So a book would not be proscribed unless it was found to be utterly without redeeming social *value*, Rembar's preferred word. All three federal constitutional criteria would have to be applicable; patent offensiveness and prurient appeal could not together outweigh social value. Where a book was commercially exploited for the sake of its prurient appeal, to the exclusion of all other values, the Court, said Brennan, might reach a different conclusion.

Such a case was *Ginzburg v. United States*, 383 U.S. 463 (1966), decided with "Fanny Hill." The Court in *Ginzburg* upheld a five-year sentence and a $28,000 fine against Ralph Ginzburg, publisher of *Eros*, a glossy, well-designed magazine (now a collector's item) devoted to relatively sophisticated sexual themes. Ginzburg and his attorneys had not paid heed to Chief Justice Warren's admonition in *Roth* that it is the *conduct* of the purveyor that ought to be punished. Ginzburg's publications were not obscene by the Court's own standards, but a majority of the justices thought that he promoted them as if they were; he defined their "social value." If books cannot be punished, said the Court, booksellers can, especially if they display what Brennan referred to as the "leer of the sensualist."

Ginzburg had had the temerity to attempt to link his potential readers by means of a biweekly newsletter called *Liaison* and initially to get their attention with a sexual autobiography entitled *The Housewife's Handbook on Selective Promiscuity*. To further stimulate his customers, Ginzburg sought mailing privileges for *Eros* from the postmasters of Intercourse and Blue Ball, Pennsylvania. The post offices were too small for Ginzburg's business, so he settled for the postmark, Middlesex, N.J.

Brennan was affronted by Ginzburg's sales pitch and in a perplexing sentence wrote that "the fact that each of these publications was created or exploited entirely on the basis of its appeal to prurient interests strengthens the conclusion that the transactions here were sales of illicit merchandise, not sales of constitutionally protected matter."

"Prurient interest" obviously was to remain a central element in judging obscenity. More important, the act of pandering somehow superseded any consideration of the intrinsic merits of the publication. "[I]f the First Amendment means anything," said Justice Stewart in dissent, "it means that a man cannot be sent to prison merely for distributing publications which offend a judge's esthetic sensibilities, mine or any other's."

246. Rolph (ed.), *The Trial of Lady Chatterley: Regina v. Penguin Books Limited* (1961). See also, Note, *The Use of Expert Testimony in Obscenity Litigation*, 1965 Wis.L.Rev. 113.

247. Rembar, 440.

There is a Catch-22 quality about *Ginzburg*. His publications were themselves protected by the First Amendment for, whatever they were, they were not "patently offensive," that is, hard core pornography. Ginzburg's crime was the way he advertised them. "Commercial exploitation" and "titillation," longtime givens in American selling, had suddenly become crimes, and crimes for which Ginzburg had not been originally charged.

The Court's affirmation of Ginzburg's five-year sentence (later reduced to three) sent shock waves through the publishing world.[248] Brennan's new test did not seem to meet minimal standards of due process. Justice Harlan called it "an astonishing piece of judicial improvisation." Rembar compared it with the ancient legal notion of *estoppel*, the idea that you ought to be held to what you say. If a publisher implies that his books are obscene, the Supreme Court will take him at his word. If he guarantees that his material will catalyze certain glandular juices, then that is in fact what they do.

Ironically the eroticism of the mid-sixties is not the eroticism of the nineties. In retrospect Ginzburg's incarceration seems unjust and ludicrous.

After ten years of appeals and legal maneuvering Ginzburg was committed to a federal prison where he served eight months of his three-year sentence. Through it all, fellow publishers remained frighteningly silent. After his release in October 1972, Ginzburg vowed to gain vindication in the Supreme Court, a Court which he then held in contempt.[249]

Between *Roth* and *Ginzburg* the Court was inclined not to uphold convictions for obscenity. *Ginzburg* opened the gates to a torrent of confusion. Some interpreted the ruling as a "frantic effort to adjust the scales in favor of the censors after a decade of tipping them in favor of free expression."[250] Was the public to be denied its own assessment of artistic value because a publisher's promotional material was vulgar? How would pandering (obscenity *per quod*) affect the intrinsic merits of a book, a magazine, or a photograph?

"Prurient interest" was equally confounding. Do or do not sexually mature persons have prurient interests? The Kinsey Institute had concluded that "the impulse to seek pleasurable sexual visual stimuli is statistically, biologically, and psychologically normal."[251] Censors, as usual, were reserving prurient experiences for themselves—"privileged prurience," Eliot Fremont-Smith called it—or "like their Puritan ancestors they were objecting to bear-baiting not because it gave pain to the bear but because it gave pleasure to the spectators."[252]

And there was no uniform response to the "patent offensiveness" of hard core pornography. Half of the authors, critics, and university dons who engaged in debate in *The Times* literary supplement over the literary merits of Williams Burrough's *Naked Lunch* thought it a masterpiece; the other half considered it arcane trash!

Only the "social value" test seemed useful. If they felt strongly enough about a work, reputable "experts" would testify, and courts could be influenced.

"As to whether the book has any redeeming social value," said a Massachusetts court in one of a number of *Naked Lunch* cases, "* * * it appears that a substantial and intelligent group in the community believes the book to be of some literary significance. Although we are not bound by the opinion of others concerning the book, we cannot ignore the serious acceptance of it by so many persons in the literary community."[253]

The Court's brief *per curiam* opinion in *Redrup v. New York*, 386 U.S. 767 (1967), reversing a conviction for selling obscene books and magazines unobtrusively to willing adults, provided a helpful map of the twisting path trod by the Warren Court. *Roth* and its aftermath had generated a Babel of opinions. The *Redrup* map contained the following landmarks.

The *Roth-Memoirs* test, based on the influential 1957 case and the *Fanny Hill* case of 1966, provided a coalescent, three-element definition of obscenity. Absent any one, and there would be no finding of punishable obscenity:

a. The dominant theme of the material taken as a whole must appeal to a prurient interest in sex;
b. The material must be patently offensive because it affronts contemporary community standards re-

248. Epstein, *The Obscenity Business*, Atlantic, August 1966.
249. Ginzburg, *Castrated: My Eight Months in Prison*, The New York Times Magazine, December 3, 1972.
250. Note, *The Substantive Law of Obscenity: An Adventure in Quicksand*, 13 N.Y.L.F. 124 (1967).
251. Kinsey Institute for Sex Research, *Sex Offenders*, 403, 671, 678 (1965).
252. Freund, 42 F.R.D. 499 (1967).
253. *Attorney-General v. A Book Named "Naked Lunch,"* 218 N.E.2d 571, 572 (Mass. 1966).

lating to the description or representation of sexual matters, and the community standards were to be national rather than local;
c. The material must be utterly without redeeming social value.

The primary test could be overridden if:

a. there were appeals made to children or juveniles [*Ginsberg v. State of New York*, 390 U.S. 629 (1968)];
b. there was pandering or a commercial exploitation of the natural interest in sex *(Ginzburg)*; or
c. there was an assault upon personal privacy through the mail or by other public means. *(Rowan)*

Redrup led to scores of *per curiam* reversals of obscenity convictions, and for a while tidied up some of the mess left by earlier cases.

In 1969 the Court decided *Stanley v. Georgia*, 394 U.S. 557 (1969), a case of freedom "for" rather than freedom "from" obscenity. Federal and state agents had entered Stanley's home with search warrants to look for evidence of bookmaking activity. They found none. But they did find three reels of 8 mm. film in a bedroom dresser drawer, and with Stanley's screen and projector they amused themselves for a few hours. Stanley was then arrested, charged with the possession of obscene matter, and convicted.

A unanimous Supreme Court reversed. "If the First Amendment means anything," said Justice Marshall for the Court, "it means that a [s]tate has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Marshall did not explain, though, how one might legally procure obscene films.

In 1971 the Court backed off from *Stanley*, or at least distinguished it, in two cases. In *United States v. Reidel*, 402 U.S. 351 (1971), the Court through Justice White upheld the constitutionality of a federal obscenity statute prohibiting the commercial mailing of obscene material even to willing adults. *Stanley* differed from other obscenity cases because it involved constitutionally protected privacy—the privacy of the home. No such zone of privacy was involved in *Reidel*. There was no First Amendment right to receive obscene publications as *Stanley* might have implied.

Stanley and *Reidel*, when seen together, produced an odd result. Material once obtained and brought into the home was safe from obscenity prosecution, but the retailer who sold it to the householder would be fair game.

In *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971), the question was whether *Stanley* permitted the government to seize allegedly obscene materials intended for purely private use from the luggage of a returning tourist. After construing the relevant federal law so as to read into it time limits for its application consistent with the Court's fourteen-day requirement in *Freedman v. Maryland*, the majority concluded that *Stanley* did not prevent Congress from removing obscene materials from the channels of incoming foreign commerce. A port of entry, said Justice White, is not a traveler's home.

Capturing the essential absurdity of the situation, Justice Douglas dissented in both cases:

> It would seem to me that if a citizen had a right to possess "obscene" material in the privacy of his home he should have the right to receive it voluntarily through the mail. Certainly when a man legally purchases such material abroad he should be able to bring it with him through customs to read later in his home. * * *

This construction of *Stanley*, said Douglas, could only apply to a man who writes salacious books in his attic, prints them in his basement, and reads them in his living room.

One reason for the fragility of the Warren Court's obscenity doctrine, as enunciated by Justice Brennan, was Justice Harlan's notion in *Roth* that state autonomy in dealing with the question need not necessarily be bound by the federal rule.

The Warren Court edifice, built on the foundation stone of *Roth*, was beginning to crumble.

An Injection of Sanity: The Lockhart Report

For its time, the single most comprehensive and systematic study of obscenity and its effects was the *1970 Report of the Presidential Commission on Obscenity and Pornography* (New York: Bantam Books), chaired by William B. Lockhart, former dean of the University of Minnesota Law School.

Considering the value of this document, which deserves to be read in its entirety, it is disappointing that it was rejected by a president and a Congress—in the Senate by resolution—and given only scant attention by the U.S. Supreme Court.

Facts developed by the commission did not support widely held assumptions. Although cautious about its conclusions, the commission could find little evidence that obscene books or motion pictures incite youth or adults to criminal conduct, sexual deviance, or emotional disturbances. And it hoped that its own modest pioneering work in empirical research would help to open the way for more extensive and long-term research.

In the context of constitutional law the commission rejected the three elements of the *Roth-Memoirs* definition—prurient interest, patent offensiveness, and redeeming social value—as vague and highly subjective esthetic, psychological, and moral judgments providing no meaningful guidance for law enforcement officials, juries, or courts. In its inconsistent application the test would interfere with constitutionally protected expression. In addition, public opinion would not, in the final analysis, support legal prohibition of adult use of obscene materials.

"Americans," the commission added, "deeply value the right of each individual to determine for himself what books he wishes to read and what pictures or films he wishes to see. Our traditions of free speech and press also value and protect the right of writers, publishers, and booksellers to serve the diverse interests of the public. The spirit and letter of our Constitution tell us that government should not seek to interfere with these rights unless a clear threat of harm makes that course imperative. Moreover, the possibility of the misuse of general obscenity statutes prohibiting distributions of books and films to adults constitutes a continuing threat to the free communication of ideas among Americans—one of the most important foundations of our liberties."

The commission recommended the repeal of all existing federal, state, and local legislation prohibiting or interfering with consensual distribution of obscene materials to adults.

The commission did not reject the secondary tests that had attached themselves to *Roth-Memoirs*—appeals to the young, pandering, and assaults on personal privacy. Statutes protecting children were supported by the commission on the grounds that insufficient research had been done on the effects of exposure of children to sexually explicit stimuli. Also there were strong ethical feelings against experimenting with children in this realm. The commission respected the stated opinions of parents on the issue of obscenity.

Statutory proposals from the commission covered only pictorial material since it could think of no constitutionally safe way to control the distribution of books and other textual materials. Broadcast material would also be exempted because of adequate self-regulation and supervision by the Federal Communications Commission.

Additional support for the secondary tests was found in the commission's endorsement of state and local laws prohibiting public displays of sexually explicit materials and federal laws dealing with the mailing of unsolicited advertising of a sexually explicit nature. The commission was sensitive to unwanted intrusions upon individual privacy, but here again it would exempt written materials and broadcast programming.

Perhaps the most controversial of all its proposals was that of a massive sex education program beginning in the schools.

Ironically, as it was to turn out, the commission advised against the elimination by Congress of federal judicial jurisdiction in the obscenity areas as a response to vocal citizen criticism of the results of that jurisdiction. "Freedom in many vital areas," said the commission, "frequently depends upon the ability of the judiciary to follow the Constitution rather than strong popular sentiment."

Burger Court Revisionism: The *Roth-Miller* Standard

The Warren Court obscenity edifice came crashing down on June 21, 1973 when the Court's Nixon appointees joined by Justice Byron White constituted a five-man majority in five cases in which Chief Justice Burger delivered the opinion of the Court.

The cases were *Miller v. State of California*, 1 Med.L.Rptr. 1441, 413 U.S. 15 (1973) (mass mailing campaign to advertise illustrated "adult" books); *Paris Adult Theatre I et al. v. Slaton*, 1 Med.L.Rptr. 1454, 413 U.S. 49 (1973) (commercial showing of two "adult" films); *United States v. Orito*, 413 U.S. 139 (1973) (interstate transportation of lewd, lascivious, and filthy materials); *Kaplan v. State of California*, 413 U.S. 115 (1973) (proprietor of "adult" bookstore selling unillustrated book containing repetitively descriptive material of an explicitly sexual nature); and *United States v. 12 200-Ft. Reels of Super 8mm. Film et al.*, 413 U.S. 123 (1973) (im-

portation of obscene matter for personal use and possession).

Essentially the cases reject the "utterly without redeeming social value" element of the *Roth-Memoirs* test, substituting the words "does not have serious literary, artistic, political or scientific value." Secondly, the contemporary community standards against which the jury is to measure prurient appeal and patent offensiveness are to be the standards of the *state or local community*. The trend toward permissiveness had been reversed by the first majority agreement on an obscenity definition since *Roth* in 1957. Justices Brennan, Douglas, Marshall, and Stewart dissented in all five cases.

The most important of the opinions are Chief Justice Burger's opinion for the Court in *Miller*, outlining the new standards, and Justice Brennan's review of sixteen years of judicial tribulation in his *Paris Adult Theatre* dissent.

MILLER v. STATE OF CALIFORNIA

413 U.S. 15, 93 S.CT. 2607, 37 L.ED.2D 419 (1973).

Chief Justice BURGER delivered the opinion of the Court.

* * *

This case involves the application of a state's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This court has recognized that the states have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment.

* * *

While *Roth* presumed "obscenity" to be "utterly without redeeming social value," *Memoirs* required that to prove obscenity it must be affirmatively established that the material is "*utterly* without redeeming social value." Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, i.e., that the material was "*utterly* without redeeming social value"—a burden virtually impossible to discharge under our criminal standards of proof. Such considerations caused Justice Harlan to wonder if the "*utterly* without redeeming social value" test had any meaning at all.

* * *

Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. We have seen "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." This is not remarkable, for in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities.

The case we now review was tried on the theory that California Penal Code § 311 approximately incorporates the three-state *Memoirs* test, *supra*. But now *the Memoirs test has been abandoned as unworkable by its author*[4] *and no member of the Court today supports the Memoirs formulation.* [Emphasis added.]

This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. The First and Fourteenth Amendment have never been treated as absolutes. We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. * * *

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

4. See the dissenting opinion of Justice Brennan in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

artistic, political, or scientific value. [Emphasis added.] We do not adopt as a constitutional standard the "*utterly* without redeeming social value" test of *Memoirs v. Massachusetts*; that concept has never commanded the adherence of more than three Justices at one time. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under the second part (b) of the standard announced in this opinion, supra:

a. Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
b. Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence and other protective features provide, as we do with rape, murder and a host of other offenses against society and its individual members.

* * *

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.

* * *

It is certainly true that the absence, since *Roth*, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts. *But today, for the first time since Roth was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment.* Now we may abandon the casual practice of *Redrup v. New York*, and attempt to provide positive guidance to the federal and state courts alike. [Emphasis added.]

This may not be an easy road, free from difficulty. But no amount of "fatigue" should lead us to adopt a convenient "institutional" rationale—an absolutist, "anything goes" view of the First Amendment—because it will lighten our burdens. * * * Nor should we remedy "tension between state and federal courts" by arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day. * * *

Under a national Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate fact-finders in criminal prosecutions, has historically permitted triers-of-fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a *national* "community standard" would be an exercise in futility.

* * *

We conclude that neither the State's alleged failure to offer evidence of "national standards," nor the trial court's charge that the jury consider state community standards, were constitutional errors.* Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene as a matter of fact. * * *

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. * * * We hold the requirements that the jury evaluate the materials with reference to "contemporary standards of the State of California" serves this protective purpose and is constitutionally adequate.

* * *

In sum we (a) reaffirm the *Roth* holding that obscene material is not protected by the First Amendment, (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated above, without a showing that the material is "*utterly* without redeeming social value," and (c) hold that obscenity is to be determined by applying "contemporary community standards," * * * not "national standards."

Vacated and remanded for further proceedings.

PARIS ADULT THEATRE I v. SLATON

413 U.S. 49, 93 S.CT. 2628, 37 L.ED.2D 446 (1973).

[EDITORIAL NOTE Chief Justice Burger in a second opinion for the Court upheld the judgment of the Georgia Supreme Court that two "adult" movies were constitutionally unprotected. He noted that although there had been a full adversary proceeding on the question, there was no error in failing to require "expert" affirmative evidence that the materials were obscene. "The films, obviously," said Burger, "are the best evidence of what they represent." He rejected the consenting adults standard on the grounds that the state had a legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation.

Citing the Hill-Link Minority Report of the Commission on Obscenity and Pornography, which found an arguable correlation between obscene material and crime, the Chief Justice nevertheless depreciated the importance of the Court's resolving empirical uncertainties in legislation unless constitutional rights were being infringed. Legislators and judges, he said, could and must act on unprovable assumptions such as the notion that the crass commercial exploitation of sex debases sex in the development of human personality, family life, and community welfare.

Noting that "free will" is not to be a governing concept in human affairs—we don't leave garbage and sewage disposal up to the individual—Burger, with assistance from social commentator Irving Kristol, found an inconsistency in the liberal stance:

> *States are told by some that they must await a "laissez faire" market solution to the obscenity-pornography problem, paradoxically "by people who have never otherwise had a kind word to say for laissez faire," particularly in solving urban, commercial and environmental pollution problems.*

Privacy, he added, while encompassing the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing does not include the right to watch obscene movies in places of public accommodation. The Chief Justice concluded:

> *The idea of a "privacy" right and a place of public accommodation are, in this context, mutually exclusive. Conduct or depictions of conduct that the state police power can prohibit on a public street does not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theatre stage, any more than a "live" performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue. * * * [W]e reject the claim that the State of Georgia is here attempting to control the minds or thoughts of those who patronize theatres. Preventing unlimited display or distribution of obscene material, which by definition lacks any serious literary, artistic, political or scientific value as communication, is distinct from a control of reason and the intellect. Where communication of ideas, protected by the First Amendment, is not involved, nor the particular privacy of the home protected by*

* Chief Justice Burger indicates in a footnote that community standards in the *Miller* case were ascertained by a police officer with many years of specialization in obscenity offenses. He had conducted an extensive statewide survey—the Chief Justice says nothing more specific about the survey—and had given expert evidence on twenty-six occasions in the year prior to the Miller trial.

Stanley, *nor any of the other "areas or zones" of constitutionally protected privacy, the mere fact that, as a consequence, some human "utterances" or "thoughts" may be incidentally affected does not bar the state from acting to protect legitimate state interests.*

Justice Brennan, since Roth *the Court's leading spokesman on obscenity law, was joined in his dissent by Justices Stewart and Marshall. His opinion provides an excellent review of the Court's work in this troubling area from 1957 to 1973, an area which, he says, has demanded a substantial commitment of the Court's time, has generated much disharmony of views, and has remained resistant to the formulation of stable and manageable standards. The dissent should be read in its entirety. A segment follows.]*

Justice BRENNAN, dissenting:

* * *

I am convinced that the approach initiated 15 years ago in *Roth v. United States*, 354 U.S. 476 (1957), and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach.

* * *

The decision of the Georgia Supreme Court rested squarely on its conclusion that the State could constitutionally suppress these films even if they were displayed only to persons over the age of 21 who were aware of the nature of their contents and who had consented to viewing them. For the reasons set forth in this opinion, I am convinced of the invalidity of that conclusion of law, and I would therefore vacate the judgment of the Georgia Supreme Court. I have no occasion to consider the extent of state power to regulate the distribution of sexually oriented materials to juveniles or to unconsenting adults. Nor am I required, for the purposes of this appeal, to consider whether or not these petitioners had, in fact, taken precautions to avoid exposure of films to minors or unconsenting adults. * * * The essence of our problem in the obscenity area is that we have been unable to provide "sensitive tools" to separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into the suppression of the latter.

* * *

To be sure, five members of the Court did agree in *Roth* that obscenity could be determined by asking "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." But agreement on that test—achieved in the abstract and without reference to the particular material before the Court,—was, to say the least, short lived. By 1967 the following views had emerged: Justice Black and Justice Douglas consistently maintained that government is wholly powerless to regulate any sexually oriented matter on the ground of its obscenity. Justice Harlan, on the other hand, believed that the Federal Government in the exercise of its enumerated powers could control the distribution of "hard-core" pornography, while the States were afforded more latitude to "[ban] any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material." Justice Stewart regarded "hard-core" pornography as the limit of both federal and state power.

The view that, until today, enjoyed the most, but not majority, support was an interpretation of *Roth* (and not, as the Court suggests, a veering "sharply away from the *Roth* concept and the articulation of "a new test of obscenity," adopted by Chief Justice Warren, Justice Fortas, and the author of this opinion in *Memoirs v. Massachusetts*, 383 U.S. 413 [1966]). We expressed the view that Federal or State Governments could control the distribution of material where "three elements * * * coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." Even this formulation, however, concealed differences of opinion. * * * Nor, finally, did it ever command a majority of the Court.

In the face of this divergence of opinion the Court began the practice in 1967 in *Redrup v. New York*, 386 U.S. 767, of *per curiam* reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene. This approach capped the attempt in *Roth* to separate all forms of sexually oriented expression into two categories—the one

subject to full governmental suppression and the other beyond the reach of governmental regulation to the same extent as any other protected form of speech or press. Today a majority of the Court offers a slightly altered formulation of the basic *Roth* test, while leaving entirely unchanged the underlying approach.

Our experience with the *Roth* approach has certainly taught us that the outright suppression of obscenity cannot be reconciled with the fundamental principles of the First and Fourteenth Amendments. For we have failed to formulate a standard that sharply distinguishes protected from unprotected speech, and out of necessity, we have resorted to the *Redrup* approach, which resolves cases as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decision. *It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion.* [Emphasis added.]

Of course, the vagueness problem would be largely of our own creation if it stemmed primarily from our failure to reach a consensus on any one standard. But after 15 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncracies of the person defining them. * * *

As a result of our failure to define standards with predictable application to any given piece of material, there is no probability of regularity in obscenity decisions by state and lower federal courts. That is not to say that these courts have performed badly in this area or paid insufficient attention to the principles we have established. The problem is, rather, that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so. The number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court.

But the sheer number of the cases does not define the full extent of the institutional problem. For quite apart from the number of cases involved and the need to make a fresh constitutional determination in each case, we are tied to the "absurd business of perusing and viewing the miserable stuff that pours into the Court. * * *" While the material may have varying degrees of social importance, it is hardly a source of edification to the members of this Court who are compelled to view it before passing on its obscenity.

Moreover, we have managed the burden of deciding scores of obscenity cases by relying on *per curiam* reversals or denials of certiorari—a practice which conceals the rationale of decision and gives at least the appearance of arbitrary action by this Court. More important, no less than the procedural schemes struck down in such cases as *Blount v. Rizzi*, 400 U.S. 410 (1971), and *Freedman v. Maryland*, 380 U.S. 51 (1965), the practice effectively censors protected expression by leaving lower court determinations of obscenity intact even though the status of the allegedly obscene material is entirely unsettled until final review here. In addition, the uncertainty of the standards creates a continuing source of tension between state and federal courts, since the need for an independent determination by this Court seems to render superfluous even the most conscientious analysis by state tribunals. And our inability to justify our decisions with a persuasive rationale—or indeed, any rationale at all—necessarily creates the impression that we are merely second-guessing state court judges.

The severe problems arising from the lack of fair notice, from the chill on protected expression, and from the stress imposed on the state and federal judicial machinery persuade me that a significant change in direction is urgently required. I turn, therefore, to the alternatives that are now open.

1. The approach requiring the smallest deviation from our present course would be to draw a new line between protected and unprotected speech, still permitting the States to suppress all material on the unprotected side of the line. In my view, clarity cannot be obtained pursuant to this approach except by drawing a line that resolves all doubts in favor of

state power and against the guarantees of the First Amendment. We could hold, for example, that any depiction or description of human sexual organs, irrespective of the manner or purpose of the portrayal, is outside the protection of the First Amendment and therefore open to suppression by the States. That formula would, no doubt, offer much fairer notice of the reach of any state statute drawn at the boundary of the State's constitutional power. And it would also, in all likelihood, give rise to a substantial probability of regularity in most judicial determinations under the standard. But such a standard would be appallingly overbroad, permitting the suppression of a vast range of literary, scientific, and artistic masterpieces. Neither the First Amendment nor any free community could possibly tolerate such a standard. Yet short of that extreme it is hard to see how any choice of words could reduce the vagueness problem to tolerable proportions, so long as we remain committed to the view that some class of materials is subject to outright suppression by the State.

2. The alternative adopted by the Court today recognizes that a prohibition against any depiction or description of human sexual organs could not be reconciled with the guarantees of the First Amendment. But the Court does retain the view that certain sexually oriented material can be considered obscene and therefore unprotected by the First and Fourteenth Amendments. To describe that unprotected class of expression, the Court adopts a restatement of the *Roth-Memoirs* definition of obscenity: "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, * * * (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *California v. Miller*, ante. In an apparent illustration of "sexual conduct," as that term is used in the test's second element the Court identifies "(a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "(b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of genitals."

The differences between this formulation and the three-pronged *Memoirs* test are, for the most part, academic. The first element of the Court's test is virtually identical to the *Memoirs* requirement that "the dominant theme of the material taken as a whole [must appeal] to a prurient interest in sex." Whereas the second prong of the *Memoirs* test demanded that the material be "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters," the test adopted today requires that the material describe, "in a patently offensive way, sexual conduct specifically defined by the applicable state law." The third component of the *Memoirs* test is that the material must be "utterly without redeeming social value." The Court's rephrasing requires that the work, taken as a whole, must be proved to lack "serious literary, artistic, political, or scientific value."

The Court evidently recognizes that difficulties with the *Roth* approach necessitate a significant change of direction. But the Court does not describe its understanding of those difficulties, nor does it indicate how the restatement of the *Memoirs* test is in any way responsive to the problems that have arisen. In my view, the restatement leaves unresolved the very difficulties that compel our rejection of the underlying *Roth* approach, while at the same time contributing substantial difficulties of its own. The modification of the *Memoirs* test may prove sufficient to jeopardize the analytic underpinnings of the entire scheme. And today's restatement will likely have the effect, whether or not intended, of permitting far more sweeping suppression of sexually oriented expression, including expression that would almost surely be held protected under our current formulation.

Although the Court's restatement substantially tracks the three-part test announced in *Memoirs v. Massachusetts*, it does purport to modify the "social value" component of the test. Instead of requiring, as did *Roth* and *Memoirs*, that state suppression be limited to materials utterly lacking in social value, the Court today permits suppression if the government can prove that the materials lack *"serious* literary, artistic, political, or scientific value." But the definition of "obscenity" as expression utterly lacking in social importance is the key to the conceptual basis of *Roth* and our subsequent opinions. In *Roth* we held that certain expression is obscene, and thus outside the protection of the First Amendment, precisely *because* it lacks even the slightest redeeming social value. The Court's approach necessarily as-

sumes that some works will be deemed obscene—even though they clearly have some social value—because the State was able to prove that the value, measured by some unspecified standard, was not sufficiently "serious" to warrant constitutional protection. That result is not merely inconsistent with our holding in *Roth*; it is nothing less than a rejection of the fundamental First Amendment premises and rationale of the *Roth* opinion and an invitation to widespread suppression of sexually oriented speech. Before today, the protections of the First Amendment have never been thought limited to expressions of *serious* literary or political value.

Although the Court concedes that "*Roth* presumed 'obscenity' to be 'utterly without redeeming social value,' " it argues that *Memoirs* produced "a drastically altered test that called on the prosecution to prove a negative, i.e., that the material was 'utterly without redeeming social value'—a burden virtually impossible to discharge under our criminal standards of proof." One should hardly need to point out that under the third component of the Court's test the prosecution is still required to "prove a negative"—i.e., that the material lacks serious literary, artistic, political, or scientific value. Whether it will be easier to prove that material lacks "serious" value than to prove that it lacks any value at all remains, of course, to be seen.

In any case, even if the Court's approach left undamaged the conceptual framework of *Roth*, and even if it clearly barred the suppression of works with at least some social value, I would nevertheless be compelled to reject it. For it is beyond dispute that the approach can have no ameliorative impact on the cluster of problems that grows out of the vagueness of our current standards. Indeed, even the Court makes no argument that the reformulation will provide fairer notice to booksellers, theatre owners, and the reading and viewing public. Nor does the Court contend that the approach will provide clearer guidance to law enforcement officials or reduce the chill on protected expression. Nor, finally, does the Court suggest that the approach will mitigate to the slightest degree the institutional problems that have plagued this Court and the State and Federal Judiciary as a direct result of the uncertainty inherent in any definition of obscenity.

* * * The Court surely demonstrates little sensitivity to our own institutional problems, much less the other vagueness-related difficulties, in establishing a system that requires us to consider whether a description of human genitals is sufficiently "lewd" to deprive it of constitutional protection; whether a sexual act is "ultimate"; whether the conduct depicted in materials before us fits within one of the categories of conduct whose depiction the state or federal governments have attempted to suppress; and a host of equally pointless inquiries. In addition, adoption of such a test does not, presumably, obviate the need for consideration of the nuances of presentation of sexually oriented material, yet it hardly clarifies the application of those opaque but important factors.

If the application of the "physical conduct" test to pictorial material is fraught with difficulty, its application to textual material carries the potential for extraordinary abuse. Surely we have passed the point where the mere written description of sexual conduct is deprived of First Amendment protection. Yet the test offers no guidance to us, or anyone else, in determining which written descriptions of sexual conduct are protected, and which are not.

Ultimately, the reformulation must fail because it still leaves in this Court the responsibility of determining in each case whether the materials are protected by the First Amendment. * * *

3. I have also considered the possibility of reducing our own role, and the role of appellate courts generally, in determining whether particular matter is obscene. Thus, we might conclude that juries are best suited to determine obscenity *vel non* and that jury verdicts in this area should not be set aside except in cases of extreme departure from prevailing standards. Or, more generally, we might adopt the position that where a lower federal or state court has conscientiously applied the constitutional standard, its finding of obscenity will be no more vulnerable to reversal by this Court than any finding of fact. Cf. *Interstate Circuit v. Dallas*, 390 U.S. 676, 706–707 (1968) [separate opinion of Harlan, J.]. While the point was not clearly resolved prior to our decision in *Redrup v. New York*, it is implicit in that decision that the First Amendment requires an independent review by appellate courts of the constitutional fact of obscenity. That result is required by principles applicable to the obscenity issue no less than to any other area involving free expression, or other constitutional right. In any event, even if the Constitution would permit us to refrain from judging for ourselves the alleged obscenity of particular materials, that approach would solve at best only a small part of our problem. For while it would mitigate the institutional stress produced by the *Roth* approach, it would neither offer nor produce any cure for the

other vices of vagueness. Far from providing a clearer guide to permissible primary conduct, the approach would inevitably lead to even greater uncertainty and the consequent due process problems of fair notice. And the approach would expose much protected sexually oriented expression to the vagaries of jury determinations. *Plainly, the institutional gain would be more than offset by the unprecedented infringement of First Amendment rights.* [Emphasis added.]

4. Finally, I have considered the view, urged so forcefully since 1957 by our Brothers Black and Douglas, that the First Amendment bars the suppression of any sexually oriented expression. That position would effect a sharp reduction, although perhaps not a total elimination, of the uncertainty that surrounds our current approach. Nevertheless, I am convinced that it would achieve that desirable goal only by stripping the States of power to an extent that cannot be justified by the commands of the Constitution, at least so long as there is available an alternative approach that strikes a better balance between the guarantee of free expression and the States' legitimate interests.

Our experience since *Roth* requires us not only to abandon the effort to pick out obscene materials on a case-by-case basis, but also to reconsider a fundamental postulate of *Roth:* that there exists a definable class of sexually oriented expression that may be totally suppressed by the Federal and State Governments. Assuming that such a class of expression does in fact exist, I am forced to conclude that the concept of "obscenity" cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a by-product of the attempt to suppress unprotected speech, and to avoid very costly institutional harms. Given these inevitable side-effects of state efforts to suppress what is assumed to be *unprotected* speech, we must scrutinize with care the state interest that is asserted to justify the suppression. For in the absence of some very substantial interest in suppressing such speech, we can hardly condone the ill-effects that seem to flow inevitably from the effort.

* * *

In short, while I cannot say that the interests of the State—apart from the question of juveniles and unconsenting adults—are trivial or nonexistent, I am compelled to conclude that these interests cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results from state efforts to bar the distribution even of unprotected material to consenting adults. *I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the state and federal governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly "obscene" contents. Nothing in this approach precludes those governments from taking action to serve what may be strong and legitimate interests through regulation of the manner of distribution of sexually oriented material.* [Emphasis added.]

COMMENT

If Justice Brennan could have commanded a majority of the Court for a case or two, more essential elements of the Lockhart Commission proposals might have begun to shape the law, and society would have been spared the madness of most obscenity prosecutions. Brennan's desire to protect the privacy of unconsenting adults and to limit the dissemination of erotic material to children has long been subscribed to by liberal commentators.[254]

Miller Applied

The abiding importance of *Freedman v. Maryland* and its standard of procedural due process was underlined by the Supreme Court when in 1979 it unanimously invalidated seizure of 800 magazines, films, and other material from a bookstore under an open-ended search warrant that grew from two to sixteen pages as the six-hour search proceeded. Presence of a town justice making snap judgments as to what was obscene was no substitute, said the Court, for a "neutral" and "detached" judicial officer. Reminiscent of the pre-Revolution general warrant, the whole procedure was said to violate the First, Fourth, and Fourteenth Amendments.[255]

254. Emerson, *The System of Freedom of Expression*, 497 (1970) and Kuh, *Foolish Figleaves?* (1967).
255. *Lo-Ji Sales v. New York*, 442 U.S. 319 (1979).

Although *Miller* has come to be applied more cautiously and narrowly by lower courts, it has by no means solved the puzzle of pornography. The first misapplication of its standard came to the Supreme Court from Georgia in 1974 and focused on a critically acclaimed movie titled *Carnal Knowledge*. In *Jenkins v. Georgia*, 418 U.S. 153 (1974) the Court was plunged into the consequences of its own mischief. The Court in *Miller* had hoped to avoid making an independent assessment of whether or not particular material was obscene, hoping to leave that issue to "triers of facts"—usually juries. It sought a way out of the quagmire. But *Jenkins* showed that no such path was marked by *Miller*. Technically, the Court reversed the state supreme court in *Jenkins* because that court had misinterpreted *Miller*. It had thought that a jury verdict reached pursuant to *Miller*-based instructions precluded further judicial review. But juries, said the Court, did not have "unbridled discretion" to determine "what is 'patently offensive'." Moreover, *Carnal Knowledge* was not "hard core," said Justice Rehnquist, because the camera did not focus on the bodies of the actors during scenes of "ultimate sexual acts" nor were the actors' genitals exhibited during those scenes. *Miller* had held that the jury could use a "local" community standard in order to give meaning to pruriency and patent offensiveness. *Jenkins* demonstrated that these elements of the test could remain debatable even where the jury's verdict had seemed to settle the legal question.

Jenkins was a state prosecution under *Miller*. What about a federal prosecution? How would the *Miller* criteria apply? In *Hamling v. United States*, 1 Med.L.Rptr. 1479, 418 U.S. 87 (1974), the Court upheld the federal conviction of the mailer of an obscene brochure advertising what was purported to be an illustrated edition of the Lockhart Commission Report.

"A juror," said Justice Rehnquist, again speaking for the Court, "is entitled to draw on his own knowledge of the views of the average person [not the most prudish or the most tolerant] in the community or vicinage from which he comes in making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law. * * * Our holding in *Miller* that California could constitutionally proscribe obscenity in terms of a 'statewide' standard did not mean that any such precise geographical area is required as a matter of constitutional law."

Expert testimony, the Court added, is irrelevant in defining obscenity or community standards, and there is no need for federal statutes to look to national standards of decency, even though the trial judge in *Hamling* had instructed the jury largely in terms of national standards.

An important aspect of *Hamling*, then, is that the Court made it clear that the federal jury's having been instructed to apply a national community standard did not in itself constitute reversible error. But the boundaries of "community" remain fuzzy and flexible.

"National distributors choosing to send their products in interstate travels will be forced," said Justice Brennan in dissent, "to cope with the community standards of every hamlet into which their goods may wander."

Brennan had observed in *Jenkins* that as long as *Miller* remained in effect "one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so." The Court, it seemed, would again have to deal with obscenity on a case-by-case basis.

In *Smith v. United States*, 2 Med.L.Rptr. 1833, 431 U.S. 291 (1977), the Court held that in a federal obscenity prosecution a jury is not necessarily bound by the definition of contemporary community standards found in a state statute. Federal jurors could determine the meaning of pruriency and patent offensiveness in light of their own understanding of local community standards. In addition the Court in *Smith* rejected a vagueness challenge to 18 U.S.C.A. § 1461, the Comstock Act.

The best guidance the Court can provide is that jurors consider the entire community and not simply their own subjective reactions or the reactions of a sensitive or a callous minority. Community standards will determine what appeals to prurient interest or is patently offensive, and this, said the Court, would be a question of fact for the jurors.

One of four dissenters, Justice Stevens thought it obvious that a federal statute defining a criminal offense should prescribe a uniform standard applicable throughout the country—especially where the First Amendment was involved. Stevens thought it inevitable that community standards, whether national or local, would be subjective, a matter of values and not of fact.

"In my judgment," wrote Stevens, "the line between communications which 'offend' and those

which do not is too blurred to identify criminal conduct. It is also too blurred to delimit the protections of the First Amendment. * * *

"I am not prepared to rely on either the average citizen's understanding of an amorphous community standard or on my fellow judge's appraisal of what has serious artistic merit as a basis for deciding what one citizen may communicate to another by appropriate means"—and Stevens did think there were inappropriate means: for example, erotic displays in a residential neighborhood.

The Ninth Circuit ruled, reluctantly perhaps, that including children in the definition of community was not reversible error.[256] It was reversed by the Supreme Court in *Pinkus v. United States*, 3 Med.L.Rptr. 2329, 436 U.S. 293 (1978), but it was no error, said the Court, to include "sensitive" persons in the definition and to permit the jury to consider the appeal of material to the prurient interest of "deviant" groups and the degree to which it was pandered.

It would be nearly a decade before the Supreme Court would address these questions again. In *Pope v. Illinois*, 481 U.S. 497 (1987), the Court through Justice White said that a jury should not be instructed to apply community standards in deciding the "serious value" aspects of *Miller*. Only the first and second prongs of the *Miller* test—appeal to prurient interest and patent offensiveness—should be decided with reference to community standards. A work need not obtain majority approval to merit protection, and the value of that work does not vary from community to community, depending upon the degree of local acceptance it has won. The proper inquiry, said White, is not whether an ordinary member of any given community would find serious value in the allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.

How the Court meant to differentiate the "ordinary" from the "reasonable" member of the community is not clear, beyond the suggestion in this and earlier cases that neither the hypersensitive nor the callous is the reasonable person. And, of course, reasonable people may disagree. Jurors still have little guidance as to what is or is not obscene.

Protection of Children

Courts have shown a continuing determination to protect children from viewing many types of sexual materials or from being involved in its manufacture. That determination was underscored in a 1968 U.S. Supreme Court decision upholding the constitutionality of a New York statute prohibiting the sale of "girlie" magazines or anything else alleged to be obscene to anyone under seventeen.

Typical of self-conscious obscenity legislation, the New York law prohibited the sale to a minor of any depiction of nudity that included "the showing of * * * female buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple. * * *"

Speaking for the Court, Justice Brennan, citing a 1944 case that held that children selling religious pamphlets on street corners violated a state child's labor laws,[257] ruled that the power of the state to control the conduct of children reaches beyond the scope of its authority over adults. There was, moreover, a strong presumption that parents supported the law. *Ginsberg v. State of New York*, 1 Med.L.Rptr. 1424, 390 U.S. 629 (1968).

Two aspects of *Ginsberg* should be stressed. First, it illustrated the constitutional validity of the concept of variable obscenity since material that would not have been obscene if sold to an adult was held obscene when sold to a juvenile. Second, the case showed that the First Amendment rights of children are more attenuated than those of adults. The state's claims to regulate in the interests of children in the area of obscenity are accorded particular force in the courts. This view still commanded the support of Justice Brennan, as his broad libertarian dissent in *Paris Adult Theatres* in 1973 (this text, p. 662) and his 1982 concurrence in *New York v. Ferber* reflected.

The latter case presented a constitutional dilemma because of its support for an outright ban on the exhibition of films that visually depict sexual conduct by children under sixteen, regardless of whether such presentations are obscene under the *Miller* guidelines. No distinction was made between conduct and publication.

256. *United States v. Pinkus*, 2 Med.L.Rptr. 2217, 551 F.2d 1155 (9th Cir. 1977).
257. *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944).

A New York statute[258] defines "sexual performance" as any performance that includes sexual conduct by a child and "sexual conduct" as actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.

Ferber was convicted under the statute, and the Appellate Division of the New York Supreme Court affirmed. The New York Court of Appeals reversed, holding that the statute violated the First Amendment by being both underinclusive and overbroad. The U.S. Supreme Court in effect placed "child pornography" in a special category outside the complex and imprecise rules that had already been fashioned for adult obscenity, thus removing child pornography from First Amendment protection altogether—at least where the state statute is sufficiently precise. Through recognition of the concept of child pornography the decision added complexity and confusion to obscenity law. The material might not be obscene, but it could be banned. The confusion over definition persists.

The Court noted that forty-seven states and the federal government had passed laws specifically directed at child pornography, and at least half of those did not require that the material presented be legally obscene.

While admitting its own struggle with "the intractable obscenity problem," notably the vacillation over a definition of obscenity, the Court remained firm in the position that "the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." The essentials of the Court's opinion follow.

NEW YORK v. FERBER

458 U.S. 747, 102 S.CT. 3348, 73 L.ED.2D 1113 (1982).

* * *

Justice WHITE delivered the opinion of the Court.

* * *

First. It is evident beyond the need for elaboration that a state's interest in "safeguarding the physical and psychological well being of a minor" is "compelling." * * * "A democratic society rests, for its continuance, upon the healthy well-rounded growth of young people into full maturity as citizens." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In *Prince v. Massachusetts, supra*, the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity. In *Ginsberg v. New York*, 390 U.S. 629 (1968), we sustained a New York law protecting children from exposure to nonobscene literature. Most recently, we held that the government's interest in the "well-being of its youth" justified special treatment of indecent broadcasting received by adults as well as children. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The legislative findings accompanying passage of the New York laws reflect this concern:

> "There has been a proliferation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based on the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances." Laws of N.Y., 1977, ch. 910, § 1.

We shall not second-guess this legislative judgment. Respondent has not intimated that we do so. Suffice it to say that virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combatting "child pornography." The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. [There follows a substantial list of social science authority for the foregoing statement.] That judgment, we think, easily passes muster under the First Amendment.

258. Penal Law, Article 263, § 263.05ff (1977). A similar statute, but applying to children under eighteen (Code § 18.2–374.1), was upheld by Virginia's Supreme Court in *Freeman v. Virginia*, 8 Med.L.Rptr. 1340, 288 S.E.2d 461 (Va. 1982).

Second. The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. Indeed, there is no serious contention that the legislature was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product. Thirty-five States and Congress have concluded that restraints on the distribution of pornographic materials are required in order to effectively combat the problem, and there is a body of literature and testimony to support these legislative conclusions. * * *

Respondent does not contend that the State is unjustified in pursuing those who distribute child pornography. Rather, he argues that it is enough for the State to prohibit the distribution of materials that are legally obscene under the *Miller* test. While some States may find that this approach properly accommodates its interests, it does not follow that the First Amendment prohibits a State from going further. The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. "It is irrelevant to the child [who has been abused] whether or not the material * * * has a literary, artistic, political, or social value." * * * We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem.

Third. The advertising and selling of child pornography provides an economic motive for and is thus an integral part of the production of such materials, an activity illegal throughout the nation. "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). We note that were the statutes outlawing the employment of children in these films and photographs fully effective, and the constitutionality of these laws have not been questioned, the First Amendment implications would be no greater than that presented by laws against distribution: enforceable production laws would leave no child pornography to be marketed.

Fourth. The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work. As the trial court in this case observed, if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative. Nor is there any question here of censoring a particular literary theme or portrayal of sexual activity. The First Amendment interest is limited to that of rendering the portrayal somewhat more "realistic" by utilizing or photographing children.

Fifth. Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions. "The question whether speech is, or is not protected by the First Amendment often depends on the content of the speech. * * * It is the content of an utterance that determines whether it is a protected epithet or an unprotected 'fighting comment.' " *Young v. American Mini Theatres*, [427 U.S. 50,] at 66. * * * Leaving aside the special

considerations when public officials are the target, *New York Times v. Sullivan*, 376 U.S. 254 (1964), a libelous publication is not protected by the Constitution. * * * Thus, it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. When a definable class of material, such as that covered by § 263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.

* * *

Because § 263.15 is not substantially overbroad, it is unnecessary to consider its application to material that does not depict sexual conduct of a type that New York may restrict consistent with the First Amendment. As applied to Paul Ferber and to others who distribute similar material, the statute does not violate the First Amendment as applied to the States through the Fourteenth. The decision of the New York Court of Appeals is reversed and the case is remanded to that Court for further proceedings not inconsistent with this opinion.

So ordered.

COMMENT

Justice Brennan, in a concurrence joined by Justice Marshall, agreed with the Court that the tiny fraction of material of serious artistic, scientific, or educational value that could conceivably fall within the reach of the New York statute was insufficient to justify striking the law on grounds of overbreadth. But on First Amendment grounds Brennan was not so sure. The constitutional value of depictions of children that are in themselves serious contributions to art, literature, or science could be substantial. And he had to assume harm to children to agree with the Court in the case.

Courts have struggled with the constitutionality of laws restricting the display of nonobscene but sexually explicit materials to minors. Lower courts have generally upheld the constitutionality of ordinances requiring stores to cover portions of some "adult" magazines by "blinder racks" or opaque covers.[259] In 1986, however, the U.S. Court of Appeals for the Fourth Circuit overturned a Virginia statute prohibiting the display of sexually explicit materials "harmful to juveniles * * * in a manner whereby juveniles may examine and peruse" them. The Fourth Circuit feared that the statute would lead vendors to restrict adult access to protected, nonobscene materials and that binder racks, covers, adults-only sales areas, and similar devices were either unconstitutional or ineffective.[260]

Early in 1988 the U.S. Supreme Court sidestepped consideration of constitutional issues raised by the case by certifying two largely factual matters to the Supreme Court of Virginia.[261] That court subsequently ruled that the sixteen books in question were not "harmful to juveniles" and that the booksellers had taken "reasonable efforts to prevent perusal of harmful materials by juveniles."[262] As a result of these determinations, the U.S. Supreme Court in late 1988 vacated the Fourth Circuit's 1986 decision and returned the case to that circuit for further consideration. Since the Supreme Court of Virginia had, in effect, determined that no violation of the Virginia statute had taken place it seems as if the resolution of constitutional issues surrounding display of nonobscene but explicit materials to minors will have to be resolved in some other case.

The Politics of Pornography

Pornography lends itself to politicization. A second Commission on Pornography, the *Meese Report*, published in 1986, extracted what it found useful from both science and religion and prescribed the

259. *M. S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983) and *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985).

260. *American Booksellers Ass'n v. Virginia*, 792 F.2d 1261 (4th Cir. 1986).

261. *Virginia v. American Booksellers Ass'n Inc.*, 484 U.S. 383 (1988).

262. *Commonwealth of Virginia v. American Booksellers Ass'n Inc.*, 372 S.E.2d 618 (Va. 1988).

severest enforcement of old and new obscenity laws.[263] In 1988 the Justice Department, in a project dubbed "PostPorn," began a nationwide crackdown on the mailing of promotional material for obscenity in any form, especially that going to minors. This was followed by federal legislation banning the buying and selling of children for use in child pornography, the possession or sale of child pornography and other obscene materials, and the giving of expanded federal authority to states to regulate indecent broadcast programming and so-called "dial-a-porn" services. See Chapter 9 for the expanded treatment of this complex topic.

Beyond the protection of children, the *Meese Report*, in a diffuse and sometimes cursory analysis of pornography's many dimensions, concluded that society must wage war against the explicit depiction of sex, the purpose of which is to arouse sexual feelings. Toward this end it recommended that state legislatures amend their obscenity statutes to incorporate provisions of the federal Racketeer Influenced and Corrupt Organizations law (RICO), part of the federal Organized Crime Control Act of 1970.[264]

The federal law punishes racketeering acts affecting interstate or foreign commerce when they constitute a pattern of at least two acts within a ten-year period, one of which must have occurred after the effective date of the federal act. Criminal penalties under the act include fines of up to $25,000 or imprisonment of up to twenty years, or both, and forfeiture of any and all assets acquired or maintained through a violation of the law. Civil penalties include divestment, imposition of restrictions, orders of dissolution or reorganization, and treble damages. It is believed that these pocketbook penalties will have a deterrent effect.

By 1989, twenty-seven states and Puerto Rico had passed their own versions of RICO statutes. First use of the federal law by the Department of Justice's National Obscenity Enforcement Unit came in Virginia. In 1987, prosecutors closed down an adult bookstore by seizing the personal and business assets of four persons allegedly engaged in the distribution of obscene films and books. Convicted on three counts of racketeering and seven counts of interstate distribution of $105.30 worth of obscene materials, the defendants faced life imprisonment and the forfeiture of a warehouse, bank accounts, stock, the contents of their stores, and eight videotape clubs valued at $1 million. All assets were considered part of a criminal enterprise. A $2 million estate was later excluded from the penalty.[265]

A divided Indiana Supreme Court approved the use of Indiana's RICO laws to combat obscenity, denying any violation of either First or Fourteenth Amendment or a prior restraint.[266] The decision vacated a lengthy and elaborately reasoned previous decision by the Indiana Court of Appeals that found application of the RICO related statutes to be facially unconstitutional prior restraints.[267]

The Indiana Supreme Court held that it was irrelevant whether assets acquired through racketeering activity were obscene or not. "They are subject to forfeiture," said the court, "if the elements of a pattern of racketeering activity are shown. Purpose of forfeiture is to disgorge assets acquired through racketeering activity."[268]

A dissenting judge found the state statute "an unconstitutional prior restraint of speech. As employed by * * * prosecutors, once a person is found to have engaged more than once in an open retail sale of unprotected speech, he forfeits his rights in protected speech."

Similarly, Georgia's RICO statute had been held to constitute no significant infringement upon First Amendment rights.[269]

On the opening day of its 1988 term, the U.S. Supreme Court heard oral arguments in its review of the Indiana cases. Appellant's attorneys pressed the chilling effect on presumptively protected expression of what they said were disproportionate penalties of prison and forfeiture.

The United States Supreme Court disagreed and on February 21, 1989 held application of Indiana's RICO statute to the distribution of obscene materials constitutional and the *Miller v. California* tests for obscenity clear enough to withstand First Amendment scrutiny.

263. Attorney General's Commission on Pornography: Final Report, July 1986, Vols. I and II, 381.
264. 18 U.S.C.A. §§ 1961–1968 (1982). Obscenity became a predicate offense in a 1984 amendment to the statute.
265. *United States v. Pryba*, 674 F.Supp. 1518 (E.D. Va. 1987).
266. *4447 Corp. v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987).
267. *4447 Corp. v. Goldsmith*, 479 N.E.2d 578 (Ind. 1985).
268. *4447 Corp. v. Goldsmith*, 504 N.E.2d 559, 564 (Ind. 1987).
269. *Western Business Systems, Inc. v. Slaton*, 492 F.Supp. 513 (N.D. Ga. 1980).

But in one of the two Indiana cases before the Court a plurality of the justices objected to the pretrial seizure of the petitioner's bookstore contents.

FORT WAYNE BOOKS INC. v. INDIANA

16 MED.L.RPTR. 1337, 109 S.CT. 916 (1989).

Justice WHITE delivered the opinion of the Court.

* * *

We reverse, however, the judgment in No. 87–470 sustaining the pretrial seizure order.

In a line of cases dating back to *Marcus v. Search Warrant*, 367 U.S. 717 (1961), this Court has repeatedly held that rigorous procedural safeguards must be employed before expressive materials can be seized as "obscene." In *Marcus*, and again in A *Quantity of Books v. Kansas*, 378 U.S. 205 (1963), the Court invalidated large-scale confiscations of books and films, where numerous copies of selected books were seized without a prior adversarial hearing on their obscenity. In those cases, and the ones that immediately came after them, the Court established that pretrial seizures of expressive materials could only be undertaken pursuant to a "procedure 'designed to focus searchingly on the question of obscenity.' " *Id.*, at 210 (quoting *Marcus*, *supra*, at 732).

We refined that approach further in our subsequent decisions. Most importantly, in *Heller v. New York*, 413 U.S. 483, 492 (1973), the Court noted that "seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding." As a result, we concluded that until there was a "judicial determination of the obscenity issue in an adversary proceeding," exhibition of a film could not be restrained by seizing all the available copies of it. *Id.*, at 492–493. The same is obviously true for books or any other expressive materials. While a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause, the publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing. *Ibid.*; see *New York v. P. J. Video, Inc.*, 475 U.S. 868, 874–876 (1986).

* * *

We do not question the holding of the court below that adding obscenity-law violations to the list of RICO predicate crimes was not a mere ruse to sidestep the First Amendment. And for the purpose of disposing of this case, we assume without deciding that bookstores and their contents are forfeitable (like other property such as a bank account or a yacht) when it is proved that these items are property actually used in, or derived from, a pattern of violations of the State's obscenity laws. Even with these assumptions, though, we find the seizure at issue here unconstitutional. It is incontestable that these proceedings were begun to put an end to the sale of obscenity at the three bookstores named in the complaint, and hence we are quite sure that the special rules applicable to removing First Amendment materials from circulation are relevant here. This includes specifically the admonition that probable cause to believe that there are valid grounds for seizure is insufficient to interrupt the sale of presumptively protected books and films.

Here there was not—and has not been—any determination that the seized items were "obscene" or that a RICO violation *has occurred*. True, the predicate crimes on which the seizure order was based had been adjudicated and are unchallenged. But the petition for seizure and the hearing thereon were aimed at establishing no more than *probable cause to believe* that a RICO violation had occurred, and the order for seizure recited no more than probable cause in that respect. As noted above, our cases firmly hold that mere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation. See, *e.g.*, *New York v. P. J. Video, Inc.*, *supra*; *Heller v. New York*, 413 U.S. 483 (1973). The elements of a RICO violation other than the predicate crimes remain to be established in this case; *e.g.*, whether the obscenity violations by the three corporations or their employees established a pattern of racketeering activity, and whether the assets seized were forfeitable under the State's CRRA* statute. Therefore, the pretrial seizure at issue here was improper.

* * *

*CRRA—Civil Remedies for Racketeering Activity

At least where the RICO violation claimed is a pattern of racketeering that can be established only by rebutting the presumption that expressive materials are protected by the First Amendment, that presumption is not rebutted until the claimed justification for seizing books or other publications is properly established in an adversary proceeding. Here, literally thousands of books and films were carried away and taken out of circulation by the pretrial order. Yet it remained to be proved whether the seizure was actually warranted under the Indiana CRRA and RICO statutes. If we are to maintain the regard for First Amendment values expressed in our prior decisions dealing with interrupting the flow of expressive materials, the judgment of the Indiana Court must be reversed.

For the reasons given above, the judgment in No. 87–470 is reversed, and the case is remanded for further proceedings. The judgment in No. 87–614 is affirmed, and it too is remanded for further proceedings.

It is so ordered.

STEVENS, J., with whom Brennan and Marshall, JJ., join, dissenting in No. 87–614, and concurring in part and dissenting in part in No. 87–470:

The Court correctly decides that we have jurisdiction and that the pretrial seizures to which petitioners in No. 87–470 were subjected are unconstitutional. But by refusing to evaluate Indiana's Racketeer Influenced and Corrupt Organizations (RICO) and Civil Remedies for Racketeering Activity (CRRA) statutes as an interlinked whole, the Court otherwise reaches the wrong result.

It is true that a bare majority of the Court has concluded that delivery of obscene messages to consenting adults may be prosecuted as a crime. The Indiana Legislature has done far more than that: by injecting obscenity offenses into a statutory scheme designed to curtail an entirely different kind of antisocial conduct, it has not only enhanced criminal penalties, but also authorized wide-ranging civil sanctions against both protected and unprotected speech. In my judgment there is a vast difference between the conclusion that a State may proscribe the distribution of obscene materials and the notion that this legislation can survive constitutional scrutiny.

* * *

Quite simply, the longstanding justification for suppressing obscene materials has been to prevent people from having immoral thoughts. The failure to do so, it is argued, threatens the moral fabric of our society.

Limiting society's expression of that concern is the Federal Constitution. The First Amendment presumptively protects communicative materials. Because the line between protected pornographic speech and obscenity is "dim and uncertain," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, 1 Med.L.Rptr. 1116 (1963), "a State is not free to adopt whatever procedures it pleases for dealing with obscenity," *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961), but must employ careful procedural safeguards to assure that only those materials adjudged obscene are withdrawn from public commerce. *Freedman v. Maryland*, 380 U.S. 51, 1 Med.L.Rptr. 1126 (1965). The Constitution confers a right to possess even materials that are legally obscene. *Stanley v. Georgia*, 394 U.S. 557 (1969). Moreover, public interest in access to sexually explicit materials remains strong despite continuing efforts to stifle distribution.

Whatever harm society incurs from the sale of a few obscene magazines to consenting adults is indistinguishable from the harm caused by the distribution of a great volume of pornographic material that is protected by the First Amendment. Elimination of a few obscene volumes or videotapes from an adult bookstore's shelves thus scarcely serves the State's purpose of controlling public morality. But the State's RICO/CRRA scheme, like the Federal RICO * * * after which it was patterned, furnishes prosecutors with "drastic methods" for curtailing undesired activity. The Indiana RICO/CRRA statutes allow prosecutors to cast wide nets and seize, upon a showing that two obscene materials have been sold, or even just exhibited, all a store's books, magazines, films, and videotapes—the obscene, those nonobscene yet sexually explicit, even those devoid of sexual reference. Reported decisions indicate that the enforcement of Indiana's RICO/CRRA statutes has been primarily directed at adult bookstores. Patently, successful prosecutions would advance significantly the State's efforts to silence immoral speech and repress immoral thoughts.

* * *

Indiana's RICO/CRRA statutes arm prosecutors not with scalpels to excise obscene portions of an adult bookstore's inventory but with sickles to mow down the entire undesired use. This the First

Amendment will not tolerate. " '[I]t is better to leave a few * * * noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits,' " [29] for the "right to receive information and ideas, regardless of their social worth, is fundamental to our free society."

Accordingly, I would reverse the decision in No. 87–614. In No. 87–470, I would not only invalidate the pretrial seizures but would also direct that the complaint be dismissed.

COMMENT

While the Court would not condone the seizing of the entire contents of a bookstore before an adversarial hearing because that would constitute a prior restraint, it had no difficulty finding the racketeering statutes constitutional. In the second case, which came to the Court as *Sappenfield v. Indiana* (docket number 87-614), the Court rejected a trial court's finding that the Indiana RICO was unconstitutionally vague as applied to obscenity predicate offenses. The Indiana Court of Appeals had reversed and reinstated the charges and the Indiana Supreme Court had denied review.

Because a final judgment had not been rendered by the state's highest court, Justices O'Connor and Blackmun did not think the United States Supreme Court had jurisdiction in *Sappenfield*, but they joined the Court in its disposition of *Fort Wayne Books*.

Justice Stevens, with whom Brennan and Marshall joined, dissenting in part and concurring in part, launched a frontal attack on the RICO/CRRA statutes themselves and in the process ripped the fabric of the Court's obscenity construct, the Meese Report, and Indiana's hypersensitivity to erotic materials.

A 1986 U.S. Supreme Court decision had demonstrated that the Court may be tolerant of restrictions on adult oriented establishments when nonexpressive violations of the law are linked with them. In *Arcara v. Cloud Books, Inc.*, the Court allowed New York to use public health law violations—including "lewdness, assignation and prostitution"—that occurred on the premises of an establishment called "Village Books and News Store" to justify an order closing the bookstore for one year.[270] According to Chief Justice Burger's opinion for the Court, "[t]he legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity. Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal use of premises." Burger concluded that this was much more of a conduct than expression case and that First Amendment analysis was largely irrelevant.

Dissenting Justices Blackmun, Brennan, and Marshall had a much different view. They argued that

> [t]he Court's decision creates a loophole through which [the government] can suppress "undesirable," protected speech without confronting the protections of the First Amendment. Until today, the Court has required States to confine any book banning to materials that are determined, through constitutionally approved procedures, to be obscene. * * * Until today, States could enjoin the future dissemination of adult fare as a nuisance only by "adher[ing] to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance." * * * A State now can achieve a sweeping result without any special protection for the First Amendment interests so long as the predicate conduct—which could be as innocent as repeated meetings between a man and a woman—occurs on the premises. That a bookstore might meet the heavy burden of proving selective prosecution * * * hardly guarantees the prompt, constitutionally required review necessary to minimize deterrence of protected speech. * * * And even when a State's only intention is to eliminate sexual acts in public, a 1-year closure has a severe and unnecessary impact on the First Amendment rights of booksellers.
>
> If the freedom of speech protected by the First Amendment is to retain its "transcend[ent] value, * * * First Amendment interests must be given special protection. "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."

Zoning Laws

At the local level, there has been much experimentation with zoning laws as a means of regulating

29. *Near v. Minnesota ex rel. Olson*, 283 U.S., at 718 (Hughes, C. J.) (quoting 4 Writings of James Madison 544 (1865)).

270. 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986).

sexual matters. City councils can't decide whether to disperse or cluster "adult" entertainment. Detroit's Anti-Skid Row ordinance required adult theaters to be at least 1,000 feet from other theaters or bookstores, cabarets, bars, pawnshops, secondhand stores, shoeshine parlors, pool halls, taxi dance halls, public lodging houses, motels, and hotels. They also had to be 500 feet from residential areas.

Any vagueness in the ordinance, said the United States Supreme Court, was susceptible of a narrowing construction by state courts. Detroit's compelling interest was in regulating commercial property; the effects on free speech were negligible, and the content involved had none of the significance of social or political speech. Four justices dissented from what they saw as a drastic departure from established principles of First Amendment law.[271]

Ten years later, the constitutionality of Renton, Washington's zoning ordinance, was upheld by the Supreme Court as a time, place, and manner regulation designed to preserve the quality of urban life. Renton's ordinance would concentrate adult theaters and bookstores.[272]

Zoning laws can and have gone too far. A New Jersey ordinance prohibited all live entertainment including plays, concerts, musicals, and dance in order to get at live nude dancing. The U.S. Supreme Court saw this as a violation of the First and Fourteenth Amendments.[273]

In the lower courts there is confusion as to what "community" is to define obscenity,[274] on whether judge or jury should determine community standards,[275] on how to define a "residential" area,[276] on where adult entertainment businesses are to be located,[277] and on the role social science surveys are to play in describing the realities of erotica.[278]

A privately funded survey by a geographer demonstrated that only .058 square miles of Ann Arbor, Michigan or .23 percent of the city could lawfully contain an adult bookstore under the city's zoning laws. And there was no "predominating purpose" of avoiding urban blight behind the ordinance. Also flawed was the law's allowance of a bookstore to carry up to 20 percent of adult wares in its total stock, a provision based on the erroneous assumption that all erotic material is obscene. "It is clearly quite restrictive," said the Sixth Circuit Court of Appeals, "to permit a business to engage in that protected expression only 20 percent of the time."[279]

In February 1989 the U.S. Supreme Court granted certiorari in *M.J.R., Inc., v. Dallas* and two related cases. The Court will review a ruling of the U.S. Court of Appeals for the Fifth Circuit (*F.W./P.B.S., Inc. v. Dallas*, 837 F.2d 1298, 1987) broadly upholding Dallas's zoning system for sexually oriented businesses, including "adult" hotels. Are procedural safeguards required for zoning law violations and can past convictions lead to license denials? These questions are before the Court. See 57 U.S.L.W. 3009, 3064, 3125 (1988).

MacKinnon's Law

A far more original and revolutionary approach to the pornography question was Catherine MacKinnon's attempt to get laws passed that would consider pornography an attack on the civil rights of women. In a carefully reasoned and intellectually sophisticated work, MacKinnon argued that pornography leads to the terrorization of women by men, and so the free speech of men silences the free speech of women. Pornography, she argued, is ultimately not speech but action requiring the submission of women.[280]

City councils in both Minneapolis and Indianapolis approved MacKinnon's statute, but in Minneapolis the mayor vetoed the proposal and in In-

271. *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

272. *City of Renton v. Playtime Theatres, Inc.*, 12 Med.L.Rptr. 1721, 106 S.Ct. 925 (1986).

273. *Schad v. Mount Ephraim*, 452 U.S. 61 (1981). See also, *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

274. *Septum v. Keller*, 7 Med.L.Rptr. 1664 (unreported U.S. Dist. Ct. Ga. 1980).

275. *Miami v. Florida Literary Distributing Corp.*, 12 Med.L.Rptr. 2158, 486 S.2d 569 (Fla. S.Ct. 1986).

276. *Harris Books v. Santa Fe*, 8 Med.L.Rptr. 1913, 647 P.2d 868 (N.M. S.Ct. 1982).

277. *Marco Lounge v. Federal Heights*, 7 Med.L.Rptr. 1229, 625 P.2d 982 (Colo. S.Ct. 1981); *Keego Harbor Company v. Keego Harbor*, 7 Med.L.Rptr. 2195, 657 F.2d 94 (6th Cir. 1981); and *Walnut Properties v. Whittier*, 13 Med.L.Rptr. 1640, 807 F.2d 178, 808 F.2d 1331 (9th Cir. 1986), judgment vacated, 106 S.Ct. 1255. In the latter case the zoning law was based in part on the disdain a church had for displays of the human body. See also, *Avalon Cinema v. Thompson*, 7 Med.L.Rptr. 2059, 658 F.2d 555 (8th Cir. 1981) and 7 Med.L.Rptr. 2588, 667 F.2d 659 (8th Cir. 1981).

278. *Miami v. Florida Literary Distributing Corp.*, *supra*, citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Avalon Cinema v. Thompson*, 7 Med.L.Rptr. 2588, 667 F.2d 659 (8th Cir. 1981); *Christy v. Ann Arbor*, 14 Med.L.Rptr. 1483, 824 F.2d 489 (6th Cir. 1987).

279. *Christy v. Ann Arbor*, op. cit.

280. MacKinnon, *Feminism Unmodified*, 1987. See also, MacKinnon, *Pornography, Civil Rights and Speech*, 20 Harv.Civ.Rts.-Civ.Lib. L.Rev. 1 (1985).

diana the legislation did not survive federal court tests of constitutionality. Large segments of the feminist movement had disagreed with MacKinnon's position. Disagreement centered around evidence of effects, vagueness in definition, and the political consequences of Left joining Right in forbidding some forms of speech.

In a review of feminist opposition to MacKinnon's proposal, Rosemarie Tong examined the notion that another concept, *consent*, is a fake concept. "[I]f women are incapable of consent," asks Tong, "what entitles them to be treated less paternalistically than children? If *materialism* is permissible when it comes to a woman's sexual decisions, why is *paternalism* impermissible when it comes to a woman's workplace and schoolplace decisions? Either women have the capacity to consent or they do not, and we cannot afford to remain undecided on the issue." [281]

Federal courts put the question in constitutional terms.

AMERICAN BOOKSELLERS ASSOCIATION v. HUDNUT

11 MED.L.RPTR. 2465, 771 F.2D 323 (7TH CIR. 1985).

EASTERBROOK, J.:

Indianapolis enacted an ordinance defining "pornography" as a practice that discriminates against women. "Pornography" is to be redressed through the administrative and judicial methods used for other discrimination. The City's definition of "pornography" is considerably different from "obscenity," which the Supreme court has held is not protected by the First Amendment..

* * *

"Pornography" under the ordinance is "the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

> (1) Women are presented as sexual objects who enjoy pain or humiliation; or
> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
> (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
> (4) Women are presented as being penetrated by objects or animals; or
> (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
> (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display." Indianapolis Code §16–3(q).

The statute provides that the "use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section." The ordinance as passed in April 1984 defined "sexually explicit" to mean actual or simulated intercourse or the uncovered exhibition of the genitals, buttocks or anus. An amendment in June 1984 deleted this provision, leaving the term undefined.

The Indianapolis ordinance does not refer to the prurient interest, to offensiveness, or to the standards of the community. It demands attention to particular depictions, not to the work judged as a whole. It is irrelevant under the ordinance whether the work has literary, artistic, political, or scientific value. The City and many amici point to these omissions as virtues. They maintain that pornography influences attitudes, and the statute is a way to alter the socialization of men and women rather than to vindicate community standards of offensiveness. And as one of the principal drafters of the ordinance has asserted, "if a woman is subjected, why should it matter that the work has other value?" Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. Civ. Rts.—Civ. Lib. L.Rev. 1, 21 (1985).

Civil rights groups and feminists have entered this case as amici on both sides. Those supporting the ordinance say that it will play an important role in reducing the tendency of men to view women as sexual objects, a tendency that leads to both unacceptable attitudes and discrimination in the workplace and violence away from it. Those opposing the ordinance point out that much radical feminist literature is explicit and depicts women in ways forbidden by the ordinance and that the ordinance would reopen old battles. It is unclear how Indianapolis would treat works from James Joyce's *Ulys-*

281. Tong, *Women, Pornography, and the Law*, Academe, September/October, 1987.

ses to Homer's *Iliad*; both depict women as submissive objects for conquest and domination.

We do not try to balance the arguments for and against an ordinance such as this. The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way—in sexual encounters "premised on equality" (MacKinnon, *supra*, at 22)—is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.

The ordinance contains four prohibitions. People may not "traffic" in pornography, "coerce" others into performing in pornographic works, or "force" pornography on anyone. Anyone injured by someone who has seen or read pornography has a right of action against the maker or seller.

* * *

The district court held the ordinance unconstitutional. 598 F.Supp. 1316 (S.D. Ind. 1984). The court concluded that the ordinance regulates speech rather than the conduct involved in making pornography. The regulation of speech could be justified, the court thought, only by a compelling interest in reducing sex discrimination, an interest Indianapolis had not established. The ordinance is also vague and overbroad, the court believed, and establishes a prior restraint of speech.

* * *

Under the ordinance graphic sexually explicit speech is "pornography" or not depending on the perspective the author adopts. Speech that "subordinates" women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in "positions of servility or submission or display" is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an "approved" view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.

Indianapolis justifies the ordinance on the ground that pornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so. Pornography is an aspect of dominance. It does not persuade people so much as change them. It works by socializing, by establishing the expected and the permissible. In this view pornography is not an idea; pornography is the injury.

There is much to this perspective. Beliefs are also facts. People often act in accordance with the images and patterns they find around them. People raised in a religion tend to accept the tenets of that religion, often without independent examination. People taught from birth that black people are fit only for slavery rarely rebelled against that creed; beliefs coupled with the self-interest of the masters established a social structure that inflicted great harm while enduring for centuries. Words and images act at the level of the subconscious before they persuade at the level of the conscious. Even the truth has little chance unless a statement fits within the framework of beliefs that may never have been subjected to rational study.

Therefore we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, "[p]ornography is central in creating and maintaining sex as a basis of discrimination." * * *

Yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech. Hitler's orations affected how some Germans saw Jews. Communism is a world view, not simply a *Manifesto* by Marx and Engels or a set of speeches. * * * The Alien and Sedition Acts passed during the administration of John Adams rested on a sincerely held belief that disrespect for the government leads to social collapse and revolution—a belief with support in the history of many nations. Most governments of the world act on this empirical regularity, suppressing critical speech. In the United States, however, the strength of the support for this belief is irrelevant. * * *

Racial bigotry, anti-semitism, violence on television, reporters' biases—these and many more influence the culture and shape our socialization. None

is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.

Sexual responses often are unthinking responses, and the association of sexual arousal with the subordination of women therefore may have a substantial effect. But almost all cultural stimuli provoke unconscious responses. * * * People may be conditioned in subtle ways. If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.

It is possible to interpret the claim that the pornography is the harm in a different way. Indianapolis emphasizes the injury that models in pornographic films and pictures may suffer. The record contains materials depicting sexual torture, penetration of women by redhot irons and the like. These concerns have nothing to do with written materials subject to the statute, and physical injury can occur with or without the "subordination" of women. As we discuss [below], a state may make injury in the course of producing a film unlawful independent of the viewpoint expressed in the film.

The more immediate point, however, is that the image of pain is not necessarily pain. In *Body Double*, a suspense film directed by Brian DePalma, a woman who has disrobed and presented a sexually explicit display is murdered by an intruder with a drill. The drill runs through the woman's body. The film is sexually explicit and a murder occurs—yet no one believes that the actress suffered pain or died. * * * And this works both ways. The description of women's sexual domination of men in *Lysistrata* was not real dominance. Depictions may affect slavery, war, or sexual roles, but a book about slavery is not itself slavery, or a book about death by poison a murder.

Much of Indianapolis's argument rests on the belief that when speech is "unanswerable," and the metaphor that there is a "marketplace of ideas" does not apply, the First Amendment does not apply either. The metaphor is honored; Milton's *Aeropagitica* and John Stuart Mill's *On Liberty* defend freedom of speech on the ground that the truth will prevail, and many of the most important cases under the First Amendment recite this position. The Framers undoubtedly believed it. As a general matter it is true. But the Constitution does not make the dominance of truth a necessary condition of freedom of speech. To say that it does would be to confuse an outcome of free speech with a necessary condition for the application of the amendment.

A power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth. At some point the government must be able to say (as Indianapolis has said): "We know what the truth is, yet a free exchange of speech has not driven out falsity, so that we must now prohibit falsity." If the government may declare the truth, why wait for the failure of speech? Under the First Amendment, however, there is no such thing as a false idea, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), so the government may not restrict speech on the ground that in a free exchange truth is not yet dominant.

* * *

At all events, "pomography" is not low value speech within the meaning of these cases. Indianapolis seeks to prohibit certain speech because it believes this speech influences social relations and politics on a grand scale, that it controls attitudes at home and in the legislature. This precludes a characterization of the speech as low value. True, pornography and obscenity have sex in common. But Indianapolis left out of its definition any reference to literary, artistic, political, or scientific value. The ordinance applies to graphic sexually explicit subordination in works great and small. The Court sometimes balances the value of speech against the costs of its restriction, but it does this by category of speech and not by the content of particular works. * * * Indianapolis has created an approved point of view and so loses the support of these cases.

Any rationale we could imagine in support of this ordinance could not be limited to sex discrimination. Free speech has been on balance an ally of those seeking change. Governments that want stasis start by restricting speech. Culture is a powerful force of continuity; Indianapolis paints pornography as part of the culture of power. Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is.

The definition of "pornography" is unconstitutional. No construction or excision of particular terms could save it.

* * *

No amount of struggle with particular words and phrases in this ordinance can leave anything in effect. The district court came to the same conclusion. Its judgment is therefore affirmed.

The Oregon Approach

Oregon has found yet another way to deal with obscenity. It has declared the punishment of obscenity unconstitutional under the state constitution's Article 1, Section 8:

> No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

As for the *Miller* test and obscenity laws that incorporate it, the Oregon Supreme Court held:

> In a law censoring speech, writing or publication, such an indeterminate test is intolerable. It means that anyone who publishes or distributes arguably "obscene" words or pictures does so at the peril of punishment for making a wrong guess about a jury's estimate of "contemporary state standards" of prurience.[282]

Oregon found its constitutional protection of expression broader than that provided by the First Amendment and, by interpretation, admitting of no exceptions. Beyond legal analysis, the Oregon justices used historical allusions to suggest the futility and danger of attempts to suppress the erotic, except where youth and unwilling viewers are concerned. The Oregon court in effect endorsed not only Justice Brennan's dissent in *Paris Adult Theatres* but the recommendations of the Lockhart Commission as well.

There is evidence that pornoviolence may develop aggressive attitudes in those who view it. Edward Donnerstein, in a comprehensive review of effects studies, including his own, notes: "If you take out the sex and leave in the violence, you get the increased violent behavior in the laboratory setting. * * * If you take out the violence and leave the sex, nothing happens." [283]

In the fabric of American custom and law, pornography is still closer to sex alone than to violence or a combination of the two. Perhaps counterspeech rather than repression ought to be used to educate and sensitize old and young alike against what is warped, shallow, tasteless, and repugnant, much of it sold for profit. But must the general population see only what meets the approval of far Right or far Left? As for the law, Harry Kalven, Jr. may have put it best: "The evil of arousing revulsion in adults who are a non-captive audience [may be] simply too trivial a predicate for constitutional regulation." [284]

A pox on censors, said Luis Buñuel. "They are like nannies sitting on our shoulders inhibiting calm and destroying our phantoms." [285]

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282. *Oregon v. Henry*, 14 Med.L.Rptr. 1011, 732 P.2d 9 (Ore. S.Ct. 1987)..
283. Donnerstein, Daniel Linz and Steven Penrod, *The Question of Pornography: Research Findings and Policy Implications*, 1987.
284. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 S.Ct.Rev. 40.
285. Quoted in Penelope Cilliat, *Long Live the Living*, The New Yorker (December 5, 1977), 66.

NINE

The Regulation of Electronic Media: Some Problems of Law, Technology, and Policy

INTRODUCTION: THE RATIONALE OF BROADCAST REGULATION

One of the startling legal realities of the law of broadcasting as compared with the law of the print media is that the legal framework of broadcasting has long been altogether different from that of print. As Judge Warren Burger stated in *Office of Communication of United Church of Christ v.* FCC, 359 F.2d 994 at 1003 (D.C.Cir. 1966):

> A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot.

The structure of broadcast regulation under the Federal Communications Act of 1934 is rather extensive. Licenses for broadcasting stations are now five years for television licenses and seven years for radio licenses. According to the act, licenses are to be granted by the Federal Communications Commission provided that "the public convenience, interest, or necessity will be served thereby." 47 U.S.C.A. § 307(a).

In the light of these and other provisions of the act, a dominant problem in broadcast regulation has been with the definition of the "public interest" standard. What criteria, for example, should govern the "public interest" principle of § 307 of the act? How extensive should regulation be? How directly can content be regulated without violating First Amendment standards?

In the 1940s, NBC and CBS argued, in the case below, that the FCC's authority was limited solely to removing technical and engineering impediments which obstruct effective broadcasting. Otherwise, their argument ran, the FCC has no authority to make any particular qualitative demands of broadcast licensees.

Once the FCC imposed restrictions on radio network/affiliate relationships, the networks (called chain broadcasters at the time) appealed—ultimately to the U.S. Supreme Court. That Court addressed some very fundamental questions. Fundamentally, was broadcasting different than print? Should the FCC's function be limited to traffic control? Or should it be directed instead to determining the composition of the traffic, i.e., the character and quality of broadcast programming?

Theory of Scarcity

NBC v. UNITED STATES
CBS v. UNITED STATES

319 U.S. 190, 63 S.CT. 997, 87 L.E.D. 1344 (1943).

Justice FRANKFURTER delivered the opinion of the Court.

In view of our dependence upon regulated private enterprise in discharging the far-reaching role which radio plays in our society, a somewhat detailed exposition of the history of the present controversy and the issues which it raises is appropriate.

* * *

On March 18, 1938, the Commission undertook a comprehensive investigation to determine whether special regulations applicable to radio stations engaged in chain broadcasting were required in the "public interest, convenience, or necessity."

* * *

The regulations, * * * are addressed (directly) to station licensees and applicants for station licenses. They provide, in general, that no licenses shall be granted to stations or applicants having specified relationships with networks. Each regulation is directed at a particular practice found by the Commission to be detrimental to the "public interest," and we shall consider them seriatim. * * *

The commission found that at the end of 1938 there were 660 commercial stations in the United States, and that 341 of these were affiliated with national networks. * * * It pointed out that the stations affiliated with the national networks utilized more than 97% of the total night-time broadcasting power of all the stations in the country. NBC and CBS together controlled more than 85% of the total night-time wattage, and the broadcast business of the three national network companies amounted to almost half of the total business of all stations in the United States.

The commission recognized that network broadcasting had played and was continuing to play an important part in the development of radio. "The growth and development of chain broadcasting," it stated, "found its impetus in the desire to give widespread coverage to programs which otherwise would not be heard beyond the reception area of a single station. Chain broadcasting makes possible a wider reception for expensive entertainment and cultural programs and also for programs of national or regional significance which would otherwise have coverage only in the locality of origin. Furthermore, the access to greatly enlarged audiences made possible by chain broadcasting has been a strong incentive to advertisers to finance the production of expensive programs. * * * But the fact that the chain broadcasting method brings benefits and advantages to both the listening public and to broadcast station licensees does not mean that the prevailing practices and policies of the networks and their outlets are sound in all respects, or that they should not be altered. The commission's duty under the Communications Act of 1934, 47 U.S.C.A. § 151 et seq., is not only to see that the public receives the advantages and benefits of chain broadcasting, but also, so far as its powers enable it, to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated."

The commission found * * * [certain] network abuses were amendable to correction within the powers granted it by Congress.

Regulation 3.101—Exclusive affiliation of station. The commission found that the network affiliation agreements of NBC and CBS customarily contained a provision which prevented the station from broadcasting the programs of any other network. The effect of this provision was to hinder the growth of new networks. * * *

"Restraints having this effect," the commission observed, "are to be condemned as contrary to the public interest irrespective of whether it be assumed that Mutual [another network] programs are of equal, superior, or inferior quality. The important consideration is that station licensees are denied freedom to choose the programs which they believe best suited to their needs; in this manner the duty of a station licensee to operate in the public interest is defeated. * * *"

Regulation 3.102—Territorial exclusivity. The commission found another type of "exclusivity" provision in network affiliation agreements whereby the network bound itself not to sell programs to any other station in the same area. The effect of this provision, designed to protect the affiliate from the competition of other stations serving the same territory, was to deprive the listening public of many programs that might otherwise be available.

* * *

The Commission concluded that * * * "It is as much against the public interest for a network affiliate to enter into a contractual arrangement which prevents another station from carrying a network program as it would be for it to drown out that program by electrical interference." * * *

Regulation 3.103—Term of affiliation. The standard NBC and CBS affiliation contracts bound the station for a period of five years, with the network having the exclusive rights to terminate the contracts upon one year's notice. The commission, relying upon § 307(d) of the Communications Act of 1934, under which no license to operate a broadcast station can be granted for a longer term than three years, found the five-year affiliation term to be contrary to the policy of the act. * * *

The commission concluded that under contracts binding the affiliates for five years, "stations become parties to arrangements which deprive the public of the improved service it might otherwise derive from competition in the network field; and that a station is not operating in the public interest when it so limits its freedom of action." * * *

Regulation 3.104—Option time. The commission found that network affiliation contracts usually contained so-called network optional time clauses. Under these provisions the network could upon 28 days' notice call upon its affiliates to carry a commercial program during any of the hours specified in the agreement as "network optional time" meant the entire broadcast day. * * *

In the commission's judgment these optional time provisions, in addition to imposing serious obstacles in the path of new networks, hindered stations in developing a local program service. * * *

Regulation 3.105—Right to reject programs. The commission found that most network affiliation contracts contained a clause defining the right of the station to reject network commercial programs. The NBC contracts provided simply that the station "may reject a network program the broadcasting of which would not be in the public interest, convenience, and necessity." * * *

While seeming in the abstract to be fair, these provisions, according to the commission's finding, did not sufficiently protect the "public interest." As a practical matter, the licensee could not determine in advance whether the broadcasting of any particular network program would or would not be in the public interest. * * * "In practice, if not in theory, stations affiliated with networks have delegated to the networks a large part of their programming functions. In many instances, moreover, the network further delegates the actual production of programs to advertising agencies. These agencies are far more than mere brokers or intermediaries between the network and the advertiser. To an ever increasing extent, these agencies actually exercise the function of program production. Thus it is frequently neither the station nor the network, but rather the advertising agency, which determines what broadcast programs shall contain. Under such circumstances, it is especially important that individual stations, if they are to operate in the public interest, should have the practical opportunity as well as the contractual right to reject network programs. * * *

"It is the station, not the network, which is licensed to serve the public interest. * * *" [Federal Communications Commission, Report on Chain Broadcasting, 1941, pp. 39, 66.]

* * *

Regulations 3.106—Network ownership of stations. The commission found that [the] * * * 18 stations owned by NBC and CBS * * * were among the most powerful and desirable in the country, and were permanently inaccessible to competing networks. * * * The commission concluded that "the licensing of two stations in the same area to a single network organization is basically unsound and contrary to the public interest," and that it was also against the "public interest" for network organizations to own stations in areas where the available facilities were so few or of such unequal coverage that competition would thereby be substantially restricted. * * *

Regulation 3.108—Control by networks of station rates. * * * Under this provision the station could not sell time to a national advertiser for less than it would cost the advertiser if he bought the time from NBC. * * *

The commission concluded that "it is against the public interest for a station licensee to enter into a contract with a network which has the effect of decreasing its ability to compete for national business. We believe that the public interest will best be served and listeners supplied with the best programs if stations bargain freely with national advertisers."

* * *

The appellants attack the validity of these regulations along many fronts. They contend that the commission went beyond the regulatory powers conferred upon it by the Communications Act of 1934; * * * and that, in any event, the regulations abridge the

appellants' right of free speech in violation of the First Amendment. We are thus called upon to determine whether Congress has authorized the commission to exercise the power asserted by the Chain Broadcasting Regulations, and if it has, whether the Constitution forbids the exercise of such authority. * * *

The enforcement of the Radio Act of 1912 presented no serious problems prior to the World War. Questions of interference arose only rarely because there were more than enough frequencies for all the stations then in existence. The war accelerated the development of the art, however, and in 1921 the first standard broadcast stations were established. They grew rapidly in number, and by 1923 there were several hundred such stations throughout the country. The act of 1912 had not set aside any particular frequencies for the use of private broadcast stations; consequently, the secretary of commerce selected two frequencies, 750 and 833 kilocycles, and licensed all stations to operate upon one or the other of these channels. The number of stations increased so rapidly, however, and the situation became so chaotic, that the secretary, upon the recommendation of the National Radio Conferences which met in Washington in 1923 and 1924, established a policy of assigning specified frequencies to particular stations. * * * Since there were more stations than available frequencies, the secretary of commerce attempted to find room for everybody by limiting the power and hours of operation of stations in order that several stations might use the same channel. * * *

[Courts declared] the secretary of commerce powerless to deal with the situation. * * * From July, 1926, to February 23, 1927, when Congress enacted the Radio Act of 1927, 44 Stat. 1162, almost 200 new stations went on the air. These new stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard. The situation became so intolerable that the President in his message of December 7, 1926, appealed to Congress to enact a comprehensive radio law.

* * *

The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communications—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interferring with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile. In enacting the Radio Act of 1927, the first comprehensive scheme of control over radio communication, Congress acted upon the knowledge that if the potentialities of radio were not to be wasted, regulation was essential.

The Radio Act of 1927 created the Federal Radio Commission, composed of five members, and endowed the commission with wide licensing and regulatory powers. We do not pause here to enumerate the scope of the Radio Act of 1927 and of the authority entrusted to the Radio Commission, for the basic provisions of that Act are incorporated in the Communications Act of 1934, * * * 47 U.S.C.A. § 151 et. seq., * * * the legislation immediately before us. * * *

The criterion governing the exercise of the commission's licensing power is the "public interest, convenience, or necessity." §§ 307(a)(d), 309(a), 310, 312. * * *

The act itself establishes that the commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the act does not restrict the commission merely to supervision of the traffic. It puts upon the commission of the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the commission.

The commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience, or necessity," a criterion which "is as concrete as the complicated factors for judgment in such a field of delegated authority permit." *Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). * * *

The "public interest" to be served under the Communications Act is thus the interest of the listening

public in "the larger and more effective use of radio." § 303(g). The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. * * * The commission's licensing function cannot be discharged, therefore, merely by finding that there are not technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity." * * *

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the communications commission with comprehensive powers to promote and realize the vast potentialities of radio. Section 303(g) provides that the commission shall "generally encourage the larger and more effective use of radio in the public interest"; subsection (i) gives the commission specific "authority to make special regulations applicable to radio stations engaged in chain broadcasting," and subsection (r) empowers it to adopt "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this act."

These provisions, individually and in the aggregate, preclude the notion that the commission is empowered to deal only with technical and engineering impediments to the "larger and more effective use of radio in the public interest." We cannot find in the act any such restriction of the commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. The stations might interfere with each other so that neither could be clearly heard. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses.

In essence, the Chain Broadcasting Regulations represent a particularization of the Commission's conception of the "public interest" sought to be safeguarded by Congress in enacting the Communications Act of 1934. The basic consideration of policy underlying the Regulations is succinctly stated in its Report: "With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest. * * * The net effect [of the practices disclosed by the investigation] has been that broadcasting service has been maintained at a level below that possible under a system of free competition. Having so found, we would be remiss in our statutory duty of encouraging 'the larger and more effective use of radio in the public interest' if we were to grant licenses to persons who persist in these practices."

We would be asserting our personal views regarding the effective utilization of radio were we to deny that the commission was entitled to find that the large public aims of the Communications Act of 1934 comprehend the considerations which moved the commission in promulgating the Chain Broadcasting Regulations. True enough, the act does not explicitly say that the commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137. In the context of the developing problems to which it was directed, the act gave the commission not niggardly but expansive powers. It was given a comprehensive mandate to "encourage the larger and more effective use of radio in the public interest," if need be, by making "special

regulations applicable to radio stations engaged in chain broadcasting." § 303(g)(i).

* * *

While Congress did not give the commission unfetted discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers for the commission to specify details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved. * * *

We conclude, therefore, that the Communications Act of 1934 authorized the commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting.

* * *

Since there is no basis for any claim that the commission failed to observe procedural safeguards required by law, we reach the contention that the Regulations should be denied enforcement on constitutional grounds. Here, as in *New York Cent. Securities Corp. v. United States*, 287 U.S. 12, 24, 25, the claim is made that the standard of "public interest" governing the exercise of the powers delegated to the commission by Congress is so vague and indefinite that, if it be construed as comprehensively as words alone permit, the delegation of legislative authority is unconstitutional. But, as we held in that case, "It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the act, the requirements it imposes, and the context of the provision in question show the contrary." Id.

We come, finally, to an appeal to the First Amendment. The regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. *Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.* [Emphasis added.] But Congress did not authorize the commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the commission by these regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. The question here is simply whether the commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech. * * *

Affirmed.

Justice MURPHY, dissenting.

* * * Although radio broadcasting, like the press, is generally conducted on a commercial basis, it is not an ordinary business activity, like the selling of securities or the marketing of electrical power. In the dissemination of information and opinion radio has assumed a position of commanding importance, rivaling the press and the pulpit. Owing to its physical characteristics radio, unlike the other methods of conveying information, must be regulated and rationed by the government. Otherwise there would be chaos, and radio's usefulness would be largely destroyed. But because of its vast potentialities as a medium of communication, discussion and propaganda, the character and extent of control that should be exercised over it by the government is a matter of deep and vital concern. Events in Europe show that radio may readily be a weapon of authority and misrepresentation, instead of a means of entertainment and enlightenment. It may even be an instru-

ment of oppression. In pointing out these possibilities I do not mean to intimate in the slightest that they are imminent or probable in this country but they do suggest that the construction of the instant statute should be approached with more than ordinary restraint and caution, to avoid an interpretation that is not clearly justified by the conditions that brought about its enactment, or that would give the commission greater powers than the Congress intended to confer.

* * *

By means of these regulations and the enforcement program, the commission would not only extend its authority over business activities which represent interests and investments of a very substantial character, which have not been put under its jurisdiction by the act, but would greatly enlarge its control over an institution that has now become a rival of the press and pulpit as a purveyor of news and entertainment and a medium of public discussion. To assume a function and responsibility of such wide reach and importance in the life of the nation, as a mere incident of its duty to pass on individual applications for permission to operate a radio station and use a specific wave length, is an assumption of authority to which I am not willing to lend my assent.

* * *

COMMENT

The FCC and the Supreme Court believed broadcasting to be "scarce" in the late 1930s and early 1940s. In 1940, there were 765 radio stations and a handful of TV stations on the air. By mid-1989 there were 10,505 radio stations and 1,400 full power TV stations broadcasting. Does this growth in the number of broadcast stations, added to the arrival of other media such as cable television, undercut the "scarcity" rationale for regulation? See Fowler and Brenner, A *Marketplace Approach to Broadcast Regulation*, 60 Texas L. Rev. 207 (1982).

Is the limited access medium rationale the only plausible basis for broadcast regulation? Since Justice Murphy points out that radio "may be a weapon of authority and misrepresentation instead of a means of entertainment and enlightenment," why doesn't he wish to uphold the Chain Broadcasting Regulations and thereby limit the concentration of communicating power?

Justice Murphy's dissent offers the basis for a new rationale for government regulation of broadcasting—the social impact rationale. Under this theory, the pervasiveness and the impact of broadcasting justify a greater measure of government regulation than other media. For application of this theory, see FCC *v. Pacifica Foundation*, p. 828.

The Chain Broadcasting Regulations were an attempt by the FCC to do what Congress failed to do in the Federal Communications Act, i.e., bring the networks under the regulatory authority of the FCC. The FCC was concerned with the problem that the station licensees, the parties regulated by the act, were becoming conduits for the largely unregulated networks. As with radio in 1943, at the present time television programming in the evening or "prime time" hours is largely dominated by the networks, although in the late 1980s network "share" of the audience dropped substantially due to increased competition from cable TV and independent television stations.

Presently, the networks, although not subject directly to regulation under the Federal Communications Act of 1934, are actually responsive to FCC jurisdiction in at least two ways. First, FCC rules and regulations do, of course, bind broadcast licensees. To the extent these licensees are network affiliates, which in large part they are, the networks are affected by FCC policy. Second, although there are limitations on how many broadcasting outlets of each type a single party may own, the networks utilize to the limit the existing rules which permit them to own a limited number of stations of each type. See text, p. 862. Therefore, with respect to O and O's (stations owned and operated by the networks) the networks are directly regulated by the FCC.

Should networks be placed under additional direct regulation?

We have been considering the problem of the station owner who is a network affiliate, who does not know what programming his station will be emitting until he flicks the dial with the rest of the audience. However, the same problem can arise with the station which is not a network affiliate.[1]

Although the Federal Communications Act of 1934 itself afforded the FCC no specific authority

1. See Yale Broadcasting Co. v. FCC, 478 F.2d 594 (D.C.Cir. 1973), cert.den. 414 U.S. 914 (1973).

to regulate the contractual relationships between the individual broadcast licensee and the network, the FCC based its authority to issue the chain broadcasting regulations on the act's many references to the power of the FCC to regulate broadcasting in the "public interest." In a proposed "rewrite" of the Federal Communications Act of 1934, the "Communications Act of 1978," authored by the House Subcommittee on Communications chaired by Congressman Lionel Van Deerlin (D. Calif.), major revisions were proposed for broadcast regulation. The proposal still left the networks unregulated. However, the "rewrite" did make a major change by way of deletion. In the entire 217-page text of the proposed "rewrite" not a single reference was made to the "public interest, convenience and necessity." See H.R. 13015, 95th Cong., 2d Sess., June 6, 1978.

Harry Shooshan, chief counsel of the House Communications Subcommittee, explained the omission by observing that Congressman Van Deerlin "felt that much of what's bad in communications regulation can be traced to the FCC's trying to interpret that phrase" and therefore "decided not to invite any further misinterpretation of Congress' intentions." Shooshan also observed that the "rewrite" was "an effort to fulfill the public interest" and thus spoke for itself. See *Broadcasting*, (June 12, 1978), 39–40. Would the FCC and the courts still have to import a "public interest" concept to aid them in enforcing and interpreting a new act? Without importing such a standard into the text of a new act, it is hard to see how the flexibility necessary for effective regulation can exist, particularly in the event of the occurrence of unforeseen developments. After all, the Federal Communications Act of 1934 was applied to television and to cable television even though neither was a reality in 1934. Doesn't a regulatory agency with the task of governing an industry which is bound up with an everchanging technology need some language which authorizes it to exercise a wise discretion? How else can one govern new technology in the electronic field? It would seem that the "public interest" standard was designed to facilitate the exercise of such a wise discretion.

A more recent study still considered the *NBC* case to be a critical precedent on whether the FCC can regulate network practices even though the Federal Communications Act does not grant specific authority to the FCC to regulate the networks:

> In NBC, the court addressed three points of continuing interest to the issue of the FCC's jurisdiction. First, the court confirmed that the commission's licensing authority over broadcast stations permits it to promulgate regulations involving network practices addressed to broadcast station licensees that are network affiliates. Second, the Court suggested that courts should construe the 1934 act liberally in evaluating the commission's regulatory powers and responsibilities. Stated simply, courts should view the specific responsibilities assigned to commission as exemplary of its larger responsibilities. Third, the court implied by its silence that the commission's overriding responsibility to regulate television broadcasting and its specific power to regulate stations engaged in chain broadcasting authorize it to regulate networks directly.

See, Krattenmaker and Metzger, *FCC Regulatory Authority Over Commercial Television Networks: The Role of Ancillary Jurisdiction*, 77 Northwestern U.L.Rev. 403 at 431–432 (1982).

NBC v. United States determined that scarcity justified different treatment of broadcasting and print. It was a number of years, however, before the Supreme Court began to confront the manner in which broadcast and print First Amendment theory would vary. Does the "public interest" have a constitutional dimension? Are there public First Amendment rights as well as broadcaster First Amendment rights? In case of a conflict, whose rights should be subordinated?

Theories of Listeners' and Viewers' Rights

When a fundamentalist minister, Rev. Billy James Hargis, attacked a journalist, Fred Cook, critical of presidential candidate Barry Goldwater, his strident attack implicated the "personal attack" rules which flowed from the FCC's fairness doctrine. In *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969), these doctrines and policies were challenged as violative of the First Amendment rights of broadcasters. At this point the student should read the *Red Lion* decision, text, p. 795.

The *Red Lion* decision evidenced that the Supreme Court continued to believe that scarcity justified unique First Amendment treatment of broadcasters. Even more significantly, for the first time the Court parsed out and then rank ordered the interests of competing First Amendment claimants. To the surprise of broadcasters, the Court held that the fairness doctrine and personal attack rules not only did not abridge the First Amendment but, instead, enhanced First Amendment values.

Although the *Red Lion* decision professes allegiance to the scarcity rationale for broadcast regulation, does the case actually recognize a new justification for broadcast regulation? Does it add a new access-for-ideas justification for broadcast regulation which goes beyond the older rationalization of limited access to the spectrum?

The invalidation in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), of a state statutory right to reply to the print media in the case of editorial attack presents a vivid contrast to the right of reply to personal attack in the broadcast media upheld in *Red Lion*. In *Miami Herald*, the Supreme Court held, in a unanimous opinion, that a Florida statute requiring a newspaper to grant a political candidate equivalent space to reply if the paper editorially attacked the candidate violated the First Amendment. (See text, p. 497.) The *Miami Herald* decision does not so much as cite the *Red Lion* case decided only five years earlier. Henry Geller, former General Counsel of the FCC, has argued that "there is a direct conflict between *Tornillo* and *Red Lion* * * *" But he argues at the same time that the conflict is understandable. See Geller, *Does Red Lion Square With Tornillo?* 29 U. of Miami L.Rev. 477 (1975). * * *

Geller points out that even if the fairness doctrine were abolished, government regulation would still play a role in the broadcast media that it does not play in the print media:

> The point is that by eliminating the fairness doctrine, the problem of government control is not eliminated as long as regulation and licensing based on the public trust concept continues. But the public would be left wholly unprotected from licensees based on presenting only one side of an issue. I, for one, would not accept that.

Judge Tamm spoke directly to the broadcaster argument that *Red Lion* and *Tornillo* were flatly inconsistent:

> I find the decisions "flatly consistent. "Arguments advanced to the contrary are only reflective of broadcasters' desires to become indistinguishable from the print media and to be freed of their obligations as public trustees. While the relevancy of *Red Lion* was fully briefed in *Tornillo*, that decision contained no reference to *Red Lion* or to implications for the broadcast media. I read the Court's striking down a reply rule for newspapers in *Tornillo* after upholding a similar rule for broadcasters in *Red Lion* as demonstrating the Court's continuing recognition of the distinction between the two media, which is primarily manifested in the unique responsibilities of broadcasters as public trustees. See *National Broadcasting Co., Inc. v. FCC*, 516 F.2d 1101 at 1193–1194 (D.C.Cir. 1974).

Four years later, in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973), the U.S. Supreme Court affirmed its belief in the First Amendment theory of *Red Lion*. While the Court refused to extend *Red Lion* into a First Amendment right of public access to broadcasting, it did so by arguing that the fairness doctrine was adequate to protect the public's First Amendment right of access to information. Text, p. 511.

Eight years after *CBS v. DNC*, the Court (a much more conservative Court by then) once again endorsed the notion of First Amendment rights of the public to be informed. The issue in *CBS, Inc. v. FCC*, text, p. 780, was the constitutionality of section 312(a)(7) of the Communications Act of 1934. That section requires broadcasters to provide "reasonable access" to candidates for federal elective office. The Court reasoned that section 312(a)(7), although impinging on the First Amendment rights of broadcasters, primarily advanced the paramount First Amendment rights of the public to receive political information.

Listeners and viewers rights theories have had an interesting impact on the law of advertising. In recent years the Court has overturned earlier theories holding that advertising was unprotected speech and recognized First Amendment rights of the public to receive at least certain kinds of advertising messages without government censorship. See text, p. 135. If *Red Lion*'s theories depend on scarcity, why has the Court applied them to advertising—hardly a scarce resource?

Theories of Impact

Scarcity theories and listeners' and viewers' rights theories, at least partly derived from scarcity, have been the major reasons over the years for treating broadcasting differently from print.

In 1978, however, the U.S. Supreme Court announced a new justification for distinct treatment of broadcasting—what have been called "impact" or "intrusiveness" or "accessibility" theories.

The context was the regulation of broadcast indecency. Congress had provided in 18 U.S.C.A.

section 1464 that "obscene, indecent or profane" broadcasts were prohibited. The FCC had tried, several times previously, to distinguish indecent broadcasts from obscene broadcasts, but none of those cases had reached the U.S. Supreme Court.

In 1975, however, the FCC chastised a noncommercial, educational radio station in New York City for airing a monologue by George Carlin. A case gradually worked its way up to the high court. The Court's eventual decision was not rooted in scarcity theory. Instead, the Court found other—new—reasons why broadcasters should be treated distinctly under the First Amendment.

The student should read *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), text, p. 828.

The law of broadcast indecency, as defined by the Congress and by the FCC, has changed substantially since 1978. The major continuing issues focus on how *Pacifica* will be applied in new contexts.

Does *Pacifica* stand the First Amendment on its head, saying that the more pervasive and influential a medium is, the more it is subject to government regulation? If so, is this not, perhaps, an argument for more extensive regulation of powerful media?

Is the decision limited strictly to a concern for children? If so, then its impact may be narrow. If not, does it, as the dissenters argue, prohibit adults from receiving materials fit for them, not considered fit for children?

Is *Pacifica* just a broadcasting case? On one hand, it relies little on "scarcity" to distinguish broadcasting from other media. However, other media are "pervasive" and, perhaps, intrusive. Should its arguments be extended to new, nonbroadcast media?

Do the differences between "obscenity" and "indecency" that the FCC and the U.S. Supreme Court attempt to create hold up? The FCC and the Court say that obscenity can be banned, but indecency is only "channeled" to times of day when children are not likely to be in the audience. When are those times? What would happen if Congress decided to prohibit indecency throughout the day? Text, p. 841. How distinguishable, really, is obscenity from indecency?

Marketplace-Based Theories of Broadcast Regulation

Major alternative theories of regulation—really theories for deregulation—began to be advanced in the late 1970s and throughout the 1980s. The era was one, generally, in which doubt was raised about the wisdom of "New Deal" affirmative governmental regulation of many aspects on life. Transportation and banking came first, but communications was not far behind.

In the 1970's, the FCC was urged to intervene when radio stations changed program format. The FCC, adopting a deregulatory philosophy, refused. The FCC reasoned that stations should be free to format in response to marketplace forces rather than in response to government mandates. The issue ultimately reached the Supreme Court. The Court upheld the FCC's decision to rely on marketplace forces.

FCC v. WNCN LISTENERS GUILD

450 U.S. 582, 101 S.CT. 1266, 67 L.ED.2D 521 (1981)

• • •

Justice WHITE delivered the opinion of the Court.

Sections 309(a) and 310(d) of the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (act), empower the Federal Communications Commission to grant an application for license transfer or renewal only if it determines that "the public interest, convenience and necessity" will be served thereby. The issue before us is whether there are circumstances in which the commission must review past or anticipated changes in a station's entertainment programming when it rules on an application for renewal or transfer of a radio broadcast license. The commission's present position is that it may rely on market forces to promote diversity in entertainment programming and thus serve the public interest.

This issue arose when, pursuant to its informal rulemaking authority, the commission issued a "policy statement" concluding that the public interest is best served by promoting diversity in entertainment formats through market forces and competition among broadcasters and that a change in entertainment programming is therefore not a material factor that should be considered by the commission in ruling on an application for license renewal or transfer. Respondents, a number of citizen groups interested in fostering and preserving particular entertainment formats, petitioned for review in the court of Appeals for the District of Columbia Circuit. That court held that the commission's policy statement violated the act. We reverse the decision of the court of appeals.

Beginning in 1970, in a series of cases involving license transfers, the Court of Appeals for the District of Columbia Circuit gradually developed a set of criteria for determining when the "public-interest" standard requires the commission to hold a hearing to review proposed changes in entertainment formats. Noting that the aim of the act is "to secure the maximum benefits of radio to all the people of the United States," *National Broadcasting Co. v. United States*, * * * the court of appeals ruled in 1974 that "preservation of a format [that] would otherwise disappear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest." *Citizens Committee to Save WEFM v. FCC* * * *. It concluded that a change in format would not present "substantial and material questions of fact" requiring a hearing if (1) notice of the change had not precipitated "significant public grumbling"; (2) the segment of the population preferring the format was too small to be accommodated by available frequencies; (3) there was an adequate substitute in the service area for the format being abandoned; or (4) the format would be economically unfeasible even if the station were managed efficiently. The court rejected the commission's position that the choice of entertainment formats should be left to the judgment of the licensee, stating that the commission's interpretation of the public-interest standard was contrary to the act.

In January 1976 the commission responded to these decisions by undertaking an inquiry into its role in reviewing format changes. In particular, the commission sought public comment on whether the public interest would be better served by commission scrutiny of entertainment programming or by reliance on the competitive marketplace.

Following public notice and comment, the commission issued a policy statement pursuant to its rulemaking authority under the act. The commission concluded in the policy statement that review of format changes was not compelled by the language or history of the act, would not advance the welfare of the radio-listening public, would pose substantial administrative problems, and would deter innovation in radio programming. In support of its position, the commission quoted from *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475, * * * (1940): "Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee * * * to survive or succumb according to his ability to make his programs attractive to the public." The commission also emphasized that a broadcaster is not a common carrier and therefore should not be subjected to a burden similar to the common carrier's obligation to continue to provide service if abandonment of that service would conflict with public convenience or necessity.

The commission also concluded that practical considerations as well as statutory interpretation supported its reluctance to regulate changes in formats. Such regulation would require the commission to categorize the formats of a station's prior and subsequent programming to determine whether a change in format had occurred; to determine whether the prior format was "unique"; and to weigh the public detriment resulting from the abandonment of a unique format against the public benefit resulting from that change. The commission emphasized the difficulty of objectively evaluating the strength of listener preferences, of comparing the desire for diversity within a particular type of programming to the desire for a broader range of program formats and of assessing the financial feasibility of a unique format.

Finally, the commission explained why it believed that market forces were the best available means of producing diversity in entertainment formats. First, in large markets, competition among broadcasters had already produced "an almost bewildering array of diversity" in entertainment formats. Second, format allocation by market forces accommodates listeners' desires for diversity within a given format and also produces a variety of formats. Third, the market is far more flexible than governmental regulation and responds more quickly to changing public tastes. Therefore, the commission concluded that "the market is the allocation mechanism of preference for entertainment formats and * * * commission supervision in this area will not be conducive either to producing program diversity [or] satisfied radio listeners."

The court of appeals, sitting en banc, held that the commission's policy was contrary to the act as construed and applied in the court's prior format decisions. *WNCN Listeners Guild v. FCC*, * * * The court questioned whether the commission had rationally and impartially re-examined its position and particularly criticized the commission's failure to disclose a staff study on the effectiveness of market allocation of formats before it issued the policy statement. The court then responded to the commis-

sion's criticisms of the format doctrine. First, although conceding that market forces generally lead to diversification of formats, it concluded that the market only imperfectly reflects listener preferences and that the commission is statutorily obligated to review format changes whenever there is "strong prima facie evidence that the market has in fact broken down." * * * Second, the court stated that the administrative problems posed by the format doctrine were not insurmountable. Hearings would only be required in a small number of cases, and the commission could cope with problems such as classifying radio format by adopting a "rational classification schema." 197 U.S.App.D.C., at 334, 610 F.2d, at 853. Third, the court observed that the commission had not demonstrated that the format doctrine would deter innovative programming. Finally, the court explained that it had not directed the commission to engage in censorship or to impose common carrier obligations on licensees: *WEFM* did not authorize the commission to interfere with licensee programming choices or to force retention of an existing format; it merely stated that the commission had the power to consider a station's format in deciding whether license renewal or transfer would be consistent with the public interest. * * *

Although conceding that it possessed neither the expertise nor the authority to make policy decisions in this area, the court of appeals asserted that the format doctrine was "law," not "policy," and was of the view that the commission had not disproved the factual assumptions underlying the format doctrine. Accordingly, the court declared that the policy statement was "unavailing and of no force and effect."

Rejecting the commission's reliance on market forces to develop diversity in programming as an unreasonable interpretation of the act's public-interest standard, the court of appeals held that in certain circumstances the commission is required to regard a change in entertainment format as a substantial and material fact in deciding whether a license renewal or transfer is in the public interest. With all due respect, however, we are unconvinced that the court of appeals' format doctrine is compelled by the act and that the commission's interpretation of the public-interest standard must therefore be set aside.

It is common ground that the act does not define the term "public interest convenience, and necessity." The court has characterized the public-interest standard of the act as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). * * *

Furthermore, we recognized that the commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support for the commission's ultimate conclusions is not required, since " 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' "

The commission has provided a rational explanation for its conclusion that reliance on the market is the best method of promoting diversity in entertainment formats. The court of appeals and the commission agree that in the vast majority of cases market forces provide sufficient diversity. The court of appeals favors government intervention when there is evidence that market forces have deprived the public of a "unique" format, while the commission is content to rely on the market, pointing out that in many cases when a station changes its format, other stations will change their formats to attract listeners who preferred the discontinued format. The court of appeals places great value on preserving diversity among formats, while the commission emphasizes the value of intra-format as well as inter-format diversity. Finally, the court of appeals is convinced that review of format changes would result in a broader range of formats, while the commission believes that government intervention is likely to deter innovative programming.

In making these judgments, the commission has not forsaken its obligation to pursue the public interest. On the contrary, it has assessed the benefits and the harm likely to flow from government review of entertainment programming, and on balance has concluded that its statutory duties are best fulfilled by not attempting to oversee format changes. This decision was in major part based on predictions as to the probable conduct of licensees and the functioning of the broadcasting market and on the commission's assessment of its capacity to make the determinations required by the format doctrine. * * * It did not assert that reliance on the marketplace would achieve a perfect correlation between listener preferences and available entertainment programming. Rather, it recognized that a perfect correlation

would never be achieved, and it concluded that the marketplace alone could best accommodate the varied and changing tastes of the listening public. These predictions are within the institutional competence of the commission.

Our opinions have repeatedly emphasized that the commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference. * * * Furthermore, diversity is not the only policy the commission must consider in fulfilling its responsibilities under the act. The commission's implementation of the public-interest standard, when based on a rational weighing of competing policies, is not to be set aside by the court of appeals, for "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the commission in the first instance." FCC *v. National Citizens Committee for Broadcasting*, 436 U.S., at 810 * * *. The commission's position on review of format changes reflects a reasonable accommodation of the policy of promoting diversity in programming and the policy of avoiding unnecessary restrictions on licensee discretion. As we see it, the commission's policy statement is in harmony with cases recognizing that the act seeks to preserve journalistic discretion while promoting the interests of the listening public.

The policy statement is also consistent with the legislative history of the act. Although Congress did not consider the precise issue before us, it did consider and reject a proposal to allocate a certain percentage of the stations to particular types of programming. Similarly, one of the bills submitted prior to passage of the Radio Act of 1927 included a provision requiring stations to comply with programming priorities based on subject matter. This provision was eventually deleted since it was considered to border on censorship. Congress subsequently added a section to the Radio Act of 1927 expressly prohibiting censorship and other "interfer[ence] with the right of free speech by means of radio communication." That section was retained in the Communications Act. As we read the legislative history of the act, Congress did not unequivocally express its disfavor of entertainment format review by the commission, but neither is there substantial indication that Congress expected the public-interest standard to *require* format regulation by the commission. The legislative history of the act does not support the court of appeals and provides insufficient basis for invalidating the agency's construction of the act.

In the past we have stated that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *." Prior to 1970, the commission consistently stated that the choice of programming formats should be left to the licensee. In 1971 the commission restated that position but announced that any application for license transfer or renewal involving a substantial change in program format would have to be reviewed in light of the court of appeals' decision in Citizens Committee to Preserve the Voice of the Arts in Atlanta, * * * 436 F.2d 263, 267 (D.C.Cir. 1970), in which the court of appeals first articulated the format doctrine. * * * [A]lthough the commission was obliged to modify its policies to conform to the court of appeals' format doctrine, the policy statement reasserted the commission's traditional preference of achieving diversity in entertainment programming through market forces.

* * * Surely, it is argued, there will be some format changes that will be so detrimental to the public interest that inflexible application of the commission's policy statement would be inconsistent with the commission's duties. But radio broadcasters are not required to seek permission to make format changes. The issue of past or contemplated entertainment format changes arises in the courses of renewal and transfer proceedings; if such an application is approved, the commission does not merely assume but affirmatively determines that the requested renewal or transfer will serve the public interest.

Under its present policy, the commission determines whether a renewal or transfer will serve the public interest without reviewing past or proposed changes in entertainment format. This policy is based on the commission's judgment that market forces, although they operate imperfectly, will not only more reliably respond to listener preference than would format oversight by the commission but will also serve the end of increasing diversity in entertainment programming. This court has approved of the commission's goal of promoting diversity in radio programming, FCC *v. Midwest Video Corp.*, 440 U.S. 689 (1979), but the commission is nevertheless vested with broad discretion in determining how much weight should be given to that goal and what policies

should be pursued in promoting it. The act itself, of course, does not specify how the commission should make its public interest determinations.

A major underpinning of its policy statement is the commission's conviction, rooted in its experience, that renewal and transfer cases should not turn on the commission presuming to grasp, measure and weigh the elusive and difficult factors involved in determining the acceptability of changes in entertainment format. To assess whether the elimination of a particular "unique" entertainment format would serve the public interest, the commission would have to consider the benefit as well as the detriment that would result from the change. Necessarily, the commission would take into consideration not only the number of listeners who favor the old and the new programming but also the intensity of their preferences. It would also consider the effect of the format change on diversity within formats as well as on diversity among formats. The commission is convinced that its judgments in these respects would be subjective in large measure and would only approximately serve the public interest. It is also convinced that the market, although imperfect, would serve the public interest as well or better by responding quickly to changing preferences and by inviting experimentation with new types of programming. Those who would overturn the commission's policy statement do not take adequate account of these considerations.

It is also contended that since the commission has responded to listener complaints about nonentertainment programming, it should also review challenged changes in entertainment formats. But the difference between the commission's treatment of nonentertainment programming and its treatment of entertainment programming is not as pronounced as it may seem. Even in the area of nonentertainment programming, the commission has afforded licensees broad discretion in selecting programs. Thus, the commission has stated that "a substantial and material question of fact [requiring an evidentiary hearing] is raised only when it appears that the licensee has abused its broad discretion by acting unreasonably or in bad faith." Mississippi Authority for Educational TV, 71 FCC 2d 1296, 1308 (1969). Furthermore, we note that the commission has recently re-examined its regulation of commercial radio broadcasting in light of changes in the structure of the radio industry. See Notice of Inquiry and Proposed Rulemaking, In the Matter of Deregulation of Radio, 73 FCC 2d 457 (1979). As a result of that re-examination, it has eliminated rules requiring maintenance of comprehensive program logs, guidelines on the amount of nonentertainment programming radio stations must offer, formal requirements governing ascertainment of community needs, and guidelines limiting commercial time. See Report and Order, In the Matter of Deregulation of Radio, 46 Fed.Reg. 13888 (1981).

This case does not require us to consider whether the commission's present or past policies in the area of nonentertainment programming comply with the act. We attach some weight to the fact that the Commission has consistently expressed a preference for promoting diversity in entertainment programming through market forces, but our decision ultimately rests on our conclusion that the commission has provided a reasonable explanation for this preference in its policy statement.

We decline to overturn the commission's policy statement, which prefers reliance on market forces to its own attempt to oversee format changes at the behest of disaffected listeners. Of course, the commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully. * * *

Respondents contend that the court of appeals judgment should be affirmed because, even if not violative of the act, the policy statement conflicts with the First Amendment rights of listeners "to receive suitable access to social, political, esthetic, moral, and other ideas and experience." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) * * *. *Red Lion* held that the Commission's "fairness doctrine" was consistent with the public-interest standard of the Communications Act and did not violate the First Amendment, but rather enhanced First Amendment values by promoting "the presentation of vigorous debate of controversial issues of importance and concern to the public." * * * Although observing that the interests of the people as a whole were promoted by debate of public issues on the radio, we did not imply that the First Amendment grants individual listeners the right to have the commission review the abandonment of their favorite entertainment programs. The commission seeks to further the interests of the listening public as a whole by relying on market forces to promote di-

versity in radio entertainment formats and to satisfy the entertainment preferences of radio listeners. This policy does not conflict with the First Amendment.

Contrary to the judgment of the court of appeals, the commission's policy statement is not inconsistent with the act. It is also a constitutionally permissible means of implementing the public-interest standard of the act. Accordingly, the judgment of the court of appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Justice MARSHALL, with whom Justice Brennan joins, dissenting.

COMMENT

The challenge to the limitation of the spectrum rationale for radio regulation served as a justification for the the Reagan-era FCC to repeal much of the prior regulatory structure applicable to radio, i.e., formal ascertainment procedures, guidelines regarding the amount of nonentertainment programming, and guidelines limiting commercial time. See, *Report and Order In the Matter of Deregulation of Radio*, 46 Fed.Reg. 1388 (1981), text, p. 742.

How does radio deregulation affect the licensee's underlying public interest obligation to provide different types of programs and to know the needs of the audience? Justice White, in *WNCN*, appears to be sympathetic to allowing deregulation based on the FCC's perception of the public interest. Justice Marshall's dissent demonstrated his belief that nonentertainment programming issues remain relevant to FCC consideration of petitions to deny a license grant or renewal. Since the FCC will continue to examine the reasonableness of a broadcaster's nonentertainment programming decisions, licensees must still know what issues interest their communities. See *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C.Cir. 1983).

While doubts about intrusive government regulation of communications content were first incorporated in public policy under the Carter Administration, the strongest drive to "unregulate"—to back away as far as possible from FCC regulation of broadcast content—emerged under President Reagan, specifically under the FCC chairman who served throughout most of the Reagan presidency, Mark S. Fowler.

Very early in the Fowler administration, a law review article appeared that outlined his philosophy of a marketplace approach to broadcast regulation. The philosophy expressed here had profound influence on the seven-year term of Fowler as FCC head and, for that matter, will continue to do so. See Fowler and Brenner, A *Marketplace Approach to Broadcast Regulation*, 60 Texas L.Rev. 207 (1982):

> * * * Our thesis is that the perception of broadcasters as community trustees should be replaced by a view of broadcasters as marketplace participants. Communications policy should be directed toward maximizing the services the public desires. Instead of defining public demand and specifying categories of programming to serve this demand, the Commission should rely on the broadcasters' ability to determine the wants of their audiences through the normal mechanisms of the marketplace. The public's interest, then, defines the public interest. And in light of the first amendment's heavy presumption against content control, the Commission should refrain from insinuating itself into program decisions made by licensees.
>
> In *FCC v. WNCN Listeners Guild* 450 U.S. 582 (1981), decided in 1981, the Supreme Court expressly sanctioned the Commission's discretion to invoke market forces in its regulatory mission. In *WNCN* the court found no inconsistency between the first amendment and the Commission's decision that the public interest in radio is best served by promoting diversity in entertainment formats through market forces and competition among broadcasters. The Court noted that the Commission had admitted that the marketplace would not necessarily achieve a perfect correlation between listener preferences and available entertainment programs. But given the choice of regulating format changes or leaving those decisions to the marketplace, the Court concluded that the Commission acted reasonably in adopting the latter. The Court recognized that the Commission was within its range of discretion in preferring a market approach to achieve the Communication Act's goal of providing "the maximum benefits of radio to all the people of the United States."
>
> The market perspective diminishes the importance of the Commission's past efforts to define affirmatively the elements of operation "in the public interest." It recognizes as valid communications policy, well within Commission discretion, reliance on voluntary broadcaster efforts to attract audiences—whether by specialized formats, as in the case of major market radio, or with a mix of programs, as in the case of television—and to provide the best practicable programming service to the public. It concludes that governmental efforts to improve the broadcast market have led to dis-

> tortions of programming that have merely yielded a different programming mix, not a better one, and that the costs of government intrusion into the marketplace outweigh the benefits. Important first amendment interests support this conclusion as well.
>
> * * *The marketplace approach to broadcast regulation has two distinct advantages from a first amendment perspective. First, it does not conflict with *Red Lion*. In basing editorial and program judgments on their perceptions of popular demand, broadcasters enforce the paramount interests of listeners and viewers. Even if licensees occasionally misperceive the wants of their audiences, the present regulatory system, which is based upon the Commission's judgment of the community's needs, does not ensure a better result. Second, the marketplace approach accords protection to the distinct constitutional status of broadcasters under the press clause. This first amendment interest is, or should be, coextensive with the first amendment rights of the print media, regardless of whether the public is best served by its uninhibited exercise. A broadcaster's first amendment rights may differ from its listeners' rights to receive and hear suitable expression, but once the call is close, deference to broadcaster judgment is preferable to having a government agency mediate conflicts between broadcasters and their listeners.

Fowler and Brenner proceeded to establish an agenda to implement their "marketplace theories." The FCC substantially deregulated radio and television during the Fowler regime at the FCC. See text, p. 758. Other ideas suggested during this era have yet to win acceptance. Thus, the suggestion that spectrum space could be sold or auctioned has not yet come to pass. Further, it has been proposed that the proceeds from sales or auctions of spectrum space—or perhaps instead "taxes" imposed on commercial broadcasters—could be used to support public broadcasting. That has not happened yet either.

Does the "marketplace approach" cover all the interests formerly embraced by the trusteeship concept? Will it protect the interests of children or the elderly who may participate in the marketplace in unique ways?

Fowler and Brenner argue that the marketplace approach could be implemented under *Red Lion*. Do you agree with that, or are they just straining to find a way to implement their ideas without waiting for the Supreme Court to repudiate *Red Lion?*

Reconceptualization by the U.S. Supreme Court?

The "scarcity rationale", as recognized by *NBC v. United States*, and the "paramount rights of listeners and viewers," as articulated in *Red Lion*, have been the linchpins of First Amendment theory for broadcasting for decades—as even Fowler and Brenner recognize. In a 1984 decision involving the constitutionality of statutory restrictions on editorializing by some public broadcast licensees, the U.S. Supreme Court hinted that it might be willing to review these fundamental cases underlying so much broadcast First Amendment theory.

In *dicta* in *FCC v. League of Women Voters of California*, 468 U.S. 364, (1984), see text, p. 851, Justice Brennan in two footnotes opened the door to fundamental reconsideration of broadcast First Amendment theory.

Footnote 11 read, in part, as follows:

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. See, e.g., Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex.L.Rev. 207, 221–226 (1982). We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.

The following footnote, number 12, questioned *Red Lion:*

> We note that the FCC, observing that "[i]f any substantial possibility exists that the [fairness doctrine] rules have impeded, rather than furthered, First Amendment objectives, repeal may be warranted on that ground alone," has tentatively concluded that the [personal attack and political editorializing] rules, by effectively chilling speech, do not serve the public interest and has therefore proposed to repeal them. Notice of Proposed Rulemaking In re Repeal or Modification of the Personal Attack and Political Editorial Rules, 48 Fed. Reg. 28295, 28298 (June 21, 1983). Of course, the Commission may, in the exercise of its discretion, decide to modify or abandon these rules, and we express no view on the legality of either course. As we recognized in *Red Lion*, however, were it to be shown by the Commission that the fairness doctrine "has the effect of reducing rather than enhancing" speech, we would then be forced to reconsider the constitutional basis of our decision in that case.

Under Chairman Mark Fowler and his successor, Dennis Patrick, the FCC strove mightily to give a

"signal" that scarcity was a thing of the past as far as broadcasting was concerned. Its efforts to do so will be discussed subsequently in sections dealing with broadcast deregulation. Congress, however, was reluctant to support the FCC in many of these areas.

In the fairness doctrine area, as will be discussed later, the Commission has concluded that the doctrine has chilling effects and has attempted to abandon much of it. The Commission's initiatives in this area may, ultimately, force the U.S. Supreme Court to follow up on the hints it gave in FCC *v. League of Women Voters*. If "scarcity" is rejected as a basis for broadcast regulation, or if the listeners and viewers rights theories expressed in *Red Lion* are reconsidered, the rationale for treating broadcasting uniquely under the First Amendment would be, at least, profoundly altered. *Pacifica* might remain, with the question then being whether it was a narrow case tailored to protecting special rights of children or, instead, a broader case justifying distinct treatment of broadcasting based on its perceived pervasiveness or intrusiveness.

TRAC v. FCC

801 F.2D 501 (D.C.CIR. 1986)

[EDITORIAL NOTE In Telecommunications Research & Action Center (TRAC) v. FCC, *the court reviewed an FCC decision refusing to apply various political broadcasting policies to a new technology—teletext. In an influential decision, Judge Robert Bork for the court in* TRAC, *disagreed with the FCC that the political broadcasting policies at issue did not apply to teletext since the proper First Amendment model for teletext was* Tornillo *rather than* Red Lion. *He particularly took issue with a justification for broadcast regulation which rested on either scarcity or impact theories. His analysis poses a fundamental challenge to a bifurcated First Amendment—one First Amendment model for broadcasting and another for the print media.]*

BORK, J.:

With respect to the first argument, the deficiencies of the scarcity rationale as a basis for depriving broadcasting of full first amendment protection, have led some to think that it is the immediacy and the power of broadcasting that causes its differential treatment. Whether or not that is true, we are unwilling to endorse an argument that makes the very effectiveness of speech the justification for according it less first amendment protection. More important, the Supreme Court's articulation of the scarcity doctrine contains no hint of any immediacy rationale. The Court based its reasoning entirely on the physical scarcity of broadcasting frequencies, which, it thought, permitted attaching fiduciary duties to the receipt of a license to use a frequency. This "immediacy" distinction cannot, therefore, be employed to affect the ability of the Commission to regulate public affairs broadcasting on teletext to ensure "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion*, 395 U.S. at 390, 89 S.Ct. at 1807.

The Commission's second distinction—that a textual medium is not scarce insofar as it competes with other "print media"—also fails to dislodge the hold of *Red Lion*. The dispositive fact is that teletext is transmitted over broadcast frequencies that the Supreme Court has ruled scarce and this makes teletext's content regulable. We can understand, however, why the Commission thought it could reason in this fashion. The basic difficulty in this entire area is that the line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. Employing the scarcity concept as an analytic tool, particularly with respect to new and unforeseen technologies, inevitably leads to strained reasoning and artificial results.

It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.

Neither is content regulation explained by the fact that broadcasters face the problem of interference, so that the government must define useable frequencies and protect those frequencies from encroachment. This governmental definition of frequencies is another instance of a universal fact that does not offer an explanatory principle for differing treatment. A publisher can deliver his newspapers only because government provides streets and reg-

ulates traffic on the streets by allocating rights of way. Yet no one would contend that the necessity for these governmental functions, which are certainly analogous to the government's function in allocating broadcast frequencies, could justify regulation of the content of a newspaper to ensure that it serves the needs of the citizens.

There may be ways to reconcile *Red Lion* and *Tornillo* but the "scarcity" of broadcast frequencies does not appear capable of doing so. Perhaps the Supreme Court will one day revisit this area of the law and either eliminate the distinction between print and broadcast media, surely by pronouncing *Tornillo* applicable to both, or announce a constitutional distinction that is more usable than the present one. In the meantime, neither we nor the Commission are free to seek new rationales to remedy the inadequacy of the doctrine in this area. The attempt to do that has led the Commission to find "implicit" considerations in the law that are not really there. The Supreme Court has drawn a first amendment distinction between broadcast and print media on a premise of the physical scarcity of broadcast frequencies. Teletext, whatever its similarities to print media, uses broadcast frequencies, and that, given *Red Lion*, would seem to be that.

The Commission, therefore, cannot on first amendment grounds refuse to apply to teletext such regulation as is constitutionally permissible when applied to other, more traditional, broadcast media.

COMMENT

Judge Bork says that, "given *Red Lion*," he is not free to create a new rationale to remedy what he sees as the present inadequacy of First Amendment doctrine to explain the governance of the electronic media. What then is the point of his attack on the scarcity and the impact rationales?

Is Judge Bork really writing a brief calling for the reversal of *Red Lion*? Should it be reversed? Should broadcasting be governed by market forces alone? If that happens, new problems may be presented. Consider the following critique by Professor Owen Fiss of "market" theory as a system of governance for the electronic media:

> A fully competitive market might produce a diversity of programs, formats, and reportage, but to borrow an image of Renata Adler's, it will be the diversity of "a pack going essentially in one direction." [A] perfectly competitive market will produce shows or publications whose marginal cost equals marginal revenue. But there is no necessary, or even probabilistic, relationship between making a profit (or allocating resources efficiently) and supplying the electorate with the information they need to make free and intelligent choices about government policy, the structure of government, or the nature of society. This point was well understood when we freed our educational systems and our universities from the grasp of the market, and it applies with equal force to the media." See Fiss, *Why The State?* 100 Harv.L.Rev. 781 (1987).

THE EMERGENCE OF "NEW" TECHNOLOGIES: REGULATING NONBROADCAST SERVICES

Introduction

The last couple of decades have been filled with talk of "new communications technologies." Some of these technologies, however, weren't very new; they just put old technologies to new uses. Others, such as direct broadcast satellites, were so "new" that they existed more in law and policy than in fact. What the "new technologies" have most in common is that they aren't broadcasting. Discussion of them can be divided into two major categories: those that use the electromagnetic spectrum and those that don't.

Spectrum-Using Services

Four spectrum-using services created new legal problems in the 1970s and 1980s. The FCC expanded the range of uses broadcasters could make of carriers and subcarriers through "subsidiary communications authorizations" (SCA's). It converted what had been a rather limited low-power translator system to "retransmit" the signals of existing stations into a "Low Power Television Service" (LPTV) for which it had ambitious expectations. An old, but not extensively used, service called Multi-point Distribution Service was converted into something new known as "Multichannel, Multipoint Distribution Service" (MMDS). Finally, by authorizing "Direct Broadcast Satellites" (DBS), the Commission hoped to expand pay service alternatives, especially to sparsely populated areas. At least three of these four new services looked most promising if offered on a subscription,

or pay, basis. This eventually led the Commission into a legal redefinition of what "broadcasting" itself was.

SCA'S. Most broadcast stations don't use up all the spectrum space they are assigned just carrying programs for people to watch or listen to. In AM, FM, and TV there's the technical capability to put some additional information on top of the broadcast signal in a piggyback fashion. People who just listen to radio or watch TV aren't aware of the extra information. Their receivers aren't affected by it; the radio sounds the same, and the TV looks the same even if additional information is being carried. People with special receivers, however, can pick off the piggyback signals and put them to special purposes.

The AM broadcast signal offers the fewest such possibilities. At best, an AM station can incorporate simple things—like digital on/off instructions—in what is known as its carrier signal. It can't carry much more than simple codes. FM and television are different. They have more room and can carry more additional information. The FCC recognized this ability of FM in the mid-1950s and 1960s and authorized stations to do two things with it. First, in order to shore up the then weak economic status of FM radio, the FCC in the 1950s authorized limited use of the FM subcarriers. The limits were simple. FM stations could use them to offer "broadcast-like" services even if the services required special decoders (and usually payment) to receive. See Non-Broadcast Activities by FM Stations, 11 RR 1590 (1955). There were two major outcomes of this policy. Noncommercial education FM's offered talking services for the blind—readings of newspapers, books, and magazines—who could get special receivers from social service agencies. Commercial FM's offered "Muzak"—uninterrupted background music services for stores, restaurants, and, as its name "elevator music" implied, elevators. Later, the FCC authorized FM-Stereo. Stations could send one aural channel of programming on their main channel and the other on a "subcarrier"—a piggyback signal. The result, once sorted out by receivers, was stereo sound.

The goal of the subcarrier policies was to help the economics of FM stations. So long as the service was a struggling one, that was okay with it. By the mid 1970s, however, FM radio had overtaken AM radio as the dominant aural service—both economically and in terms of listenership. FM (and to a limited extent, financially pressed AM) broadcasters grew anxious to do other, potentially more profitable, things with their carriers and subcarriers. The result was a multistage push for "deregulation" of auxiliary services.

The FCC first gave FM broadcasters the right to use their SCA's for what is known as utility load management. FM stations were allowed to send coded signals to big electric users (e.g., large factories) that would automatically cut them off from electric power (and force them to use alternative sources of energy) when demand for electricity reached its peak. The result was a potential savings of millions, perhaps billions, of dollars for electric utilities. For the cost of special receivers at a few sites, plus some service charges paid to broadcasters, utilities might save the cost of building a new power plant costing billions. Whatever this was, however, it wasn't broadcasting. The policy opened the door to more flexible policies toward subcarrier uses for nonbroadcast purposes. The FCC took a hands-off attitude, authorizing the service but not caring how much broadcasters charged for it or how they did it, so long as whatever they did didn't degrade FM broadcast radio service. Subsidiary Communications Authorizations, 50 RR 2d 1169 (1981).

Before long, financially pressed AM stations concluded that they could handle utility load management too and asked the FCC for permission to add it to their carrier signals. Anxious to help AM stations out financially, the FCC gave them authorization, similar to that previously given FM, in 1984. AM Carrier Signals, 100 FCC 2d, 56 RR 2d 1292 (1984).

FM, however, wanted to do more. Their service could carry more complex piggyback signals, and they wanted the opportunity to fully exploit those opportunities. Broadcasting seemed to be peaking as a revenue source, and they hoped that these new services would bring in new profits. After getting the right to offer utility load management, they argued that they ought to be allowed to do more. They sought complete freedom from the old requirement that their services be "broadcast related." In 1983, the FCC gave them that freedom.

In FM Subsidiary Communications Authorizations, 53 RR 2d 1519 (1983), the FCC deregulated FM uses of SCA's. FM broadcasters could use their subcarriers for anything they could dream up—broadcast related or not—so long as what they did didn't interfere with their broadcast signal. FM

broadcasters had lots of things in mind; offering paging services (to compete with telephone companies), delivering specialized audio services (e.g., audio services tailored for doctors or business executives), delivering data services (e.g, commodities reports to farmers, stock quotations to business people), updated price lists to stores using automated scanners at checkout lines, and the like. The market for these services has not grown as quickly as the FCC and broadcasters hoped, but the FCC's rules permit broadcasters to explore them. Some are doing so with modest success. Subsequently the FCC gave similar freedom to AM stations, but given the limited amount of extra space in AM transmissions, they can't do many of the extra things FM can.

Television, however, also offers many opportunities to use subcarriers. Television uses FM sound and, like an FM broadcaster, a TV station has aural subcarriers. The FCC has deregulated those too, letting TV broadcasters explore new uses of their FM aural subcarriers as FM broadcasters see what they can do with their new options. The primary thing TV stations have done is to offer TV stereo sound, but the rules at least permit them to try other uses of remaining subcarriers. Television SCA Use, 55 RR 2d 1642 (1984). In addition to subcarriers, however, TV stations also have what's known as a Vertical Blanking Interval (VBI). Like film, TV achieves the illusion of motion by quickly flashing a series of still pictures before your eyes. In television, the "frames" are replaced thirty times per second. It's necessary to tell the television set when one frame has ended and when another has begun—in effect, tell the set to start to create another picture. The part of the TV signal that does this is the "vertical blanking interval." We set up our TV technical standards in 1941 and, when we did so, allowed substantial spectrum space for the VBI. It turned out there is room in the VBI for additional information.

The initial use for this was captioning for the hearing impaired. In the 1970s, the FCC set aside what was called "line 21" of the VBI for a captioning system. Hearing impaired persons could go to their local electronics store and purchase a decoder. The decoder would show captions, placed in line 21 of the VBI on the screens of TVs attached to it. Everybody without a decoder would be unaware that the captions were there. Shortly after that, the Commission generally authorized teletext services (a way of delivering electronic "text" to viewers or listeners equipped with special receivers and willing to pay for the service) in the VBI. Report and Order in Broadcast Docket No. 81–741, 48 FR 27054, 53 RR 2d 1309 (1983), aff'd on recon., 101 FCC 2d 287, 57 RR 2d 842 (1985). Finally, at about the same time that it deregulated FM subcarriers, the Commission decided that television broadcasters could use their extra VBI space for any purposes they might come up with, so long as whatever they did didn't degrade their TV broadcast service or interfere with the line 21 captioning system. Vertical Blanking Interval, 36 FCC 2d 31, 57 RR 2d 832 (1984). Many TV broadcasters adopted TV-stereo sound; quite a few used their VBI to cue electronic newsgathering units in the field (to provide a way for directors in station studios to tell reporters on the field that they were "on the air"), some broadcasters and networks experimented with using the VBI for teletext, and a few experimented, like their FM colleagues, with more exotic uses. So long as broadcast services were left unaffected, the FCC's policy was neutral. It believed minimal regulation was in the public interest and tried not to let broadcast regulatory principles (such as equal time or the fairness doctrine) intrude. It defined text services as "ancillary" to broadcasting and tried, with general success, to exempt them from broadcast policies such as the equal time provisions of the Communications Act of 1934. The FCC's current rules for SCA services are found at 47 C.F.R. §§ 73.293, 73.295, 72.319, 73.322 (1987). Those for VBI's occur at 47 C.F.R. sec. 73.646 (1987).

LPTV. Low-power television has been around for years in the form of satellite and/or translator stations. The principle of these older services is simple. Full-power TV stations can have coverage problems. Their service is often blocked, for example, by mountains. Almost since the start of broadcasting, it had been possible to put low-power TV stations on the air that retransmitted the programming of a nearby full-power TV station, usually after shifting it to another channel, in ways that could serve the areas with reception difficulty. For many years, however, such translators or satellite stations operated with significant legal restrictions. While they could retransmit another station's signal, they couldn't originate programming of their own, except in the event of an emergency and to appeal for funds to support the service. Otherwise, they just retransmitted the signals of nearby full-power TV stations.

Under President Carter, the National Telecommunications and Information Administration (NTIA, a part of the Department of Commerce) decided that more could be done with this service. A spectrum management study convinced NTIA that hundreds, perhaps even thousands, of Low Power Television Stations could be squeezed in among existing full-power stations without causing interference to those stations but, in the process, providing service to small areas. NTIA believed that these stations might do lots of things. They might serve very small communities, unable to support a full-power station. Alternatively, in urban areas, they might serve neighborhoods or regions, including those heavily populated by minority group members, that tended to get ignored by the full-power stations serving an area. The barrier to achieving these things was the FCC's limit that translators and satellite stations (the only low-power stations of their time) could only retransmit the programming of full-power TV broadcasters. NTIA asked the FCC to change that and to let low-power stations originate programming freely.

In 1982, the FCC went along. In line with its economic projections for the service (not optimistic) and with its general deregulatory philosophy of the time, the FCC imposed only minimal regulations. LPTV stations could originate whatever kind of programming they wished. That might be over the air broadcasting; it could be subscription (pay) scrambled services. It might mean hooking up to some satellite delivered service twenty-four-hours per day and doing no locally originated programming; that was okay too. The FCC recognized that LPTV was using broadcast spectrum space but decided that broadcast rules (like the equal time provisions of section 315) would apply only to locally *originated* programming, which a LPTV station was free to completely ignore. The rationale for all this deregulation was that LPTV was new, experimental, and risky. The FCC chose not to burden it with the full panoply of broadcast regulations in hopes that some people would be able to make something out of the service if substantial freedom was granted. See Low Power Television Service, 51 RR 2d 476 (1982). So far, that's not worked out as well as it was hoped. The number of LPTV stations is not large, few serve small communities or minority groups (as NTIA had hoped), and the service is still struggling. Many, however, still hope for better things for LPTV in the future.

MMDS. MMDS introduces a new concept—that of a common carrier. In theory, a common carrier provides a transmission service but offers that service to anyone willing to pay established rates regardless of what they want to transmit. A common carrier does not normally discriminate among customers and does not control content. MMDS is, technically, still a common carrier service, as were its predecessors. The Multichannel Multipoint Distribution Services evolved out of three earlier services: the Multipoint Distribution Service (MDS), Instructional Television Fixed Services (ITFS), and Private Operational Television Fixed Services (OTFS). All are technically similar. Unlike broadcasting, they all involved using microwave transmitters (higher in frequency than broadcast stations) to transmit programming from a central point to scattered sites. MDS operators often reached theaters to show things like prizefights; ITFS (and sometimes OTFS) operators sent programs to schools. Although the service had been around for years, it hadn't grown much. In the early 1980s, the FCC decided to change things. Educators tended to underutilize the ITFS and OTFS channels reserved for them; MDS, however, was limited to two channels per community—not enough, many argued. The FCC eventually set up a complex system under which some ITFS and OTFS spectrum space could be used for MDS services and under which a single MDS operator could get a package of several channels per community. The theory was that these newly defined Multichannel Multipoint Distribution Services providers could put together packages of about four channels per community and compete, at least where it was not yet offered, with cable television. Indeed, the industry is coming to be known as wireless cable. An MMDS operator might sell, for example, a movie channel, a sports channel, a news channel, and a general entertainment channel—perhaps at a package price comparable to that of a cable system. As with LPTV, the FCC adopted a deregulatory attitude. Its position was that the MMDS needed maximum freedom in order to prosper. See Multichannel Multipoint Distribution Service, 57 RR 2d 943 (1985). Current rules are found at 47 CFR §§ 21.90–21.910 (1987).

DBS. In 1979, COMSAT, our nation's major international communications provider, threw a surprise at the FCC. COMSAT filed an application for

a domestic Direct Broadcast Satellite Service, proposing to put a high-power satellite in a geosynchronous orbit and offer service to folks in the eastern U.S. using small (one meter or less) earth stations. COMSAT hoped to offer a cablelike service (three or four channels of pay programming) primarily for people cable television had not yet reached. The major problem was that DBS, as a service, was not recognized by the FCC when COMSAT applied. Given that, it filled out a broadcast station application, specifying its transmitter location as "space" and proposed, initially, to serve the U.S.'s eastern time zone. The FCC eventually approved the COMSAT application and, at the same time, began the process of developing and adopting general DBS rules. As with its policies towards other new services at the time, the FCC adopted a deregulatory attitude. It decided that it would leave up to DBS providers many decisions as to what kinds of services they would provide. Most significantly, it said that it wouldn't care, in advance, whether DBS applicants proposed to provide a broadcast service (as COMSAT had asked for), fully subject to the FCC's broadcast rules, or a common carrier service (where the satellite operator would simply put up the satellite and then let others buy time on it). The FCC tried to leave that choice to DBS service providers. See Report and Order in Gen. Docket No. 80–603, 90 FCC 2d 676, 51 RR 2d 1341 (1982).

This approach was challenged, first at the FCC and later in court, by the National Association of Broadcasters and others. They argued that the Communications Act of 1934 created two regulatory systems—broadcasting and common carriage—and that the FCC had to choose which DBS fit into. They claimed that the FCC could not leave that choice up to DBS operators. NAB took the FCC to court, and in 1984 the U.S. Court of Appeals for the D.C. Circuit sided, in part, with the broadcasters. While generally supporting the FCC's authority to authorize DBS service, and agreeing with most of the rules it adopted, the court told the FCC that it had to decide whether DBS was broadcasting or common carriage. *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 56 RR 2d 1005 (D.C.Cir. 1984). That lead to an FCC redefinition of broadcasting, discussed below.

The DBS service has not developed as the FCC and its early proponents hoped. The high-power (small earth station) service COMSAT had proposed has not come to pass in this country. Lower power (larger earth station) service, however, has grown into a modest market. Originally designed to provide programming to cable television systems, these lower power satellites now also serve the "Television Receive Only" (TVRO) earth station market. Both Congress and the FCC have intervened to try and protect the ability of backyard earth station owners to buy access to the services available from cable-oriented satellite delivered programmers. The FCC's minimal regulations for the DBS service are now found at 47 CFR secs. 100.1–100.51 (1987). The more important issue, however, is how the DBS controversy forced the FCC into reexamining an old issue—exactly how a broadcast service is defined.

The Redefinition of Broadcasting

The Court of Appeals decision in *NAB v. FCC* threw many of the FCC's plans for new services for a loop. More than anything else, the FCC was trying to prevent broadcast law (e.g., the equal time provisions of section 315) from applying to these new services. The Court, however, suggested that the FCC's ability to do this was limited, that the new services were either broadcasting, subject to most or all of those rules, or common carriage but not, as the FCC seemed to propose, some kind of a regulatory hybrid. To deal with this dilemma, the FCC began an inquiry into subscription (pay) video services. In 1987, it released a report and order that dealt with subscription services by redefining broadcasting. For years, the FCC had explained that services which were designed to be of interest to a large number of listeners and which could, in fact, be received by such a mass audience were "broadcasting." The FCC focused on the content of the service and its technological pervasiveness. In its 1987 order, however, the FCC switched its focus to the intent of the transmitter of information. If the transmitter intended that the service be freely available to all, then the service was broadcasting and fully subject to broadcasting law. If, however, the service provider intended that the service be available only to a more limited, paying, audience—and took concrete steps such as scrambling to limit access—then the service was "point to multipoint nonbroadcast service" and not subject to broadcast rules. Subscription Video, 2 FCC Rcd. 1001, 62 RR 2d 389 (1987). The new FCC policy was challenged in the U.S. Court of Appeals for the D.C. Circuit. The

court upheld the FCC's change, over the vigorous dissent of Judge Patricia Wald.

NATIONAL ASS'N FOR BETTER BROADCASTING v. FCC

849 F.2D 665 (D.C. CIR. 1988).

SENTELLE, Circuit Judge. This petition presents for review a decision by the Federal Communications Commission * * * concerning the status under Title III of the Communications Act of 1934 * * * of subscription video services, including subscription television ("STV") and direct broadcast satellite ("DBS") services. *Report and Order, Subscription Video*, 2 FCC Red 1001 Gen. Dkt. No. 85-305 (Feb. 17, 1987) ("*Report and Order*"). The petition by National Ass'n for Better B/casting ("NABB") takes issue with * * * the Commission's designation of subscription television and subscription direct broadcast satellite services as not being broadcasting within the meaning of the Act. * * * For the reasons outlined below, we uphold the decision of the FCC and deny the petition. * * *

Title III of the Act establishes a broad grant of authority to the Commission to regulate radio (and television) communications including classification of stations, prescription of the nature of services to be rendered, regulation of the apparatus used, study of new uses and encouragement of more and effective uses of radio, and ultimately the issuance of licenses to operate stations when it finds that the public interest will be served thereby.

The Act distinguishes between stations engaged in "broadcasting" and those providing fixed point-to-point services. Broadcasting is defined as the "[D]issemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." * * * The Act imposes certain obligations and restrictions only on those stations that engaged in "broadcasting." See *e.g.*, 47 U.S.C. §§ 310(b), 312(a)(7), 315, 317, 318, 325, 503(b), 508, 509. Therefore, the determination of whether a station is engaged in broadcasting can at times be critical.

In making the determination as to whether a particular transmission constitutes "broadcasting," the Commission, following Section 3(o) and its history, must look to the licensee's intent. However, while the language of the section clearly mandates that the intent of the licensee is crucial in making this determination, neither that section nor any other provision of the Act provides criteria for determining that intent. For many years the Commission looked to the content of the transmissions to ascertain the intent of the licensee, reasoning that "broadcasting" did not occur when the transmissions were designed to be of interest to only a limited number of listeners. * * *

More directly related to the issues now at bar, the question of subscription radio services vis-vis "broadcasting" arose in various contexts over the year[s]. In *Muzak Corp.*, 8 FCC 2d 581 (1941), the Commission considered a proposal to lease decoding equipment to subscribers, without which receipt of the transmission would be disturbed by a discordant sound or "pig's squeal" signal. The Commission at that time held this form of transmission to be broadcasting, since the service was "available to the public generally upon subscription therefor. * * *" *Id.* Later in the *1955 Report and Order*, the Commission concluded that subscription background music services of a sort were not "broadcasting" within the meaning of the Act because they were not primarily intended to be received by the public. *Nonbroadcast Activities by FM Stations*, 11 Rad. Reg. (P&F) 1590, 1591–92 (1955). This Court reversed that decision. *Functional Music, Inc. v. FCC*, 274 F.2d 543, 17 RR 2152 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959). However, that decision did not involve pure subscription services, but rather a system in which music was simultaneously broadcast to subscribers and other receivers, the broadcasters being able by the transmission of a specific tone to delete advertising and other messages from the receivers of subscribers, leaving them only with the music. This Court held that "broadcasting remains broadcasting even though a segment of those capable of receiving the broadcast signal are equipped to delete a portion of that signal." *Id.* at 548.

But subsequent court and agency decisions addressing "pure" subscription radio services (those receivable only by subscribers) concluded that such services are not "broadcasting" under the Act. * * * The Commission exhibited some inconsistency in its treatment of various forms of subscription television service as being or not being "broadcasting." However, with varying degrees of fidelity the Commission clung to a content-based approach, viewing the transmission of programming designed to appeal

to mass audiences as constituting "broadcasting," without regard to the technology employed. The combination of rapidly expanding technology and Commission uncertainty finally brought to this Court *National Ass'n of Bl casters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984). In that case, we vacated a portion of the underlying FCC decision which had held DBS satellite lessees distributing programming to individual homes not to be engaged in broadcasting. We did so noting that "[T]he test for whether a particular activity constitutes broadcasting is whether there is 'an intent for *public* distribution' and whether programming is 'of interest to the *general* * * * *audience*.' " *Id.* at 1201 (citations omitted) (emphasis in original). We held that "[T]he FCC at the time of the DBS decision was bound not to depart without reasoned explanation" from its prior determination that the appeal to general public as opposed to message-specific individuals distinguishes broadcasting from point-to-point service, and reminded the Commission of its prior words that "broadcasting remains even though a segment of the public is unable to receive programs without special equipment. * * *" Thereafter, in January of 1986, the Commission published a Notice of Proposed Rulemaking, proposing to classify subscription video services as point-to-multipoint nonbroadcast video services rather than as broadcasting. *Subscription Video Services*, 51 FR 1817 (1986). The Commission proposed to, and ultimately did, adopt new indicia of intent, abandoning the program content method, focusing on technology and re-classifying the SVS now before this Court as being outside the statutory definition of "broadcasting." *Report and Order, Subscription Video*, 2 FCC Red 1001 (1987). It is this decision of the Commission that petitioners now seek to have us vacate.

* * *

As indicated above, the Commission in its February 1987 Order abandoned the previous content-based intent determination, finding new indicia of intent relating to the use by the programming services of transmission techniques preventing the reception of the programming by nonsubscribers. * * * Under the new approach, such signals as STV and DBS, being unreceivable without special antenna converters and/or decoding equipment supplied by the licensee or programmer, are now classified by the Commission as "point to multi-point" services rather than broadcasting. Shortly put, the Commission's determination, focusing on the transmission and receipt techniques involved, rather than program content, is that the licensee or programmer intends the signal to be received only by subscribers and not by the general public. * * *

To restate the familiar, the Commission's "construction of a statutory scheme it is entrusted to administer" is entitled to great deference. * * * However * * * before we apply that deference we must first ask the question "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the Agency, must give effect to the unambiguously expressed intent of Congress." * * * Petitioner argues here that the Commission's determination is contrary to the express intent of Congress. First, petitioner asserts the absence of any adjective modifying the word "public" in Congress' definition of "broadcasting" in Section 3(o) of the Act, arguing that the Commission's new rule focusing on whether a signal is receivable by the "indeterminate" public or by a limited number of subscribers improperly departs from Congress' definition of broadcasting. NABB contends that since the programmer makes the signal available to as many of the public as will buy it, the communication is "intended to be received by the public" within the meaning of the Act. While having a certain facial appeal, this argument proves too much. No matter how broadcasting is distinguished from point-to-point or other nonbroadcasting transmissions, the nonbroadcast signals are intended for some part of the public and presumably, in commercial situations, for as many of the public as will "buy" them. Even under the old content-based criteria it was important to this Court that a signal was " 'of interest to the *general* * * * audience.' " * * *

Beyond the language of the statute, petitioner quite properly urges that we look to the history of the legislation to determine Congressional intent. * * * Specifically, petitioner notes that Senator Dill, a principal sponsor of the original legislation, in the debates concerning the legislation used the term "broadcast" in a broad sense inconsistent with the limitations the Commission now seeks to apply. Specifically, Dill stated, referring to the possibility of possible future "inventions" limiting the availability of particular transmissions to subscribers, "[I]f any *broadcaster* wants so to limit his listening public to those who have bought the attachment, while the other *broadcasters* allow everybody to listen, that is his privilege." 68 Cong. Rec. 3033 (1926) (emphasis

supplied). As petitioner further notes, Dill and other Senators extended that colloquy, repeatedly referring to stations using such an attachment as "broadcasters" contrasting them only with "general broadcasting." * * * Once again, while that argument has a certain appeal, it proves too much. Further review of the recorded debate and Senator Dill's involvement in it, makes it plain that the Senators did not purport to be using the term "broadcasting" in any technical sense. * * * It must be presumed that the Senators, like most of the rest of us, at times use "broadcasting" not in its statutorily defined sense, as in Section 3(o), but as if it were synonymous with "transmission." In sum, the legislative history in this case * * *, is at best ambiguous. * * *

Having determined that Congress has not unambiguously defined the meaning of "intended to be received by the public" in the definition of "broadcasting" and noting that the Commission has now done so, the principle of deference requires us to determine not whether the agency's choice is the best one, but merely whether it is"reasonable," and if so, afford it controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute. As the language of the Act and its ambiguous history reveal, this administrative decision cannot be held manifestly contrary to the statute. Therefore, we will uphold the Commission's new rule unless it is arbitrary or capricious. Petitioner would have us find arbitrariness and capriciousness in an alleged inconsistency between the new criteria and prior court decisions, specifically *NAB v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984). As we noted above, that decision did require the FCC "not to depart without reasoned explanation" from its prior conclusions that subscription services were broadcasting. However, the FCC in a properly noticed rulemaking has now supplied that reasoned explanation. Without rehashing the entire language of the *Report and Order*, the Commission's conclusions in paras. 41 and 42 that "subscription program services exhibit the most significant indicia of intent of the purveyor that the service not be received by the public," pointing to the special equipment requirements already mentioned and the "private contractual relationship" between the purveyor and the subscribing audience certainly constitute a reasoned explanation. The Commission's decision is neither arbitrary nor capricious and is within the authority given by Congress. Therefore, it must be upheld.

* * *

For the reasons set forth above, NABB's petition is denied and the decision of the Commission is affirmed.

WALD, Chief Judge, dissenting. I agree with former FCC Commissioner Rivera: "It looks like broadcasting, smells like broadcasting, tastes like broadcasting, has all the benefits of broadcasting, but it's not regulated like broadcasting because it didn't exist when the Communications Act was adopted?"

"Broadcasting" is defined in the Communications Act of 1934 as:

> * * * the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

47 U.S.C.A. § 153(o) (1982). After more than 50 years, the Commission reads the "public" to mean "an indeterminate public," and, therefore, concludes that dissemination to viewers who may pay to watch is never "broadcasting." * * * So narrow a view of the scope of the Act runs contrary to its avowed purpose.

* * *

When the legislative history of the Act and the purposes of Title III are given their due, the Commission's redefinition of "broadcasting," as excluding all types of pay TV, cannot tow the mark. Not only did the 1927 and 1934 Congresses consider the special fixtures and contracts that subscription services might entail, but they expressly declined to rest any regulatory distinctions upon these factors. Congress was right then and the Commission is wrong now; the pay factor alone is an insufficient basis for a regulatory exemption from the public interest requirements imposed upon those who control the airwaves.

* * *

We begin with the 1927 Radio Act, the first major federal legislation dealing with broadcasting. The Commission itself acknowledged that the Congressional debates and reports relating to the adoption of the 1934 Communications Act by themselves tell us little about what regulatory status Congress envisioned for subscription radio services. We can find substantial guidance, however, in Congress' deliberations on the pay subscription issue during the passage of the 1927 Radio Act. Because the relevant provisions of the 1927 Act were reenacted virtually without change in Title III of the Communications Act, these deliberations deserve serious consideration.

The 1927 Radio Act did not define "broadcasting," for, as its principal sponsor noted, "there is no question at all what is meant by " 'broadcasting'. * * *" The Congressional debates indicate that the common understanding then was that "broadcasting" included subscription services directed to a general audience as well as "free" broadcasting.

Congress designed the 1927 Radio Act as a broad and flexible measure, which would deal not only with current technology but also provide a framework for resolving future problems arising out of new radio technologies. * * *

More critically, throughout the 1927 Radio Act debates, Congress *expressly* contemplated the advent of subscription services and assumed that they would, at a minimum, be subject to the same regulation as other forms of broadcasting. This forecast of pay broadcasting services refutes the majority's claim that the Commission's reclassification results from "focusing on technology." * * *

In fact, Congress debated, not whether paid subscription service should be exempt from statutory restrictions, but, whether it should receive *more* regulation than free radio. * * *

As a result, the Senate bill contained an explicit provision to protect listeners from unreasonable subscription rates. The House also discussed a provision that would have prohibited subscription services entirely. Although neither provision was adopted, their consideration reveals that Congress did *not* intend to exempt those broadcasters who chose to provide service on a subscription, rather than advertiser-funded, basis from the requirements imposed under the Act. There was not a word mentioned about any such exemption throughout the numerous days of debate: the clear assumption was that subscription service would be subject to at least the same regulations as free broadcasting.

* * *

While Congress' principal concern in enacting the 1927 Radio Act was to end spectrum interference, another major purpose was to protect the public from potential abuse by powerful broadcasters. The legislators recognized the danger:

> [Broadcasting] can mold and crystalize sentiment as no agency in the past has been able to do. If the strong arm of the law does not prevent monopoly ownership and make discrimination by such stations illegal, American thought and American politics will be largely at the mercy of those who operate these stations.

67 Cong. Rec.. 5558 (1926) (statement of Rep. Johnson). The legislative history of the 1927 Radio Act leaves no doubt that Congress was concerned about political discrimination and manipulation by powerful media owners. * * * These concerns led the majority of the 1927 Congress to enact statutory restrictions on all broadcasters, which were reenacted as Title III of the Communications Act seven years later.

For example, the provision ensuring equal media access for political candidates evoked substantial debate over whether broadcasters should be made common carriers as to all candidates for public office. * * * Similarly, it was suggested that the equal access principle should be extended to all matters of public concern, not just political candidates. * * * Although these more intrusive measures were ultimately rejected in favor of the present equal access provision (then Section 18), they bespeak Congress's strong desire to control the power of the new broadcast media.

An interchange in the midst of House debate on the Radio Act makes clear that Congress intended its restrictions on the media's exercise of power to apply to subscription as well as free services. Representative Davis, the unsuccessful proponent of specific anti-monopoly provisions, was asked whether the bill, without his amendment, would "increase the danger of charging for listening in." * * * After responding that he believed that the bill should have forbidden "a charge to listeners," Davis listed provisions still in the bill that he thought would protect subscription listeners, to some degree, from abuse. * * *

Now, ironically, fifty years later, the Commission abandons those very restrictions that the 1927 Congress worried might be *insufficient* to protect subscribers to broadcast services.

* * *

When, seven years later, Congress replaced the 1927 Radio Act with the Communications Act of 1934, it reenacted in Title III the equal access provision and several other restrictions just discussed. Furthermore, there was not a word during the passage of the 1934 Act to suggest that Congress had in any way altered its 1927 view that protection against the dangers of political partisanship were just as necessary in direct-charge as in advertiser-funded radio broadcasting.

The 1934 Act defined "broadcasting" for the first time and did so in a way designed primarily to distinguish broadcasting from common carrier services. The precise language of Section 153(o) was drawn from the Washington International Radiotelegraph Convention of 1927, which defined a "broadcasting service" as "a service carrying on the dissemination of radio communications intended to be received by the public. * * *" The Commission makes much of the fact that the 1927 Convention excluded fixed, or point-to-point, services from broadcasting. This historical argument, however [does] not support the exclusion of present-day subscription services from the category of "broadcasting." Point-to-point services were defined *negatively* in the 1927 Convention as "radio communications of any kind between fixed points, *exclusive of broadcasting.* * * *" *Id.* (emphasis added). Thus point-to-point services were simply a residual category for those private-message uses of radio not "intended to be received by the public." The Commission's argument based on the dichotomy in the 1927 Convention is therefore circular. The Commission fails, moreover, to point to any 1927–1934 service that, like today's STV, provided information and entertainment programming to the general public yet was considered a "fixed service."

The definition of broadcasting in the 1934 Communications Act, contrary to the Commission's claim and following the lead of the 1927 Radio Act, was designed to be comprehensive and nontechnical, expressly excluding only common carrier services.[19] Indeed, Congress' desire that the 1934 Act provide a continuing comprehensive regulatory framework was evidenced by specific provision for the study and nurture of "new uses for radio, * * *" 47 U.S.C. § 303(g).

Finally, in the 1934 Act, Congress endorsed the balance between broadcaster freedom and public protection established in the 1927 Radio Act, by incorporating into Title III of the Communications Act the substantial part of the 1927 broadcast regulations. It notably failed even to mention, let alone reconsider, the subscription service issue. There is absolutely no basis on which to find a departure from its 1927 resolution that is subscription services developed, they should be subject to the same title III requirements as the rest of broadcasting.

In refusing now—fifty years later—to apply Title III regulations to subscription television services, the FCC and the majority have too casually swept aside the Congressional concerns that gave rise to Title III. In so doing, they have, I believe, evaded Congress's discernible intent—reflected in both the 1927 and 1934 Acts—to protect all the listening public, pay and free, from broadcaster abuse.

* * *

Apart from its contradiction of Congressional intent, the Commission's exemption of subscription TV from the Title III restraints imposed on other broadcasters makes no sense in light of the policies and purposes which underlie these provisions. Even if it had the power to allow such an exclusion, the Commission has provided no satisfactory rationale for distinguishing between viewer-funded and advertiser-funded television in this respect.

* * *

The Commission's attempt to base its redefinition of broadcasting on the technological details of subscription services does not withstand analysis. First, as we have seen the 1927 Congress already contemplated technologies that would allow radio broadcasters to prevent all but paying subscribers from receiving their signals. Thus customer-"addressability" is not a brand new phenomenon at all. While the necessity of special receivers or decoders may in some circumstances suggest an intent not to disseminate programs to the general public, the legislative history of the 1927 Act makes unmistakably clear that Congress did not mean for special equipment to provide a letter of transit out of the Act's public interest requirements.

Furthermore, the technology employed by most subscription television services, unlike cable, which Congress nonetheless chose to subject to Title III-like requirements, is more analogous to traditional television broadcasting than to any its currently unregulated communications cousins. STV and conventional broadcast services often have similar methods of transmission and may transmit the same kind

19. Of course, not all radio transmissions fall neatly into one of these two mutually exclusive categories; many point-to-point services not intended for the public, including radio uses for aviation, navigation, and industrial firms, police departments and taxis are neither broadcast nor common-carrier services. See First Report, 23 FCC at 541 (1957).

of information. For example, both types of service employ omnidirectional point-to-multipoint transmission patterns. They also have similar capacities to deliver information of the same amount and type over six-megahertz-wide channels.

STV licensees, like traditional broadcasting stations, normally possess "the ability to exercise editorial control over programming that is transmitted and of interest to the general public and that may entertain, inform, and persuade regardless of its subscription nature." Most important, both STV and conventional free service are used for the distribution of general interest video programming to the public. Thus, STV shares most characteristics of traditional broadcasting, including its primary one—*i.e.*, transmissions are directed toward "as many people as can be interested in the particular program as distinguished from a point-to-point message service to specified individuals," *National Ass'n of B/casters v. FCC*, 740 F.2d at 1201 ((citing *Subscription Television Service*, 3 FCC 2d 1, 9–10 (1966)).

At any rate, in *National Ass'n of B/casters*, we rejected the notion that simply because Congress does not specifically predict the development of a particular broadcast technology, it need not be regulated as broadcasting. * * * On close inspection there is nothing in the Commission's incantation of "technological change," to explain the deliverance of STV from all broadcast regulation, except perhaps the Commission's apparent desire to forego Title III regulation of as many burgeoning spectrum uses as possible.

The Commission claims that because STV involves a contractual relationship between the viewers and the service-provider, its regulatory status should be different from broadcasting. This distinction, however, is irrelevant for purposes of Title III. The Commission itself admits that a "subscription service provider would not ordinarily refuse service to as many members of the public as may be interested in receiving the programming in exchange for a fee * * *." * * * It seems disingenuous then to argue that merely because a fee is charged, these omnidirectional transmissions are not "intended to be received by the public," * * *. Subscription television providers obviously do not care about the identities of the particular individuals to whom their communications are transmitted; their real goal is to obtain revenues from any and all possible viewers. In that sense, they are just like newspaper publishers or movie producers—their products are aimed at the general public, so long as that public can pay.

The practical effect of the FCC's action is to remove the listener protections of Title III from that portion of the television viewing public that can afford to pay for subscription television. Yet there is no reason—consistent with the Act's emphasis on protecting the public from receiving one-sided partisan or propagandizing programming—to deny viewers statutory protections solely on the grounds that they have paid to view.

Ironically, Congress' original rationale for Title III regulation applies with even greater force to the paying audience in today's age of multi-million dollar election campaigns. The impact of one persuasive political candidate allowed exclusive use of a subscription video forum catering to a high income level TV audience might well be greater than that of a candidate with similar access to the more modest audience of a conventional broadcast station.

The Commission predictably makes the market-oriented pitch that because of their economic relationship to the service provider, subscription television viewers do not need Title III protection; if they do not like the political orientation of an STV channel, or if they object to some other aspect of its programming, they can cancel their subscription. But this possibility, even if realistic, does not distinguish them in any real sense from free TV viewers. Free TV viewers can also, at least in theory, influence program content through participation in TV rating polls and, more commonly, through their patronage of program sponsors. Yet, Title III protections are still deemed necessary to protect the public from broadcaster abuses. Congress's considered judgment is that, despite such leverage, individual viewers still need Title III's basic rules of fair play to protect against one-sided exposure or other forms of political manipulation through broadcasting.

The Commission, however, claims that at least in large cities STV viewers have access to other sources of information about candidates and that therefore the access requirements of Sections 315 and 312(a)(7) are superfluous. But this response proves too much; in large cities, free TV viewers as well have access to multiple channels yet neither Congress nor the FCC suggests that this vitiates the need for Title III regulation. The Commission's decision, on the other hand, skips too blithely over the plight

of the small cities and rural areas where pay TV could be the only source of information, political or otherwise. Its speculative assumption that no one will use pay TV in such areas for political purposes is not only condescending but unsupported.

The Commission further argues that it has not been made aware of any access problems with other services not subject to Title III requirements. * * * In replying to a similar argument in *Telecommunications Research & Action Center v. FCC*, 836 F.2d 1349 (D.C. Cir. 1988), we pointed out that it is the Commission's duty, not that of private citizens, to regulate service-providers subject to the Act and to prevent the abuses which Congress feared. Furthermore, subscription services are in their infancy; because the horse has stayed in the barn so far is no reason to prop the door open indefinitely.

* * *

Consider the following hypothetical; an ordinary free television station, maintaining its present programming format, switches to a subscription funding mechanism by sending a signal which requires special equipment to unscramble. * * * Under the Commission's view, the licensee would automatically be exempt from regulation as a broadcaster, even if its audience remained the same.

Yet consider the changes that would result, the effect on viewers in the same hypothetical. * * * The prohibition on alien ownership no longer applies, nor do the reasonable access and equal opportunity requirements for political candidates (inviting unfair political propagandizing). 47 U.S.C. §§ 310(b), 312(a)(7) and 315. The individual or business financing a program no longer need be identified (allowing commercial manipulation). 47 U.S.C. §§ 317 and 508. The station is no longer subject to the Commission's Equal Employment Opportunity rules (decreasing viewers' chances of exposure to diverse viewpoints). 47 CFR § 73.2080 (1987). And, as the majority itself points out, other results, silly and serious, ensue; game shows on that channel need no longer be run honestly, *see* 47 U.S.C. § 509 (prohibiting practices influencing, prearranging or predetermining the outcome in broadcast contests of knowledge, skill or chance), and unauthorized rebroadcasting of other stations' material can be done at will, *see* 47 U.S.C. § 325(a) (prohibiting broadcast stations from rebroadcasting material from other stations without authorization). Such results are surely inconsistent with what Congress intended for the viewing public, free or paying.

At the end of the day, the broadcaster's intent to provide radio transmissions to the "public" is the critical factor. It can not be, as the Commission suggests, the "indeterminancy" of a tune-in public as opposed to a definite subscription audience of several million that controls. Rather, whether the programming is directed to a general (paying or not) audience so that broadcast regulation in the public interest is necessary must be determinative. The intent of an STV provider to disseminate a generalized entertainment and information format to as many viewers as possible, rather than to direct specialized information to a narrowly defined group, is the common sense distinction upon which to rest the need for Title III protections. Clearly, subscription service-providers, soliciting the general public, ordinarily have such an intent. Therefore, it cuts against the thrust of the Communications Act to exempt all pay programming from Title III.

* * *

I dissent from the panel majority's opinion upholding the FCC's deregulation of STV because I can find no basis for the Commission's wholesale reclassification of subscription TV as nonbroadcasting. The drafters of the 1927 Radio Act and the 1934 Communications Act thought about pay service and decided to include it within the regulatory ambit of Title III. The Commission's technological and economic arrangements justifications for saying now—fifty years later—that it is not broadcasting are transparently inadequate. Nothing requires this Court to put its imprimatur on an agency interpretation like this one that flies in the face of the Act's purpose and intent. The Commission's coup-de-grace ruling that a free-to-pay switch is only a "minor change," which does not merit public input, tells the story; deregulatory zeal has overtaken rational statutory interpretation. The court does not do justice to its independent review function by acceding so readily to the Commission's evasion of Congressional directives.

COMMENT

The subscription video services proceeding leaves subscription services primarily regulated by the mar-

ketplace, rather than by FCC rules. It says that the FCC won't supervise whether or not these services serve the "public interest, convenience and necessity." How satisfactory is this outcome? If these services are the wave of the future, should they be as unregulated as the FCC believes?

The exact scope of the policy is unclear. It plainly applies to subscription television (a dead marketplace) and to DBS (a nonexistent marketplace). LPTV, on the other hand, is clearly regarded as a specialized broadcast service subject to some broadcast rules. Ancillary pay services, like SCA's and teletext, would seem to come under the new policy, but neither the FCC nor the courts make it crystal clear that they qualify. MMDS is technically, still, a common carrier service rather than a "point-to-multipoint nonbroadcast video service." Is it time for the FCC to reconsider something even more fundamental than the definition of broadcasting: the difference between a common carrier and a mass medium?

High Definition Television (HDTV)

One other "new technology" deserves brief mention—High Definition Television (HDTV). The TV transmission system used in the U.S. is antiquated. While nearly the state-of-the-art when adopted in 1941, the National Technical Systems Committee (NTSC) standard is now deficient in two major ways. First, its resolution is poor. Our TV "picture" consists of 525 lines running down the TV screen. European systems, adopted later than ours, use more and achieve slightly better picture resolution. The technology now exists to more than double the number of lines in a TV picture. The result would be a TV image that, even if projected in a large-screen display, would have resolution comparable to 35 mm. slides or film.

The other problem with our TV system is that its aspect ratio (height to width radio) is different than film. Our TV picture is fairly boxy; film uses an aspect ratio where the picture is wider, relative to its height, than TV. When films are transferred to television, they are either squeezed together optically or electronically (which makes the figures look like stick drawings) or the TV image cuts out part of the film image and concentrates only on the most important part of the film frame. In any event, films broadcast on TV just don't look like they look in theaters.

High definition television could fix this. Japanese electronics companies have developed equipment with an aspect ratio much like film and using 1125 (instead of 525) lines. In other words, the picture would have more than twice the resolution of our current picture and would provide an image looking much more like film. The problem with high definition television is that all the extra lines and the expanded aspect ratio require more spectrum space to transmit. Using current technology, HDTV can't be fit into the amount of spectrum space we've allocated for VHF and UHF television stations.

The result is a dilemma with both technological and economic implications. If we wish to have HDTV in this country, we have to find some place to put it in the spectrum. We might decide to reallocate all the existing TV stations to new places in the spectrum—essentially beginning TV broadcasting all over again. We might find some place in the spectrum where, for a while, TV stations could broadcast HDTV, continuing to broadcast in their old NTSC standard at the old places in the spectrum until HDTV had really caught on. Somewhere in the future, we could eliminate NTSC and put the VHF and UHF spectrum space it now occupies to other uses. Finally, we could try and develop a HDTV transmission system that (1) is compatible with existing NTSC policy and (2) uses an augmentation channel to contain the additional HDTV signal information. In plain English, we could try and come up with a system—unlike those now proposed by the Japanese, Europeans, and a few American manufacturers—that could be received by current receivers (although they wouldn't get the benefits of HDTV) and by a new generation of TV sets. We could also try to broadcast part of the HDTV in the current VHF and UHF parts of the spectrum, with the rest of the signal being transmitted someplace else in the spectrum. This system would not force current TV stations to reallocate. All these technological problems are before the Congress and the FCC as this book is written.

They are complicated by the economic aspects of this issue. If all TV reception, production, and transmission equipment must be replaced to really do HDTV, the process would involve much replacement of equipment, costing many billions of dollars. At the moment, the U.S. does not manufacture much "consumer electronics" equipment (home equipment) at all and very little transmission or pro-

duction equipment. A switch to HDTV could send billions of dollars of equipment sales abroad, most likely to Asia. Given concerns about the U.S. balance of payments situation, powerful political pressures are being exerted to try and prevent that from happening. At the same time, however, the technology exists, and it's an open-ended question as to whether the U.S. can delay its introduction long enough to adopt a system compatible with our current TV transmission system and build up an electronics manufacturing capability sufficient to profit from the sales of new equipment.

HDTV introduction as a terrestrial broadcast service (or, as some propose, a DBS service) can plainly be delayed by the Federal Communications Commission. Until the FCC approves a spectrum-using system, none can operate in the U.S. HDTV, however, might be introduced into the U.S. earlier by other nonspectrum using services. One possibility would be videotapes or video discs. Another would be cable television.

Non-Spectrum-Using Services

INTRODUCTION. Alternative, nonbroadcast, electronic communications services don't necessarily have to use the spectrum. One alternative, cable television, has been around since about 1949, although it grew explosively only in the 1970s and 1980s. Changes in the way our telephone system works have complicated the matter. The telephone system, once nothing more than a form of automated person-to-person (or company-to-company) communication, is used more and more as a means of one-to-many communication. That's the essence of mass communication, and these new uses force policymakers to figure out how to reconcile mass communication law principles with the quite different traditions of telephone law and regulation.

CABLE TELEVISION. Cable television began in this country in the 1940s as a way of improving broadcast reception for people in mountainous or otherwise "shadowed" areas. By the 1980s, it had become something quite different—bringing broadcast programming plus a whole host of other cable-only services (e.g., HBO, ESPN, CNN) to more than half of all the people in the U.S. with televisions. These developments stressed the legal system for regulating cable television, which had never established a definite legal or regulatory identity. The details of this are discussed later in this chapter.

CHANGES IN TELEPHONY. At about the same time, but especially accelerating after the break-up of AT&T in 1984, the law of telephony assumed mass communications aspects. Traditionally, telephone systems had been regarded as common carriers. They provided communications services but were neither responsible for nor much concerned about the nature of the content transmitted. In the 1980s, those attitudes changed. It became more and more possible to use the telephone for one-to-many communications. For example, one could place a phone call and receive such diverse services as stock quotations, "Dial a Santa" or "Dial an Easter Bunny" during holiday seasons, "Gab Lines" (appealing primarily to teens), or "Dial-A-Porn" (sexually explicit recorded or "live" content). The result was the need, still much in progress, to rethink how mass communications law applied to telephony. The direction was toward a new synthesis of common carrier and mass communications law, although the precise outcome was hard to predict. More about this is found at the end of the cable section of this chapter.

PROBLEMS OF BROADCAST LICENSING AND LICENSE RENEWAL

The structure of broadcast regulation under the Federal Communications Act of 1934 is rather extensive. Until 1981, licenses for broadcasting stations were granted only for a period of three years under the act. In 1981, section 307(d) of the act was amended to provide that the license period should be five years for television licenses and seven years for radio licenses. According to the act, licenses are to be granted by the Federal Communications Commission provided that "the public convenience, interest, or necessity will be served thereby." 47 U.S.C.A. § 307(a). At the expiration of the licensing period, the licensee is required to apply for renewal which may be granted

"if the commission finds that public interest, convenience, and necessity would be served thereby." 47 U.S.C.A. § 307(d).

The Sole Applicant Problem

The FCC encounters many problems in licensing decisions. One such problem occurs if only one applicant applies for a license. The rationale for FCC selection of licensees is that the FCC must choose among competing licensees. Suppose there is only one applicant? The problem arose in *Henry v. FCC*, 302 F.2d 191 (D.C.Cir. 1962), where a new applicant sought a permit to construct the first commercial FM station in Elizabeth, New Jersey. In support of the application, the applicant submitted identical programming proposals to support its license applications for FM facilities in Berwyn, Illinois and Alameda, California.

In *Henry*, the court upheld the FCC's authority to reject even the sole applicant for a new license:

> Appellants contend that the statutory licensing scheme requires a grant where, as here, it is established that the sole applicants for a frequency are legally, financially and technically qualified. This view reflects an arbitrarily narrow understanding of the statutory words "public convenience, interest, or necessity." It leaves no room for commission consideration of matters relating to programming.

The court concluded that the FCC could require that even a sole applicant for a license must show an "earnest interest in serving a local community by evidencing familiarity with its particular needs and an effort to meet them." The FCC's action in denying the license application in *Henry* was held to involve "no greater interference with a broadcaster's alleged right to choose its programs free from commission control than the interference involved in National Broadcasting Co."

The *Henry* case looks innocent enough. But it actually represents a challenge to the entire existing rationale for broadcast regulation. The theory of the *NBC* case was that broadcasting was a limited access medium. Therefore, the commission was under obligation to play a role in determining the "composition of the traffic." But if only one applicant seeks a station license, why should the commission play any role at all? The limited access rationale at this point presumably disappears. Does the *Henry* result suggest an alternative theory of broadcast regulation? If so, what is it?

The Enforcement Powers of The FCC and the Licensing Process

In enforcing the Federal Communications Act and the rules, policies, and regulations issued thereunder, the FCC has tremendous discretion in terms of the range and severity of the sanctions available to it. Thus, in *FCC v. Pacifica Foundation*, text, p. 828, the Supreme Court, per Justice Stevens, quoted with apparent approval the FCC's statement of its enforcement powers in Pacifica, 56 FCC 2d 94, at 96 fn. 3 (1975):

> The commission noted: "Congress has specifically empowered the FCC to (1) revoke a station's license, (2) issue a cease and desist order, or (3) impose a monetary forfeiture for a violation of Section 1464, 47 U.S.C.A. §§ 312(a), 312(b), 503(b)(1)(E). The FCC can also (4) deny license renewal or (5) grant a short term renewal, 47 U.S.C.A. §§ 307, 308."

ENFORCEMENT BY LETTER. One regulatory procedure used by the FCC is enforcement by letter. This usually takes place when a third party protests some programming decision by a licensee. On rare occasions, the commission dispatches a letter to the licensee stating its view of how the matter should be dealt with. There is some criticism of this method since it is very difficult to get judicial review of the course of action outlined by the FCC in a letter. These letters of reprimand, which is what they often are, constitute the so-called "raised eyebrow" technique. Do you see why such review would be difficult?

CEASE-AND-DESIST ORDERS. From a reading of the Federal Communications Act one might expect that section 312(b) would play an important role in enforcing the commission's programming standards. That provision states:

> Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this act, * * * or (3) has violated or failed to observe any rule or regulation of the commission authorized by this act or by a treaty ratified by the United States, the commission may order such person to cease and desist from such action.

Cease-and-desist orders have not been used on a widespread basis by the commission. The commission nevertheless professes to be willing to use them.

DENIAL OF THE APPLICATION FOR LICENSE RENEWAL: THE DEATH PENALTY. The most severe sanction in the FCC's enforcement arsenal is the commission's power to deny any application for license renewal. The industry calls this particular sanction "the death penalty." As a sanction, it exists more as a specter than a reality since it is rarely used. The FCC, of course, may also revoke licenses under specified circumstances. See, for example, the discussion of 47 U.S.C.A. § 312(a)(7) permitting revocation of a license where there has been willful failure to provide "reasonable access" to broadcasting to a "legally qualified candidate for federal elective office." See generally, text, p. 780. A halfway house between outright denial of the application for renewal is to grant an offending party a short-term renewal for one year rather than the five or seven year renewal authorized under the act. See 47 U.S.C.A. § 307(d).

As should become clear from the materials in this chapter, denial of a license renewal application is an unusual event in broadcast regulation. Although incumbency is not given a specific preference in the license renewal process in the Federal Communications Act, the "living law" certainly supports the view that such a preference for incumbency exists. Why does the FCC exercise such solicitude toward the applicant who has been licensed before? If the relatively few license renewal applications which have been denied are examined, it will be seen that misrepresentation by the licensee to the FCC is apparently deemed to constitute sin of a fundamental kind.

The leading case on misrepresentation as a ground for denial of license renewal is *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946), where Justice Jackson stated:

> The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose.

In *Robinson v. FCC*, 334 F.2d 534 (D.C.Cir. 1964), the FCC took the unusual step of refusing to renew a license in a case where, among other issues, the licensee had allocated a substantial amount of its programming to off-color jokes and remarks. One of the grounds for denial listed by the FCC was that Robinson had made misrepresentations in the license renewal proceeding. The court of appeals in a *per curiam* opinion affirmed the decision on that ground alone.

One of the FCC findings which the court of appeals refused to pass upon was the finding that some of the disc jockey program material was "coarse, vulgar, suggestive, and susceptible of indecent, double meaning." Judge Miller, concurring, thought this and other FCC findings should have been upheld by the court of appeals. Judge Miller speculated on why the court's opinion in *Robinson v. FCC* nervously avoided the obscenity issue:

"Perhaps, the majority refrained from discussing the other issues because of a desire to avoid approving any commission action which might be called program censorship."

See also *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), where a radio station in Media, Pennsylvania won the dubious honor of being the first licensee in the history of broadcast regulation to lose its license at renewal time because of failure to comply with the fairness doctrine.

On the basis of the majority opinion in *Brandywine*, it is apparent that the group defamation practices of WXUR were a serious factor in the massive citizen group effort to persuade the FCC to deny WXUR's license renewal application. But the group defamation problem, however large it may have loomed in stimulating the movement against renewal of WXUR, does not loom very large in the formal rationalization for the result reached either by the FCC or by the court.

In fact, just a count of judicial votes at the court of appeals level shows that the real basis for decision in *Brandywine* isn't even the fairness doctrine but is instead the misrepresentation issue. The only theory which the two judges of the three-judge appellate panel which reviewed the FCC decision in *Brandywine* agreed upon was that deception in obtaining a broadcast license is justification for denying renewal of that license. *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946).

Why is "misrepresentation" a preferred ground for denial of a license renewal application compared to denial on the basis of violation of a programming standard?

Standing and License Renewal

Who is entitled to set the enforcement process in motion? If a licensee seeks renewal of a license, who can challenge that renewal application? The law is clear that the other applicants for the license may certainly challenge a renewal application. Indeed, in such a case a comparative hearing must be held in which all the applicants are joined in a single proceeding and the merits and demerits of each applicant are weighed one against the other. See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

But who beyond the competitors of a licensee may institute and intervene in FCC proceedings? Until 1969, standing to challenge the programming activity of a licensee before the FCC was rather limited. The traditional view had been established by the Supreme Court's decision in *FCC v. Sanders*, 309 U.S. 470 (1940), where it was held that a showing of economic injury was necessary for standing before the commission. The theory behind this doctrine was that only someone who had an economically measurable interest in a proceeding could be considered to have a bona fide or nonmischievous stake in it. The theory proceeded on the belief that the public interest could best be defended by someone who was economically injured by the illegal behavior of a licensee since only he would have sufficient incentive to be steadily on the alert for noncompliance with the Federal Communications Act.

The difficulty with the doctrine was that it had an industry rather than a consumer orientation. The *Sanders* doctrine proceeded on the rather simplistic assumption that the competitive interests of other members of the broadcasting industry exhausted the range of values encompassed under the category of broadcasting in the "public interest." As a result, the stake of the listening audience in the social and informing function of broadcasting was largely unrepresented. An approach to standing based on economic injury reflected a quantitative rather than a qualitative approach to the problems of broadcasting. In 1966, a heavy assault was finally made on the *Sanders* doctrine.

OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST v. FCC

359 F.2D 994 (D.C.CIR. 1966).

BURGER, Circuit Judge:

The petition claimed that WLBT failed to serve the general public because it provided a disproportionate amount of commercials and entertainment and did not give a fair and balanced presentation of controversial issues, especially those concerning Negroes, who comprise almost forty-five percent of the total population within its prime service area; it also claimed discrimination against local activities of the Catholic Church.

Appellants claim standing before the commission on the grounds that:

1. They are individuals and organizations who were denied a reasonable opportunity to answer their critics, a violation of the Fairness Doctrine.
2. These individuals and organizations represent the nearly one half of WLBT's potential listening audience who were denied an opportunity to have their side of controversial issues presented, equally a violation of the Fairness Doctrine, and who were more generally ignored and discriminated against in WLBT's programs.
3. These individuals and organizations represent the total audience, not merely one part of it, and they assert the right of all listeners, regardless of race or religion, to hear and see balanced programming on significant public questions as required by the Fairness Doctrine and also their broad interest that the station be operated in the public interest in all respects.

The commission denied the petition to intervene on the ground that standing is * * * predicated upon the invasion of a legally protected interest or an injury which is direct and substantial and that "petitioners * * * can assert no greater interest of claim or injury than members of the general public." * * *

Upon considering Petitioners' claims and WLBT's answers to them on this basis, the commission concluded that

> serious issues are presented whether the licensee's operations have fully met the public interest standard. Indeed, it is a close question whether to designate for hearing these applications for renewal of license.

Nevertheless, the commission conducted no hearing but granted a license renewal, asserting a belief that

renewal would be in the public interest since broadcast stations were in a position to make worthwhile contributions to the resolution of pressing racial problems, this contribution was "needed immediately" in the Jackson area, and WLBT, if operated properly, could make such a contribution. * * *

The one-year renewal was on conditions which plainly put WLBT on notice that the renewal was in the nature of a probationary grant. * * *

The commission's denial of standing to appellants was based on the theory that, absent a potential direct, substantial injury or adverse effect from the administrative action under consideration, a petitioner has no standing before the commission and that the only types of effects sufficient to support standing are economic injury and electrical interference. It asserted its traditional position that members of the listening public do not suffer any injury peculiar to them and that allowing them standing would pose great administrative burdens.

Up to this time, the courts have granted standing to intervene only to those alleging electrical interference, *NBC v. FCC (KOA)*, 132 F.2d 545 (1942), aff'd, 319 U.S. 239, or alleging some economic injury, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). * * *

* * *

We see no reason to believe, therefore, that Congress through its committees had any thought that electrical interference and economic injury were to be the exclusive grounds for standing or that it intended to limit participation of the listening public to writing letters to the Complaints Division of the commission. Instead, the Congressional reports seem to recognize that the issue of standing was to be left to the courts. * * *

* * * Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience. * * *

There is nothing unusual or novel in granting the consuming public standing to challenge administrative actions.

* * *

After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.

Such beneficial contribution as these Appellants, or some of them, can make must not be left to the grace of the commission.

Public participation is especially important in a renewal proceeding, since the public will have been exposed to the licensee's performance, as cannot be the case when the commission considers an initial grant, unless the applicant has a prior record as a licensee. In a renewal proceeding, furthermore, public spokesmen, such as appellants here, may be the only objectors. In a community served by only one outlet, the public interest focus is perhaps sharper and the need for airing complaints often greater than where, for example, several channels exist. * * * Even when there are multiple competing stations in a locality, various factors may operate to inhibit the other broadcasters from opposing a renewal application. An imperfect rival may be thought a desirable rival, or there may be a "gentleman's agreement" of deference to a fellow broadcaster in the hope he will reciprocate on a propitious occasion.

Thus we are brought around by analogy to the Supreme Court's reasoning in *Sanders*; unless the listeners—the broadcast consumers—can be heard, there may be no one to bring programming deficiencies or offensive overcommercialization to the attention of the commission in an effective manner. * * *

As to these appellants we limit ourselves to holding that the commission must allow standing to one or more of them as responsible representatives to assert and prove the claims they have urged in their petition. * * *

We hold further that in the circumstances shown by this record an evidentiary hearing was required in order to resolve the public interest issue. Under Section 309(e) the commission must set a renewal application for hearing where "a substantial and material question of fact is presented or the commission for any reason is unable to make the finding" that the public interest, convenience, and necessity will be served by the license renewal. [Emphasis added.]

The commission argues in this Court that it accepted all appellants' allegations of WLBT's misconduct and that for this reason no hearing was necessary. * * *

The commission in effect sought to justify its grant of the one-year license, in the face of accepted facts irreconcilable with a public interest finding, on the ground that as a matter of policy the immediate need warranted the risks involved, and that the "strict

conditions" it imposed on the grant would improve *future* operations. However, the conditions which the commission made explicit in the one-year license are implicit in every grant. * * *

Assuming *arguendo* that the commission's acceptance of appellants' allegations would satisfy one ground for dispensing with a hearing, i.e., absence of a question of fact, Section 309(e) also commands that in order to avoid a hearing the commission must make an affirmative finding that renewal will serve the public interest. Yet the only finding on this crucial factor is a qualified statement that the public interest would be served, provided WLBT thereafter complied strictly with the specified conditions. * * * The statutory public interest finding cannot be inferred from a statement of the obvious truth that a properly operated station will serve the public interest.

* * * The issues which should have been considered could be resolved only in an evidentiary hearing in which all aspects of its qualifications and performance could be explored. * * *

We hold that the grant of a renewal of WLBT's license for one year was erroneous. The commission is directed to conduct hearings on WLBT's renewal application, allowing public intervention pursuant to this holding. Since the commission has already decided that appellants are responsible representatives of the listening public of the Jackson area, we see no obstacle to a prompt determination granting standing to appellants or some of them. Whether WLBT should be able to benefit from a showing of good performance, if such is the case, since June 1965 we do not undertake to decide. The commission has had no occasion to pass on this issue and we therefore refrain from doing so.

The record is remanded to the commission for further proceedings consistent with this opinion; jurisdiction is retained in this court.

Reversed and remanded.

The Petition to Deny and the Citizens Group: *Hale v. FCC*

Suppose a citizens group is dissatisfied with the job a broadcast licensee has been doing. What can it do? If another applicant applies for a license, the citizens group can enter the renewal proceeding as a result of the *United Church of Christ* decision. But if there is no hearing in which to participate, what can a citizens group do then? It can file a petition to deny with the FCC, requesting that the incumbent's license renewal application be denied. But a denial of a license renewal application will hardly be granted without a hearing, and a petition to deny does not usually lead to the grant of a hearing.

In *Hale v. FCC*, 425 F.2d 556 (D.C.Cir. 1970), two citizens of Salt Lake City challenged the license renewal application of an AM radio station in Salt Lake City, KSL–AM. KSL is wholly owned by the Mormon church as is one of the daily newspapers in Salt Lake City, the *Deseret News*.

The Salt Lakers seeking to defeat the license renewal application waged a tough battle for a hearing. Without a hearing, the citizens said, the testimony, both on direct and cross-examination, which would show the poor programming response by the licensee to community needs, would be difficult to obtain. Proof of the actual programming presented by KSL was made particularly difficult for the licensee because KSL did not even publish its daily program log in any Salt Lake daily newspaper.

The FCC adamantly refused to grant a hearing on the matter because the commission interprets section 309(d) and (e) of the Federal Communications Act to require a hearing only when the petition to deny reveals a substantial issue of fact requiring a resolution by hearing. Of course, the whole thing was a triumph of circular reasoning. Without a hearing the citizens group found it nearly impossible to show the material issue of fact concerning the licensee's performance which alone would produce a hearing.

The citizens took the FCC to court for its refusal to grant them a hearing. In a decision which sharply reduced the potential effectiveness of the petition to deny, the United States Court of Appeals for the District of Columbia affirmed the FCC determination not to grant a hearing. The case is an excellent illustration of the type of difficulty citizens groups experience in obtaining a hearing from the FCC through a petition to deny.

Petitions to deny are sometimes used to pressure stations into making changes particularly in the areas of personnel practices and minority programming policies. In view of the difficulties in obtaining a hearing on a license renewal, citizen groups sometimes file petitions to deny for their *in terrorem* effect and then bargain (often very successfully) privately

and directly with the stations involved. If the citizens group requests are granted, the petition to deny is withdrawn. Sometimes the citizens group bargains with the broadcaster first, usually just before renewal time, keeping the threat of filing a petition to deny in reserve for leverage. What criticisms would you make of these developments? What suggestions for corrections? See Barron, *"The Citizen Group At Work," Freedom of the Press for Whom?* 233–248 (1973).

The FCC has set forth standards which, within limits, generally allow broadcasters to enter into agreements with citizen groups. See In the Matter of Agreements Between Broadcast Licensees and the Public, 57 FCC 2d 42 (1975). The FCC made it clear that "a licensee is not obliged to undertake negotiations or agreements." If a licensee does enter into an agreement with citizens, the FCC stressed that "(t)he obligation to determine how to serve the public interest is personal to each licensee and may not be delegated, even if the licensee wishes to." The FCC warned that agreements should "not take responsibility for making public interest decisions out of the hands of a licensee."

On March 30, 1989, the FCC voted to limit broadcaster reimbursement of citizen's groups to "legitimate and prudent expenses." *Broadcasting*, 3 April 1989: 27.

Minority and Gender Preferences in the Licensing Process

In 1973, the U.S. Court of Appeals for the D.C. Circuit remanded a comparative proceeding where the FCC had declined to give enhanced integration credit to a group including two local black residents as owner/managers. The FCC's position was that it was "color-blind." The court, however, said that combined ownership interests and active managerial participation of the blacks gave their group an advantage in providing "broader community representation and practicable service to the public by increasing diversity of content, especially of opinion and viewpoint." Twenty-five percent of the residents to be served by the proposed station were black. *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), rehearing and rehearing *en banc* denied (1974), cert. den. 419 U.S. 986, 95 S.Ct. 245, 42 L.Ed.2d 194 (1974).

In subsequent years, the FCC, led largely by its Review Board, followed a policy of giving an enhancement to comparative advantages already held by applicants proposing integrated owners and managers when those persons were members of minority groups. See, for example, *Flint Family Radio, Inc.*, 41 RR 2d 1155 (Rev. Bd., 1977). For a summary of these developments, consult *West Michigan Broadcasting v. FCC*, 735 F.2d 601 (D.C. Cir. 1984). In plainer English, since the FCC already gave comparative advantages to groups where the owners promised to be active day-to-day managers, it simply decided to give even more comparative credit to applicants where the active owner/managers were minorities. These policies were not designed to promote minority ownership *per-se*. Rather, they were intended to increase the number of minority owners involved in day-to-day management. The assumption was that ownership diversity would result in viewpoint diversity and better service in the public interest.

Subsequently, the FCC developed a number of other policies directly intended to promote minority ownership. It established a "distress sale" policy, under which licensees designated for renewal hearings could sell their stations to minority controlled corporations, despite their pending difficulties at the FCC. While sales after designation for hearings are not normally permitted, these minority distress sales were allowed, but only if the sale was for no more than 75 percent of the fair market value of the station. Minority Ownership of Broadcast Facilities, 68 FCC 2d 979 (1978) and Clarification of Distress Sale Policy, 44 RR 2d 479 (1978).

The FCC also awarded tax certificates to owners of broadcast stations and, eventually, cable television systems, who voluntarily sold their properties to minority controlled corporations. Such certificates allow deferral (and sometimes complete avoidance) of capital gains taxes associated with sales. Minority Ownership of Broadcast Facilities, 68 FCC 2d 979 (1978), Minority Ownership in Broadcasting, 52 RR 2d 1301 (1982), and Minority Ownership of Cable Television Facilities, 52 RR 2d 1469 (1983).

Congress entered the scene in 1981. The FCC had established its low-power television service and was then inundated with thousands of mutually exclusive applications for the new licenses. Faced with more applications than it could possibly review under traditional comparative systems, the FCC asked Congress to authorize a long-discussed alternative to full-blown comparative proceedings: a lottery selection process. Congress accommodated. The Om-

nibus Budget Reconciliation Act of 1981, 95 Stat. 736–37 added to section 309 of the Federal Communications Act of 1934. New subsection 309(i) gave the FCC discretion to implement a lottery selection system in making grants to use the spectrum. In November 1981 the FCC opened a rulemaking proceeding to determine whether or not it should use this discretion. Notice of Proposed Rule Making in Gen. Doc. No. 81–768, 88 FCC 2d 476 (1981).

Within a few months, however, the FCC concluded that it did not want a lottery if it had to be run as Congress had prescribed. The FCC perceived two major problems. First, Congress said that the lotteries could take place only after the FCC had fully evaluated all the competing applicants. As far as the FCC was concerned, that wasn't any help with its paperwork mountain. The FCC preferred to pick first from all applicants, evaluate the "winner," give the license to the winner if basically qualified, and, if not, just pick again and repeat the process. That wasn't possible under the 1981 law.

Second, Congress had told the FCC to influence the lottery. Specifically, Congress ordered the FCC to give a "significant preference" in the lottery to "groups or organizations or members of groups or organizations, which are underrepresented in the ownership of telecommunications facilities or properties." The FCC professed to be somewhat confused by this statement. The legislative history indicated that Congress intended well-established minority groups (blacks, Hispanics, for example) to benefit, but, the FCC wondered, what was it to do about other groups (the handicapped, Italian-Americans, women) who might come forward and make a claim for a "preference"? Given all this, the FCC put the rulemaking on hold and asked Congress to reconsider its actions. Random Selection/Lottery Systems, 89 FCC 2d 257 (1982).

Congress did. In September 1982, Congress adopted new legislation more to the FCC's liking—although not totally satisfactory to it from most accounts. Under the new legislation, the FCC was able to do what it wanted—run the lottery first and fully evaluate the qualifications of winners only. In addition, Congress tightened up the preference system. Now the FCC was told to give "significant" preferences that would, (1) promote diversification of ownership and (2) promote minority ownership. Pub. L. 97–259, 96 Stat. 1087 (1982). The FCC reopened its rulemaking proceeding, 47 FR 45046 (1982), and eventually adopted a lottery system including systems for promoting minority ownership and diversification.

Under the new rules, which the FCC initially applied to low-power television and MMDS, applicants were required to disclose other mass media holdings and claim minority group member status in their applications. Preferences then flowed as follows. Applicants, more than 50 percent of whose ownership interests were held by minority group members, received a 2:1 preference—in other words, in the eventual random selection, it was as if they were thrown into the pot twice rather than once. Applicants whose owners in the aggregate held more than 50 percent of the ownership interests in no other media of mass communications also received a 2:1 preference. If applicants had owners who, in the aggregate, held more than 50 percent of the ownership in one to three other mass media applied, they received a 1.5:1 preference. Preferences are cumulative: a minority controlled group owning no other mass media properties would receive a 4:1 advantage. See Lottery Selection Among Applicants, 93 FCC 2d 952 (1983) and 47 CFR sec. 1.1622 (1987). In 1985, taking a strict approach to the 1982 legislation, the Commission refused to extend a lottery preference to women. Lottery Selection (Preference for Women), 102 FCC 21 1401 (1985), affd. *Pappas v.* FCC, 807 F.2d 1019 (D.C. Cir. 1986).

Women, however, were occasionally getting preferences in traditional comparative proceedings. The FCC's Review Board, an intermediate appellate stop between the administrative law judges and the commissioners themselves, had developed a female preference policy modeled on the minority policy that grew from TV 9. The Review Board sometimes "enhanced" already existing credit for integration of ownership and management when the integrated owners/managers were female. In 1983, this policy led the board to award a radio station license to a group with integrated female ownership/management over other competitors. *Cannon's Point Broadcasting* Co., 93 FCC 23 643 (Rev. Bd. 1983). The board refused to reconsider, 94 FCC 2d 72 (Rev. Bd. 1983), and in 1984, without published opinion, the full FCC denied review. FCC 84-161 (April 13, 1984). The losers, including James Steele, appealed.

In *Steele v.* FCC, 770 F.2d 1192 (D.C. Cir. 1985), disappointed applicant James Steele brought an action challenging an FCC policy that extended preferential treatment to female applicants for FM

radio stations in comparative proceedings. The court, per Judge Tamm, held that the FCC exceeded its statutory authority in extending such preferential treatment absent a factual showing that such a preference promoted the public interest in fostering diversity of viewpoints in mass media. Unlike the minority preference, the court was unable to find any "(c)lear Congressional endorsement of the FCC's female preference policy."

Did the rationale underlying minority preference extend to women? The court answered this in the negative. It ran against the constitutional grain to assume that membership in a minority group would cause members to have distinct tastes and perspectives that would consciously or unconsciously be reflected in distinct programming. Such an assumption was a "(m)ere indulgence in the most simplistic kind of ethnic stereotyping." Instead, an individual's beliefs and tastes "should be assessed on their own merits."

Although the court conceded that these assumptions may be of merit with regard to cohesive ethnic cultures, the court declared that "women transcend ethnic, religious, and other cultural barriers." Thus, it was simply "(n)ot reasonable to expect that granting preferences to women will increase programming diversity." Consequently, the court invalidated the female preference policy and held that the FCC had exceeded its authority because "(t)he Commission had been unable to offer any evidence other than statistical under-representation to support its bald assertion that more women station owners would increase programming diversity." In a dissent, Judge Wald argued that it was not necessary for the FCC to demonstrate in advance that increasing female ownership in broadcasting would result in programming more responsive to the perspectives of women: "The Commission's reasonable expectation is sufficient." *Steele* was decided on August 23, 1985.

On October 31, 1985, the court, *en banc*, granted a rehearing and vacated the panel opinion. The court then issued an order asking the parties to file supplemental briefs addressing the FCC's statutory authority to grant gender-based preferences and the constitutionality of such grants. In response, the FCC, in an astonishing turnaround, expressed doubt that either its female or minority preference policies satisfied statutory and constitutional requirements.

The FCC was especially concerned with several United States Supreme Court cases involving affirmative action programs that might have implicated the FCC's comparative preference, minority distress sale, and minority tax certificate programs. Collectively, these cases minimally established that classifications based on race or sex were inherently suspect and subject to strict or heightened scrutiny. In order to address these constitutional questions the FCC initiated a Notice of Inquiry (MM Docket No. 86-484), set forth below, in which it invited commenters to focus on establishing a factual record that demonstrated an actual (i.e., not *assumed*) nexus between the preference scheme and enhanced program diversity, and also on whether such ownership was necessary to achieve such diversity (i.e., whether the policy was narrowly tailored).

IN THE MATTER OF REEXAMINATION OF THE COMMISSION'S COMPARATIVE LICENSING, DISTRESS SALES AND TAX CERTIFICATE POLICIES PREMISED ON RACIAL, ETHNIC OR GENDER CLASSIFICATIONS

1 FCC RCD. 1315 (1986)

Notice of Inquiry
Adopted: December 17, 1986

* * *

Over the past decade, the Commission has administered three regulatory policies designed to achieve diversity in broadcast programming by fostering an increase in the number of broadcast facilities owned by minority group members and women. These policies are, first, the application of racial, ethnic, and gender preferences in comparative licensing proceedings for broadcast stations; second, the administration of the Commission's distress sale policy to permit minority acquisition of broadcast stations designated for hearing on basic qualifications issues; and third, the issuance of tax certificates for sales of broadcast properties to minorities. This proceeding was prompted by concerns as to the continuing legality of these policies as a result of the *Steele* case and several recent Supreme Court cases. The Commission asked for a remand in order to determine whether a record can be established that

would support the constitutionality of its preference scheme. The Commission also has decided that this is an appropriate occasion to determine whether comparative preferences, distress sales and tax certificates are appropriate as a matter of policy.

* * *

In a comparative licensing proceeding, the Commission selects the applicant best able to serve the public interest. See, *e.g.*, *Johnston Broadcasting v. FCC*, 175 F.2d 351 (D.C.Cir. 1949). To make this choice, the Commission has set out standard criteria to be considered in every comparative proceeding. See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) [hereafter *1965 Policy Statement*]. The commission explained in the *1965 Policy Statement* that there are two principal objectives on which it would focus in selecting among qualified applicants: (1) best practicable service to the public; and (2) maximum diffusion of control of the media of mass communications, generally referred to as diversification, in order to maximize diversity of programming. See generally *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 603–07 (D.C.Cir. 1984), *cert. denied*, 105 S.Ct. 1392 (1985). Integration of ownership and management is the single most important factor in evaluating best practicable service. Certain qualitative attributes of participating owners, such as local residence, participation in civic activities and broadcast experience have been used to enhance integration credit.

Minority and female ownership were not specifically addressed in the *1965 Policy Statement*. Instead, the Commission's current comparative preference policies had their origin in the Court of Appeals decision in *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C.Cir. 1973), *cert denied*, 419 U.S. 986 (1974). In *TV 9*, the Court stated that "we hold that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded." The Court, however, reversed the Commission's decision that minority preferences should be granted only after the minority applicant demonstrated a nexus to program diversity. The court concluded that it could be assumed that minority ownership would foster program diversity when there is integration of ownership and management. It therefore found that the Commission should have awarded merit to the minority owner in *TV 9* without first requiring a demonstration of a nexus between minority ownership and increased program diversity. In 1975 in *Garrett*, the court clarified its *TV 9* holding, stating that the "entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of black citizenry and that 'reasonable expectation' without 'advance demonstration' gives them relevance." See also *West Michigan Broadcasting Co.*, 735 F.2d at 606–616. Based on these directives from the court, the Commission concluded that minority ownership and participation should receive credit in the comparative process; it decided to treat this factor as an enhancement to the standard comparative criterion of integration of management, an element used to evaluate which competing applicant is likely to provide the best practicable service to the public. *WPIX, Inc.*, 68 FCC 2d 381 (1978).

In a subsequent decision, the Commission's Review Board applied the preference policy to women, concluding that "merit for female ownership and participation is warranted upon essentially the same basis as the merit given for black ownership and participation, but that it is a merit of lesser significance." *Mid-Florida Television Corp.*, 69 FCC 2d 607, 652 (Rev.Bd. 1978), *set aside on other grounds*. 87 FCC 2d 203 (1981). Finding the rationale of *TV 9* and *Garrett* applicable to women as well, the Board concluded that, if it were correct to assume that minority ownership promotes diversity, then the goal of diversification of programming would by the same logic likely be furthered by a policy that gives some comparative credit for female ownership of broadcast stations, given that women, like minorities, were infrequent owners of broadcast operations. However, based on the observation that women, unlike minorities, had not been "excluded from the mainstream of society" due to prior discrimination, the merit accorded integrated female ownership is of lesser weight than that awarded minority ownership. The Board followed the court's ruling in *TV 9* and did not require a showing of a nexus between female ownership and program diversity before awarding the preference.

Minority and female preference policies have been applied in numerous cases. In *Cannon's Point Broadcasting Co.*, 93 FCC 2d 643 (Rev.Bd. 1983), *reconsid. denied*, 94 FCC 2d 72 (Rev.Bd. 1983), *review denied*, FCC 84-161 (April 13, 1984), *appealed sub nom. Steele v. FCC*, No. 84-1176 (D.C.Cir. *motion for remand granted* Oct. 9, 1986), a comparative application proceeding for a new FM

broadcast station, the Commission's Review Board found that, between two competing applicants, neither of whom owned any other media properties and both of whom were to be sole owner-operators of the station, the woman's qualitative enhancement credits for 100% female integration and past local residence prevailed over the nonminority male applicant with an enhancement for prior broadcast experience. The commission affirmed this decision and the losing applicant appealed, challenging the constitutionality of the female preference policy.

A majority of a divided three-judge panel of the Court of Appeals held that the gender preference was invalid because it exceeded the Commission's statutory authority, *Steele v. FCC*, 770 F.2d 1192, 1199 (D.C.Cir. 1985), and it reversed the Commission's decision. The majority stated that the assumptions underlying the preference policies "run counter to the fundamental constitutional principle that race, sex, and national origin are not valid factors upon which to base government policy." *Id.* at 1198.

The court, *en banc*, granted a rehearing and vacated the panel opinion in an order released October 31, 1985. In a subsequent order on November 22, 1985, the court asked the parties to file supplemental briefs addressing the Commission's statutory authority to grant gender-based preferences and the constitutionality of such grants. The Commission responded with a brief that expressed its concern that both the female and minority preference policies do not at present satisfy statutory and constitutional requirements, because the Commission had never undertaken a proceeding to determine whether there is a nexus between the preference scheme and enhanced diversity, but instead had assumed such a nexus. At the same time, the Commission sought a remand so that it could conduct such a proceeding. *Steele v. FCC*, No. 84-1176 (D.C.Cir. *motion for remand filed* Sept. 12, 1986). That motion was granted in an order released October 9, 1986.

* * *

Applying the reasoning of TV 9 and in response to concerns raised in the Federal Communications Commission's Minority Ownership Task Force, *Minority Ownership Report* (1978), the Commission has adopted two additional minority ownership policies to encourage broadcasters to seek out minority purchasers. *Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 982–983 (1978). First, the Commission used its authority under 28 U.S.C. § 1071 to grant tax certificates to assignors or transferors whose voluntary sales of their broadcast stations would increase minority ownership where it determined that "there is substantial likelihood that diversity of programming will be increased." *Id.* The Commission contemplated issuing tax certificates where minority ownership would be controlling, and it would consider issuing certificates in other cases where "minority ownership [would be] significant enough to justify the certificate in light of the purpose of the policy. * * *" *Id.* at 983 n. 20 Section 1071 authorizes the Commission to issue tax certificates whenever a sale of a broadcast property is found to be "necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to ownership and control of radio broadcasting stations." Tax certificates allow the seller to defer capital gains taxation on the proceeds of the sale.

Second, the Commission extended its existing distress sale policy, which as originally adopted allowed incapacitated or bankrupt broadcasters to sell their stations, to include distress sales to prospective purchasers with significant minority ownership interests. Under this policy, the Commission permits a licensee whose license or whose renewal application is designated for hearing on basic qualifications issues to transfer or assign its license to a qualified minority applicant at a distress sale price, if the sale occurs before the hearing is initiated and the parties "demonstrate how the sale would further the goals" underlying the policy. The goals are described simply as "fostering the growth of minority ownership," *id.* at 982, because of the assumption in TV 9 that minority ownership and participation in management can be expected to increase diversity of program content as well as diversity of control of the media.

The application of this distress sale policy is the subject of a pending appeal in *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600 (D.C.Cir. *supplemental brief ordered* Sept. 18, 1986). Recognizing that the minority distress sale policy may implicate some of the same statutory and constitutional concerns as the comparative preference policy in *Steele*, the Commission asked the court to remand *Shurberg* for further Commission consideration after the Commission's Motion for Remand of the *Steele* case was granted. The Motion for Remand, filed October 23, 1986, is pending before the court.

The minority tax certificate policy, adopted in the same decision as the distress sale policy, was premised on the same diversity assumption, and therefore must necessarily be addressed in the instant proceeding.

The Commission adopted its policies fostering minority ownership and applied racial and gender preferences in comparative hearings to respond to the court's mandates in *TV 9* and *Garrett, supra*, that the FCC should assume that minority ownership affects content diversity. Thus, in compliance with the court's holdings, the Commission has applied its comparative policy solely on the basis of the amount of minority or female ownership reflected in management. Likewise, the Commission, in it *Policy on Minority Ownership of Broadcasting Facilities, supra*, based its distress sale and tax certificate decisions on the nature of the minority interests, *i.e.*, whether they were controlling.

As indicated previously, the Supreme Court decided several cases involving affirmative action programs that may implicate the Commission's comparative preference, minority distress sale and minority tax certificate programs. See, *e.g, Wygant v. Jackson Board of Education*, 90 L.Ed.2d 260 (1986); *Fullilove v. Klutznik*, 448 U.S 448 (1980); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). See also *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) ("heightened scrutiny" applied to gender-based classifications). Although these cases are primarily concerned with quota or set-aside affirmative action remedies for past discrimination, collectively these cases at a minimum establish the proposition that classifications based on race or sex are inherently suspect, presumptively invalid, and subject to strict or heightened scrutiny. Because there is no factual predicate against which to apply such cases, the Commission has initiated this proceeding to reexamine its policies based on racial or gender classifications and preferences.

As stated previously, the purpose behind each of these policies has been to expand program diversity. We find program diversity compelling governmental interest within the Commission's authority. Although we do not interpret the Supreme Court opinions to preclude consideration of race or gender in the licensing process under all circumstances, we do read these cases to mean that the use of minority/gender status must include a determination of whether their use is necessary and narrowly tailored to achieve their goals. The Commission's brief concluded, in response to the *Steele* court's questions, that racial or gender classifications may not be based on the assumption alone that integrated minority/female owners will result in increased content diversity. The Commission concluded, therefore, that an inquiry should be conducted to reexamine the legal and factual predicates of our policies. To this end, we seek to determine whether there is a nexus between minority/female ownership and viewpoint diversity, and whether such ownership is necessary to achieve this goal. The questions that follow are designed to elicit evidence on these points. They are also designed to focus attention on the effectiveness of these policies in achieving their intended goals and on other alternatives the Commission might or should consider. We also seek to determine whether, as a matter of policy, these preferences schemes should be retained.

COMMENT

The Notice of Inquiry was carefully crafted. It invited comment on constitutional matters. Were race- or gender-based preferences constitutionally infirm, as *Steele* suggested but as an earlier case, *West Michigan Bl casting Co. v. FCC*, 735 F.2d 601 (D.C.Cir. 1984) had rejected? Most importantly, it asked commenting parties to submit evidence on a crucial question: did ownership diversity result in program diversity? The *TV 9* court had assumed that it would do so, if only the FCC would grant licenses to groups including minority owner/managers. The FCC, in adopting most of its minority and female preference policies, had made the same assumption. The *Steele* case could be interpreted as inviting the FCC to bring back evidence to support the assumption. The FCC's Notice of Inquiry could be interpreted as just an objective effort to gather the relevant information.

However, the Inquiry was also subject to other interpretations. It was possible to view the FCC's request for a remand as a deliberate attempt to create a means to abandon, in one fell swoop, all the FCC's minority and female preference policies. FCC officials, especially then FCC Chairman Mark Fowler, had given several speeches questioning gender- or race-based preferences. Parties concerned that the FCC was going to use the proceeding to bring down

minority and female preferences that the 1986 FCC inherited from earlier commissions and did not like, appealed to the U.S. Congress for help.

It took a while, but Congress intervened. In a bill providing appropriations for Fiscal Year 1988, Congress forced the FCC to terminate its inquiry and to reinstate its minority and female preference policies. Public Law 100–202, signed December 22, 1987, gave the FCC money to continue operating into 1988, but said that it couldn't use any of that money to:

> repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC 2d 979 and 69 FCC 2d 1591, as amended 52 R.F.2d 1313 (1982) and Mid-Florida Television Corp., 60 FCC 2d Rev.Bd. (1978), which were effective prior to September 12, 1982, other than to close MM Docket No. 86–484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry. 101 Stat. 1329–31—1329–32.

Put simply, the Congress told the FCC to stop tinkering with the minority and female preference policies established and followed before *Steele*.

The FCC complied, terminating Docket No. 86–484, and reinstated delayed proceedings that turned on minority or female preference policies. See Minority Preference Policy [FCC Brief in *Winter Park Communications v. FCC*, 65 RR 2d 424 (1988).] The ban, of course, technically expired in fiscal year 1989—it only covered use of the 1988 continuing appropriations money—but generally the Congress had told the FCC that it liked minority and female preferences. In the past, the FCC has taken the hint from such directions in appropriations bills and not reinstated policies killed by appropriations legislation.

Thus, the *Steele* case came to an end, pending, of course, additional constitutional challenges to minority and female preferences. Several policies promoting minority and female ownership continued to be enforced by the FCC:

1. Minorities, clearly, received "enhanced integration credit" when minority owners are also significantly involved in management.
2. Women, it appears, receive similar credit—although this policy is much more firmly recognized by the FCC's Review Board than by the commissioners themselves. It can also be argued that the preference extends only to FM broadcast applications—the only applications to which it has so far been applied.
3. Minority owners (but not females), even if not integrated as managers, are favored under the FCC's distress sale and tax certificate policies.
4. Minority (but again not female) owners are also given statistical advantages in lotteries for new licenses, at least under some circumstances.

How long these policies will endure is questionable.

An indication of the ferment in the area of minority and gender preferences in broadcast licensing came when a panel of the United States Court of Appeals for the District of Columbia declared that the FCC distress sales policy was unconstitutional. See *Shurberg Broadcasting of Hartford v. FCC*, (D.C.Cir. March 31, 1989). The appeals court panel held that the distress sales policy violated a nonminority applicant's equal protection rights under the Fifth Amendment. Judge Silberman declared: "The distress sales policy is not narrowly tailored to remedy past discrimination because its effect is unrelated to the need for such a remedy, and it provides no procedures for insuring that the policy's beneficiaries have actually suffered from the effects of past discrimination." In a lengthy dissent, Judge Wald charged: "The majority has too rigidly applied Supreme Court affirmative action guidelines designed for other types of programs, ignored firm precedents in this Circuit, and failed to credit the explicit intent of Congress."

As if the *Shurberg* case did not generate enough confusion in the field of affirmative action in broadcast licensing, further uncertainty was set in motion by *Winter Park Communications, Inc. v. FCC*, Nos. 85-1755, 85-1756 (D.C.Cir. April 21, 1989). In *Winter Park*, another panel of the United States Court of Appeals for the District of Columbia Circuit by another 2–1 vote affirmed the FCC's policy of granting preferences to minority applicants in the comparative licensing process.

Judge Edwards said that two factors supported the conclusion that the FCC's award of minority enhancements was not constitutionally infirm. First, there was no"grant of any given number of permits

to minorities or a denial to qualified non-minorities of the ability to freely compete for permits." Minority status was but a factor in a "competitive multi-factor selection system". Second, the FCC's action in the *Winter Park* "came on the heels of highly relevant congressional action that showed clear recognition of the extreme underrepresentation of minorities and their perspectives in the broadcast mass media."

In a powerful dissent in *Winter Park*, Judge Williams relied on the Supreme Court holding in *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989), which invalidated a Richmond program requiring prime contractors to set aside 30 percent of the dollar amount of each city construction contract to minority business enterprises. Justice O'Connor for the Court invalidated the plan on two grounds. The first ground was that the city had not shown a compelling governmental interest to justify the plan. The second ground was that the plan was not narrowly tailored to remedy effects of past discrimination.

Furthermore, Judge Williams contended that the "line between a simple quota and a multi-factored allocation is painfully thin." The FCC has made clear, he contended, that it will "give race weight until the license ownership matches the racial composition of the population at large."

As a result of these two decisions, minority preferences in comparative licensing were valid but distress sales to minorities were not. Distinguishable situations? Some lawyers though so but others thought the two decisions were in hopeless conflict. They contended that en banc hearings were needed in both cases by the United States Court of Appeals for the District of Columbia to bring clarity to the role of affirmative action in broadcast licensing. See *Broadcasting*, April 24, 1989, p. 29.

The FCC Proposal To Substitute A Lottery Process For The Comparative Hearing For New Broadcast Applicants

On January 30, 1989, the FCC proposed a random lottery procedure (random selection) for new AM and FM radio stations and for new television stations. The FCC proposed the lottery scheme in place of the present comparative hearing procedure for new broadcast stations. See Notice of Proposed Rulemaking (FCC 89–28). The FCC said the comparative hearing process drained the resources of both the FCC and of potential licensees. Licenses were awarded on the basis of "marginal differences." The FCC said in further justification of its proposal that, since most cases were settled "amongst applicants, relatively few license grants are based on comparative factors." In addition, the FCC contended that a lottery would be less costly and would lower entry barriers.

The FCC described in a press release the way the lottery process would work as follows.

> By using lotteries to license new broadcast stations, the FCC could simplify significantly the licensing process. Applications would be screened for completeness prior to the lottery. After a tentative selectee had been determined, there would be an opportunity for the filing of petitions to deny. Instead of using the numerous comparative criteria currently in place, the lottery preferences would be those required by statute—diversification and minority ownership.
>
> The FCC cited evidence that the lottery process for low power television licenses has had favorable results for minority and diversification preferences. Sample lottery results from the last three years reveal that minorities won lotteries over 60 percent of the time when at least one minority applicant was involved in a lottery group. Applicants with only a diversity preference won lotteries 40 percent of the time when at least one applicant in the lottery group had a diversity preference.

Two FCC Commissioners wrote statements on the lottery proposal. Commissioner Quello questioned it, and Commissioner Dennis favored it.

RE: AMENDMENT OF THE COMMISSION'S RULES [FOR] COMPETING APPLICANTS

Commissioner Quello:

Our proposal to extend our lottery procedures to full service broadcast facilities evidences our concern that the Commission's existing comparative procedures appear unable to bring service to the public in a timely and cost effective fashion. While it is true that lotteries have been successful in reducing massive backlogs in the low power service, our experience with cellular [radio] demonstrates lotteries may create more problems then solutions.

While I am willing to explore expansions of lottery procedures to full service broadcasting, it may not be the panacea envisioned by its proponents. The

Commission's ultimate responsibility is to select the *best* applicant. In our attempt to expedite the process we must not lose sight this statutory obligation. If lottery procedures are ultimately employed, then the Commission must make sure that all lottery applicants have the highest financial, technical and character qualifications.

Commissioner Diaz:
Roughly 80 percent of all cases are settled. In those cases, we play no role in enforcing our comparative criteria. The applicant with the worst comparative qualifications can simply buy out the other applicants, and we will routinely approve the settlement.

The only certainty in our current process is the major investment of time and money. It typically takes five years or more for a case to wend its way through our labyrinthine process, which involves an ALJ, the Review Board, the Commission, and in many cases, the U.S. Court of Appeals. Some cases have dragged on for more than twenty years. In every case, delay imposes a severe cost—the public is deprived of service, even though two or more parties are ready and willing to go on the air.

Money is also a factor. We collect no data on what it costs to prosecute a hearing to its conclusion, though the legal fees alone are substantial. We do have information on settlements. In the first six months of 1988, we approved 43 settlements in FM proceedings. On average, the winner paid the other applicants a total of $66,600. In TV, with seven settlements, the average was $70,100. For our two AM settlements, the average was $15,850. How does the public benefit by having applicants pay each other $65,000–$70,000 before they even begin to build a station? Wouldn't that money be better spent on providing the public with the best possible broadcast service?

By using the statutory lottery plan, we seek to preserve two valuable aspects of comparative hearings—the significant credit awarded for diversification of ownership and minority ownership. We hope to ensure that minority applicants and those with no other broadcast interests will do at least as well under a lottery as they would in a comparative hearing. We will thereby continue to leave the door cracked open for new entrants into the broadcast industry. I will be especially interested in seeing comments addressing this issue. Nevertheless, I am concerned that the statutory lottery plan does not provide for any female credit. We have asked in the *Notice* whether we can continue to award credit for female ownership and I will be looking to the commenters for guidance. In addition, I welcome comment on the consequences of eliminating the integration factor, as our *Notice* proposes to do.

I respect the views of those who believe the FCC should make a case-by-case judgment in granting broadcast licenses, instead of holding lotteries. I am well aware of the Congressional exhortation, expressed in the legislative history of section 309, that we bear a "heavy burden" in adopting a lottery for full-power stations.

COMMENT

Will the proposed lottery scheme mean that female preference policies can no longer be continued? In *Ashbacker v. FCC*, text, p. 716, the Supreme Court directed the FCC to hold a comparative a hearing when applicants file mutually exclusive applications. Doesn't the proposed lottery scheme violate the *Ashbacker* doctrine?

When the Congress authorized licensing by lottery, both in 1981 and in 1982, it gave the FCC discretion as to when to use lotteries and when to proceed by more traditional comparative proceedings. The big question has been, if the FCC uses a lottery, *must it* then give diversification and minority "advantages"? The FCC's position has been that it has a choice about that, but a significant judicial decision suggests that it does not.

The FCC first adopted lotteries to deal with low-power TV and MDS applications. It said it would grant minority (and, much less controversial, diversification) advantages in such proceedings. Later, it adopted lotteries for dealing with competitive applications for most cellular radio markets, but refused to extend minority preferences there. Lottery Selection Among Applicants, 57 RR 2d 427 (1984). That position was upheld by the U.S. Court of Appeals for the D.C. Circuit, *National Latino Media Coalition v. FCC*, 816 F.2d 785 (1987). By then, the FCC was claiming that it had two sources for authority to hold lotteries—the 1981 and 1982 legislation that had added section 309(i) to the Communications Act and specifically authorized lotteries and several miscellaneous, previously existing, sections of the act [specifically, 47 U.S.C.A. §§ 154(i), 154(j), and 303(g)] that the FCC claimed gave it

the right to hold lotteries without granting minority preferences.

Based on this interpretation, the FCC, in 1985, adopted a Report and Order that, in effect, rejected the idea of applying minority advantages in lotteries among competing applicants for licenses for Instruction Television Fixed Services (ITFS) facilities, especially those proposing noneducational, pay services. The important point is that the FCC claimed it didn't have to give minority preferences if it wasn't acting under the 1981 and 1982 Congressional enactments embodied in section 309(i) of the act. In 1988, a U.S. Court of Appeals decision rejected that reasoning.

Writing for a unanimous three-judge panel, Judge Patricia Wald concluded that section 309(i) governed how *all* lottery selection systems for *all* licenses to use the spectrum should be conducted. Despite some prior decisions by the Court of Appeals suggesting otherwise, Judge Wald concluded that:

> Having sought broad authority to conduct a variety of random selection procedures * * * the Commission is now in a poor position to ignore the conditions upon which Congress granted that authority. If an agency seeks authority, even clarifying authority, from Congress, and Congress grants it conditioned upon certain provisions, the agency may not ignore these requirements. * * * The 1982 statute clearly mandates minority and media ownership diversity preferences in *any* [emphasis in the original] system of random selection. *Telecommunications Res. and Action Center v. FCC*, 836 F.2d 1349, 1361 (D.C.Cir. 1988).

This decision challenges a basic distinction the FCC had been making. It was willing to give minority advantages in competitions for mass media services—LPTV and even MMDS—but not in nonmass media services like cellular telephones. It had decided it would use lotteries to "break ties" even in mass media services without giving minority advantages. Lottery Selection Among Applicants, 57 RR 2d 427 (1984). ITFS was a kind of hybrid case, but as a result of its decision not to grant minority advantages there, the FCC was told that Congress intended minority advantages to attach whenever the FCC used a lottery to award a license for any spectrum-using service. Technically, however, the *Telecommunications Research and Action Center* case involved only ITFS. It remains to be seen if minority groups, involved in competitions for other kinds of licenses, successfully press the FCC to grant minority (and diversification) preferences in licensing cases that the FCC has previously attempted to distinguish from mass media services and exempt from the standards of section 309(i).

Problems of Incumbency and Media Diversification

In the Policy Statement on Comparative Broadcast Hearings, 5 P. & F. Radio Reg. 1901 (1965), the FCC emphasized maximum diffusion of control of the media of communications as a factor in selecting among competing applicants for the same facilities. The FCC also announced in the policy statement that it would be interested in full participation in station operation by the owner and in participation in civic affairs. The FCC also insisted that broadcast experience would be a factor, but that broadcast experience was not the same as a past broadcast record since, otherwise, newcomers would be unduly discouraged. The commission also renewed its support for the programming criteria set out in the Report and Statement of Policy Re: Commission en banc Programming Inquiry, 20 P. & F. Radio Reg. 1901 (1960) and declared that these criteria would still apply.

In *WHDH, Inc.*, 16 FCC 2d 1 (1969), the FCC held that where the applicant has substantial ownership interests in other media in the same community, his license renewal application may be denied if new applicants lacking such cross-media connections are the competing applicants for the same license. The broadcast industry did not react to the uncertainties of the *WHDH* decision calmly. The industry looked to Congress for an end to the insecurity the decision posed for renewal of existing broadcast licenses.

On January 15, 1970, the FCC came in with the new 1970 Policy Statement on Renewals. Under the policy statement, where there is a hearing in which an applicant seeks the license of an incumbent licensee, the incumbent shall be preferred if he can demonstrate substantial past performance not characterized by serious deficiencies. In such circumstances the incumbent "will be preferred over the newcomer and his application for renewal will be granted." The choice of the new criterion for renewal, "substantial service to the public," rather than, say, choosing the applicant deemed most likely to render the best possible service, was justified by the

FCC on the basis of "considerations of predictability and stability." It was feared that if there was no stability in the industry, if licenses were truly up for grabs every renewal, it would not be possible for a station to render even substantial service. See *Policy Statement On Comparative Hearings Involving Regular Renewal Applicants*, 22 FCC 2d 424 (1970).

If the investment of the broadcaster were not given protection, the FCC warned, there would "be an inducement to the opportunist who might seek a license and then provide the barest minimum of service which would permit short run maximization of profit, on the theory that the license might be terminated whether he rendered a good service or not."

The FCC's decision in the *WHDH* case was affirmed by the United States Court of Appeals for the District of Columbia on November 13, 1970. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C.Cir. 1970). The FCC's dramatic decision to take away a television station from an incumbent newspaper-affiliated licensee had been affirmed by the United States Court of Appeals. The *de facto* automatic renewal process had been dealt a body blow.[2]

Additionally, Judge Leventhal's opinion in *WHDH* fully approved the preference that the FCC gave to the diversification of control of media of mass communication criterion in the *WHDH* proceeding. In other words, the FCC had been authorized, in the Court's opinion, to choose a non-newspaper-affiliated applicant in a contest between it and a newspaper-affiliated incumbent. This endorsement of the diversification policy was an indication of rising judicial dissatisfaction with the FCC's automatic renewal policy.

The Citizens Communication Center Case: The Renewal Controversy Renewed

Citizens groups, the Citizens Communication Center, and BEST (Black Efforts for Soul in Television) challenged the legality of the 1970 policy statement.

The citizen groups prevailed, and on June 11, 1970, the United States Court of Appeals for the District of Columbia directed the FCC to stop applying the policy statement. The FCC order refusing to institute rulemaking proceedings was reversed. See *Citizens Communication Center v. FCC*, 447 F.2d 1201 (D.C.Cir. 1971).

The successful citizens groups had won on a three-pronged argument. First, the *Ashbacker* rule requiring a comparative hearing for mutually exclusive applicants was violated by depriving an applicant of such a hearing if the incumbent made a showing of substantial service. See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). Further, the policy statement was unlawful because it deprived a competing applicant of a hearing in violation of section 309(c) of the Federal Communications Act. Second, the policy statement was attacked on the ground that it violated the Administrative Procedure Act. Thirdly, the policy statement was successfully attacked on the ground that the decision unlawfully chilled the exercise of First Amendment rights.

The tremors the *Citizens Communication Center* case sent through the broadcast industry rivaled the FCC's *WHDH* decision of January 1969. The unwritten rule of automatic renewal for the broadcast incumbent was once more under attack.

Communications lawyers in Washington read with particular care footnotes 35 and 36 of Judge Wright's decision in the *Citizens Communication Center* case. See *Broadcasting*, June 21, 1971. Footnote 35 said licensees rendering "superior service" ought to be renewed, otherwise the public will suffer. What is necessary, therefore, is to define "superior service." Wright suggested some criteria, i.e., avoidance of excessive advertising, quality programming, and whether the incumbent reinvests his profits "to the service of the viewing and listening public." Do you see any dangers in replacing a "superior service" standard with a "substantial service" standard? Isn't the key factor the FCC's attitude toward the renewal process?

Footnote 36 of the decision appeared to indicate that the "public interest" requirement of the Federal Communications Act would prohibit any standard for making judgments in renewals which did not give a chance of entry to broadcasting to new interests and racial minorities. Can you formulate a standard which would do this? Is it possible that

2. As a result of the *WHDH* case, the Boston *Herald-Traveler* found it could not go it alone. As a result, the *Herald-Traveler*, which had been financially dependent upon WHDH, merged with the *Record-American*. Paradoxically, as a result of *WHDH*, Boston had one *less* daily newspaper voice. Was this cause for reconsideration of a policy aimed against cross-ownership? Indeed it had that effect, and *WHDH* would come to be considered an aberration.

Judge Wright's preference for a "superior service" standard could be used to frustrate concern over the fact that then "only a dozen of 7500 broadcast licenses issued are owned by racial minorities"?

In the exhaustive study of the comparative hearing procedure presented by the court in the *Citizens Communication Center* case, one of the most salient points made by Wright was his observation (footnote 28) that the FCC had in effect "abolished the comparative hearing mandated by § 309(a) and (e) and converted the comparative hearing into a petition-to-deny proceeding." Do you see why Judge Wright said this?

The issue of diversification of media ownership received considerable attention in the *Citizens Communication Center* case. This scrutiny was significant because it meant that the efforts of broadcast owners with newspaper affiliations to escape the *WHDH* ruling on the cross-newspaper ownership point were dealt a heavy blow.

The Reaction to the CCC Case

Since the 1970 policy statement was invalidated in the *Citizens Communication Center* case, the FCC has moved warily with regard to promulgating new guidelines for the renewal process.

The FCC did not appeal the CCC decision to the Supreme Court. The FCC decided it would rather "interpret" the CCC decision than appeal it and risk having the decision resoundly affirmed.

In *Fidelity Television Inc. v. FCC*, 515 F.2d 684 (D.C.Cir. 1975), cert. den. 423 U.S. 926 (1975), an incumbent licensee whose past performance was judged to be "average" (rather than the "substantial" performance needed to earn a "plus of major significance") was renewed against a challenger. While the challenger did not particularly impress the FCC either, the challenger did have a comparative advantage over the incumbent in terms of diversification of ownership interests. Nevertheless, the FCC renewed the incumbent's license, and the appeals court affirmed.

In a 1977 report and order the FCC terminated its inquiry into comparative renewal criteria to be used in determining whether a new applicant or the incumbent licensee should be chosen at renewal time. Although it said that its preference was that Congress should abolish the comparative renewal process, the FCC decided that until Congress chose to act on this suggestion it would act on a case-by-case basis. The past performance of the incumbent licensee would continue to be examined. "[T]he licensee's responsiveness to the ascertained problems and needs of its community, including minority * * * concerns, remains central." But the FCC emphasized that in making decisions at renewal time "there is no 'formula of general application' that can be applied to all cases."

See In the Matter of Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 66 FCC 2d 419 (1977).

The court of appeals decision affirming the FCC's *WHDH* decision was relied on by the FCC in the broadcast renewal applicant report in a manner which revealed how little was left of any likelihood that the FCC's *WHDH* decision would lead to any real changes in the renewal process: "Where the renewal applicant has served the public interest in such a substantial fashion it will be entitled to the 'legitimate renewal expectancy' clearly 'implicit in the structure of the [Communications] act.' *Greater Boston Television Corporation v. FCC.* * * *"

The *Broadcast Renewal Applicant* proceeding was affirmed by the court of appeals in *National Black Media Coalition v. FCC*, 4 Med.L.Rptr. 1085, 589 F.2d 578 (D.C.Cir. 1978).

The Central Florida Enterprises Case: Weighing the Claims of the Incumbent Against the Challenger?

Eventually, the FCC fashioned a comparative renewal approach satisfactory to the U.S. Court of Appeals. *Central Florida* sets forth some guidelines which, if applied, would mean that the incumbent will not necessarily prevail in renewal battles.

CENTRAL FLORIDA ENTERPRISES, INC. v. FCC

683 F.2D 503 (D.C.CIR. 1982).

WILKEY, Circuit Judge:

This case involves a license renewal proceeding for a television station. The appeal before us is taken from a new decision by the Federal Communications Commission ("FCC" or "the commission") after our opinion in *Central Florida Enterprises v. FCC (Central Florida I)* vacated the commission's

earlier orders involving the present parties. The FCC had granted the renewal of incumbent's license, but we held that the commission's fact-finding and analysis on certain issues before it were inadequate, and that its method of balancing the factors for and against renewal was faulty. On remand, while the FCC has again concluded that the license should be renewed, it has also assuaged our concerns that its analysis was too cursory and has adopted a new policy for comparative renewal proceedings which meets the criteria we set out in *Central Florida I*. Accordingly, and with certain caveats, we affirm the commission's decision.

Central Florida Enterprises has challenged the FCC's decision to renew Cowles Broadcasting's license to operate on Channel 2 in Daytona Beach, Florida. In reaching a renewal/nonrenewal decision, the FCC must engage in a comparative weighing of pro-renewal considerations against anti-renewal considerations. In the case here, there were four considerations potentially cutting against Cowles: its illegal move of its main studio, the involvement of several related companies in mail fraud, its ownership of other communications media, and its relative (to Central Florida) lack of management-ownership integration. On the other hand, Cowles' past performance record was "superior," i.e., "sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal."

In its decision appealed in *Central Florida I* the FCC concluded that the reasons undercutting Cowles' bid for renewal did "not outweigh the substantial service Cowles rendered to the public during the last license period." Accordingly, the license was renewed. Our reversal was rooted in a twofold finding. First, the commission had inadequately investigated and analyzed the four factors weighing against Cowles' renewal. Second, the process by which the FCC weighed these four factors against Cowles' past record was never "even vaguely described" and, indeed, "the commission's handling of the facts of this case [made] embarrassingly clear that the FCC [had] practically erected a presumption of renewal that is inconsistent with the full hearing requirement" of the Communications Act. We remanded with instructions to the FCC to cure these deficiencies.

On remand the commission has followed our directives and corrected, point by point, the inadequate investigation and analysis of the four factors cutting against Cowles' requested renewal. The commission concluded that, indeed, three of the four merited an advantage for Central Florida, and on only one (the mail fraud issue) did it conclude that nothing needed to be added on the scale to Central's plan or removed from Cowles'. We cannot fault the commission's actions here.

We are left, then, with evaluating the way in which the FCC weighed Cowles' main studio move violation and Central's superior diversification and integration, on the one hand, against Cowles' substantial record of performance on the other. This is the most difficult and important issue in this case, for the new weighing process which the FCC has adopted will presumably be employed in its renewal proceedings elsewhere. We therefore feel that it is necessary to scrutinize carefully the FCC's new approach, and discuss what we understand and expect it to entail.

For some time now the FCC has had to wrestle with the problem of how it can factor in some degree of "renewal expectancy" for a broadcaster's meritorious past record, while at the same time undertaking the required comparative evaluation of the incumbent's probable future performance versus the challenger's. As we stated in *Central Florida I*, "the incumbent's past performance is some evidence, and perhaps the best evidence, of what its future performance would be." And it has been intimated—by the Supreme Court in *FCC v. National Citizens Committee for Broadcasting (NCCB)* and by this court in *Citizens Communications Center v. FCC* and *Central Florida I*—that some degree of renewal expectancy is permissible. But *Citizens* and *Central Florida I* also indicated that the FCC has in the past impermissibly raised renewal expectancy to an irrebuttable presumption in favor of the incumbent.

We believe that the formulation by the FCC in its latest decision, however, is a permissible way to incorporate some renewal expectancy while still undertaking the required comparative hearing. *The new policy, as we understand it, is simply this: renewal expectancy is to be a factor weighed with all the other factors, and the better the past record, the greater the renewal expectancy "weight."*

In our view [states the FCC], the strength of the expectancy depends on the merit of the past record. Where, as in this case, the incumbent rendered substantial but not superior service, the "expectancy" takes the form of a comparative preference weighed against [the] other factors. * * * An incumbent performing in a superior manner would receive

an even stronger preference. An incumbent rendering minimal service would receive no preference. This is to be contrasted with commission's 1965 Policy Statement on Comparative Broadcast Hearings, where "[o]nly unusually good or unusually poor records have relevance."

If a stricter standard is desired by Congress, it must enact it. We cannot: the new standard is within the statute.

The reasons given by the commission for factoring in some degree of renewal expectancy are rooted in a concern that failure to do so would hurt broadcast *consumers*.

> The justification for a renewal expectancy is three-fold (1) There is no guarantee that a challenger's paper proposals will, in fact, match the incumbent's proven performance. Thus, not only might replacing an incumbent be entirely gratuitous, but *it might even deprive the community of an acceptable service and replace it with an inferior one.* (2) Licensees should be encouraged through the likelihood of renewal to make investments *to ensure quality service. Comparative renewal proceedings cannot function as a "competitive spur" to licensees if their dedication to the community is not rewarded.* (3) Comparing incumbents and challengers as if they were both new applicants could lead to a haphazard restructuring of the broadcast industry especially considering the large number of group owners. *We cannot readily conclude that such a restructuring could serve the public interest.*

We are relying, then, on the FCC's commitment that renewal expectancy will be factored in for the benefit of the public, not for incumbent broadcasters. * * * As we concluded in *Central Florida I*, "[t]he only legitimate fear which should move [incumbent] licensees is the fear of their own substandard performance, and that would be all to the public good."

There is a danger, of course, that the FCC's new approach could still degenerate into precisely the sort of irrebuttable presumption in favor of renewal that we have warned against. But this did not happen in the case before us today, and our reading of the commission's decision gives us hope that if the FCC applies the standard in the same way in future cases, it will not happen in them either. The standard is new, however, and much will depend on how the commission applies it and fleshes it out. Of particular importance will be the definition and level of service it assigns to "substantial"—and whether that definition is ever found to be "opaque to judicial review," "wholly unintelligible," or based purely on "administrative 'feel.' " [27]

In this case, however, the commission was painstaking and explicit in its balancing. The commission discussed in quite specific terms, for instance, the items it found impressive in Cowles' past record. It stressed and listed numerous programs demonstrating Cowles' "local community orientation" and "responsive[ness] to community needs," discussed the percentage of Cowles' programming devoted to news, public affairs, and local topics, and said it was "impressed by [Cowles'] reputation in the community. Seven community leaders and three public officials testified that [Cowles] had made outstanding contributions to the local community. Moreover, the record shows no complaints. * * *" The commission concluded that "Cowles' record [was] more than minimal," was in fact " 'substantial,' *i.e.*, 'sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal.' "

The commission's inquiry in this case did not end with Cowles' record, but continued with a particularized analysis of what factors weighed against Cowles' record, and how much. The FCC investigated fully the mail fraud issue. It discussed the integration and diversification disadvantages of Cowles and conceded that Central had an edge on these issues—"slight" for integration, "clear" for diversification. But it reasoned that "structural factors such as [these]—of primary importance in a new license proceeding should have less weight compared with the preference arising from substantial past serv-

27. *Id.* at 50 [quoting earlier proceeding, 60 FCC 2d 372, 422 (1976)]. We think it would be helpful if at some point the commission defined and explained the distinctions, if any, among: substantial, meritorious, average, above average, not above average, not far above average, above mediocre, more than minimal, solid, sound, favorable, not superior, not exceptional, and unexceptional—all terms used by the parties to describe what the FCC found Cowles' level of performance to have been. We are especially interested to know what the standard of comparison is in each case. "Average" compared to all applicants? "Mediocre" compared to all incumbents? "Favorable" with respect to the FCC's expectations? We realize that the FCC's task is a subjective one, but the use of imprecise terms needlessly compounds our difficulty in evaluating what the commission has done. We think we can discern enough to review intelligently the commission's actions today, but if the air is not cleared or, worse, becomes foggier, the FCC's decision-making may again be adjudged "opaque to judicial review."

ice."[31] Finally, with respect to the illegal main studio move, the FCC found that "licensee misconduct" in general "may provide a more meaningful basis for preferring an untested challenger over a proven incumbent." The commission found, however, that here the "comparative significance of the violation" was diminished by the underlying facts:

> Cowles did not actually move a studio away from Daytona Beach. It maintained two studios, one of which gradually became somewhat superior to the other. Thus, while a violation of the rule technically occurred, Cowles demonstrated no tendency to flout commission rules or *disserve the community of license.*

The FCC concluded that "the risk to the public interest posed by the violation seems small when compared to the actuality of depriving Daytona Beach of Cowles' tested and acceptable performance."

Having listed the relevant factors and assigned them weights, the commission concluded that Cowles' license should be renewed. We note, however, that despite the finding that Cowles' performance was " 'substantial,' *i.e.*, 'sound, favorable and substantially above a level of mediocre service,' " the combination of Cowles' main studio rule violation and Central's diversification and integration advantages made this a "close and difficult case." Again, we trust that this is more evidence that the commission's weighing did not, and will not, amount to automatic renewal for incumbents.

We are somewhat reassured by a recent FCC decision granting, for the first time since at least 1961, on *comparative* grounds the application of the challenger for a radio station license and denying the renewal application of the incumbent licensee.[38] In that decision the commission found that the *incumbent deserved no renewal expectancy* for his past program record and that his application was inferior to the challenger's on comparative grounds. Indeed, it was the *incumbent's* preferences on the diversification and integration factors which were overcome (there, by the challenger's superior programming proposals and longer broadcast week). The commission found that the incumbent's "inadequate [past performance] reflects poorly on the *likelihood of future service in the public interest.*" Further, it found that the incumbent had no "legitimate renewal expectancy" because his past performance was neither "meritorious" nor "substantial."

We have, however, an important caveat. In the commission's weighing of factors the scale mid-mark must be neither the factors themselves, nor the interests of the broadcasting industry, nor some other secondary and artificial construct, but rather the intent of Congress, which is to say the interests of the listening public. All other doctrine is merely a means to this end, and it should not become more. If in a given case, for instance, the factual situation is such that the denial of a license renewal would not undermine renewal expectancy *in a way harmful to the public interest*, then renewal expectancy should not be invoked.[40]

Finally, we must note that we are still troubled by the fact that the record remains that an incumbent *television* licensee has *never* been denied renewal in a comparative challenge. American television viewers will be reassured, although a trifle baffled, to learn that even the worst television stations—those which are, presumably, the ones picked out as vulnerable to a challenge—are so good that

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31. Here we have a caveat. We do not read the commission's new policy as *ignoring* integration and diversification considerations in comparative renewal hearings. In its brief at page 6 the commission states that "an incumbent's meritorious record should outweigh in the comparative renewal context a challenging applicant's advantages under the structural factors of integration and diversification." Ceteris paribus, this may be so—depending in part, of course, on how "meritorious" is defined. But where there are weights on the scales other than a meritorious record on the one hand, and integration and diversification on the other, the commission must afford the latter two *some* weight, since while they alone may not outweigh a meritorious record they may tip the balance if weighed with something else. See *Citizens*, 447 F.2d at 1209–09 n. 23.

That, of course, is precisely the situation here, since the main studio move violation must also be balanced against the meritorious record. The commission may not weigh the antirenewal factors separately against the incumbent's record, eliminating them as it goes along. It must weigh them all simultaneously. * * *. We are convinced, however, despite some ambiguous passages like the one just quoted in the preceding paragraph, that the Commission has followed the correct procedure here. See, *e.g.*, 86 FCC 2d at 1018. Thus the commission's conclusion that diversification and integration are to be given "lesser weight" than renewal expectancy does not mean that they were or will be given *no* weight. The relative weight to be given these factors will vary, depending on how much or how little diversification or integration is at stake. Here, as stated in the text, the commission did consider the degree of Central's integration advantage ("slight") and diversification advantage ("clear") 86 FCC 2d at 1009–10.

38. In re Applications of Simon Geller and Grandbanke Corp., FCC Docket Nos. 21104–05 (released 15 June 1982). We intimate no view at this time, of course, on the soundness of the commission's decision there; we cite it only as demonstrating that the commission's new approach may prove to be more than a paper tiger.

40. Thus, the three justifications given by the commission for renewal expectancy, *supra*, should be remembered by the FCC in future renewal proceedings and, where these justifications are in a particular case attenuated, the commission ought not to chant "renewal expectancy" and grant the license.

they never need replacing. We suspect that somewhere, sometime, somehow, some television licensee *should* fail in a comparative renewal challenge, but the FCC has never discovered such a licensee yet. As a court we cannot say that it must be Cowles here.

We hope that the standard now embraced by the FCC will result in the protection of the public, not just incumbent licensees. And in today's case we believe the FCC's application of the new standard was not inconsistent with the commission's mandate. Accordingly the commission's decision is affirmed.

COMMENT

Under the FCC renewal policy described by Judge Wilkey in *Central Florida II*, will an incumbent television licensee which has other media affiliations be in a worse or better position in a renewal contest with a new applicant which has no media affiliations?

An interesting post-*Central Florida Enterprises* renewal case involving the weight to be given the renewal expectancy factor was *Simon Geller*, 91 FCC 2d 1253, 52 R.R.2d 709 (1982). Simon Geller was the sole owner, operator, announcer, technician, salesman, and licensee of WVCA, the only broadcast station in Gloucester, Massachusetts, population 28,000, twenty-five miles from Boston. Geller has held the license for more than twenty years. In 1968, Geller began to broadcast only symphonic music.

In his 1975 renewal application, Geller proposed an exclusively symphonic music format with only a small amount of nonentertainment programming. (In the license period immediately prior to the 1975 renewal, Geller broadcast a total amount of less than 1 percent nonentertainment programming.) Grandbanke Corporation challenged Geller's license application and proposed a "musical medley" with approximately 28.7 percent of its broadcast week devoted to nonentertainment programming. A comparative hearing was held. The administrative law judge found that Geller was entitled to a renewal expectancy because of his favorable past record and granted him the license renewal.

The FCC, although agreeing with the ALJ's conclusion that both applicants were "basically qualified," denied Geller's renewal application and granted the license to Grandbanke. The FCC said that even though Grandbanke operated several other broadcast stations and Geller has no other media affiliations, Geller was entitled only to a moderate rather than strong preference on the diversification of ownership criterion: "With no news, no editorializing and virtually no public affairs programming, Gloucester does not hear a separate information voice—indeed *it hears no information at all*. Therefore, while Geller's diversification showing is technically superior to Grandbanke's, he should receive no strong preference in this regard."

Geller appealed the FCC order denying him license renewal. The court of appeals remanded the case back to the FCC. See *Geller v. FCC*, 737 F.2d 74 (D.C.Cir. 1984). Judge Mikva began his opinion by relying on *Central Florida Enterprises*: "(W)e have too long hungered for just one instance in which the FCC properly denied an incumbent's renewal expectancy." But *Geller* wasn't that long sought case. The FCC hadn't followed its own precedents with respect to the factors governing comparative renewals: "Therefore, while we affirm the Commission's denial of the incumbent's renewal expectancy, we remand the case so that the FCC can recalculate the comparative factors."

Judge Mikva's opinion in the court of appeals in *Geller* is useful because it illustrates that the incumbent need not necessarily prevail under *Central Florida Enterprises*. The decision also illustrates that, although deregulation has removed many obligations from licensees, some still remain. The court of appeals pointed out that although *Geller's* formal ascertainment requirements had been eliminated, the licensee still must "determine the major issues in the community." The court of appeals in *Geller* quoted from its decision approving the deregulation of radio: "For a radio licensee to provide programming responsive to issues facing the community, it must first ascertain just what those issues are." See *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.D.Cir. 1983).

The student will recall that in its decision in *Office of Communication of the United Church of Christ* affirming the deregulation of radio, Judge Wright emphasized that licensees still had an obligation to provide issue-responsive programming. Judge Mikva picked up on this in the *Geller* case:

> Geller failed to comply with these substantive requirements. The (FCC) found that "Geller broadcast no

news, no editorials, and none of his (nonentertainment) programming was locally produced. None of his programs, moreover, were presented in response to ascertained community needs and problems." 90 FCC 2d 265. Because Geller had not adequately ascertained community needs he could not, by definition, air responsive programs. Thus, it was reasonable for the (FCC) to conclude that Geller's previous service did not warrant a renewal expectancy.

However, the court of appeals in *Geller* thought the FCC improperly changed its approach to the diversification of ownership criterion in a way which was inconsistent with its precedents. In the past "diversity of ownership" had been the "litmus test for diversity of viewpoints." For this and other reasons, the court of appeals remanded the *Geller* case back to the FCC. On remand, the FCC awarded *Geller* his license renewal. See *Simon Geller*, 102 FCC 2d 1443, 59 RR 2d 579 (1985), appeal dismissed, *Grandbanke Corp. v. FCC*, No. 86–1230 (D.C.Cir. February 6, 1988).

Reforming the Renewal Process

On June 23, 1988, the FCC issued a *Second Further Notice of Inquiry and Notice of Proposed Rule Making, In the Matter of Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, BC Docket No. 81–742. A major proposal in this sixty-eight page statement was that the comparative hearing process would not focus on programming but on compliance with the FCC's rules and policies. As Commissioner Dennis explained in a separate statement: "Under this alternative, we would still require licensees to maintain issues/programs lists and to broadcast issue-responsive programming to ensure that licensees meet public interests goals. But we would no longer force Administrative Law judges to assume the role of TV critics, assessing the quality of each station's program service. The compliance-based approach could potentially allow us to apply a more consistent set of standards and to complete hearings more quickly, while still giving challengers their full legal rights under the Communications Act."

The FCC explained its new proposal as follows:

> [W]e believe that it would be helpful at this juncture to consider portions of two legislative proposals referred to earlier—S. 1277 and H.R. 3493.[17] Commenters should be aware that, procedurally, these legislative proposals would impose a two-step process, which generally eliminates comparative renewal hearings. In the first step, an incumbent's record is reviewed, on a non-comparative basis, to determine whether it has provided a meritorious level of service in response to community needs and whether there have been any serious violations of the Communications Act or Commission rules and policies. If these requirements have been met, then the incumbent's license is renewed. However, if the licensee has failed to satisfy these public interest tests, then, after an evidentiary hearing, its license renewal application may be denied. In the second step, competing applications would be accepted for the frequency in question, necessitating a comparative hearing to determine the best applicant if two or more mutually exclusive applications are filed. Presumably, the incumbent could also file for the frequency.
>
> In suggesting examination of portions of these bills, we are not proposing the use of a two-step procedural approach which obviates the need for comparative renewal hearings. Rather, we believe that consideration of the programming tests and other factors these bills use will help us in evaluating the various tests which we could use to determine whether a renewal expectancy is appropriately awarded in the context of our rules and procedures.
>
> Under S. 1277, a broadcaster is renewed if, in the case of a radio licensee, its "programming as a whole has been meritorious and has responded to the interests and concerns of the residents in its service area, including through the coverage of issues of local importance." In the case of a television licensee, in addition to meeting this obligation, the licensees must also have provided meritorious service in "the nonentertainment programming and the programming directed towards children." In addition, the licensee must not have committed any willful or repeated failure to observe the Act or our Rules and must remain qualified under § 308(b) of the Act.

17. *See, e.g.*, S. 1277, the Broadcasting Improvements Act of 1987, 100th Cong., 1st Sess. (1987), introduced on May 27, 1987, by Senators Daniel Inouye and Ernest Hollings; H.R. 3493, the Broadcast License Reform Act of 1987, 100th Cong., 1st Sess. (1987), introduced on October 15, 1987, by Congressman Al Swift; and H.R. 1140, the Broadcast License Renewal Act of 1987, 100th Cong., 1st Sess., introduced on February 19, 1987, by Congressmen Tom Tauke and W. J. Tauzin.

> H.R. 3493 contains a similar test for determining whether a licensee is entitled to renewal. Specifically, it would grant renewal to a licensee which has provided "meritorious service responsive to issues, problems, and concerns of the residents of its service area" and which has committed "no serious violation" of the Act or our rules or policies and has committed no other violations which, taken together, constitute a pattern of abuse. In addition, H.R. 3493 adds features that are similar to our television and radio deregulation orders to the extent of permitting a licensee, in determining which issues to address and what responsive programming to air, to consider the composition of its audience, the number of other radio or television stations serving its service area, and the degree to which the programming of those stations has addressed these needs. H.R. 3493 also requires that, in determining whether a licensee's programming has been meritorious, the Commission shall accept the judgments of licensees concerning the issues addressed and the nature, duration, frequency, and scheduling of responsive programming, provided that such judgments are reasonable in the circumstances and made in good faith. It is also similar to the test set forth in the radio and television deregulation orders for reviewing licensee performance—that is, reasonableness in the selection of issues and in the broadcasting of responsive programming.

The student should recall that Judge Wilkey in *Central Florida Enterprises* observed caustically that "it would be helpful if at some point the commission defined and explained the distinctions, if any, among: substantial, meritorious, average" etc. Judge Wilkey also observed with similar asperity: "We are especially interested to know what the standard of comparison is in each case." Even standards oriented to issue-responsiveness and compliance still have to provide a calculus upon which comparative estimates are based. Do these new FCC proposed standards for comparative hearings renewal meet this need? Do they meet it where the incumbent seeks renewal?

PROGRAMMING, THE PUBLIC INTEREST, AND DEREGULATION

The Communications Act of 1934 and its predecessor, the Radio Act of 1927, were somewhat schizophrenic about the regulation of broadcast content. One one hand, section 29 of the Radio Act (44 *Stat* 1162 [1927], now section 326 of the Communications Act of 1934), prohibited FRC/FCC censorship:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. * * *

On the other hand, section 4(b) gave the FRC the power to "prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class," section 18 required that broadcasters provide "equal opportunities" to candidates for public office to use broadcast stations, and several sections provided that the FRC was only to grant or renew licenses if doing so would serve the "public interest, convenience and necessity." The result, in the early days of broadcasting, was a substantial dispute over how far the government could go in its general supervision of broadcast content. Were the Federal Radio Commission and the Federal Communications Commission to be just traffic cops of the air—policing only technical aspects of spectrum use—or, alternatively, were they to have broad, general, regulatory powers over the content of American broadcasting?

Early in its short life, the Federal Radio Commission claimed the right to exercise general regulatory supervision over the content of American broadcasting. The FRC was faced with a problem—more stations on the air than the technology of the time could accommodate without unacceptable interference. One alternative, under the circumstances, might have been to find purely technical reasons to reduce the number of stations. Another alternative, however, was to focus on the service being rendered and to order off the air those broadcasters that, in some overall sense, did not deserve licenses. The FRC chose the latter course—but not without warning.

As early as the "Great Lakes Statement," 3 FRC Ann. Rep. 32 (1929), the FRC warned broadcasters that it expected non-discriminatory general service to the public, "in the public interest":

> * * * the service rendered by broadcasting stations must be without discrimination as between its listeners. * * * Even were it technically possible * * * so to design both transmitters and receiving sets that the signals emitted by a particular transmitter can be received only by a particular kind of receiving set not available to the general public, the commission would not allow channels in the broadcast band to be used in such fashion. * * * The entire listening public within the service area of a station, or of a group of stations in one community, is entitled to service from that station

or stations. If, therefore, all the programs transmitted are intended for, and are interesting or valuable to, only a small portion of that public, the rest of the listeners are being discriminated against. This does not mean that every individual is entitled to his exact preference in program items. It does mean * * * that the tastes, needs, and desires of all substantial groups among the listening public should be met, in some fair proportion, by a *well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family find a place.* With so few channels in the spectrum and so few hours in the day, there are obvious limitations on the emphasis which can appropriately be placed on any portion of the program. * * * There are differences between communities as to the need for one type as against another. The commission does not propose to erect a rigid schedule specifying the hours or minutes that may be devoted to one kind of program or another. What it wishes to emphasize is the general character which it believes must be conformed to by a station in order to best serve the public. * * *

In such a scheme there is no room for the operation of broadcasting stations exclusively by or in the private interests of individuals or groups so far as the nature of the programs is concerned. There is not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting stations, its mouthpiece in the ether. If franchises are extended to some it gives them an unfair advantage over others, and results in a corresponding cutting down of general public-service stations. It favors the interests and desires of a portion of the listening public at the expense of the rest. Propaganda stations (a term which is here used for the sake of convenience and not in a derogatory sense) are not consistent with the most beneficial sort of discussion of public questions. As a general rule, postulated on the laws of nature as well as on the standard of public interest, convenience, or necessity, particular doctrines, creeds, and beliefs must find their way into the market of ideas by the existing public-service stations, and if they are of sufficient importance to the listening public the microphone will undoubtedly be available. If it is not, a well-founded complaint will receive the careful consideration of the commission in its future action with reference to the station complained of. [Emphasis added.]

Through policy guides like the "Great Lakes Statement," the FRC was issuing at least two warnings to the broadcasters of the day. First, service had to be well-rounded and non-discriminatory—something, basically, for everybody—in order to serve the "public interest, convenience and necessity" and justify granting licenses. Second, it was suggesting that opinions had to be handled carefully—that fairness was expected or else the government might step in. Many broadcasters of the 1920s followed the FCC's warnings. A few did not. Some of those who did not heed this advice produced court cases that established fundamental, long-lasting principles about the federal government's overall general powers to regulate broadcast content.

Two of the broadcasters who did not heed the warnings were the good "doctor" J. R. Brinkley, licensee of KFKB in Milford, Kansas and the Reverend Doctor Shuler, pastor of Trinity Methodist Church in Los Angeles, California. Both, essentially, met the test of being propaganda broadcasters—they used their stations to promote their own interests. Brinkley was the more self-interested, using his station to promote sale of patent medicines through members of the "Brinkley Pharmaceutical Association" throughout the U.S. "Battling Bob" Shuler used his station as an electronic pulpit to present his strident views attacking Jews, the Roman Catholic church, law enforcement officials in Los Angeles, and many others. Shuler even raised funds for the station by vaguely threatening that (usually unnamed) folks would go to hell unless they made contributions to its operation—an apparently successful fundraising technique.

License renewal applications for both of these broadcasters were opposed. The FRC found itself having to decide whether or not to renew the licenses given that Brinkley was accused, by the AMA among others, of harming the public health and Shuler was accused of being hostile to opposing viewpoints. In 1930, the FRC decided not to renew Brinkley's license. Later the same year it came to the same conclusion with regard to Shuler. Both unhappy broadcasters appealed these FRC decisions in court. In each case, the basic question was how far the FRC could go in general programming regulation. The result was court cases generally vindicating the right of the federal regulatory agency to be more than a technical traffic cop and, even, sustaining overall content regulation of broadcasting against constitutional attack.

Brinkley's lawyers raised nothing but statutory objections to the FRC's nonrenewal of his license. They argued that the FRC should not consider broadcasting content in making licensing decisions, even in a general way. The court rejected that position:

> * * * the business of broadcasting, being a species of interstate commerce, is subject to reasonable regulation of Congress. * * * It is apparent, we think, that the business is impressed with a public interest and that, because the number of available frequencies is limited, the commission is necessarily called upon to consider the character and quality of the service to be rendered. In considering an application for a renewal of the license, an important consideration is the past conduct of the applicant, for "by their fruits ye shall know them." Matt. VII:20. Especially is this true in a case like the present, where the evidence clearly justifies the conclusion that the future conduct of the station will not differ from the past. *KFKB Broadcasting Assn., Inc. v. FRC*, 47 F.2d 670 (D.C. Cir. 1931).

Shuler's lawyers raised additional arguments. They also urged the Brinkley position (since their case was argued before Brinkley's was decided) that Congress had not intended for the FRC to be generally concerned with content. But they also argued that the FRC had breached Shuler's First Amendment rights to freedom of speech and press.[3] When the Court decided Shuler's case in 1932, it had little difficulty disposing with both arguments. The statutory arguments were by then easy—the *Brinkley* case decided them; Congress intended the FRC to be concerned, at least in an overall sense, with the "public interest" nature of service. The constitutional arguments were made more complex by the then recently decided case of *Near v. Minnesota*, 283 U.S. 697 (1931), the first U.S. Supreme Court decision providing a mass media twist to the First Amendment. *Near* said that "prior restraints" were nearly always unconstitutional, but that post-publication punishment (subsequent punishment) was permissible. The problem the Shuler court confronted was whether refusing to renew Shuler's license was a prior restraint under *Near* or just a post-publication punishment. The court came to the conclusion that refusal to renew broadcast licenses was, under the circumstances, more of a post-publication punishment than a prior restraint.

> We need not stop to review the cases construing the depth and breadth of the first amendment. * * * It is enough to say that the universal trend of decisions has recognized the guaranty of the amendment to prevent previous restraints upon publication, as well as immunity of censorship, leaving to correction by subsequent punishment those utterances or publications contrary to the public welfare. In this aspect, it is generally regarded that freedom of speech and press cannot be infringed by legislative, executive, or judicial action, and that the constitutional guaranty should be given liberal and comprehensive construction. It may therefore be set down as a fundamental principle that under these constitutional guaranties the citizen has in the first instance the right to utter or publish his sentiments, though, of course, upon condition that he is responsible for any abuse of that right. *Near v. Minnesota ex rel. Olson*. But this does not mean that the government, through agencies established by Congress, may not refuse a renewal of license to one who has abused it to broadcast defamatory and untrue matter. In that case there is not a denial of the freedom of speech, but merely the application of the regulatory power of Congress in a field within the scope of its legislative authority.
>
> * * *
>
> In the case under consideration, the evidence abundantly sustains the conclusion of the Commission that the continuance of the broadcasting programs of appellant [Shuler] is not in the public interest. * * * However inspired Dr. Shuler may have been by what he regarded as patriotic zeal, however sincere in denouncing conditions he did not approve, it is manifest, we think, that is it not narrowing the ordinary conception of "public interest" in declaring his broadcasts—without facts to sustain or to justify them—not within that term, and, since that is the test the Commission is required to apply, we think it was its duty in considering the application for renewal to take notice of appellant's conduct in his previous use of the permit, and, in the circumstances, the refusal, we think, was neither arbitrary nor capricious.
>
> If it be considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use these facilities, reaching out, as they do, from one corner of the country to the other, to obstruct the administration, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality, and be answerable for slander only at the instance of the one offended, then this great science [broadcasting], instead of a boon, will become a scourge, and the nation a theater for the display of individual passions and the collision of personal interests. This is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the First Amendment, or an impairment of their free exercise. Appellant may continue to indulge his strictures upon

3. Interestingly, they did not argue that the FRC's actions violated Shuler's "freedom of religion" rights.

> the characters of men in public office. He may just as freely as ever criticize religious practice of which he does not approve. He may even indulge private malice or personal slander—subject, of course, to be required to answer for the abuse therof—but he may not, as we think, demand, of right, the continued use of an instrumentality of commerce for such purposes, or any other, except in subordination to all reasonable rules and regulations Congress, acting through the Commission, may prescribe. *Trinity Methodist Church South v. Federal Radio Commission*, 62 F.2d 850 (D.C. Cir. 1932).

Taken together, these court decisions set two fundamental propositions. First, the FRC—and as things turned out, its successor, the FCC—was not intended by Congress to be just a technical traffic cop. In a general, overall way, at least, the licensing agency could take a broad look at the programming offered by licensees to decide whether or not it was in the "public interest, convenience and necessity." Second, such review did not automatically violate the First Amendment. Denial of a license at renewal time, due to past overall programming deficiencies, wasn't necessarily an unconstitutional prior restraint. Rather it was more a constitutional post-publication punishment for broadcasters who had failed to meet their public interest obligations under the Radio Act of 1927 and, later, the Communications Act of 1934. On top of that, such regulation was justifiable because of the "scarcity" of broadcast spectrum space.

This general vindication of its programming regulatory powers was used cautiously by the FCC in subsequent years. In the mid and late 1930s, the FCC forced most remaining "propaganda broadcasters" off the air. But new, general programming policies were not developed until the mid-1940s. Then, largely because of changing economies of network radio, the FCC decided it was time for another general policy statement about radio. It directed its staff to consider the public interest implications of radio programming trends (TV then being technologically possible, but not yet commercially viable) and essentially put the project in the hands of Dallas Smythe, an FCC economist with strong views on the "public interest" standard in the Communications Act. On March 7, 1946 the FCC released a staff report, *Public Service Responsibility of Broadcast Licensees*, that quickly became more popularly known as the "Blue Book" because of the hue of its cover.

The "Blue Book" was undeniably critical of American radio programming. According to its authors, radio stations were (1) presenting too little "sustaining" (unsponsored) programming—programming that the public might need even if nobody was willing to sponsor it, (2) too little programming that reflected local interests and activities or included local talent (in other words, too much network programming), (3) too few "discussions of public issues" (too little news and public affairs), and (4) too many commercials. Taking a dim view of all this, the report urged broadcasters to do better and, subtly, threatened that if they didn't, some FCC remediation through regulation might be forthcoming.

Broadcasting industry reaction to the "Blue Book" was mixed. Many industry leaders responded not at all. Some harshly criticized the FCC. Most argued that the FCC was going too far in the regulation of programming, maintained that the document was somehow a violation either of section 326 of the Communications Act or of the First Amendment and urged the commissioners to adopt a more "moderate" position. The FCC's response was to waffle. The seven FCC commissioners never adopted the staff report as their own, official, statement of policy—but from time to time, in subsequent cases, they admonished broadcasters for not living up to it. The commission, in other words, never adopted the "Blue Book," but neither did it repudiate it. Even if it was never official FCC policy, until 1960 it, plus earlier FRC policy statements and FRC/FCC decisions, were the best guidance broadcasters had as to how much the FCC would regulate programming in general.

On July 29, 1960 the FCC adopted a *Report and Statement of Policy re: Commission en banc Programming Inquiry*, 44 FCC 2303—mercifully known as the "1960 Programming Policy Statement"—that, until the 1980s, was the commission's primary policy guideline on general programming regulation. For the most part, the 1960 Policy Statement reiterated well-established principles of broadcast regulation. The FCC regulation would be general, not specific. The FCC didn't intend to second-guess specific program decisions, but it would exercise general oversight. Providing programming in the "public interest, convenience and necessity" was the licensee's responsibility. Failure to meet that test couldn't be blamed on network failure to provide appropriate programming or on advertiser failure to support it—that was the job of those lucky enough

to hold FCC licenses. Programming designed only to serve the broadcaster's private interests rather than the "public interest" was inadequate. Broadcasters were expected to figure out what kind of programming the areas they were licensed to serve required—and that decision wasn't to be bound just by what advertisers would support. Years later, this 1960 standard evolved into a complex, highly formalized, process of "community ascertainment"—to be discussed shortly—that the commission abandoned in the 1980s. Finally, following earlier Commission patterns, the FCC offered to broadcasters a qualitative, nonquantitative, list of kinds of programs generally expected to be offered to adequately fulfill the "public interest" standards of the Communications Act. The commission told broadcasters that programming in the public interest generally included:

> (1) Opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups and (14) entertainment programming.

Offering these kinds of programs, in some reasonable mix, was considered to be evidence that broadcasters were serving the public interest.

Enforcement of the 1960 policy statement was not vigorous. How could it be, since the FCC had been so vague? The statement—like the "Blue Book" that preceded it—was highly qualitative, but not very quantitative. The "Blue Book" urged broadcasters to present "more" sustaining, local, topical programs—but didn't say how much was expected. The 1960 policy statement set up fourteen categories of programming, but again didn't say how much was expected in each category or when, in the broadcast day, it was expected to be offered. The result, quite predictably, was that broadcasters concentrated on the fourteenth category—"entertainment programming"—and looked to the FCC for more guidance as to what else they should do and how they should do it.

Over many years, the FCC provided that guidance. The general statement, in 1960, that broadcasters should know the problems, needs, and interests of their community—and design programming appropriate to meet those needs—evolved (largely at the request of attorneys representing broadcasters who wanted to know *exactly* what the FCC wanted) into a formal ritual of "ascertainment." At its height, broadcasters had to talk continuously (throughout their license term) to community leaders to find out what they thought the"problems, needs and interests" of the community were, do a survey of the general public (at least once during the then three-year license term) asking the public the same question, summarize the findings from the leaders and the public at license renewal time, and, finally, convert those findings into programming plans in order to convince the FCC that it should renew the broadcasters' license.

In addition, the FCC developed quantitative processing guidelines to be applied by the FCC staff when license renewals were sought by prospective broadcasters or, for that matter, when licenses were sought by new entrants into the industry. At their maximum state of development, these processing guidelines anticipated that FM broadcasters would propose to offer at least 6 percent noncommercial, nonentertainment programming. For AM broadcasters, the expectation was 8 percent; for TV it was 10 percent. Failure to propose to offer these percentages when you sought a license from the FCC, either new or a renewal, did not necessarily mean that the license could not be granted. Rather, it meant that the FCC staff couldn't grant the license and mandated referral to the full FCC (the seven commissioners). Since few broadcasters (or prospective broadcasters) wanted their applications held up by review by the full FCC, these quantitative standards were as effective as if they had been full-blown regulatory standards. Nearly all broadcasters religiously provided the expected amounts of noncommercial, nonentertainment programming (or promised them if they were applying for new licenses), and also promised to keep down the amount of commercials, where other processing standards also existed. Everything was kept sort of honest by another FCC staff processing guideline system. Significant (not trivial—there were actually quantitative measures of this) failure to live up to previous promises about amounts of noncommercial, nonentertainment programming at renewal time could block the FCC staff from granting renewal. Referral by the staff to the commissioners was then required. Thus, most broadcasters not only made the appropriate promises—they kept them. Failure to do so held up license renewal. Except in extraordinary circumstances, it wasn't worth it.

Enforcement of all this required data. To provide that, the FCC required continuous, detailed, logging of programs and commercial matter by broadcasters. Broadcasters had to categorize and record their programming and commercials continuously. Daily program logs were available to the public, and, at license renewal time, the FCC examined a sample week of those logs to see if broadcasters had kept programming promises. If not, broadcasters were in trouble although, practically speaking, they almost never lost their licenses.

By the late 1970s and very early 1980s, then, general FCC regulation of programming consisted of the following:

1. In order to get new licenses, prospective broadcasters had to do formal ascertainments of community needs and make their proposals for licenses conform to the results of those ascertainments. They also were expected to promise minimal amounts of noncommercial, nonentertainment programming and observe limits on the amount of commercial time on their stations.
2. Incumbent broadcasters seeking license renewals did several things:
   a. They had to "log" all their programming—so that the FCC and the public could check up on their performance at license renewal time;
   b. They were required to conduct ascertainments of community needs throughout their license terms in order to prove that they knew, in a very formal sense, what the "problems, needs and interests" of the community were and;
   c. At license renewal time, they were expected to make certain maximal promises about how much time they would use for commercials (too much violated other FCC staff processing standards) and minimal promises about how much noncommercial, nonentertainment programming they would offer if granted renewal. The 1960 Programming Policy Statement provided the major guideline as to what kind of programming was expected here. At renewal time, incumbent broadcasters were also held (somewhat loosely) to their prior promises. Too great a difference between what had been promised to get a license and what had actually been delivered during that term at least created some difficulty (usually resolved in the broadcaster's favor) in getting licenses renewed.

The FCC's overall supervision of broadcast programming was, at least on paper, more qualitative than quantitative. The commission expected some "public interest" programming—largely as defined by the 1960 Policy Statement. It expected that programming, somehow, would respond to the "problems, needs and interests" of the communities broadcasters held licenses to serve. To make sure that was the case, it expected such programming to be based on the results of a highly formal ascertainment process.

How much such programming was to be offered was, in theory, up to the broadcaster, but in practice, the Commission's processing guidelines told broadcasters what the FCC expected. Broadcasters (and their attorneys), more than anything else, just wanted to know what they had to do to secure their licenses. Over the years, broadcasters and broadcast attorneys asked the FCC for increasingly specific statements on licensing standards, and generally got what they wanted. When they wanted to know exactly how much programming of various kinds they had to provide to be assured license renewal, they got processing guidelines. When they wanted to know exactly how they had to log programming, they got precise marching orders from the commission. When they wanted to know exactly how the FCC expected them to ascertain community needs—so that they could do it "right" and not run into FCC problems—they got a series of Ascertainment Primers setting up a formal system. By the late 1970s, all those ground rules were well understood. There were processing guidelines, ascertainment primers, and FCC "approved" forms for logging. It was a comfortable and predictable world that, to the FCC of the 1980s, bore little relationship to real-world conditions.

By the mid-1980s, most of the regulatory world you have read about was gone. Logging, formal ascertainment, expectations of minimal amounts of noncommercial, nonentertainment programming and categorical expectation of types of programs expected to be offered to gain licenses were eliminated. They were replaced by an expectation that "marketplace forces"—the forces of commercial (and noncommercial?) competition would be just as effective as FCC rules. Yet, the FCC did not officially abandon *all* general program regulation. The result is a situation that still poses uncertainties to licensees—that, in fact, perhaps increases uncertainties over what they were in the 1970s.

What happened was that deregulation caught up with the electronic media. The Roosevelt through Johnson presidencies typified a liberal attitude toward the relationship between government and society. Government, it was felt, could, in many areas, affirmatively do things that made society better. The

Communications Act of 1934 is a characteristic piece of Roosevelt-era "New Deal" legislation. Although it largely recodified the earlier Radio Act of 1927, it clearly reflected the spirit of its time. Government could make broadcasting "good"—it could require broadcasters to serve its notions of what was in the "public interest, convenience and necessity." By the Carter administration, such faith in government's wisdom was failing. New Deal notions—if it's important, regulate it—were less widely or automatically accepted. Alfred Kahn, as Carter's head of the Civil Aeronautics Board, argued that the board should be eliminated, that the marketplace, much distrusted in the 1930s after the Depression, could be trusted as an adequate regulator. Kahn became a generic guru of "deregulation." In communications, Charles Ferris, FCC chairman throughout most of the Carter administration, came forward as a "deregulator," even though many in the broadcasting industry distrusted his sincerity in this regard. Very late in the Carter administration, in fact, after Carter had been defeated for a second term as president, the Ferris-led FCC proved that it really wanted to import the general notions of "deregulation" into the electronic mass media field. The opportunity to do so through what came to be known as the "Radio Deregulation Proceeding." Although initiated under the Carter Administration, the proceeding was obviously influenced by marketplace-based theories of regulation that came to have even greater force during the Reagan Administration.

DEREGULATION OF RADIO

84 FCC 2D 968 (1981).

On September 6, 1979, we adopted a Notice of Inquiry and Notice of Proposed Rule Making in this proceeding. In that Notice we indicated that we were "initiating a proceeding looking toward the substantial deregulation of commercial broadcast radio. * * *"

* * *

As we stated in the Notice, it is our concern that regulation should be kept relevant to technology and an industry that has been characterized from its beginning by rapid and dynamic change. In less than fifty years, broadcast radio has grown from an infancy of 583 stations in 1934 to a maturity of nearly 9000 stations today. Moreover, in the early days of radio, it was essential that a few stations provide a broad general service. Today, however, it has become essential in view of the proliferation of radio stations and other broadcast services that radio licensees specialize to attract an audience so that they may remain financially viable. * * *

We believe that the course of action which we are taking in this proceeding is warranted under, and consistent with, the public interest standard contained in the Communications Act. It is well settled that this standard was deliberately placed into the Act by Congress so as to provide the Commission with the maximum flexibility in dealing with the ever changing conditions in the field of broadcasting. Moreover, a wide latitude has been provided the Commission to modify its regulations in the face of such changes. We believe that it is entirely consistent with our authority, and our mandate, to consider the changes in broadcasting that have occurred, at an ever accelerating pace, over the past half century, and to adapt our rules and policies to those changes.

* * *

At a special Commission meeting on September 6, 1979, we adopted the Notice of Inquiry and Notice of Proposed Rule Making setting forth the proposals that were the subject of this proceeding. In that Notice, we proposed changes to our regulations in four areas as they pertain to commercial radio broadcast stations. The four areas were: the nonentertainment programming guideline; ascertainment; the commercial guidelines; and program log requirements. For each area, we listed a number of options that would be considered ranging all of the way from outright elimination of all current requirements to the retention of current requirements. Comment was also sought on options not specifically listed so long as they pertained to one of the four areas under study. * * *

* * * We are now able to resolve the issues confronting us and to take the following actions in the four principal subject areas:

a. Nonentertainment programming guideline—
We are eliminating the guideline and retain only a generalized obligation for commercial radio stations to offer programming responsive to public issues. Under certain circumstances, the issues may focus upon those of concern to the station's listenership as opposed to the community as a whole;
b. ascertainment—

We are eliminating both the 1971 Ascertainment Primer and the Renewal Primer. New applicants must file programming proposals with their application and licensees seeking renewal are only obligated to determine the issues facing their community. They may do so by any means reasonably calculated to apprise them of the issues:

c. Commercial guidelines—

We are eliminating the commercial guidelines leaving it to marketplace forces to determine the appropriate level of commercialization;

d. Program logs—

We are eliminating programming logging requirements. The only record of programming that will be required will be an annual listing of five to ten issues that the licensee covered together with examples of programming offered in response thereto. This record must be placed in the public file.

We recognize that some of these changes remove the illusory comfort of a specific, quantitative guideline. The Commission was not created solely to provide certainty. Rather, Congress established a mandate for the Commission to act in the public interest. We conceive of that interest to require us to regulate where necessary, to deregulate where warranted, and above all, to assure the maximum service to the public at the lowest cost and with the least amount of regulation and paperwork. * * *

Non-entertainment Programming Guideline

* * *

The Commission set forth a number of options in the Notice for modifying or eliminating the current guideline on the amounts of nonentertainment programming that radio stations should air. * * * What the guidelines mean is that applicants proposing to offer less than the guideline amounts of nonentertainment programming cannot have their application routinely processed by the Bureau under its delegation of authority from the Commission; rather, the application must be brought to the attention of the Commission itself. The guidelines do not mean that a station proposing to offer less nonentertainment programming is absolutely barred from, for instance, renewal of its license. It does mean, however, that its application cannot be routinely processed, that it must be brought to the Commission's attention, and that it may be designated for hearing.

* * *

In the Notice we tentatively proposed to eliminate the guideline, placing our reliance upon marketplace forces to assure the continuation of nonentertainment programming. The data which were before the Commission indicated that stations were providing amounts of such programming, and at such times of the broadcast day, as to suggest a listenership desire in the programming that would assure its presence through the working of marketplace forces. Under this option Commission intervention would occur only when it had been determined that the market had failed. The Commission noted that it would also consider the other options listed above and, additionally, alternatives proposed by commenters that were not listed in the Notice. * * *

We believe that the public interest warrants the elimination of our current nonentertainment programming guidelines for commercial broadcast radio. We are convinced that absent these guidelines significant amounts of nonentertainment programming of a variety of types will continue on radio. However, because of the growth of radio and other informational and entertainment services available to the public, we do not believe that it is necessary for the government to continue to assume, albeit indirectly, that every radio station broadcast a wide variety of different types of programming. Our review convinces us that the history of governmental involvement in nonentertainment programming has been driven by one overriding concern—the concern that the citizens of the United States be well informed on issues affecting themselves and their communities. It is with such information that the citizenry can make the intelligent, informed, decisions essential for the proper functioning of a democracy. Accordingly, we believe the only nonstatutory programming obligation of a radio broadcaster should be to discuss issues of concern to its community of license. This obligation can be fulfilled without resort to a guideline of limited effect and, we believe, of no substantial utility.

* * *

While eliminating the current nonentertainment programming guideline, we will continue to have certain expectations of radio broadcasters. What we expect, and do not expect, of broadcasters is as follows. We do not expect broadcasters to fit their nonentertainment programming into a mold whereby

each station has the same or similar amounts of programming. Other than issue responsive programming, stations need not, as a Commission requirement, present news, agricultural, etc., programming. We believe the record * * * demonstrates that stations will continue to present such programming as a response to market forces. We do not expect radio broadcasters to attempt to be responsive to the particular problems of each group in the community in their programming in every instance. We do not expect radio broadcasters to be responsive to the Commission's choices of types of programs best suited to respond to their community. What we do expect, however, is that marketplace forces will assure the continued provision of news programs in amounts to be determined by the discretion of the individual broadcaster guided by the tastes, needs, and interests of its listenership. We do expect, and will require, radio broadcasters to be responsive to the issues facing their community. However, in determining which issues to cover, commercial radio broadcasters may take into account their listenership and its interests, and the services provided by other radio stations in the community to groups other than its own listenership. Of course, broadcasters cannot engage in intentional discrimination in their selection of issues to be addressed with programming. Stations in smaller communities, where few alternatives are available to listeners, will have to be more broadly based in their programming. This does not seem to us to be undue governmental interference into programming as good business sense dictates that stations in smaller communities must broadly base all of their programming to attract, hold and serve a large audience. In markets where a full complement of programming services are available in the totality of stations, broadcasters will have the flexibility to choose which issues they believe warrant coverage based on the existence of other radio services appealing to other segments of the community. The focus of our inquiry, in the case of a challenge, will be upon whether the licensee's judgment in this regard was reasonable. * * * In other words, radio broadcasters will have what we believe to be the maximum flexibility under the public interest standard as regards their nonentertainment offerings. They will be expected to address issues of concern to the community or, where programming serving many segments of the community is otherwise available, their own listenership. No station, however, will be forced into a rigid mold and we will not endeavor to dictate the types of programs that must be used to respond to community issues or, as will be discussed later, how to ascertain what issues are present and which of these warrant attention.

* * *

As has been concluded by the Supreme Court, in adopting the Radio Act, Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. The reason for the concern with monopolization was obvious; the control of radio by a single group was thought to create the possibility that the public would receive only limited information in accordance with what the Radio Trust wanted the public to know. Rather, what was then, and has remained, among the primary concerns is that radio should present information on public issues so that the public may be informed and that this information should come from diverse sources.

Shortly after the Radio Act was enacted by Congress, the Federal Radio Commission was called upon to consider questions concerning the role of radio in addressing issues of public concern. It stated that the public interest requires "ample play for the free and fair competition of opposing views," and that it believed that "the principle applies * * * to all discussions of issues of importance to the public."

* * *

Accordingly, the Commission recognized the need for stations to offer, ". . . news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station." However, the Commission's role was to defer to the licensee in making the determination of what percentage "of the limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues rather than the other legitimate services of radio broadcasting. * * *"

Needless to say, this concern continued as indicated in the 1960 Programming Statement. In that Statement the Commission concluded that while the First Amendment forbids governmental interference asserted in aid of free speech as well as that repressive of it, broadcasters, because of the peculiar relationship between broadcasting and the First Amendment, had the obligation to offer programming relevant to the "tastes, needs and desires of the public they are licensed to serve." * * *

The Supreme Court had the opportunity to address the impact of Section 315 in the landmark Red Lion case. Justice White's opinion in that case spoke eloquently about both the goals of the First Amendment in a democracy and its relationship to the concept of the "public interest." Justice White spoke in terms of a First Amendment goal of producing an informed public capable of conducting its own affairs and stated that:

> "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market whether it be by the Government itself or a private licensee." (Citations omitted.)

* * *

Whether the obligation is described as one to serve the specific interests of the community, to meet the tastes, needs and desires of the public, or to address the needs and problems of the community, the chief concern has always been that issues of importance to the community will be discovered by broadcasters and will be addressed in programming so that the informed public opinion, necessary to the functioning of a democracy, will be possible. Accordingly, we will require that stations program to address those issues that it believes are of importance to the general community, or depending upon the availability of other radio services in the community, to its own listenership.[32] In this fashion we believe that we will best assure that the bedrock obligation contemplated by the "public interest" will be fulfilled with the least government intrusion and with the most licensee flexibility. This flexibility will allow radio broadcasters to address issues by virtually any means. This includes programming described under current definitions, and can consist of, by way of example and not limitation, public affairs, public service announcements, editorials, free speech messages, community bulletin boards, and religious programming. Flexibility will also attach to the amounts of such programming to be offered. While we believe the record demonstrated that news programming is presented in response to the interests of listeners, other programming that may be necessary to comply with the requirement to address issues of public importance may not be. We feel that such programming is an important component of the public interest standard and should be available on radio. Nonetheless, we do not believe that it is advisable or necessary to specify precise quantities of programming that should be presented by all stations regardless of local needs and conditions. Therefore, we will eliminate our current guideline and will not specify any particular amount of total nonentertainment programming that should be presented. We believe that given the competition and number of stations now present in the radio broadcasting field, there is even less of a need now than there was twenty years ago for us to articulate any "rigid mold or fixed formula for station operation." Rather, stations should be guided by the needs of their community and the utilization of their own good faith discretion in determining the reasonable amount of programming relevant to issues facing the community that should be presented.[36] The renewal standard will be retrospective in application and will contemplate a showing that during the prior license term the licensee addressed community issues with programming. The licensee need not demonstrate that it provided news programs, agricultural programs, etc. It need only show that it addressed community issues with whatever types of programming that it, in its discretion and guided by the wants of its listenership, determined were appropriate to those issues. * * *

Ascertainment

We believe that the public interest no longer require adherence to detailed ascertainment procedures. * * *

In reaching this conclusion, we recognize that ascertainment was never intended to be an end in and of itself. Rather, it is merely a tool to be used as an aid in the provision of programming responsive to the needs and problems of the community. We cannot stress this enough. Although we have been called upon to decide numerous cases revolving

32. Individual radio stations do not exist in a vacuum and should behave accordingly. In every community there are many possible issues worthy of discussion. It is appropriate for an individual licensee to take into account the coverage of issues by other stations, as well as the preferences of its particular audience, in determining which issues it should be addressing.

36. Such issues need not be controversial issues of public importance such as require coverage pursuant to the Fairness Doctrine. While station programming can, and must, include coverage of such issues, local issues that are not necessarily burning issues of a controversial nature should also be addressed.

around issues of how an ascertainment was conducted, and whether it was sufficient, or if the correct community leaders were contacted by the requisite type of station employee, etc., one should not let this obscure the underlying purpose of ascertainment—to foster relevant programming relating to community issues. The ascertainment process is merely a tool which the Commission has furnished to attempt to assure that all significant segments of a community are at least contacted so that the station can make an informed judgment about which issues it should cover and what needs exist and should be responded to. Ascertainment was never intended to become a "ritual dance." * * *

As our means to this end, we adopted formalized ascertainment requirements. Ascertainment grew out of two concepts of the role of radio. The first is that radio is a local medium, where stations are licensed to a community and are obligated to program primarily to that community. The second is that each station should attempt to provide "well-balanced" programming so that all segments of the community obtain the benefits of the licensee's ability to utilize a public resource—a radio frequency. The concept of localism was part and parcel of broadcast regulation virtually from its inception. It can be inferred from the Act itself, and, as stated in the Blue Book, the Commission has:

> "given repeated and explicit recognition to the need for adequate selection in programs of *local* interests, activities and talent." (Emphasis added.)

As noted above, this adherence to the concept of localism continued through the Programming Statement, supra, and remains a consideration to this day.

The concept of well-balanced programming is not quite so firmly entrenched. A bit of the history of the concept is instructive. Early in its history, the Federal Radio Commission, predecessor agency to the FCC, asked broadcasters applying for license renewal to list the average amount of time weekly devoted to: (1) entertainment; (2) religious; (3) commercial; (4) educational; (5) agricultural; and (6) fraternal programs. This indicates a concern that broadcasters should be responsive to the needs of these various significant segments of the community. While these elements may in retrospect appear to ignore what today are considered significant segments of the community, in the context of 1928, this list of program types may be seen as representing well-balanced programming. * * *

This concept remained vital and in the Blue Book the Commission expressly endorsed the importance of well-balanced programming. Jumping ahead to 1960 and the Programming Statement, the Commission listed fourteen programming elements necessary to service in the public interest. * * * Certainly, this too indicates the Commission's continuing concern with well-balanced programming. Needless to say, the Ascertainment Primer (27 FCC 2d 650 (1971) and Renewal Primer (57 FCC 2d 418 (1975), continued the concept. However, ascertainment of all significant segments of the community became the watchword rather than well-balanced programming elements.

* * *

From the outset it was contemplated that some stations, depending on circumstances, could present well-rounded programming to the "public generally" while others served "only special groups," and that, therefore, not all stations would offer well-balanced programming.

By 1946, and the publication of the Blue Book, the Commission recognized that especially in metropolitan areas, where a number of stations existed and the listener could therefore choose among several stations, a balanced service to the listeners could be achieved:

> ". . . either by means of a balanced program structure for each station *or by means of a number of comparatively specialized stations which, considered together, offer a balanced service to the community.*" [Emphasis supplied.]

In 1946, when the Blue Book was published there were but 1,005 stations on the air.

As society changed over time, it became more aware of the need for programming by groups that were not being adequately served by broadcasting. Chiefly, this awareness grew out of the civil rights struggle that illuminated a segment of society that had previously been ignored in many ways, among which was by lack of relevant broadcast programming. Accordingly, when the Programming Statement was issued in 1960, it stated that the broadcaster should ascertain the needs of *all* segments of the community and:

> "should reasonably attempt to meet all such needs and interests on an equitable basis."

No longer did it appear that balanced programming could be achieved through a number of comparatively specialized stations. Should that be permitted,

those segments of the community that had been left unserved, or underserved, would be likely to remain unserved or underserved.

Eleven years later, when the original Ascertainment Primer, supra, was adopted, we set forth a procedure for ferreting out problems of all significant elements of the community, but, nevertheless, did not necessarily require programming responses to all ascertained needs. Even in adopting the ascertainment requirements we noted, in response to question 25 ("Must an applicant plan broadcast matter to meet all community problems disclosed by his consultations?"), the following:

> "Answer: Not necessarily. However, he is expected to determine in good faith which of such problems merit treatment by the station. In determining what kind of broadcast matter should be presented to meet those problems, the applicant may consider his program format and the composition of his audience, but bearing in mind that many problems affect and are pertinent to diverse groups of people."

However, as we have stated in applying this programming requirement to particular cases:

> "In serving the needs of his community, the broadcaster is not required to meet all community problems; rather, a licensee may determine in good faith which problems merit treatment by the station. In making this determination, it may consider the particular format of the station, the composition of its audience and the programming offered by other stations in the community." Taft Broadcasting Company, 38 FCC 2d 770, 790 (1973).

Thus, the broadcaster has been given some latitude to take into account the particular needs of its listeners, and the nature of other available programming in the market, in determining what its own programming responses should be.

Accordingly, at several times in the past, the Commission has recognized the possibility that stations could be more narrowly focused in their programming, especially when market factors (i.e., "the particular format of the station, the composition of its audience and the programming offered by other stations in the community") permitted service to the entire community to be provided on a market-wide basis rather than by each individual station.

Given this background, the principal focus of ascertainment has been to uncover issues facing the community that go beyond those that might be discovered through the licensee's ordinary contacts, which might be limited to "a rather narrow range of persons or groups." Whether referred to as problems, needs, or interests, the fact is that what is to be discovered are public, community issues, some of which should be addressed with programming. All of the procedural requirements that have grown up around this basic obligation may have obscured this purpose. That never was our intention. * * * As noted above, localism has been, and continues to be, an important element of service in the public interest. However, the concept of well-balanced programming has not held such a continuing and elevated status. Given the factors present today in radio, where nearly 9,000 stations provide service to the American people, we believe, as stated above, that well-balanced programming need not be required on each station in all instances. What is important is that broadcasters present programming relevant to public issues both of the community at large or, in the appropriate circumstances, relevant primarily to the more specialized interests of its own listenership. It is not necessary that each station attempt to provide service to all segments of the community where alternative radio sources are available.

* * *

As discussed in the section dealing with the nonentertainment programming guideline, we have concluded that stations should be permitted to tailor their programming to conditions present in their market and the nature of their particular listenership. * * *

This being the case, what is important is that licensees utilize their good faith discretion in determining the type of programming that they will offer and the issues to which they will be responsive. It would be inconsistent with the exercise of good faith judgment for a broadcaster to be "walled off" from its community. Rather, broadcasters should maintain contact with their community on a personal basis as when contacted by those seeking to bring community problems to the station's attention. What is not important is that each licensee follow the same requirements dictating how to do so. Accordingly, formal ascertainment will be eliminated.

* * *

* * * We see no reason to require the broadcaster to engage in the current sort of renewal ascertainment if community issues can be determined in a less burdensome manner. Again, it is the programming and not the process that is the most important component of the broadcaster's efforts, the public's attention, and the Commission's concern. The only

paperwork requirement that will attach to this obligation will be for each new, assignment or transfer applicant, or each applicant proposing to greatly expand its coverage area to file a programming proposal and for each licensee seeking renewal to annually place (on the anniversary date of the grant of authorization for a licensee's first license term and thereafter on the anniversary date on which the station's renewal application would be due for filing) in its public file a listing of five to ten issues responded to with programming together with examples of such programming offered. The list should, in narrative form, contain a brief description of from five to ten issues to which the station paid particular attention with programming, together with a brief description of how the licensee determined each issue to be one facing his community and of how each issue was treated (i.e., a series of public service announcements, a call-in program with the relevant public official, etc.). Additionally, the licensee should list the date, time and duration of listed programming utilized to address these issues. We continue to be concerned that stations serve their local communities. This might often mean that stations use locally produced programs to meet their community issue obligation. This does not preclude, however, the use of other programs which address issues of importance to the community.

The list required of renewal applicants need not be exhaustive or, indeed, be a complete recitation of either all of the issues covered or all of the programming offered in response to these issues. Rather, the list is intended to provide examples of both. If challenged at renewal, the licensee may point to both listed and unlisted programming to support any claim of compliance with the Commission's requirements. * * * Given the above, ascertainment will not be an issue in either comparative or renewal proceedings. The focus of our inquiry will relate to the programming proposed or offered, as the case may be, and not the process utilized to identify issues. It would be of no concern to the Commission how the applicant or broadcaster became aware of issues facing his community (or, in the appropriate circumstances, his listenership) so long as programming was being proposed, or offered, in response to such issues.

The Commercial Guidelines

* * *

The outstanding features of the history of commercial limitations have been the Commission's persistent concern that advertising not become the superseding force in broadcast service and programming, and our concurrent reluctance to set definitive and rigid standards that would cause all broadcasters to operate in the same mold. Because of these sometimes inconsistent concerns it is not surprising that the current restrictions are not part of a definitive rule but instead take the form of processing guidelines allowing the Broadcast Bureau to process applications, with regard to the issue of commercialization, if the licensee's advertising amounts are below the guideline maximums.

With processing guidelines rather than rigid rules by which every licensee would be bound absent an express waiver, the current system apparently was designed to give licensees some flexibility in fulfilling their public interest responsibility in the advertising area. The flexibility was to be accomplished largely by allowing licensees who wished to propose more advertising time to submit their proposal for full Commission consideration.

Commenters in this proceeding have almost unanimously made the assumption that as a practical matter the guidelines nearly extinguish alternative proposals, and thus have had a greater tendency than might have been intended to discourage diversity and experimentation in the advertising area.

* * *

Stated broadly, the public interest concern of the Commission has been to avoid allowing the commercial use of stations to supersede their public interest use. Congress having opted for a private rather than a governmental system of broadcast operations, revenues from commercial time sales are necessary to enable the vast majority of stations to remain in business, and thus provide the service intended. However, the Commission is charged with insuring that the interests of the listening public are being served, as well as the institutional and financial needs of the private license holder. Having allocated a large amount of spectrum space to commercial stations, the Commission can insure that their commercial aspects do not become so important as to frustrate the purpose of the allocations.

But the existence of the authority to prevent commercial abuses has never driven the Commission to broadly exercise that authority absent a rather significant showing of interference with the public interest. And a recent but pronounced trend by the Supreme Court granting significant First Amend-

ment protection to "commercial speech" indicates that the Commission's caution in this regard may have been appropriate not only as a matter of administrative and regulatory policy, but also a matter of constitutional policy. * * *

Against this background of the scope of Commission power, the effect of the processing guidelines, and the historical reluctance of the Commission to be more intrusive than necessary in this regard, the following discussion of elimination of the commercial guidelines is divided into two major sections: (1) the likelihood of excessive commercialization and (2) the potential advantages of elimination. * * *

Commercial Excesses and Marketplace Forces

The record of this proceeding provides convincing evidence that marketplace forces have a significant impact on the amount of advertisements aired by commercial radio licensees. These forces appear more effective in curbing advertising excesses than our own rules, and are so significantly less intrusive and less expensive as to convince us to place greater reliance on them in our regulatory scheme.

* * * [T]he economic data contained both in the Notice and in the comments show that most licensees not only meet the present guidelines but also that their pattern of advertising amounts is generally so far below the guidelines as to demonstrate that it is competition and other forces operating in the marketplace, not regulation, that most effectively restricts the advertising loads of radio licensees. * * * [T]he trend appears to be in favor of greater and more effective competition in this area rather than against it, giving us substantial assurance that the policy choices we make herein are warranted.

First, as detailed in the Notice, the number of radio stations has shown a steady and striking increase over the past few decades. In 1934 there were 583 radio stations. In July of 1979, while the Notice was in preparation, there were 8,654 stations, and 15 months later there were 8,921 stations. Also, preceding and since adoption of the Notice, the Commission has both proposed and approved various plans to increase the use of the radio spectrum and thereby add a significant number of new competing stations.

Although the increase in the number of radio outlets indicates a significant increase in the number of competitive outlets for radio advertisers, it may still significantly understate the amount of increased advertising competition encountered by radio licensees. Radio has faced considerable intermarket competition from its inception when it competed with the already established informational outlets of the print media such as newspapers and magazines, and other established advertising media such as outdoor and specialty advertising. While virtually none of these competing advertising vehicles has disappeared, the radio industry has continued to face additional competition, especially from other broadcast-related media such as VHF and UHF television, and now increasingly from cable television. Other such competitors continue to appear on the horizon, not the least of which are the low powered television stations and even direct broadcast satellite communication media.

Perhaps both because of and in spite of this increased competition, the radio industry has continued to prosper as an effective medium. Both the Notice and several of the comments in this proceeding noted that because commercial radio is almost exclusively an advertiser supported industry, advertisers can in some ways be considered the "buyers" of the radio product. * * *

This desire of advertisers for more specifically segmented audiences has been one of the forces that has facilitated the movement of the commercial radio industry, especially in the past decade, toward greater specialization and diversity in program formats, paralleling a somewhat earlier trend of the magazine industry. As both audiences and advertisers sought more specific media for editorial and commercial information, magazines decreased in average circulation but increased in number and specificity while retaining a largely national character. Likewise, a great number of radio stations now deliver more specialized services.

Against this background, we view with some skepticism the assertions by some commenters that elimination of our guidelines will lead to widespread increases in the commercial loads of radio stations. Indeed, absent our own intervention—which, of course, would continue to be possible—there appear to be at least three major sources of market pressure that will inhibit commercial abuses: audiences, advertisers, and individual station owners. Together, these appear to create a largely self-regulating system

and one wherein correction of commercial abuses by the system's own forces may be more swift and more efficient than those ordinarily imposed by the Commission.

The commercial clutter issue was discussed by several of the commenters in this proceeding. Most simply, the idea is that stations with commercial excesses are attractive neither to listeners nor to advertisers. Audiences exposed to highly concentrated ads don't listen attentively, retain less of what they do hear, and become decreasingly responsive to commercial appeals. In other words, each ad tends to get lost in the "clutter" and thus is less effective, leaving advertisers to seek stations with less advertising clutter. Meanwhile, audiences avoid stations with too many commercials. Stations with excessive commercials will often find themselves with smaller audiences and fewer advertisers.

Additionally, reply comments of NTIA suggest that station owners who may wish to increase profits will have other incentives to restrict the number of ads they accept. One reason is that increased availability of advertising has a depressing effect on the unit price of *every* ad sold. Thus, although they may be able to increase the number of ads they sell, their total profits will not necessarily increase and, in fact, will likely decrease.

One potentially troublesome situation suggested by some commenters is that raised by those stations which may be less susceptible to market forces. These stations are said to have unusual "market power" either because they face little local competition in a small community or because they have a unique format or audience in a larger community. In both cases, these commenters suggest that the stations with this "market power" will increase their levels of advertising time. NTIA cast considerable doubt upon the extent and intensity of such "market power" in both situations. In small markets, there are not typically many purchasers of advertising time. Hence, the ability [to] find purchasers of additional time is not great. In larger markets, specific format stations apparently face the considerable "cross format" competition * * * and also competition from other advertising media.

These countervailing forces lead us to conclude that "market power" may be more a theoretical concern than an actual one. Our own data in the Notice, for example, confirm this conclusion by showing that the lightest advertising loads are usually found in the small markets with little or no local radio competition, and in the large markets with presumably the greatest amount of format specification. In any case, if it becomes obvious that a certain class of stations (e.g., specific format or small market stations) have significant market power and exert that power to the detriment of the public interest, the Commission can always revisit the area in a general inquiry or rule making proceeding.

Potential Advantages of Elimination

We think that the data and economic analysis indicating that marketplace forces will effectively regulate commercial excesses and the analysis of other issues * * * indicating that elimination of the guidelines will not otherwise harm the public interest provide sufficient cause for us to eliminate the commercial processing guidelines. No government regulation should continue unless it achieves some public interest objective that cannot be achieved without the regulation. Further, we think it would be irresponsible to ignore both the direct and indirect burdens of unnecessary regulation on this Commission and the broadcasters (and ultimately the public). The most direct of these costs are the unnecessary recordkeeping, reviewing, and monitoring required by the stations and the Commission pursuant to the regulation. * * *

But the paperwork burden of the commercial guidelines according to the record of this proceeding appears only to be a small part of the burden the guidelines impose. Other burdens are less direct, though no less real, and often take forms that are nearly impossible to measure or to predict accurately. Elimination of the guideline may well reduce these burdens and have substantial advantages. The potential advantages include: (1) the reduction of any anticompetitive impact of the current rules, and (2) an increase in commercial flexibility for broadcasters and diversity for audiences.

First, as NTIA and other commenters suggest, the commercial guidelines may have serious economic consequences. NTIA says that to the extent that the commercial guidelines depress the amount of commercial time below the advertiser demand for such time, they may be anticompetitive. And, to the extent that such limits decrease the advertising available to consumers, they can result in higher prices for many consumer products. When commercial levels are restricted, the price of each commercial is likely to rise, thereby restricting its avail-

ability to larger and better established businesses. Conversely, an increased supply of advertising time can be expected to decrease unit price, allowing smaller businesses to use the medium to reach potential consumers. * * *

NTIA also asserts that the restrictions have adverse competitive effects within the radio broadcasting industry: "Large, well-established radio stations can prosper despite limitations on commercial time because they tend to sell time to businesses with large advertising budgets. They thus can compensate for decreased quantity by increasing the cost of commercial time. Small stations (many of which are minority owned) may need quantity, however, to survive." * * *

These observations lead to our second major point here, i.e., without the guidelines stations may show an increased willingness to experiment with advertising formats that might exceed present limits but could serve the public interest. NBMC again provides a major point suggesting that the present guidelines restrict general consumer use of the radio medium, and saying that the guidelines are responsible for the current "absence of programs on which Black consumers may themselves advertise, such as want-ad shows or consumer sell-a-thons." Others note that our present policy discourages the use of "program length commercials" which may be very useful to consumers where products or services cannot be adequately explained in the usual spot advertisement. Although we are mindful that some such advertising procedures are subject to abuse, we think that it is preferable to encourage experimentation and diversity in this area. To encourage such experimentation, we will no longer adhere to our policy against "program length" commercials. We also understand that what might appear to us at first blush as an abuse may be a significant service to a substantial portion of the market's radio audience. Thus, we prefer to allow the interplay of good faith discretion of licensees and the competitive forces of the marketplace to determine which advertising policies better serve the needs and interests of particular listening audiences. If prolonged and blatant excesses occur in defiance of the best interests of the public, then again, we can revisit the area and take appropriate action in another rule making proceeding.

In summary, the current processing guidelines for maximum commercial amounts are herein eliminated. We expect that this change will promote licensee experimentation in the commercial area, and result in a greater range of commercial radio choices for both advertisers and audiences. Based on information in this record, we believe that commercial levels are more effectively regulated by audience selection and other marketplace forces, and therefore will not consider petitions to deny or informal objections based on allegations that an individual station has offered an "excessive" amount of commercial matter. Should events demonstrate that these competitive forces are not effective for all markets and instances, we can revisit this issue in detail in a general inquiry or rule making procedure at a later date.

Program Logs

These rules [the present program logging requirements], *inter alia*, specify the general design of the logging system, the manner for entering and correcting data, and the details of how the logs are to be made available to the public. Thus, compiled, the logs provide a rather comprehensive record of the level and timing of programming for every specified program type. * * *

Perhaps the most important area of agreement among commenters in this rule making was dissatisfaction with the current log keeping requirement. * * *

The most stunning statistic relied upon by those who discussed the great burden of the logs comes from a General Accounting Office (GAO) report on federal paperwork requirements. That GAO report says that compliance with the logging rules for AM and FM stations require a total of 18,233,940 hours per year by the industry. Although the burden seems highly exaggerated, especially in light of the fact that these rules largely operated only to standardize industry recordkeeping that is necessary in the ordinary course of business, the paperwork burden of the logs nonetheless seems just too great to be taken lightly.

Broadcasters also suggest that the current programming logging requirements have the secondary effect of facilitating Commission concentration on technical compliance with its rules rather than on substantial compliance by broadcasters. * * *

Program logs [which] are presently required by the Commission will no longer need to be maintained or made publicly available. However, broadcasters still will be required to maintain their public files, which contain much relevant programming information. The information in station public files

should be sufficient for routine Commission and public monitoring of the public interest programming performance of licensees. * * *

The Commission will not require other records of programming or commercial matter, although some such records may be kept by licensees in the ordinary course of business. * * *

Public inspection files will continue to be maintained by each licensee, and will provide considerable information of value to citizens making public interest programming inquiries of licensees. Items contained therein which have had and will continue to have great value include copies of the license application with all accompanying materials, and the political file. In addition, the most important programming document in the public inspection file will likely be the annual issues-programs list. There, each licensee will list five to ten of the important issues in its service area, examples of its public service programs aired over the past year which responded to those issues, and related information.

We wish to stress here that the continued reliance on the public file as an index to the general programming responsibility of licensees does not constitute a significant departure from our present system. As the record in this case reveals, our past program logging requirement has served primarily as an index to the *quantity* of nonentertainment and commercial programming aired by individual licensees, and has been of very little value as an index of performance in the more general programming areas. The Commission has never imposed a general requirement that stations supply extensive textual data on the *content* of their programming, and doing so would raise significant First Amendment questions. Our experience also has shown that such information is not necessary to meet our public interest oversight and other statutory responsibilities. Instead the Commission has developed a history of successful programming oversight through various means, including staff and public investigations. In so doing, the Commission has relied not only on logs or other recordkeeping devices but on the experience of those with the most extensive knowledge and greatest interest in each station's programming, its listening audience.

In sum, while elimination of the logs will decrease the public availability of some quantitative information on program service, that information will now be largely irrelevant based on other rule changes on this Report and Order. Other program information, especially that relative to the general public interest responsibilities of licensees, will continue to be available to the public much as in the past.

* * *

The steps we are taking here in no way will reduce our responsibility, ability, and determination to provide a regulatory framework that assures radio broadcast programming in the public interest. We shall continue to be concerned that broadcasters be responsive to the public. It is our expectation that the added flexibility that broadcasters will have to respond to their audiences will indeed produce such results. There remains the possibility that, at least in some isolated cases, this might not happen. Fortunately, there are built-in mechanisms to allow us to detect such an occurrence. Part of the public interest obligation of any licensee is to address issues of importance to the community as a whole or, in larger markets with many stations, to the station's listenership. If a station is not addressing issues, citizens will be able to file complaints or petitions to deny. We continue to encourage citizens to meet with their local broadcasters to discuss their concerns, but if they do not receive satisfaction, they should take the complaint or petition to deny routes. These long standing channels will allow the Commission to continue to monitor the performance of licensees, and indeed will better indicate the responsiveness of licensees than do fixed guidelines.

Citizens' complaints will also provide the basis for monitoring commercialization policy. Although there will be some additional burden placed on citizens to undertake such monitoring, in fact highest levels of commercialization tend to occur during predictable peak hours and therefore the burden is not overwhelming. The Commission in general will not be concerned with isolated incidents of stations with high levels of commercialization. If, however, there tends to be a pattern of serious abuse among certain classes of stations, the Commission could revisit the area through an inquiry or rule making proceeding. In monitoring such problem areas, the Commission might survey particular markets and use the data as the basis for fashioning appropriate remedies.

* * *

We believe that given conditions in the radio industry, it is time * * * to reduce the regulatory role played by Commission policies and rules, and to permit the discipline of the marketplace to play a

more prominent role. It is our conclusion that the regulations that we are retaining and the functioning of the marketplace will result in service in the public interest that is more adaptable to changes in consumer preferences and at less financial cost and with less regulatory burden. While savings to the public, the Commission and broadcasters cannot be accurately or exactly quantified, it is only reasonable to assume that if any reduction in costs to broadcasters and/or the Commission (and accordingly, and foremost, to the public) is achieved by the action taken herein, with no degradation in service, the public interest will be well served. It may well be that the removal of these regulations will allow broadcasters to be *more* responsive to listeners, thus improving service while reducing costs.

Our role will continue to be one of oversight. But in most instances we believe that generalized requirements that permit licensees to respond to market forces within broad parameters are warranted in radio broadcasting. * * *

COMMENT

Two separate but related developments occurred after issuance of the Radio Deregulation report. The FCC began proceedings aimed at providing comparable deregulation to commercial TV broadcasters and noncommercial broadcasters, both radio and TV. Opponents of broadcast deregulation challenged what the FCC had already done in court. On the first issue, the extension of deregulation, the FCC progressed relatively rapidly, especially under its new deregulation-minded Republican Chairman, Mark Fowler. In 1981, the FCC issued separate Notices of Proposed Rulemaking looking toward deregulation of commercial TV and noncommercial broadcasting. The notices relied heavily on the conclusions used to justify commercial radio deregulation. In 1984 the FCC released reports and orders generally granting to the rest of the broadcasting community the degree of deregulation granted radio in 1981. See Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 FCC 2d 1076 (1984) and Revision of Program Policies and Reporting Requirements Related to Public B/casting Licensees, 98 FCC 2d 746 (1984).

Essentially the FCC argued, as it had in Radio Deregulation, that competitive marketplace forces would keep stations knowledgeable of and responsive to their communities and, in the case of commercial TV, prevent overcommercialization. The FCC, of course, had to admit that the TV and noncommercial "marketplaces" were different than the radio marketplace. In Radio Deregulation, the FCC had focused mostly on the level of competition among radio stations—and found it sufficiently high to justify deregulation. In TV Deregulation, the FCC relied more heavily on competitors to TV stations beyond other TV broadcasters—cable television, video-tapes, etc. In fact, the FCC broadened the "marketplace" considerably and placed more emphasis than in radio deregulation on "competition" to TV from other information services such as books, magazines, and newspapers.

Although there were many fewer TV stations both nationally and in individual markets than radio stations, the FCC concluded competitive marketplace forces would be better than FCC rules at keeping things in order. As to noncommercial broadcasting, the FCC noted the increasing reliance of public stations on corporate underwriting and the increasing interest they had in producing adequate audiences—a striving that put them, the commission reasoned, into a reasonably competitive marketplace as well. Thus, by 1984, the FCC had dropped many of its long-standing general programming regulations—programming guidelines, ascertainment standards, and logging requirements—for all broadcasters. Gone for commercial broadcasters were the guidelines concerning the amount of commercial matter offered. These changes were not quite final because of the court challenges already mentioned.

Since Radio Deregulation had come first, it attracted the first court challenges. Since the logic and outcome of the various deregulation proceedings were so similar, the outcome of the court challenges in Radio Deregulation has had a substantial impact on the outcome of the later deregulation proceedings. Many of the challenges to radio deregulation focused on the elimination of program logs. For citizens groups seeking to challenge broadcaster license renewals, or at least to keep pressure on broadcasters to be responsive to the groups' perceptions of community needs, the detailed logs had become useful tools. They provided a publicly available, comprehensive record of everything the broadcaster had aired. After radio deregulation, the groups feared, they would have much less data about broadcaster performance to use either in formal proceedings be-

fore the FCC or in much less formal negotiations with broadcasters. One of the leading broadcast citizens groups, the Office of Communication of the United Church of Christ, took the lead in challenging Radio Deregulation.

UCC looked for help from the U.S. Court of Appeals for the D.C. Circuit. In 1983, however, that court generally upheld the FCC's 1981 Radio Deregulation order. See *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). The court did, however, conclude that the FCC had not fully explained its decision to replace prior logging requirements with the new, annual list of five to ten illustrative issues and programs. The court was particularly concerned that, under the new order, the FCC admitted it would have to depend more than before on public complaints to identify broadcasters who were not performing adequately, but appeared not to give the public information adequate to that task. It remanded the logging issue to the FCC, essentially giving the FCC a second chance at either justifying that change or making changes in it.

In 1984, the FCC decided to make two minor changes. Although it continued to consider the lists "illustrative" of community issues and programs, it dropped the ten-issue maximum created in 1981. Broadcasters now had to list at least five issues but could talk about as many more than that as they wished. The second change was to require broadcasters to prepare these lists quarterly rather than annually. UCC went to the D.C. Circuit again, and in 1985, obviously somewhat tiring of the whole process, the court overturned the revised FCC standards and their justification.

In *Office of Communication of the United Church of Christ v. FCC*, 779 F.2d 702 (D.C. Cir. 1985), a frustrated panel of the court of appeals concluded that the FCC's reliance on "illustrative" issues lists was irrational and argued that the FCC had unreasonably rejected alternatives proposed to it in the various related rulemaking proceedings.

OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST v. FCC

779 F.2D 702 (D.C. CIR. 1985).

WRIGHT, Circuit Judge.

Petitioner challenges an order of the Federal Communications Commission (FCC) revising its regulations governing the contents of the public files of commercial radio broadcasters. The new rule requires broadcast licensees to maintain a list of at least five to ten community issues addressed by the station's programming during each three-month period. This new rule was enacted pursuant to our remand in *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) (UCC III). Our remand was predicated on the FCC's failure to explain adequately its replacement of its logging requirements with an illustrative issues/programs list. We were concerned that the FCC's new rule left the public with insufficient information to evaluate the programming of broadcast licensees. Unfortunately, the FCC's latest effort provides only cosmetic improvements on its previous design. * * * [W]e find that a merely illustrative issues/program list does not further the Commission's stated regulatory goal of relying on effective public participation in the license renewal process. Moreover, the Commission has failed to provide an adequate explanation for its rejection of an alternative proposal, duly submitted during the notice and comment proceedings, that would advance its stated goal. We therefore vacate the Commission's order as arbitrary and capricious and remand the case for further proceedings.

In 1981 the FCC initiated a sweeping deregulation of the radio industry. * * * Mindful that the Commission has ample discretion to articulate policy within the broad framework of the Communications Act, we upheld the bulk of these changes when they were challenged before this court. In *Black Citizens For a Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983), cert. denied, 104 S.Ct. 3545 (1984), we upheld the new streamlined renewal process. In UCC III this court upheld the elimination of the ascertainment requirements, the minimum nonentertainment programming requirement, and the limit on commercials. 707 F.2d at 1435, 1436, 1438.

The public file regulation, however, presented special difficulties. In its First Report the FCC had eliminated the requirement that licensees maintain a log of every program aired. Instead, the Commission merely required licensees to provide an annual "issues/programs list." This list would enumerate five to ten issues of concern to the community and provide examples of the programs presented in efforts to address those issues. In evaluating this rule we noted that the agency's stated goals required a more comprehensive recordkeeping requirement.

Specifically, we noted that the FCC's new faith in voluntary public participation could only function effectively if the public were assured an adequate flow of information. We then found that the Commission had failed to provide an adequate explanation of its new recordkeeping regulations and remanded the issue to the FCC.

On remand the Commission issued a Further Notice of Proposed Rule Making, 48 FR 33499 (July 22, 1983), raising the question of what information licensees should make available. When the Commission issued its new order, however, it once more endorsed the concept of a merely illustrative issues list. * * * The new regulation, * * * reads in pertinent part:

> "[Every permittee or licensee of an AM or FM station shall maintain for public inspection a file into which the permittee or licensee will insert[,] every three months[,]] a list of at least 5 to 10 community issues addressed by the station's programming during the preceding 3 month period. The list is to be filed the first day of each calendar quarter. * * * The list shall include a brief narrative describing how each issue was treated, i.e., public service announcements or programs, giving a description of the programs including time, date and duration of each program. * * *"

Thus the Commission did not merely reinstitute the rule that we found inadequate in UCC III. Instead of an annual report the Commission now requires quarterly reports. And instead of establishing a maximum of 10 issues, the new rule leaves licensees free to determine the maximum number of issues on which they wish to report. The five-issue minimum, however, was retained. * * *

Petitioner United Church of Christ challenges the Commission's revised recordkeeping requirement as arbitrary and capricious. We sustain the challenge. * * *

There is no question but that the Commission has the statutory authority to require whatever recordkeeping requirements it deems appropriate. Review therefore proceeds under the "arbitrary and capricious" standard. * * * Rational decision making also dictates that the agency simply cannot employ means that actually undercut its own purported goals. * * * The Commission's action in this case fails to pass muster under either of these criteria.

* * * In our case the requirement that the agency's means not undermine its purported goals translates into a requirement that the FCC's rules governing the content of licensees' public files not contradict its stated policy of relying on public participation in the license renewal process. The agency relies, at least in part, on public participation in the form of petitions to deny to ensure that applicants for license renewal have met their public interest obligations under 47 U.S.C. § 309(a) (1982). * * *

The Communications Act, 47 U.S.C. § 309(d)(1) (1982), requires a petitioner seeking to deny a license renewal to bear the burden of making a prima facie case indicating that the licensee has failed to meet its public interest responsibilities under the Act. In making a prima facie case a petitioner must file affidavits making "substantial and specific allegations of fact which, if true, would indicate that a grant of the application would be prima facie inconsistent with the public interest." * * *

After considering counter-affidavits, the Commission must determine whether there is a "substantial and material question of fact" concerning the adequacy of the applicant's programming. Only if it finds such a significant dispute on this ultimate issue will it order a hearing. 47 U.S.C. § 309(d)(2) (1982). Finally, whether or not an evidentiary hearing is held, the Commission must make an ultimate determination of whether the facts establish that the public interest will be served by granting or denying the broadcaster's application for renewal of its license. * * *

Exactly *what* constitutes a violation of the public interest standard in general or the community issue programming test in particular is largely committed to the discretion of the agency. In UCC III, however, this court found that a petitioner to deny must show that the "overall" programming efforts of a licensee had failed to adequately respond to issues of community concern. On remand the Commission refined this point by noting that "the proper inquiry into a broadcasters' performance will be centered on its efforts to program in response to those issues it deems important rather than *all issues* included in the broadcast schedule." Thus to make a prima facie case a petitioner to deny must file affidavits alleging specific facts which, if established, would show that the "overall" programming efforts of the applicant failed to include adequate treatment of those issues of public concern chosen by the applicant itself.

Petitioner argues that for all practical purposes the issues list will be the sole basis for building a prima facie case in a petition to deny. Petitioner's argument is supported by this court's observation that the new streamlined renewal process "is premised, in part, on the Commission's belief that sufficient infor-

mation is available in the public's file" to facilitate petitions to deny. * * *

* * * Similarly, in enacting the new postcard renewal system the Commission itself stressed the importance of the public file in its new regulatory scheme:

> "Under the rules and policies adopted herein, the information necessary to conduct an in-depth review of a licensee's performance will be available at the station in the public inspection file. Interested citizens need only visit that file to avail themselves of the information necessary to support a complaint or petition to deny, should one be appropriate. * * * Our concerns for assuring the ability of local citizens to monitor the operations of licensees who serve them are fulfilled by maintenance of local public files. * * *"

On remand the Commission was even more explicit on this point. It noted that the issues/programs list was the critical component of the public file. * * *

The FCC now suggests, however, that where the public file of an applicant was inadequate to resolve "substantial" issues of fact the petitioner could always ask the Commission to use its power to obtain additional information from the licensee. * * *

Such reasoning puts the cart before the horse. A petitioner will simply be unable to demonstrate that such a "substantial" factual issue *exists* absent adequate information in the public file. Moreover, should the Commission decide to make liberal use of its power to compel supplemental information from licensees, notwithstanding the flimsy character of a petition to deny, we have grave doubts about whether such a policy could withstand legal challenge, for in passing Section 309(d) Congress specifically sought to stop the Commission from allowing members of the public to harass licensees with baseless allegations. * * *

If the Commission's goal is public participation in the license renewal process, the least it can do is assure that public files contain the minimum amount of information required to begin the process outlined in 47 U.S.C. § 309(d) (1982). * * * [I]f the Commission's decision that public participation is a vital element of its new renewal policy is to be taken seriously, the Commission cannot make it virtually impossible for members of the public to participate at the *most elementary* level of a Section 309(d) proceeding.

In sum, we conclude that the petition to deny plays a critical role in the current regulatory scheme. Moreover, we believe that an adequate public file is essential to proper functioning of the procedures governing the petition to deny. Specifically, the agency's public file requirements must be sufficient to enable a petitioner to make a prima facie case under 47 U.S.C. § 309(d)(1). The current public file regulations do not meet this test.

* * * As noted, the illustrative issues lists identify the issues covered by a station and describe how the station treated each issue, including specific examples of programs responsive to each issue. The lists must also identify the time, date, and duration of broadcast for each program listed. By the time a license comes up for renewal, there will be 28 quarterly lists available. Although such lists will therefore contain a nontrivial quantity of data, they will not assure a petitioner to deny the ability even to come close to making a prima facie case.

* * *

* * * As noted, to make a prima facie case a petitioner to deny must file affidavits alleging specific facts which, if established, would show that the "overall" programming efforts of the applicant failed to include adequate treatment of those issues of public concern chosen by the applicant itself. But if the petitioner were to base its challenge solely on the FCC's revised issues list, any licensee would be free to respond by stating that conclusions drawn on the basis of admittedly "illustrative" lists do not have a substantial bearing on the applicant's overall programming efforts. The licensee could argue that the petitioner lacks the complete picture and therefore has failed to evaluate fairly the licensee's programming. The petitioner would be unable to dispute that claim. Lacking a disputed material issue, the Commission would dismiss the petition.

* * *

* * * [T]he Commission has adopted an approach to the question of community-responsive programming that emphasizes the quality of a broadcaster's efforts, not the quantity of its nonentertainment programming. A petitioner must amass sufficient facts to put the overall *quality* of a licensee's broadcasting into dispute. A merely illustrative list is not up to that task. It is simply impossible to determine whether the inadequate treatment of the issues on a merely illustrative list fairly reflects on the quality of a broadcaster's overall efforts.

In UCC III, this court suggested that the Commission should determine "whether a *revised* com-

prehensive logging requirement—one designed, for example, to log information about *issues* and not *categories* of programming—might not produce benefits that would outweigh the recordkeeping costs" (emphasis in original). Petitioner criticizes the FCC for rejecting that alternative. * * *

On remand the Commission explicitly considered this option, prominently featuring it in the Further Notice of Proposed Rule Making as the agency's tentative favorite. The Commission rejected this option only after receiving numerous comments from broadcasters, indicating that an *issues* log, unlike a *category* log, would be quite expensive to produce because it would require the involvement of managerial personnel. * * *

In the past this court has not second-guessed this type of cost-benefit analysis. We will not do so here. Satisfied that the agency has rationally considered the costs and benefits of an "issues log" and that the agency has adequately explained the basis for its action, we do not find its rejection of that alternative to be arbitrary and capricious.

We do not take such a sanguine view, however, of the agency's treatment of the "significant treatment" alternative. During the notice and comment period following our remand at least one commentator suggested that the agency require licensees to list the programs that had provided "significant treatment" of community issues during the relevant time period. Under this proposal a petitioner to deny would not rely solely on a merely illustrative list. Instead, the petitioner would rely on a list that the broadcaster *itself* had certified to include those programs in which the broadcaster had provided "significant treatment" of issues of community concern.

The relative benefits of such a list are obvious. By referring to this list a petitioner to deny would be able to determine whether a broadcaster had provided significant coverage of some set of issues of community concern. The petitioner would be able to assert that by the *broadcaster's own admission* the programs on this list represented the most significant treatment by that broadcaster of issues that the broadcaster itself thought to be of community concern. If the petitioner could submit affidavits explaining why such programs failed to meet the most minimum qualitative standards, serious doubt would be cast on the overall adequacy of the broadcaster's programming. For if the broadcaster's *best* programs (i.e., its listed programs) were inadequate, it is questionable whether the broadcaster's unlisted programming would pass muster. Although the Commission would retain substantial discretion in each case to evaluate the probative value of such a showing, common sense suggests that a petitioner to deny would usually come quite close to showing that such a record made renewal of a license prima facie inconsistent with the public interest.

The Commission suggests that its current program will in fact produce this result even though its regulations merely require an exemplary list. Thus the Second Report reasons: "[W]e anticipate that broadcasters will probably use them to adequately document their significant issue-responsive programming, because doing so will serve their own self interest." The Commission may be right. Unfortunately, it has provided no explanation of what sustains its hopeful outlook.[15] Moreover, as we have noted on a previous occasion, in reviewing the Commission's public file regulations we are primarily concerned with the minimum requirements imposed by regulation, not with what the Commission hopes private parties will do if left free from such requirements.

On the other side of the ledger, it is far from clear that the costs of such a list are self-evidently prohibitive. At least nothing in the Second Order suggests that conclusion. Although this proposal would entail some use of managerial personnel, and consequently would entail some increase in costs, such costs would not be as substantial as those entailed by a daily issues log. Indeed it is not clear that this proposal would entail any *marginal* costs over those already mandated by the illustrative issues/programs list. Of course, we are not equipped to assess the relative costs of this proposal as an initial matter. We only raise such questions to illustrate the sort of analysis the agency should have provided when it rejected the "significant treatment" alternative.

This court does not insist that the agency consider every conceivable option. * * * But the "significant treatment" option would seem tailor-made to the

15. There is no doubt that *some* stations might decide to keep shoddy lists and take their chances. We simply do not know how many stations are likely to follow this course. At oral argument it was suggested by counsel for intervenor CBS, Inc. that most responsible stations would keep such lists. But it is certainly plausible that many *small* stations might decide to keep poor lists. The discounted value of losing their license might be so low, that it would not warrant the near-term costs entailed by first-rate listmaking. * * *

agency's new "qualitative" standard for evaluating petitions to deny. The Commission's failure to provide a single word of explanation for its rejection of an option that appears to serve precisely the agency's purported goals suggests a lapse of rational decision making.

* * *

The FCC has stated that it now primarily relies on petitions to deny in enforcing the statutorily mandated public interest requirement of the Communications Act. Yet the Commission's revised issues list fails to provide an adequate basis for a prima facie showing in a petition to deny. This court has repeatedly noted that its approval of the FCC's deregulation of the license renewal process hinges, in part, on the development of adequate recordkeeping requirements by the Commission. Because the Commission's new recordkeeping requirements fail to advance the Commission's own purported goals in a rational manner, and because the Commission has failed to explain adequately its rejection of one of the most serious options before it, the order of the Commission must be vacated. The case is remanded so that the agency may reconsider the specified alternative or develop another adequate means of assuring petitioners to deny the basis for stating a prima facie case.

Vacated and remanded.

COMMENT

Taking the court's command to heart, the FCC pretty much revised its programs/issues requirements as the court had suggested. In Deregulation of Radio, 104 FCC 2d 505 (1986), the FCC decided to require licensees to maintain quarterly issues-program lists reflecting their "most significant programming treatment" of the issues as determined by the broadcaster's good faith judgment. This dropped the "illustrative" standard that the court had found so objectionable and put on broadcasters the obligation to make sure that their lists included any number of issues that had received "significant" treatment. Since it was, essentially, what the court had ordered, the FCC assumed (correctly as it turned out) that this new standard would survive judicial review.

Things were a little more complex in TV. The FCC's 1984 TV Deregulation order was issued shortly after the FCC's first effort at responding to the court's concerns about Radio Deregulation. Thus, TV broadcasters were, at first, required to prepare quarterly lists of at least five issues/programs. In its 1986 *radio* deregulation order, adopting the new "significant treatment" standard, the FCC decided to try and simplify things. It required *commercial television* broadcasters to also prepare quarterly issues/programs lists reflecting "significant programming treatment." Finally, in 1988, the FCC made everything consistent. In Revision of Sec. 73.3527(A)(7) Relating to the Issues-Programs List for Public B/casting Licensees, 3 FCC Rcd. 1032 (1988), the FCC brought everybody under common standards. Nobody had ever challenged the 1984 order deregulating noncommercial broadcasters, so they were still preparing quarterly lists of five to ten community issues/programs. Recognizing that it had argued that all broadcasters could be deregulated for essentially the same reasons, and placing a high value on regulatory consistency, the FCC decided that noncommercial broadcasters, too, should prepare quarterly lists of issues/programs receiving "significant programming treatment."

The dispute over how broadcasters should document their programming was essentially over. One more issue remained—growing, this time, from TV Deregulation rather than Radio Deregulation. As will be discussed shortly, the FCC has often had special policies about children's television. Since the 1984 TV Deregulation order also affected those policies, it's not surprising that that order was challenged by children's advocates, notably Action for Children's Television. The forum was, again, the U.S. Court of Appeals for the D.C. Circuit, and, again, the FCC (mostly) won. In *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987) the court upheld most of the FCC's TV Deregulation decision. It remanded some portions of that decision directly dealing with children's television policy to the FCC for further review. Basically, the court was troubled that the FCC, after saying for so long that children were special (and did not participate in the "marketplace" as adults did), suddenly appeared to switch paths without justification. More on this issue can be found in the portions of this chapter dealing with children's television policy.

By the late 1980s, then, much of the dust over changing general programming regulation appeared

to have settled. Gone, really, was the expectation that each broadcaster would try to meet the needs of everyone. Specialization was legally permitted. Broadcasters could meet the needs of their audiences and argue that "other stations" were meeting the needs of others. Gone was the expectation that most broadcasters would offer minimal amounts of noncommercial, nonentertainment programming. Instead, broadcasters had a "bedrock obligation" to offer "issue responsive" programming—with the amount, timing, and nature of that programming not specified in advance by the FCC. Gone, as well, were comprehensive, detailed program logs. Instead, broadcasters were to prepare quarterly lists of whatever number of community issues they believed had received significant programming attention. Those lists never found their way to Washington, D.C., for FCC review unless somebody complained about a broadcaster's performance. Instead, they sat in the station's public files, used, if at all, only by the small number of knowledgeable members of the public who knew that they were there. Finally, commercial stations, both radio and TV, no longer faced any governmental pressure to hold down commercial loads. They were free to offer what the marketplace would support.

The impact of radio and TV deregulation on the public is very hard to assess. The consensus among communications scholars seems to be that many radio stations are doing less public service programming than they did before deregulation. Many stations have reduced their amounts of news and public affairs programming and scheduled much of what they do in very early morning hours. At the same time, some of the specialization the FCC expected has occurred with some stations—especially AM stations—at least moving to more of a talk/information format. Efforts to assess the effects of deregulation have been complicated by the changing FCC standards, discussed above, between 1984 and 1988.

The impact on broadcasters is also not yet very clear. At about the same time that the FCC was deregulating radio, Congress extended radio license terms from three years to seven years and TV licenses from three years to five years. Thus, few broadcasters have had to withstand renewal scrutiny under the new standards because of extended license terms. Under the old rules, broadcasters knew what to do: stick to the programming and commercial guidelines and ascertain and log correctly. It was a clear world. The revised world is less clear. Deregulation gives more discretion to broadcasters, almost certainly a good thing, but it hasn't completely eliminated general programming regulation. The expectation of the broadcasting industry was that a deregulatory-minded FCC such as that led by Mark Fowler, especially when constitutionally predisposed against content regulation, would pose few problems for broadcasters under the new standards. Whatever a broadcaster had offered as "issue responsive" programming would probably be adequate. The 1988 elections and FCC changes resulting therefrom might change that cozy proposition. Communications advisors to President Bush are not, generally, as ideological as Mark Fowler. When the FCC faces challenges to broadcast licenses that turn on "issue responsiveness," there's at least a chance that the FCC of the late 1980s and early 1990s may find some broadcasters lacking. If so, case-by-case interpretation of the "issue responsive" standard may, in the end, create new FCC standards as to what's expected. The result could well be the same process that played out in the 1960s and 1970s—case-by-case decisions summarized, eventually, in FCC Policy Statements and Primers and, in effect, reregulation.

BROADCASTING AND POLITICAL DEBATE: §315 AND THE "EQUAL TIME" REQUIREMENT

Introduction

Politicians believe that their fate is much influenced by how they are treated by broadcasters. In fact, they've been concerned about that since near the dawn of federal radio regulation. Section 18 of the Radio Act of 1927, as previously noted that the earliest general federal law governing broadcasting required two things of broadcasters when dealing with political candidates. First, if they let one legally qualified candidate for a public office use their station, then they had to provide "equal opportunities" to that candidate's legally qualified opponents to use the same station. Second, whenever candidates used stations under this section, the broadcaster could not censor the candidate's use.

These provisions were incorporated seven years later in the Federal Communications Act of 1934.

They persist today as section 315 of that act. The current version of the statute, 47 U.S.C.A. § 315(a)(1976) states:

SEC. 315. CANDIDATES FOR PUBLIC OFFICE; FACILITIES; RULES

a. Equal opportunities requirement; censorship prohibition; allowance of station use; news appearances exemption; public interest; public issues discussion opportunities.

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station; *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by any legally qualified candidate on any—

1. bona fide newscast,
2. bona fide news interview,
3. bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
4. on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

b. Broadcast media rates

The charges made for use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election to such office shall not exceed—

1. during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and
2. at any other time, the charges made for comparable use of such station by other users thereof.

c. Definitions

For purposes of this section—

1. the term "broadcasting station" includes a community antenna television system; and
2. the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

d. Rules and regulations

The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

The language of the act as just reprinted reveals how interested Congress has been in political broadcasting over the years. The portions of the act regulating rates [section 315(b)] were added in two stages. In 1952, Congress feared that some broadcasters were ripping political candidates off by setting artificially high candidate rates. Section 315(b) prohibits broadcasters from charging candidates more than they normally charge their other advertisers. In 1972, Congress decided that candidates should get the lowest rates available and hence added the lowest unit charge language to section 315(b). The four exceptions to the equal opportunities principle for news-related programming were added by Congress in 1959, after the FCC had ruled that equal opportunities—as the law was then written—applied to news appearances. Fearing that broadcasters wouldn't cover the appearances of incumbent candidates, Congress hastily amended the law.

In 1972, Congress decided that section 315 needed a complement. As we'll see shortly, section 315 creates what could be called a contingent right of access. *If* a broadcaster provides access to one candidate, *then* that broadcaster must provide equal opportunity to use the station to that candidate's opponents. By itself, however, section 315 does not require that broadcasters provide access to the station to *any* candidates in the first instance. Recognizing in 1972 that its "lowest unit charge" efforts to drive down candidate ad costs might lead broadcasters to turn away candidates altogether, Congress in 1972

added to section 312 of the Communications Act of 1934. Section 312 is where the most drastic remedies of the FCC are found—the conditions under which the commission can revoke a broadcast license. In 1972, Congress added a new part—section 312(a)(7) to this part of the act. Under this part of the statute:

> The commission may revoke any station license or construction permit * * * for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy.

Section 312 has been subject to substantial litigation and interpretation—to be summarized shortly. Suffice to say for now that it complements section 315 by opening up the airwaves to *federal* candidates—something section 315 by itself does not do.

Finally, by way of introduction to a most complex subject, there's the FCC's "fairness doctrine." Much will be said about this concept later in this chapter. A few initial points must be made here, however. First, the fate of the fairness doctrine is most unclear. Firmly established by the FCC since 1949, the FCC largely abandoned it in 1987. Congress, however, is generally supportive of the doctrine and has tried to write it directly into the Communications Act of 1934. Court decisions are still pending that affect whether or not the FCC can, as it would currently like to, abandon the doctrine.

For the sake of convenience here, we'll speak of the fairness doctrine in past tense. Recognize, however, that the "passing" of the fairness doctrine is not yet final. Second, unlike §§ 315 and 312, the fairness doctrine normally did not deal with how broadcasters treated persons; instead, it dealt with how broadcasters treated controversial issues of public importance. In its liveliest form, the doctrine said that broadcasters had to do two things: devote reasonable attention to such issues and provide reasonable opportunities for opposing viewpoints on such issues to be heard/seen on their stations.

Since campaigns often involve controversial issues, it was easy to confuse the fairness doctrine with section 315. There are, however, major distinctions. Section 315 comes into play whenever candidates appear and, as we'll see, is rather automatic and unambiguous in terms of what it requires broadcasters to do. The fairness doctrine applied (and perhaps still applies) to some but not most uses of stations by candidates. More importantly, it applied (and perhaps still applies) when issues are raised in other contexts as, for example, if a broadcaster decided to sell lots of time to proponents of a ballot referendum and then decided not to sell any time to opponents of the referendum.

The important idea at this point is that at least two and perhaps three distinct but interrelated areas of broadcasting law affect how broadcasters cover political information. The ambiguity of that statement is deliberate. Sections 312 and 315 remain solid law. The fate of the fairness doctrine, as already noted, is much more nebulous. The problem for those who want to understand how political content is regulated is (1) to distinguish between §§ 315 and 312 of the Communications Act and (2) to try to figure out the current status of the fairness doctrine. We begin with Section 315.

Section 315: "Equal Opportunities." Section 315 says, basically, that if a broadcaster lets one "legally qualified candidate for public office" use his or her station, then "equal opportunities" must, with some exceptions, be given to "legally qualified opponents" to "use" the same station. In addition, it regulates what candidates can be charged for their uses. These statements set up a model for discussing what section 315 requires:

a. What's a "public office?" Who is a "legally qualified candidate" and who is a "legally qualified opponent"?
b. What's a "use" of a station?
c. When are "uses" exempt from creating equal opportunity rights/obligations?
d. What's an "equal opportunity"?
e. How are rates regulated?
f. What control can the broadcaster have over candidate uses?
g. Is this whole system constitutional?

What's a "public office?" Who is a "legally qualified candidate" and a "legally qualified opponent?" While there are many public offices in this country, the FCC has interpreted section 315 as applying only to public offices where the electorate choses the office holder. The FCC has ruled that *all* elected offices come under section 315, regard-

less of their importance. Thus, for example, the president of the United States is covered, but so is dogcatcher of Podunk—provided that the voters of Podunk elect their dogcatcher. Appointed offices, for example a city manager in many communities, don't come under section 315 even if, by chance, somebody mounts a rather concerted campaign to be appointed. If the electorate doesn't vote for the office, it's not a "public office" under this portion of the Communications Act.

An inquiry into the meaning of the phrase "legally qualified" candidate is basic to an understanding of the statute. *Flory v. FCC*, 528 F.2d 124 (7th Cir. 1975), considered the problem. Ishmael Flory was nominated by the state committee of the Communist party to run in the 1974 election for United States senator from Illinois. Since the Communist party had not polled at least 5 percent of the vote in the preceding election, a nominating petition requiring 25,000 signatures was needed for its candidate to appear on the ballot.

Between the time of the nomination and the time when Flory eventually obtained the necessary signatures, he requested equal time in response to debates aired by broadcasters between the Republican and Democratic candidates. The FCC refused to order the broadcasters to give equal time to Flory: Since Flory had not yet secured a place on the ballot, he was not a legally qualified candidate at the time of the prior broadcasts.

The court held that Flory was not precluded from seeking equal time where the candidate involved had indicated that he would run as a write-in candidate if he did not obtain a place on the ballot:

> We cannot agree with the argument of the commission that the rule which provides qualification either by obtaining a place on the ballot or by becoming eligible by being a write-in candidate must be construed as setting up mutually exclusive routes.

However, the court did not vacate the FCC order in the case because Flory should have sought review of the FCC rulings when they were made rather than attempting to obtain makeup time for past erroneous rulings.

As a result of the *Flory* case, the FCC amended its rules defining a "legally qualified" candidate. See Amendment of the Commission's Rules Relating to Broadcasts by Legally Qualified Candidates, 60 FCC 2d 615 (1976). Under the new rules, a candidate is legally qualified if he:

1. has publicly announced his candidacy,
2. "meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate," and
3. either:
   a. has qualified for a place on the ballot, or
   b. "has publicly committed himself to seeking election by the write-in method, and is eligible under the applicable law" to be voted for by write-in or other method and "makes a substantial showing that he is a bona fide candidate for nomination or office."

The FCC has attempted with this definition to clarify the questions left unanswered by *Flory*. The rules require that the candidate publicly commit himself to seeking election by the write-in method in the event that his attempts to get on the ballot fail. But the question remains: Is the candidate's word alone sufficient "public commitment"? The commission's insistence on a "substantial showing" of bona fide candidacy suggests that more than a casual announcement by a candidate is necessary. Perhaps the pattern of continued assurance that the candidate will turn to a write-in candidacy, such as found in *Flory*, will be sufficient. See also Broadcasts and Cablecasts by Legally Qualified Candidates for Public Office, 44 F.R. 32790 (FCC, July 28, 1978).

Primary Elections and The "Equal Time" Rule. Section 315, then, comes into play whenever there are declared, legally qualified candidates for elective office. The statute says when that is the case, if broadcasters let one legally qualified candidate for an office "use" their station, then they have to give legally qualified opponents an equal opportunity to use the station. The question is, when do candidates oppose each other? As a result of FCC interpretation, it becomes important whether one is talking about a primary or a general election period.

During a primary, nobody—really—is running for a public office. Rather, various groups of candidates are running for the nomination of their respective party. The FCC treats each of these races as campaigns for "public offices" under section 315 (even though, of course, they are really party, not public, offices, and even though, in the case of president, they are really campaigns to elect a group of electors rather than a candidate *per se*). A group of Democrats, for example, might run in a primary for the Democratic nomination for president. A dif-

ferent group of Republicans might, at the same time, run for the Republican nomination for president. The FCC has ruled that during primary season, candidates from different parties are not "opponents" under section 315. Thus, use of a station by one of the Democratic candidates for an office during the primary would entitle the other legally qualified opponents for the Democratic nomination to claim "equal opportunity" rights. It would not entitle any of the Republican candidates to claim "equal opportunity" rights, however. Once the primaries are over and parties have selected their candidates, then all of the candidates from different parties become opponents. During the general election season, "use" of a station by a Republican candidate for an office, for example, would entitle the Democratic opponent to claim "equal opportunity" rights. For that matter, independent or third-party candidates for that office would also be entitled to "equal opportunities" as well.

This interpretation can work to the disadvantage of minor candidates. Richard Kay, the unopposed candidate of the American Independent party for the Ohio Senate, requested broadcast time equivalent to that afforded by broadcasters to major party candidates who were engaged in Ohio primary elections. Both the Democratic and Republican primaries were contested, and in each of these major party primaries the opponents matched against each other were well known: Governor Rhodes and Congressman Taft in the Republican primary and Howard Metzenbaum and John Glenn in the Democratic primary. The candidates for these races had been offered broadcast time for appearances. The FCC refused to order the broadcasters to give Kay equal time. The Federal Court upheld the FCC. *Kay v. FCC*, 443 F.2d 638 (D.C. Cir. 1970).

While agreeing that primary elections were covered under section 315, the court ruled that primary elections held by one party are to be considered separately from primary elections of other parties. Equal opportunity need only be afforded candidates for nomination "for the same office in the same party's primary." Section 315 provides for equal opportunities only when candidates are competing against each other. Appearance on the broadcast media, prior to the primary, of candidates of one party does not entitle candidates of another party to equal time. Candidates in primary elections are running solely against other candidates from their own party and not against candidates from other parties.

The *Kay* case obviously presents some serious obstacles to the candidate of the minority party. Where a candidate, as was the case in *Kay*, is unopposed in his party's primary, the equal time rule provides no assistance. In short, major party candidates in contested primaries may gain great broadcast impact in terms of coverage and publicity before the equal time rule can be invoked. The *Kay* interpretation with respect to the application of the equal time rule to noncontested primaries is therefore particularly damaging to third party candidates who are necessarily dependent on media exposure if they are to popularize and legitimize their parties and candidacies.

Does the *Kay* ruling open the door for potential abuse by broadcasters? The court of appeals answered this question by declaring its acceptance of the FCC's response to the issue:

> The commission brief said: Were a station to afford extensive time to candidates in one primary race and give little or no coverage of other races involving ultimately the same office, or having given extensive coverage to one party's primary race, a station did not cover the general election campaign involving the same race, a serious question would arise under the fairness doctrine as to the licensee's performance as a public trustee. See *Office of Communication, Church of Christ v. FCC*, 359 F.2d 994 (D.D.Cir. 1966).

Note that if Richard Kay had had an opponent in the American Independent party primary, his opponent would have had rights to equal time if Kay had been given the broadcast time he requested. The FCC recognized that primary elections were covered by section 315 when it stated that "both primary elections, nominating conventions and general elections are comprehended within the terms of Section 315."

Who is a "qualified" presidential or vice-presidential candidate? The FCC applies some special standards when it comes to candidates for president and vice-president. Sometimes these standards mean that broadcasters have to treat as "candidates" under section 315 persons whom their audience can't vote for. The problem is that the presidency and the vice-presidency are the only offices we elect nationally, and we don't even elect them directly. Instead, we use the "electoral college" system. This complicates section 315 as it applies to candidates for president and vice-president. The FCC's rules work as follows. First, broadcasters must treat as candidates under

section 315 *all* persons who have qualified for the presidential or vice-presidential ballot in their service area (or, if write-ins are allowed, are making a serious effort to get elected that way). This is so even if these persons have qualified in no other sections of the country and haven't any chance of being elected president or vice-president. The voters the broadcaster serves have a choice—they can vote for such minor candidates—so the FCC applies section 315 to them. Second, all broadcasters must treat as candidates under section 315 persons who have qualified for the ballot in ten states anywhere in the United States. Thus, sometimes, broadcasters have to consider section 315 implications for candidates their listeners or viewers can't vote for and who are not on the local ballot. The theory here is that one could win the presidency or vice-presidency by taking the ten largest states in the U.S.—that would be enough electoral college votes to win—and that, therefore, broadcasters should treat persons as "national candidates" once they have qualified in at least ten states. In other words, broadcasters have to treat as section 315 candidates for president and vice-president everybody who has qualified for a place on their local ballot (even if not nationally electible) plus candidates, if any, who have qualified in ten states someplace in the nation even if not in their local service area.

What is a "use" of a station? The policies just described show that the FCC is not anxious to guess when somebody is a candidate. Nobody is a candidate until he or she says so. Similarly, the FCC has developed rather rigid notions of what a "use" of a station by a candidate is under section 315. Basically, a legally qualified candidate for public office "uses" a station whenever he or she appears on the station in an identifiable fashion. In television, it doesn't matter whether that appearance is audio or video. Candidates, for example, often produce commercials in which they don't appear—"man-on-the-street" spots in which ordinary folks say what a great person the candidate is. That's not a use of the station as far as the FCC is concerned, because the candidate has not appeared. If, however, the candidate appears in any way in the spot—in video, for example, in a brief still picture at the end of the spot or, in audio, reading the sponsorship ID lines explaining who has paid for the spot—then the same spot becomes a "use" under section 315 because it includes an identifiable candidate appearance.

Basically, the FCC doesn't want to get in the business of guessing which uses are political and which are not. Thus, the general rule is that *any* identifiable appearance by a legally qualified candidate for public office constitutes a use. This can lead to some interesting decisions.

In Adrian Weiss, 58 FCC 2d 342 (1976), the applicability of the equal time doctrine to nonpolitical broadcasts was tested during the 1976 presidential campaign when a broadcast station in California sought a ruling prior to airing old movies starring Ronald Reagan, a legally qualified candidate in the New Hampshire presidential preference primary. The FCC remarked that attempting to distinguish between political and nonpolitical use of broadcast facilities by candidates would require highly subjective judgments concerning content and would potentially enlarge government interference with broadcasting operations. Therefore the FCC declined to distinguish between political and nonpolitical appearances and ruled that "the broadcast of movies in which Ronald Reagan appears would be 'use' under Section 315 and would entitle opposing candidates to equal opportunities in the use of the broadcasting station."

At the time of the *Weiss* decision, Ronald Reagan was no longer engaged in an acting career. But what of an actor who is still performing on television and who is also campaigning for office? Should such an actor be successful in urging that his nonpolitical appearances should not impose "equal opportunities obligations upon broadcast licensees?" In *Paulsen v. FCC*, 491 F.2d 887 (9th Cir. 1974), the FCC responded in the negative to this question, and the federal court affirmed. The court explained:

> Paulsen's proposed distinction between political and non-political use would, the FCC contends, require it to make highly subjective judgments concerning the content, context, and potential political impact of a candidate's appearance. We agree.

Even more recently, the FCC has ruled that under certain circumstances, appearances of station news personnel performing their normal functions as broadcast journalists can amount to "uses" under section 315. See *Branch v. FCC*, 824 F.2d 37 (D.C.Cir., 1987), text p. 775.

When are "uses" exempt from creating equal opportunity rights/obligations? There are three exceptions to this notion that all "identifiable" uses count under section 315. The first exception occurs

when a candidate "appears" in advertisements run by independent political groups. If such a group runs an ad supporting a candidate, but without that candidate's approval, appearance of the candidate in that spot won't entitle his or her opponents to equal opportunities. If a station allows a group to run a spot opposing a candidate, appearance by that candidate in the spot won't trigger equal opportunity rights for his or her opponents. It may, however, trigger the so-called Zapple Rule and obligate the station to stand willing to sell comparable time to the attacked candidate, if he or she can afford it and wishes to buy response time. The second exception recognized by the FCC is for so-called "fleeting uses." The Commission will sometimes rule that a candidate's appearance is so brief or from such a wide angle that it should not count under section 315.

The most important exceptions from the idea that all appearances count as uses, however, were those created by Congress in 1959. The FCC had ruled that section 315, as then written, was absolute—any appearance, in any format (including news) meant that legally qualified opposing candidates were entitled to equal opportunities. Broadcasters had always, wrongly, assumed that news programs were somehow exempt from section 315, and they quickly urged Congress to change the law in response to the FCC's ruling. Congress, therefore, added four "exceptions" to section 315 within weeks of the FCC decision. The exceptions have been previously mentioned: (1) bona fide newscasts, (2) bona fide news interviews, (3) bona fide news documentaries (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), and (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

Note that the Congress used the phrase "bona fide" in all these exemptions. Bona fide means true or genuine. Inclusion of the phrase gives the FCC the right to decide that some news-related appearances aren't real or genuine but are, instead, just ways around the law. The FCC generally defers to what broadcasters, using reasonable, good faith judgment, believe to be exempt programs. The FCC, however, has issued some decisions that define what's a real or genuine use of the exemption and what's not.

The bona fide newscast exemption has presented few problems. Appearances by legally qualified candidates on the regularly scheduled newscasts of radio and TV stations don't create equal opportunity rights for their opponents. Stations can take things that might not otherwise be exempt and include them in their newscasts and still be okay, unless there's evidence showing that the reason for doing this was to deliberately favor one candidate over another. A newscast does not even have to be regularly scheduled to qualify for this exemption; special news bulletins have also been ruled to be bona fide newscasts.

When Congress exempted bona fide news interviews it had in mind the news interview shows of 1959—venerable programs like "Meet the Press." Such programs remain exempt today. If a news interview program is regularly scheduled, sticks to its normal format, is under the control of the broadcaster and not the candidate, and has chosen the people it interviews for their newsworthiness, the program will almost always be ruled exempt by the FCC. A couple of twists have been added in recent years, however. For a long time, the FCC exempted only news interview shows that had been regularly scheduled in the past. This made it hard for a broadcaster to start a new interview show near election time. In 1984, the FCC ruled that some *proposed* news interview programs, if run according to guidelines submitted by the broadcasters to the FCC, would also be exempt. See *CBS, Inc.*, 55 RR 2d 864 (1984) and *NBC Inc.*, 56 RR 2d 958 (1984). In subsequent years, the FCC has occasionally ruled that bona fide (newsworthy) *interview segments* of shows that are not wholly devoted to news interviews would also be exempt under this provision of section 315.

The bona fide news documentary provision of section 315 has not occasioned much interpretation, largely because the interest of the broadcasting industry in documentaries has been in decline in recent years. It does, however, have an important twist. Documentaries about campaigns and candidates are not exempt. Documentaries are only exempt when the candidate's appearance is incidental to his or her status as a candidate. If, for example, a broadcaster were to run a documentary about "Campaign 1988" and include then presidential nominee George Bush in the documentary, that appearance would not be exempt since Bush is appearing because he was a candidate. If, on the other hand, the same broadcaster ran a documentary about the decline of the American petroleum industry and in that documentary included an appearance by former oilman George Bush, that appearance would presumably be exempt. In the latter example, Bush would be appearing not because he was a candidate but because he was formerly involved in the oil industry. His

appearance in the documentary would be because of his affiliation with the subject of the documentary, and it would only be "incidental" that he was also a candidate for public office at the time.

The final exemption, on-the-spot coverage of bona fide news events, has been the most controversial over the years. In 1959, Congress clearly exempted coverage of political conventions. The immediate question was what else, if anything, did Congress also intend to include in this exemption? Early FCC rulings said, in effect, not much else. In the 1960s, the FCC ruled that this exemption did not apply to broadcaster-run candidate debates or coverage of press conferences called by candidates.

The famous John F. Kennedy-Richard M. Nixon television debates of 1960, which many think led to the election of John F. Kennedy, were made possible by an amendment to section 315 which suspended operation of section 315 during the presidential campaign of 1960. 74 Stat. 554 (1960). Why wouldn't the debate have been possible otherwise? Suppose the presidential candidate of the Vegetarian or the Prohibition party had asked for "equal time" after the Kennedy-Nixon debate and that section 315 was in effect, would the broadcasters have had to provide time?

There is apparent broadcaster willingness to give time to major party candidates but no such willingness with regard to minority party candidates. See Friedenthal and Medalie, *The Impact of Federal Regulation of Political Broadcasting: § 315 of the Communications Act*, 72 Harv.L.Rev. 445 at 449 (1959). Is the way to deal with the problem a statute which simply repeals section 315 for the purpose of those political contests where the minority party candidates have no real popular support and no chance of victory? Does such a technique assure permanent minority status to minority parties?

In the 1976 presidential election the equal time question, inevitable in presidential elections, arose once again: Could the television networks carry a live television debate between the candidates for the two major parties, Gerald Ford and Jimmy Carter, without incurring obligations to give "equal time" to third party candidates?

On September 30, 1975, in response to petitions filed by CBS and the Aspen Institute, the FCC held, overruling past decisions,[4] that the exemption in section 315(a)(4) for "on-the-spot coverage of bona fide news events" would free from "equal time" obligations broadcast coverage of debates between candidates sponsored by nonbroadcast entities, i.e., nonstudio debates.[5] *In re Aspen Institute and CBS, Inc.*, 55 FCC 2d 697 (1975).

The FCC said that its decisions in the overruled cases were based on an incorrect reading of the legislative history of newscast exemptions. Language in a 1959 House Report had suggested that for a candidate's appearance on the broadcast media to be exempt, it would have to be "incidental to" the main coverage of a news event. By definition, a debate could never qualify for exemption. The appearance of the candidates is the central focus of the event.

However, the FCC stated that the "incidental to" language was removed by congressional conference before the amendment to the Communications Act was passed in 1959. Thus, the FCC's former conclusion that a candidate's appearance must be incidental to be exempt was on re-examination held to be unsupported by legislative history. The FCC said that Congress did not intend the FCC "to take an unduly restrictive approach which would discourage news coverage of political activities of candidates." Accordingly, a program which is otherwise exempt does not lose that status because the appearance of a political candidate is central to the presentation. The FCC stressed that the broadcaster has reasonable latitude in making the initial determination of whether an event will be eligible for exemption under section 315. The FCC can overturn the licensee's determination if it was not reasonable or made in good faith.

Shortly after the *Aspen* decision, plans for a debate between Jimmy Carter and Gerald Ford, sponsored by the League of Women Voters, exclusive of any initiation or control by any broadcast media, was announced. The *Aspen* decision had done its work. A televised debate limited to the candidates of the two major parties had become a reality. Although there were numerous additional legally qualified candidates for president, none was invited by the league to take part in the debates. Broadcast networks ABC, CBS, and NBC were then invited by the league to air "live" each of the three scheduled debates

4. See The Goodwill Industries Station, Inc., 40 FCC 362 (1962) and National Broadcasting Co. (Wyckoff), 40 FCC 370 (1962).

5. In *Petitions of CBS and Aspen Institute*, the FCC also held that presidential press conferences and press conferences of other candidates for political office which are broadcast "live" and in their entirety would qualify for exemption under § 315(a)(4).

before an invited audience. The panelists assigned to question the candidates were to be selected by the league and not by the broadcasters. Broadcasters would not be permitted to show the audience or its reaction.

When the networks agreed to air the debates on the basis of *Aspen*, the National Organization for Women (NOW) and Representative Shirley Chisholm, a legally qualified candidate for president, challenged the FCC ruling and the legality of the planned debates. In *Chisholm v. FCC*, 538 F.2d 349 (D.C.Cir. 1976), the court affirmed the FCC rulings in *Aspen*.

In *Chisholm*, the court upheld the FCC's new interpretation of the equal time rules. The court stressed the necessity for judicial deference to agency interpretation where Congress has assigned the responsibility for dealing with specific situations to the agency. Moreover, an agency could change its mind about the meaning of a statute no matter how long-standing its prior interpretation. As a result of *Chisholm*, therefore, debates between qualified political candidates, which were initiated by nonbroadcast entities, would be exempt under § 315(a)(4) provided that they were covered "live" and that there was no evidence of broadcast favoritism. Once these requirements were met, the essential factor was that the decision to cover the debate was based on the good faith determination of the broadcast licensee that the debate was a "bona fide news event" worthy of broadcast coverage.

How does one explain the fact that Congress in 1960 had to change the law to permit what in 1976 was found to be permissible anyway, i.e., permitting broadcasters to televise a debate limited to the presidential candidates of the two major parties without incurring any equal time obligations? The court of appeals answered this argument in *Chisholm*:

> [T]he 1960 suspension of Section 315 is more properly viewed as an isolated experiment in total repeal of the equal time requirements for presidential and vice presidential candidates, and not as a recognition or limitation of the scope of the news coverage exemption.

Fundamental changes, such as those created by *Aspen* and *Chisholm* were, of course, subject to further judicial and FCC interpretation. In 1980, the U.S. Court of Appeals for the D.C. Circuit sustained an FCC ruling that Senator Edward Kennedy, a challenger to Democratic President Jimmy Carter for the party's nomination in the 1980 elections, was not entitled to "equal opportunities" following a Carter press conference.

KENNEDY FOR PRESIDENT COMMITTEE v. FCC

6 MED.L.RPTR. 1722, 636 F.2D 432 (D.C.CIR. 1980).

ROBINSON, *Circuit Judge*:

This controversy arose when, on February 13, 1980, President Carter held a press conference carried live in prime time by the four major American television networks. On the day following, petitioner Kennedy for President Committee complained to the networks that the President had taken advantage of the occasion for purposes of his candidacy for the 1980 presidential nomination of the Democratic party. Petitioner asked for "an equal opportunity" for its candidate, Senator Edward M. Kennedy, "to respond to * * * calculated and damaging statements" allegedly made by the President "and to provide contrasting viewpoints * * *." Each of the networks responded negatively, whereupon petitioner turned to the Federal Communications Commission for assistance. On March 7, that agency's Broadcast Bureau denied petitioner's request, and on May 6, by the order now under review, the commission sustained the Bureau's ruling.

Petitioner challenges the commission's decision on several grounds. Foremost are contentions that the commission abdicated a duty to apply the equal-opportunity mandate of Section 315(a) of the Communications Act of 1934, and ignored an independent responsibility to accord First Amendment considerations their just due. The commission, on the other hand, insists that its action kept faith with principles of Section 315(a) interpretation formulated in its *Aspen* decision and approved by this court, and that its disposition furthered the common objective of Section 315(a) and the First Amendment by encouraging maximal coverage of events envisioned by the networks as newsworthy. We agree with the commission and affirm.

The press conference precipitating this litigation transpired on the eve of the 1980 presidential primary in New Hampshire. Petitioner charges that the conference was staged as an integral part of President Carter's so-called "Rose Garden" campaign strategy. During the course of the telecast, the President was asked four questions regarding his candidacy for the Democratic presidential nomination and that of

Senator Kennedy, his principal rival. In its protest to the networks, petitioner predicated its equal-opportunity demand on allegedly "distorted and inaccurate statements" by the President in response to queries "about Senator Kennedy's views on a number of issues." In turning petitioner down, each network maintained that the telecast of the conference was free of Section 315(a)'s equal-opportunity obligation because it was an activity within that section's Exemption 4 for "[o]n-the-spot coverage of bona fide news events."

Petitioner then urged the commission "to rule that President Carter's News Conference of February 13 constituted a 'use' of television facilities offered by the major networks and to direct the networks to afford equal time[14] to Senator Kennedy * * *." Petitioner claimed that the President had "devoted more than five minutes * * * to a direct attack upon Senator Kennedy," with the consequence that "millions of viewers were misinformed about Senator Kennedy's views on national and international issues critical to voters in the campaign for the presidential nomination."

The commission's Broadcast Bureau denied petitioner's request, primarily in reliance upon the commission's *Aspen* decision, affirmed by this court in *Chisholm v. FCC*. The bureau concluded that the telecast fell within *Aspen's* holding that press conferences featuring political candidates are exempt from Section 315(a)'s equal-opportunity requirement as "on-the-spot coverage of bona fide news events." The bureau felt that under *Aspen* the regulatory role in equal-opportunity proceedings is confined to determining "whether or not the broadcaster intends to promote the interest of a particular candidate in presenting coverage of a news event." Noting that petitioner had presented no evidence that the networks were not exercising good faith journalistic judgment in appraising the president's press conference as newsworthy, and detecting no indication of a purpose to favor the president's candidacy over the senator's by televising the event, the bureau rejected petitioner's plea for an order providing an opportunity to respond.

Four weeks later, on April 2, petitioner sought reexamination of the Bureau's ruling by the commission. On May 6, the commission denied petitioner's application for review. Since we later draw directly and heavily on the commission's opinion, it suffices for now merely to say that essentially the commission tracked the bureau's reasoning, and ultimately adhered pivotally to its *Aspen* holding that "so long as a covered event is considered newsworthy in the good faith judgment of the broadcaster," it is encompassed by one or more of Section 315(a)'s exemptions from the duty to afford equal opportunity. It is the commission's ensuing order that petitioner now brings before us. * * *

"Equal opportunities" is manifestly a comprehensive term, and the commission has given it rather full sway. Four types of programming, however, are statutorily deemed nonuses of a broadcasting station, and thus are exempted from this requirement. One—embraced by Exemption 4—immunizes the "[a]ppearance by a legally qualified candidate on any * * * on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto)." This provision, in the commission's view, relieved the networks of any equal-opportunity obligation consequent upon the telecasts of the president's February 13 press conference.

The question, then, is whether the commission properly extended Exemption 4 to that conference, and in answering we do not write on a completely clean slate. * * *

* * *

Aspen marked the commission's recognition that its original understanding—that candidates' press conferences were "uses" of station facilities enabling their opponents to demand broadcast privileges for their own purposes—was not congenial with the underlying purpose of the 1959 amendments. * * *

14. The phrases "equal time" and "equal opportunity" are often used interchangeably. The latter is employed in the statute, see 47 U.S.C.A. § 315(a) (1976), and is the more accurate of the two. A broadcaster's obligations under § 315(a) extend beyond an equal amount of time for the use of rival candidates to such things as availability of the responsive broadcast, be made available at an equal rate, and a comparable hour of the day. See The Law of Political Broadcasting and Cablecasting, 69 FCC 2d 2209, 2216, 2260–2262 (1978). Though, literally, § 315(a) makes its exaction only for use of a "broadcasting station," the commission has long held that a candidate may demand equal opportunities from a network presenting his opponent instead of looking to each individual station. Senator Eugene J. McCarthy, 11 FCC 2d 511 n. 1 (1968). See also *CBS v. FCC*, 5 Med.L.Rptr. 2649 at 2649, 629 F.2d 1 (1980) (D.C.Cir. 1980) (construing 47 U.S.C.A. § 312(a)(7)(1976)).

Accordingly, the commission adopted the stance it deemed more in keeping with the legislative aims: that broadcasts of press conferences featuring candidates for political office qualified under Exemption 4 as "on-the-spot coverage of bona fide news events."

We upheld the commission's new determination in *Chisholm*. * * * Moreover, we found credible the commission's declaration in *Aspen* that "*any* appearance by a candidate on the broadcast media is designed, to the best of the candidate's ability, to serve his own political ends." We thus held that the commission acted reasonably in rejecting "the degree of control by the candidate, or the degree to which candidates tailor such events to serve their own political advantages," as a criterion for ascertaining whether the equal-opportunity provision of Section 315(a) had been triggered.

Having so concluded, we faced in *Chisholm* the further question whether the broadcaster's good faith judgment on newsworthiness—the element deemed crucial by the commission—provided an acceptable measure of applicability of Section 315(a)'s exemptions. At the outset, we noted that this standard came directly from the legislative history of Section 315(a): the chairman of the House Committee had explained during debate that "[i]t sets up a test which appropriately leaves reasonable latitude for the exercise of good faith news judgment on the part of broadcasters and networks. * * *"

Although we did not find sufficient authority either in the reports or the debates to substantiate the proposition that Congress intended this to be the sole factor the commission could utilize in its calculus, we were satisfied that Congress wished to increase broadcaster discretion as a means of maximizing coverage of campaign activity. * * * Accordingly, we upheld the commission's revised approach.

Petitioner raises four principal objections to the commission's handling of the statutory issues generated by this litigation. These include its use of *Aspen* and *Chisholm* as controlling precedents, the deference accorded broadcaster discretion, the burden placed on petitioners to demonstrate the absence of good faith on the part of the networks, and the commission's refusal to consider post hoc "corrective" action. These we now examine in turn.

The first contention advanced by petitioner is that the commission "woodenly applied" *Aspen* by improperly treating it as establishing a per se rule. Certainly we did not in *Chisholm* approve a per se exemption of press conferences from the equal-opportunity requirement of Section 315(a), nor do we think the commission attempted to apply *Aspen* in that manner here.

In *Chisholm*, we upheld the commission's specification of three criteria to govern the decision on whether a candidate's press conference is exempt from the equal-opportunity provision. They are (1) whether the conference is broadcast live, (2) whether it is based upon the good faith determination of the broadcaster that it is a bona fide news event, and (3) whether there is evidence of broadcaster favoritism. It is clear enough that the commission examined the president's February 13 press conference in each of these respects, and not in the least are we moved to impugn the conclusions the commission reached.

Petitioner contends that the commission effectively delegated to the networks its responsibility to determine whether a particular appearance of a candidate is a "use" entitling opponents to equal opportunities. This, petitioner says, the commission did by attaching too great a weight to the broadcasters' good faith judgment of newsworthiness. The flaw in this argument is that, as we have noted, this criterion proceeds directly from the legislative history of Section 315(a). In *Chisholm*, we found congressional intent to expand the role of broadcasters under Section 315(a) and to place considerable reliance on the exercise of their journalistic discretion in order to insure attainment of goals viewed as even more important than equal responsive opportunities.

It would be pointless to restate the analysis carefully expounded in *Chisholm*. It is enough to say that in applying the challenged criterion the commission pursued the course approved by this court as consistent with the legislative history and objectives. * * *

Nor do we believe the commission acted improperly in requiring a candidate seeking an order affording equal opportunities to come forward with evidence that the broadcaster involved did not exercise a bona fide judgment on newsworthiness in covering an appearance by his opponent.

Petitioner has never even alleged that any of the networks failed to make or abide by a good faith estimate of newsworthiness. Petitioner thus is hardly in position to complain that the evidentiary burden

defined by the commission erects an impermissible barrier to complainants attempting to assert rights under Section 315(a). * * * Requiring a complainant to substantiate his allegations at the outset effectuates this congressional purpose by promoting fearless exercise of the discretion Congress intended broadcasters to have.[72]

Petitioner's apparent inability to satisfy the commission's threshold burden—allegation and corroboration of either bad faith or nonexercise of judgment on newsworthiness by the networks—does not demonstrate that the standard on this score is improvident. On the contrary, it seems evident that one having a legitimate claim in this regard will ordinarily be able to point to something tending to support it. And we do not doubt that when a prima facie showing is made the commission, as it has stated, will inquire into the honesty and reasonableness of a broadcaster's professed news judgment.

Finally, on statutory grounds, petitioner urges that the actual content of a candidate's press-conference broadcast should determine whether the equal-opportunity obligation of Section 315(a) is activated. This contention is linked with the further argument that the commission erroneously failed to consider post hoc whether remedial action should be taken to mitigate damage allegedly wrought. It seems much too late to raise these objections, for petitioner never placed a transcript or other recording of the press conference before the commission. In any event, we are convinced that one of the main purposes of Section 315(a) would be frustrated by requiring the commission to make subjective judgments on the political content of a broadcast program.

As we have previously observed, a major goal of the 1959 amendments to Section 315(a) was preservation of broadcasters' journalistic judgment on news programming. Congress then decided that when broadcasters are allowed to exercise good faith discretion in evaluating the newsworthiness of candidates' appearances on the four exempted types of broadcast programs, the benefits to the public outweigh the detriments to either the public or the candidates. We think the commission steers the right course in declining to undertake assessments on the political or nonpolitical nature of a candidate's appearance, even assuming that there really is much of a difference. As the commission aptly stated, "to draw such distinctions would require [it] to make subjective judgments concerning content, context and potential political impact of a candidate's appearance," and "[n]either Congress nor the commission desires to expand governmental oversight of broadcasters' professional journalistic functions."

We find eminently reasonable, too, the commission's reading of Section 315(a) to require broadcasters to appraise newsworthiness prior to broadcast of the questioned event. Were the commission to hinge operation of the equal-opportunity provision on after-the-fact reexamination of the event broadcast, the purposes for which Congress enacted the Section 315(a) exemptions would largely be set for naught. Broadcasters could never be sure that coverage of any given event would not later result in equal-opportunity obligations to all other candidates; resultantly, broadcaster discretion to carry or not to carry would be seriously if not fatally crippled. * * *

We also deem irrelevant petitioner's assertion that the questioned press conference was "orchestrated as a partisan political event designed to gain maximum political advantage in the New Hampshire primary and subsequent elections—a fact recognized here and throughout the country if not at the commission." When we decided *Chisholm*, we fully explained the insignificance of the candidate's motivation in appearing on the broadcast program. We perceive no good reason to reiterate the discussion here.

We thus are unpersuaded by petitioner's statutory arguments. Together they travel several routes, but they all lead to the same destination. In a word, petitioner's objections to the commission's analysis of Section 315(a) do not warrant reversal of the order under review. We proceed, then, to the constitutional claim.

[EDITORIAL NOTE: The court's discussion of Senator Kennedy's First Amendment claims is treated later in this chapter.]

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72. In its brief the commission points out: While the [agency's] order * * * did not address the types of situations where the reasonableness of a broadcaster's judgment might require further scrutiny, several suggest themselves. For example, if the broadcaster has reason to believe in advance that the press conference questions were going to be "rigged" or that the candidate were going to give his routine stump speech and not accept questions, then the broadcaster's treatment of the press conference as a bona fide news event might be called into question. A pre-existing family or business connection between the candidate and the broadcaster might also warrant closer scrutiny of the broadcaster's judgment.

Developments Since *Aspen-Chisholm*

Broadcasters liked the *Aspen-Chisholm* rulings but still viewed them as less than ideal. Under these rulings, debates had to be conducted by somebody else—usually the League of Women Voters—and had to be broadcast "live" and "in their entirety." Broadcasters would have preferred more flexibility but seemed fearful to ask for it themselves. In 1983 they got some help from an unlikely quarter, former FCC General Counsel and former head of NTIA, Henry Geller, often a thorn in the side of the broadcasting industry. Geller asked the FCC to broaden *Aspen* and to allow non-contemporaneous coverage of debates, including debates conducted by broadcasters themselves.

In Petitions of Henry Geller et. al., 95 FCC 2d 1236 (1983), the FCC agreed. It concluded that broacaster-run debates, as well as debates run by third parties, could be bona fide news events so long as there was no evidence of a broadcaster's intent to favor a candidate. Recognizing that third-party sponsors of debates might not always be available, the FCC noted that broadcasters may be "the ideal, and perhaps the only, entity interested in promoting a debate between candidates for a particular office, especially at the state or local level." It ruled that to be exempt, a debate—even if broadcaster run—had to be "of genuine news value and not be used to advance the candidacy of a particular individual."

The *Geller* decision also eliminated a coverage-within-twenty-four-hours interpretation of "live" coverage that had grown up around the *Aspen* rule. Broadcasters could present delayed coverage of taped debates (and, presumably, press conferences) so long as they did not do so in a fashion intended to promote a single candidate. The U.S. Court of Appeals for the D.C. Circuit rejected appeals of the *Geller* decision. *League of Women Voters v. FCC*, 731 F.2d 995 (D.C.Cir., 1984). Thus, by the late 1980s, broadcasters had substantial latitude to cover political debates. Provided they were not obviously attempting to promote one candidate, they could cover debates run by third parties (e.g., the League of Women Voters) without fear of having to provide equal opportunities to candidates the third party might choose not to include in the debate. They could even set up candidate debates themselves and leave out minor party candidates if they did not intend to favor one of the candidates they included. They did not necessarily have to present their coverage "live"; they could tape delay it if it retained its newsworthiness. It appeared, even, as if they were not required to cover debates and press conferences "in their entirety," as *Aspen* had required, although no FCC decision squarely addressed this issue.

An example of the difficulties in interpreting section 315(a) in the context of presidential and vice-presidential elections is found in *King Broadcasting Co. v. FCC*, 860 F.2d 465 (D.C.Cir. 1988). A broadcaster proposed to carry two program formats covering the major party candidates in the 1988 presidential and vice-presidential races. Each format would be a pretaped studio event. The broadcaster described the two proposed formats as follows:

> The first (format) would be a one-hour program in which each of the two major party candidates would be allotted thirty minutes to "set forth their essential campaign message to the American people." (E)ach candidate would be recorded separately, but they would be broadcast back-to-back, with one candidate's presentation immediately followed by that of the other. There would be two such presentations, one at the start of the campaign season, and one just before the election. The order of presentation would be determined by a coin flip for the first show, and would be reversed in the second show. Between these two broadcasts (the broadcaster) proposed an "in-depth, in-studio separate interview with the two candidates of probably 45 minute duration (90 minutes for both)," also presented back-to-back, moderated by a journalist interviewer who, along with the questions and format, would be "supplied by the licensee, acting in concert with other interested licensees."

The broadcaster who proposed these formats had a problem. He was worried that without a section 315(a) exemption, the proposed formats would not be feasible. If he had to give thirty-minute presentations to all the minor party candidates for president and vice-president, he said he would be forced to spend millions for prime-time messages that would have little viewer appeal. The broadcaster, King Broadcasting Co., therefore, asked the FCC to issue a declaratory ruling that the proposed formats would be exempt under section 315(a).

King Broadcasting contended that the 315(a)(4) exemption should be extended. King argued that there was no difference between an in-studio debate and in-studio joint or back-to-back candidate appearances in a program series. The FCC rejected this analysis of 315(a)(4) on the ground that in presidential debates and press conferences the press was

present to question the candidates and provide spontaneity. King's proposals, the FCC concluded, were "more like advertisements by the candidates than bona fide news programming."

King Broadcasting also contended that its ninety-minute interview show should be exempt under 315(a)(2) as a bona fide news interview. That contention was rejected also. Exemption 315(a)(2) was limited, the FCC declared, to regularly scheduled programs, i.e., "Face The Nation," "Meet the Press."

Confronted with the FCC's refusal to grant a 315 exemption, King Broadcasting sought review in the federal court of appeals on the ground that the FCC had misconstrued section 315. King also contended that the FCC had violated the First Amendment "by stifling a public debate that would otherwise ensue." The court of appeals agreed with the FCC's construction of 315(a)(2). But with respect to 315(a)(4) dealing with "on the spot coverage of news events," the court felt that the FCC's "present construction of section 315(a)(4) cannot be squared with prior pronouncements on the issue." In addition, the court could "discern no reasonable explanation for the FCC's apparent departure from its own precedent."

The court was particularly concerned that in *Aspen*, section 315(a) had been interpreted by the FCC "to require two related inquiries when determining whether a program qualified for a 315(a)(4) exemption." Was the program genuinely "newsworthy"? Was the newsworthiness determination an exercise of good faith news judgment by the broadcaster? Failure to undertake either of these inquiries prompted the court to remand the case to the FCC for further consideration. The court said the FCC could change its mind in interpreting 315(a), but it could not do so without reasonable explanation.

When the FCC undertakes the two *Aspen*-type inquiries, do you think the result will be the same? Assuming the result is the same, is there any merit in King's claim that the FCC's refusal to grant an exemption chills expression sufficiently to violate the First Amendment?

What's an "equal opportunity?" Assuming that one candidate for a public office has made a nonexempt use of a broadcast station, broadcasters are obligated to provide equal opportunities upon request for all of that candidate's legally qualified opponents to "use" the station. Thus, the next section 315 issue is what "equal opportunity" to use a station means.

Section 315 is often erroneously called the "equal time" section of the Communications Act. It is that—but in three distinct ways. According to the FCC, equal opportunity to use a station includes three things. First of all, it does mean an equal amount of time. Thus, if Candidate A has appeared for five minutes, his or her opponent, Candidate B, gets five minutes of "use" as well. Here, the FCC divides between "spot" use and "program" use. If Candidate A appears in something of three minutes or less total time (say a thirty-second ad), opposing Candidate B gets the same *total* amount of time as Candidate A had. Even if A's appearance was only for a few seconds, e.g., the candidate reads the tagline explaining who paid for the spot but does not otherwise appear in it, Candidate B still would get the total amount of time that A's appearance occurred within, in this example, thirty seconds. When we get to longer formats (certainly five minutes or longer), the FCC will actually count the time a candidate appears. Suppose, for example, that an old Ronald Reagan movie was run at a time when Reagan was a candidate for a public office and had opponents. In this instance, the FCC would calculate how long Reagan appeared in the movie—either by visual image or just by voice—and the opposing candidates would be entitled to that total amount of time to use the station that had aired the movie. Section 315, then, does require under most circumstances an equal amount of time. It also requires more.

Second, the FCC has ruled that opposing candidates are also allowed comparably desirable time. This policy prevents broadcasters from putting a favored candidate on during radio drive time, but providing equal amounts of time to opponents at 3:00 A.M. on Sunday mornings. The FCC recognizes that it's impossible for broadcasters to deliver exactly the same audience to opposing Candidate B that it allowed Candidate A to use, so it doesn't expect broadcasters to achieve that. Nor does it require that broadcasters put opposing candidates in exactly the same programs. Putting candidates in obviously discrepant time periods, in terms of audience potential, however, will run afoul of section 315.

Finally, the FCC says that "equal opportunity" means that candidates must receive access to stations on the same commercial terms. Thus, if one candidate pays twenty-five dollars for a radio spot, his or her opponents must be given the opportunity to "use" the station at the same rate—twenty-five dollars. There's no obligation to give free time in response to paid time under section 315. If an im-

poverished candidate can't afford what an opponent paid, the impoverished candidate is just out of luck. All section 315 requires is that broadcasters treat opposing candidates under the same rules. If Candidate A had to pay, opposing Candidate B must pay too.

All of these claims for equal opportunity must be made with the FCC within seven days of what the FCC terms a "first-prior-use." These policies can get rather complex but can be exemplified simply. Suppose there is a three-candidate race for a public office. Candidate A makes some kind of a use on the first of the month. Candidate B asks a broadcaster for an "equal opportunity" use on the sixth of the month. Candidate B is in time—within seven days of A's use. Assume that the third candidate, C, is not aware of A's use, but becomes aware of B's. Two days after B's use, C asks the station for an "equal opportunity." The station can deny the request. The "first prior use" there was A's, on the first of the month. B's use flowed from that, and C has come in eight days after A's use. C is too late, under the seven-day after first prior use rule. In the real world, working out these computations can be complex. The point, however, is: candidates cannot bank their rights to equal opportunity uses and claim them all at the last minute before an election.

How are rates regulated? What broadcasters can charge candidates to use their stations is regulated in three ways. First, since 1927, broadcasters can't, under section 315, charge one candidate more than they have charged an opposing candidate for a previous use. Thus, if candidate A paid twenty-five dollars for a radio spot, candidate B can't be charged more than twenty-five dollars for a comparable spot under section 315.

Second, since 1952, broadcasters have been forbidden from having artificially high candidate rates. Broadcasters can't charge candidates more for advertising time than they charge other advertisers. In the 1950s broadcasters had two motivations for artificially high rates. Some broadcasters wanted to keep politicians off their stations altogether and sought to do so through exorbitant rates. Other broadcasters recognized that politicians needed broadcast advertising and sought to gouge politicians through high rates. The 1952 amendments to the Communications Act prohibited both kinds of broadcaster discrimination.

Finally, since 1972, Congress has required broadcasters to sell time to candidates at the "lowest unit charge" during periods just prior to elections—forty-five days before primaries and sixty days before general elections. This restriction arose from generalized congressional concerns about the high cost of campaigning. Congress sought to drive down the cost of campaigning. Political broadcast ads were a major part of that cost. So, in 1972, Congress required broadcasters to sell time to candidates at their lowest unit rate.

The phrase is not as clear as it might seem. Prior to adoption of this law, broadcasters didn't think of unit rates, let alone "lowest" unit rates. The concept, however, is easy to express even if it's hard to work out in practice. Congress basically recognized that broadcast advertising time could be measured two ways: amount of time (number of seconds/minutes) and desirability of time (prime time/drive time/class A time/etc.). What Congress basically said in 1972 was that if a broadcaster sold a particular length ad at a particular place in his or her schedule for a certain amount, and if that was the lowest price at which such a "class and amount of time" could be purchased, then broadcasters had to be willing to cut the same deal with candidates during periods just before elections. Figuring out lowest unit charge can be complex in practice; for example, candidates get the benefit of volume purchase discounts even if they don't buy enough advertising to qualify for them. But Congress's intent is clear—give candidates, just before elections, a break. Give them the benefit of the lowest price for which any other advertiser could buy the same ad at that time.

What control can the broadcaster have over candidate uses? Under section 315, broadcasters can not censor candidate uses. Basically this means that when a candidate gains a right to use a station under section 315, the broadcaster has no control over what the candidate does. Broadcasters must provide the same facilities to Candidate B as they provided voluntarily to his or her opponent, Candidate A. If Candidate B chooses to use those facilities in ways the broadcaster might not have expected and might not like, then the broadcaster still must permit Candidate B to engage in those uses.

The no-censorship provision can, obviously, create problems for broadcasters. In *Farmers Educational & Cooperative Union v. WDAY, Inc.*, 360 U.S. 525 (1959), the U.S. Supreme Court addressed

some of these problems. A. C. Townley, a perennial candidate for public office in North Dakota, had run for the U.S. Senate and, in the eyes of the Farmers Educational and Cooperative Union, libeled the union. Townley had few resources, so the union sued the broadcast station that under section 315 had carried Townley's comments. A unanimous Supreme Court held that under section 315 of the act, WDAY had no right to censor Townley's comments. The language of Congress was clear—broadcasters could not censor what candidates did under section 315. The Court split 5–4 on a different question: should WDAY be financially responsible for Townley's remarks. Five members of the Court said no; Congress had given broadcasters no ability to prevent libelous candidate statements, so broadcasters should not be responsible for them when made. Four members of the Court took the position that if Congress had intended through section 315 to make broadcasters immune to damages arising from defamatory remarks, then Congress should have said so. Thus, by the narrowest of margins, a fundamental principle was established. Broadcasters could not censor candidate uses under section 315, but they were also not legally responsible for comments they could not prevent.

Years later, when a candidate used the word "nigger" in a spot, the FCC ruled that broadcasters could not censor that use. Letter to Lonnie King, 36 FCC 2d 635 (1972). When Barry Commoner used the word "bullshit" in a spot in the 1976 campaign, broadcasters did not even bother to bring it to the FCC's attention; they ran the spot, with a disclaimer that they were powerless to prevent it. *Hustler* magazine publisher Larry Flynt threw panic into the broadcasting community when he threatened to run for president in 1980. Flynt claimed that one of his planks would be freedom for sexually explicit expression. Broadcasters feared that if Flynt became a candidate, they would have to run his ads. The chairman of the FCC at the time, Mark Fowler, made some public statements to the effect that he believed ways could be found for broadcasters to block Flynt's speech if it was obscene, despite the language of section 315. All this debate came to naught, however, when Flynt did not pursue his candidacy.

Is this whole system constitutional? Broadcasting, obviously, is subjected to regulation of political content that would not be acceptable in other media. Many constitutional challenges have been mounted to this scheme. Many turn on the oft-recognized position of the courts that broadcasting enjoys a unique First Amendment status, as already discussed. By and large, the courts have sustained the constitutionality of section 315, although the U.S. Supreme Court has yet to speak on the matter.

One significant challenge came in 1980 when Senator Kennedy tested the FCC's interpretation of how section 315 applied to a press conference by President/Candidate Carter, already discussed in part.

KENNEDY FOR PRESIDENT COMMITTEE v. FCC

636 F.2D 432 (D.C.CIR., 1980)

ROBINSON, J:

Petitioner's First Amendment thesis is that "[p]rivate interests cannot be permitted to abridge the presentation and receipt of legitimate First Amendment expression on the basis of their own subjective values of '*bona fide*' news judgment." Taken simply as a general proposition suitable for application in proper context, few if any expectably would disagree. What petitioner thus characterizes, however, is the commission's deference to the journalistic judgment of broadcasters on newsworthiness of statutorily-exempted events involving candidate appearances, absent some indicium of bad faith or favoritism on the broadcaster's part. In our view, petitioner's legal premise does not fit the situation this case summons us to examine.

* * *

We believe petitioner looks at the First Amendment aspect of this litigation from the wrong standpoint, for in the area of broadcasting the interest of the public is the chief concern. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount * * *. It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here." From its inception more than a half-century ago, federal regulation of broadcasting has largely entrusted protection of that public right to short-term station licensees functioning under commission supervision, and with liberty as well as responsibility to determine who may get on the air and when. The history of this era portrays Congress' consistent refusal to mandate access to the

air waves on a non-selective basis and, contrariwise, its decision "to permit private broadcasting to develop with the widest journalistic experience consistent with its public obligations." The commission has honored that policy in a series of rulings establishing that a private right to utilize the broadcaster's facilities exists only when specially conferred. The net effect of these many years of legislative and administrative oversight of broadcasting is that "[o]nly when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the act."

While Section 315(a) generally exacts for a candidate's use of broadcast facilities an equal opportunity to his opponents, Congress specifically exempted coverage of a number of arguably "political" news events in the belief that an overly-broad statutory right of access would diminish rather than augment the flow of information to the American public. The real question, then, is whether this legislative scheme transgresses the First Amendment interests of a candidate demanding an opportunity to respond to another candidate's statements on an excepted occasion. We think the answer is evident. As the commission states, "Congress has chosen to enforce the public's primary right in having 'the medium function consistently with the ends and purposes of the First Amendment' by relying on broadcasters as public trustees, periodically accountable for their stewardship, to use their discretion in insuring the public's access to conflicting ideas." More importantly, the Supreme Court has emphasized that no "individual member of the public [has a right] to broadcast his own particular views on any matter," rejecting the "view that every potential speaker is 'the best judge' of what the public ought to hear or indeed the best judge of the merits of his or her views."

* * *

Thus we find no merit in petitioner's First Amendment contention. With the absence also of any valid statutory objection, the order under review is affirmed.

COMMENT

In *Johnson v. FCC*, 829 F.2d 157 (D.C.Cir. 1987), the court of appeals rejected claims of Sonia Johnson and her running mate, Richard Walton—both nominees of the Citizens Party—that "by 1984 the televised Presidential and Vice-Presidential debates had become so institutionalized as to be a prerequisite for election." The court rejected First Amendment claims by Johnson and Walton that their exclusion from 1984 presidential and vice-presidential debates sponsored by the League of Women Voters restricted their access to the ballot and their opportunities to be elected.

Relying on *Kennedy for President Committee* and *CBS v. DNC*, the court declared:

> (P)etitioners present a far weaker constitutional thesis than the ones those cases rejected. They seek, not general access, as in *(CBS v. DNC)*, nor an opportunity to respond to a particular broadcast, as in *(Kennedy for President Committee)*, but rather the specific right to appear on a specific program—a program not organized by the broadcasters, but by a third party. Thus, viewed in light of the First Amendment balance struck in the statutory scheme, as delineated in the governing caselaw, petitioners have stated no legally cognizable claim to participate in the broadcast debates.

A final and significant First Amendment challenge to section 315 was mounted by a California TV journalist, William Branch. Branch became a candidate for public office. He regularly appeared on his station's newscasts. The FCC had long previously taken the position that the bona fide newscast exemption to section 315 did not cover newscasts in which newscasters were also candidates. After the FCC supported that position, telling Branch's station that it would have to provide equal opportunity to Branch's opponents if Branch appeared on newscasts, the journalist appealed to the U.S. Court of Appeals for the D.C. Circuit. In 1987, that court upheld the FCC and, in the process, addressed generally the constitutionality of section 315.

BRANCH v. FCC

824 F.2D 37 (D.C.CIR., 1987); CERT. DEN., 108 S.CT. 1220 (1988)

BORK, J.

A television news reporter who wishes to run for public office challenges the Federal Communications Commission's decision that the station which employs him would be required to provide "equal time" to his political opponents. This decision would

require the station to offer his opponents opportunities to appear on the station that are equivalent to the newscaster's regular daily appearances. The Commission's determination rested on a federal statute. The reporter challenges both the interpretation of the statute and its constitutionality. We deny the petition for review. * * *

Branch initially contends that the statute's "equal time" provisions do not apply to him because the statute exempts the television appearances of a newscaster candidate from their coverage. * * *

Branch reads the statutory language to mean: the "equal opportunities" requirement applies only when there is a "use" of a broadcasting station; a candidate's appearance on a bona fide newscast does not constitute such a "use"; thus Branch's appearances on KOVR's bona fide news broadcasts are not subject to the "equal opportunities" requirement. The apparent simplicity of this argument, however, is misleading. * * *

The legislative history of the 1959 amendments conclusively establishes three critical and overlapping points. First, Congress' central concern in taking action was to overrule the Commission's *Lar Daly* decision. * * *

Second, the purpose of overruling *Lar Daly* was to restore the understanding of the law that had prevailed previously. * * *

Third, Congress objected to the imposition of "equal opportunities" obligations on any station that carried news coverage of a candidate, because it deterred the broadcast media from providing the public with full coverage of political news events, and many other news events as well. * * *

Thus Congress' intent in enacting the amended Section 315 is readily discernible. "Appearance by a legally qualified candidate," which is not "deemed to be use of a broadcasting station," is coverage of the candidate that is presented to the public as news. The "appearance" of the candidate is itself expected to be the newsworthy item that activates the exemption. "By modifying all four categories [not deemed to be 'use'] with the phrase 'bona fide,' Congress plainly emphasized its reliance on newsworthiness as the basis for an exemption."

The thrust of the language is brought out further in the third and fourth specific exemptions. The "news documentary" exemption applies only "if the appearance of the candidate is incidental to *the presentation of the subject or subjects covered by the news documentary*." This passage relates the candidate's appearance to the subjects covered in the program. If the candidate's appearance has nothing to do with the subjects that are being covered as news—whether because the candidate is a regular employee on all such programs or, to take another example, because the candidate is being offered a gratuitous appearance that realistically is unrelated to the news content of the program—then the exemption does not apply. Similarly, the fourth exemption for "on-the-spot coverage" of news applies only to "coverage of bona fide news events." Here again the focus is on a news *event* that is being covered, with the candidate's appearance expected to occur as part of the event *being covered*.

When a broadcaster's employees are sent out to cover a news story involving other persons, therefore, the "bona fide news event" is the activity engaged in by those other persons, not the work done by the employees covering the event. The work done by the broadcaster's employees is not a part of the event, for the event would occur without them and they serve only to communicate it to the public. For example, when a broadcaster's employees are sent out to cover a fire, the fire is the "bona fide news" event and the reporter does not become a part of that event merely by reporting it. There is nothing at all "newsworthy" about the work being done by the broadcaster's own employees, regardless of whether any of those employees happens also to be a candidate for public office.

* * *

Moreover, Congress' objection to *Lar Daly* was that it discouraged wide broadcast coverage of political news events by restricting a station's ability to determine which news *events* to present to the public. Congress solved this problem by exempting any on-air appearance by a candidate who is the *subject* of news coverage. It is irrelevant to that problem whether a station has broad discretion to determine which of its employees will actually present the news on the air. * * *

In opposition to that consistent approach, Branch asks this court to read the phrase "[a]ppearance by a legally qualified candidate on any [news program]" as exempting from the "equal opportunities" rule all on-air work done by newscaster candidates. We cannot do so. As we have already noted, such a reading would be at odds with the law before *Lar Daly*, which Congress explicitly sought to restore through the 1959 amendments. In addition, this reading would

raise a station's news employees to an elevated status not shared by any of its other employees: although the work done on the air by any other employee on any other program would not be exempt, the work done on the air by news employees would be. Yet this novel division was never endorsed, or even discussed, by Congress.

We have determined that Section 315 does not exempt newscaster candidates from the strictures of the "equal opportunities" rule. Branch challenges the statute, as so interpreted, on several constitutional grounds. Common to all of the challenges is Branch's assertion that the Commission acted arbitrarily and capriciously by initially refusing "to undertake a review here of previous determinations as to the constitutionality of Section 315." The Commission did not err in taking this position, for although an administrative agency may be influenced by constitutional considerations in the way it interprets or applies statutes, it does not have jurisdiction to declare statutes unconstitutional. We think this approach was entirely proper, and we turn now to Branch's substantive challenges to the constitutionality of Section 315.

Branch's first objection is that the statute extinguishes his right to seek political office. That he has such a right is undeniable, though the Constitution and the Supreme Court's cases in the area do not pinpoint the precise grounds on which it rests. But whatever its source, the right is not implicated in this case. "In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." Here that impact is slight. The "equal opportunities" rule does not extinguish anyone's right to run for office. It simply provides that certain uses of a broadcast station by a candidate entitled other candidates for the same office to equal time. That the rule will affect some candidates favorably and others unfavorably is obvious. It may cause certain candidates to receive less time on the air than if the statute did not exist. But the Supreme Court has held that no individual has any right of access to the broadcast media. *Columbia Bl casting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). * * *

The core of Branch's challenge on this point is that the statute imposes an undue burden on his ability to run for office because he cannot, during the time he is a candidate, do his normal work of reporting news on the air for Station KOVR. But nobody has ever thought that a candidate has a right to run for office and at the same time to avoid all personal sacrifice. * * * Even if the practicalities of campaigning for office are put to one side, many people find it necessary to choose between their jobs and their candidacies. * * *

Indeed, the burdens Branch complains of are borne by all other radio and television personalities under Section 315, though the exception he seeks would apply only to newscasters. In *Paulsen v. FCC*, those burdens were upheld against essentially the same objection made here. The petitioner, a television performer who had announced his candidacy for President, contended that Section 315 "forces him to give up his means of livelihood as a television performer in order to run for office." In *Paulsen* the challenge was clothed in an equal protection guise, and perhaps at bottom Branch's challenge is also one of equal protection. However that may be, the argument is the same, and so is the result. Under established law, *Paulsen* was correct in finding the burdens imposed by Section 315 justifiable as "both reasonable and necessary to achieve the important and legitimate objectives of encouraging political discussion and preventing unfair and unequal use of the broadcast media." * * *

Branch's second constitutional objection to Section 315 is that the "equal opportunities" rule violates the first amendment. He cites *Miami Herald Publishing Co. v. Tornillo* where the Supreme Court * * * broadly declared that a "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.' " * * * The "equal opportunities" rule, in Branch's view, is identical to a right-of-reply statute in its impact.

The Supreme Court has expressly held, however, that the first amendment's protections for the press do not apply as powerfully to the broadcast media. In *Red Lion Bl casting Co. v. FCC*, the Court upheld the government's authority "to put restraints on licensees in favor of others whose views should be expressed on this unique medium." What makes the broadcast medium unique, in the Court's view, is the scarcity of broadcast frequencies.

While doubts have been expressed that the scarcity rationale is adequate to support differing degrees of first amendment protection for the print and electronic media, see, e.g., *Telecommunications Research & Action Center v. FCC*, *Meredith Corp. v. FCC*, it remains true, nonetheless, that Branch's first amendment challenge is squarely foreclosed by *Red Lion*. In *Red Lion*, the Supreme Court upheld

as constitutional the Commission's authority to enforce the fairness doctrine, which requires broadcast stations to give fair coverage to each side of a public issue, and in particular upheld "its specific manifestations in the personal attack and political editorial rules." In the course of its opinion, the Court held that the statutory "equal opportunities" rule in Section 315 and the Commission's own fairness doctrine rested on the same constitutional basis of the government's power to regulate "a scarce resource which the Government has denied others the right to use". * * *

Nor can we adopt Branch's suggestion that this court would be justified in stepping away from *Red Lion*. The Supreme Court recently reaffirmed *Red Lion* and disavowed any intention "to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *FCC v. League of Women Voters of California*. The Commissioner may now have sent just such a signal by issuing a report which concludes that Section 315 is unconstitutional and should be abandoned. But unless the Court itself were to overrule *Red Lion*, we remain bound by it.

Branch's final constitutional challenge to Section 315 is that it impermissibly limits the discretion of broadcast stations to select the particular people who will present news on the air to the public. Branch thus attempts to press the third-party rights of broadcasters who are not themselves parties to this case. * * *

Nonetheless, the third-party challenge Branch advances is rebutted by *Red Lion*. A burden on the ability to present a particular broadcaster on the air, which applies to all broadcasters irrespective of the content of the news they present, is a much less significant burden than rules requiring the transmission of replies to personal attacks and political editorials, which were upheld in *Red Lion*. The latter provisions apply directly to political speech, and weigh more heavily on some messages than on others, depending on the precise content of the message conveyed. In contrast, the burdens on broadcasters that Branch asserts here do not "impair the discretion of broadcasters to present their views on any issue or to carry any particular type of programming." * * * Moreover, we note again that there is no right of any particular individual to appear on television.

The petition for review is, therefore, denied. * * *

COMMENT

Judge Bork makes clear in *Branch* that the motivating force behind the enactment by Congress in 1959 of exemptions from equal time obligation for bona fide newscasts, news interviews, news documentaries, and on-the-spot coverage of bona fide news events was the much criticized *Lar Daly* case. Lar Daly, a Chicago mayoral candidate, complained to the FCC that TV "newscasts had shown interviews of his opponents and a film clip of the incumbent mayor greeting the Argentinean President at the airport." The FCC held that this was a "use" under section 315 and that, therefore, Lar Daly had a right to equal time. See *In re Telegram to CBS, Inc.*, 18 RR 238, recon. denied, 26 FCC 715 (1959). This interpretation irritated the Congress. Judge Bork quotes Senator Pastore of Rhode Island: " 'It was not until February of this year (1959), when the FCC issued its stupid, silly decision in the *Lar Daly* case, that we were confronted with any trouble.' "

In a concurring opinion in the *Branch* case, Judge Starr took a different view of section 315:

> When a newscaster reports the news, there is no "use" or "permitting" of a use in the ordinary sense of those words. Employers do not "permit" their employees to "use" broadcast facilities. Employees are hired to do their jobs. Once, on the payroll, they have to carry on their duties; there is no "permission" being granted in the everyday sense of the word.

Judge Starr believed a "more natural statutory interpretation would exempt newscasters who are just doing their job from the 'equal opportunities' requirement of section 315(a)." The legislative history, however, Judge Starr conceded, did indicate that Congress passed the 1959 amendments to restore the pre-Lar Daly law. That law "included the principle that a newscaster's appearance was indeed a 'use' within section 315(a)." Since the court was bound to accept the FCC's reasonable interpretation of its "governing statute," Judge Starr joined in the result. But Judge Starr noted that the FCC was not bound by its interpretation of the *Branch* problem which he believed to be "less natural" and "less sensible" than his.

In the *Branch* case, Judge Bork observed: "But unless the Court itself were to overrule *Red Lion*, we remain bound by it." Suppose in a case involving the fairness doctrine, the Supréme Court overruled *Red Lion* only vis-à-vis the fairness doctrine? Would the "equal opportunities" rule still be valid?

Section 315 And Other Contingent Rights of Access

Like their print colleagues, broadcasters normally decide what content to air and, consequently, bear legal responsibility for it. Unlike the print media, however, there are instances when broadcasters must by law provide access to their stations to others. Section 315 of the Communications Act, as discussed above, is one such instance. It creates a contingent right of access. If a broadcaster permits one legally qualified candidate for a public office to use a station in a nonexempt format, then that broadcaster must be willing to provide equal opportunities to use the station to all of that candidate's legally qualified opponents.

Three related FCC policies create somewhat similar contingent rights of access: the so-called "Zapple Rule," the FCC's political editorializing rules, and its personal attack rules.

THE ZAPPLE RULE. In 1970, Nicholas Zapple, at the time the leading staff member of the Senate Commerce Committee, sent a letter to the Federal Communications Commission. The committee's Chairman, Senator John Pastore (D. Rhode Island) was concerned that broadcasters, especially the major networks, seemed willing to sell time to the Republican party. He feared that they might not be similarly willing to sell time to the Democratic party. The uses involved did not include candidate "appearances," hence section 315 did not apply. Pastore directed Zapple to ask the FCC how it would respond to unequal access to the airwaves among major political parties.

The FCC response has become known as the Zapple Rule. Conceptually, the FCC linked section 315 and the fairness doctrine. It said it would be contrary to the public interest (and, perhaps, a violation of the fairness doctrine) for a broadcaster to sell or provide time to one major political party without being willing to provide comparable access to the other major political party. This is sometimes also known as a "quasi-equal-opportunity" requirement. It basically says that if one major political party gets access, the other major party ought to be able to get comparable access on the same terms from the same broadcasters. As previously stressed, it creates a contingent right of access. Zapple does not require broadcasters to sell or provide time to political parties in the first place, but says that if they do, then they must provide quasi-equal opportunities to the other major party. Letter to Nicholas Zapple, 23 FCC 2d 707 (1970).

THE POLITICAL EDITORIALIZING RULES. Broadcasters sometimes run editorials supporting or opposing candidates for public office. When stations take such a formal position, as a licensee, over a candidate for public office, the commission's Political Editorializing rules come into play. Within twenty-four hours of such a political editorial, the station must contact candidates. If a station opposes a candidate, that candidate must be given a reasonable opportunity to present a response. If the station supports a candidate in a race, then all the legally qualified opposing candidates must be notified and given a reasonable response opportunity. If they wish, stations can tell candidates that they must select a spokesperson to present their response, thus avoiding possible "equal opportunities" problems under section 315 of the act. 47 C.F.R. sec. 73.1920 (1985). If they plan to run such editorials within seventy-two hours of the election, or on election day itself, candidates must be notified "sufficiently far in advance of the broadcast" that a "reasonable opportunity to respond" is created. 47 C.F.R. sec. 73.1930 (1985). Again, contingent rights of access are created. If broadcasters run certain kinds of candidate-related editorials, they must provide access to candidates or, most commonly, to candidate spokespersons. Nothing legally compels them, however, to take editorial positions on candidates for public office.

THE PERSONAL ATTACK RULES. When it wrote the political editorializing rules, the FCC also adopted what have come to be known as the "personal attack rules." Derived from the fairness doctrine, these rules say that if a broadcaster attacks the "honesty, character or integrity" of an identified person or group while discussing a controversial issue of public importance, then that broadcaster must contact that person or group within a week, provide a script, tape, or accurate summary of the attack, and offer a reasonable opportunity to respond over the same station without charge. 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1985). The FCC interprets the "personal" element of the rule strictly; attacks not going to personal character don't count.

Thus, broadcasters can vigorously criticize individuals and groups so long as they don't directly attack their "honesty, character or integrity." The

FCC also adheres to its requirement that the only attacks that come under the rule are those occurring in the context of discussions of controversial issues of public importance. Generally, this phrase means the same thing in a personal attack case as it means in a fairness doctrine case from which the phrase, of course, was derived.

Some kinds of personal attacks are exempt. To start with, attacks occurring in bona fide newscasts, news interviews, and on-the-spot coverage of bona fide news events don't bring on personal attack responsibilities. These exemptions, derived from section 315 of the Communications Act, notably do not include the bona fide news documentary exemption also found there. Attacks on foreign groups are also exempt. Most importantly, many attacks in a political context are also not covered. Attacks made by or on behalf of legally qualified candidates during a political campaign don't trigger the rules. If an attack is somehow made upon a legally qualified candidate, the broadcaster can offer the opportunity to respond to a candidate's spokesperson, again avoiding section 315 "equal opportunities" problems. 47 C.F.R. § 73.1920 (1985). As with the political editorializing rules, however, only a contingent right of access is created. Broadcasters don't have to attack persons in the first place—the rules simply say that if a personal attack occurs, some access must be given to the individual or, in a few instances, a spokesperson to respond.

It should be noted that the FCC has had proceedings going for years to repeal the personal attack and political editorializing rules. The FCC appears not to have acted on these proceedings out of concern for Congress's reaction. The fate of the rules is much linked to the fate of the fairness doctrine, discussed subsequently.

SECTION 312 (A)(7) AND "REASONABLE ACCESS" FOR FEDERAL POLITICAL CANDIDATES

So far there's only one law requiring broadcasters to provide noncontingent access to their facilities: section 312(a)(7) of the Communications Act of 1934. In 1971, Congress was concerned about the high cost of campaigning for federal office and adopted the Federal Election Campaign Act of 1971. In that act Congress attempted to hold down the cost of campaigning by mandating that just before elections, broadcasters—if they sold time to candidates at all—had to sell them that time at the "lowest unit charge"—basically the lowest price available on the station on that date for that particular length and class of ad.

Having driven the price of political advertising time to its lowest levels, Congress logically became concerned about the possibility that some broadcasters might decide not to sell any political advertising time at all. To prevent this, Congress amended section 312 of the Communications Act to add a provision saying that, at least in theory, the FCC could revoke the license of a broadcaster who refused to provide "reasonable access" to the station's facilities for legally qualified candidates for federal office. No broadcaster has ever lost a license under section 312(a)(7), but the provision has occasioned substantial interpretation by the FCC and, eventually, a major decision by the U.S. Supreme Court. In *CBS, Inc. v. FCC*, 453 U.S. 367 (1981), the Court upheld the constitutionality of the "reasonable access" requirement. The context was the refusal of broadcast networks to sell time to the Carter-Mondale campaign in the early stages of their ultimately unsuccessful quest for reelection in 1979–1980. The Court concluded that section 312 was constitutional because it protected the public's right to receive political information.

CBS, INC. v. FCC

7 MED.L.RPTR. 1563, 453 U.S. 367, 101 S.CT. 2813, 69 L.ED.2D 706 (1981).

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to consider whether the Federal Communications Commission properly construed 47 U.S.C. § 312(a)(7) and determined that petitioners failed to provide "reasonable access to * * * the use of a broadcasting station" as required by the statute.

* * *

On October 11, 1979, Gerald M. Rafshoon, President of the Carter-Mondale Presidential Committee, requested each of the three major television networks to provide time for a 30-minute program between 8 P.M. and 10:30 P.M. on either the 4th, 5th, 6th, or 7th of December 1979. The committee

intended to present, in conjunction with President Carter's formal announcement of his candidacy, a documentary outlining the record of his administration.

The networks declined to make the requested time available. Petitioner CBS emphasized the large number of candidates for the Republican and Democratic presidential nominations and the potential disruption of regular programming to accommodate requests for equal treatment, but it offered to sell two 5-minute segments to the committee, one at 10:55 P.M. on December 8 and one in the daytime. Petitioner ABC replied that it had not yet decided when it would begin selling political time for the 1980 Presidential campaign, but subsequently indicated that it would allow such sales in January 1980. Petitioner NBC, noting the number of potential requests for time from presidential candidates, stated that it was not prepared to sell time for political programs as early as December 1979.

On October 29, 1979, the Carter-Mondale Presidential Committee filed a complaint with the Federal Communications Commission, charging that the networks had violated their obligation to provide "reasonable access" under § 312(a)(7) of the Communications Act of 1934, as amended. Title 47 U.S.C. § 312(a)(7) states:

> The commission may revoke any station license or construction permit * * * for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy.

At an open meeting on November 20, 1979, the commission, by a 4-to-3 vote, ruled that the networks had violated § 312(a)(7). In its Memorandum Opinion and Order, the commission concluded that the networks' reasons for refusing to sell the time requested were "deficient" under its standards of reasonableness, and directed the networks to indicate by November 26, 1979, how they intended to fulfill their statutory obligations. 74 FCC 2d 631.

Petitioners sought reconsideration of the FCC's decision. The reconsideration petitions were denied by the same 4-to-3 vote, and, on November 28, 1979, the commission issued a second Memorandum Opinion and Order clarifying its previous decision. It rejected petitioners' arguments that § 312(a)(7) was not intended to create a new right of access to the broadcast media and that the commission had improperly substituted its judgment for that of the networks in evaluating the Carter-Mondale Presidential Committee's request for time. November 29, 1979, was set as the date for the networks to file their plans for compliance with the statute. 74 FCC 2d 657.

The networks, pursuant to 47 U.S.C. § 402, then petitioned for review of the commission's orders in the United States Court of Appeals for the District of Columbia Circuit. The court allowed the Committee and the National Association of Broadcasters to intervene, and granted a stay of the Commission's orders pending review.

Following the seizure of American Embassy personnel in Iran, the Carter-Mondale Presidential Committee decided to postpone to early January 1980 the 30-minute program it had planned to broadcast during the period of December 4–7, 1979. However, believing that some time was needed in conjunction with the president's announcement of his candidacy, the committee sought and subsequently obtained from CBS the purchase of five minutes of time on December 4. In addition, the committee sought and obtained from ABC and NBC offers of time for a 30-minute program in January, and the ABC offer eventually was accepted. Throughout these negotiations, the committee and the networks reserved all rights relating to the appeal.

The court of appeals affirmed the commission's order, 629 F.2d 1 (1980), holding that the statute created a new, affirmative right of access to the broadcast media for individual candidates for federal elective office. As to the implementation of § 312(a)(7), the court concluded that the commission has the authority to independently evaluate whether a campaign has begun for purposes of the statute, and approved the commission's insistence that "broadcasters consider and address all nonfrivolous matters in responding to a candidate's request for time." For example, a broadcaster must weigh such factors as: "(a) the individual needs of the candidate (as expressed by the candidate); (b) the amount of time previously provided to the candidate; (c) potential disruption of regular programming; (d) the number of other candidates likely to invoke equal opportunity rights if the broadcaster grants the request before him; and (e) the timing of the request." And in reviewing a broadcaster's decision, the commission will confine itself to two questions: "(1) has the broadcaster adverted to the proper standards in deciding whether to grant a request for

access, and (2) is the broadcaster's explanation for his decision reasonable in terms of those standards?"

Applying these principles, the court of appeals sustained the commission's determination that the presidential campaign had begun by November 1979, and, accordingly, the obligations imposed by § 312(a)(7) had attached. * * *

We consider first the scope of § 312(a)(7). Petitioners CBS and NBC contend that the statute did not impose any additional obligations on broadcasters, but merely codified prior policies developed by the Federal Communications Commission under the public interest standard. The commission, however, argues that § 312(a)(7) created an affirmative, promptly enforceable right of reasonable access to the use of broadcast stations for individual candidates seeking federal elective office.

The Federal Election Campaign Act, of 1971, which Congress enacted in 1972, included as one of its four titles the Campaign Communications Reform Act (Title I). Title I contained the provision that was codified as 47 U.S.C. § 312(a)(7).

We have often observed that the starting point in every case involving statutory construction is "the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 * * * (1979). In unambiguous language, § 312(a)(7) authorizes the commission to revoke a broadcaster's license. * * * It is clear on the face of the statute that Congress did not prescribe merely a general duty to afford some measure of political programming, which the public interest obligation of broadcasters already provided for. Rather, § 312(a)(7) focuses on the individual "legally qualified candidate" seeking air time to advocate "*his* candidacy," and guarantees him "reasonable access" enforceable by specific governmental sanction. Further, the sanction may be imposed for "willful or repeated" failure to afford reasonable access. This suggests that, if a legally qualified candidate for federal office is denied a reasonable amount of broadcast time, license revocation may follow even a single instance of such denial so long as it is willful; where the denial is recurring, the penalty may be imposed in the absence of a showing of willfulness.

The command of § 312(a)(7) differs from the limited duty of broadcasters under the public interest standard. The practice preceding the adoption of § 312(a)(7) has been described by the commission as follows:

> Prior to the enactment of the [statute], we recognized political broadcasting as one of the fourteen basic elements necessary to meet the public interest, needs and desires of the community. No legally qualified candidate had at that time a specific right of access to a broadcasting station. However, stations were required to make reasonable, good faith judgments about the importance and interest of particular races. Based upon those judgments, licensees were to "determine how much time should be made available for candidates in each race on either a paid or unpaid basis. There was no requirement that such time be made available for specific "uses" of a broadcasting station to which Section 315 "equal opportunities would be applicable." [footnotes omitted.] Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 FCC 2d 1079, 1087–1088 (1978) (1978 Report and Order).

Under the pre-1971 public interest requirement, compliance with which was necessary to assure license renewal, some time had to be given to political issues, but an individual candidate could claim no personal right of access unless his opponent used the station and no distinction was drawn between federal, state, and local elections. See *Farmers Educational & Cooperative Union v. WDAY, Inc.*, 360 U.S. 525, 534 * * * (1959). By its terms, however, § 312(a)(7) singles out legally qualified candidates for *federal* elective office and grants them a special right of access on an individual basis, violation of which carries the serious consequence of license revocation. The conclusion is inescapable that the statute did more than simply codify the pre-existing public interest standard.

The legislative history confirms that § 312(a)(7) created a right of access that enlarged the political broadcasting responsibilities of licensees. * * *

Perhaps the most telling evidence of congressional intent, however, is the contemporaneous amendment of § 315(a) of the Communications Act. That amendment was described by the Conference Committee as a "conforming statement" necessitated by the enactment of § 312(a)(7). * * * Prior to the "conforming amendment," the second sentence of 47 U.S.C § 315(a) (1970 ed.) read: "No obligation is imposed upon any licensee to allow the use of its station by any such candidate." This language made clear that broadcasters were not common carriers as to affirmative, rather than responsive, requests for access. As a result of the amendment, the second sentence now contains an important qualification: "No obligation is imposed *under this subsection* upon any licensee to allow the use of its station by any such candidate." 47 U.S.C. § 315(a) [emphasis added]. Congress retreated from its statement that "no ob-

ligation" exists to afford individual access presumably because § 312(a)(7) compels such access in the context of federal elections. If § 312(a)(7) simply reaffirmed the pre-existing public interest requirement with the added sanction of license revocation, no conforming amendment to § 315(a) would have been needed.

Thus, the legislative history supports the plain meaning of the statute that individual candidates for federal elective office have a right of reasonable access to the use of stations for paid political broadcasts on behalf of their candidacies,[8] without reference to whether an opponent has secured time. * * *

Since the enactment of § 312(a)(7), the commission has consistently construed the statute as extending beyond the prior public interest policy. In 1972, the commission made clear that § 312(a)(7) "now imposes on the overall obligation to operate in the public interest *the additional specific requirement* [emphasis added] that reasonable access and purchase of reasonable amounts of time be afforded candidates for Federal office." Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 FCC 2d 510, 537–538 (1972) (1972 policy statement). * * * In its 1978 Report and Order, the commission stated:

> When Congress enacted Section 312(a)(7), it imposed an additional obligation on the general mandate to operate in the public interest. Licensees were specifically required to afford reasonable access to or to permit the purchase of reasonable amounts of broadcast time for the "use" of Federal candidates.
>
> We see no merit to the contention that Section 312(a)(7) was meant merely as a codification of the commission's already existing policy concerning political broadcasts. There was no reason to commit that policy to statute since it was already being enforced by the commission * * *.

The commission had adhered to this view of the statute in its rulings on individual inquiries and complaints. * * *

Although Congress provided in § 312(a)(7) for greater use of broadcasting stations by federal candidates, it did not give guidance on how the commission should implement the statute's access requirement. Essentially, Congress adopted a "rule of reason" and charged the commission with its enforcement. Pursuant to 47 U.S.C.A. § 303(r), which empowers the commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Communications Act]," the agency has developed standards to effectuate the guarantees of § 312(a)(7). See also 47 U.S.C.A. §154(i). The commission has issued some general interpretative statements, but its standards implementing § 312(a)(7) have evolved principally on a case-by-case basis and are not embodied in formalized rules. The relevant criteria broadcasters must employ in evaluating access requests under the statute can be summarized from the commission's 1978 Report and Order and the Memorandum Opinions and Orders in these cases.

Broadcasters are free to deny the sale of air time prior to the commencement of a campaign, but once a campaign has begun, they must give reasonable and good faith attention to access requests from "legally qualified" candidates for federal elective office. Such requests must be considered on an individualized basis, and broadcasters are required to tailor their responses to accommodate, as much as reasonably possible, a candidate's stated purposes in seeking air time. In responding to access requests, however, broadcasters may also give weight to such factors as the amount of time previously sold to the candidate, the disruptive impact on regular programming, and the likelihood of requests for time by rival candidates under the equal opportunities provision of § 315(a). These considerations may not be invoked as pretexts for denying access; to justify a negative response, broadcasters must cite a realistic danger of substantial program disruption—perhaps caused by insufficient notice to allow adjustments in the schedule—or of an excessive number of equal time requests. Further, in order to facilitate review by the commission, broadcasters must explain their reasons for refusing time or making a more limited counteroffer. If broadcasters take the appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference even if the commission's analysis would have differed in the first instance. But if broadcasters adopt "across-the-board policies" and do not attempt to respond to the individualized situation of a particular candidate, the commission is not compelled to sustain their denial of access. * * * 1978 Report and

8. No request for access must be honored under § 312(a)(7) unless the candidate is willing to pay for the time sought. See *Kennedy for President Comm. v. FCC*, 636 F.2d 432, 446–450 (D.C.Cir. 1980).

Order, at 1089–1092, 1094. Petitioners argue that certain of these standards are contrary to the statutory objectives of § 312(a)(7).

The commission has concluded that, as a threshold matter, it will independently determine whether a campaign has begun and the obligations imposed by § 312(a)(7) have attached. * * * Petitioners assert that, in undertaking such a task, the commission becomes improperly involved in the electoral process and seriously impairs broadcaster discretion.

However, petitioners fail to recognize that the commission does not set the starting date for a campaign. Rather, on review of a complaint alleging denial of "reasonable access," it examines objective evidence to find whether the campaign has already commenced, "taking into account the position of the candidate *and the networks* as well as other factors." [Emphasis added]. As the court of appeals noted, the "determination of when the statutory obligations attach does not control the electoral process, * * * the determination is controlled by the process." 629 F.2d at 16. Such a decision is not, and cannot be, purely one of editorial judgment.

Moreover, the commission's approach serves to narrow § 312(a)(7), which might be read as vesting access rights in an individual candidate as soon as he becomes "legally qualified" without regard to the status of the campaign. By confining the applicability of the statute to the period after a campaign commences, the commission has limited its impact on broadcasters and given substance to its command of *reasonable* access.

Petitioners also challenge the commission's requirement that broadcasters evaluate and respond to access requests on an individualized basis. In petitioners' view, the agency has attached inordinate significance to candidates' needs, thereby precluding fair assessment of broadcasters' concerns and prohibiting the adoption of uniform policies regarding requests for access.

While admonishing broadcasters not to " 'second guess' the 'political' wisdom or * * * effectiveness" of the particular format sought by a candidate, the commission has clearly acknowledged that "the candidate's * * * request is by no means conclusive of the question of how much time, if any, is appropriate. Other * * * factors, such as the disruption or displacement of regular programming (particularly as affected by a reasonable probability of requests by other candidates), must be considered in the balance." * * * Thus, the commission mandates careful consideration of, not blind assent to, candidates' desires for air time.

Petitioners are correct that the commission's standards proscribe blanket rules concerning access; each request must be examined on its own merits. While the adoption of uniform policies might well prove more convenient for broadcasters, such an approach would allow personal campaign strategies and the exigencies of the political process to be ignored. A broadcaster's "evenhanded" response of granting only time spots of a fixed duration to candidates may be "unreasonable" where a particular candidate desires less time for an advertisement or a longer format to discuss substantive issues. In essence, petitioners seek the unilateral right to determine in advance how much time to afford *all* candidates. Yet § 312(a)(7) assures a right of reasonable access to *individual* candidates for federal elective office, and the commission's requirement that their requests be considered on an *individualized* basis is consistent with that guarantee. * * *

There can be no doubt that the commission's standards have achieved greater clarity as a result of the orders in these cases.[13] However laudable that may be, it raises the question whether § 312(a)(7) was properly applied to petitioners.[14] Based upon the commission's prior decisions and 1978 Report and Order, however, we must conclude that petitioners had adequate notice that their conduct in responding to the Carter-Mondale Presidential Committee's request for access would contravene the statute.

In the 1978 Report and Order, the commission stated that it could not establish a precise point at which § 312(a)(7) obligations would attach for all campaigns because each is unique. * * *

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13. In 1978, the commission issued a Notice of Inquiry, which asked whether rulemaking proceedings should be commenced in order to clarify licensee obligations under § 312(a)(7). 43 Fed.Reg. 12938 (March 28, 1978). Petitioners and others in the broadcasting industry expressed strong opposition to the promulgation of specific rules, and none were formulated. 1978 Report and Order, *supra*, at 1079–1081. Petitioners, therefore, must share responsibility for any vagueness and confusion in the commission's standards.

14. Section 312(a) empowers the commission to "revoke any *station* license or construction permit." [Emphasis added.] In the court of appeals, petitioners argued that the statute applies only to licensees, not to networks. However, the court rejected that contention, reasoning that the commission's jurisdiction to "mandate reasonable network access * * * is 'reasonably ancillary' to the effective enforcement of the individual licensee's Section 312(a)(7) obligations. * * *" 629 F.2d, at 25–27. Petitioners do not contest that holding in this Court. See Tr. of Oral Arg. 16–17. In any event, as the commission noted, each petitioner is "a multistation licensee fully reachable [as to its licenses] by [the express] revocation authority" granted under § 312(a)(7). 74 FCC 2d, at 640, n. 10.

> [A]n arbitrary "blanket" ban on the use by a candidate of a particular class or length of time in a particular period cannot be considered reasonable. A federal candidate's decisions as to the best method of pursuing his or her media campaign should be honored as much as possible under the 'reasonable' limits imposed by the licensee.

Here, the Carter-Mondale Presidential Committee sought broadcast time approximately 11 months before the 1980 presidential election and 8 months before the Democratic national convention. In determining that a national campaign was underway at that point, the commission stressed: (a) that 10 candidates formally had announced their intention to seek the Republican nomination, and two candidates had done so for the Democratic nomination; (b) that various states had started the delegate selection process; (c) that candidates were traveling across the country making speeches and attempting to raise funds; (d) that national campaign organizations were established and operating; (e) that the Iowa caucus would be held the following month; (f) that public officials and private groups were making endorsements; and (g) that the national print media had given campaign activities prominent coverage for almost 2 months. * * * The commission's conclusion about the status of the campaign accorded with its announced position on the vesting of § 312(a)(7) rights and was adequately supported by the objective factors on which it relied.

Nevertheless, petitioners ABC and NBC refused to sell the Carter-Mondale Presidential Committee any time in December 1979 on the ground that it was "too early in the political season." * * * These petitioners made no counteroffers, but adopted "blanket" policies refusing access despite the admonition against such an approach in the 1978 Report and Order. * * * Likewise, petitioner CBS, while not barring access completely, had an across-the-board policy of selling only 5-minute spots to all candidates, notwithstanding the commission's directive in the 1978 Report and Order that broadcasters consider "a candidate's desires as to the method of conducting his or her media campaign." * * * Petitioner CBS responded with its standard offer of separate 5-minute segments, even though the Carter-Mondale Presidential Committee sought 30 minutes of air time to present a comprehensive statement launching President Carter's reelection campaign. Moreover, the committee's request was made almost 2 months before the intended date of broadcast, was flexible in that it could be satisfied with any prime time slot during a 4-day period, was accompanied by an offer to pay the normal commercial rate, and was not preceded by other requests from President Carter for access. * * * Although petitioners adverted to the disruption of regular programming and the potential equal time requests from rival candidates in their responses to the Carter-Mondale Presidential committee's complaint, the commission rejected these claims as "speculative and unsubstantiated at best." * * *

Under these circumstances, we cannot conclude that the commission abused its discretion in finding that petitioners failed to grant the "reasonable access" required by § 312(a)(7).[15] * * *

Finally, petitioners assert that § 312(a)(7) as implemented by the commission violates the First Amendment rights of broadcasters by unduly circumscribing their editorial discretion. * * * Petitioners argue that the commission's interpretation of § 312(a)(7)'s access requirement disrupts the "delicate balanc[e]" that broadcast regulation must achieve. We disagree.

A licensed broadcaster is "granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *Office of Communication of the United Church of Christ v. FCC.* * * *

* * *

The First Amendment interests of candidates and voters, as well as broadcasters, are implicated by § 312(a)(7). We have recognized that "it is of particular importance that candidates have the * * * opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." *Buckley v. Valeo.* * * * Section 312(a)(7) thus makes

15. As it did here, the commission, with the approval of broadcasters, engages in case-by-case adjudication of § 312(a)(7) complaints rather than awaiting license renewal proceedings. See Tr. of Oral Arg. 11–16. Although the penalty provided by § 312(a)(7) is license revocation, petitioners simply were directed to inform the commission of how they intended to meet their statutory obligations. See 74 FCC 2d, at 651; 74 FCC2d, at 676–677. In essence, the commission entered a declaratory order that petitioners' responses to the Carter-Mondale Presidential Committee constituted a denial of "reasonable access." Such a ruling favors broadcasters by allowing an opportunity for curative action before their conduct is found to be "willful or repeated" and subject to the imposition of sanctions.

a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process.

Petitioners are correct that the Court has never approved a *general* right of access to the media. See, *e.g.*, *FCC v. Midwest Video Corp.* * * *; *Miami Herald Publishing Co. v. Tornillo* * * *; *CBS, Inc. v. Democratic National Committee.* Nor do we do so today. Section 312(a)(7) creates a *limited* right to "reasonable" access that pertains only to legally qualified federal candidates and may be invoked by them only for the purpose of advancing their candiacies once a campaign has commenced. The commission has stated that, in enforcing the statute, it will "provide leeway to broadcasters and not merely attempt *de novo* to determine the reasonableness of their judgments * * *." * * * If broadcasters have considered the relevant factors in good faith, the commission will uphold their decisions. * * * Further, § 312(a)(7) does not impair the discretion of broadcasters to present their views on any issue or to carry any particular type of programming.

Section 312(a)(7) represents an effort by Congress to assure that an important resource—the airwaves—will be used in the public interest. We hold that the statutory right of access, as defined by the commission and applied in these cases, properly balances the First Amendment rights of federal candidates, the public, and broadcasters.

The judgment of the court of appeals is

Affirmed.

Justice WHITE, with whom Justice Rehnquist and Justice Stevens join, dissenting.

While both the Court and the commission describe other factors considered relevant such as the number of candidates and disruption in programming, the overarching focus is directed to the perceived needs of the individual candidate. This highly skewed approach is required because, as the Court sees it, the networks "seek the unilateral right to determine in advance how much time to afford *all* candidates." But such a right, reasonably applied, would seem to fall squarely within the traditionally recognized discretion of the broadcaster. Instead of adhering to this traditional approach, the Court has laid the foundation for the unilateral right of candidates to demand and receive any "reasonable" amount of time a candidate determines to be necessary to execute a particular campaign strategy. The concomitant commission involvement is obvious. There is no basis in the statute for this very broad and unworkable scheme of access. * * *

* * *

COMMENT

It has been argued that *Red Lion* and *Tornillo* "cannot be reconciled because the distinctions which have been drawn between them are constitutionally insignificant." But it is contended that "unlike *Red Lion*, *CBS v. FCC* can be reconciled with *Tornillo*." See, Shelledy, *Note, Access to the Press: Teleological Analysis of a Constitutional Double Standard*, 50 Geo. Wash.L.Rev. 430 (1982). How? *CBS v. FCC* distinguished the right of access sought there from the Florida right of reply statute which was considered in *Tornillo*. The "identity of the medium" was not the critical factor. *Tornillo* is often distinguished from *Red Lion* on the ground that in a newspaper case the restraint which can be imposed under the First Amendment is far more severe in nature than that imposed upon the electronic media.

The George Washington note distinguishes *Tornillo* from *CBS v. FCC* as follows:

> Only one of the limiting characteristics of section 312(a)(7), the reasonableness standard, distinguishes it from the Florida right of reply on a level of constitutional significance: an editor's decision not to broadcast another's message is left undisturbed so long as the decision has been reached reasonably. The Florida statute the *Tornillo* Court invalidated constrained editorial discretion far more severely than section 312(a)(7). Once a triggering editorial vested the Florida right of reply, the editor lost all control over the decision of whether to publish a response, what length to allot to the response, and placement and choice of typeset—notwithstanding reasonable alternatives the editor could have chosen. Had the Florida statute been limited by the reasonableness standard, as is Section 312(a)(7), it would not have transgressed the Court's command in *Tornillo* that any "compulsion to publish that which "reason" tells [editors] should not be published is unconstitutional."

Do you agree?

In *CBS v. Democratic National Committee*, 412 U.S. 94 (1973), the Supreme Court held that an "arbitrary" blanket network policy refusing to sell time to political groups for the discussion of social and political issues did not violate the First Amendment. Yet, in *CBS v. FCC*, the Court held that an

"arbitrary" blanket ban by the networks on the use by a candidate of a particular length of time in a particular period could not be considered reasonable under section 312(a)(7). A blanket network ban on a certain category of programming was deemed permissible in one instance and impermissible in the other. Why? The difference is that in *CBS v. FCC* a *statute* conferred particular rights on individual political candidates. The FCC's construction of the statute made the candidate's "desires as to the method of conducting his or her campaign" a matter to be considered by the licensee in determining whether to grant reasonable access under the statute.

In short, the second *CBS* case involved a limited statutorily conferred right, whereas the first *CBS* case would have required a decision by the Supreme Court that the First Amendment itself was a barrier to the exercise of broadcast editorial judgment.

Did section 312(a)(7) of the Federal Election Campaign Act of 1971 create an affirmative, promptly enforceable right of access? Or did it merely codify prior FCC policies, i.e., the obligation to provide reasonable access to federal political candidates that was part of the public interest standard of the Federal Communications Act?

Chief Justice Burger's answer on this is very clear. Section 312(a)(7) of the Federal Election Campaign Act of 1971 created a *new*, affirmative, promptly enforceable right of access. Why? For one thing, the fact that the second sentence of section 315(a) was contemporaneously amended to make it clear that "no obligation is imposed *under this subsection* upon any licensee to allow the use of its station by any such candidate" is seen as quite significant. The amendment was interpreted by the Court in *CBS v. FCC* as evidence of congressional awareness that section 312(a)(7) had imposed upon broadcast licensees an obligation to allow the use of their stations by federal political candidates in a manner which previously had not obtained under either the public interest standard of the act or the prior unamended text of the second sentence of section 315(a).

How does section 312(a)(7) differ anyway from the duty to provide access for political candidates which broadcasters had under the public interest standard? One answer to this question is that previous to the enactment of section 312(a)(7), no legislative candidate had a specific right of access to broadcasting. There was a general public interest obligation to give political candidates some time, but no particularized rights were lodged in the candidates. If one candidate was given time, then, of course, under section 315(a) rights to equal opportunities were triggered for that office by broadcasters. If all candidates were denied time, then all the candidates seeking time would have had to rely on would be the general public interest obligation of broadcasters to provide time for political campaigns. This obligation was difficult to enforce since no particular candidate had any specified rights under such an obligation.

For that matter, is there still a public interest based duty to provide access to political candidates? The FCC and the U.S. Supreme Court concluded that such a duty existed prior to 1971 because the FCC "recognized political broadcasting as one of the fourteen basic elements necessary to meet the public interest, needs and desires of the community." The fourteen-point list was first announced in the FCC's "1960 Programming Policy Statement," Report and Statement of Policy re: Commission en banc Programming Inquiry, 44 FCC 2303 (1960). It is generally believed that the FCC's 1981 Radio Deregulation and 1984 Television Deregulation orders eliminated the 1960 Policy statement's guidelines for broadcast programming. The deregulation orders said that the only expectation the FCC would have of programming in the public interest would be that broadcasters provided some issue-responsive programming. Do the radio and TV deregulation orders mean that the *only* obligations broadcasters have toward political speech are those found in sections 312 and 315 of the Communications Act? Does this mean that broadcasters are under no legal obligation to provide any access to nonfederal candidates? Remember broadcasters still have an obligation to provide issue-responsive programming, text, p. 759.

Do you agree with Justice White that the majority interpretation of section 312(a)(7) is an "open invitation to start campaigning early"? In section 312(a)(7), the FCC refuses to defer to the editorial judgment of the broadcasters about when a campaign may be deemed to have commenced and reserves that issue for itself. As a result, the candidate may be encouraged to show a "need" to campaign early. If his recognition factor is low and his treasury is full, the incentive to seek access for early campaigning is great. Does the majority opinion suggest any means by which such requests may be countered by the FCC? What are they?

CBS v. FCC requires that candidate requests under Sec. 312(a)(7) be handled on a case-by-case basis and refused to accept an approach to Sec. 312(a)(7) based on blanket network policies. The FCC has stated that blanket policies against selling candidates either program-length amounts of time or spot ads also violate sec. 312(a)(7). Broadcasters must be willing to consider expressed candidate needs for access to the electorate through long programs or short ads if that is what candidates desire.

Does § 312(a)(7) Require Broadcasters to Make Free Time Available?

KENNEDY FOR PRESIDENT COMMITTEE v. FCC

6 MED.L.RPTR. 1705, 636 F.2D 432 (D.C.CIR. 1980).

ROBINSON, Circuit Judge.

On March 14, 1980, the three major commercial television networks broadcast a half-hour speech by President Carter from 4:00 to 4:30 p.m. and a presidential press conference from 9:00 to 9:30 p.m. On each occasion, the principal topic of discussion was the state of the Nation's economy. Each event was presented in its entirety and, with but one exception, was televised live by each network. The president's statements were also reported in the course of the networks' regularly scheduled national and local newscasts.

The Kennedy for President Committee, the petitioner herein, charges that these programs saturated the American public with the president's views on the economy only four days before the 1980 Illinois presidential primary. That, petitioner asserts, diminished the chances of its candidate, Senator Edward M. Kennedy, of winning the Democratic Party's presidential nomination later in the year. Petitioner claims that Section 312(a)(7) of the Communications Act of 1934 and the well-known fairness doctrine separately entitle the senator to time for telecasts of his own ideas and proposals on economic conditions.

The networks denied petitioner's request for responsive time, and the Federal Communications Commission rejected petitioner's bid for an administrative directive therefor. Before us now is a petition for review of the commission's order. We agree with the commission that petitioner's reliance on Section 312(a)(7) is misplaced, and that petitioner failed to establish the elements of a prima facie case under the fairness doctrine. We accordingly affirm. Reacting to announcements of plans to televise President Carter's March 14 speech and press conference, petitioner implored the networks to provide Senator Kennedy with an opportunity to speak in prime time to the American people on the economy.

Independently, the networks refused. In each instance, they construed petitioner's request as an invocation of the equal-opportunity command of Section 315(a) of the Communications Act, and expressed the belief that the telecasts in question were exempt from that requirement as on-the-spot coverage of bona fide news events. Each network reminded petitioner that it had given extensive coverage to the senator's campaign, and to his position on economic issues. Two of the networks emphasized their earlier presentations of wide spectra of economic commentary and analysis encompassing numerous alternatives to the stratagems advanced by the president.

Petitioner then turned to the commission for "redress [of] a pattern of conduct causing an unacceptably imbalanced presentation of important facts." Petitioner specifically identified Section 312(a)(7) of the Communications Act and the long-established fairness doctrine as bases for a commission order to the networks to make time available to the senator.

At the first level of commission consideration, the Broadcast Bureau denied relief. It first declared that petitioner's dependence on Section 312(a)(7) was faulty; "[g]iven the availability of prime time for purchase," it said, "the networks' failure to furnish free time does not raise a Section 312(a)(7) question." With respect to the fairness doctrine, the bureau concluded that petitioner had not established a prima facie case of violation because it had neither alleged nor substantiated any instance of bad faith on the networks' part, or any failure to present contrasting views on economic issues in their overall programming.

In essence, then, the bureau held that Section 312(a)(7) does not entitle a candidate to free time when time is available for purchase, and that establishment of a prima facie case under the fairness doctrine demands more than a bare conclusory assertion that a broadcaster has not balanced his programming on an important and controversial issue. Without awaiting an application from petitioner, the commission, in the interest of expedition, examined the bureau's decision and affirmed simply on the basis of the bureau's opinion. Then followed the instant petition for review by this court.

Petitioner's Section 312(a)(7) contention is that it required the networks to allot free time to Senator Kennedy, particularly in consequence of the so-called saturation coverage of President Carter's economic views shortly before the Illinois primary. Two theories are advanced in attempted support of this position. One is that Section 312(a)(7) provides a candidate for federal elective office with a contingent right of access to free time, triggered in this instance by the telecasts of the president's March 14 speech and press conference. The other is that independently of this contingent right, the section confers upon such a candidate direct and unqualified entitlement to use broadcast facilities without charge.

As we shall soon see, Sections 312(a)(7) and 315(a) of the Communications Act work in tandem to govern access to broadcast media by candidates for public office. With the interaction of these two sections at the heart of federal intervention in political broadcasting, we begin our assessment of petitioner's arguments with an analysis of their interrelationship. The first part of Section 315(a) is its equal-opportunity provision, frequently referred to as an equal-time grant.

The import of this language is clear: any broadcaster who permits a "use" of station facilities by a legally qualified candidate must provide equal opportunities to that candidate's opponents. As originally enacted, this was the full extent of Section 315(a), but in 1959 Congress amended it to exclude candidate appearances in bona fide newscasts and news interviews, bona fide documentaries in which the appearance is incidental, and on-the-spot coverage of bona fide news events—which no longer constitute a "use" of broadcast facilities, and therefore are unencumbered by the equal-opportunity obligation. Since Section 315(a), as its proviso specifically states, does not impose an unconditional obligation on broadcasters to allow use of their station facilities by any candidate, the equal-opportunity grant has aptly been characterized as a contingent right of access. It does not compel a broadcaster to afford access to any candidate in the first instance, but it does mandate parity for all candidates for a given office once access by one is permitted. The duty is thus no more or less than to accord equal treatment to all legally qualified candidates for the same public office, and "equal opportunity" encompasses such elements as hour of the day, duration and charges.

As we have noted, four categories of news-type programs are expressly exempted from this equal-opportunity mandate. Those programs, like others, however, remain subject to the exigencies of the public interest and the demands of the fairness doctrine. The last sentence of Section 315(a) makes plain that broadcasters are not relieved,

> in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under [the act] to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

This language, placed in Section 315(a) in 1959 when Congress added the exemptions to the equal-opportunity provision, codifies the fairness doctrine formulated by the commission in 1949.[6] So, while broadcast of an event exempted by Section 315(a) does not enliven the equal-opportunity requirement, it does summon adherence to public-interest and "fairness" considerations. Since we address the ramifications as well as the confines of the fairness doctrine in detail at a later point, we need not dwell upon them now. It is sufficient merely to say that this is another means by which a candidate might gain entree to broadcast facilities for use in his campaign.

The third leaf of the triad governing candidate access to broadcast media is Section 312(a)(7), which authorizes the commission to

> revoke any station license or construction permit * * * for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy.

The import of this passage is the focus of the instant litigation, and it is immediately apparent that its language alone does not dispense with need for inquiry into whether Section 312(a)(7) was intended to serve as an auxiliary to Section 315(a)'s equal-opportunity specification nor whether, when appli-

6. [Six years later, a different panel of the same circuit court of appeals concluded that the 1959 Amendment did *not* codify the fairness doctrine. Telecommunications Research and Action Center v. FCC, 801 F.2d 501 (D.C. Cir., 1986).]

cable, it assures candidates of some quantum of free time.

This is not the first time that a controversy has arisen over interpretation of Section 312(a)(7). In our recent decision in *CBS v. FCC*, we addressed the question whether Section 312(a)(7) was enacted as a new and additional entitlement to broadcast-media access for federal candidates, or whether it merely codified the pre-existing duty of broadcasters to provide time to such candidates pursuant to the general mandate to operate in the public interest. Reading Section 312(a)(7) in light of its legislative history, we concluded that it does indeed "create an affirmative right of access for individual candidates for federal elective office." We did not, however, attempt to define the monetary parameters of that right, for *CBS* involved refusal of requests to *purchase* time. To resolve the issues now before us—whether Section 312(a)(7) augments Section 315(a) as an additional but broader equal-opportunity exaction, and the extent to which it independently grants access on a free basis—we must return to the legislative history and undertake a somewhat broader analysis.

Section 312(a)(7) had its genesis in the Federal Election Campaign Act of 1971. Title I of that legislation, denominated the "Campaign Communications Reform Act," contained three distinct provisions: the reasonable-access requirement now embodied in Section 312(a)(7); the lowest-unit-cost specification which is now Section 315(b)(1); and a spending limitation on use of communications media by candidates for federal elective office, which has since been repealed. Each provision stemmed from serious congressional concern over the ever-mounting expense of modern electioneering.

The most straightforward reading of the language of Section 312(a)(7) is that broadcasters may fulfill their obligation thereunder either by allotting free time to a candidate or by selling the candidate time at the rates prescribed by Section 315(b). Section 312(a)(7) in terms authorizes license or permit revocation "for willful or repeated failure to allow reasonable access to *or* to permit purchase of reasonable amounts of time for the use of a broadcasting station," and "or" normally connotes the disjunctive. While "or" permissibly may be accepted in the conjunctive sense when that adequately appears to have been the legislative intent, in this instance the disjunctive interpretation is clearly supported.

Each reference to Section 312(a)(7) in the legislative history of the Campaign Communications Reform Act speaks of the *sale* of time. * * *

This consistent characterization of the statutory text as a mandate for sale of a reasonable amount of time supplies firm support for a disjunctive reading. This conclusion is in harmony with Senator Pastore's declaration, a year after passage of that act, that "there was a great deal of pressure to mandate free time" but that Congress decided "to avoid that" and imposed something different.

Consequently, we discern no right to free time for candidates for federal elective office under Section 312(a)(7) either from a reading of the statutory text or from our analysis of its legislative history. Remaining to be answered, however, is the question whether the "reasonable access" language of Section 312(a)(7) sometimes accomplishes that and by affording a right of access to broadcast facilities auxiliary to the Section 315(a) right to equal opportunities.

An equal-opportunity quality for Section 312(a)(7) is mentioned only fleetingly in the legislative history. The very few references to the section as an equal-opportunity provision all concerned S.956 and the role that Section 312(a)(7) would play upon the anticipated—but ultimately aborted—revocation of the equal-opportunity mandate of Section 315(a) with respect to presidential and vice-presidential candidates. In this context, there was but one notable allusion to Section 312(a)(7) as a guaranty of fair treatment of such candidates by broadcasters. The idea, advanced by Senator Mathias, was that after excluding presidential and vice-presidential candidates from the benefit of Section 315(a)'s equal-opportunity provision, Section 312(a)(7) could serve as a source of authority for requiring broadcasters selling time to one such candidate to do the same for his opponents. This suggestion seems to have contemplated no more, however, than that Section 312(a)(7) could operate as a means of assuring that broadcasters would make sufficient quantities of time for purchase available to candidates for presidential or vice-presidential office.

Even assuming that these references tended somewhat to depict Section 312(a)(7) as something of an equal-opportunity auxiliary, that justification eroded away when the proposed partial suspension of Section 315(a)'s equal-opportunity provision failed to pass. There was warm support for suspension, which we noted earlier, but many legislators were fearful

of abolition and that provision. * * * Consequently, the Conference Committee decided to eliminate the portion of the Senate bill proposing elimination of Section 315(a)'s equal-opportunity requirement in presidential and vice-presidential campaigns, and neither the final Conference Report nor the ensuing debate on the floor of either House again referred to Section 312(a)(7) as an equal-opportunity measure. Save for the instant proceeding, the commission has not had occasion to consider whether Section 312(a)(7) grants an automatic right to respond to broadcast material additional to that defined in Section 315(a); and here the denial of petitioner's rather vague argument on that point was unelucidated. The Broadcast Bureau dismissed reliance on Section 312(a)(7) for that purpose as misplaced, stating merely that this "section of the law was intended to insure that broadcasters make available reasonable amounts of time for *use* by federal candidates," and the commission affirmed without opinion of its own. To be sure, this disposition evinces an underlying construction of Section 312(a)(7) not at all inharmonious with its legislative reflections, but it adds nothing to an understanding of why. There is, however, a significant history of administrative interpretation with respect to whether Section 312(a)(7), when it does obtain, grants its right of access on a free or a paid basis.

The commission has consistently read Section 312(a)(7) as giving broadcasters the option of fulfilling their obligation thereunder by offering to candidates either free time or the privilege of purchasing time. The commission first took this position in 1972, shortly after passage of Section 312(a)(7), when it issued a public notice in the form of questions and answers:

5. Q. Does the "reasonable access" provision of Section 312(a)(7) require commercial stations to give free time to legally qualified candidates for Federal elective office?

A. No, but the licensee cannot refuse to give free time and also [refuse] to permit the purchase of reasonable amounts of time. If the purchase of reasonable amounts of time is not permitted, then the station is required to give reasonable amounts of free time.

6. Q. If a commercial station gives reasonable amounts of free time to candidates for federal elective office, must it also permit purchase of reasonable amounts of time?

A. No. A commercial station is required either to provide reasonable amounts of free time or permit purchase of reasonable amounts of time.

It is not required to do both.

The commission brought this public notice to the attention of Congress in 1973, and neither then nor at any time thereafter has Congress expressed disagreement with the commission's interpretation of Section 312(a)(7). To boot, the commission has reiterated its original interpretation on subsequent occasions.

We are duty bound to honor the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *." Especially should we do so when the agency's initial interpretation of the statute is substantially contemporaneous with its enactment. And where, as here, the administrative interpretations have maintained consistency undeviatingly, there can be no doubt that the deference they command is considerably heightened.

The Communications Act envisions integration of two of its sections in a relatively uncomplicated scheme of access to broadcast facilities by candidates for public office. Section 312(a)(7) supplies a right of access by requiring broadcasters, on pain of license revocation, to make reasonable amounts of time available for use by legally qualified persons seeking federal elective office. This right is unconditional in the sense that no prior use by any opponent of that candidate is necessary. Irrefutably, reasonable access is for the asking if the candidate is willing to pay, and the amount he can be charged is carefully limited by law. The measure of the right remains constant, however, at "reasonable access."

Section 315(a), in turn, ordains that whenever a broadcaster permits any candidate for any public office—federal, state or local—to "use" broadcast facilities, the broadcaster must afford an equal opportunity to any legally qualified rival of that candidate who seeks it. This right is contingent in nature; it does not come into fruition unless and until an opponent makes some "use" of station facilities, but once that occurs it ripens, and the candidate becomes unconditionally entitled to equal opportunities, though to no more. The Section 315(a) duty arises, however, only with respect to an opponent's "use" of broadcast facilities; and coverage of an event within the purview of the four exemp-

tions to that section is statutorily deemed a nonuse, and therefore does not activate the equal-opportunity requirement.

The statutory language and historical precedents also make plain that this section does not, however, confer the privilege of using the broadcaster's facilities without charge. Rather, we have found that broadcasters may meet the demands of Section 312(a)(7) either by an allotment of free time or by making time available for purchase.

We are satisfied, too, that a candidate cannot secure broadcast time, free or otherwise, through the simple expedient of reading Section 312(a)(7) as just another equal-opportunity provision. Nothing in the history of the section's evolution or its administrative interpretation serves to validate the thesis that it confers a second responsive right to broadcast privileges that may be employed as a supplement to Section 312(a)'s equal-opportunity mandate. And without some clear indication that Congress so intended, we perceive no justification for such a reading. Settled principles of statutory construction militate strongly against that interpretation, for it would engender grave doubt as to the internal consistency of the statutory scheme.

If Section 312(a)(7) were to be viewed as an auxiliary source of entitlement to equal opportunities, the exemptions to Section 315(a) would easily be destroyed. The purpose of these exclusions, it will be recalled, was to free broadcasters who carried any of four types of newsworthy "political" events from the equal-opportunity burden, and thereby to encourage more complete coverage of these events. Should Section 312(a)(7) be construed as automatically entitling a candidate to responsive broadcast access whenever and for whatever reason his opponent has appeared on the air, Section 315(a)'s exemptions would soon become meaningless. Statutes are to be interpreted, if possible, to give operation to all of their parts, and to maintain them in harmonious working relationship. Congress has devised a comprehensive and cohesive plan in which Section 312(a)(7), Section 315(a) and the latter's exemptions all have well-defined missions. No provision may be misused to defeat the effective functioning of another.

Consequently, we do not find in Section 312(a)(7) a right of access that Section 315 denies. Petitioner has not advanced any claim under Section 315(a), nor has it quarreled with the networks' unanimous conclusion that the broadcasts of the President's March 14 speech and press conference were immune from the equal-opportunity command of that section. We hold that petitioner cannot use Section 312(a)(7) to circumvent the explicit exemptions of Section 315(a).

We further hold that petitioner is not in a position to utilize Section 312(a)(7) in the manner in which Congress designed it to function. Petitioner has never claimed that it was denied an opportunity to buy time; rather, it has insisted that the networks violated Section 312(a)(7) simply by refusing to provide free time to Senator Kennedy. We have seen that the section entitles a candidate to free time only if and when a broadcaster refuses to sell a reasonable quantity of time. No showing of that sort has been made, or indeed undertaken.

We thus find petitioner's Section 312(a)(7) arguments unpersuasive. We turn now to a consideration of its contentions under the fairness doctrine.

* * *

Affirmed.

THE FAIRNESS DOCTRINE: ANACHRONISM OR PROTECTOR OF PUBLIC FIRST AMENDMENT RIGHTS?

A Preliminary Caution

For nearly forty years (1949–1987), the Federal Communications Commission enforced an administrative policy known as the fairness doctrine. Despite this long history, the FCC in August, 1987 abandoned the policy. As this book is written, however, the story of the fairness doctrine is by no means concluded. Judicial appeals of the FCC's actions are still pending. Many in the U.S. Congress advocate reimposition of the doctrine through amendments to the Communications Act of 1934. President Ronald Reagan vetoed one congressional effort to make the doctrine statutory and blocked another through a threatened veto. If the doctrine should be reimposed by Congress, inevitable court appeals of that action could leave the fate of the doctrine unresolved for years.

One thing is certain. The constitutionality and public policy wisdom of the doctrine will continue

to be debated for some time. Thus, we focus here on those matters, presenting the arguments on behalf of and in opposition to the doctrine. Our treatment of nitty-gritty application problems of the doctrine is limited and our focus more on whether or not it should exist at all. If the doctrine is successfully reimposed by Congress, attention can turn, again, to the specific problems of its application.

A Fairness Doctrine Primer

To follow the debate over the fairness doctrine it is essential to have a basic understanding of what it required. Under the doctrine, broadcasters had two affirmative responsibilities. First, they had to devote a "reasonable" amount of time to covering "controversial issues of public importance" in their service areas—the so-called "first prong" of the doctrine. Second, once coverage of a controversial issue of public importance was opened, broadcasters had to provide a "reasonable opportunity" for significant opposing viewpoints on such issues to be heard—the "second prong" of the doctrine.

Although often confused with section 315 of the Communications Act—the so-called "equal time" provision—the fairness doctrine actually worked quite differently. Section 315 provides little broadcaster discretion and works rather automatically. If a broadcaster allows one legally qualified candidate for a public office to use his or her station, then all legally qualified opponents of that candidate must be given precisely equal opportunities to use the same station—no ifs, ands, or buts. A key concept in fairness doctrine enforcement, on the hand, was "reasonableness." Under the first prong of the doctrine, broadcasters did not have to cover *every* controversial issue of public importance; only those they chose to cover under a standard of "reasonableness and good faith." In practice, they got in trouble with the FCC under the first prong only if they failed to cover the most crucial of controversies in their communities and, in fact, the FCC only once—ever—found a broadcaster to have violated the first prong. Rep. Patsy Mink, 59 FCC 2d 987, 37 R.R.2d 744 (1976).

Under the second prong of the doctrine, broadcasters did not, as is true under section 315, have to provide "equal" opportunity for opposing views to be heard—only a "reasonable opportunity." In practice, the FCC was quite tolerant of unequal amounts of time being devoted to opposing views, stepping in only when the discrepancies became truly unreasonable. In addition, unlike section 315, the fairness doctrine never created a right for the proponents of views on controversial issues to demand access to stations. Under section 315, broadcasters must permit "opposing candidates" direct access to their stations, but under the fairness doctrine, all broadcasters had to do was see to it that the opposing views were presented somehow. While that might mean putting an advocate for those views on the air, the doctrine did not require that. Broadcasters could present opposing views in any way they decided; the important matter was that the views got presented, somehow, in a reasonable fashion. Individual programs did not have to be "balanced," only the broadcaster's overall service.

Full-blown FCC fairness doctrine cases, compared to fairness doctrine complaints, were relatively infrequent. Although the FCC received hundreds to thousands of complaints per year while the doctrine was in effect, it deflected most of them from licensees. By placing many burdens of pleading and proof on complaining parties, the FCC usually managed procedurally to reject most fairness doctrine complaints rather than passing them along to licensees for response. Complaining parties had to prove that broadcasts concerned a "controversial issue of public importance." They had to assert that they were regular listeners and viewers to the station involved and in a preliminary way had to prove that the broadcaster had not "reasonably" treated opposing viewpoints on other programming. Complaints were referred to broadcasters only after these hurdles were cleared.

Broadcaster responses to submitted fairness complaints had to be accepted if they were reasonable. If, for example, a complaining party characterized an issue in a way that made it controversial and of public importance while the broadcaster characterized the issue in a different way that removed its controversiality or public importance, courts told the FCC that they had to accept the broadcaster's reasonable characterization of things. *National Broadcasting* Co. *v.* FCC, 516 F.2d 1101 (D.C. Cir. 1974). See also *American Security Council Educational Foundation v.* FCC, 607 F.2d 438 (D.C. Cir. 1979). Even if a broadcaster was found to have violated the doctrine, the usual FCC response was simply to tell the licensee that somehow, someway he or she had to present additional programming dealing with the issue or, more commonly, the particular side presented "unreasonably." Only one

broadcaster ever lost a license where fairness doctrine violations were a factor. In that case, it's unclear whether the license was lost for the fairness violations alone or, more likely, for a combination of the violations plus misrepresentation to the FCC about them. *Brandywine-Main Line Radio, Inc. v.* FCC, 473 F.2d 16 (D.C.Cir. 1972), cert. den. 412 U.S. 922 (1973).

The doctrine was, at least once, subjected to fairly direct constitutional challenge. In the *Red Lion* case, the U.S. Supreme Court decided that the doctrine, as then applied and defended by the FCC, was not unconstitutional.

The "Fairness" Doctrine and the *Red Lion* Case—The Background

In November 1964, the Red Lion Broadcasting Co. of Red Lion, Pennsylvania carried a program series entitled *The Christian Crusade*. One of the programs included an attack by Rev. Billy James Hargis on a book entitled *Goldwater—Extremist Of The Right*.

The *Red Lion* case concerns the "personal attack" rule, an aspect of the fairness doctrine requiring that, when an individual is personally attacked, the station carrying the attack must give him an opportunity to reply. A question which had been unclear under the personal attack rule was whether the station had to furnish broadcast time free if the person attacked could not obtain a sponsor and was himself unable to pay for the time.

Cook asked the radio station for an opportunity to reply to Hargis. The radio station replied that the "personal attack" aspect of the fairness doctrine only required a licensee to make free time for reply available if no paid sponsorship could be secured. The station therefore insisted that Cook had to warrant that no such paid sponsorship could be found. Cook refused and instead complained to the FCC. The FCC took the position that the station had the duty to furnish reply time, paid or not. The FCC declared that it was not necessary for Cook to show that he could neither afford nor find sponsored time before the station's duty to make reply time available went into effect. The FCC ruled that the public interest required that the public be given an opportunity to learn the other side and that this duty remained even where the time had to be sustained by the station. The FCC entered a formal order to that effect, and the station appealed to the United States Court of Appeals.

The United States Court of Appeals for the District of Columbia in the *Red Lion* case held that the fairness doctrine and the personal attack rules were constitutional. *Red Lion Broadcasting* Co. *v.* FCC, 381 F.2d 908 (D.C.Cir. 1967).

With the *Red Lion* decision in the court of appeals, the fairness doctrine prevailed in the first court test of its validity under the First Amendment as did its corollary, the personal attack rules.

The broadcast industry was shocked by the court of appeals decision in the *Red Lion* case. The Radio Television News Directors Association decided to institute suit for judicial review of FCC orders upholding the personal attack rules and reply time for political editorials. Suit was filed in the United States Court of Appeals for the Seventh Circuit in Chicago, a forum which was perhaps selected because it was thought to be less sympathetic to government than the United States Court of Appeals for the District of Columbia in Washington. The United States Court of Appeals for the Seventh Circuit ruled that the personal attack rules and the political editorial rules would violate the First Amendment. *Radio Television News Directors Association v. United States*, 400 F.2d 1002 (7th Cir. 1968).

The seventh circuit in the *RTNDA* case essentially adopted many of the prior restraint contentions which the District of Columbia Circuit had rejected in the *Red Lion* case. Basically, the *RTNDA* decision took the position that broadcasters might forego controversial commentary if they had to go to the expense of furnishing transcripts of personal attacks to those attacked, and if they had to furnish time free for responses to those who wished to avail themselves of the right of reply furnished by the personal attack rules. Under such circumstances, the *RTNDA* court reasoned, free speech would be unconstitutionally inhibited.

The Supreme Court had granted review in *Red Lion* but decided to defer decision until the Seventh Circuit Court of Appeals had decided the *RTNDA* case. When the FCC appealed the *RTNDA* ruling, the Supreme Court joined the two cases. The world of broadcast journalism eagerly watched to see how the Supreme Court would break the 1–1 score on the fairness doctrine and personal attack rules produced by the split between the two federal courts of appeals.

The Supreme Court affirmed the *Red Lion* decision and reversed the *RTNDA* decision. The fairness doctrine and the personal attack rules were up-

held as consistent with the First Amendment by a unanimous Supreme Court consisting of all the seven justices who participated in the case.

RED LION BROADCASTING CO., INC. v. FCC

395 U.S. 367, 89 S.CT. 1794, 23 L.ED.2D 371 (1969).

Justice WHITE delivered the opinion of the Court.

The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory requirement of § 315 of the Communications Act that equal time be allotted all qualified candidates for public office. Two aspects of the fairness doctrine, relating to personal attacks in the context of controversial public issues and to political editorializing, were codified more precisely in the form of FCC regulations in 1967. The two cases before us now, which were decided separately below, challenge the constitutional and statutory bases on the doctrine and component rules. *Red Lion* involves the application of the fairness doctrine to a particular broadcast, and *RTNDA* arises as an action to review the FCC's 1967 promulgation of the personal attack and political editorializing regulations, which were laid down after the *Red Lion* litigation had begun.

* * *

Not long after the *Red Lion* litigation was begun, the FCC issued a Notice of Proposed Rule Making, 31 Fed.Reg. 5710, with an eye to making the personal attack aspect of the fairness doctrine more precise and more readily enforceable, and also to specify its rules relating to political editorials.

Believing that the specific application of the fairness doctrine in *Red Lion*, and the promulgation of the regulations in *RTNDA*, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional, reversing the judgment below in *RTNDA* and affirming the judgment below in *Red Lion*.

The history of the emergence of the fairness doctrine and of the related legislation shows that the commission's action in the *Red Lion* case did not exceed its authority, and that in adopting the new regulations the commission was implementing congressional policy rather than embarking on a frolic of its own. * * *

After an extended period during which the licensee was obliged not only to cover and to cover fairly the views of others, but also to refrain from expressing his own personal views, Mayflower Broadcasting Corp., 8 FCC 333 (1941), the latter limitation on the licensee was abandoned and the doctrine developed into its present form.

There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees, 13 FCC 1246 (1949). The broadcaster must give adequate coverage to public issues, United Broadcasting Co., 10 FCC 515 (1945), and coverage must be fair in that it accurately reflects the opposing views. New Broadcasting Co., 6 P & F Radio Reg. 258 (1950). This must be done at the broadcaster's own expense if sponsorship is unavailable. Cullman Broadcasting Co., 25 P & F Radio Reg. 895 (1963). Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source. * * *

When a personal attack has been made on a figure involved in a public issue, both the doctrine of cases such as *Red Lion* and Times-Mirror Broadcasting Co., 24 P & F Radio Reg. 404 (1962), and also the 1967 regulations at issue in *RTNDA* require that the individual attacked himself be offered an opportunity to respond. Likewise, where one candidate is endorsed in a political editorial, the other candidates must themselves be offered reply time to use personally or through a spokesman. These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from preceding fairness doctrine. The simple fact that the attacked men or unendorsed candidates may

respond themselves or through agents is not a critical distinction, and indeed, it is not unreasonable for the FCC to conclude that the objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response, rather than leaving the response in the hands of the station which has attacked their candidacies, endorsed their opponents, or carried a personal attack upon them.

The statutory authority of the FCC to promulgate these regulations derives from the mandate to the "commission from time to time, as public convenience, interest, or necessity requires" to promulgate "such rules and regulations and prescribe such restrictions and conditions * * * as may be necessary to carry out the provisions of this chapter * * *." 47 U.S.C.A. § 303 and § 303(r). The commission is specifically directed to consider the demands of the public interest in the course of granting licenses, 47 U.S.C.A. §§ 307(a), 309(a); renewing them, 47 U.S.C.A. § 307; and modifying them. Ibid. Moreover, the FCC has included among the conditions of the Red Lion license itself the requirement that operation of the station be carried out in the public interest, 47 U.S.C.A. § 309(h). This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power "not niggardly but expansive," *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943), whose validity we have long upheld. It is broad enough to encompass these regulations.

The fairness doctrine finds specific recognition in statutory form, is in part modeled on explicit statutory provisions relating to political candidates, and is approvingly reflected in legislative history.

In 1959 the Congress amended the statutory requirement of § 315 that equal time be accorded each political candidate to except certain appearances on news programs, but added that this constituted no exception *"from the obligation imposed upon them under this act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."* Act of September 14, 1959, § 1, 73 Stat. 557, amending 47 U.S.C.A. § 315(a) [Emphasis added]. This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard. Subsequent legislation enacted into law and declaring the intent of an earlier statute is entitled to great weight in statutory construction. And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation. Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the act authorized the commission to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations which fall short of abridgment of the freedom of speech and press, and of the censorship proscribed by § 326 of the act.

The objectives of § 315 themselves could readily be circumvented but for the complementary fairness doctrine ratified by § 315. The section applies only to campaign appearances by candidates, and not by family, friends, campaign managers, or other supporters. Without the fairness doctrine, then, a licensee could ban all campaign appearances by candidates themselves from the air and proceed to deliver over his station entirely to the supporters of one slate of candidates, to the exclusion of all others. In this way the broadcaster could have a far greater impact on the favored candidacy than he could by simply allowing a spot appearance by the candidate himself. It is the fairness doctrine as an aspect of the obligation to operate in the public interest, rather than § 315, which prohibits the broadcaster from taking such a step.

* * *

It is true that the personal attack aspect of the fairness doctrine was not actually adjudicated until after 1959, so that Congress then did not have those rules specifically before it. However, the obligation to offer time to reply to a personal attack was presaged by the FCC's 1949 Report on Editorializing, which the FCC views as the principal summary of its *ratio decidendi* in cases in this area.

* * * When the Congress ratified the FCC's implication of a fairness doctrine in 1959 it did not,

of course, approve every past decision or pronouncement by the commission on this subject, or give it a completely free hand for the future. The statutory authority does not go so far. But we cannot say that when a station publishes a personal attack or endorses a political candidate, it is a misconstruction of the public interest standard to require the station to offer time for a response rather than to leave the response entirely within the control of the station which has attacked either the candidacies or the men who wish to reply in their own defense. When a broadcaster grants time to a political candidate, Congress itself requires that equal time be offered to his opponents. It would exceed our competence to hold that the commission is unauthorized by the statute to employ a similar device where personal attacks or political editorials are broadcast by a radio or television station.

In light of the fact that the "public interest" in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public; the fact that the FCC has rested upon that language from its very inception a doctrine that these issues must be discussed, and fairly; and the fact that Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts, we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority. The Communications Act is not notable for the precision of its substantive standards and in this respect the explicit provisions of § 315, and the doctrine and rules at issue here which are closely modeled upon that section, are far more explicit than the generalized "public interest" standard in which the commission ordinarily finds its sole guidance, and which we have held a broad but adequate standard before. We cannot say that the FCC's declaratory ruling in *Red Lion*, or the regulations at issue in *RTNDA*, are beyond the scope of the congressionally conferred power to assure that stations are operated by those whose possession of a license serves "the public interest."

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment grounds, alleging that the rules abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose, from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters.

Although broadcasting is clearly a medium affected by a First Amendment interest, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948), differences in the characteristics of new media justify differences in the First Amendment standards applied to them. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952). For example, the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions are reasonable and applied without discrimination. *Kovacs v. Cooper*, 336 U.S. 77 (1949).

Just as the Government may limit the use of sound amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.

It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Com-

munications Act of 1934, as the Court has noted at length before. *National Broadcasting Co. v. United States*, 319 U.S. 190, 210–214 (1943). It was this reality which at the very least necessitated first the division of the radio spectrum into portions reserved respectively for public broadcasting and for other important radio uses such as amateur operation, aircraft, police, defense, and navigation; and then the subdivision of each portion, and assignment of specific frequencies to individual users or groups of users. Beyond this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few.

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airways. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

This had been the consistent view of the Court. Congress unquestionably has the power to grant and deny licenses and to delete existing stations. *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933). No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech." *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 227 (1943).

By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right of free speech by means of radio communications." Because of the scarcity of radio frequencies, the government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.* [Emphasis added.] See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361–362 (1955); Z. Chafee, Government and Mass Communications 546 (1947). It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee. * * * It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. The expression of a political endorsement, or of a personal attack while dealing with a controversial public issue, simply triggers this time-sharing. As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an unconditional mo-

nopoly of a scarce resource which the government has denied others the right to use.

In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules are indistinguishable from the equal-time provision of § 315, a specific enactment of Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements. That provision, which has been part of the law since 1927, Radio Act of 1927, c. 169, § 18, 44 Stat. 1162, 1170, has been held valid by this court as an obligation of the licensee relieving him of any power in any way to prevent or censor the broadcast, and thus insulating him from liability for defamation. The constitutionality of the statute under the First Amendment was unquestioned. *Farmers Educ. & Coop. Union v. WDAY*, 360 U.S. 525 (1959).

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public.[18] Otherwise station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press v. U.S.*, 326 U.S. 1, 20 (1944).

It is strenuously argued, however, that, if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective. Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled.

At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative. The communications industry, and in particular the networks have taken pains to present controversial issues in the past, and even now they do not assert that they intend to abandon their efforts in this regard. It would be better if the FCC's encouragement were never necessary to induce the broadcasters to meet their responsibility. And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect.

That this will occur now seems unlikely, however, since if present licensees should suddenly prove timorous, the commission is not powerless to insist that they give adequate and fair attention to public issues. It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect.

* * *

18. The expression of views opposing those which broadcasters permit to be aired in the first place need not be confided solely to the broadcasters themselves as proxies. "Nor is it enough that he should hear the arguments of his adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them." J. S. Mill, "On Liberty" 32 ed., R. McCallum, 1947.

The litigants embellish their first amendment arguments with the contention that the regulations are so vague that their duties are impossible to discern. Of this point it is enough to say that, judging the validity of the regulations on their face as they are presented here, we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech. Past adjudications by the FCC give added precision to the regulations; there was nothing vague about the FCC's specific ruling in *Red Lion* that Fred Cook should be provided an opportunity to reply. The regulations at issue in *RTNDA* could be employed in precisely the same way as the fairness doctrine was in *Red Lion*. Moreover, the FCC itself has recognized that the applicability of its regulations to situations beyond the scope of past cases may be questionable, 32 Fed.Reg. 10303, 10304 and n. 6, and will not impose sanctions in such cases without warning. We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, *United States v. Sullivan*, 332 U.S. 689, 694 (1948), but will deal with those problems if and when they arise.

We need not and do not now ratify every past and future decision by the FCC with regard to programming. There is no question here of the commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airways; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious first amendment issues. But we do hold that the Congress and the commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials. * * *

In view of the prevalence of scarcity of broadcast frequencies, the government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional. The judgment of the court of appeals in *Red Lion* is affirmed and that in *RTNDA* reversed and the causes remanded for proceedings consistent with this opinion.

It is so ordered.

COMMENT

Why did the FCC in effect rule that if a person has a right of reply under the personal attack rules, the station must put him on free if he is not willing to pay? WGCB in Red Lion, Pennsylvania was a small, independent station whose rates compared to network time were not high. Presumably the FCC reasoned that if a principle were followed of only permitting paid reply time when the personal attack rules were involved, the high cost of network time, particularly television time, would serve to make the personal attack rules a dead letter. Few could or would wish to pay for reply time under such circumstances.

Both the court of appeals and the Supreme Court in the *Red Lion* case cited Cullman Broadcasting Co., 40 FCC 516 (1963), for the proposition that once a fairness doctrine obligation arises, time must be provided by the licensee at his own expense if sponsorship is not available. The FCC described *Cullman* rights as follows in the *Democratic National Committee* case:

> * * * The paramount public interest, we stressed, is the right of the public to be informed. The licensee has adjudged that an issue is of importance to its area by presenting the first viewpoint; that being so, the public's right to hear the other side cannot turn on whether the licensee received money. This approach perfectly fits the public trustee concept. See, In re Democratic National Committee, Washington, D.C., Request for Declaratory Ruling Concerning Access to Time on Broadcast Stations, 25 FCC 2d 216 (1970).

The *Red Lion* case marks the extension of the *Cullman* principle of a right of free response from the fairness doctrine context to the context of the personal attack rules once a licensee obligation under the personal attack rules arises. When the FCC abandoned the fairness doctrine in 1987, it also abrogated the *Cullman* principle.

The invalidation in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), of a state statutory right to reply to the print media in the case of editorial attack presents a vivid contrast to the right of reply to personal attack in the broadcast media upheld in *Red Lion*. In *Miami Herald*, the Supreme

Court held, in a unanimous opinion, that a Florida statute requiring a newspaper to grant a political candidate equivalent space to reply if the paper editorially attacked the candidate violated the First Amendment. (See this text, p. 497).

The *Miami Herald* decision does not so much as cite the *Red Lion* case decided only five years earlier.

The Court noted in *Red Lion* that it did not intend in that case to uphold all possible applications of the doctrine for all time—a reservation of particular importance in the late 1980s when the FCC argued that the doctrine had, due to changed conditions, become unconstitutional. At least two subsequent U.S. Supreme Court decisions, *CBS v. DNC*, 412 U.S. 94 (1973) and *CBS v. FCC*, 453 U.S. 367 (1981), appeared to reinforce the *Red Lion* decision, but one more recent decision, *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), questioned it.

Speaking for the Court in *League of Women Voters*, Justice Brennan discussed the question of the future of the fairness doctrine in footnote 12:

> We note that the FCC, observing that "[i]f any substantial possibility exists that the [fairness doctrine] rules have impeded, rather than furthered, First Amendment objectives, repeal may be warranted on that ground alone," has tentatively concluded that the rules, by effectively chilling speech, do not serve the public interest, and has therefore proposed to repeal them. Notice of Proposed Rulemaking In re Repeal or Modification of the Personal Attack and Political Editorial Rules, 48 Fed. Reg. 28295, 28298, 28301 (June 21, 1983). Of course, the Commission may, in the exercise of its discretion, decide to modify or abandon these rules, and we express no view on the legality of either course. As we recognized in *Red Lion*, however, were it to be shown by the Commission that the fairness doctrine "has the effect of reducing rather than enhancing" speech, we would then be forced to reconsider the constitutional basis of our decision in that case. 395 U.S., at 393.

FCC reexamination of the doctrine began in earnest on April 11, 1984 when the commission, by then dominated by "unregulators" such as its Chairman, Mark Fowler, and much influenced by a First Amendment philosophy that electronic and print media should be treated alike, launched a major inquiry into the "General Fairness Doctrine Obligations of Broadcast Licensees." Excerpts from that Inquiry follow. They tell the story of the evolution of and justification for the doctrine. They also explain why, by 1984, the FCC had come to question it.

INQUIRY INTO THE GENERAL FAIRNESS DOCTRINE OBLIGATIONS OF BROADCAST LICENSEES

49 FR 20317 (1984).

* * *

Accordingly, in order to revisit the question of whether the fairness doctrine comports with the public interest, we believe it is also important that we explore the question of what legal authority Congress vested in us under the Communications Act of 1934, as amended, and, in particular, under the 1959 legislative amendments to section 315 of the Act, to determine whether we have the agency discretion to significantly modify or even repeal the fairness doctrine.

When the Federal Communications Commission was established by Congressional passage of the Communications Act in 1934, it followed the same regulatory philosophy as its predecessor agency.

Thus, the new agency followed FRC decisions in requiring provision of program fare that appealed to the general public rather than a select few. Absent from these early FRC and FCC decisions, however, was any clearly expressed requirement that operation under the public interest standard compelled an obligation to provide contrasting viewpoints on controversial issues.

With the Commission's decision in *Mayflower Broadcasting Corp.*, 8 FCC 333 (1940), however, came a new, more expansive meaning of the public interest standard and also a more restrictive view of broadcaster's latitude under that standard. * * *

* * * Thus, the Commission expanded its general prohibition against use of broadcast facilities for private or individual interests to include a specific ban forbidding editorializing broadcast licensees.

The *Mayflower* decision was important not only because the agency enacted a specific edict against broadcast editorializing but because it appeared to break new ground by announcing that, under the public interest standard, broadcast licensees had specific *affirmative obligations to cover public issues.*

As a result of the *Mayflower* decision, considerable controversy, confusion and uncertainty ensued, especially with respect to the nature and scope of

broadcasters' obligations under the Act. In *United Broadcasting Co.*, 10 FCC 515 (1945), the Commission provided some guidance to one of the many questions surrounding this controversy by holding that a station could not adopt a general policy refusing to sell time for the discussion of controversial issues. * * * According to the Commission, "the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues" is "inconsistent with the concept of the public interest established by the Communications Act." * * *

In 1948, "in view of the apparent confusion concerning certain of the Commission's previous statements on these vital matters by broadcast licensees and members of the general public," the Commission *sua sponte* held several days of hearings on "the obligations of broadcast licensees in the field of news, commentary and opinion," and, in the following year, issued a comprehensive policy statement, *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949) (hereafter "*Report on Editorializing*"). In this *Report*, which has served as the basis for all subsequent fairness rulings, the Commission not only reversed its policy on broadcast licensee editorializing but also framed for the first time that set of obligations which collectively are referred to as the fairness doctrine. * * *

Thus, in formalizing the fairness doctrine, the Commission explicity recognized a two part duty on the part of broadcasters (1) to devote a reasonable percentage of time for the coverage of controversial issues and (2) to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.

In reversing its prior directive against broadcast licensee editorializing, the Commission expressed the view that "a station's willingness to stand up and be counted" might contribute more readily toward "a climate of fairness and equal opportunity for expression of contrary views" since the public would have less reason to fear "the open partisan" than the "covert propagandist." * * *

For a substantial time afterwards, there were relatively few regulatory developments in this area. * * *

In 1967, however, a new storm of controversy developed from a Commission decision in *WCBS–TV*, 8 FCC 2d 381, *stay and recon. denied*, 9 FCC 2d 921 (1967), *aff'd Banzhaf v. FCC*, 405 F.2d 1082 (1968), *cert. denied* 396 U.S. 842 (1969), to extend the doctrine to broadcast advertising. For the first time, the Commission applied the fairness doctrine to product advertising by ruling that the advertisement of cigarettes on broadcast stations raised a controversial issue of public importance. The Commission reasoned that cigarette smoking itself was a controversial health issue and, accordingly, required broadcasters to provide opportunities for contrasting viewpoints. * * *

In subsequent cases, the Commission found itself unable to articulate any satisfactory standard by which to judge what types of programming would trigger fairness obligations. * * * Thus, notwithstanding efforts to limit the scope of the cigarette advertising ruling, the Commission was unable to extricate itself from this area.

* * *

* * * As a result of continuing difficulties of this sort, in 1971 it instituted a wide ranging inquiry into the fairness doctrine and its efficacy "in the light of current demands for access to the broadcast media to consider issues of public concern." *Study of Fairness Doctrine, Notice of Inquiry.* * * *

Following this inquiry, in 1974, the Commission adopted the 1974 *Fairness Report*, which reaffirmed the earlier *Report on Editorializing* and upheld the application of a general fairness doctrine requirement for broadcast licensees on both statutory and constitutional grounds. * * *

The Commission's 1974 *Report*, including its decision to narrowly apply fairness doctrine obligations to broadcast advertising, was generally affirmed in *National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095, (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978), but the court remanded the proceeding to the Commission "for further inquiry" concerning the right of access proposal as well as a proposal to require licensees to provide a numerical listing of controversial issues covered. * * * In addition, the Commission was instructed to explore "other ways of achieving compliance with the Fairness Doctrine's first obligation." This subsequently lead to *Report and Order in BC Docket No. 78–60*, 74 FCC 2d 163 (1979), *recon. denied*, 89 FCC 2d 916 (1982), wherein the Commission declined to experiment further with new regulatory options, e.g., mandatory access to satisfy fairness doctrine obligations, and thereby terminated further deliberations concerning agency change of general fairness obligations applicable to broadcast licensees.

Today, there appear to be many substitutes for the traditional broadcast media, radio and television, in their roles as sources of information and, simi-

larly, substitutes for the traditional print media. This substitutability or interchangeability among media is witnessed to some extent by consumer acceptance of different media to satisfy individual information and entertainment needs. * * *

Changes in communications technology are primarily responsible for dramatically increasing the means by which information reaches the public. As more fully described herein, distribution systems once thought to be quite different, such as broadcasting and print, are becoming interchangeable, merging into one mass media marketplace. * * *

* * * In the period from 1950 to the present, we see the growth in the number of radio stations from 2,867 stations to 9,282 stations, an increase of over 300 percent. * * *

We also see a dramatic increase in the number and different types of conventional television stations available throughout the United States, which is attributable in large measure to the Commission's establishment of the table of television station allocations in 1952. From 1950 to the present, the percentage increase in the total number of television stations alone is over 1100 percent.

* * *

In summary, the rapid growth of existing technologies, particularly throughout the 1970's, as well as the development of new ones that are or will soon be available throughout the remainder of the 1980's suggests that a proliferation of programming and information sources presently exists and will be even further augmented in the future. Although the above information is based on media outlets nationwide, nevertheless, even the less densely populated areas of the country appear to have access to a variety of information sources, particularly, the electronic media.

This overview of the electronic and print mass media marketplace indicates the existence of a plethora of print, video, and voice outlets and, through such outlets, the availability of large amounts of information to the public through these outlets. It also suggests that continued imposition of fairness doctrine obligations may be inappropriate when significant technological developments contributing to dynamic growth in the electronic media and to continued convergence between the print and electronic media appear to be undercutting what might have been at one time legitimate distinctions between the print and electronic media. In sum, this analysis leads us to ask whether the original underlying premises of the doctrine, namely, the scarcity of broadcast outlets and, with it, the possibility that the public might be left uninformed on public issues, can any longer be legitimately applied to the broadcast media regardless of whether the appropriate marketplace examined is that consisting wholly of broadcast media or, more appropriately perhaps, that comprising both the print and electronic media. Under either approach, the query is the same: whether the scarcity rationale and the attendant right of the public to have suitable access to a diverse marketplace of ideas continue to be appropriate justification for singling out broadcast media for that peculiar set of obligations that collectively comprise the fairness doctrine.

As stated at the outset, the purpose of the fairness doctrine is the same as that of the First Amendment itself—"to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail * * *" It is well established that, when regulations evince a governmental interest unrelated to the suppression of free expression, they must further an important or substantial governmental interest and, if, incidentally, they restrict First Amendment freedoms, they must be no greater than is essential to the furtherance of that interest.

Therefore, even though technological considerations relating to the degree of electromagnetic radio spectrum assigned to broadcasting continue to constitute an entry barrier that precludes the possibility for each person to operate a broadcast station, nevertheless, it would appear that broadcast stations are not "scarce" in the commonly understood meaning of the word, at least as compared to the print media. Indeed, we note that the most significant barrier to entry in the broadcast field would appear to be financing or working capital, the very same entry barrier that exists in the newspaper publishing business or, for that matter, in most other businesses. * * *

* * * Just as there is editorial diversity as between newspapers, there is, and will continue to be, editorial diversity as between different broadcasters. But should the print media or the broadcast media be considered mutually exclusive information sources? Individuals typically do not receive information from a single medium. Rather, they can be expected to consult a variety of sources in a wide array of media. Accordingly, we query not only whether a scarcity of information outlets exists but also whether it can be said that broadcast stations are not diverse when considered alone or in conjunction with other available media. Stated differently, is the fairness doctrine any more necessary to assure that the public

will be exposed to varying points of view on public issues via the broadcast media than it is to assure such a result in the print media? Anything even approaching the intrusiveness of the fairness doctrine would not pass constitutional muster if applied to the print media. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Thus, we must ask whether such a doctrine remains appropriate to the broadcast media which appear more numerous and very diverse.

Additionally, we question whether it is equitable to place the broadcast media under the disadvantage of governmentally imposed journalistic obligations in view of the fact that the print media, with which it competes, is free of all such restraints. * * *

Thus, the electronic media taken as a whole appear to have an enormous and important presence in the marketplace. Given this electronic environment, we question whether governmental intervention remains necessary to assure that any segment or segments of the electronic media present "diverse and antagonistic" points of view or provide "suitable access to social, political, esthetic, moral and other ideas and experiences." Indeed, because our ability to obtain such diversity and access via the electronic media continues to expand in what appears to be an almost limitless fashion, we believe it important to pose these questions now.

* * *

In short, absent a fairness doctrine, would there be coverage of controversial issues of public importance? Given the nature of the issues to which the doctrine pertains, it seems likely that issues of this nature would be covered by broadcasters especially in view of the fact that the absence of a similar doctrine applicable to the print media reveals no dearth of print coverage of controversial matters. Absent a fairness doctrine would the coverage of such issues be balanced on each station? Comparison with the print media suggests that this might not necessarily be so; but even though there is no requirement that the print media be "balanced", journalistic standards assure at least some measure of fairness. * * *

If the fairness doctrine may not be necessary to attain the very same objectives underlying the First Amendment itself—to insure the free flow of information and contribute to a climate that promotes vigorous and spirited debate on public issues of the day—then such regulation may not only be an unnecessary exercise of governmental regulation but also, and perhaps more importantly, may impermissibly tread not only on the First Amendment rights of broadcasters but also on those of the public, the intended beneficiary of the doctrine. * * *

* * *

We believe that the costs borne by broadcasters and the public as a whole under this doctrine include the need for some degree of governmental oversight over the content of broadcasts to assure balanced programming, and concomitantly, the possibility that the surveillance required may lead to excessive and unnecessary interference with important editorial and journalistic functions performed by broadcast licensees. * * * In sum, we query whether they can have the unintended effect of inhibiting or "chilling" the exercise of speech by broadcasters. If governmental censorship (or even the possibility thereof) leads to licensee self-censorship, then the benefits of diversity sought to be achieved by government regulation might well be outweighed by the detrimental effect upon the public and, under such circumstances, to paraphrase the Court in *CBS v. DNC*, the interests of the public sought to be achieved by governmental regulatory power over broadcasters' speech would not appear to outweigh the private journalistic interests of broadcasters. Additionally, because "inhibition as well as prohibition against the exercise of First Amendment rights is a power denied to government," such regulation which has the undesirable effect of chilling the exercise of speech would also appear to be constitutionally suspect.

The historical evolution of First Amendment doctrine, along with the different approach the Supreme Court has demonstrated to First Amendment questions in other areas and with respect to other media, raise questions whether the sharply divergent First Amendment treatment applicable to broadcasting and, more specifically, the constitutional considerations we have previously relied upon to justify the fairness doctrine's regulation of broadcast programming under the public interest standard of the Communications Act, should be reexamined in order to ensure that our regulation is not being gradually eclipsed by the underlying import of more recent Supreme Court First Amendment cases. * * * Accordingly, just as the technological and marketplace changes discussed earlier suggest that it may be more difficult to justify the fairness doctrine on policy grounds, we query whether developments in

First Amendment jurisprudence continue to support or appear to be eroding the constitutional pillars upon which the fairness doctrine rests.

* * *

[I]f the overall thrust of the *CBS v. DNC* decision appears to be that the First Amendment seriously circumscribes governmental interference with journalistic function performed by the press, whether electronic or print, and if, therefore, significant parallels exist between that decision and the later *Miami Herald* decision, we question whether any of the constitutional considerations that led the Court to affirm this agency's rejection of a right of access to broadcast paid political advertisement and later reject the right of reply statute applicable to the print medium would also be germane to the fairness doctrine particularly as that doctrine has the potential for significant intrusion into the editorial functions performed by broadcasters.

Even if *CBS v. DNC* and the later *Miami Herald* decision can be read as signaling some degree of retreat from the broad language of *Red Lion*, * * * we query whether the "unique" characteristics of broadcasting would nevertheless continue to justify the degree of regulation required by the fairness doctrine. Because it is by no means entirely free from doubt whether Congress intended to foreclose our discretion to administer the fairness doctrine either in whole or in part, we invite comment on the construction most reasonably deducible from the 1959 legislative amendments and the legislative history.

At the outset, we do not believe that any significant question exists that, prior to the 1959 amendments to Section 315, the fairness doctrine was not statutorily required by any express statutory provision or by the general public interest standard of the Communications Act. It has been generally conceded that, before those amendments, the fairness doctrine had evolved as an aspect of the Commission's discretionary authority to formulate policies consistent with the broad public interest. * * *

For this reason, we believe that the appropriate focus for purposes of this inquiry turns on Congress' enactment of the *Act of September 14, 1959*, * * * which resulted in statutory amendment of section 315 of the Communications Act and, more specifically, inclusion of the statutory language at the end of that section which appears to reference the fairness doctrine. * * *

At the end of the exemption language, Congress added a sentence that apparently references the second prong of the Commission's fairness doctrine. That sentence, which appears in the present version of the Act, reads as follows:

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of news casts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

47 U.S.C. 315(a). This proviso contains the statutory language that raises the question whether Congress meant to impose statutorily on broadcasters the fairness doctrine in its entirety, meant to ensure by the statutory language that the Commission would apply the doctrine to issues concerning candidates in news programs exempted from the reach of the equal opportunities requirements, or merely meant to acknowledge but not disturb the Commission's existing regulatory efforts in this area. In the paragraphs below, we shall explore each of these alternative interpretations.

One construction of the effect of the 1959 amendments which, in our estimation, appears reasonable based upon an *overall* analysis of the legislative history is that Congress did not intend to strip this agency of complete discretion in this area but rather, by referencing the fairness doctrine obligations, merely intended to ensure that the Commission would continue to apply the fairness doctrine in the political broadcasting realm to ensure that the underlying purposes of the equal opportunities requirements would not be defeated by abuse of the newly created news exemption. * * *

The House and Senate debates, when read in their entirety, can also be viewed as generally supporting this interpretation. Although the debates contain virtually no mention of the actual parameters of the fairness doctrine policy, the doctrine is obliquely referred to in several instances as "the standard of fairness" imposed by a broadcaster's obligation to operate in the public interest. * * *

Indeed, we note that, in response to these concerns, the Senate had earlier adopted an amendment to the bill introduced by Senator Proxmire, which appeared to contain an affirmative statement of congressional intent to impose fairness type obligations on broadcasters. Although Senator Proxmire

may have intended his amendment to apply to a broader range of matters than those relating to political candidates and issues, it appears that what was foremost in the minds of most Senators during the debates was the applicability of the Proxmire amendment to political races and candidates.

Even though the language of the so-called Proxmire amendment was significantly modified by the Conference Committee (which proposed the existing statutory language), it appears that the concerns which led to its adoption in the Senate may have been identical to those mentioned in the Senate Report; namely, to ensure fair news coverage of political candidates.

* * *

The statutory interpretation that Congress intended to impose fairness doctrine obligations only in the political contexts that were the subject of the other section 315 amendments also appears to be in accord with the Supreme Court's decision in *Red Lion*, *supra*, at 382, where the Court, in upholding the personal attack and political editorializing rules, recognized that "the objectives of section 315 could readily be circumvented" by broadcasters banning all campaign appearances by candidates themselves while, instead, featuring the supporters of one candidate or slate of candidates to the exclusion of others. The Court observed that "the fairness doctrine as an aspect of the obligation to operate in the public interest rather than § 315" prohibits a broadcaster "from taking such a step" and, specifically stated that "[t]he legislative history reinforces this view of the effect of the 1959 amendment."

The foregoing analysis of the legislative history suggests that we may indeed have the legal authority to substantially alter the fairness doctrine particularly with respect to its applicability to areas outside the political arena and, accordingly, we invite comment upon that authority. However, even assuming that we do have such administrative discretion, it would appear that, in exercising such discretion, we would still be required, at a minimum, to maintain adequate safeguards to ensure against the possibility of abuses in broadcast news coverage of political matters, e.g., by retention of the doctrine to political candidates and political issues in order to comport this section 315 of the Act. * * *

By the same token, we are fully aware that support can be mustered for the opposite view that Congress did in fact intend to impose by statute general fairness doctrine obligations on broadcasters. Indeed, we have assumed, but without giving the matter extensive consideration, that our discretion was removed by enactment of the 1959 amendments. * * *

In our previous notice of inquiry into the fairness doctrine commenced in 1971, we expressed a similar view stating that the "Commission cannot abandon the fairness doctrine" because "[t]he Communications Act is explicit in th[is] respect[]."

We also recognize that, at first blush, this interpretation may seem to be the one most readily drawn from a reading of the statute and its legislative history notwithstanding the statutory analysis provided above.

* * *

We are also aware that the Conference Committee Report and, in particular, the express statement of the Conferees explaining the statutory language in question, can be construed as evincing Congress' intent to impose the specific obligation of fairness on broadcasters rather than the more limited interpretation suggested in the previous paragraphs. In this regard, the Conferees stated:

> The conferees feel that there is nothing in this language which is inconsistent with the House substitute. It is a restatement of the basic policy of the "standard of fairness" which is imposed on broadcasters under the Communications Act of 1934.

We also note that at least one statement made during the final Senate debate on the bill provides evidence that the language ultimately enacted was interpreted by at least some legislators as applying to all broadcasts concerning issues and controversies.

In addition, the Supreme Court's affirmance of the personal attack and political editorial rules in the *Red Lion* case can be viewed as adding weight to the view that Congress, by adding the proviso appearing at the end of section 315, intended to impose a statutory obligation of fairness on broadcasters. This view turns on the Court's references, in dicta, to the fairness doctrine as being "ratified", * * * finding "specific recognition in statutory form," * * * Similarly, the plurality opinion in *CBS v. DNC*, discussed more fully previously, states on two occasions that the 1959 amendments "give statutory approval" to the fairness doctrine, * * * and Justice Stewart, in his concurring opinion in the case, notes that "[t]he basis for a fairness doctrine is statutory," * * * For these reasons, we also invite comment on the interpretation that the 1959 amendment was

intended to codify the second prong of the fairness doctrine as it applies to all controversial issues of public importance.

* * *

* * * In particular, we seek comment on the possible interpretation that Congress did not intend to impose by statute any part of the fairness doctrine and its obligations. In this regard, it bears repeating what the Supreme Court said in *Red Lion, supra*, at 383–384, about the original Proxmire amendment:

> Rather than leave this approval solely in the legislative history, Senator Proxmire suggested an amendment to make it part of the Act. 105 Cong. Rec. 14457. This amendment, which Senator Pastore, a manager of the bill and a ranking member of the Senate Committee, considered "rather surplusage," 105 Cong. Rec. 14462, constituted a positive statement of doctrine and was altered to the present merely approving language in the conference committee.

Accordingly, we also seek views on the possibility that Congress may not have intended any statutory codification of the fairness doctrine at all.

Conclusion

* * *

The mass media marketplace as presently constituted and as augmented in the future by entry of new and diverse program and information sources raises the question of the need for this doctrine in the broadcast area. In sum, questions exist over the need for continued governmental interference into the private journalistic discretion that the fairness doctrine occasions. For these reasons, we seek comment on the purposes, effects, relevancy and legality of continued imposition of the fairness doctrine including, but not limited to, the following question:

(1) If a primary purpose of the fairness doctrine is, as pointed out in *Red Lion*, to assure the public's access to diverse ideas, viewpoints, and experiences, is retention of the doctrine essential and desirable to achieving that end given the present mass media marketplace?

(2) In considering the primary purpose of the doctrine and the need for its retention, should we limit our focus to the broadcast media or should our examination include other electronic media such as cable television, multipoint distribution services, etc.? Should we consider information available from the print media as well?

(3) Should we be concerned that, without the fairness doctrine, broadcast licensee bias will result? If such occurs, is it necessarily inconsistent with the public interest? If the public has, in fact, access to diverse ideas, viewpoints, etc., would the availability of information sources, whether through broadcast media alone or through those and other nonbroadcast mass media as well, be sufficient to negate any possible ill effects of individual broadcast licensee bias?

(4) Does the traditional basis for broadcast content regulation in general—that the airwaves are not available to all who wish to use them, i.e., the scarcity rationale—continue to be a justifiable basis for imposition of the fairness doctrine? What is the effect of the increasing decline in the number of the newspaper print media, i.e., daily newspapers, and expanding number of broadcast and nonbroadcast electronic media alike on this rationale?

(5) Is it appropriate to continue imposition of general fairness doctrine obligations on broadcasters when other media, both electronic and print, are not hampered by such constraints in competing in the mass media marketplace?

(6) In view of the continuing convergence between traditional print media and electronic media through the development of such services as teletext, videotex, access to print media information through common carrier transmission facilities, cable facilities, personal home computers and in view of the traditional First Amendment freedoms accorded the print media, is retention of the fairness doctrine in the broadcast area constitutionally wise?

(7) Does the fairness doctrine contribute toward the First Amendment goal of encouraging "uninhibited, robust, and wide-open" debate on public issues, *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), or does it inhibit such exchange, i.e., what are the practical effects of administration of the doctrine on the public and on broadcast licensees?

(8) Is the Supreme Court's decision in *Miami Herald*, which held that a government mandated right of reply to newspaper editorials had an impermissible chilling effect on the exercise of a newspaper's editorial discretion, reconcilable with retention of general fairness doctrine obligations from the standpoint of the possible chilling effects of such obligations on broadcasters? From the standpoint of requiring broadcasters to present views "which their

'reason' tells them should not be published," *see Associated Press v. United States*, 326 U.S. 1, 20 n. 18?

(9) Because "the 'public interest' standard necessarily invites reference to First Amendment principles," *CBS v. DNC*, * * * is the fairness doctrine consistent with contemporary First Amendment jurisprudence: which, for example, frowns generally upon government restricting First Amendment rights based upon the identity of the speaker, * * * which, in other areas, shows disfavor toward abridgement of First Amendment rights in order to enhance the First Amendment rights of others, * * * which disfavors government regulation of speech because such speech may be unduly persuasive or socially undesirable.

(10) Is the fairness doctrine statutorily required under Section 315? Under the general public interest standard on the Communications Act? If the fairness doctrine was codified, was it codified in its entirety or was only the second prong (balanced presentation) codified? If there is any limitation on the Commission's authority, is it solely related to remedying abuses arising from broadcast news coverage of political campaigns? Arising from political news coverage in general?

(11) If the Commission does possess the statutory discretion to impose or not impose general fairness doctrine obligations on broadcast licensees, are there nevertheless public interest considerations that might militate against repeal or modification of the doctrine? In favor of limited application of the doctrine, e.g., imposition of the *Zapple* doctrine, to ensure that the equal time provisions are not circumvented by broadcasters?

The FCC, The Courts, President Reagan, And The Fairness Doctrine

A little over five months after starting its inquiry, the FCC, on October 26, 1984, concluded that WTVH-TV, a Syracuse, New York television station owned by Meredith Corporation, had violated the fairness doctrine—the only such finding reached while Mark Fowler headed the FCC. Responding to a complaint brought by a group called Syracuse Peace Council, the FCC concluded that WTVH-TV had been "unreasonable" under the second prong of the doctrine in its treatment of a controversy surrounding construction of a nuclear power plant, a conclusion that Meredith Corporation vigorously contested.

Things became more complex when, on August 7, 1985, the FCC concluded its fairness doctrine inquiry. Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 FCC 2d 143 (1985). The FCC concluded (1) that the doctrine was contrary to the public interest—it "chilled" expression more than it promoted it—and (2) that the doctrine was probably unconstitutional. Despite these conclusions, the FCC retained the doctrine. It doubted that it was within its power to pass on the constitutionality of the doctrine (especially given the *Red Lion* precedent), and it believed that Congress had probably incorporated the doctrine into the Communications Act of 1934 when, in 1959, Congress amended section 315 of the Act. Thus, an anomalous situation was created by the time Meredith's request for "reconsideration" of its case was reviewed by the FCC. The outcome of the inquiry certainly suggested that the FCC did not like the doctrine. In its petition for reconsideration, Meredith pressed hard for the FCC to consider its constitutional objections to the doctrine. The FCC, however, refused to do so and, on reconsideration, upheld its earlier decision that Meredith had violated the doctrine. Syracuse Peace Council, 59 RR 2d 179 (1985).

To many observers, what was going on reflected an attempt by the FCC to have courts declare the doctrine void. Members of the FCC knew well that many members of Congress would be angry if the FCC abandoned the doctrine. By sticking to its guns in the *Syracuse* case, some suspected, the FCC could force the doctrine to be overturned by the courts, an action that would accomplish the FCC's objectives without substantial political costs.

Indeed, the next development in this scenario came from the courts and favored the FCC's perspective. On September 19, 1986, a panel of the U.S. Court of Appeals for the D.C. Circuit declared, in a most unlikely context, that the fairness doctrine—contrary to the general understanding of the FCC as reflected in its 1985 Report—had not been specifically mandated by Congress through the 1959 Amendments to the Communications Act. In *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C.Cir. 1986), the court held that the fairness doctrine did not apply to teletext and that Congress had, at most, intended to affirm that the FCC could promulgate a fairness

doctrine but had not mandated it. That kind of a decision galvanized the fairness doctrine's supporters in Congress.

Less than a month later, on October 15, 1986, Congress—as part of the 1986 appropriations for the FCC—ordered it to study "alternative means of enforcement of the Fairness Doctrine and to report to the Congress by September 30, 1987." Making Continuing Appropriations for the Fiscal Year 1987, P.L. 99–591, Title V, 100 Stat. 3341, 3341–67 (1986). Congress's goal was plain—tell the FCC not to monkey with the doctrine, despite the *TRAC* decision.

All of these developments influenced Meredith Corporation's pursuit of an appeal of the decision that it had violated the fairness doctrine. On January 16, 1987, panels of the U.S. Court of Appeals for the D.C. Circuit made decisions that much influenced future developments. In *Meredith Corp. v. FCC*, 809 F.2d 863 (1987), the court said that the FCC should not duck Meredith's constitutional arguments. Instead, said the court, the FCC should address them. In a related case, *Radio-Television News Directors Association v. FCC*, 809 F.2d 860 (D.C.Cir. 1987), the court suggested that the FCC should consider a rulemaking proceeding aimed at figuring out whether or not the fairness doctrine was or was not in the public interest.

Responding to the congressional mandate of October 1986, the FCC on February 13, 1987 opened an inquiry into alternatives to the fairness doctrine, Notice of Inquiry into sec. 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of B/cast Licensees (MM Dock. 87–26), 2 FCC Rcd. 1532 (1987). Congress, however, was not willing to wait for the report. On April 21, 1987 the Senate adopted S. 742, a bill intended to write the fairness doctrine squarely into the Communications Act of 1934. On June 3, 1987 the House adopted S. 742, sending the measure to President Reagan. On June 19, 1987, however, Reagan vetoed the bill. Reagan's veto message raised constitutional objections to the doctrine:

Veto of the Fairness in Broadcasting Act of 1987

> I am returning herewith without my approval S. 742, the "Fairness in Broadcasting Act of 1987," which would codify the so-called "fairness doctrine" * * * . This type of content-based regulation * * * is, in my judgment, antagonistic to the freedom of expression guaranteed by the First Amendment.
>
> In any other medium besides broadcasting, such Federal policing of the editorial judgment of journalists would be unthinkable * * * the United States Supreme Court, in striking down a right-of-access statute that applied to newspapers, spoke of the statute's intrusion into the function of the editorial process and concluded that "[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).
>
> I recognize that 18 years ago the Supreme Court indicated that the fairness doctrine as then applied to a far less technologically advanced broadcast industry did not contravene the First Amendment, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) * * *
>
> The Supreme Court [however] indicated in *Red Lion* a willingness to reconsider the appropriateness of the fairness doctrine if it reduced rather than enhanced broadcast coverage. In a later case, the Court acknowledged the changes in the technological and economic environment in which broadcasters operate. It may now be fairly concluded that the growth in the number of available media outlets does indeed outweigh whatever justifications may have seemed to exist at the period during which the doctrine was developed. The FCC itself has concluded that the doctrine is an unnecessary and detrimental regulatory mechanism. * * * Furthermore, the FCC found that the doctrine in fact *inhibits* broadcasters from presenting controversial issues of public importance, and thus defeats its own purpose.
>
> * * *
>
> S. 742 simply cannot be reconciled with the freedom of speech and the press secured by our Constitution. It is, in my judgment, unconstitutional. Well-intentioned as S. 742 may be, it would be inconsistent with the First Amendment and with the American tradition of independent journalism. Accordingly, I am compelled to disapprove of this measure. [23 *Weekly Compilation of Presidential Documents* 715–16 (1987).]

Reagan's resolve was probably reinforced by a U.S. Supreme Court decision released just eleven days prior to his veto. On June 8, 1987 the Court refused to review the *TRAC* decision, making final the court of appeals decision that Congress had not mandated the fairness doctrine in 1959. *Telecommunications Research and Action Center v. FCC*, 107 S.Ct. 3196 (1987). Thus, at the time Reagan vetoed S. 742, courts had held that the fairness doctrine had not

been made statutory in 1959; and Reagan successfully vetoed the 1987 effort to write it into the act. By late June 1987, it became apparent to Congress that, although a majority of both the Senate and House supported the doctrine, the two-thirds votes necessary to overturn the president's veto were not to be had.

The result of all these developments was to put the matter back in the hands of the FCC. Courts had told the FCC that it had to consider Meredith's constitutional arguments and suggested that it ought to look harder at whether or not the doctrine, even if constitutional, served the public interest. They had told the FCC that it didn't have to uphold the doctrine out of a belief that Congress had mandated it in 1959. The FCC had not gotten all from the courts that it might have wished; no lower court had been willing to find the doctrine unconstitutional, but the courts certainly had left the commission a free hand to do as it wished. On August 4, 1987 the FCC reached a momentous decision. In *Syracuse Peace Council*, 2 FCC Rcd. 5043 (1987), the FCC bit the bullet. It eliminated the doctrine—at least most of it—as both contrary to the public interest and as unconstitutional.

SYRACUSE PEACE COUNCIL

2 FCC RCD. 5043 (1987).

In *Meredith Corp. v. FCC*, the U.S. Court of Appeals remanded this case to the Commission for further consideration of our decision, in this adjudication, to enforce the Fairness Doctrine against Station WTVH. The court found that the Commission, on the basis of the evidence of record, had properly concluded that the station failed to satisfy the requirements of the Fairness Doctrine. It determined, however, that the Commission had acted arbitrarily and capriciously in not considering WTVH's contentions that the enforcement of the Doctrine deprived the station of its constitutional rights.

Pursuant to the court's Order, we reopened this proceeding in order to consider the constitutional and public interest issues raised by WTVH. As explained more fully below, based upon this record, our experience in administering the Fairness Doctrine, fundamental constitutional principles, and the findings contained in our comprehensive 1985 Fairness Report, we conclude that the Fairness Doctrine, on its face, violates the First Amendment and contravenes the public interest. Accordingly, we shall grant reconsideration of our earlier determinations in this proceeding, and our previous orders in this proceeding are hereby vacated. Any formal determination that WTVH failed to comply with the requirements of the Fairness Doctrine can no longer be used against WTVH in any subsequent renewal proceedings or in any other context.

As the court noted in *Meredith Corp. v. FCC*, the Commission recently conducted "a comprehensive reexamination of the public policy and constitutional implications of the fairness doctrine."

Based upon compelling evidence of record, the Commission, in its 1985 Fairness Report, concluded that the Fairness Doctrine disserved the public interest. * * *

While disclaiming any intention to "definitively resolve whether or not the Fairness Doctrine is constitutional," the Commission questioned whether the Doctrine is consistent with the guarantees of the First Amendment. It stated that "were the balance ours alone to strike, the Fairness Doctrine would thus fall short of promoting those interests necessary to uphold its constitutionality." The Commission recognized that the Supreme Court in 1969 had upheld the Doctrine in *Red Lion Bl/casting Co. v. FCC* ("Red Lion"), but determined that the factual predicates underlying that decision had been eroded.

In the 1985 Fairness Report, the Commission did not reach a definitive conclusion as to whether the Doctrine was codified. In light of the "intense Congressional interest in the Faimess Doctrine * * * the pendency of legislative proposals," as well as the uncertainty as to whether the Doctrine was in fact codified, the Commission concluded that "it would be inappropriate at this time * * * to either eliminate or significantly restrict the scope of the Doctrine." Expressing its intention to continue to enforce the Fairness Doctrine, the Commission forwarded its Report to Congress so that the legislature would have "an opportunity to review the Fairness Doctrine in light of the evidence [in that Report]." While the general inquiry on the Fairness Doctrine was still pending before the agency, the Commission in this adjudication held that television Station WTVH in Syracuse, N.Y., had violated the Doctrine. The Commission determined that WTVH, by broadcasting a series of editorial advertisements advocating the construction of the Nine Mile Point II nuclear plant as a sound investment for New York, presented a controversial issue of public importance.

Finding at that time that the station had failed to air any contrasting viewpoints on the issue, the Commission concluded that WTVH had not met its obligations under the Fairness Doctrine.

In a Memorandum Opinion and Order, the Commission denied Meredith's petition for reconsideration. Addressing in detail the nonconstitutional contentions raised by Meredith, the Commission concluded that it had correctly found on the basis of the evidence before it that WTVH had violated the Fairness Doctrine. The agency, however, did not reach the merits of Meredith's constitutional arguments. Citing the 1985 Fairness Report, it stated that it had determined to continue to enforce the Doctrine "irrespective of [its] view concerning the constitutionality of the Fairness Doctrine, [because] the question of its repeal or its constitutionality is best left to Congress and the courts."

Meredith sought judicial review of the Commission's order in the U.S. Court of Appeals for the District of Columbia Circuit. The court on review rejected Meredith's contention that the Commission had misconstrued administrative precedent or erred in determining that WTVH's actions did not satisfy the requirements of the Fairness Doctrine. It asserted, however, that the Commission had acted improperly in holding that Meredith violated the Doctrine without responding to the broadcaster's constitutional arguments. While noting that "[a]n agency is not required to reconsider the merits of a rule each time it seeks to apply it," the court stated that the Commission, in its 1985 Fairness Report:

> has already largely undermined the legitimacy of its own rule. The FCC has issued a formal report that eviscerates the rationale for its existing regulations. The agency has deliberately cast grave legal doubt on the Fairness Doctrine * * * [in] a formal fashion.[46]

In remanding the case to the Commission for further consideration of Meredith's constitutional claims, the court provided the Commission with several options. It indicated that the Commission could address the constitutional issue broadly or "choose to decide the issue narrowly, resting on the particular circumstances of Meredith's case." As a further alternative, the court stated that the Commission could determine, "in an adjudicatory context, that the Doctrine cannot be enforced because it is contrary to the public interest and thereby avoid the constitutional issue." In any event, the court admonished the members of this Commission that the failure to consider Meredith's constitutional arguments in its defense was not only the "very paradigm of arbitrary and capricious administrative action," but may also have constituted a breach of the oath that each Commissioner took to support and defend the Constitution. This case was therefore remanded for rectification, and we now consider it, in light of that admonition.

In view of the importance and potentially far-ranging impact of our decision on remand, we invited interested persons, through publication of a notice in the Federal Register, to submit comments on "whether, in light of the 1985 Fairness Report,

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46. * * * The court of appeals concluded that, on remand, avoiding the constitutional issue in this case "appears clearly no longer available" to the agency. *Meredith Corp. v. FCC*, 809 F.2d at 873, n. 11. The court pointed out that it had recently determined, in *TRAC v. FCC*, that the Fairness Doctrine was not codified. In addition, the court discussed the fact that Congress, subsequent to *TRAC v. FCC*, had enacted appropriations legislation which referred explicitly to the Fairness Doctrine both in the body of that statute and in its legislative history. *Meredith Corp. v. FCC*, 809 F.2d at 873, n. 11. See Making Continuing Appropriations for Fiscal Year 1987, * * * and H.R. Rep. No. 99–1005, 99th Cong., 2d Sess. 70–71 (1986). The court asserted that the actual language of the appropriations legislation "does not appear to mandate the Fairness Doctrine." *Meredith Corp. v. FCC*, 809 F.2d at 873, n. 11. The court probed counsel for the Commission, at oral argument, as to whether the Commission could be bound by legislative intent, as expressed in report language and other legislative history, but not in actual legislation. In its decision, the court noted that counsel admitted that legislative history was not legally binding. Despite the fact that the court had before it legislative history indicating that at least some members of Congress did not want the Commission to act on the Fairness Doctrine, the court nevertheless remanded the proceedings and directed the Commission to consider the constitutional and public interest challenges to the Fairness Doctrine, demonstrating its determination that the various expressions of congressional intent did not codify the Doctrine nor justify continued delay in resolving petitioner's claim.

Subsequent to the court's decision in *Meredith Corp. v. FCC*, efforts have been made to codify the Fairness Doctrine. S. 742, 100th Cong., 1st Sess. (1987); H.R. 1934 (1987). See S. Rep. 100–34, 100th Cong., 1st Sess. (1987); H.R. Rep. No. 100–108, 100th Cong. 1st Sess. (1987). S. 742 was passed by the Senate on April 21, 1987, and H.R. 1934 was passed by the House of Representatives on June 3, 1987. The legislation, however, was vetoed by the President on June 19, 1987, 23 Weekly Comp. Pres. Doc. 715 (June 29, 1987), and on June 23, 1987, the Senate voted to return the bill to committee without attempting to override the veto. 133 Cong. Rec. S8438 (daily ed. June 23, 1987). Thus, to date, these efforts have not resulted in codification, and thus the Fairness Doctrine is not mandated by statute. Hence, this case does not involve the authority of the Commission to question the constitutionality of a statute.

Nearly seven months have passed since the court of appeals decided *Meredith Corp. v. FCC*, and the Commission has had adequate time to assess comments and to analyze the constitutional and public interest challenges thoroughly. In light of these facts, and in light of the court's clear directions in remanding this case, we believe that we can no longer justifiably delay our response to WTVH's claims. Any further delay in deference to Congress' continuing interest in fairness legislation would be inconsistent with our adjudicatory responsibilities, *Meredith Corp. v. FCC*, 809 F.2d at 873–74, and proper administrative procedure, see *Koniag, Inc. v. Village of Uyak*, 580 F.2d 601 (D.C.Cir. 1978); *Pillsbury v. FTC*, 354 F.2d 952 (5th Cir. 1966).

enforcement of the Fairness Doctrine is constitutional and whether enforcement of the Doctrine is contrary to the public interest."

* * *

As we began to examine the policy issues, however, it became evident to us that the policy and constitutional considerations in this matter are inextricably intertwined and that it would be difficult, if not impossible, to isolate the policy considerations from the constitutional aspects underlying the Doctrine. We believe, as a result, that it is appropriate and necessary to address the policy and constitutional issues together for a number of reasons. A meaningful assessment of the propriety of the Doctrine, therefore, necessarily includes an evaluation of its constitutionality. If the Doctrine impedes the realization of First Amendment objectives—and, as explained more fully below, we believe that it does—a fortiori it disserves the public interest.

A second, but related, reason that the policy and constitutional issues are inextricably intertwined is that the promotion of First Amendment values was the Commission's core policy objective in establishing and maintaining the Doctrine.

* * *

Third, this Commission was established by Congress as the expert agency in broadcast matters and possesses more than fifty years of experience with the day-to-day implementation of communications regulation. As a consequence, the courts, when considering the constitutionality of broadcast regulation, have found our perspective informative.

After reviewing Meredith's several arguments in its defense, we are persuaded by its argument that the Fairness Doctrine is unconstitutional on its face. We, therefore, do not—and, as explained below, cannot—confine our determination of the issues involved here to the specific facts of this adjudication.

* * *

We believe that the relevant issue in this proceeding is whether the Doctrine itself complies with the strictures of the First Amendment and thereby comports with sound public policy. Therefore, in order to resolve the issues that the court directed us to consider, we conclude that we have no choice but to consider Meredith's challenge to the facial validity of the Fairness Doctrine itself.

* * *

In short, broadcasters are faced daily with editorial decisions concerning what types of commercial or noncommercial material on controversial public issues to present to their listeners and viewers. The fundamental issue embodied in this Fairness Doctrine litigation is the same as that presented in all other Fairness Doctrine cases: whether it is constitutional and thereby sound public policy for a government agency to oversee editorial decisions of broadcast journalists concerning the broadcast of controversial issues of public importance. Because the case before us is a product of the Fairness Doctrine itself, and because it raises important policy and constitutional issues common to all Fairness Doctrine litigation, we do not believe that the resolution of this proceeding turns on any specific facts that are unique to this adjudication.

Nor do we believe that it would be appropriate, in passing on the constitutional and policy issues raised by our enforcement of the Fairness Doctrine, to limit our consideration of such issues to the one part of the Fairness Doctrine that we determined had been violated in this case. The Fairness Doctrine, although consisting of two parts, is a unified Doctrine; without both parts, the Doctrine loses its identity. The litigants and courts in this and, indeed, the *Red Lion* case have all considered the validity of the Doctrine as a whole, and not as two separate policies.

* * *

In remanding this case to us, the court of appeals did not indicate that we were obligated to consider, or even that we should consider, the two parts of the Doctrine separately, and, as stated above, we do not believe that we are otherwise obligated to do so.

* * *

Until the Supreme Court reevaluates that determination, * * * we shall evaluate the constitutionality of the Fairness Doctrine under the standard enunciated in *Red Lion* and its progeny.

The [*Red Lion*] Court emphasized that if the Fairness Doctrine were found to inhibit broadcasters from covering controversial issues of public importance:

> Such a result would indeed be a serious matter for * * * the purposes of the Doctrine would be stifled. At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative. * * * The Fairness Doctrine in the past has had no such overall effect.

The Court in *Red Lion* expressly stated that it would reconsider its holding "if experience with the administration of [the Fairness Doctrine] indicates that [it] ha[s] the net effect of reducing rather than enhancing the volume and quality of coverage [of controversial issues of public importance]."

Under the standard enunciated by the Supreme Court for assessing the constitutionality of broadcast regulation, "it is the right of the viewers and listeners and not the broadcasters which are paramount." This standard permits the government to regulate the speech of broadcasters in order to promote the interest of the public in obtaining access to diverse viewpoints.

In subsequent cases applying the *Red Lion* standard, the Supreme Court also recognized expressly that broadcasters have substantial rights under the First Amendment.

An assessment of the constitutionality of the Fairness Doctrine under the standard established by *Red Lion* and its progeny, therefore, "requires a critical examination of the interests of the public and broadcasters." We shall thus consider the constitutionality of the Fairness Doctrine from the perspective both of the public and the broadcast licensees. In so doing, we shall examine the record developed in this case and in the 1985 Fairness Report to determine, in accordance with existing Supreme Court precedent, whether the enforcement of the Fairness Doctrine (1) chills speech and results in the net reduction of the presentation of controversial issues of public concern and (2) excessively infringes on the editorial discretion of broadcast journalists and involves unnecessary government intervention to the extent that it is no longer narrowly tailored to meet its objective.

In the 1985 Fairness Report, the Commission evaluated the efficacy of the Fairness Doctrine in achieving its regulatory objective. Based upon the compelling evidence of record, the Commission determined that the Fairness Doctrine, in operation, thwarts the purpose that it is designed to promote. Instead of enhancing the discussion of controversial issues of public importance, the Commission found that the Fairness Doctrine, in operation, "chills" speech.

* * *

As the Commission demonstrated, the incentives involved in limiting the amount of controversial issue programming are substantial. A broadcaster may seek to lessen the possibility that an opponent may challenge the method in which it provided "balance" in a renewal proceeding. If it provides one side of a controversial issue, it may wish to avoid either a formal Commission determination that it violated agency policy or the financial costs of providing responsive programming. More important, however, even if it intends to or believes that it has presented balanced coverage of a controversial issue, it may be inhibited by the expenses of being second-guessed by the government in defending a Fairness Doctrine complaint at the Commission, and if the case is litigated in court, the costs of an appeal.

* * *

Furthermore, the Commission determined that the Doctrine inherently provides incentives that are more favorable to the expression of orthodox and well-established opinion with respect to controversial issues than to less established viewpoints. The Commission pointed out that a number of broadcasters who were denied or threatened with the denial of renewal of their licenses on fairness grounds had provided controversial issue programming far in excess of the typical broadcaster. Yet these broadcasters espoused provocative opinions that many found to be abhorrent and extreme, thereby increasing the probability that these broadcasters would be subject to Fairness Doctrine challenges. The Commission consequently expressed concern that the Doctrine, in operation, may have penalized or impeded the expression of unorthodox or unpopular opinion, depriving the public of debates on issues of public opinion that are "uninhibited, robust, and wide-open." The Doctrine's encouragement to cover only major or significant viewpoints, with which much of the public will be familiar, inhibits First Amendment goals of ensuring that the public has access to innovative and less popular viewpoints.

The record in the fairness inquiry demonstrated that this self-censorship is not limited to individual programs. In order to avoid Fairness Doctrine burdens, the Commission found that stations have adopted company "policies" which have the direct effect of diminishing the amount of controversial material that is presented to the public on broadcast stations. For example, some stations refuse to present editorials; other stations will not accept political advertisements; still others decline to air public issue (or editorial) advertising; and others have policies to decline acceptance of nationally produced programming that discusses controversial subjects or to have their news staffs avoid controversial issues as a matter

of routine. The Commission concluded, therefore, that the Doctrine "inhibits the presentation of controversial issues of public importance to the detriment of the public and in degradation of the editorial prerogatives of broadcast journalists."

Further, we believe that enforcement actions such as the one in this proceeding provide substantial disincentives to broadcasters to cover controversial issues of importance in their community. As a direct result of the Commission second-guessing the editorial discretion of Meredith's Station WTVH in its coverage of an important, controversial issue, Station WTVH became embroiled in a burdensome, regulatory quagmire. Even though it has, under today's decision, ultimately prevailed in this adjudication, the station has incurred substantial litigation expenses associated with the initial adjudication.

As explained above, the Supreme Court has held that restrictions on the content of broadcasters' speech must be narrowly tailored to achieve a substantial government interest in order to pass constitutional muster.

* * *

As a result of its 1985 review, the Commission determined that "the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today" and that the growth in both radio and television broadcasting alone provided "a reasonable assurance that a sufficient diversity of opinion on controversial issues of public importance [would] be provided in each broadcast market." It concluded, therefore, and we continue to believe, that government regulation such as the Fairness Doctrine is not necessary to ensure that the public has access to the marketplace of ideas.

As noted above, under the standard of review set forth in *Red Lion*, a governmental regulation such as the Fairness Doctrine is constitutional if it furthers the paramount interest of the public in receiving diverse and antagonistic sources of information. Under *Red Lion*, however, the constitutionality of the Fairness Doctrine becomes questionable if the chilling effect resulting from the Doctrine thwarts its intended purpose. Applying this precedent, we conclude that the Doctrine can no longer be sustained.

In the 1985 Fairness Report, we evaluated whether the Fairness Doctrine achieved its purpose of promoting access to diverse viewpoints. After compiling a comprehensive record, we concluded that, in operation, the Fairness Doctrine actually thwarts the purpose which it is designed to achieve. We found that the Doctrine inhibits broadcasters, on balance, from covering controversial issues of public importance. As a result, instead of promoting access to diverse opinions on controversial issues of public importance, the actual effect of the Doctrine is to "overall lessen[] the flow of diverse viewpoints to the public." Because the net effect of the Fairness Doctrine is to reduce rather than enhance the public's access to viewpoint diversity, it affirmatively disserves the First Amendment interests of the public. This fact alone demonstrates that the Fairness Doctrine is unconstitutional under the standard of review established in *Red Lion*.

* * *

In sum, the Fairness Doctrine in operation disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression. Its chilling effect thwarts its intended purpose, and it results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists. We hold, therefore, that under the constitutional standard established by *Red Lion* and its progeny, the Fairness Doctrine contravenes the First Amendment and its enforcement is no longer in the public interest.

Our review of the Supreme Court precedent in the application of First Amendment principles to the electronic media leads to an inescapable conclusion: throughout the development of these principles, the Supreme Court has repeatedly emphasized that its constitutional determinations in this area of the law are closely related to the technological changes in the telecommunications marketplace.

* * *

With respect to the Fairness Doctrine itself, a policy that the Commission defended before the Supreme Court in 1969, our comprehensive study of the telecommunications market in the 1985 Fairness Report has convinced us that a rationale that supported the Doctrine in years past is no longer sustainable in the vastly transformed, diverse market that exists today. Consequently, we find ourselves today compelled to reach a conclusion regarding the constitutionality of the Fairness Doctrine that is very different from the one we reached in 1969.

We believe that the 1985 Fairness Report, as reaffirmed and further elaborated on in today's action, * * * provides the basis on which to reconsider its application of constitutional principles that were de-

veloped for a telecommunications market that is markedly different from today's market. We further believe that the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, in response to the question raised by the Supreme Court in League of Women Voters, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press.

As stated above, we no longer believe that there is scarcity in the number of broadcast outlets available to the public. Regardless of this conclusion, however, we fail to see how the constitutional rights of broadcasters—and indeed the rights of the public to receive information unencumbered by government intrusion—can depend on the number of information outlets in particular markets.

* * *

Because there is no longer a scarcity in the number of broadcast outlets, proponents of a scarcity rationale for the justification of diminished First Amendment rights applicable to the broadcast medium must rely on the concept of spectrum (or allocation) scarcity. This concept is based upon the physical limitations of the electromagnetic spectrum. Because only a limited number of persons can utilize broadcast frequencies at any particular point in time, spectrum scarcity is said to be present when the number of persons desiring to disseminate information on broadcast frequencies exceeds the number of available frequencies. Consequently, these frequencies, like all scarce resources, must be allocated among those who wish to use them.

In fact, spectrum scarcity was one of the bases articulated by the Court in *Red Lion* for the disparate treatment of the broadcast and the print media. Reliance on spectrum scarcity, however, "has come under increasing criticism in recent years."

At the outset, we note that the limits on the number of persons who can use frequencies at any given time is not absolute, but is, in part, economic: greater expenditures on equipment and/or advances in technology could make it possible to utilize the spectrum more efficiently in order to permit a greater number of licensees. So the number of outlets in a market is potentially expandable, like the quantities of most other resources.

Nevertheless, we recognize that technological advancements and the transformation of the telecommunications market described above have not eliminated spectrum scarcity. All goods, however, are ultimately scarce, and there must be a system through which to allocate their use. Although a free enterprise system relies heavily on a system of property rights and voluntary exchange to allocate most of these goods, other methods of allocation, including first-come, first-served, administrative hearings, lotteries, and auctions, are or have been relied on for certain other goods. Whatever the method of allocation, there is not any logical connection between the method of allocation for a particular good and the level of constitutional protection afforded to the uses of that good.

Additionally, there is nothing inherent in the utilization of the licensing method of allocation that justifies the government acting in a manner that would be proscribed under a traditional First Amendment analysis. * * * Indeed, the fact that government is involved in licensing is all the more reason why the First Amendment protects against government control of content.

On the other hand, the fact that government may not impose unconstitutional conditions on the receipt of a public benefit does not preclude the Commission's ability, and obligation, to license broadcasters in the public interest, convenience and necessity. The Commission may still impose certain conditions on licensees in furtherance of this public interest obligation. Nothing in this decision, therefore, is intended to call into question the validity of the public interest standard under the Communications Act.

Rather, we simply believe that, in analyzing the appropriate First Amendment standard to be applied to the electronic press, the concept of scarcity—be it spectrum or numerical—is irrelevant. As Judge Bork stated in *TRAC v. FCC*, "Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion." Consequently, we believe that an evaluation of First Amendment standards should not focus on the *physical differences* between the electronic press and the printed press, but on the *functional similarities* between these two media and upon the underlying values and goals of the First Amendment. We believe that the function of the electronic press in a free society is identical

to that of the printed press and that, therefore, the constitutional analysis of government control of content should be no different.

* * *

[A] cardinal tenet of the First Amendment is that governmental intervention in the marketplace of ideas of the sort involved in the enforcement of the Fairness Doctrine is not acceptable and should not be tolerated.

The Fairness Doctrine is at odds with this fundamental constitutional precept. While the objective underlying the Fairness Doctrine is that of the First Amendment itself—the promotion of debate on important controversial issues—the means employed to achieve this objective, government coercion, is the very one which the First Amendment is designed to prevent. In this sense, the underlying rationale of the Fairness Doctrine turns the First Amendment on its head.

Indeed, even when approving the Doctrine in the 1974 Fairness Report, the Commission recognized the anomaly of a policy which purports to further First Amendment values by the very mechanism proscribed by that constitutional provision. * * *

* * *

Because the dissemination of a particular viewpoint by a broadcaster can trigger the burdens associated with broadcasting responsive programming, the Doctrine directly penalizes—through the prospect or reality of government intrusion—the speaker for expressing his or her opinion on a matter of public concern. For even if the broadcaster has, in fact, presented contrasting viewpoints, the government, at the request of a complainant, may nevertheless question the broadcaster's presentation, which in and of itself is a penalty for simply covering an issue of public importance.

In this regard, we note that sound journalistic practice already encourages broadcasters to cover contrasting viewpoints on a topic of controversy. The problem is not with the goal of the Fairness Doctrine, it is with the use of government intrusion as the means to achieve that goal. With the existence of the Fairness Doctrine, broadcasters who intend to, and who do in fact, present contrasting viewpoints on controversial issues of public importance are nevertheless exposed to potential entanglement with the government over the exercise of their editorial discretion. Consequently, these broadcasters may shy away from extensive coverage of these issues. We believe that, in the absence of the Doctrine, broadcasters will more readily cover controversial issues, which, when combined with sound journalistic practices, will result in more coverage and more diversity of viewpoint in the electronic media; that is, the goals of the First Amendment will be enhanced by employing the very means of the First Amendment: government restraint.

Finally, we believe that under the First Amendment, the right of viewers and listeners to receive diverse viewpoints is achieved by guaranteeing them the right to receive speech unencumbered by government intervention. The *Red Lion* decision, however, apparently views the notion that broadcasters should come within the free press and free speech protections of the First Amendment as antagonistic to the interest of the public in obtaining access to the marketplace of ideas. As a result, it is squarely at odds with the general philosophy underlying the First Amendment, i.e., that the individual's interest in free expression and the societal interest in access to viewpoint diversity are both furthered by proscribing governmental regulation of speech. The special broadcast standard applied by the Court in *Red Lion*, which sanctions restrictions on speakers in order to promote the interest of the viewers and listeners, contradicts this fundamental constitutional principle.

Under a traditional First Amendment analysis, the type of governmental intrusion inherent in the Fairness Doctrine would not be tolerated if it were applied to the print media. Indeed, in *Miami Herald Publishing* Co. *v. Tornillo*, the Supreme Court struck down, on First Amendment grounds, a Florida statute that compelled a newspaper to print the response of a political candidate that it had criticized.

* * *

Relying on Tornillo, the Court, in *Pacific Gas & Electric* Co. *v. Public Utilities Comm'n of California*, recently determined that a state administrative order requiring a utility to place the newsletter of its opponents in its billing envelopes contravened the First Amendment.

* * *

We believe that the role of the electronic press in our society is the same as that of the printed press. * * * There is no doubt that the electronic media is powerful and that broadcasters can abuse their

freedom of speech. But the framers of the Constitution believed that the potential for abuse of private freedoms posed far less a threat to democracy than the potential for abuse by a government given the power to control the press. We concur. We therefore believe that full First Amendment protections against content regulation should apply equally to the electronic and the printed press.

The court in *Meredith Corp. v. FCC* "remand[ed] the case to the FCC with instructions to consider [Meredith's] constitutional arguments." In response to the court's directive, we find that the Fairness Doctrine chills speech and is not narrowly tailored to achieve a substantial government interest. We therefore conclude, under existing Supreme Court precedent, as set forth in *Red Lion* and its progeny, that the Fairness Doctrine contravenes the First Amendment and thereby disserves the public interest. * * * As a consequence, we determine that the editorial decision of Station WTVH to broadcast the editorial advertisements at issue in this adjudication is an action protected by the First Amendment from government interference. Accordingly, we reconsider our prior determinations in this matter and conclude that the Constitution bars us from enforcing the Fairness Doctrine against Station WTVH.

We further believe, as the Supreme Court indicated in *FCC v. League of Women Voters of California*, that the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media. Despite the physical differences between the electronic and print media, their roles in our society are identical, and we believe that the same First Amendment principles should be equally applicable to both. This is the method set forth in our Constitution for maximizing the public interest; and furthering the public interest is likewise our mandate under the Communications Act. It is therefore, to advance the public interest that we advocate these rights for broadcasters.

COMMENT

The FCC dutifully completed its report to the Congress on alternatives to the fairness doctrine. The FCC, however, gave Congress little time to respond to the report, since it adopted it just minutes before overturning the doctrine in *Syracuse Peace Council*. Several alternatives were before the FCC. Many of them had been previously considered and rejected. Among them: enforcement of the doctrine only at license renewal time, rather than on a case-by-case basis; enforcement only of the "second prong" of the doctrine; permitting stations to opt for voluntary systems of public access in lieu of compliance with the doctrine; and use of an "actual malice" standard, derived from the law of libel, in determining fairness doctrine violations. The FCC rejected all of these alternatives, preferring, instead, the general repeal of the doctrine adopted in *Syracuse Peace Council*. Basically, the FCC found that any of the alternatives would involve the government in content regulation to a greater extent than would repeal of the doctrine, were contrary to the commission's interpretation of the public interest, and, in most instances, probably violated the First Amendment.

In *Syracuse Peace Council* the FCC developed two positions on the *Red Lion* case. At the start of its decision, the commission abandoned the fairness doctrine because in its view, it's not consistent with *Red Lion*. According to the commission, the doctrine does not further the public right to receive information and, therefore, violates *Red Lion*. In the latter part of its decision, however, the FCC urged the U.S. Supreme Court to abandon *Red Lion* altogether. The motivation for this seems to be the Court's 1984 *FCC v. League of Women Voters*, 468 U.S. 364, decision, in which the Court indicated that it might reconsider *Red Lion* if it got a signal to do so from either the FCC or the Congress. The commission's 1987 *Syracuse Peace Council* decision seems designed to send such a signal to the Court.

In a largely unsuccessful effort to placate an irate Congress, FCC Chairman Dennis Patrick wrote Representative John Dingell (D-Mich.), chairman of the House Commerce Committee, in September 1987. Patrick assured Dingell that the commission had not eliminated the personal attack rules, the political editorializing rules, the "Zapple Doctrine" [quasi-equal access to stations for major political parties], or the application of the doctrine to ballot issues or political campaigns. Patrick noted, however, that all who wanted to challenge FCC policy in those areas could cite *Syracuse Peace Council* in support of their positions.

The commission's analysis of issues directly addresses the question of how "scarcity" is assessed in broadcasting. The FCC admits that there is both physical scarcity (the spectrum can't, at the moment,

accommodate everyone who might want to broadcast and have the basic resources to acquire and operate a transmitter) and economic scarcity (stations can be purchased by almost anyone who can raise a price sufficient to motivate a licensee to sell). The commission prefers an economic to a physical analysis of scarcity. Is that, really, the best way to analyze the problem?

The FCC also, at the end, takes the position that the First Amendment should apply consistently to print and electronic media. Does this mean that the U.S. Supreme Court should abandon its long-held view that each medium of expression presents unique "problems" and that media-specific First Amendment theories are therefore justifiable?

As this book is written, there are several future scenarios. Congress could, again, attempt to incorporate the doctrine into the Communications Act. If it does so, two things could happen. President Bush could veto the legislation—as did his predecessor, Ronald Reagan. In that case, the issue would turn political: could Congress muscle the two-thirds vote necessary to overturn a veto? Bush could also approve the enactment, something especially likely if Congress attaches it to some other legislation considered vital by the president. In either event, the fairness doctrine could become clearly statutory. Action would likely then shift to the courts, which might be squarely confronted with the question of the constitutionality of the doctrine.

In the meantime, a new chapter in the *Syracuse Peace* litigation occurred on February 10, 1989, when a federal appeals panel, per Judge Williams, upheld the FCC's refusal to enforce the fairness doctrine against Meredith Broadcasting Co. See *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C.Cir. 1989). Judge Williams declared:

> Although the Commission somewhat entangled its public interest and constitutional findings, we find that the Commission's public interest determination was an independent basis for its decision and was supported by the record. We uphold that determination without reaching the constitutional issue.

Judge Wald concurred in part and dissented in part. She concurred in that part of Judge William's decision which upheld "the FCC's decision to abrogate the second prong of the fairness doctrine as an exercise of its statutory authority to regulate in the public interest." However, she dissented from that part of the opinion which sustained the FCC's decision "to eliminate the fairness doctrine's first prong."

In a concurrence, Judge Kenneth Starr explained that he did not agree that the FCC had made its determination in *Syracuse Peace Council* on nonconstitutional grounds. He thought the constitutional issue had to be confronted. In his view, the FCC order refusing to uphold the fairness doctrine against Meredith Broadcasting should nonetheless be upheld: "Vindication of the constitutional reasoning in the (FCC) order would *not* constitute a judicial determination that the fairness doctrine as (currently administered) is 'unconstitutional.' To reiterate: I would hold only that the FCC's decision to eliminate the fairness doctrine correctly interprets *Red Lion* and is based, as the court's opinion effectively demonstrates, on an adequate factual record. Such a decision would therefore not foreclose a future FCC (or Congress) from reestablishing the fairness doctrine in its present or (some modified) form."

REGULATING OBSCENITY AND INDECENCY IN BROADCASTING

The Basis for Regulation

The regulation of broadcast obscenity and indecency is a murky area because the FCC and courts must reconcile two apparently contradictory statutes: 47 U.S.C.A. § 326 of the Communications Act of 1934 which prohibits FCC censorship and 18 U.S.C.A. § 1464 of the criminal code which prohibits broadcasting "any obscene, indecent, or profane language."

Section 326 states:

> Nothing in this chapter shall be understood or construed to give the commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the commission which shall interfere with the right of free speech by means of radio communication.

The Federal Criminal Code, 18 U.S.C.A. § 1464, provides as follows:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

In 1978, the Supreme Court in *FCC v. Pacifica Foundation, Inc.*, a case discussed in more detail

shortly, summarized the legislative history of these two provisions and observed that they had a common origin. The Court insisted that the two statutes did not conflict:

> A single section of the 1927 [Radio] act is the source of both the anticensorship provision and the [c]ommission's authority to impose sanctions for the broadcast of indecent or obscene language. Quite plainly, Congress intended to give meaning to both provisions. Respect for that intent requires that the censorship language be read as inapplicable to the prohibition on broadcasting obscene, indecent, or profane language.

Broadcasters can be punished directly for violation of 18 U.S.C.A. § 1484 by the Department of Justice. Such suits would be tried in federal courts. If pursued, they could be much more serious than complaints brought by the FCC since they carry the risk of imprisonment. In recent years, the Department of Justice has not vigorously prosecuted such cases and broadcasters have much more concern about how the FCC applies these standards.

General Issues

Although the prohibition of obscene, indecent, or profane utterances originated in the Radio Act of 1927 and was carried forward to the Communication Act of 1934, it was removed from that act in 1948 when Congress created the U.S. Criminal Code. The ability of the FCC to continue to enforce the prohibition, however, persisted under another part of the Communications Act, 47 U.S.C.A. § 503(b)(2), which authorizes the FCC to punish infractions of 18 U.S.C.A § 1464 by assessing forfeitures (fines). The FCC could also seek cease-and-desist orders from federal judges to halt such speech, but it never has.

Most severely, the FCC can consider violations of 18 U.S.C.A. § 1464 when licenses are sought—either by renewal applicants or by initial applicants. Disqualification of a license application has been rare. See text, p. 715. Instead, the FCC has preferred to warn or admonish licensees, although occasionally there have been exceptions. For a while in the 1980s, the FCC indicated that it would not pursue alleged violations of this section of the criminal code but would, instead, refer complaints to the U.S. Department of Justice for prosecution. Video 44, 103 FCC 2d 1204 (1986). Through this process, the FCC apparently sought to resolve a long-standing problem: how could commissioners in Washington, D.C., understand local attitudes toward obscenity or indecency? How could local community standards be assessed? It also sought to conserve its resources by having others do things it had been doing in the past. In the face of accusations, with associated political pressure, that the FCC was abdicating its responsibility to enforce these sections of the law, however, the FCC eventually retreated from this position and stated (and shortly thereafter concretely demonstrated) that it would indeed apply the standards itself. Video 44, 3 FCC Rcd. 757 (1988).

Section 1464 prohibits three kinds of "utterances": (1) profane, (2) obscene, and (3) indecent. Interpretation of the statute has posed many problems. Are all these terms in the conjunctive—just synonyms for the constitutional definition of obscenity? Or are all these terms disjunctive? Is there a difference between profanity, obscenity, and indecency? Do the differences in these utterances justify different forms of regulation? How are the terms to be defined? If there is a difference, especially, between obscenity and indecency, how is it determined? Who makes these decisions? Is there something special about the fact that this statute applies to broadcasting? Is there a difference between how obscenity (or indecency) is to be judged in broadcasting as contrasted with other media? FCC and court decisions throw light on all these points.

Profanity

Profanity generally refers to using religious or sacred names or terms in an irreverent fashion. Since it so closely implicates freedom of religion, courts have been reluctant to endorse use of government power to prevent profanity. If the courts were to protect the religious terms of one faith, that might amount to an establishment of that religion, violating the First Amendment to the Constitution. Consequently, courts and the FCC are rarely concerned about an occasional "hell" or "damn" on broadcasting. The closest the FCC has come in recent—and, in fact, not very recent—years was its decision to deny license renewal to Palmetto Broadcasting Company's WDKD, owned by the late Hollywood "bad man" Edward G. Robinson, Jr. Palmetto Broadcasting Co., 33 FCC 250 (1962).

The FCC denied renewal for WDKD, Kingstree, South Carolina largely because Robinson had lied to the commission during a renewal proceeding. The formal FCC term for this was that Robinson

"misrepresented" himself. Misrepresentation is a sin of major proportion to the FCC which, being a small agency without an extensive police force, depends heavily on the honesty and trustworthiness of the people it regulates. While Robinson said he had never heard complaints about the allegedly objectionable programming of disc jockey Charlie Walker, which featured what at the time were considered off-color jokes and remarks, numerous witnesses testified to the contrary. The commission never really zeroed in on whether the programming was profane, indecent, or obscene. The most important factor was that Robinson lied to the FCC when it asked him about it.

The FCC's decision not to renew the license was upheld by the U.S. Court of Appeals for the D.C. Circuit. *Robinson v. FCC*, 334 F.2d 534 (D.C.Cir. 1964). In a concurring opinion, Judge Wilbur Miller expressed his belief that some of the Charlie Walker shows violated 18 U.S.C. § 1464. Miller thought the court should have upheld the FCC's finding that the programming was "coarse, vulgar, suggestive, and susceptible of indecent, double meaning," instead of focusing on the misrepresentation issue: "I do not think that denying renewal of a license because of the station's broadcast of obscene, indecent or profane language—a serious criminal offense—can properly be called program censorship." In the end, though, this case did not directly turn on section 1464. Neither the FCC nor the courts directly relied on it. "Coarse" and "vulgar" language was not in the public interest, at least if you lied about it to the FCC—it might cost you your license. Obscenity and indecency are different matters.

Obscenity

The law of obscenity is extensively described in other portions of this text. In theory, it applies no differently to broadcasting than to other media. In practice, the FCC has had little opportunity to develop a law of broadcast obscenity. Commercial forces for most of broadcasting's history restrained radio and TV stations from pushing sexual frankness to its limit and, perhaps, crossing the dividing line into obscenity.

As discussed in the obscenity chapter of this book, the U.S. Supreme Court has varied its definitions of obscenity over the last few decades. Whenever the FCC has been faced with an allegation of broadcast obscenity, it has claimed to apply the then-current definition of obscenity supported by the U.S. Supreme Court. The FCC, however, has gone further and proscribed speech as "indecent" which would not have been "obscene" to accommodate the so-called special characteristics of broadcasting.

The first significant FCC broadcast obscenity case arose in 1973 when several stations adopted what was called a "topless radio" format. Basically a talk or call-in format, topless radio featured hosts—usually male—who encouraged members of the audience—usually female—to call in and discuss a topic of the day—nearly always sexual in nature. The format was popular for a while but attracted complaints to the FCC. The commission eventually concluded that a station owned by Sonderling Broadcasting Company had violated section 1464 by broadcasting obscene utterances. Since the *Roth-Memoirs* definition of obscenity was then endorsed by the U.S. Supreme Court, the FCC claimed that Sonderling's broadcasts were obscene under that standard.

SONDERLING BROADCASTING CORP., WGLD-FM

41 FCC 2D 777 (1973).

This letter constitutes a Notice of Apparent Liability for forfeiture issued under Section 503(b)(2) of the Communications Act of 1934, as amended, 47 U.S.C.A. 503(b)(2), pursuant to Section 503(b)(1)(E) of the Act, 47 U.S.C.A. 503(b)(1)(E).

The Facts. Station WGLD-FM, Oak Park, Illinois, licensed to Sonderling Broadcasting Corporation, is one of a number of broadcast stations which have been using a format sometimes called "topless radio," in which an announcer takes calls from the audience and discusses largely sexual topics. The program on WGLD-FM is called "Femme Forum" and runs five hours a day, from 10 a.m. to 3 p.m., Monday through Friday, moderated by Mr. Morgan Moore. On February 23, 1973, the topic was "oral sex." The program consisted of very explicit exchanges in which the female callers spoke of their oral sex experiences.

Discussion. It is the commission's conclusion that broadcasts of this nature—and these particular broadcasts—call for imposition of a forfeiture under Section 503(b)(1)(E) of the Communications Act.

* * *

First, it is most important to make clear what we are not holding. We are emphatically *not* saying that sex *per se* is a forbidden subject on the broadcast medium. * * * Second, we note that we are not dealing with works of dramatic or literary art. * * * We are rather confronted with the talk or interview show where clearly the interviewer can readily moderate his handling of the subject matter so as to conform to the basic statutory standards—standards which, as we point out, allow much leeway for provacative material.[2]

* * *

We shall apply here the * * * *Roth* test and guidelines such as in *Ginzburg v. U.S.*, 383 U.S. 463 (1966).

* * * It is important to note that these criteria are being applied in the broadcast field. The Supreme Court has made clear that different approaches are appropriate for different media of expression in view of their varying natures. * * * That *caveat* applies with particular force to broadcasting. This is peculiarly a medium designed to be received and sampled by millions in their homes, cars, on outings, or even as they walk the streets with transistor radio to the ear, without regard to age, background or degree of sophistication. A person will listen to some musical piece or portion of a talk show, and decide to turn the dial to try something else. While many have loyalty to a particular station or stations, many others engage in this electronic smorgasbord sampling. That, together with its free access to the home, is a unique quality of radio, wholly unlike other media such as print or motion pictures. It takes a deliberate act to purchase and read a book, or seek admission to the theater.[3] * * *

We also repeat what we said at the outset. The foregoing does not mean that the only material that can be broadcast is what must be suitable for children or will never offend any significant portion of a polyglot audience. But it does mean that in determining whether broadcast material meets the statutory test, the special quality of this medium must be taken appropriately into account. The consequences of not doing so would be disastrous to "the larger and more effective use of radio in the public interest." (Section 303(g) of the act.) For there is a Gresham's Law at work here. If broadcasters can engage in commercial exploitation of obscene or indecent material of the nature described above, an increasing number will do so for competitive reasons, with spiralling adverse effects upon millions of listeners.

* * *

Application of the* Roth *Criteria to this Case. First, we note the applicability of some elements of *Ginzburg* to this case. There is here "commercial exploitation," an effort at pandering. Formats like Femme Forum, aptly called "topless radio," are designed to garner large audiences through titillating sexual discussions. The announcer actively solicits the titillating response. We shall not treat this aspect further, because in any event, all this is background to the crucial consideration: Were the *Roth* criteria met by the material here broadcast?

We believe that they were. We have no doubt that the explicit material set out above is patently offensive to contemporary community standards for broadcast matter. * * * If discussions in this titillating and pandering fashion of coating the penis to facilitate oral sex, swallowing the semen at climax, overcoming fears of the penis being bitten off, etc., do not constitute broadcast obscenity within the meaning of 18 U.S.C.A. 1464, we do not perceive what does or could. We also believe that the dominant theme here is clearly an appeal to prurient interest. The announcer coaxed responses that were designed to titillate—to arouse sexual feelings. Indeed, again in this very program, one caller stated that as a result of what she had heard on the program, she was going to try oral sex that night. Finally, from what has been discussed, we do not believe that there is redeeming social value here. This is not a serious discussion of sexual matters, but rather titillating, pandering exploitation of sexual materials. Further, we think that not only can we examine the program in its "commercial exploitation" context but also in sections or parts. These are five-hour talk shows; some parts are of necessity not obscene—are, for example, nothing more than banal "filler". It would make no sense to say that a broadcaster can escape the proscription against obscenity if he schedules a

2. In order to assure compliance with the law and their own programming policies, many licensees interpose a "tape delay" in telephone interview programs, enabling the licensee to delete certain material before it is broadcast.

3. In that sense, a broadcast or cable pay-TV operation (or any "locked-key" cable operation) may well stand on a different footing.

three, four or five-hour talk program, and simply intersperses the obscenity—so critical for the ratings—with other, non-obscene material.

Our conclusions here are based on the pervasive and intrusive nature of broadcast radio, even if children were left completely out of the picture. However, the presence of children in the broadcast audience makes this an *a fortiori matter*. There are significant numbers of children in the audience during these afternoon hours—and not all of a preschool age. Thus, there is always a significant percentage of school age children out of school on any given day. Many listen to radio; indeed it is almost the constant companion of the teenager. * * *

There is evidence that this program is not intended solely for adults. On the February 6, 1973 program on "Do you always achieve orgasm?", the announcer moved from a discussion of orgasm to a comment aimed in large part at the 16–20 year old audience.

* * *

[T]here is an alternative ground for action in this case. In *WUHY* we set out at some length our construction that the term "indecent," as used in 18 U.S.C.A. 1464, constituted a different standard from "obscene" in the broadcast field. * * * We therefore find, as an alternative ground, that the material, even if it were not found to appeal to a prurient interest, warrants the assessment of a forfeiture because it is within the statutory prohibition against the broadcast of indecent matter.

* * * [W]e recognize that we are not the final arbiters in this sensitive First Amendment field. Therefore, we welcome and urge judicial consideration of our action. As to the amount of the forfeiture, we believe that $2,000 is appropriate for the willful or repeated violations here involved (covering both the February 21 and 23, 1973, programs). While it is true that there has been no judicial consideration of obscenity or indecency in this specific broadcast situation we are not fashioning any new theory here.

* * *

In view of the foregoing, we determine that, pursuant to Section 503(b)(1)(E) of the Communications Act of 1934, as amended, Sonderling Broadcasting Corporation has incurred an apparent liability of two thousand dollars ($2000).

COMMENT

In *Sonderling* the FCC invoked both the indecency and the obscenity standards of 18 U.S.C.A. § 1464 and found that a forfeiture was warranted under both standards. *Sonderling* specifically applied the *Roth-Memoirs-Ginzburg* obscenity standard to broadcasting while making note that "the special quality of the medium must be taken into account."

The FCC says that on the basis of its discussion of obscenity in *Sonderling*, it is clear that the matter broadcast is "indecent" as well. Do you agree?

Commissioner Johnson in dissent attacked the FCC policy of enforcing both an obscenity standard and an indecency standard. His position was that since the FCC concedes that the "indecency" standard may proscribe material that does not constitute "obscenity," it is questionable whether "indecency" can be regulated. He complained further that the defense of "indecency" is constitutionally imprecise. What is imprecise about it?

Commissioner Johnson offered the criticism that the majority did not define the community whose standards were supposed to have been violated. This duty to define the relevant community is now much more fundamental than ever in the light of the new importance given to the local community standard by *Miller v. California*, 413 U.S. 15 (1973), a case which had not been decided at the time of the announcement of the FCC's *Sonderling* opinion.

In the light of *Miller*, how should community be defined in a case like *Sonderling*?

Commissioner Johnson said that the enforcement of 18 U.S.C.A. § 1464 is better left to the Justice Department. This approach would leave the problem of defining section 1464 to the federal courts, and it is certainly arguable that federal judges are better equipped to deal with the sensitive First Amendment issues involved than is the FCC. On the other hand, the FCC in *Sonderling* was acting pursuant to 47 U.S.C.A. § 503(b)(1)(E), Federal Communications Act of 1934. It is not appropriate for the agency to fail to enforce a provision of its enabling statute.

The Sonderling Broadcasting Co. simply paid the forfeiture to the FCC and did not appeal. But the Illinois Citizens Committee for Broadcasting and the Illinois Division of the American Civil Liberties Union took up the fight and sought a petition for reconsideration of the notice of apparent liability and also sought remission of the forfeiture from the FCC. These requests were denied by the FCC, and

the ACLU and the committee petitioned the federal court of appeals for review.

In *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (D.C.Cir. 1974), the court, per Judge Leventhal, upheld the FCC determination in the *Sonderling* case: The FCC did not unconstitutionally infringe the listening alternatives of the public when it determined that a radio call-in show carrying an explicit discussion of ultimate sexual acts in a titillating context was an obscene broadcast.

The court reasoned that the station's approach in the radio call-in show in question, "Femme Forum," triggered the principles of *Ginzburg v. United States*.

Justice Brennan there found that commercial exploitation of interests in erotica could be decisive in the determination of obscenity. In *Ginzburg*, the "leering innuendo" was found in the modes of sales promotion. Here the "commercial exploitation" of titillation was found in the "tone" which was "set by the continuity provided by the announcer."

Perhaps most significant was Sonderling's choice of broadcast hours. "Femme Forum" was broadcast from 10 A.M. to 3 P.M. when the radio audience might include children, home from school for lunch, illness, or staggered school hours. Judge Leventhal concluded: "Given this combination of factors, we do not think that the FCC's evaluation of this material infringes upon rights protected by the First Amendment."

A problem arose in determining the obscenity standard that should be applied. The FCC found Sonderling's broadcasts obscene under the standards of *Roth v. United States* and *Memoirs v. Massachusetts*. Between the FCC's resolution of the case and the present appeal, the Supreme Court decided *Miller v. California*, which sets out the following guidelines for the trier of fact:

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

The court, per Judge Leventhal, rejected the contention that *Miller* required reversal of the FCC ruling in *Sonderling*:

> We conclude that, where a radio call-in show during daytime hours broadcasts explicit discussions of ultimate sexual acts in a titillating context, the commission does not unconstitutionally infringe upon the public's right to listening alternatives when it determines that the broadcast is obscene.

The petitioners then sought a rehearing *en banc* by the full court. On March 13, 1975, that request was denied. Judge Bazelon, however, disagreed with his colleagues in refusing a grant a rehearing. He questioned the conclusion of obscenity in light of the fact that *Miller* requires "local fact-finders to apply 'local community standards' of decency." Bazelon argued that the court should have required the FCC "to take evidence on 'local community standards' before reaching a decision under *Miller*."

Judge Bazelon set forth further objections to the court's reasoning:

> There is another difficulty with the court's opinion. *Miller* retains the established requirement that material allegedly obscene must be "taken as a whole" in the judgment of obscenity. Here the commission made its judgment of obscenity on a 22 minute tape which eliminated the bulk of the Sonderling (and other broadcasters') talk show programming not involving sexual discussion. By the admitted facts the FCC did not take the material as a whole but rather viewed the material piece meal. * * * I think this is grounds for a remand.

In Bazelon's view the condemnation of sex-oriented radio shows by then FCC Chairman Burch and the commencement by the FCC a day earlier of a closed notice of inquiry into the broadcast of obscene, indecent, or profane material made it clear that what was involved was not a "specific attack on *Sonderling* but rather a general attack on all sex-oriented talk shows." An entire class of speech had been chased off the air:

> Here the commission has effectively terminated sex-oriented talk shows without any due process for the licensees, without any consideration of the individual merits of different shows, and without any participation by the courts which are given the primary burden of defining obscenity.

Finally, there was a basic statutory defect in the FCC's regulation of obscenity in broadcasting as manifested by the *Sonderling* decision: Judge Bazelon questioned whether "any FCC enforcement of obscenity prohibitions prior to a judicial determination of obscenity is consistent with the broad principles of First Amendment 'due process.' "

Judge Bazelon elaborated on this point in a footnote in the *Illinois Citizens* case:

> 47 U.S.C.A. § 503(b)(1)(E) (1970) speaks in terms of one who "violates" 18 U.S.C.A. § 1464 (1970) and thus may refer only to one adjudicated in violation and not one merely charged with a violation by the FCC (who can only charge a violation and not conclusively adjudicate a violation). The legislative history is similarly unclear. Originally, the FCC was given enforcement powers over obscene broadcasts. See *Duncan v. United States*, 48 F.2d 128 (9th Cir. 1931), cert. denied 283 U.S. 863. In 1948, the prohibition on obscene broadcasts was moved to Title 18 and nothing in Title 47 authorized the FCC to consider obscenity in a forfeiture proceeding. In 1960 Congress added § 503 to grant authority to the FCC to aid in the enforcement of antiquiz fraud provisions. Law 86-752, 74 Stat. 889. It was not stated whether the FCC was to have co-ordinate enforcement powers with the Department of Justice. The commission in Sonderling Broadcasting Corp., 41 FCC 2d 777, 778, 781 (1973) argues that *FCC v. American Broadcasting* Co., 347 U.S. 284, 289–90 n. 7 * * * (1954) establishes this concurrent enforcement authority. The commission misinterprets this case. The Supreme Court therein referred only to the power to enforce the general law upon licensees by revoking or failing to renew a license and expressly declined to hold in a comprehensive footnote that the FCC has forfeiture powers. The power to adjudicate violations of a criminal statute to impose a forfeiture prior to judicial review of the adjudication is a far cry from considering adjudicated illegal conduct or allegations of illegal conduct at license renewal time. *See* the perceptive discussion of this argument in Note, Broadcasting Obscene Language, 43 Ariz.St.L.J. 457, 466–70 (1974).

Judge Bazelon then discussed whether the "FCC as a national administrative agency" is equipped "to make a finding of whether speech appeals to a prurient interest under contemporary community standards *(qua Memoirs-Roth)* or under a local community standard (qua *Miller*)." The court had rejected this objection on the ground that "the Supreme Court has found that jury trials are not required in obscenity decisions." But Bazelon's rejoinder to this was that it was "irrelevant to the larger question of whether a national administrative agency can be compared even to a local trial judge."

Although considered shocking at its time, the content of "Femme Forum" might be hard to distinguish today from radio programs such as those hosted by "Dr. Ruth" and similar sex therapists. Does this help demonstrate the value of relying on *contemporary* community standards? It may be nothing is obscene forever—it's obscene, if at all, only at the time it's judged to be so. Standards can and do change.

After *Sonderling*, the FCC has had few opportunities to decide broadcast obscenity cases. The closest it has come arose out of a broadcast in 1975 on WXPN(FM), Philadelphia, Pennsylvania. On January 27 of that year, WXPN(FM) created a furor with two allegedly obscene broadcasts of a "live" call-in program called "The Vegetable Report," broadcast Monday evenings between 4:00 and 7:00 P.M. The station was licensed to the Trustees of the University of Pennsylvania but admittedly was managed solely by the students of the University. Some of the offensive content was even the product of students at *other* universities. Despite some corrective actions taken by the University, the FCC found a violation of section 1464 for the broadcast of obscene and indecent matter. The commission fined the licensee $2,000. It then turned the case into a renewal matter, on its own motion setting the trustees' renewal application for hearing. The FCC was primarily concerned that the licensee (the trustees) had lost control of the station to the students. The FCC placed upon the trustees the burden of proving that it again possessed the qualifications to be a licensee and that grant of a renewal application would serve the public interest. See generally, In re Notice to the Trustees of the University of Pennsylvania, 57 FCC 2d 783 (1975). Eventually, after the trustees cleaned house and reestablished control over the station, the FCC granted a new license.

The FCC found at least four particular segments of the January 27 broadcast obscene under the test set forth in *Miller v. California*. One of the segments dealt with sexual relations between husband and wife. The other three dealt with using an on-the-air conversation with a three-year-old boy for purposes of sexual titillation. In one instance, the program announcer asked the child, who had been put on the phone by his mother, "Johnny, can you say 'fuck'?"

Concerning these four segments, the FCC stated:

> The commission believes that these particular segments appear to appeal to the prurient interest, describe sexual conduct in a patently offensive way, and lack serious literary, artistic, political, or scientific value. We note that the Court in *Illinois Citizens Committee*, indicated that it would not be inappropriate for the commission to evaluate a broadcasting program that is

episodic in nature with a cluster of individual and typically disconnected commentaries such as a call-in program of this type. We believe that these segments of the January 27 broadcast appear to present a pandering approach to explicit descriptions of ultimate sexual acts. Furthermore, the broadcast not only occurred at a time of the day when children might be expected to be present in the listening audience, but at one point apparently involved a three-year-old child directly in the discussion.

These two broadcasts of "The Vegetable Report" also appear to have been indecent under the then prevailing standard regarding indecent language set forth in the *WUHY* case, and the subsequent standard enunciated in *WBAI*, to comply with the *Miller* decision.

Indecency

Congress, in section 1464, did not define indecency, and the concept does not exist in nonbroadcast areas. Perceiving that obscenity and indecency are somewhat related, the FCC's approach has been to define broadcast indecency by using at least part of whatever at the time is the approved U.S. Supreme Court definition of obscenity. The pattern began with the *WUHY* case reprinted below. At the time, the *Roth-Memoirs* definition of obscenity was in favor with the U.S. Supreme Court. Under that definition, described in more detail earlier in this text, something was obscene only if, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appealed to a prurient interest in sex and the work, as a whole, was utterly without any redeeming social value. The FCC decided that it took much less than that for a radio broadcast to be indecent.

IN RE WUHY-FM EASTERN EDUCATION RADIO

24 FCC 2D 408 (1970).

Facts: WUHY-FM, a non-commercial educational radio station, broadcasts a weekly program, CYCLE II, from 10:00 to 11:00 P.M. On January 4, 1970, Jerry Garcia, of a musical group called *The Grateful Dead*, was interviewed by WUHY on tape in his hotel room. In the interview two of the most celebrated Anglo-Saxon four letter words were used with remarkable frequency by Garcia. [The words were not edited out when WUHY eventually broadcast the interview.] The FCC investigated WUHY.

Three commissioners, Bartley, Lee and Wells, comprised the majority who notified WUHY-FM of liability for forfeiture of $100 because of indecent programming.

* * *

The issue in this case is not whether WUHY-FM may present the views of Mr. Garcia or "Crazy Max" on ecology, society, computers, and so on. Clearly that decision is a matter solely within the judgment of the licensee. See Section 326 of the Communications Act of 1934, as amended. Further, we stress, as we have before, the licensee's right to present provocative or unpopular programming which may offend some listeners. * * * Rather the narrow issue is whether the licensee may present previously taped interview or talk shows where the persons intersperse or begin their speech with expressions like, "Shit, man * * *" "* * * and shit like that," or "* * * 900 fuckin' times," "* * * right fucking out of ya," etc.

We believe that if we have the authority, we have a duty to act to prevent the widespread use on broadcast outlets of such expressions in the above circumstances. For the speech involved has no redeeming social value, and is patently offensive by contemporary community standards, with very serious consequences to the "public interest in the larger and more effective use of radio" (Section 303(g)). * * *

* * *

This brings us to the second part of the analysis—the consequence to the public interest. * * * *And here it is crucial to bear in mind the difference between radio and other media.* Unlike a book which requires the deliberate act of purchasing and reading (or a motion picture where admission to public exhibition must be actively sought), broadcasting is disseminated generally to the public under circumstances where reception requires no activity of this nature. Thus, it comes directly into the home and frequently without any advance warning of its content. Millions daily turn the dial from station to station. While particular stations or programs are oriented to specific audiences, the fact is that by its very nature, thousands of others not within the "intended" audience may also see or hear portions of the broadcast. Further, in that audience are very large numbers of children. Were this type of programming (e.g., the WUHY interview with the above described language) to become widespread, it would

drastically affect the use of radio by millions of people. * * * There are two aspects of this issue. First, there is the question of the applicability of 18 U.S.C.A. § 1464, which makes it a criminal offense to "utter any obscene, indecent, or profane language by means of radio communications." This standard, we note, is incorporated in the Communications Act. See Sections 312(a)(6) and 503(b)(1)(E), 47 U.S C.A. § 312(a)(6); 503(b)(1)(E). The licensee urges that the broadcast was not obscene "because it did not have a dominant appeal to prurience or sexual matters." We agree, and thus find that the broadcast would not necessarily come within the standard laid down in *Memoirs v. Massachusetts*. 383 U.S. 413, 418 (1965); see also *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1963). *Roth v. United States*, 354 U.S. 476 (1956). However, we believe that the statutory term, "indecent," should be applicable, and that, in the broadcast field, the standard for its *applicability* should be that the material broadcast is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value. The Court has made clear that different rules are appropriate for different media of expression in view of their varying natures. "Each method tends to present its own peculiar problems." *Burstyn v. Wilson*, 343 U.S. 495, 502–503 (1951). We have set forth [above], the reasons for applicability of the above standard in defining what is indecent in the broadcast field. We think that the factors set out [above] are cogent, powerful considerations for the different standard in this markedly different field.

* * *

The licensee argues that the program was not indecent, because its basic subject matters "* * * are obviously decent"; "the challenged language though not essential to the meaning of the program as a whole, reflected the personality and life style of Mr. Garcia"; and "the realistic portrayal of such an interview cannot be deemed 'indecent' because the subject incidentally used strong or salty language." We disagree with this approach in the broadcast field. * * *

The licensee itself notes that the language in question "was not essential to the presentation of the subject matter * * *" but rather was "* * * essentially gratuitous." We think that is the precise point here—namely, that the language *is* "gratuitous"—i.e., "unwarranted or [having] no reason for its existence." There is no valid basis in these circumstances for permitting its widespread use in the broadcast field, with the detrimental consequences described [above].

The matter could also be approached under the public interest standard of the Communications Act. * * * The standard for such action under the public interest criterion is the same as previously discussed—namely, that the material is patently offensive by contemporary community standards and utterly without redeeming social value. * * *

In sum, we hold that we have the authority to act here under Section 1464 (i.e., 503(b)(1)(E)), or under the public interest standard (Section 503(b)(1)(A)(B))—for failure to operate in the public interest as set forth in the license or to observe the requirement of Section 315(a) to operate in the public interest).

However, whether under Section 1464 or the public interest standard, the criteria for commission action thus remains the same, in our view—namely, that the material be patently offensive and utterly without redeeming value. Finally, as we stressed before in sensitive areas like this [Report and Order on Personal Attack Rules, 8 FCC 2d 721, 725 (1968)], the commission can appropriately act only in clear-cut, flagrant cases; doubtful or close cases are clearly to be resolved in the licensee's favor.

* * * In view of the foregoing, little further discussion is needed on this aspect. We believe that the presentation of the Garcia material quoted [above] falls clearly within the two above criteria, and hence may be the subject of a forfeiture under Section 503(b)(1)(A)(B) and (E). We further find that the presentation was "willful" (503(b)(1)(A)(B)). We note that the material was taped. Further the station employees could have cautioned Mr. Garcia either at the outset or after the first few expressions to avoid using these "gratuitous" expressions; they did not do so. That the material was presented without obtaining the station manager's approval—contrary to station policy—does not absolve the licensee of responsibility. * * * Indeed, in light of the facts here, there would appear to have been gross negligence on the part of the licensee with respect to its supervisory duties.

* * * [T]he issue in this case is whether to impose a forfeiture (since one of the reasons for the forfeiture provision is that it can be imposed for the isolated occurrence, such as an isolated lottery, etc.). On this issue, we note that, in view of the fact that this is largely a case of first impression, particularly as

to the Section 1464 aspect, we could appropriately forego the forfeiture and simply act prospectively in this field.

* * * However, were we to do so, we would prevent any review of our action and in this sensitive field we have always sought to insure such reviewability. * * * Thus, while we think that our action is fully consistent with the law, there should clearly be the avenue of court review in a case of this nature (see Section 504(a)). * * *

In view of the foregoing, we determine that, pursuant to Section 503(b)(1)(A), (B), (E) of the Communications Act of 1934, as amended, Eastern Education Radio has incurred an apparent liability of one hundred dollars ($100).

* * *

COMMENT

Did the FCC choose "indecency" as the actionable term precisely because it had not received a detailed and limiting construction by the courts but "obscenity" had? Did the FCC think that making "indecency" the key term would give itself more room to deal with the different kinds of obscenity problems presented by the broadcast media as compared with the print media?

The FCC's definition of "indecency" omits any necessity to make a finding that the "dominant theme of the material taken as a whole appeals to a prurient interest in sex." Obviously, if a case of "indecency" is made out by pointing out that a broadcast used a "verboten" word, the "dominant theme" requirement must be dropped.

But the function of *Roth's* "dominant theme" requirement was to give maximum protection to expression, to prevent one objectionable word or a few words from being used to ban an entire book, play, or movie. Is there any reason why the most susceptible member of the audience and the single offensive word should be the touchstone of "indecency" when for the print media the "average reader" and the "dominant theme" requirements suffice?

The WUHY decision was the object of substantial, immediate criticism. The criticism focused on several points.

The FCC regarded broadcasting as "different" than other media. In WUHY it said that content could be judged by deciding whether or not it was "patently offensive according to contemporary community standards *for the broadcast media.*" The U.S. Supreme Court had never judged these issues in such a media-specific fashion. Was it permissible for the FCC to do this in defining broadcast indecency?

The FCC took a nominalistic approach to defining indecency. What bothered it most were Garcia's "gratuitous expletives," especially since they were on tape and could have been deleted before broadcast. This seemed to run counter to the U.S. Supreme Court's approach to obscenity where works (and their words) were considered "as a whole" and with regard to their "dominant theme."

Some were concerned that the commission had deleted from the obscenity definition the notion of an appeal to prurient interest in sex. While Garcia's words were sexual in nature, they were unlikely to excite prurient interests in context. To the FCC, that didn't matter. They were "gratuitous" and ought not to have been aired.

Finally, note that the FCC's approach reflects a particular concern for possible effects of the broadcast on children. According to the U.S. Supreme Court, obscenity was to be decided with reference to the standards of "the average person," by which the Court usually meant adults. The FCC, however, seemed particularly anxious to prevent harm to children. Would the courts allow that?

Resolution of these matters did not come immediately. Although the FCC plainly invited the licensee to take it to court, WUHY-FM elected, instead, to pay its nominal $100 fine. Sonderling Broadcasting later did the same with regard to its $2,000 fine. It wasn't until 1975 that the FCC found a broadcaster willing to pursue obscenity or indecency litigation in the courts. The result, in 1978, was a U.S. Supreme Court decision, *FCC v. Pacifica Foundation*, that clarified somewhat many of the issues *WUHY* had left dangling. Like *WUHY*, *Pacifica* was an indecency, not an obscenity case. Because the U.S. Supreme Court replaced the *Roth-Memoirs* obscenity definition with the so-called *Miller* test in 1973, the FCC, in dealing with a 1975 complaint about Pacifica Foundation's WBAI-FM (New York), had to fashion a new definition of broadcast indecency.

In *WUHY-FM* the FCC decided that the reference to "indecent" utterance in 18 U.S.C.A. § 1464 permitted the FCC to expand its regulatory authority to prohibit programming which was allegedly patently offensive but which did not otherwise meet

the constitutional test for obscenity. Such a policy clearly ran a risk of judicial reversal since the whole point of putting a separate and distinct meaning in the reference to "indecent" utterance in 18 U.S.C.A. § 1464 appeared to be designed to escape the rigors of the constitutional definition of obscenity. In the 1978 Supreme Court decision in *Pacifica Foundation*, the FCC's gamble in trying to create a new category of prohibited programming on broadcasting—"indecent" programming—succeeded. In a decision which surprised broadcasters and disappointed civil libertarians, the Supreme Court agreed that the FCC's authority to regulate "indecent" programming was not limited by the constitutional requirements associated with its authority to regulate "obscene" programming. In the *Pacifica* case, the Supreme Court specifically cited *WUHY-FM* along with other FCC cases for the point that the FCC "has long interpreted § 1464 as encompassing more than the obscene."

FCC v. PACIFICA FOUNDATION

3 MED.L.RPTR. 2553, 438 U.S. 726, 98 S.CT. 3026, 57 L.ED.2D 1073 (1978).

Justice STEVENS delivered the opinion of the Court and an opinion in which the Chief Justice and Justice Rehnquist joined in part.

This case requires that we decide whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.

A satiric humorist named George Carlin recorded a 12-minute monologue entitled "Filthy Words" before a live audience in a California theater. He began by referring to his thoughts about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." He proceeded to list those words and repeat them over and over again in a variety of colloquialisms. * * *

At about 2 o'clock in the afternoon on Tuesday, October 30, 1973, a New York radio station owned by respondent, Pacifica Foundation, broadcast the "Filthy Words" monologue. A few weeks later a man, who stated that he had heard the broadcast while driving with his young son, wrote a letter complaining to the commission. He stated that, although he could perhaps understand the "record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control."

The complaint was forwarded to the station for comment. In its response, Pacifica explained that the monologue had been played during a program about contemporary society's attitude toward language and that immediately before its broadcast listeners had been advised that it included "sensitive language which might be regarded as offensive to some."

* * *

On February 21, 1975, the commission issued a declaratory order granting the complaint and holding that Pacifica "could have been the subject of administrative sanctions." 56 FCC 2d 94, 99 (1975). The commission did not impose formal sanctions, but it did state that the order would be "associated with the station's license file, and in the event that subsequent complaints are received, the commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress."

In its memorandum opinion the commission stated that it intended to "clarify the standards which will be utilized in considering" the growing number of complaints about indecent speech on the airwaves. Advancing several reasons for treating broadcast speech differently from other forms of expression, the commission found a power to regulate indecent broadcasting in two statutes: 18 U.S.C.A. § 1464, which forbids the use of "any obscene, indecent, or profane language by means of radio communications," and 47 U.S.C.A. § 303(g), which requires the commission to "encourage the larger and more effective use of radio in the public interest."

The commission characterized the language used in the Carlin monologue as "patently offensive," though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of nuisance where the "law generally speaks to *channeling* behavior more than actually prohibiting it. * * * [T]he concept of 'indecent' is intimately connected with the exposure of children to language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." 56 FCC 2d, at 98.

Applying these considerations to the language used in the monologue as broadcast by respondent, the commission concluded that certain words depicted sexual and excretory activities in a patently offensive

manner, noted that they "were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon)," and that the prerecorded language, with these offensive words "repeated over and over," was "deliberately broadcast." In summary, the commission stated: "We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. 1464."

After the order issued, the commission was asked to clarify its opinion by ruling that the broadcast of indecent words as part of a live newscast would not be prohibited. The commission issued another opinion in which it pointed out that it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it." 59 FCC 2d 892 (1976). The commission noted that its "declaratory order was issued in a specific factual context," and declined to comment on various hypothetical situations presented by the petition. It relied on its "long standing policy of refusing to issue interpretive rulings or advisory opinions when the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them."

The United States Court of Appeals for the District of Columbia reversed, with each of the three judges on the panel writing separately.

* * *

The relevant statutory questions are whether the commission's action is forbidden "censorship" within the meaning of 47 U.S.C.A. § 326 and whether speech that concededly is not obscene may be restricted as "indecent" under the authority of 18 U.S.C.A. § 1464. The questions are not unrelated, for the two statutory provisions have a common origin. Nevertheless, we analyze them separately.

Section 29 of the Radio Act of 1927 provided:

> Nothing in this act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent or profane language by means of radio communication.

The prohibition against censorship unequivocally denies the commission any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves. The prohibition, however, has never been construed to deny the commission the power to review the content of completed broadcasts in the performance of its regulatory duties.

There is nothing in the legislative history to contradict this conclusion. * * * In 1934, the anticensorship provision and the prohibition against indecent broadcasts were re-enacted in the same section, just as in the 1927 act. In 1948, when the Criminal Code was revised to include provisions that had previously been located in other titles of the United States Code, the prohibition against obscene, indecent, and profane broadcasts was removed from the Communications Act and re-enacted as § 1464 of Title 18. That rearrangement of the code cannot reasonably be interpreted as having been intended to change the meaning of the anticensorship provision.

We conclude, therefore, that § 326 does not limit the commission's authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting.

The only other statutory question presented by this case is whether the afternoon broadcast of the "Filthy Words" monologue was indecent within the meaning of § 1464. Even that question is narrowly confined by the arguments of the parties.

The commission identified several words that referred to excretory or sexual activities or organs, stated that the repetitive, deliberate use of those words in an afternoon broadcast when children are in the audience was patently offensive, and held that the broadcast was indecent. Pacifica takes issue with the commission's definition of indecency, but does not dispute the commission's preliminary determination that each of the components of its definition was present. Specifically, Pacifica does not quarrel with the conclusion that this afternoon broadcast was patently offensive. Pacifica's claim that the broadcast was not indecent within the meaning of the statute rests entirely on the absence of prurient appeal.

The plain language of the statute does not support Pacifica's argument. The words "obscene, indecent, or profane" are written in the disjunctive, implying that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of "indecent" merely refers to nonconformance with accepted standards of morality.

Pacifica argues, however, that this Court has construed the term "indecent" in related statutes to mean "obscene," as that term was defined in *Miller v. California*. Pacifica relies most heavily on the con-

struction this Court gave to 18 U.S.C.A. § 1461 in *Hamling v. United States*, 418 U.S. 87. *Hamling* rejected a vagueness attack on § 1461, which forbids the mailing of "obscene, lewd, lascivious, indecent, filthy or vile" material.

* * *

In *Hamling* the Court agreed with Justice Harlan that § 1461 was meant only to regulate obscenity in the mails; by reading into it the limits set by *Miller v. California*, 413 U.S. 15, the Court adopted a construction which assured the statute's constitutionality.

The reasons supporting *Hamling's* construction of § 1461 do not apply to § 1464. * * * The former statute deals primarily with printed matter enclosed in sealed envelopes mailed from one individual to another; the latter deals with the content of public broadcasts. It is unrealistic to assume that Congress intended to impose precisely the same limitations on the dissemination of patently offensive matter by such different means.[17]

Because neither our prior decisions nor the language or history of § 1464 supports the conclusion that prurient appeal is an essential component of indecent language, we reject Pacifica's construction of the statute. When that construction is put to one side there is no basis for disagreeing with the commission's conclusion that indecent language was used in this broadcast.

Pacifica makes two constitutional attacks on the commission's order. First, it argues that the commission's construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required even if Pacifica's broadcast of the "Filthy Words" monologue is not itself protected by the First Amendment. Second, Pacifica argues that inasmuch as the recording is not obscene, the Constitution forbids any abridgment of the right to broadcast it on the radio.

The first argument fails because our review is limited to the question whether the commission has the authority to proscribe this particular broadcast. As the commission itself emphasized, its order was "issued in a specific factual context." 59 FCC 2d, at 893. That approach is appropriate for courts as well as the commission when regulation of indecency is at stake, for indecency is largely a function of context—it cannot be adequately judged in the abstract.

The approach is also consistent with *Red Lion Broadcasting Co. Inc. v. FCC*, 395 U.S. 367. In that case the Court rejected an argument that the commission's regulations defining the fairness doctrine were so vague that they would inevitably abridge the broadcasters' freedom of speech.

* * *

It is true that the commission's order may lead some broadcasters to censor themselves. At most, however, the commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern.

* * *

When the issue is narrowed to the facts of this case, the question is whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances. For if the government has any such power, this was an appropriate occasion for its exercise.

The words of the Carlin monologue are unquestionably "speech" within the meaning of the First Amendment. It is equally clear that the commission's objections to the broadcast were based in part on its content. The order must therefore fall if, as Pacifica argues, the First Amendment prohibits all governmental regulation that depends on the content of speech. Our past cases demonstrate, however, that no such absolute rule is mandated by the Constitution.

The classic exposition of the proposition that both the content and the context of speech are critical elements of First Amendment analysis is Justice Holmes' statement for the Court in *Schenck v. United States*. * * * Other distinctions based on content have been approved in the years since *Schenck*. The government may forbid speech calculated to provoke a fight. See *Chaplinsky v. New Hampshire*, 315 U.S. 568. It may pay heed to the " 'commonsense differences' between commercial speech and other

17. But it is well settled that the First Amendment has a special meaning in the broadcasting context. See, e.g., *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775; *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367; *Columbia Broadcasting System, Inc. v. Democratic Nat. Committee*, 412 U.S 94. For this reason, the presumption that Congress never intends to exceed constitutional limits, which supported Hamling's narrow reading of § 1461, does not support a comparable reading of 1464.

varieties." *Bates v. State Bar.* It may treat libels against private citizens more severely than libels against public officials. See *Gertz v. Robert Welch, Inc.* Obscenity may be wholly prohibited. *Miller v. California.* And only two Terms ago we refused to hold that a "statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment." *Young v. American Mini Theatres.*

The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content.[20] Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. *Roth v. United States.* But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four letter words, First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends. * * *

Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. * * * Nonetheless, the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its "social value," to use Justice Murphy's term, vary with the circumstances. Words that are commonplace in one setting are shocking in another.

* * *

In this case it is undisputed that the content of Pacifica's broadcast was "vulgar," "offensive," and "shocking." Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the commission's action was constitutionally permissible.

We have long recognized that each medium of expression presents special First Amendment problems. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 502–503. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve "the public interest, convenience, and necessity." Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, *Miami Herald Publishing Co. v. Tornillo,* it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism. *Red Lion Broadcasting Co., Inc. v. FCC.*

The reasons for these distinctions are complex, but two have relevance to the present case. *First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans.* [Emphasis added.] Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

Second, broadcasting is uniquely accessible to children, even those too young to read. [Emphasis added.] * * * Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion pictures theaters, for example, may be prohibited from making indecent material available to children. We

20. Although neither Justice Powell nor Justice Brennan directly confronts this question, both have answered it affirmatively, the latter explicitly, * * *, and the former implicitly by concurring in a judgment that could not otherwise stand.

held in *Ginsberg v. New York*, that the government's interest in the "well being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.

It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Justice Sutherland wrote, a "nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard." We simply hold that when the commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

The judgment of the court of appeals is reversed.

* * *

Justice POWELL, with whom Justice Blackmun joins, concurring.

* * *

* * * Because I do not subscribe to all that is said * * * however, I state my views separately.

* * * The issue, however, is whether the commission may impose civil sanctions on a licensee radio station for broadcasting the monologue at two o'clock in the afternoon. The commission's primary concern was to prevent the broadcast from reaching the ears of unsupervised children who were likely to be in the audience at that hour. In essence, the commission sought to "channel" the monologue to hours when the fewest unsupervised children would be exposed to it. In my view, this consideration provides strong support for the commission's holding.

* * *

As the foregoing demonstrates, my views are generally in accord with what is said in part of Justice Stevens' opinion. I therefore join that portion of his opinion. [H]owever, I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection, and which is less "valuable" and hence deserving of less protection. In my view the result in this case does not turn on whether Carlin's monologue, viewed as a whole, or the words that comprise it, have more or less "value" than a candidate's campaign speech. This is a judgment for each person to make, not one for the judges to impose upon him.

The result turns instead on the unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interest of unwilling adults in not being assaulted by such offensive speech in their homes. Moreover, I doubt whether today's decision will prevent any adult who wishes to receive Carlin's message in Carlin's own words from doing so, and from making for himself a value judgment as to the merit of the message and words.

Justice STEWART, with whom Justice Brennan, Justice White, and Justice Marshall join, dissenting.

* * * The commission held, and the Court today agrees, that "indecent" is a broader concept than "obscene" as the latter term was defined in *Miller v. California*, because language can be "indecent" although it has social, political or artistic value and lacks prurient appeal. But this construction of § 1464, while perhaps plausible, is by no means compelled. To the contrary, I think that "indecent" should properly be read as meaning no more than "obscene." Since the Carlin monologue concededly was not "obscene," I believe that the commission lacked statutory authority to ban it. Under this construction of the statute, it is unnecessary to address the difficult and important issue of the commission's constitutional power to prohibit speech that would be constitutionally protected outside the context of electronic broadcasting.

* * *

Justice BRENNAN, with whom Justice Marshall joins, dissenting.

I agree with Justice Stewart that, under *Hamling v. United States*, and *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123 (1973), the word "in-

decent" in 18 U.S.C.A. § 1464 must be construed to prohibit only obscene speech. I would, therefore, normally refrain from expressing my views on any constitutional issues implicated in this case. However, I find the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose *its* notions of propriety on the whole of the American people so misguided, that I am unable to remain silent.

* * *

* * * Yet despite the Court's refusal to create a sliding scale of First Amendment protection calibrated to this Court's perception of the worth of a communication's content, and despite our unanimous agreement that the Carlin monologue is protected speech, a majority of the Court nevertheless finds that, on the facts of this case, the FCC is not constitutionally barred from imposing sanctions on Pacifica for its airing of the Carlin monologue. This majority apparently believes that the FCC's disapproval of Pacifica's afternoon broadcast of Carlin's "Dirty Words" recording is a permissible time, place, and manner regulation. Both the opinion of my Brother Stevens and the opinion of my Brother Powell rely principally on two factors in reaching this conclusion: (1) the capacity of a radio broadcast to intrude into the unwilling listener's home, and (2) the presence of children in the listening audience. * * *

Without question, the privacy interests of an individual in his home are substantial and deserving of significant protection. In finding these interests sufficient to justify the content regulation of protected speech, however, the Court commits two errors. First, it misconceives the nature of the privacy interests involved where an individual voluntarily chooses to admit radio communications into his home. Second it ignores the constitutionally protected interests of both those who wish to transmit and those who desire to receive broadcasts that many—including the FCC and this Court—might find offensive.

* * *

Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the "off" button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive a message entitled to full First Amendment protection. To reach a contrary balance, as does the Court, is clearly, to follow Justice Stevens' reliance on animal metaphors, "to burn the house to roast the pig."

The Court's balance, of necessity, fails to accord proper weight to the interests of listeners who wish to hear broadcasts the FCC deems offensive. It permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority. No decision of this Court supports such a result. Where the individuals comprising the offended majority may freely choose to reject the material being offered, we have never found their privacy interests of such moment to warrant the suppression of speech on privacy grounds.

* * *

Most parents will undoubtedly find understandable as well as commendable the Court's sympathy with the FCC's desire to prevent offensive broadcasts from reaching the ears of unsupervised children. Unfortunately, the facial appeal of this justification for radio censorship masks its constitutional insufficiency.

* * * [W]e have made it abundantly clear that "under any test of obscenity as to minors * * * to be obscene 'such expression must be, in some significant way, erotic.' " Quoting *Cohen v. California*, 403 U.S., at 20.

Because the Carlin monologue is obviously not an erotic appeal to the prurient interests of children, the Court, for the first time, allows the government to prevent minors from gaining access to materials that are not obscene, and are therefore protected, as to them. It thus ignores our recent admonition that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." [3] The Court's refusal to follow its own pronouncements is especially lamentable since it has

3. It may be that a narrowly drawn regulation prohibiting the use of offensive language on broadcasts directed specifically at younger children constitutes one of the "other legitimate proscription[s]" alluded to in *Erznoznik*. This is so both because of the difficulties inherent in adapting the *Miller* formulation to communications received by young children, and because such children are "not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees." *Ginsberg v. New York*. I doubt, as my Brother Stevens suggests * * * that such a limited regulation amounts to a regulation of speech based on its content, since, by hypothesis, the only persons at whom the regulated communication is directed are incapable of evaluating its content. To the extent that such a regulation is viewed as a regulation based on content, it marks the outermost limits to which content regulation is permissible.

the anomalous subsidiary effect, at least in the radio context at issue here, of making completely unavailable to adults material which may not constitutionally be kept even from children. This result violates in spades the principle of *Butler v. Michigan*, 352 U.S. 380 (1957). * * * Speaking for the Court, (in *Butler*). Justice Frankfurter reasoned:

> "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. * * *"

* * *

As demonstrated above, neither of the factors relied on by both the opinion of by Brother Powell and the opinion of my Brother Stevens—the intrusive nature of radio and the presence of children in the listening audience—can, when taken on its own terms, support the FCC's disapproval of the Carlin monologue. These two asserted justifications are further plagued by a common failing: the lack of principled limits on their use as a basis for FCC censorship. No such limits come readily to mind, and neither of the opinions comprising the Court serve to clarify the extent to which the FCC may assert the privacy and children-in-the-audience rationales as justification for expunging from the airways protected communications the commission finds offensive. * * * For my own part, even accepting that this case is limited to its facts,[7] I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs and where, until today, it resided: in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand.

* * *

It is quite evident that I find the Court's attempt to unstitch the warp and woof of First Amendment law in an effort to reshape its fabric to cover the patently wrong result the Court reaches in this case dangerous as well as lamentable. Yet there runs throughout the opinions of my Brothers Powell and Stevens another vein I find equally disturbing: a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain.

* * *

Today's decision will thus have its greatest impact on broadcasters desiring to reach, and listening audiences comprised of persons who do not share the Court's view as to which words or expressions are acceptable and who, for a variety of reasons, including a conscious desire to flout majoritarian conventions, express themselves using words that may be regarded as offensive by those from different socio-economic backgrounds. In this context, the Court's decision may be seen for what, in the broader perspective, it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking.

* * *

COMMENT

The Supreme Court's *Pacifica* decision won immediate praise from those concerned about moral issues in broadcasting and brought immediate concerns to broadcasters. Despite the fact that the ruling was narrow, with the Supreme Court (and the FCC) constantly cautioning that it was confined to the specific facts of WBAI's broadcast, the FCC was promptly confronted with new complaints that other broadcasters were transmitting indecency.

The FCC moved quickly to assure broadcasters that it did not intend to exercise the potentially broad supervisory power over content that *Pacifica* could be read to imply. The opportunity to do that came when it was asked to deny license renewal to WGBH-TV, an educational broadcasting station in Boston. Morality in Media of Massachusetts made the following allegations concerning WGBH's programming:

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7. Having insisted that it seeks to impose sanctions on radio communications only in the limited circumstances present here, I believe that the FCC is estopped from using either this decision or its own orders in this case, 56 FCC 2d 94 (1975) and 59 FCC 2d 892 (1967), as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing the relentless repetition, for longer than a brief interval, of "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." 56 FCC 2d, at 98. For surely broadcasters are not now on notice that the commission desires to regulate any offensive broadcast other than the type of "verbal shock treatment" condemned here, or even this "shock treatment" type of offensive broadcast during the late evening.

> Petitioner alleges that WGBH-TV "has failed in its responsibility to the community by consistently broadcasting offensive, vulgar and material otherwise harmful to children without adequate supervision or parental warnings."

The FCC dismissed the petition and granted WGBH's application for renewal. In doing so, it observed:

> [*Pacifica*] affords this Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station. We intend strictly to observe the narrowness of the *Pacifica* holding. In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the "indecent" words in question.

In re Application of WGBH Educ. Found., 69 FCC 2d 1250, 1954 (1978).

Basically, the FCC told the broadcasting industry that it would only be concerned about the seven specific words Carlin had used and then only when they were used repetitiously. The FCC found no other broadcasters guilty of indecent utterances between *Pacifica* in 1975 and April of 1987. Indeed, if anything, the FCC tried to get out of these controversies by, as previously noted, briefly taking the posture that it would refer section 1464 complaints to the Justice Department for prosecution and take action against broadcasters only after prosecutions, if any, came to a close.

On April 29, 1987, however, this state of affairs changed when the FCC issued four decisions that suddenly indicated a substantially renewed FCC interest in indecency. Three of the decisions involved broadcast stations, one involved an amateur radio operator. Taken together, they indicated that the FCC was abandoning its earlier cautions that it would interpret *Pacifica* narrowly. The commission stated that it would no longer focus on *just* the Carlin "seven dirty words" and that it was abandoning its policy of acting only when it found repetitious use of those words. Instead, the FCC returned to the generic definition of broadcast indecency in the WBAI case and said that action was likely whenever there were broadcasts that depicted or described sexual or excretory activities or organs in a patently offensive fashion for the broadcast media at a time of day when children were likely to be in the audience. It even expressed reservations about some earlier FCC cases suggesting that broadcasters could assume that children weren't in the audience between 10:00 P.M. and 6:00 A.M.—that that period was a kind of "safe harbor." See generally New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees, 62 RR 2d 1218 (1987).

This new "get tough" policy of the FCC was appealed to the U.S. Court of Appeals for the D.C. Circuit. For the most part, the FCC's new policy was upheld. Judge Ginsburg's decision below gives a good account of this new "get tough" policy.

ACTION FOR CHILDREN'S TELEVISION v. FCC

852 F.2D 1332 (D.C.CIR. 1988).

GINSBURG, J.:

Petitioners in this case are commercial broadcasting networks, public broadcasting entities, licensed broadcasters, associations of broadcasters and journalists, program suppliers, and public interest groups; they seek review of a December 1987 FCC order which affirmed, on reconsideration, three April 1987 rulings, and announced a new gauge for administering the restraint, imposed by 18 U.S.C. § 1464 (1982), on the use of indecent language in radio communications. The Commission also warned broadcasters that "10:00 p.m. can no longer be considered the hour after which indecent programming may be aired"; instead, 12:00 midnight is the FCC's "current thinking" on "a reasonable delineation point." *In re Infinity Broadcasting Corp. of Pennsylvania*, 64 Rad. Reg. 2d (P&F) 211, 219 n.47 (1987) (*Reconsideration Order*). * * *

Adhering to the view that broadcast material that is indecent but not obscene may be channeled to certain times of day, but not proscribed entirely, the FCC indicated in its *Reconsideration Order* that 12:00 midnight to 6:00 a.m. would be "safe harbor" hours for such material. * * * Petitioners, joined by intervenors ACLU *et al.*, contend that this time restraint, stretching to all but the hours most listeners are asleep, lacks record support and, in violation of the first amendment, effectively denies adults access to constitutionally-protected material.

We hold that the FCC adequately explained why it decided to change its enforcement standard. Consideration of petitioners' vagueness challenge, we conclude, is not open to lower courts, in view of the Supreme Court's 1978 *Pacifica* decision. Inter-

venors' overbreadth plea, we rule, is not effective argument to the extent that it attacks the FCC's generic definition of indecent material.

We further hold, however, that the FCC failed to adduce evidence or cause, particularly in view of the first amendment interest involved, sufficient to support its hours restraint; consequently, we vacate two of the FCC's declaratory orders and remand for reconsideration of the times at which programs containing indecent material may be broadcast.

In 1978, in *Pacifica*, the Supreme Court upheld the FCC's authority to regulate a radio broadcast that is indecent but not obscene. The Court ruled that 47 U.S.C. § 326 (1982), which forbids FCC "censorship," does not deny the Commission power "to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting." 438 U.S. at 738. The Court concluded that the specific broadcast material in question in *Pacifica*—a recording of a George Carlin monologue titled "Filthy Words"—was indecent within the meaning of section 1464. In so ruling, the court rejected the broadcaster's objection that the definition of indecent material must include the element of prurient appeal. *Id.* at 741.

In the Commission's 1975 *Pacifica* order, 56 F.C.C. 2d 94 (1975), the FCC stated that "to avoid the error of overbreadth," it was important to be "explicit" about "whom we are protecting and from what"; the Commission then advanced this definition of "the concept of 'indecent' " in relation to broadcast material: "exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." (also reiterating that regulation is in order only "at times of the day when there is a reasonable risk that children may be in the audience").

Following the Supreme Court's narrow affirmance of the Commission's 1975 *Pacifica* order, * * * the FCC consistently reported that it would not essay expansive interpretation of the indecency concept.

Repetitious use of Carlin's "seven dirty words" effectively became the FCC's yardstick for "indecency," and broadcasts after 10:00 p.m. were deemed not actionable. No broadcasts were in fact found actionable after 1975, until the instant rulings.

On April 29, 1987 the Commission released three decisions, each of which declared "indecent" material which would not have been so identified under the prior FCC standard; two of the broadcasts had aired after 10:00 p.m. *In re Infinity Broadcasting Corp. of Pennsylvania*, 2 FCC Rcd 2705 (1987) (*Infinity*); *In re Pacifica Found., Inc.*, 2 FCC Rcd 2698 (1987) (*Pacifica Foundation*); *In re Regents of the University of California*, 2 FCC Rcd 2703 (1987) (*Regents of U.C.*) In the *Infinity* case, the FCC held actionable portions of the Howard Stern talk show, which airs from 6:00 to 10:00 a.m. Monday through Friday; in *Pacifica Foundation*, the Commission made a similar ruling regarding excerpts of a play titled "Jerker," broadcast between 10:00 and 11:00 p.m. on a Sunday evening; in *Regents of U.C.*, the FCC held actionable the broadcast of the song "Makin' Bacon" on a Saturday after 10:00 p.m.

Together with its decision in the *Infinity*, *Pacifica Foundation*, and *Regents of U.C.* cases, the FCC issued on April 29, 1987, a Public Notice summarizing the three orders released that day and "put[ting] all broadcast and amateur radio licensees on notice as to new standards that the Commission will apply in enforcing the prohibition against obscene and indecent transmissions." *New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees*, 62 Rad.Reg.2d (P&F) 1218 (1987). The Commission received multiple petitions for reconsideration and clarification. In response, the FCC issued a single reconsideration order in which it affirmed the three individual rulings, addressed comments and questions it had received, and elaborated on the rationale for the change in policy. Petitioners now seek review of the reconsideration order.

As a threshold matter, the FCC contends that this court should follow the model set by the High Court in *Pacifica*, and accordingly review nothing more than the three specific FCC holdings declaring material "indecent as broadcast." The Commission thus would have us consider only the questions whether, in each case, the broadcast material was indecent, * * * and if it was, then whether the indecent material was aired at a time when there was a reasonable risk that children may have been in the audience. * * * The agency action we confront, however, appears to us sufficiently distinct from that involved in *Pacifica* as to warrant a different judicial response.

The *Pacifica* Court had before it a single, narrowly focused agency order. Though the FCC had articulated a generic definition of indecency, * * * the Commission also noted that "the number of words which fall within the definition of indecent is clearly limited." * * * On reconsideration, the Commis-

sion declined to respond to a request that it apply the generic definition to news and public affairs programming. * * * In its brief to the Supreme Court the FCC emphasized the narrowness of its ruling.

In contrast, in the present cases the FCC has left no doubt that it has stated a standard it expects to apply generally, not a prescription peculiarly fitted to the three individual broadcasts. The Commission, indeed, suggested no theme or principle uniting the three disparate cases other than the generic definition itself.

The FCC's current procedural course differs notably from the route the Commission followed in the first *Pacifica* case. The three individual rulings here were accompanied by a Public Notice alerting all broadcasters to the new, generic standard by which broadcasts would be judged.

We conclude that the agency has employed the informal adjudication format to promulgate a rule of general applicability. We therefore address petitioners' and intervenors' challenges to the FCC's generic definition of indecency and the specification of the times at which indecent material may be broadcast.

The FCC acknowledges a change of regulatory course: The Commission now measures broadcast material against the generic definition of indecency, while formerly "no action was taken unless material involved the repeated use, for shock value, of words similar or identical to those satirized in the Carlin "Filthy Words' monologue." * * * Petitioners charge that the Commission has failed to supply an adequate explanation for the change.

The explanation offered by the Commission, in its *Reconsideration Order*, is that it found the deliberately-repeated-use-of-dirty-words policy "unduly narrow as a matter of law" and inconsistent with its obligation responsibly to enforce section 1464. * * * The former approach permitted the unregulated broadcast of any material that did not contain Carlin's "filthy words," no matter how the material might affect children exposed to it. It made no legal or policy sense, the FCC said, to regulate the Carlin monologue but not "material that portrayed sexual or excretory activities or organs in as patently offensive a manner * * * simply because it avoided certain words."

We find the FCC's explanation adequate. Short of the thesis that *only* the seven dirty words are properly designated indecent—an argument petitioners disavow—some more expansive definition must be attempted. The FCC rationally determined that its former policy could yield anomalous, even arbitrary, results. No reasonable formulation tighter than the one the Commission has announced has been suggested in this review proceeding. The difficulty, or "abiding discomfort," we conclude, is not the absence of "reasoned analysis" on the Commission's part, but the "[v]agueness * * * inherent in the subject matter." *Pacifica Found. v. FCC*, 556 F.2d at 35 (Leventhal, J., dissenting). We turn next to that issue.

Petitioners charge that the term "indecent" is inherently unclear, and that the FCC's generic definition of indecency adds nothing significant in the way of clarification. The Commission's definition, petitioners therefore contend, provides broadcasters no meaningful guide identifying the category of material subject to regulation; accordingly, petitioners urge, the definition should be ruled unconstitutionally vague. In our view the Supreme Court's disposition of *Pacifica* stops "what the Constitution calls an 'inferior court' " from addressing this question on the merits.

The generic definition of indecency now employed by the FCC is virtually the same definition the Commission articulated in the order reviewed by the Supreme Court in the *Pacifica* case.[8] However, the Court did not address, specifically, whether the FCC's definition was on its face unconstitutionally vague. The Court did hold the Carlin monologue indecent within the meaning of section 1464. 438 U.S. at 741. We infer from this holding that the Court did not regard the term "indecent" as so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

In sum, if acceptance of the FCC's generic definition of "indecent" as capable of surviving a va-

8. In 1975 the Commission included in its definition of indecent material the element that material be broadcast "at times of the day when there is a reasonable risk that children may be in the audience." In re Pacifica Found., 56 F.C.C. 2d 94, 98 (1975). The Commission now treats the nature of the material involved and the time of day when it is broadcast separately; the time of a broadcast is pertinent to whether it is actionable, not whether it is indecent. Nevertheless, a violation of section 1464 must be predicated on the same components relevant under the 1975 formulation: whether material is indecent and whether it was broadcast when there was a reasonable risk of children in the audience. *Reconsideration Order*, 64 Rad. Reg. 2d at 213 n.6.

gueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction.

Intervenors ACLU *et al.* argue that the FCC's generic definition of indecency is substantially overbroad. As we read *Pacifica*, only two members of the five-member majority thought it in order to rule on overbreadth, so we proceed to address that issue on the merits. The ACLU's challenge is predicated on the absence of redemption from indecency status for material that has "serious merit." We hold that "serious merit" need not, in every instance, immunize indecent material from FCC channeling authority.

* * *

According to intervenors, a proper definition of indecency would include the requirement that the "work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Brief of Intervenors ACLU *et al.* at 30 (quoting from *Miller v. California*, 413 U.S. 15, 24 (1973)). Observing that social value entitles otherwise unprotected obscene expression to first amendment protection, the ACLU contends that "it must also be true that social importance requires full protection for otherwise merely indecent' expression." * * *

Indecent but not obscene material, we reiterate, qualifies for first amendment protection whether or not it has serious merit. Children's access to indecent material, however, may be regulated, because "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults * * * .' " *Ginsburg v. New York*, 390 U.S. 629, 638 (1968) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)). Channeling is designed to protect unsupervised children.[12] Some material that has significant social value may contain language and descriptions as offensive, from the perspective of parental control over children's exposure, as material lacking such value.[13] Since the overall value of a work will not necessarily alter the impact of certain words or phrases on children, the FCC's approach is permissible under controlling case law: merit is properly treated as a factor in determining whether material is patently offensive, but it does not render such material *per se* not indecent. * * * The FCC's definition, therefore, is not vulnerable to the charge that it is substantially overbroad.[14]

We have upheld the FCC's generic definition of indecency in light of the sole purpose of that definition: to permit the channeling of indecent material, in order to shelter children from exposure to words and phrases their parents regard as inappropriate for them to hear. Petitioners press two linked objections to the FCC's "current thinking" that 12:00 midnight is the hour after which indecent material may be broadcast without sanctions. The FCC's channeling decision is arbitrary and capricious, petitioners contend, because it is not based on an adequate factual or analytic foundation. * * * Tied to and coloring that contention, petitioners charge that the Commission's action regarding channeling violates the first amendment because it reduces adults to seeing and hearing material fit only for children. See *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

We agree that, in view of the curtailment of broadcaster freedom and adult listener choice that channeling entails, the Commission failed to consider fairly and fully what time lines should be drawn. We therefore vacate, in the *Pacifica Foundation and Regents of U.C.* cases, the FCC's ruling that the broadcast under review was actionable, and we remand those cases to the agency for thoroughgoing reconsideration of the times at which indecent material may be aired.

We are impelled by the Supreme Court's *Pacifica* decision, however, to affirm the declaratory ruling in *Infinity*. The FCC in that case held actionable portions of a talk show that airs 6:00–10:00 a.m. Monday through Friday. In *Pacifica*, the Court af-

12. Broadcasting is a unique medium; it is not possible simply to segregate material inappropriate for children, as one may do, e.g., in an adults-only section of a bookstore. Therefore, channeling must be especially sensitive to the first amendment interests of broadcasters, adults, and parents.

13. The Carlin monologue itself may be an example of indecent material possessing significant social value. *See Pacifica*, 438 U.S. at 730 (broadcaster explained that the "monologue had been played during a program about contemporary society's attitude toward language" and that "Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words").

Other examples that come readily to mind include descriptions of the doings of Gargantua and Pantagruel in Rabelais' classic, certain passages in the works of Joyce, words and phrases found in the writings of D.H. Lawrence, James Baldwin, and Frank Harris.

14. Though declining to defer absolutely to broadcasters' judgments of what is or is not indecent, the FCC has assured this court, at oral argument, that it will continue to give weight to reasonable licensee judgments when deciding whether to impose sanctions in a particular case. *Cf. Reconsideration Order*, 64 Rad. Reg. 2d at 218–19 paras. 26, 27 & n.44. Thus, the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.

firmed a similar declaratory order regarding material broadcast 2:00 p.m. on a Tuesday. No principle has been suggested to us under which we might rationally command different treatment of the *Infinity* early morning program and the *Pacifica* early afternoon broadcast, viewing those broadcasts in the context of the parent-child concerns underpinning the FCC's indecent speech regulation. Having upheld the Commission's standard for "indecent material," we conclude that the FCC's adjudication in *Infinity* must remain in place just as the Supreme Court ordered with respect to the Commission's adjudication in *Pacifica*.

Each of the April 29, 1987 rulings reported an FCC finding that the broadcast occurred at a time of day when there was a reasonable risk that children may have been in the audience. In *Pacifica Foundation*, involving a 10:00–11:00 p.m. broadcast, the Commission relied on ratings data indicating that "approximately 112,200 children aged 12–17 are in the Los Angeles metro survey area radio audience per average quarter hour between 7 p.m. and midnight on Sunday night." 2 FCC Rcd at 2699. In *Regents of U.C.*, involving a program aired after 10:00 p.m., available data indicated that

> approximately 1,200 children between 12 and 17 years of age are still in the radio audience per average quarter hour in the Santa Barbara area between 7 p.m. and midnight on Saturday evenings. There are approximately 4,900 children within this age group within the City of Santa Barbara itself and 27,800 in the county. 2 FCC Rcd at 2704 n. 10.

Even were we to treat each of the two rulings solely as an ad hoc adjudication, we would regard the evidence on which the Commission rested its channeling decisions as insubstantial, and its findings more ritual than real. It is familiar law that an agency treads an arbitrary course when it fails to "articulate any rational connection between the facts found and the choice made." We conclude that the Commission followed such a course here.

In each instance under inspection the cited population figures appear to estimate the number of teens in the *total* radio audience. There is no indication of the size of the predicted audience for the specific radio stations in question. * * *

More troubling, the FCC ventures no explanation why it takes teens aged 12–17 to be the relevant age group for channeling purposes.[16] In the Commission's 1976 legislative proposal, cited to the Supreme Court in the FCC's *Pacifica* brief, the Commission would have required broadcasters to minimize the risk of exposing to indecent material children *under* age 12. The FCC reasoned: "Age 12 was selected since it is the accepted upper limit for children's programming in the industry and at the Commission. The Commission considered using the generally recognized age of majority—18—but concluded that it would be virtually impossible for a broadcaster to minimize the risk of exposure to 18-year-olds." * * * The FCC further referred to the distinction between obscene and merely indecent material in observing that "a reduced age seemed in order." * * * We cannot tell from the record before us whether the Commission is now spreading the focus of its concern to children over 12. * * * If it is thus widening its sights, that apparent change in policy warrants explanation. If, on the other hand, the FCC continues to consider children under 12 as the age group of concern, it should either supply information on the listening habits of children in the age range, or explain how it extrapolates relevant data for that population from the available ratings information.

Furthermore, we note that in the Los Angeles case there is no basis for comparison between the number of teens estimated to be in the radio audience and the total number of teens in the listening area.

We do not, however, remand solely for reconsideration of the individual rulings. In the *Reconsideration Order* the FCC offered some advice to broadcasters:

> [W]hereas previously we indicated that 10:00 p.m. was a reasonable delineation point, we now indicate that 12:00 midnight is our current thinking as to when it is reasonable to expect that it is late enough to ensure that the risk of children in the audience is minimized and to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience. 64 Rad. Reg. 2d at 219 n.47.

The Commission next listed several competing interests * * * and said that its approach accommo-

16. The FCC notes on brief that the ratings services do not publish figures for children under 12. Brief for Respondents at 44 n.46, but the orders under review do not mention that fact. Nor did the Commission say how it uses the 12–17 age group figures to reach conclusions about the younger group.

dated them. As noted by Commissioner Dennis, however, "the arguments the majority gives in support of midnight as the critical hours may well be equally true if applied to an earlier hour." * * * We agree that the FCC's midnight advice, indeed its entire position on channeling, was not adequately thought through.

At oral argument of this case on June 1, 1988, General Counsel for the FCC suggested that if this court found the midnight safe harbor problematic, we could disregard it and permit the Commission to make future channeling decisions on a case-by-case basis. However, the FCC itself has recognized that "the effect of that approach may well be to cause broadcasters to forego the broadcast of certain protected speech altogether, rather than to channel it to late night hours." * * * In common with the Commission, we are constrained to agree with that assessment. Facing the uncertainty generated by a less than precise definition of indecency *plus* the lack of a safe harbor for the broadcast of (possibly) indecent material, broadcasters surely would be more likely to avoid such programming altogether than would be the case were one area of uncertainty eliminated. We conclude that, in view of the constitutionally protected expression interests at stake, the FCC must afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired.[18]

It is not within our authority to instruct the FCC to establish a safe harbor by means of a rulemaking proceeding. * * * We call attention, however, to the clear statement made by one Commissioner: "The fact is the Commission has no scientific body of information that conclusively establishes one time as more appropriate than another as the critical hour after which to permit broadcast of indecent speech. What is necessary is a notice of a proposed rulemaking to establish a record." * * * The inadequate record relevant to channeling made in the cases the Commission adjudicated lends support to that Commissioner's view.

The FCC noted that a channeling decision must accommodate these competing interests:

> (1) the government, which has a compelling interest in protecting children from indecent material; (2) parents, who are entitled to decide whether their children are exposed to such material if it is aired; (3) broadcasters, who are entitled to air such material at times of day when there is not a reasonable risk that children may be in the audience; and (4) adult listeners, who have a right to see and hear programming that is inappropriate for children but not obscene.

* * * At the June 1, 1988 oral argument, the FCC's General Counsel, in response to the court's inquiry, clarified the government's interest: it is the interest in protecting unsupervised children from exposure to indecent material; the government does not propose to act *in loco parentis* to deny children's access *contrary* to parents' wishes. Therefore the first two interests identified by the FCC coalesce; the government's role is to facilitate parental supervision of children's listening. "[T]he Commission is advancing the government interest in safeguarding children from patently offensive [material], so as to enable parents to decide effectively what material of this kind their children will see or hear." * * * Thus, the FCC must endeavor to determine what channeling rule will most effectively promote parental—as distinguished from government—control.

A securely-grounded channeling rule would give effect to the government's interest in promoting parental supervision of children's listening, without intruding excessively upon the licensee's range of discretion or the fare available for mature audiences and even children whose parents do not wish them sheltered from indecent speech. Such a rule would present a clearly-stated position enabling broadcasters to comprehend what is expected of them and to conform their conduct to the legal requirement.

Broadcast material that is indecent but not obscene is protected by the first amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on free-

18. In the 1987 *Pacifica Foundation* order the FCC suggested that channeling can be viewed as a valid time, place, and manner restriction on speech. We disagree. Time, place, and manner regulations must be content-neutral. Channeling, however, is a content-based regulation of speech.

Content-based restrictions ordinarily "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." * * * The Supreme Court has recognized a government's interest in "safeguarding the physical and psychological well-being of a minor" as "compelling." New York v. Ferber, 458 U.S. 747, 756–57 (1982) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)). But that interest, in the context of speech control, may be served only by carefully-tailored regulation. Here, the precision necessary to allow scope for the first amendment shielded freedom and choice of broadcasters and their audiences cannot be accomplished, we believe, unless the FCC adopts a reasonable safe harbor rule.

dom and choice in what the people say and hear. We have concluded that, under governing precedent, the FCC's definition of indecent broadcast material, though vagueness is inherent in it, is not constitutionally defective, and that the Commission's declaratory order in *Infinity*, 2 FCC Rcd 2705, must be affirmed. But we have also found that the FCC has not implemented its authority to channel such material in a reasonable manner. We therefore vacate in part the reconsideration order under review and return *Pacifica Foundation*, 2 FCC Rcd 2698, and *Regents of U.C.*, 2 FCC Rcd 2703, to the Commission for redetermination, after a full and fair hearing, of the times at which indecent material may be broadcast.

COMMENT

Pending possible review by the U.S. Supreme Court, the ACT decision seemed to settle matters. The FCC could use its "generic" definition of broadcast indecency; broadcasters would have to do their best to apply it. Some fine-tuning might be needed by the commission to justify a particular "safe harbor," but the Court seemed to welcome the safe harbor concept, if only the FCC could justify it better. The commission began to gather the information it needed to defend some specific time period.

Anticipating that it would be upheld by the court of appeals, the FCC had even indicated an intent to take action against a TV station for the prime-time showing of *Private Lessons*, a film with a story line involving seduction of a fifteen-year-old boy by his maid and including scenes of her bare breasts and buttocks. The FCC announced that it would impose a fine of $2,000 on the debtors-in-possession for KZKC-TV in Kansas City, Missouri. This marked the first time that the FCC had employed section 1484 when the "utterances" in dispute were visual rather than, as in all the prior radio cases, aural. See FCC Rulemaking Reports, par. 23,390 (1988).

On October 1, 1988, however, things changed dramatically when President Reagan signed fiscal 1989 appropriations for the FCC and other agencies. Public Law 100–459. The bill ordered the FCC to enforce its indecency standards around the clock—twenty-four hours per day. Since the congressional mandate eliminated the need to define and justify a new safe harbor, the FCC abandoned that effort. On December 21, 1988, the FCC adopted an order implementing the new total ban. Commissioner Patricia Diaz Dennis issued a separate statement, noting that she had voted to impose the ban because it was clearly what Congress wanted but expressing substantial doubts about its constitutionality. *News Notes*, 15:39 Media Law Reporter (January 10, 1989). The new FCC policy prohibiting "indecent" broadcasts twenty-four hours a day as well as the underlying law "are being challenged in courts on First Amendment grounds by a coalition of broadcasting and public-interest groups, including such diverse groups as National Association of Broadcasters and Action for Children's Television." See *Broadcasting* (January 16, 1989) p. 19.

Doubts about the constitutionality of the ban were widely shared. A similar total ban on indecent, commercial telephone messages, the Telephone Decency Act, had gone into effect July 1, 1988 [PL 100–297, sec. 6101, amending 47 U.S.C.A. § 223 (b)], but by July 19, 1988, had been enjoined from enforcement. See *Sable Communications of Calif. v. FCC*, 692 F.Supp. 1208 (C.D.Cal. 1988), prob juris. noted, January 19, 1989, 57 LW 3451 (1989).

The problem was clear. Prior FCC and judicial decisions about broadcast indecency had accepted the FCC contention that indecency was not banned but just channeled away from children. The prior law had recognized that indecent speech was protected expression under the First Amendment. Nevertheless, Congress ordered the FCC to ban indecency completely, and in late 1988 that's what the FCC did. The Supreme Court invalidated the portion of the Telephone Decency Act banning indecent speech. *Sable Communications of Calif., Inc. v. the FCC*, 109 S.Ct. ___ (1989). See Appendix B.

Earlier in 1988—prior to the *Sable* case—the Second Circuit Court of Appeals had upheld FCC regulations establishing a defense to prosecution under section 223(b) of the Federal Communications Commission Authorization Act of 1983, 47 U.S.C.A. § 223(b) (Supp. I 1983); this statute regulated interstate "dial-a-porn" services. The court, per Judge Oakes, found that the "record supports the FCC's conclusion that a scheme involving access codes, scrambling, and credit card payment is a feasible and effective way" to serve the compelling governmental interest in protecting "minors from obscene speech." See *Carlin Communications Inc. v. FCC*, 837 F.2d 546 (2d Cir. 1988).

Do you think the twenty-four-hour indecency broadcast ban is constitutional?

CHILDREN'S TELEVISION

For many years, the FCC treated children as special audience members. The 1960 Programming Policy Statement, for example, indicated that broadcasters were normally expected to provide programs for children. In 1970, largely in response to pressure from advocacy groups such as Action for Children's Television, the FCC adopted a comprehensive children's programming and advertising policy statement.

Although not as explicit as ACT wished, the 1974 Policy Statement prodded TV broadcasters to increase the amount of children's programming they offered, to schedule it throughout the week instead of clustering it in a Saturday morning children's TV ghetto, and to make a reasonable amount of it educational and informational and not just designed for entertainment. Relying on the not-then-abandoned NAB Television Code, the FCC urged broadcasters to sharply distinguish between program content and ads (notably by discouraging "host selling" in which, for example, a cartoon show host also pitches products) and appeared to rely on the NAB Code limits as to the maximum amount of commercial matter children's shows should contain. See *Children's Television Report and Policy Statement*, 50 FCC 2d 1, 31 RR 2d 1228 (1974).

After five years of experience with the 1974 Policy Statement, FCC conducted a review of its effects. In 1979, the commission concluded that the policy statement appeared to have little effect on the amount, type, or scheduling of children's programs, although it did seem to have held the commercial load of children's programs to those advocated in 1974. The commission opened a proposed rulemaking in which it said it planned to explore five options, given its conclusion that the 1974 statement was having minimal effects. One option was to rescind the 1974 statement and rely on sources other than commercial broadcasters (such as cable television or VCRs) to fulfill the needs of kids. Other options were to strengthen the policy statement—regulate more pervasively, set mandatory minimal children's TV standards for all broadcasters, develop firm renewal guidelines regarding children's programming, or work to increase the number of video outlets with hopes that some of the new outlets would better serve children. Children's Television Programming and Advertising Practices, 75 FCC 2d 138 (1979).

This proceeding languished at the FCC for years. It was pending when Ronald Reagan became president, and the deregulation-oriented commissioners he named were not anxious to take it up. Finally, under prodding from the courts (see *Washington Ass'n for Television and Children v. FCC*, 712 F.2d 677 (D.C.Cir. 1983)), the FCC acted in late 1984.

As could easily be predicted, given the philosophy of the commissioners, the FCC chose the "deregulation" option first proposed in 1979. It concluded that sources other than commercial TV (public broadcasting, cable, VCRs, etc.) could also be considered in determining whether a licensee's programming would fulfill the needs of children and abandoned most of its 1974 Policy Statement. Specifically, the FCC indicated that it no longer had any minimal expectations about amounts of children's programming, no longer would try to mandate that at least some of it be educational or instructional, and no longer was concemed about forcing broadcasters to schedule at least some programming outside of the weekend. The FCC indicated that the marketplace would generally see to it that the needs of children were met or at least would do as good a job of that as FCC rules and regulations had done since 1974.

The FCC, however, did not totally deregulate children's TV. Under the public interest standard of the Communications Act of 1934, commercial TV broadcasters had to do at least something to meet the special needs of the child audience. The FCC refused, however, to be specific about what was required; this suggested a hands-off policy. But, plainly, it also invited those unhappy with a broadcaster's service to children to respond by filing Petitions to Deny with the FCC when TV broadcasters sought license renewals. The FCC offered remarkably little guidance for either broadcasters or citizen groups as to exactly what would be expected if a broadcaster's service to children was challenged. The FCC's new policies were generally upheld by the courts. Children's Television Programming and Advertising Practices, 96 FCC 2d 634, 55 RR 2d 199 (1984), aff'd sub nom. *Action for Children's Television v. FCC*, 756 F.2d 899 (D.C. Cir. 1985).

One aspect of the FCC's regulation of children's programming, however, was not immediately sustained by the court. In 1986, the FCC clarified that

its 1984 general TV deregulation order was intended to eliminate its prior children's television commercialization guidelines. Memorandum Opinion and Order on Reconsideration, 104 FCC 2d 358 (1986). Action for Children's Television appealed this decision to the U.S. Court of Appeals for the D.C. Circuit. The court concluded that after years of saying that marketplace forces could not be relied upon to prevent overcommercialization towards children, the FCC failed to adequately justify deregulation through no more than two paragraphs and two footnotes in its 1986 decision. The court remanded the issue to the FCC, giving it an opportunity to develop a more complete justification for deregulation. *Action for Children's Television v.* FCC, 821 F.2d 741 (D.C. Cir. 1987).

In response to the remand, the FCC expanded an existing notice inquiry and notice of proposed rulemaking to include new children's television issues. Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, MM Docket No. 83–670, Further Notice of Proposed Rulemaking/Notice of Inquiry, FCC 87–338, RR 2d, Current Service, 53:365 (1987). In addition to responding to the court's remand, the FCC also asked for comment on two previously filed petitions for rulemaking from ACT. One of the petitions dealt with so-called program-length children's commercials. To ACT, some children's shows (especially children's cartoon shows) had become so intertwined with associated merchandising of toys that the entire program was, in effect, one long commercial. If so, the length of the commercial would exceed almost any commercial guideline the FCC might adopt. ACT believed such programs contrary to the public interest; the FCC at least asked for comment on the issue. Similarly, ACT had complained to the FCC about "interactive" children's TV shows. Such shows would contain signaling information that could activate toys, permitting a limited amount of interactive play with the television. ACT argued that these programs were contrary to the public interest because they could not be fully enjoyed without purchase of the home product. The FCC asked commentors to indicate whether or not they perceived any problem with such programs and, if so, why they might be contrary to the public interest.

The central issue in most of these matters is whether or not marketplace forces will meet the needs of children. The FCC generally believes that they will, especially if alternatives such as VCRs and cable television are included in the "marketplace." Proponents of special policies for children argue that the children's marketplace is different and deserves special regulation. Since the FCC for years stood in that camp, it's not surprising that the courts have asked the FCC for a full justification of its change of heart. It is likely that the FCC will, at some future date, provide such a justification. There appears to be at the moment little support on the FCC for extensive new children's rules—and then the question will be whether or not the FCC has convinced the court that it's not changing its views arbitrarily or capriciously.

In 1988, Congress forcefully attempted to intervene through the Children's Television Act of 1988. The bill (H. 3966), adopted by the House of Representatives in June 1988 and by the Senate in October, would have specifically required the FCC to consider at renewal time whether or not the station has served "the educational and informational needs of children in its overall programming." It also would have prohibited more than ten-and-one-half minutes per hour of commercials on children's programs on weekends and more than twelve minutes per hour on weekdays. Despite the fact that broadcast interest groups (notably the National Association of Broadcasters) decided not to oppose the bill, President Reagan pocket vetoed it on November 11, 1988. Whether or not Congress can be induced to repass this or similar legislation in the future is uncertain.

BROADCAST LOTTERY REGULATION

Since 1934, broadcasters have been prohibited from promoting many kinds of lotteries. The original prohibition, still found in 18 U.S.C.A. § 1304, is sweeping. It prohibits broadcast of "any advertisement of or information concerning any lottery." Until the 1970s, the prohibition was absolute. When states in the 1960s and 1970s, however, began to have state-run lotteries (e.g., the Illinois State Lottery), Congress was persuaded to amend the law slightly in 1975 to permit limited advertising or promotion of state-run lotteries by broadcasters licensed to states with such lotteries. Under these amendments, a broadcaster in such a state could promote that state's official lottery and the state-run lotteries, if any, of adjacent states. Lotteries of more distant

states, however, could not be promoted, nor could any privately run lotteries—for example, bingo games run by local churches. In addition, a broadcaster licensed to a state without a state-run lottery was unable to promote any lotteries, even if a substantial portion of that station's audience was in a state that ran one.

In late 1988, however, Congress changed the law dramatically. It enacted the somewhat misnamed Charity Games Advertising Clarification Act of 1988, P.L. 100–625, 102 Stat. 3205. By May 1990, the act will significantly change the ways broadcasters (and, for that matter, the print media) can advertise or promote lotteries—not just, as the name might imply, those run on behalf of charities but also those run for very commercial purposes. Before proceeding to a discussion of that, however, one needs to know what a lottery is.

Lotteries Defined

A lottery consists of three elements. It is the distribution of (1) a prize, (2) by chance, (3) for consideration. If any of these three elements is lacking, there's no lottery. If any of these is missing, broadcasters are, not even considering the 1989 changes in the law, free to promote the activity without legal concern.

The easiest element to define is prize. A prize is anything of value. Often it's money, as in a drawing where the prize is a cash award. It can, however, be other things. If a lucky person is given some other object of value, say a car, that's clearly a prize. Even giving somebody a day off from work with his or her place being taken by a temporary worker is a prize. In most lottery law cases, the element of "prize" is not very debatable. To those who run lotteries, the prize is the most important thing. It's what gets people to participate. It's usually pretty obvious.

Chance is a bit harder to define. Fundamentally, something is decided by chance if it's not determined by knowledge or skill. Another way of stating the same thing is to say that chance is present if a person can't do anything to determine the outcome. The selection of a winning ticket from a drum is obviously chance—there's no way that somebody can control whether a ticket is drawn or not. Things get more complex when chance and skill are mixed up. If "winners" are drawn from those who can give the name of the first president of the United States, chance prevails. If, on the other hand, winners are chosen from a non-trivial test of knowledge administered to a randomly selected group of people, then the winner is determined by skill rather than by chance, and a lottery isn't present. Most "games of chance," obviously, involve chance.

Finally, there's consideration. The idea here is simple. If somebody has to give up something of value in order to compete for a prize, then whatever is given up is the "consideration." In the classic raffle situation, for example, the consideration would be whatever you'd pay for a ticket to enter the raffle. Sometimes consideration gets trickier. If you do something you would not routinely do—for example, take a test drive in an automobile—then the time you spend doing that can equal consideration. If, on the other hand, you're simply asked to do something most people do all the time—go to a grocery store and drop off an entry coupon or send in a postcard—then that's not consideration. Having to have a phone in order to respond to a station call-in contest isn't consideration, but having to purchase a newspaper in order to get an entry form is. In this area, recent judgments of the FCC and similar authorities must sometimes be tracked carefully.

There's one more important thing about consideration. It only "counts" under lottery law if the consideration flows to the person providing the prize. Two examples will explain this principle. First, consider a classical raffle. Somebody, a church, say, has a bicycle to raffle off. The church sells tickets, keeps the money, and gives the bicycle to the winner. Consideration in a lottery law sense is present here. The consideration went to the party giving the prize. Suppose, on the other hand, that a bicycle store rents a booth at a state fair to promote their business. All persons who attend the fair are eligible to drop by the bicycle store's booth and receive a ticket that may win them a free bicycle at the end of the fair. Although people had to pay to enter the fairgrounds, tickets for the bicycle drawing are free. In this case, there's probably no consideration. The money paid didn't go to the bicycle shop. Instead, it went to the fair authorities. Millions of people go to the fair, and few, probably, do so just to enter the bicycle drawing. Advertising the fair and even advertising the bike shop would be okay—even under pre-1988 lottery law.

The simplest way to avoid problems under lottery law is to take away any of these three elements. If

there's no prize, no chance, or no consideration—there's no lottery. In that case, there's no need to be concerned about unlawfully promoting a lottery.

What Promotions of Lotteries are Lawful?

Prior to 1975, the answer to the above question for broadcasters was simple: None. Lotteries, even if run by churches for the noblest of causes, could not be promoted. They could be reported as news, but if the news account would tend to encourage others to gamble—especially by telling them exactly how to do so—even that was unlawful.

In 1975, as previously noted, Congress allowed broadcasters licensed to states that had state-run lotteries to promote those state-run lotteries and the state-run lotteries, if any, of adjacent states. The law didn't change with regard to private lotteries. Promotion of the church bingo game was still out.

The Charity Games Advertising Clarification Act of 1988 will change things substantially. Approved by President Reagan on November 7, 1988, most of its provisions go into effect in May 1990. The new law defers to federalism. Much more than in the past, what broadcasters can do will be determined by state law. Congress, in fact, delayed implementation of the act for eighteen months after adoption so that states could change their laws dealing with lotteries and lottery advertising if they wanted to do so. The act makes the following basic changes in lottery promotion law.

STATE-RUN LOTTERIES. Congress removed the "adjacent state" provision of current lottery law. Unless the state to which the broadcaster is licensed has or enacts a law to the contrary, broadcasters licensed to states with state-run lotteries will in May 1990 be able to promote any state-run lotteries anywhere in the U.S. However, broadcasters in states without state-run lotteries will not be able to promote state-run lotteries at all.

PRIVATELY RUN LOTTERIES. Assuming that the lottery is lawful under state law, a big assumption in many states, and that the state in which the broadcaster is licensed has not adopted any contrary lottery advertising legislation, broadcasters will be able to advertise or promote many private lotteries in 1990. All lawful lotteries run by "not-for-profit organizations or by a governmental organization" are okay. When it comes to lawful lotteries run by for-profit organizations, the test is whether or not the "advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme * * * is * * * conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization." P.L. 100–625, sec. 2(a). This seems to mean that businesses can run occasional lotteries, if allowed by state law, and broadcasters can promote the business and its lottery, unless the state adopts laws restricting lottery advertising or promotion. Depending on state law, broadcasters will also be able to run station promotions or contests that are lotteries. Promotion of unlawful lotteries, however, remains illegal.

LOTTERIES RUN BY AMERICAN INDIANS. Another law adopted in 1988, the Indian Gaming Statute, immediately permitted most broadcasters to advertise most forms of gambling conducted on Indian reservations. The law is very complex. Sometimes Indian games can only be advertised after approval of a compact between the Indian tribe and the secretary of interior or by a newly established National Indian Gaming Commission. Sometimes games run by contractors rather than by Indians themselves also may not be readily promoted. Broadcasters view this as potentially a very lucrative market, since gambling on Indian reservations is now a multimillion dollar activity.

CASINO GAMBLING. The new law doesn't change things at all when it comes to advertising casino gambling. Even if such gambling is lawful (for example, in Nevada or in Atlantic City), it's still contrary to federal law to promote it. Ads can be run for hotels where "casino" is part of the full name of the hotel, but the ads still can't promote the casino aspect of the operation. Instead they can stress accommodations, food, general entertainment, or the like—but not gambling.

COMMENT

One of the most interesting aspects of the new statute is how much control it gives the states over broadcast

content. Generally, broadcast content regulation has been preempted by the federal government, mostly by the FCC, and the states have been prohibited from dealing with it. Here, however, states will have substantial control. Broadcasters will have to become very familiar with the specific provisions of state law, something quite new for most of them.

Some states may choose to ban lottery advertising even if they allow lotteries. Consider the impact of *Posadas de Puerto Rico* discussed in the text, p. 145.

PUBLIC BROADCASTING

The Public Broadcasting Act of 1967

A significant development in the life of American radio and television was the Public Broadcasting Act of 1967, 47 U.S.C.A. §§ 390–401.

One of the broad purposes of the Public Broadcasting Act is to assist through matching grants in the construction of noncommercial educational television or radio broadcasting facilities. 47 U.S.C.A. § 391. But the truly novel aspect of the act is the provision for the creation of the Corporation for Public Broadcasting. Great Britain has had long experience with a public network run by an independent board—the much praised BBC, the British Broadcasting Corporation. Similarly, CBC, the Canadian Broadcasting Corporation, which is sponsored by the federal parliament of Canada, is an integral part of Canadian life. But an American effort in the direction of government-sponsored broadcasting is a relatively recent development in American broadcasting. Indeed, whether the federal government can finance an instrument which will influence the opinion-making process is itself a First Amendment question.

"Objectivity" and "Balance" in Public Broadcasting

The Corporation for Public Broadcasting is supposed to facilitate the development of programming of high quality for educational broadcasting with "strict adherence to objectivity and balance in all programs or series of programs of a controversial nature." See 47 U.S.C.A. § 396(g)(1)(A).

Is the requirement that public broadcasting must be "balanced" and "objective" enforceable? This issue was presented for decision in *Accuracy In Media, Inc. v. FCC*, 521 F.2d 288 (D.C.Cir. 1975).

Accuracy In Media (AIM), a feisty conservative citizens organization and a professional thorn in many a media side, filed a complaint against the Public Broadcasting System (PBS) before the FCC, charging that two programs distributed by PBS to member stations did not provide a balanced or objective presentation of the subject presented. In its complaint, AIM charged that PBS had violated the law in two respects. First, AIM charged that the PBS programs violated the fairness doctrine. (The FCC rejected this contention.) AIM's other contention involved the little-known provision of the Public Broadcasting Act of 1967 which required the Corporation for Public Broadcasting (CPB) to adhere to a standard of objectivity or balance in programming of a controversial nature.[7] AIM contended that the two offending programs (one dealing with sex education and the other dealing with the American system of criminal justice) violated the balance and objectivity requirement of the Public Broadcasting Act.

The provision of the Public Broadcasting Act which required "balance" and "objectivity" authorizes CPB to "facilitate the full development of educational television." CPB's mandate is to obtain programs of "high quality * * * from diverse sources" and to make them available to noncommercial broadcasters. This provision of the act concludes that these responsibilities are to be accomplished "with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature."

AIM contended that since the PBS programs it objected to were funded by CPB, pursuant to the authorization just described, the programs were subject to the requirement of "strict adherence to objectivity and balance"—a requirement which AIM contended was "more stringent than the standard of balance and fairness in overall programming contained in the fairness doctrine."

If CPB programming must be balanced and objective, how does such a requirement differ from the fairness doctrine? AIM argued that the balance and objectivity requirement differed from the fair-

7. 47 U.S.C.A. § 396(g)(1)(A) (1970).

ness doctrine in two ways. With respect to the "balance" requirement of the programming standard, AIM argued that broadcasters must achieve a balanced presentation of the issues with respect to each program. Balanced discussion in a broadcaster's overall programming would not suffice as suggested by the fairness doctrine. With respect to "objectivity" requirements, AIM contended that the FCC would have to conduct a "more searching inquiry into alleged factual inaccuracies than contemplated by the fairness doctrine."

The FCC refused to rule on the correctness of AIM's interpretation of the "balance and objectivity" standard in the Public Broadcasting Act because in its view it had no jurisdiction to enforce the Act. AIM then sought review in the federal court of appeals. The federal court, per Judge Bazelon, spokesman for the new liberal unease with the fairness doctrine, agreed with the FCC and not AIM.

The court of appeals' conclusion that the FCC had no jurisdiction to enforce the "balance and objectivity" standard was based on section 398 of the Public Broadcasting Act which provides that no "agency * * * of the United States" should have authority to supervise or control CPB. The court reasoned that since the FCC was an "agency of the United States," *ergo*, the FCC could not "supervise" the Corporation for Public Broadcasting. Nevertheless, as Judge Bazelon conceded, the matter was hardly free from doubt. A provision of the Public Broadcasting Act of 1967, section 399, mandates "supervision" of noncommercial licenses and contemplates FCC enforcement.

Judge Bazelon, however, made it clear that there was nothing in section 398 of the Federal Communications Act which served to limit FCC authority—"including the Fairness Doctrine"—over local noncommercial licensees. "While § 398 prohibits FCC jurisdiction over CPB and its program-related activities, i.e., production, funding or distribution, the commission retains its authority concerning the broadcasting of programs, whether funded by CPB or not." Noncommercial licensees, therefore, were subject to FCC jurisdiction including programming policies like the fairness doctrine. But the FCC could not enforce the "objectivity" and "balance" requirement imposed on CPB by the Public Broadcasting Act.

The implication from the legislative history materials gathered by Judge Bazelon in his decision for the federal court of appeals is that permitting FCC supervision of the programming product of PBS would result in precisely that governmental supervision which Congress had desired to prevent.

If the FCC had no jurisdiction or authority to enforce the balance and objectivity requirements of the Public Broadcasting Act, who did? AIM argued that if the FCC was removed from enforcing the standard, then the specific statutory directive of the Congress was rendered meaningless. Judge Bazelon disagreed. The congressional appropriations process was the means designed to safeguard against "partisan abuse." As Bazelon put it: "Ultimately, Congress may show its disapproval of any activity of the Corporation [for Public Broadcasting] through the appropriations process."

AIM lost its effort to secure a judicial ruling that the FCC had a duty to enforce the objectivity and balance requirement of the Public Broadcasting Act. The court not only held that the FCC did not have jurisdiction to enforce the obligation found in the Public Broadcasting Act requiring the Corporation for Public Broadcasting to adhere strictly to objectivity and balance in its programming, but the court went beyond the FCC's determination of no jurisdiction to enforce the objectivity and balance provisions. The federal court of appeals in effect repealed the specific congressional directive that there be objectivity and balance in CPB programming. "The corporation is not required to provide programs with 'strict adherence to objectivity and balance' but rather to 'facilitate the full development of educational broadcasting in which programs * * * will be made available * * *.' We leave the interpretation of this hortatory language to the directors of the corporation and to Congress in its supervisory capacity."

The State in the Editor's Chair: Problems of Access in Public Broadcasting

Muir v. Alabama Educational Television Commission, 688 F.2d 1033 (5th Cir. 1982), presented the access issue in the context of public broadcasting. Alabama Educational Television Commission (AETC), a network of nine noncommercial educational television stations, is funded from state legislative appropriations, matching federal grants through the Corporation for Public Broadcasting (CPB), and private contributions.

AETC was scheduled to program "Death of a Princess," a dramatization of the public execution

for adultery in 1977 of a Saudi Arabian princess and her lover, on May 12, 1980, at 8:00 P.M. There were protests about the planned showing of "Death of a Princess" for fear that its showing would jeopardize the physical security of Alabamians working in the Middle East. Two days prior to the planned broadcast, AETC announced that it would not broadcast the film.

Residents of Alabama who had planned to watch the show filed suit in the federal district court under 42 U.S.C.A. § 1983 and the First and Fourteenth Amendments to compel AETC to broadcast the film and to enjoin it from making "political" program decisions. The district court refused to order AETC to broadcast the program and granted summary judgment for AETC. A panel of the United States Court of Appeals for the Fifth Circuit affirmed the decision of the district court.

In Texas, a federal district court reacted affirmatively to a viewer's request that a noncommercial broadcast station, KUHT-TV, owned and operated by the University of Houston, which had scheduled "Death of a Princess" but then canceled it, be compelled to show it. The federal district court held that KUHT-TV was a "public forum" and that the station could not deny access to speakers without meeting the strict scrutiny by which prior restraints are traditionally reversed. See *Barnstone v. University of Houston*, 487 F.Supp. 1347 (S.D.Tex. 1980).

In the Houston case the district judge said that the decision to cancel "Death of a Princess" was made by Patrick Nicholson, Vice President of University Relations for the University of Houston: "It was the government, the University of Houston, which decided not to program 'The Death of a Princess.' When the government gets involved in broadcasting, it has an obligation, at a minimum, to establish procedures that assure that programming decisions are not based on the political beliefs of its programmers and are not made arbitrarily and without due process of law."

In *Barnstone v. Houston*, 7 Med.L.Rptr. 2185, 660 F.2d 137 (5th Cir. 1981), cert. den. 103 S.Ct. 1274 (1983), a panel of the Fifth Circuit Court of Appeals reversed the federal district court on the basis of an earlier panel decision in *Muir v. Alabama Educational Television Commission*, 7 Med.L.Rptr. 1933, 656 F.2d 1012 (5th Cir. 1981).

The Fifth Circuit directed that both panel decisions in *Muir* and *Barnstone* be consolidated and reheard *en banc*. The U.S. Court of Appeals for the Fifth Circuit in its *en banc* decision affirmed the judgment of the District Court for the Northern District of Alabama in *Muir* and reversed the decision of the Southern District Court of Texas in *Barnstone*.

Do individual members of the public have a First Amendment right to compel public television stations "to broadcast a previously scheduled program which the licensees have decided to cancel"? In its *en banc* opinion, the United States Court of Appeals for the Fifth Circuit in *Muir v. Alabama Educational Television Commission*, 8 Med.L.Rptr. 2305, 688 F.2d 1033 (5th Cir. 1982), cert. den. 103 S.Ct. 1274 (1983), answered "No" to this question. The First Amendment protects private rather than government expression: "To find that the government is without First Amendment protection is not to find that the government is prohibited from speaking or that private individuals have the right to limit or control the expression of government."

The Fifth Circuit decision in *Muir* may serve as a kind of *magna carta* of the rights of public broadcasting: "Under the existing statutes public licensees such as AETC and the University of Houston possess the same rights and obligations to make free programming decisions as their private counterparts; however, as state instrumentalities, these public licensees are without the protection of the First Amendment. This lack of constitutional protection implies only that government could possibly impose restrictions on these licensees which it could not impose on private licensees. The lack of First Amendment protection does not result in the lessening of any of the statutory rights and duties held by the public licensees. It also does not result in individual viewers gaining any greater right to influence the programming discretion of the public licensees."

An issue that continually arose in the "Death of a Princess" litigation was whether public television stations were "public forums." If public television stations were public forums, then, presumably, individual viewers could appropriately argue that they had a right of access to compel the broadcast of a program which had been scheduled and then canceled.

The reasons which the *en banc* decision of the court in *Muir* offered for its conclusion that public television stations are *not* public forums are set forth below:

> In the cases in which a public facility has been deemed a public forum the speakers have been found to have a right of access because they were attempting to use

> the facility in a manner fully consistent with the "pattern of usual activity" and "the general invitation extended." The pattern of usual activity for public television stations is the statutorily mandated practice of the broadcast licensee exercising sole programming authority. The invitation extended to the public is not to schedule programs, but to watch or decline to watch what is offered. It is thus clear that the public television stations involved in the cases before us are not public forums. The plaintiffs have no right of access to compel the broadcast of any particular program.

The court of appeals in *Muir* also specifically rejected the public access argument of the plaintiffs. According to this argument, even if a public right of access were denied on the theory that public television stations were not public forums, the action of the public television stations in the "Death of a Princess" litigation was impermissible on the ground that public television stations could not "make programming decisions based on the communicative impact of a program."

Another issue which was resolved by the *en banc* decision of the Fifth Circuit Court of Appeals in *Muir* was whether the decision to cancel "Death of a Princess" by the public television stations should be deemed to constitute government censorship. The view was rejected that the decision to cancel "Death of a Princess" constituted governmental censorship. A distinction was drawn between state regulation of private expression and "the exercise of editorial discretion by state officials responsible for the operation of public television stations."

Judge Hill, for the court in *Muir*, summarized the *en banc* court's reasons for concluding that the decision to cancel "Death of a Princess" could not properly be characterized as impermissible government censorship as follows: "Had the states of Alabama and Texas sought to prohibit the exhibition of the film by another party then indeed a question of censorship would have arisen. Such is not the case before us. The states have not sought to forbid or curtail the right of any person to show or view the film. In fact plaintiff Barnstone has already viewed the film at an exhibition at Rice University in Houston. The state officials in charge of AETC and KUHT-TV have simply exercised their statutorily mandated discretion and decided not to show a particular program at a particular time. There is a clear distinction between a state's exercise of editorial discretion over its own expression, and a state's prohibition or suppression of the speech of another."

Judge Rubin concurred, joined by three other judges who participated in the *en banc* review of *Muir* by the Fifth Circuit, pointing out that the government was involved in the publication of a variety of informational media. Content neutrality was not necessarily required in the operation of these media.

> The function of a state agency operating an informational medium is significant in determining first amendment restrictions on its actions. State agencies publish alumni bulletins, newsletters devoted to better farming practices, and law reviews; they operate or subsidize art museums and theater companies and student newspapers. The federal government operates the Voice of America and Radio Free Europe and Radio Liberty, publishes "journals, magazines, periodicals, and similar publications" that are "necessary in the transaction of the public business," including newspapers for branches of the Armed Forces, and pays the salaries of many federal officials who, like the president's press secretary, communicate with the public through the media. The first amendment does not dictate that what will be said or performed or published or broadcast in these activities will be entirely content-neutral. In those activities that, like television broadcasting to the general public, depend in part on audience interest, appraisal of audience interest and suitability for publication or broadcast inevitably involves judgment of content.

Judge Frank Johnson, joined by four other judges, dissented from the *en banc* decision of the Fifth Circuit in *Muir*. The question as he saw it was this: can executive officers of a state-operated public television station cancel a previously scheduled program because it presents a point of view disagreeable to the religious and political regime of a foreign country? Judge Johnson's answer was in the negative. Judge Johnson advocated a strict standard of review for programming decisions such as those involved in the "Death of a Princess": "Once the plaintiff demonstrates that the government has silenced a message because of its substantive content, the government's decision becomes presumptively unconstitutional. The government should then be allowed to demonstrate that it would have taken the same action on the basis of legitimate reasons. Finally, the plaintiff should be given a full opportunity to refute the government's assertion."

COMMENT

Muir and *Barnstone* are not equivalent situations. In *Muir*, the editorial judgment of broadcast journalists was the source of the decision to cancel.

Broadcast journalists were the decision makers in *Muir*, and their exercise of editorial judgment was upheld. But the decision to cancel in *Barnstone* was a governmental and politically inspired judgment made by a university official not a journalist.

The "Death of a Princess" case was seen by the Fifth Circuit as a case of First Amendment rights in conflict—freedom of the press versus freedom of speech and the derivative right to hear. The plaintiffs contended that the decision to cancel could not be viewed the same way as a decision to cancel a program by a private broadcaster. The presence of the state government as a sponsor and as a source of funds in part for AETC was said to have transformed the programming decisions of AETC into "governmental action" and "governmental censorship." Judge Markey, author of the Fifth Circuit panel decision in *Muir*, disagreed. See *Muir v. Alabama Educational Television Commission*, 7 Med.L.Rptr. 1933, 656 F.2d 1012 (5th Cir. 1981). "The application of constitutional principles cannot, however, be controlled by the bare and barren fact that government plays some role."

Judge Markey appeared to be unimpressed with the argument that government funding of public broadcasting should serve to provide the public with greater rights of participation in editorial decision making: "Hence, if government ownership and partial funding alone be synonymous with government censorship of program content, government ownership and funding would doubtless have to cease. * * * If initial rejection of some programs were considered a form of constitutionally forbidden censorship, every public television station would violate the Constitution with virtually every choice it made. * * * It would demean the First Amendment to find that it required a public referendum on every programming decision made every day by every public television station solely because the station is 'owned' and partially funded by a state government." No difference was seen between a decision canceling a scheduled broadcast and the initial scheduling decision as far as judicial oversight is concerned. Both suffered from the same infirmity. The use of court injunctions in either situation would destroy editorial freedom as well as involve excessive government entanglement in the editorial process.

What if there had been proof that government sought to propagandize? The implication in the panel decision in *Muir* is that evidence of government intent to propagandize in editorial decision making would have made a difference and would have been declared impermissible. Here then is a difference in the editorial freedom of a public broadcaster as compared to that of a private broadcaster. If private broadcasters cancel a television show out of a desire to propagandize, presumably the First Amendment is not violated although arguably some aspect of FCC law may have been violated. But if a public broadcaster cancels a show out of a desire to propagandize, then presumably the First Amendment is violated. Government cannot mandate a point of view. This would be impermissible "compelled speech." See *Wooley v. Maynard*, 430 U.S. 705 (1977), text, p. 151.

May Public Broadcasters Editorialize?

Commercial broadcasters may editorialize. See *Mayflower Broadcasting Corp.*, 8 FCC 333 (1941); *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949). However, the Public Broadcasting Act of 1967 did not give this opportunity to noncommercial broadcasters. Section 399 of the Public Broadcasting Act of 1967 was amended in 1981 to state the no-editorializing prohibition as follows: "No noncommercial educational broadcasting station which receives a grant from the Corporation for Public Broadcasting under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for public office."

Suit was brought challenging the constitutionality of an earlier version of this no-editorializing ban by Pacifica Foundation, which owns and operates several noncommercial broadcasting stations in five metropolitan areas in the United States. Others joining in the Pacifica suit were the League of Women Voters of California and Congressman Henry Waxman, a regular listener and viewer of public broadcasting.

When the statute was amended as set forth above, Pacifica and the other challengers amended their complaint and continued their suit attacking the constitutionality of the no-editorializing ban. The federal district court held that section 399's ban on editorializing was a violation of the First Amendment. The government appealed to the United States Supreme Court. The Supreme Court, per Justice Brennan, affirmed the district court and ruled that

the no-editorializing ban of section 399 was unconstitutional. This marked the first time the Supreme Court had declared a federal statute dealing with broadcasting unconstitutional. The Court did not rule on the no-political-endorsement sentence in section 399 since that provision was not challenged.

FCC v. LEAGUE OF WOMEN VOTERS

468 U.S. 364, 104 S.CT. 3106, 82 L.ED.2D 278 (1984).

Justice BRENNAN delivered the opinion of the Court.

* * *

Thus, although the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern. As a result of these restrictions, of course, the absolute freedom to advocate one's own positions without also presenting opposing viewpoints—a freedom enjoyed, for example, by newspaper publishers and soapbox orators—is denied to broadcasters. But, as our cases attest, these restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues, *e.g.*, *Red Lion*. See also *Columbia Broadcasting System, Inc. v. FCC; Columbia Broadcasting System, Inc. v. Democratic National Committee, supra,; Red Lion*. Making that judgment requires a critical examination of the interests of the public and broadcasters in light of the particular circumstances of each case.

We turn now to consider whether the restraint imposed by § 399 satisfies the requirements established by our prior cases for permissible broadcast regulation. Before assessing the government's proffered justifications for the statute, however, two central features of the ban against editorializing must be examined, since they help to illuminate the importance of the First Amendment interests at stake in this case.

First, the restriction imposed by § 399 is specifically directed at a form of speech—namely, the expression of editorial opinion—that lies at the heart of the First Amendment protection. In construing the reach of the statute, the FCC has explained that "although the use of noncommercial educational broadcast facilities by licensees, their management or those speaking on their behalf for the propagation of the licensee's own views on public issues is not permitted, such prohibition should not be construed to inhibit any *other* presentations on controversial issues of public importance." *In re Complaint of Accuracy in Media, Inc.*, 45 F.C.C. 2d 297, 302 (1973) (emphasis added). The Commission's interpretation of § 399 simply highlights the fact that what the statute forecloses is the expression of editorial opinion on "controversial issues of public importance." Indeed, the pivotal importance of editorializing as a means of satisfying the public's interest in receiving a wide variety of ideas and views through the medium of broadcasting has long been recognized by the FCC; the Commission has for the past 35 years actively encouraged commercial broadcast licensees to include editorials on public affairs in their programming. Because § 399 appears to restrict precisely that form of speech which the Framers of the Bill of Rights were most anxious to protect—speech that is "indispensable to the discovery and spread of political truth"—we must be especially careful in weighing the interests that are asserted in support of this restriction and in assessing the precision with which the ban is crafted. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

Second, the scope of § 399's ban is defined solely on the basis of the content of the suppressed speech. A wide variety of non-editorial speech "by licensees, their management or those speaking on their behalf," *In re Complaint of Accuracy in Media, Inc., supra*, 45 F.C.C. 2d, at 302, is plainly not prohibited by § 399. Examples of such permissible forms of speech include daily announcements of the station's program schedule or over-the-air appeals for contributions from listeners. Consequently, in order to determine whether a particular statement by station management constitutes an "editorial" proscribed by § 399, enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed concern "controversial issues of public importance."

As Justice Stevens observed in *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), however, "[a] regulation of speech that is motivated by nothing more than a desire to curtail

expression of a particular point of view on controversial issues of general interest is the purest example of a 'law * * * abridging the freedom of speech, or of the press.' A regulation that denies one group of persons the right to address a selected audience on 'controversial issues of public policy' is plainly such a regulation." (concurring opinion). Section 399 is just such a regulation, for it singles out noncommercial broadcasters and denies them the right to address their chosen audience on matters of public importance. Thus, in enacting § 399 Congress appears to have sought, in much the same way that the New York Public Service Commission had attempted through the regulation of utility company bill inserts struck down in *Consolidated Edison*, to limit discussion of controversial topics and thus to shape the agenda for public debate. Since, as we observed in *Consolidated Edison*, "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of an entire topic," we must be particularly wary in assessing § 399 to determine whether it reflects an impermissible attempt "to allow the government [to] control * * * the search for political truth."

In seeking to defend the prohibition on editorializing imposed by § 399, the Government urges that the statute was aimed at preventing two principal threats to the overall success of the Public Broadcasting Act of 1967. According to this argument, the ban was necessary, first, to protect noncommercial educational broadcasting stations from being coerced, as a result of federal financing, into becoming vehicles for government propagandizing or the objects of governmental influence; and, second, to keep these stations from becoming convenient targets for capture by private interest groups wishing to express their own partisan viewpoints. By seeking to safeguard the public's right to a balanced presentation of public issues through the prevention of either governmental or private bias, these objectives are, of course, broadly consistent with the goals identified in our earlier broadcast regulation cases. But, in sharp contrast to the restrictions upheld in *Red Lion* or in *Columbia Broadcasting System, Inc. v. FCC*, which left room for editorial discretion and simply required broadcast editors to grant others access to the microphone, § 399 directly prohibits the broadcaster from speaking out on public issues even in a balanced and fair manner. The Government insists, however, that the hazards posed in the "special" circumstances of noncommercial educational broadcasting are so great that § 399 is an indispensable means of preserving the public's First Amendment interests. We disagree.

When Congress first decided to provide financial support for the expansion and development of noncommercial educational stations, all concerned agreed that this step posed some risk that these traditionally independent stations might be pressured into becoming forums devoted solely to programming and views that were acceptable to the Federal government. That Congress was alert to these dangers cannot be doubted. It sought through the Public Broadcasting Act to fashion a system that would provide local stations with sufficient funds to foster their growth and development while preserving their tradition of autonomy and community-orientation.

More importantly, an examination of both the overall legislative scheme established by the 1967 Act and the character of public broadcasting demonstrates that the interest asserted by the Government is not substantially advanced by § 399. First, to the extent that federal financial support creates a risk that stations will lose their independence through the bewitching power of governmental largesse, the elaborate structure established by the Public Broadcasting Act already operates to insulate local stations from governmental interference. Congress not only mandated that the new Corporation for Public Broadcasting would have a private, bipartisan structure, see §§ 396(c)–(f), but also imposed a variety of important limitations on its powers. The Corporation was prohibited from owning or operating any station, § 396(g)(3), it was required to adhere strictly to a standard of "objectivity and balance" in disbursing federal funds to local stations, § 396(g)(1)(A), and it was prohibited from contributing to or otherwise supporting any candidate for office, § 396(f)(3).

The Act also established a second layer of protections which serve to protect the stations from governmental coercion and interference. Thus, in addition to requiring the Corporation to operate so as to "assure the maximum freedom [of local stations] from interference with or control of program content or other activities," § 396(g)(1)(D), the Act expressly forbids "any department, agency, officer, or employee of the United States [from] exercis[ing] any direction, supervision, or control over educational television or radio broadcasting, or over the Corporation or any of its grantees or contractors * * *,"

§ 398(a). The principal thrust * * * therefore, has been to assure long-term appropriations for the Corporation and, more importantly, to insist that it pass specified portions of these funds directly through to local stations to give them greater autonomy in defining the uses to which those funds should be put. Thus, in sharp contrast to § 399, the unifying theme of these various statutory provisions is that they substantially reduce the risk of governmental interference with the editorial judgments of local stations without restricting those stations' ability to speak on matters of public concern.

Even if these statutory protections were thought insufficient to the task, however, suppressing the particular category of speech restricted by § 399 is simply not likely, given the character of the public broadcasting system, to reduce substantially the risk that the Federal Government will seek to influence or put pressure on local stations. An underlying supposition of the Government's argument in this regard is that individual noncommercial stations are likely to speak so forcefully on particular issues that Congress, the ultimate source of the stations' Federal funding, will be tempted to retaliate against these individual stations by restricting appropriations for all of public broadcasting. But, as the District Court recognized, the character of public broadcasting suggests that such a risk is speculative at best. There are literally hundreds of public radio and television stations in communities scattered throughout the United States and its territories. Given that central fact, it seems reasonable to infer that the editorial voices of these stations will prove to be as distinctive, varied, and idiosyncratic as the various communities they represent. More importantly, the editorial focus of any particular station can fairly be expected to focus largely on issues affecting only its community. Accordingly, absent some showing by the Government to the contrary, the risk that local editorializing will place all of public broadcasting in jeopardy is not sufficiently pressing to warrant § 399's broad suppression of speech.

Indeed, what is far more likely than local station editorials to pose the kinds of dangers hypothesized by the Government are the wide variety of programs addressing controversial issues produced, often with substantial CPB funding, for national distribution to local stations. Such programs truly have the potential to reach a large audience and, because of the critical commentary they contain, to have the kind of genuine national impact that might trigger a congressional response or kindle governmental resentment. The ban imposed by § 399, however, is plainly not directed at the potentially controversial content of such programs; it is, instead, leveled solely at the expression of editorial opinion by local station management, a form of expression that is far more likely to be aimed at a smaller local audience, to have less national impact, and to be confined to local issues. In contrast, the Act imposes no substantive restrictions, other than normal requirements of balance and fairness, on those who produce nationally distributed programs. Indeed, the Act is designed in part to encourage and sponsor the production of such programs and to allow each station to decide for itself whether to accept such programs for local broadcast.

Furthermore, the manifest imprecision of the ban imposed by § 399 reveals that its proscription is not sufficiently tailored to the harms it seeks to prevent to justify its substantial interference with broadcasters' speech. Section 399 includes within its grip a potentially infinite variety of speech, most of which would not be related in any way to governmental affairs, political candidacies or elections. Indeed, the breadth of editorial commentary is as wide as human imagination permits. But the Government never explains how, say, an editorial by local station management urging improvements in a town's parks or museums will so infuriate Congress or other Federal officials that the future of public broadcasting will be imperiled unless such editorials are suppressed. Nor is it explained how the suppression of editorials alone serves to reduce the risk of governmental retaliation and interference when it is clear that station management is fully able to broadcast controversial views so long as such views are not labelled as its own.

The Government appears to recognize these flaws in § 399, because it focuses instead on the suggestion that the source of governmental influence may well be state and local governments, many of which have established public broadcasting commissions that own and operate local noncommercial educational stations. The ban on editorializing is all the more necessary with respect to these stations, the argument runs, because the management of such stations will be especially likely to broadcast only editorials that are favorable to the state or local authorities that hold the purse strings. The Government's argument, however, proves too much. First, § 399's ban applies to the many private noncommercial community or-

ganizations that own and operate stations that are not controlled in any way by state or local government. Second, the legislative history of the Public Broadcasting Act clearly indicates that Congress was concerned with "assur[ing] complete freedom from any *Federal Government influence.*"

Finally, although the Government certainly has a substantial interest in ensuring that the audiences of noncommercial stations will not be led to think that the broadcaster's editorials reflect the official view of the government, this interest can be fully satisfied by less restrictive means that are readily available. To address this important concern, Congress could simply require public broadcasting stations to broadcast a disclaimer every time they editorialize which would state that the editorial represents only the view of the station's management and does not in any way represent the views of the Federal Government or any of the station's other sources of funding. Such a disclaimer—similar to those often used in commercial and noncommercial programming of a controversial nature—would effectively and directly communicate to the audience that the editorial reflected only the views of the station rather than those of the government.

In sum, § 399's broad ban on all editorializing by every station that receives CPB funds far exceeds what is necessary to protect against the risk of governmental interference or to prevent the public from assuming that editorials by public broadcasting stations represent the official view of government. The regulation impermissibly sweeps within its prohibition a wide range of speech by wholly private stations on topics that do not take a directly partisan stand or that have nothing whatever to do with federal, state or local government.

Assuming that the Government's second asserted interest in preventing noncommercial stations from becoming a "privileged outlet for the political and ideological opinions of station owners and management," Brief at 34, is legitimate, the substantiality of this asserted interest is dubious. The patent over- and underinclusiveness of § 399's ban "undermines the likelihood of a genuine [governmental] interest" in preventing private groups from propagating their own views via public broadcasting. *First National Bank of Boston v. Bellotti.* If it is true, as the government contends, that noncommercial stations remain free, despite § 399, to broadcast a wide variety of controversial views through their power to control program selection, to select which persons will be interviewed, and to determine how news reports will be presented, then it seems doubtful that § 399 can fairly be said to advance any genuinely substantial governmental interest in keeping controversial or partisan opinions from being aired by noncommercial stations.

In short, § 399 does not prevent the use of noncommercial stations for the presentation of partisan views on controversial matters; instead, it merely bars a station from specifically communicating such views on its own behalf or on behalf of its management. If the vigorous expression of controversial opinions is, as the Government assures us, affirmatively encouraged by the Act, and if local licensees are permitted under the Act to exercise editorial control over the selection of programs, controversial or otherwise, that are aired on their stations, then § 399 accomplishes only one thing—the suppression of editorial speech by station management. It does virtually nothing, however, to reduce the risk that public stations will serve solely as outlets for expression of narrow partisan views. What we said in *Columbia Broadcasting System, Inc. v. Democratic National Committee, supra,* applies, therefore, with equal force here: the "sacrifice [of] First Amendment protections for so speculative a gain is not warranted. * * *" 412 U.S., at 127.

Finally, the public's interest in preventing public broadcasting stations from becoming forums for lopsided presentations of narrow partisan positions is already secured by a variety of other regulatory means that intrude far less drastically upon the "journalistic freedom" of noncommercial broadcasters. *Columbia Broadcasting System, Inc. v. Democratic National Committee, supra,* at 110. The requirements of the FCC's fairness doctrine, for instance, which apply to commercial and noncommercial stations alike, ensure that such editorializing would maintain a reasonably balanced and fair presentation of controversial issues. Thus, even if the management of a noncommercial educational station were inclined to seek to further only its own partisan views when editorializing, it simply could not do so. Since the breadth of § 399 extends so far beyond what is necessary to accomplish the goals identified by the Government, it fails to satisfy the First Amendment standards that we have applied in this area.

We therefore hold that even if some of the hazards at which § 399 was aimed are sufficiently substantial, the restriction is not crafted with sufficient precision to remedy those dangers that may exist to

justify the significant abridgement of speech worked by the provision's broad ban on editorializing. The statute is not narrowly tailored to address any of the government's suggested goals. Moreover, the public's "paramount right" to be fully and broadly informed on matters of public importance through the medium of noncommercial educational broadcasting is not well served by the restriction, for its effect is plainly to diminish rather than augment "the volume and quality of coverage" of controversial issues. *Red Lion*, *supra*, at 393. Nor do we see any reason to deny noncommercial broadcasters the right to address matters of public concern on the basis of merely speculative fears of adverse public or governmental reactions to such speech.

In conclusion, we emphasize that our disposition of this case rests upon a narrow proposition. We do not hold that the Congress or the FCC are without power to regulate the content, timing, or character of speech by noncommercial educational broadcasting stations. Rather, we hold only that the specific interests sought to be advanced by § 399's ban on editorializing are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgement of important journalistic freedoms which the First Amendment jealously protects. Accordingly, the judgment of the District Court is affirmed.

Justice REHNQUIST, with whom The Chief Justice and Justice White join, dissenting.

All but three paragraphs of the Court's lengthy opinion in this case are devoted to the development of a scenario in which the government appears as the "Big Bad Wolf," and appellee Pacifica as "Little Red Riding Hood." In the Court's scenario the Big Bad Wolf cruelly forbids Little Red Riding Hood from taking to her grandmother some of the food that she is carrying in her basket. Only three paragraphs are used to delineate a truer picture of the litigants, wherein it appears that some of the food in the basket was given to Little Red Riding Hood by the Big Bad Wolf himself, and that the Big Bad Wolf had told Little Red Riding Hood in advance that if she accepted his food she would have to abide by his conditions. Congress in enacting § 399 of the Public Broadcasting Act, 47 U.S.C. (Supp. V) § 399, has simply determined that public funds shall not be used to subsidize noncommercial, educational broadcasting stations which engage in "editorializing" or which support or oppose any political candidate. I do not believe that anything in the First Amendment to the United States Constitution prevents Congress from choosing to spend public monies in that manner. Perhaps a more appropriate analogy than that of Little Red Riding Hood and the Big Bad Wolf is that of Faust and Mephistopheles; Pacifica, well aware of § 399's condition on its receipt of public money, nonetheless accepted the public money and now seeks to avoid the conditions which Congress legitimately has attached to receipt of that funding.

The Court's three-paragraph discussion of why § 399, repeatedly reexamined and retained by Congress, violates the First Amendment is to me utterly unpersuasive. Congress has rationally determined that the bulk of the taxpayers whose monies provide the funds for grants by the CPB would prefer not to see the management of local educational stations promulgate its own private views on the air at taxpayer expense. Accordingly Congress simply has decided not to subsidize stations which engage in that activity.

The Court seems to believe that Congress actually subsidizes editorializing only if a station uses federal money specifically as editorializing expenses. But to me the Court's approach ignores economic reality. CPB's unrestricted grants are used for salaries, training, equipment, promotion, etc.—financial expenditures which benefit all aspects of a station's programming, including management's editorials. Given the impossibility of compartmentalizing programming expenses in any meaningful way, it seems clear to me that the only effective means for preventing the use of public monies to subsidize the airing of management's views is for Congress to ban a subsidized station from all on-the-air editorializing.

Here, in my view, Congress has rationally concluded that the bulk of taxpayers whose monies provide the funds for grants by the CPB would prefer not to see the management of public stations engage in editorializing or the endorsing or opposing of political candidates. Because Congress' decision to enact § 399 is a rational exercise of its spending powers and strictly neutral, I would hold that nothing in the First Amendment makes it unconstitutional. Accordingly, I would reverse the judgment of the District Court.

COMMENT

In dissent, Justice Stevens appeared to object to considering the validity of the no-editorializing rule ban

in section 399 without also considering the no-political-endorsement ban. Justice Stevens believed that section 399 was designed to keep the "Federal Government out of the propaganda arena." Congressional concern that the financial assistance it gave to public broadcasting might be used to fund government propaganda merited greater weight than it received:

> The court jester who mocks the King must choose his words with great care. An artist is likely to paint a flattering portrait of his patron. By enacting the statutory provision that the Court invalidates today, a sophisticated group of legislators expressed a concern about the potential impact of government funds on pervasive and powerful organs of mass communication. One need not have heard the raucous voice of Adolph Hitler over Radio Berlin to appreciate the importance of that concern.
>
> (T)he statutory prohibitions against editorializing and candidate endorsements rest on the same foundation. In my opinion that foundation is far stronger than merely "a rational basis" and it is not weakened by the fact that it is buttressed by other provisions that are also designed to avoid the insidious evils of propaganda favoring particular points of view. The quality of the interest in maintaining government neutrality in the free market of ideas—of avoiding subtle forms of censorship and propaganda—out-weigh the impact on expression that results from this statute.

One scholar, writing just before the *League of Women Voters* case, addressed the general problem of government sponsored expression as well as the subject of public broadcasting. See Yudof, *When Government Speaks: Politics, Law and Government Expression in America* (1983). Professor Yudof believes that public broadcasting has escaped from government influence: "Ironically, the very localism advocated by the Nixon Administration (in public broadcasting) became the vehicle by which government attempts to influence programming were blunted."

Professor Yudof argues that the charge that "public broadcasting is a propaganda arm of the federal government is simply unfounded." Cultural elitism, however is a more serious charge. Public broadcasting, in this view, has been geared to the programming tastes of the cultured upper class rather than the programming needs of minorities or the poor. The solution? Professor Yudof suggests affirmative action by government:

> (W)hat of the obligation of government to expand the potential for choice by informing, teaching and leading? From this perspective, Congress could sensibly require that its funds be utilized to cover political conventions, to broadcast legislative hearings, to investigate and air controversial political matters, and to produce documentaries and other shows on the economy, on the adequacy of service delivery by government, and on world crises.

Isn't it possible that implementation of some of these proposals would violate the strictures set forth in *League of Women Voters*? If so, how?

RELIGIOUS BROADCASTING

Regulating religious broadcasting has long been a minor problem for the FCC and its predecessor, the Federal Radio Commission. One of the earliest FRC enforcement actions came against the Rev. Dr. Shuler, whose Trinity United Methodist Church used its radio station to attack other religions, criticize the criminal justice system, and raise money through intimidation. The FRC refused to renew Shuler's license. On appeal, he argued that the First Amendment prohibited the FRC from considering past programming in making licensing decisions and that his First Amendment rights of freedom of speech and press had been violated. Shuler lost, but in the process helped the FRC establish the principle that it wasn't just a technical traffic cop of the air—that it could consider content in making licensing decisions. *Trinity Methodist Church, South v. Federal Radio Commission*, 62 F.2d 850 (D.C.Cir. 1932). Interestingly, Shuler didn't argue that the FRC had violated his freedom of religion rights, also guaranteed under the First Amendment. The future of First Amendment media law might have been quite different had he made that argument.

From time to time, the FCC has tried to encourage religious programming. The commission's 1960 Policy Statement, for example, listed religious programming as one of the fourteen types of programming normally expected of licensees. The commission, however, never took any sanctions against broadcasters for not offering religious programs and, with radio and TV deregulation in the early 1980s, it's likely that the FCC today no longer expects broadcasters to offer religious programs.

When broadcasters have offered religious programming, however, the FCC has often been put in tight spots if complaints about that programming ensued. One of the major problems has been religious broadcaster compliance with the fairness doc-

trine. At least while that doctrine existed, the FCC maintained that it applied to religious and secular broadcasters alike. Religious broadcasters, in fact, stimulated some of the most important of fairness doctrine cases. *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C.Cir. 1972), cert. den. 412 U.S. 922 (1973); text, p. 793. Broadcasts of an attack upon author Fred Cook on WGCB (W-God-Christ-Bible) in Red Lion, Pennsylvania, set off the U.S. Supreme Court's leading decision on the Constitutionality of the doctrine. *Red Lion Broadcasting Co. v. FCC*. The FCC's position throughout has been consistent—there's no difference between what the FCC expects of religious broadcasters, in terms of compliance with its rules, and what it expects of others.

Religious stations, like secular stations, have run afoul of lottery law. Many religious programs are aired for pay by stations that simply turn over large blocks of time to preachers, a practice known as time brokering. In theory, the FCC expects the licensee to know what's being aired and holds the licensee, not the paying preacher, responsible. A few unscrupulous "preachers" have used radio stations to run numbers games. Scripture references are marvelous devices for hiding numbers games and tips. When the FCC has discovered this, the result has been serious licensing difficulties for the broadcasters involved. *United Broadcasting Co. v. FCC*, 565 F.2d 699 (D.C.Cir. 1977); *cert. den.* 434 U.S. 1046 (1978).

The FCC long ago reserved frequencies in the FM and TV bands for "noncommercial, educational" radio and television. Religious stations can operate on commercial assignments, or they can operate noncommercially on frequencies also available for commercial operation, or they can attempt to qualify for the reserved noncommercial channels. If they run noncommercially, they face certain limits on their operations—they can't run routine ads for products or services. To qualify for the reserved educational channels, they have to show that the "primary thrust" of their operation will be "educational, albeit with a religious aspect to the religious activity. Recognizing that some overlap in purpose is, or can be, involved [the FCC] look[s] to the application as a whole to determine which is the essential purpose and which is incidental." Bible Moravian Church, Inc. 28 FCC 2d 1, 21 RR 2d 492 (1971). Reserved channel licenses are routinely granted to organizations, like schools, that operate associated educational institutions. If a religious organization seeks a reserved noncommercial, educational license, it is usually required to prove that it operates a school in the community for which the license is sought. If that is not the case, the FCC sometimes finds itself in the delicate position of trying to decide whether the "primary thrust" of the application is religious or educational. The effort to make that distinction has sometimes led the FCC perilously close to making fine distinctions between religious content and nonreligious educational programming.

A good example of the complexity of this is Moody Bible Institute, 66 FCC 2d 162, 40 RR 2d 1264 (1977). Moody Bible Institute applied for two reserved noncommercial, educational licenses in East Moline, Illinois and Boynton Beach, Florida. The FCC, without opinion, found Moody qualified. Commissioner Margita White, however, was moved to release a lengthy concurring statement, questioning the FCC staff efforts to distinguish between religious and educational program proposals. The staff found it necessary to evaluate the application against 47 CFR § 73..503, the basic standards for qualifying for the reserved channels. It evaluated Moody's proposed programs, trying to classify each as general educational or religious. Commissioner White took the extraordinary step of releasing copies of the staff analysis of Moody's application, showing penciled annotations. The staff had great trouble figuring out whether programs such as the "Radio School of the Bible," described as "a daily instructional series offering courses in Bible subjects" or "Cleared for Take-Off," a "Daily youth dramatic series, illustrating lives of missionary aviators in true-to-life situations," were religious or educational. White obviously believed there were constitutional aspects to such an analysis, but since Moody got its licenses anyway, they were never further explored by the FCC or the courts.

The granting of noncommercial, educational licenses to religious organizations became particularly controversial when a pair of public interest (and community radio) advocates filed a petition with the FCC asking it to look into two issues. First, were religious organizations, when granted noncommercial licenses, complying with the fairness doctrine? Second, was it sound public policy to grant reserved noncommercial licenses to religious organizations? The FCC quickly dismissed the petition, but rumors about it plagued the commission for years.

Even though the matter was legally dead at the FCC, the rumor spread (often stimulated by conservative religious organizations) that the commis-

sion was considering a petition from noted atheist Madalyn Murry O'Hair to ban religious broadcasting—a topic *never* the object of the original petition. Churches were encouraged to write to the FCC and complain; "Help Lines" in newspaper columns often republished the FCC's address, and for years the FCC received hundreds of thousands of pieces of mail objecting to a petition that never existed. The commission even found it necessary to set up a special phone number to answer queries about the petition. The monumental nature of this problem should not be underestimated. For several years, the FCC mailroom had to sort the large portion of its mail pertaining to the nonexistent petition (sometimes as much as 50 percent of all the mail received that day) from legitimate mail to the agency.

Once religious organizations get licenses, the FCC's expectation of them is the same as of secular broadcasters. They must comply with the same rules and subject themselves to the same FCC supervision. On occasion, the FCC's investigation of alleged irregularities in the operation of religious stations has stirred controversy. In 1979, the FCC began an investigation into the operation of WJAN(TV) in Canton, Ohio. The objective was to find out whether or not the station had broadcast false information when it solicited funds. The station was closely affiliated with Heritage Village Church and Missionary Fellowship, Inc., of Charlotte, North Carolina. That religious organization did business as the PTL Television Network and was headed by Rev. James O. Bakker. After several years of investigation into these charges, the FCC decided that there was "smoke" here but refused to look for the underlying fire. The commission terminated its investigation and referred what it had learned to the U.S. Department of Justice for possible prosecution, a referral the Justice Department did not pursue. Thus, the FCC missed a chance to blow open what, in the late 1980s, was to become a major scandal for the religious broadcasting community, the "affairs" of Jim Bakker. See PTL of Heritage Village Church, 71 FCC 2d 324 (1979).

In another case, however, the FCC pursued its investigation more doggedly. The minister here was the Rev. W. Eugene Scott, pastor of a religious organization called Faith Center Church, which was the licensee of radio and television stations. Upon receiving allegations similar to those in the Bakker case, that Scott was using the station for fraudulent solicitation of funds, the FCC launched an investigation. Scott argued that the investigation into his fundraising techniques, his contributors, and the "membership" of his electronic church violated both the establishment and free exercise clauses of the First Amendment. This, in effect, was the argument Rev. Shuler had not made more than fifty years earlier. The U.S. Court of Appeals for the Ninth Circuit eventually decided that the FCC's investigators had not transgressed upon Scott's freedom of religion rights. While the FCC had inquired into religious activities, it had the right to do so under the facts of this case.

SCOTT v. ROSENBERG

702 F.2D 1263 (9TH CIR. 1983).

Before WALLACE, SCHROEDER and CANBY, Circuit Judges.

WALLACE, Circuit Judge:

Scott, the president and pastor of Faith Center Church (the church), brought this action for injunctive relief and for actual and punitive damages against five present and former officers and employees (the government employees) of the Federal Communications Commission (the FCC), alleging that they violated his first amendment rights during an investigation of the church's television and radio stations. The district court granted summary judgment for the government employees. We affirm.

Diederich, a former employee of one of the church's television stations, sent a letter to the FCC in which he alleged that Scott had solicited during broadcasts and subsequently received funds for projects which were never undertaken. He also stated his belief that Scott was using the stations for his personal gain. In response to that letter, the FCC instituted an investigation of the church's California television and radio stations. The FCC conducted a number of interviews during which further allegations were made: that the stations had failed to log paid religious programming as commercial broadcasting, that Scott had misstated the amount of his personal remuneration during broadcast solicitations, and that Scott had made personal pledges during the broadcasts which he had never fulfilled.

Subsequently, two FCC employees made an unannounced visit to the television station located in the main church building to interview employees and investigate records. There is some dispute with respect to how clearly they identified the purpose of

their visit and with respect to the scope of their request for access to church and station records. In any event, the church subsequently made available some, but not all, of the materials requested, and thereafter the FCC issued an order designating for hearing the station's application for license renewal and a notice of apparent liability for forfeiture for violation of 18 U.S.C. § 1343, the statute governing fraud by use of radio and television. * * * Scott brought this action not in any representative capacity, but to vindicate his individual rights. He apparently does not, in his personal capacity, contest the FCC's request for station logs and for his salary records. He does, however, allege that the FCC's inquiry into his personal donations violates his free exercise rights under the first amendment. Scott's claim that his religion requires donations to be made confidentially if they are to be received by God as sacrifices is not disputed.

* * *

We must next decide whether Scott has a claim under the first amendment and, if so, what type of remedy is appropriate.

* * *

We assume, without deciding, that a private cause of action may be implied directly under the Constitution for violations of the first amendment.

* * *

We must next examine the record to determine if there is any genuine factual dispute whether the government employees violated Scott's first amendment rights. Scott alleges that the government employees informed the press and public that they were investigating charges of fraud against Scott. He claims that those statements interfered with the free exercise of his religious obligation to convert others to his beliefs. He also argues that the FCC's demand, in conjunction with its investigation, that the church provide records of his personal pledges during 1976 and 1977, together with information showing the status of those pledges (paid, withdrawn, or outstanding) violates the free exercise clause of the first amendment.

In support of their motions for summary judgment, the government employees submitted affidavits in which they stated that they did not provide any information to the press or public with respect to the specific allegations made against the church. They further testified that they made no statements to the press or public accusing Scott of any criminal or dishonest activity. Scott introduced letters prepared by two of the government employees in response to public and congressional inquiries concerning the investigation. Those letters simply confirm that an investigation was in progress and that it was initiated in response to a complaint alleging irregular conduct. The letters further clarify the FCC's responsibility to investigate such complaints, including possible questions concerning the complainant's credibility. The letters do not, however, support Scott's allegations that the government employees dispatched charges of fraud to the press and public. Scott's allegations are unsupported by a factual presentation. Merely conclusory, they are insufficient to survive the government employees' motion for summary judgment. * * *

Scott's second argument about the investigation of his pledges presents more difficult questions. It is complicated by the fact that the church owns the broadcast station. Our analysis must be on two levels: first, the result of the actions of the FCC in relation to the station and second, the result of its actions in relation to Scott.

* * *

The first question, therefore, is should the FCC be required to meet a different standard prior to investigation of broadcasters of religious programs than it is required to meet prior to investigation of broadcasters of secular programs? More specifically, should the FCC be required to demonstrate a compelling governmental interest prior to investigating an allegation of fraud by one of its licensees that is owned by or affiliated with a religious organization? We hold that such a requirement is not necessary.

The Federal Communications Act authorizes the FCC to regulate as required by the "public convenience, interest, or necessity," 47 U.S.C. § 303, and does not differentiate types of broadcast licensees. The FCC grants licenses and regulates the public airwaves without differentiating between religious and secular broadcasters. * * *

Requiring the FCC to justify investigations undertaken in response to allegations of fraud by one of its licensees, religious or secular, is not supported by precedent, is impracticable, and might raise other first amendment obstacles. * * * During the investigation, free expression conflicts may arise. This brings us to the second level of our analysis which

pertains to the acts of the FCC in relation to Scott. When a collision between portions of an FCC investigation and free exercise rights occurs, free exercise rights can be protected by requiring the FCC to demonstrate a compelling governmental interest. A compelling governmental interest must be shown at that point because an action taken in the course of an investigation directly conflicts with a sincerely held religious belief. * * *

Here, we conclude that it is necessary to employ compelling state interest analysis because of the unique factual setting. The FCC requested information, the release of which Scott alleges in and of itself violates his religious free exercise right. Thus, there is a direct conflict between a sincerely held religious belief and an action by government officials. * * *

Therefore, we conclude that we can affirm the district court's order granting summary judgment only if the FCC's demand for the records of Scott's donations does not infringe on his first amendment freedoms or, if it does, a compelling governmental interest justifies the demand.

In support of his claim, Scott submitted personal affidavits in which he states that he believes that his church contributions are "sacrifices" and that disclosure of his sacrifices would violate their sacred nature. The government employees do not challenge the sincerity of Scott's beliefs. * * * Furthermore, Scott's claim is not "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 715, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624 (1981) *(Thomas)*. We therefore conclude that the FCC's demand interferes with Scott's first amendment rights.

The conclusion that there is conflict between Scott's beliefs and the demand imposed by the FCC is "only the beginning, however, and not the end of the inquiry. Not all burdens on religion are unconstitutional." * * * The state may justify its infringement on religious liberty if it is necessary to accomplish an overriding governmental interest. * * * We must therefore determine whether the governmental interest in preventing the fraudulent practices alleged is sufficiently compelling to justify the burden upon Scott's right to the free exercise of his religion and, if so, whether the demand for church records of Scott's pledges and donations was necessary to further that interest. * * *

The governmental interest in preventing some crimes is compelling, * * * but that interest is not sufficient to permit interference with free exercise rights in every case. * * * The Supreme Court has repeatedly stated that religious frauds can be penalized. Lower courts have applied this principle to religious organizations conducting fraudulent nonreligious activities * * * and to individuals soliciting money for pretended religious purposes when religious beliefs were not sincerely held, * * * and have concluded that the protections of the first amendment were not applicable.

Here, however, we face the question whether, when an allegedly fraudulent activity is connected with the exercise of sincerely held religious beliefs, the governmental interest in preventing fraud overrides the individual's right of religious freedom. We conclude that the answer depends, at least in part, on the nature of the fraud. * * * Scott claims that in the framework of his religion, it is only important that the contributor give and, having made the gift, the contributor is spiritually blessed, no matter how his donation is used. Scott further states that he must follow "the leanings of the Lord" with respect to the utilization of donations. Scott does not claim, however, that contributors to identified projects know that their contributions may be used for any purpose which Scott determines to be in accordance with the will of the Lord. Scott does not claim that he clarified this aspect of his religious practice in his broadcast solicitations. At least under these limited circumstances, we conclude that the government has a compelling interest in preventing the diversion of funds from the specifically identified projects for which they have been solicited.

Our final inquiry is whether the government's investigation of Scott's pledge and donation records was necessary to further this compelling interest. We need not determine whether any other aspects of the FCC investigation were justifiable, for Scott contests only the FCC demand for those records. Although not every allegation of fraudulent solicitation would justify the government's interference with the religious practices of individuals and churches, we conclude that the allegations here justified the FCC's narrow and limited inquiry into Scott's donation records.

Several important considerations support this conclusion. First, we believe that the context in which the pledges were made is significant. When

Scott and the church decided to acquire television and radio stations, they availed themselves of facilities which, under congressional mandate, must be operated in the public interest. 47 U.S.C. §§ 307(a), 309(a). With respect to the operation of broadcast facilities, the Supreme Court has held that the right of viewers and listeners, not that of broadcasters, is paramount. * * * An allegation of fraud, even if not sufficiently specific or reliable generally to justify inquiry into solicitations made by a congregation in church, may nevertheless be sufficient to justify inquiry into broadcast solicitations.

Second, the FCC investigation in this case was premised on information sufficiently reliable to justify the limited intrusion on first amendment rights which it engendered. The FCC began its inquiry only after it received a complaint signed by Diederich, a former employee of the television station. In his former employment, Diederich was in a position in which he was likely to have received personal knowledge of the irregularities he alleged. His signed complaint, if knowingly false, could expose him to liability in tort for malicious prosecution. * * * and was therefore entitled to a greater inference of reliability than an unsigned statement would have been. * * *

Third, the investigation in this case was narrow and avoided any unnecessary interference with the free exercise of religion. We can imagine circumstances in which the interference with religion could be substantial enough to overbalance a governmental interest that otherwise would be compelling, but that is not this situation. There was no request for wholesale investigation of the church's financial records, but rather specific requests for records of an FCC licensee concerning Scott's salary and donations, both of which he allegedly misrepresented during broadcast solicitations. * * *

Finally, the FCC's demand for access to Scott's donation records was necessary to serve its compelling interest in investigating the alleged diversion of funds. If, as alleged, Scott solicited funds for projects which were never undertaken or if funds contributed to these projects were illegally diverted to other uses, Scott's misrepresentation of his personal pledges may have been intended to induce those contributions and therefore could constitute part of a scheme to defraud. Although other information might be only tangentially relevant to the objectives of a legitimate inquiry, the nexus between the investigations and the FCC's objective in this case was sufficiently close to comply with the principle that valid restrictions on first amendment rights must embody the least restrictive means of effectuating the government's compelling interest. * * *

Scott also claims that the actions of the government employees violated the establishment clause of the first amendment. He apparently believes that inquiry into his donation record is only the first step in a contemplated program of pervasive regulation. The government employees have submitted affidavits in which they state that their inquiries were for the purpose of ascertaining the truth of Diederich's allegations and determining whether renewal of the church's license was in the public interest. Scott has alleged no facts from which we can infer that pervasive regulation is either planned or threatened. * * *

AFFIRMED.

COMMENT

Scott eventually lost the license for KHOF-TV (and, for that matter, sold WHOF-TV in Providence, Rhode Island, his other major TV station). He didn't give up without a fight, however. The last few hours of broadcasting of KHOF-TV are unique in broadcast history. Scott spent most of his time berating the commission, presenting its members with a scroll describing them as "the antichrist," and displaying the antics of dozens of mechanical monkeys that he called the "FCC Monkey Band." As the plug on the station was pulled, Scott was shouting about the FCC—and asking his listeners to contribute funds to keep up the fight.

The Bakker scandals and others (such as the alleged tryst with a prostitute of evangelist Jimmy Swaggart and televangelist Oral Roberts's over-the-air claim that God would "call me home" unless he raised millions of dollars in a short period of time) stimulated increased self-regulation by many religious broadcasters. Under the guidance of the National Religious Broadcasters Association, a self-regulatory code was adopted in 1987. It requires religious broadcasters to submit to audits and open their books to broader scrutiny.

Religious programming also found a haven on cable television. Jim Bakker's "PTL" program was primarily distributed by cable, although many broadcast stations carried it too. The Rev. (and 1988

candidate for Republican nomination for president) Pat Robertson's Christian Broadcasting Network is primarily a cable programming service. Others, like Rev. Jerry Falwell, also found cable an effective (and less regulated) means of distributing their message. The "Eternal World" cable service provides programming for Catholics. There are other services for Jews and Muslims. Both the "ether" and the cable have become multidenominational.

PROBLEMS OF DIVERSIFICATION OF OWNERSHIP

The Multiple Ownership Rules and the One-to-a-Market Rule

The FCC's so-called multiple ownership rules create a conclusive presumption that nationwide ownership by a single party of more than twelve AM, twelve FM radio stations, or twelve television stations is in itself contrary to the public interest.

For television there is an audience-reach cap limitation. This "limits the aggregate ownership interests in TV stations to those which penetrate a maximum of 25% of the national audience." Due to the physical limitations of UHF stations, owners of those stations will be attributed with only 50 percent of the television households in their service areas.

In order "to promote minority participation in the broadcast industry," minority-controlled entities were allowed to own 14 stations of each type and were "allowed to reach a maximum of 30% of the national audience, provided that at least 5% of the aggregate reach of its stations is contributed by minority controlled stations." A minority station is a station with more than a 50 percent minority ownership. See generally, Report and Order on Amendment of FCC Rules Relating to Multiple Ownership, 100 FCC 2d 74 (1985).

The FCC said that there was a strong case for the repeal of multiple ownership rules: "(T)he appropriate market for ideas is primarily local, and includes a broad variety of means of communication, especially cablecasting, newspapers and opinion magazines, in addition to radio and television." Insofar as "the idea market is a national one," it is sufficiently diverse, the FCC declared, to be unaffected by repeal of the multiple ownership rules. However, in order to prevent too rapid a restructuring of the broadcast industry before its implications would become clear, the FCC decided to promulgate the "Rules of Twelves."

Moreover, the FCC prohibits the grant of a license of the same type of facility to anyone already holding such a license in a given community. In other words, if one already holds one AM radio station license in Middletown, Connecticut, one cannot acquire a license for another such AM radio station in Middletown. See 47 C.F.R. §§ 73.35, 73.240, and 73.636. See also, Multiple Ownership of AM, FM and TV Stations, 18 FCC 288 (1953), aff'd United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

On October 27, 1988, the FCC modified its radio duopoly rule to help commercial radio broadcasters in different but overlapping markets. The FCC explained its modification in a press release: "Citing the explosion of new stations in all sized markets offering a great diversity of program choices, the Commission modified the radio 'duopoly' rule, which prohibits common ownership of two or more commercial radio stations in the same broadcast service whose 1 mV/m contours overlap. Specifically, the FCC relaxed the rule to a principal-city contour standard (the 5mV/m contour for AM stations and the 3.16 mV/m contour for FM stations)."

Basically, the new rules permit commonly owned stations a greater degree of overlap than was possible previously. This will make it possible for commercial radio broadcasters "to take greater advantage of at least some of the economies of scale and related cost savings inherent in the joint ownership of stations in the same market." See FCC MM Docket 87–7.

In 1970, the FCC prohibited the "common ownership, operation, or control of more than one unlimited-time broadcast station in the same area, regardless of the type of broadcast service involved." First Report and Order, Multiple Ownership of Standard, FM & TV Broadcast Stations, 22 FCC 2d 306 (1970). This was known popularly as the one-to-a-market rule. The rule has not done much to alter concentration of ownership in the media since the FCC specifically exempted existing AM, FM, and TV combinations because of the disruptive effects of a divestiture order. See First Report And Order, 22 FCC 2d 306 at 323 (1970).

In March 1971, the FCC amended the so-called one-to-a-market rule to permit AM and FM radio

stations in the same market to be under common ownership. See In The Matter of Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 28 FCC 2d 662 (1971). The FCC Memorandum Opinion order supporting the Amendment defends the Amendment on the following grounds:

> In * * * most cases existing AM-FM combinations in the same area may be economically and/or technically interdependent. * * * We therefore adopted rules permitting the assignment or transfer of combined AM-FM stations to a single party if a showing was made that established the interdependence of such stations and the impracticability of selling and operating them as separate stations. In so doing, we observed that although this would not foster our objective of increasing diversity, it would prevent the possible closing down of many FM stations, which could only decrease diversity.

On December 12, 1988, the FCC modified its prohibition against the common ownership of radio and television stations in the same television market. Although the cross-ownership ban against common ownership of radio and television stations in the same market would be retained, henceforth the FCC would look favorably on case-by-case waiver applications "where those applications involve radio and television stations located in the top 25 markets where at least 30 separately owned or operated broadcast licensees or 'voices' would remain after the proposed combination." The FCC said such joint radio-television ownership "might lead to more news and public affairs programming, a greater diversity of program formats, and better technical facilities, and could enable struggling radio or television stations to remain on the air." See FCC Report No. BC–1307.

Do you see any connection between the "balanced programming" concept, the "fairness" doctrine, and the rules designed to diversify ownership of broadcasting stations?

Although no specific provision in the Federal Communications Act of 1934 deals materially with the concentration of ownership problems in broadcasting, the multiple ownership rules have been held to lie within the administrative discretion of the FCC under the broad purposes of the act. See *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

Newspaper/Broadcast Cross-Ownership

The one-to-a-market rule applies only to new common ownership situations, does not apply to existing licensees, and does not apply to newspapers. In justification the FCC pointed out in the AM–FM combination exception proceeding, 28 FCC 2d 662 (1971), that the whole point of the one-to-a-market rules was to produce more diversity of programming and viewpoints over the broadcast media. The rules did not "contemplate any action with regard to cross-ownership of newspapers and broadcast facilities." But the FCC conceded that problems of divestiture and newspaper cross-ownership gave the FCC pause.

Simultaneous with the promulgation of the one-to-a-market rule, the FCC announced a rulemaking proceeding to consider whether it would be in the public interest to require divestiture by newspapers or multiple owners in a given market. See Further Notice of Proposed Rulemaking, Multiple Ownership of Standard, FM and TV Broadcast Stations, 22 FCC 2d 339 (1970). This proceeding culminated in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

The 1978 Supreme Court decision in the cross-ownership case was the *denouement* of the long but inconsistent effort of the FCC to wrestle with the role newspaper ownership should play in choosing from among the applicants for the licenses of broadcast stations.

In 1975, the FCC set forth its new cross-ownership rules. The substance of the new rules was to prohibit the future licensing or transfer of broadcast stations to those who owned a newspaper in the same community. The new rules were designed to forbid in the future the operation of a broadcast station and a newspaper by a common ownership in the same community. The new rules, however, were not as draconian as this account might indicate. Existing cross-ownership situations were—with the exception of sixteen communities where the only daily newspaper and the only television station in the community were under common ownership—essentially "grandfathered."

Broadcasters thought the new rules went too far, and citizens groups thought they did not go far enough. On review to the federal court of appeals in Washington, D.C., that court in a notable opinion by Judge Bazelon upheld the new FCC rules in part and reversed them in part. The court upheld the

FCC's prospective ban on the future creation of cross-ownership situations in the same community. But the court held that the FCC had erred in "grandfathering" the existing cross-ownership situations. The FCC sought review in the Supreme Court. The Court agreed with the FCC and not with the court of appeals.

FCC v. NATIONAL CITIZENS COMMITTEE FOR BROADCASTING

3 MED.L.RPTR. 2409, 436 U.S. 775, 98 S.CT. 2096, 56 L.ED.2D 697 (1978).

Justice MARSHALL delivered the opinion of the Court.

At issue in these cases are Federal Communications Commission regulations governing the permissibility of common ownership of a radio or television broadcast station and a daily newspaper located in the same community. Second Report and Order. 50 FCC 2d 1046 (1975) (hereinafter cited as Order), as amended upon reconsideration, 53 FCC 2d 589 (1975), codified in 47 CFR 73.35, 73.240, 73.636 (1976). The regulations, adopted after a lengthy rulemaking proceeding, prospectively bar formation or transfer of co-located newspaper-broadcast combinations. Existing combinations are generally permitted to continue in operation. However, in communities in which there is common ownership of the only daily newspaper and the only broadcast station, or (where there is more than one broadcast station) of the only daily newspaper and the only television station, divestiture of either the newspaper or the broadcast station is required within five years, unless grounds for waiver are demonstrated.

The questions for decision are whether these regulations either exceed the commission's authority under the Communications Act of 1934, or violate the First or Fifth Amendment rights of newspaper owners; and whether the lines drawn by the commission between new and existing newspaper-broadcast combinations, and between existing combinations subject to divestiture and those allowed to continue in operation, are arbitrary or capricious within the meaning of § 10(e) of the Administration Procedure Act. For the reasons set forth below, we sustain the regulations in their entirety.

In setting its licensing policies, the commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power. See e.g., Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 FCC 1476, 1476–1477 (1964).

Thus, prior to adoption of the regulations at issue here, the fact that an applicant for an initial license published a newspaper in the community to be served by the broadcast station was taken into account on a case-by-case basis and resulted in some instances in awards of licenses to competing applicants.

Diversification of ownership has not been the sole consideration thought relevant to the public interest, however. The commission's other, and sometimes conflicting goal has been to ensure "the best practicable service to the public." To achieve this goal, the commission has weighed factors such as the anticipated contribution of the owner to station operations, the proposed program service, and the past broadcast record of the applicant—in addition to diversification of ownership—in making initial comparative licensing decisions. Moreover, the commission has given considerable weight to a policy of avoiding undue disruption of existing service. As a result, newspaper owners in many instances have been able to acquire broadcast licenses for stations serving the same communities as their newspapers and the commission has repeatedly renewed such licenses on findings that continuation of the service offered by the common owner would serve the public interest.

Against this background, the commission began the instant rulemaking proceeding in 1970 to consider the need for a more restrictive policy toward newspaper ownership of radio and television broadcast stations. Further Notice of Proposed Rulemaking, 22 FCC 2d 339 (1970). Citing studies showing the dominant role of television stations and daily newspapers as sources of local news and other information, the notice of rulemaking proposed adoption of regulations that would eliminate all newspaper-broadcast combinations serving the same market, by prospectively banning formation or transfer of such combinations and requiring dissolution of all existing combinations within five years. The Order explained that the prospective ban on creation of co-located newspaper-broadcast combinations was

grounded primarily in First Amendment concerns, while the divestiture regulations were based on both First Amendment and antitrust policies. In addition, the commission rejected the suggestion that it lacked the power to order divestiture, reasoning that the statutory requirement of license renewal every three years necessarily implied authority to order divestiture over a five-year period.

The prospective rules, barring formation of new broadcast-newspaper combinations in the same market, as well as transfers of existing combinations to new owners, were adopted without change from the proposal set forth in the notice of rulemaking. While recognizing the pioneering contributions of newspaper owners to the broadcast industry, the commission concluded that changed circumstances made it possible, and necessary, for all new licensing of broadcast stations to "be expected to add to local diversity." The prospective rules were justified, instead, by reference to the commission's policy of promoting diversification of ownership: increases in diversification of ownership would possibly result in enhanced diversity of viewpoints and, given the absence of persuasive countervailing considerations, "even a small gain in diversity" was "worth pursuing."

With respect to the proposed across-the-board divestiture requirement, however, the commission concluded that "a mere hoped for gain in diversity" was not a sufficient justification. Characterizing the divestiture issues as "the most difficult" presented in the proceeding, the Order explained that the proposed rules, while correctly recognizing the central importance of diversity considerations, "may have given too little weight to the consequences which could be expected to attend a focus on the abstract goal alone." Forced dissolution would promote diversity, but it would also cause "disruption for the industry and hardship for individual owners, resulting in losses or diminution of service to the public."

The commission concluded that in light of these countervailing considerations divestiture was warranted only in "the most egregious cases," which it identified as those in which a newspaper-broadcast combination has an "effective monopoly" in the local "marketplace' of ideas as well as economically." The commission recognized that any standards for defining which combinations fell within that category would necessarily be arbitrary to some degree, but "[a] choice had to be made." It thus decided to require divestiture only where there was common ownership of the sole daily newspaper published in a community and either

1. the sole broadcast station providing that entire community with a clear signal, or
2. the sole television station encompassing the entire community with a clear signal.

The Order identified eight television-newspaper and 10 radio-newspaper combinations meeting the divestiture criteria. Waivers of the divestiture requirement were granted *sua sponte* to one television and one radio combination, leaving a total of 16 stations subject to divestiture. The commission explained that waiver requests would be entertained in the latter cases, but, absent waiver, either the newspaper or the broadcast station would have to be divested by January 1, 1980.

On petitions for reconsideration, the commission reaffirmed the rules in all material respects. Memorandum Opinion and Order, 53 FCC 2d 589 (1975).

Various parties * * * petitioned for review of the regulations in the United States Court of Appeals for the District of Columbia Circuit. * * * NAB, ANPA, and the broadcast licensees subject to divestiture argued that the regulations went too far in restricting cross-ownership of newspapers and broadcast stations; NCCB and the Justice Department contended that the regulations did not go far enough and that the commission inadequately justified its decision not to order divestiture on a more widespread basis.

Agreeing substantially with NCCB and the Justice Department, the court of appeals affirmed the prospective ban on new licensing of co-located newspaper-broadcast combinations, but vacated the limited divestiture rules, and ordered the commission to adopt regulations requiring dissolution of all existing combinations that did not qualify for a waiver under the procedure outlined in the Order. 555 F.2d 938 (1977). The court held, first, that the prospective ban was a reasonable means of furthering "the highly valued goal of diversity" in the mass media, and was therefore not without a rational basis. The court concluded further that, since the commission "explained why it considers diversity to be a factor of exceptional importance," and since the commission's goal of promoting diversification of mass media ownership was strongly supported by First Amendment and antitrust policies, it was not arbi-

trary for the prospective rules to be "based on [the diversity] factor to the exclusion of others customarily relied on by the commission."

The court also held that the prospective rules did not exceed the commission's authority under the Communications Act. The court reasoned that the public interest standard of the act permitted, and indeed required, the commission to consider diversification of mass media ownership in making its licensing decisions, and that the commission's general rule-making authority under 47 U.S.C.A. §§ 303(r) and 154(i) allowed the commission to adopt reasonable license qualifications implementing the public interest standard. The court concluded, moreover, that since the prospective ban was designed to "increas[e] the number of media voices in the community," and not to restrict or control the content of free speech, the ban would not violate the First Amendment rights of newspaper owners.

After affirming the prospective rules, the court of appeals invalidated the limited divestiture requirement as arbitrary and capricious within the meaning of § 10(e) of the Administrative Procedure Act, 5 U.S.C.A. § 706(2)(A). The court's primary holding was that the commission lacked a rational basis for "grandfathering" most existing combinations while banning all new combinations. The court reasoned that the commission's own diversification policy, as reinforced by First Amendment policies and the commission's statutory obligation to "encourage the larger and more effective use of radio in the public interest" 47 U.S.C.A. § 303(g), required the commission to adopt a "presumption" that stations owned by co-located newspapers "do not serve the public interest." The court observed that, in the absence of countervailing policies, this "presumption" would have dictated adoption of an across-the-board divestiture requirement, subject only to waiver "in those cases where the evidence clearly discloses that cross-ownership is in the public interest." The countervailing policies relied on by the commission in its decision were, in the court's view, "lesser policies" which had not been given as much weight in the past as its diversification policy. And "the record [did] not disclose the extent to which divestiture would actually threaten these [other policies]." The court concluded, therefore, that it was irrational for the commission not to give controlling weight to its diversification policy and thus to extend the divestiture requirement to all existing combinations.

The court of appeals held further that, even assuming a difference in treatment between new and existing combinations was justifiable, the commission lacked a rational basis for requiring divestiture in the 16 "egregious" cases while allowing the remainder of the existing combinations to continue in operation. The court suggested that "limiting divestiture to small markets of 'absolute monopoly' squanders the opportunity where divestiture might do the most good," since "[d]ivestiture may be more useful in the larger markets." The court further observed that the record "[did] not support the conclusion that divestiture would be more harmful in the grandfathered markets than in the 16 affected markets," nor did it demonstrate that the need for divestiture was stronger in those 16 markets. On the latter point, the court noted that, "[a]lthough the affected markets contain fewer voices, the amount of diversity in communities with additional independent voices may in fact be no greater."

The commission, NAB, ANPA, and several cross-owners who had been intervenors below, and whose licenses had been grandfathered under the commission's rules but were subject to divestiture under the court of appeals' decision, petitioned this court for review. We granted certiorari. And we now affirm the judgment of the court of appeals insofar as it upholds the prospective ban and reverse the judgment insofar as it vacates the limited divestiture requirement.

Petitioners, NAB and ANPA contend that the regulations promulgated by the commission exceed its statutory rulemaking authority and violate the constitutional rights of newspaper owners. We turn first to the statutory, and then to the constitutional, issues.

* * * NAB contends that, since the act confers jurisdiction on the commission only to regulate "communication by wire or radio," 47 U.S.C.A. § 152(a), it is impermissible for the commission to use its licensing authority with respect to broadcasting to promote diversity in an overall communications market which includes, but is not limited to, the broadcasting industry.

This argument undersells the commission's power to regulate broadcasting in the "public interest." In making initial licensing decisions between competing applicants, the commission has long given "primary significance" to "diversification of control of the media of mass communications," and has denied licenses to newspaper owners on the basis of this

policy in appropriate cases. As we have discussed on several occasions, the physical scarcity of broadcast frequencies, as well as problems of interference between broadcast signals, led Congress to delegate broad authority to the commission to allocate broadcast licenses in the "public interest." And "[t]he avowed aim of Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." *National Broadcasting Co. v. United States.* It was not inconsistent with the statutory scheme, therefore, for the commission to conclude that the maximum benefit to the "public interest" would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole.

Our past decisions have recognized, moreover, that the First Amendment and antitrust values underlying the commission's diversification policy may properly be considered by the commission in determining where the public interest lies. "[T]he 'public interest' standard necessarily invites reference to First Amendment principles," *Columbia Broadcasting System, Inc. v. Democratic Nat. Committee,* 412 U.S. 94, 122 (1973), and, in particular, to the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States.* And, while the commission does not have power to enforce the antitrust laws as such, it is permitted to take antitrust policies into account in making licensing decisions pursuant to the public interest standard.

It is thus clear that the regulations at issue are based on permissible public interest goals and, so long as the regulations are not an unreasonable means for seeking to achieve these goals, they fall within the general rulemaking authority recognized in the *Storer Broadcasting* and *National Broadcasting* cases. Petitioner ANPA contends that the prospective rules are unreasonable in two respects: first, the rulemaking record did not conclusively establish that prohibiting common ownership of co-located newspapers and broadcast stations would in fact lead to increases in the diversity of viewpoints among local communications media; and second, the regulations were based on the diversification factor to the exclusion of other service factors considered in the past by the commission in making initial licensing decisions regarding newspaper owners. With respect to the first point, we agree with the court of appeals that, notwithstanding the inconclusiveness of the rulemaking record, the commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints. As the court of appeals observed, "[d]iversity and its effects are * * * elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds." Moreover, evidence of specific abuses by common owners is difficult to compile; "the possible benefits of competition do not lend themselves to detailed forecast." In these circumstances, the commission was entitled to rely on its judgment, based on experience, that "it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run." * * *, see 555 F.2d at 962.

As to the commission's decision to give controlling weight to its diversification goal in shaping the prospective rules, the Order makes clear that this change in policy was a reasonable administrative response to changed circumstances in the broadcasting industry. The Order explained that, although newspaper owners had previously been allowed, and even encouraged, to acquire licenses for co-located broadcast stations because of the shortage of qualified license applicants, a sufficient number of qualified and experienced applicants other than newspaper owners was now available. In addition, the number of channels open for new licensing had diminished substantially. It had thus become both feasible and more urgent for the commission to take steps to increase diversification of ownership, and a change in the commission's policy toward new licensing offered the possibility of increasing diversity without causing any disruption of existing service. In light of these considerations, the commission clearly did not take an irrational view of the public interest when it decided to impose a prospective ban on new licensing of co-located newspaper-broadcast combinations.

Petitioners NAB and ANPA also argue that the regulations, though designed to further the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States,* nevertheless violate the First Amendment rights of newspaper owners. We cannot agree, for this argument ignores the fundamental proposition that

there is no "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion Broadcasting Co. v. FCC*, 395 U.S., at 388.

The physical limitations of the broadcast spectrum are well known. Because of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public. In light of this physical scarcity, government allocation and regulation of broadcast frequencies are essential, as we have often recognized. No one here questions the need for such allocation and regulation, and, given that need, we see nothing in the First Amendment to prevent the commission from allocating licenses so as to promote the "public interest" in diversification of the mass communications media.

NAB and ANPA contend, however, that it is inconsistent with the First Amendment to promote diversification by barring a newspaper owner from owning certain broadcasting stations. In support, they point to our statement in *Buckley v. Valeo*, 424 U.S. 1 (1976), to the effect that "government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others." As *Buckley* also recognized, however, " 'the broadcast media pose unique and special problems not present in the traditional free speech case.' " Id., at 50 n. 55, quoting *Columbia Broadcasting System v. Democratic Nat. Committee*. Thus efforts to " 'enhanc[e] the volume and quality of coverage' of public issues" through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be. And n. 55, quoting *Red Lion Broadcasting Co. v. FCC*; compare *Miami Herald Pub. Co. v. Tornillo*. Requiring those who wish to obtain a broadcast license to demonstrate that such would serve the "public interest" does not restrict the speech of those who are denied licenses; rather, it preserves the interests of the "people as a whole * * * in free speech." *Red Lion Broadcasting Co.* As we stated in *Red Lion*, "to deny a station license because 'the public interest' requires it 'is not a denial of free speech.' " Quoting *National Broadcasting Co. v. United States*.

* * *

Finally, petitioners argue that the commission has unfairly "singled out" newspaper owners for more stringent treatment than other license applicants. But the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications were already treated under the commission's multiple ownership rules; owners of radio stations, television stations, and newspapers alike are now restricted in their ability to acquire licenses for co-located broadcast stations.

In the instant case, far from seeking to limit the flow of information, the commission has acted, in the court of appeals' words, "to enhance the diversity of information heard by the public without on-going government surveillance of the content of speech." 555 F.2d at 954. The regulations are a reasonable means of promoting the public interest in diversified mass communications; thus they do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them. Being forced to "choose among applicants for the same facilities," the commission has chosen on a "sensible basis," one designed to further, rather than contravene, "the system of freedom of expression." T. Emerson, *The System of Freedom of Expression* 663 (1970).

After upholding the prospective aspect of the commission's regulations, the court of appeals concluded that the commission's decision to limit divestiture to 16 "egregious cases" of "effective monopoly" was arbitrary and capricious within the meaning of the Administrative Procedure Act (APA), § 10(e), 5 U.S.C.A. § 706(2)(A).

In the view of the court of appeals, the commission lacked a rational basis, first, for treating existing newspaper-broadcast combinations more leniently than combinations that might seek licenses in the future; and, second, even assuming a distinction between existing and new combinations had been justified, for requiring divestiture in the "egregious cases" while allowing all other existing combinations to continue in operation. We believe that the limited divestiture requirement reflects a rational weighing of competing policies, and we therefore reinstate the portion of the commission's order that was invalidated by the court of appeals.

* * *

The commission was well aware that separating existing newspaper-broadcast combinations would promote diversification of ownership. It concluded, however, that ordering widespread divestiture would not result in the "the best practicable service to the American public", a goal that the commission has always taken into account and that has been specif-

ically approved by this Court, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

In particular, the commission expressed concern that divestiture would cause "disruption for the industry" and "hardship to individual owners," both of which would result in harm to the public interest. Especially in light of the fact that the number of co-located newspaper-broadcast combinations was already on the decline as a result of natural market forces, and would decline further as a result of the prospective rules, the commission decided that across-the-board divestiture was not warranted.

The Order identified several specific respects in which the public interest would or might be harmed if a sweeping divestiture requirement were imposed: the stability and continuity of meritorious service provided by the newspaper owners as a group would be lost; owners who had provided meritorious service would unfairly be denied the opportunity to continue in operation; "economic dislocations" might prevent new owners from obtaining sufficient working capital to maintain the quality of local programming; and local ownership of broadcast stations would probably decrease. We cannot say that the commission acted irrationally in concluding that these public interest harms outweighed the potential gains that would follow from increasing diversification of ownership.

In the past, the commission has consistently acted on the theory that preserving continuity of meritorious service furthers the public interest, both in its direct consequence of bringing proven broadcast service to the public, and in its indirect consequence of rewarding—and avoiding losses to—licensees who have invested the money and effort necessary to produce quality performance. Thus, although a broadcast license must be renewed every [few] years, and the licensee must satisfy the commission that renewal will serve the public interest, both the commission and the courts have recognized that a licensee who has given meritorious service has a "legitimate renewal expectanc[y]" that is "implicit in the structure of the Act" and should not be destroyed absent good cause. *Greater Boston Television Corp. v. FCC*. Accordingly, while diversification of ownership is a relevant factor in the context of license renewal as well as initial licensing, the commission has long considered the past performance of the incumbent as the most important factor in deciding whether to grant license renewal and thereby to allow the existing owner to continue in operation. Even where an incumbent is challenged by a competing applicant who offers greater potential in terms of diversification, the commission's general practice has been to go with the "proven product" and grant renewal if the incumbent has rendered meritorious service.

In the instant proceeding, the commission specifically noted that the existing newspaper-broadcast cross-owners as a group had a "long record of service" in the public interest; many were pioneers in the broadcasting industry and had established and continued "[t]raditions of service" from the outset. Order, at 1078. Notwithstanding the commission's diversification policy, all were granted initial licenses upon findings that the public interest would be served thereby, and those that had been in existence for more than three years had also had their licenses renewed on the ground that the public interest would be furthered. The commission noted, moreover, that its own study of existing co-located newspaper-television combinations showed that in terms of percentage of time devoted to several categories of local programming, these stations had displayed "ah undramatic but nonetheless statistically significant superiority" over other television stations. An across-the-board divestiture requirement would result in loss of the services of these superior licensees, and—whether divestiture caused actual losses to existing owners, or just denial of reasonably anticipated gains—the result would be that future licensees would be discouraged from investing the resources necessary to produce quality service.

At the same time, there was no guarantee that the licensees who replaced the existing cross-owners would be able to provide the same level of service or demonstrate the same long-term commitment to broadcasting. And even if the new owners were able in the long run to provide similar or better service, the commission found that divestiture would cause serious disruption in the transition period. Thus, the commission observed that new owners "would lack the long knowledge of the community and would have to begin raw," and—because of high interest rates—might not be able to obtain sufficient working capital to maintain the quality of local programming.

The commission's fear that local ownership would decline was grounded in a rational prediction, based on its knowledge of the broadcasting industry and supported by comments in the record, that many of the existing newspaper-broadcast combinations owned by local interests would respond to the divestiture

requirement by trading stations with out-of-town owners. It is undisputed that roughly 75% of the existing co-located newspaper-television combinations are locally owned, and these owners' knowledge of their local communities and concern for local affairs, built over a period of years, would be lost if they were replaced with outside interests. Local ownership in and of itself has been recognized to be a factor of some—if relatively slight—significance even in the context of initial licensing decisions. It was not unreasonable, therefore, for the commission to consider it as one of several factors militating against divestiture of combinations that have been in existence for many years.

In light of these countervailing considerations, we cannot agree with the court of appeals that it was arbitrary and capricious for the commission to "grandfather" most existing combinations, and to leave opponents of these combinations to their remedies in individual renewal proceedings. In the latter connection we note that, while individual renewal proceedings are unlikely to accomplish any "overall restructuring" of the existing ownership patterns, the Order does make clear that existing combinations will be subject to challenge by competing applicants in renewal proceedings, to the same extent as they were prior to the instant rulemaking proceedings. That is, diversification of ownership will be a relevant but somewhat secondary factor. And, even in the absence of a competing applicant, license renewal may be denied if, *inter alia*, a challenger can show that a common owner has engaged in specific economic or programming abuses.

In concluding that the commission acted unreasonably in not extending its divestiture requirement across-the-board, the court of appeals apparently placed heavy reliance on a "presumption" that existing newspaper-broadcast combinations "do not serve the public interest." The court derived this presumption primarily from the commission's own diversification policy, as "reaffirmed" by adoption of the prospective rules in this proceeding, and secondarily from "[t]he policies of the First Amendment," and the commission's statutory duty to "encourage the larger and more effective use of radio in the public interest." 47 U.S.C.A. § 303(g). As explained above, we agree that diversification of ownership furthers statutory and constitutional policies, and, as the commission recognized, separating existing newspaper-broadcast combinations would promote diversification. But the weighing of policies under the "public interest" standard is a task that Congress has delegated to the commission in the first instance, and we are unable to find anything in the Communications Act, the First Amendment, or the commission's past or present practices that would require the commission to "presume" that its diversification policy should be given controlling weight in all circumstances.

Such a "presumption" would seem to be inconsistent with the commission's longstanding and judicially approved practice of giving controlling weight in some circumstances to its more general goal of achieving "the best practicable service to the public." Certainly, as discussed above, the commission through its license renewal policy has made clear that it considers diversification of ownership to be a factor of less significance when deciding whether to allow an existing licensee to continue in operation than when evaluating applicants seeking initial licensing. Nothing in the language or the legislative history of § 303(g) indicates that Congress intended to foreclose all differences in treatment between new and existing licensees, and indeed, in amending § 307(d) of the Act in 1952, Congress appears to have lent its approval to the commission's policy of evaluating existing licensees on a somewhat different basis than new applicants. Moreover, if enactment of the prospective rules in this proceeding itself were deemed to create a "presumption" in favor of divestiture, the commission's ability to experiment with new policies would be severely hampered. * * *

The court of appeals also relied on its perception that the policies militating against divestiture were "lesser policies" to which the commission had not given as much weight in the past as its divestiture policy. This perception is subject to much the same criticism as the "presumption" that existing co-located newspaper-broadcasting combinations do not serve the public interest. The commission's past concern with avoiding disruption of existing service is amply illustrated by its license renewal policies. In addition, it is worth noting that in the past when the commission has changed its multiple ownership rules it has almost invariably tailored the changes so as to operate wholly or primarily on a prospective basis. * * *

The court of appeals apparently reasoned that the commission's concerns with respect to disruption of existing service, economic dislocations, and decreases in local ownership necessarily could not be very weighty since the commission has a practice of

routinely approving voluntary transfers and assignments of licenses. But the question of whether the commission should compel proven licensees to divest their stations is a different question from whether the public interest is served by allowing transfers by licensees who no longer wish to continue in the business. As the commission's brief explains:

> [I]f the commission were to force broadcasters to stay in business against their will, the service provided under such circumstances, albeit continuous, might well not be worth preserving.

* * *

We also must conclude that the court of appeals erred in holding that it was arbitrary to order divestiture in the 16 "egregious cases" while allowing other existing combinations to continue in operation. The commission's decision was based not—as the court of appeals may have believed—on a conclusion that divestiture would be more harmful in the grandfathered markets than in the 16 affected markets, but rather on a judgment that the need for diversification was especially great in cases of local monopoly. This policy judgment was certainly not irrational, see *United States v. Radio Corp. of America*, 358 U.S., at 351–352, and indeed was founded on the very same assumption that underpinned the diversification policy itself and the prospective rules upheld by the court of appeals and now by this Court—that the greater the number of owners in a market, the greater the possibility of achieving diversity of program and service viewpoints.

As to the commission's criteria for determining which existing newspaper-broadcast combinations have an "effective monopoly" in the "local marketplace of ideas as well as economically," we think the standards settled upon by the commission reflect a rational legislative-type judgment. Some line had to be drawn, and it was hardly unreasonable for the commission to confine divestiture to communities in which there is common ownership of the only daily newspaper and either the only television station or the only broadcast station of any kind encompassing the entire community with a clear signal. Cf. *United States v. Radio Corp. of America*. It was not irrational, moreover, for the commission to disregard media sources other than newspapers and broadcast stations in setting its divestiture standards. The studies cited by the commission in its notice of rulemaking unanimously concluded that newspapers and television are the two most widely utilized media sources for local news and discussion of public affairs; and, as the commission noted in its Order, at 1081, "aside from the fact that [magazines and other periodicals] often had only a tiny fraction in the market, they were not given real weight since they often dealt exclusively with regional or national issues and ignored local issues." Moreover, the differences in treatment between radio and television stations were certainly justified in light of the far greater influence of television than radio as a source for local news. See Order, at 1083.

The judgment of the court of appeals is affirmed in part and reversed in part.

It is so ordered.

COMMENT

The Supreme Court decision in the cross-ownership case reversed the court of appeal's effort to restructure on an across-the-board basis existing cross-ownership patterns in American communities. Beyond this holding, the Supreme Court decision in the cross-ownership case gave a new sense of security to incumbent or existing licensees by declaring that past performance by the incumbent licensee rather than diversification of ownership was the "most important factor in deciding whether to grant license renewals." See *Central Florida Enterprises v. FCC*, text, p. 730.

In its cross-ownership rules opinion, the FCC emphasized that the rules derived from First Amendment policy rather than antitrust policy. Diversification of ownership was seen by the FCC as a First Amendment goal. The Supreme Court agreed with this perspective.

Perhaps the whole philosophy of the diversification of ownership concept in broadcasting is wrongheaded. The concept assumes apparently that the more diffuse the ownership of broadcast stations, the more diverse the content of broadcast programming will be. But is this a realistic assumption?

Recent modifications in the one-to-a-market rule suggest that the FCC now doubts this assumption, see text, p. 863.

Justice Marshall acknowledged that an FCC study of co-located newspaper-television combinations revealed that such combinations showed an " 'undramatic but nonetheless statistically significant superiority' " in the percentage of programming time devoted to some local programming. If co-located

newspaper-broadcast combinations display a measurably superior performance, how can even application of a prospective ban on the formation of such combinations be justified?

Is the reason the Court sustains the prospective ban based on the principle that the formation of broadcast regulatory policy is an FCC and not a judicial responsibility? Perhaps the FCC's decision to root the cross-ownership rules in First Amendment policy rather than antitrust policy indicates that the rules reflect a certain leap of First Amendment faith rather than any empirically or economically demonstrable policy.

If the Supreme Court had upheld the court of appeals' extension of the ban on cross-ownership to existing combinations, the result would not, at least on a national basis, have necessarily led to a substantial change in ownership patterns in the communications industry. A cross-ownership ban on existing combinations was bound to encourage trades. A newspaper in one city could sell its television station in that city to a newspaper in another and buy in its stead the television station in the other city.

Although the Supreme Court may have "grandfathered" existing cross-ownership combinations, such combinations are by no means impervious to future attack. The Court, per Justice Marshall, was careful to say: "And even in the absence of a competing applicant, license renewal may be denied if a challenger can show that a common owner has engaged in specific economic or programming abuses."

Citizens groups interested in working to bring a larger measure of deconcentration of ownership in the broadcast industry were thus relegated to the renewal process and resort to petitions to deny individual application for renewal. In short, absence of diversification of ownership on the part of a renewal application can still be asserted as a demerit in comparative hearings. In the absence of another alternative, this remedy was better than nothing, but it was hardly likely to yield much overall change in the broadcast industry.

Congress, Cross-Ownership, and the Rupert Murdoch Caper

On March 19, 1988, the United States Court of Appeals for the District of Columbia, per Judge Williams, decided a much publicized case involving a clash between celebrated media magnate, Rupert Murdoch, and the cross-ownership rules. See *News America Publishing Inc. v. FCC*, 844 F.2d 800 (D.C.Cir. 1988). The case involved analysis of the meaning of the Supreme Court's decision in *FCC v. NCCB*. More important, the case considered a Continuing Resolution demonstrating congressional attachment to diversification of ownership policies such as the cross-ownership rules. The resolution also signaled congressional dissatisfaction with the relaxed enforcement of such policies by the FCC in its present deregulatory mode. The facts, as derived from Judge Williams's decision, are set forth below.

News America Inc., controlled by K. Rupert Murdoch, is a corporation which owns huge broadcast and newspaper holdings around the world. Rupert Murdoch also owns Fox Television, Inc., which owns numerous television stations throughout the United States. In November 1985 and November 1986 Fox Television obtained permission from the FCC to acquire WNYW-TV in New York City and WXNE-TV in Boston. Since News America owned the New York *Post* and the Boston *Herald*, these acquisitions required waivers of the cross-ownership rules. (Do you see why, absent a waiver, these acquisitions would have violated the newspaper/broadcast cross-ownership rules?)

The FCC granted the temporary waivers—two years for the New York acquisition and eighteen months for the one in Boston. Murdoch was expected to sell the newspapers within these periods. The waiver extended to March 6, 1988 for the New York interests and to June 30, 1988 for those in Boston. News America sold the *Post* on March 7, but that still left the Boston situation.

On December 22, 1987 Congress passed and President Reagan signed a Continuing Resolution appropriating all of the funds for the federal government for the 1988 fiscal year. A provision in that resolution, an amendment introduced by Senator Hollings of South Carolina and Senator Kennedy of Massachusetts, would have deprived the FCC of any power to give any additional waivers in these matters to Rupert Murdoch:

> Provided further, that none of the funds appropriated in this Act or any other Act may be used to repeal, to retroactively apply changes in, or to begin or continue a re-examination of the rules of the Federal Communications Commission with respect to the common ownership of a daily newspaper and a television station where the grade A contour of the television station encompasses the entire community in

> which the newspaper is published, *or to extend the time period of current grants of temporary waivers to achieve compliance with such rules.*

Making Further Continuing Appropriations for the Fiscal year Ending September 30, 1988, H. Rep. No. 498, 100th Cong., 1st Sess. 34 (1987) ("Conference Report").

Judge Williams analyzed the statute as follows: "As of December 22 the sole holder of any temporary waiver of the sort specified in the italicized phrase was News America Publishing Inc. [I]ts sole effect was to forbid extensions of those waivers." News America applied to the FCC for extensions of its waivers anyway on January 14, 1988. On the basis of the Hollings Amendment, the FCC issued an order denying these requests. Review was sought and obtained in the court of appeals, and the FCC's order was stayed.

The court of appeals ruled that the last eighteen italicized words of the Hollings Amendment were unconstitutional. The court did not rule on the rest of the amendment. The court said that, under the First and Fifth Amendments, it had to "scrutinize" the legislation under a "test more stringent than the 'minimum rationality' criterion." The FCC argued that *FCC v. NCCB*, 436 U.S. 775 (1978), established "the minimum rationality standard for 'structural' regulations of the broadcast industry."

But Judge Williams declared: "[T]he Hollings Amendment is far from purely structural. Indeed, it is structural only in form, as it applies to a closed class of one publisher/broadcaster. Thus, even if we were to accept the Commission's analysis of *NCCB*, we would not agree that the Amendment should be lumped with the cross-ownership rules and accorded the high deference that the Commission believes the latter received. We need not go so far as the Supreme Court in *League of Women Voters*, and require a showing that the Amendment's classification is narrowly drawn to serve a substantial governmental interest. What suffices for this case is that more is required than 'minimum rationality.' "

Judge Williams concluded for the court in *News America Publishing* that the waiver request should be remanded back to the FCC: "Congress has denied a single publisher/broadcaster the opportunity to ask the FCC to exercise its discretion to extend its waivers. Whatever Congress' motives, the 'potential for abuse' of First Amendment interests is so great in such restrictions, *cf. Minneapolis Star*, 460 U.S. at 592, that bland invocation of Congress's conventional power to approach a problem one step at a time cannot sustain the Amendment."

Judge Williams suggested that continuation of a waiver policy might be necessary if the cross-ownership rules were to avoid First Amendment challenge: "[T]he Supreme Court in sustaining the cross-ownership rules against First Amendment attack found that their 'reasonableness' was 'underscored' by the availability of waivers where the station and newspaper 'cannot survive without common ownership.' *NCCB*, 436 U.S. at 802 n. 20. Thus, whether or not the waiver process is constitutionally compelled, First Amendment values are implicated in the process and require even-handed treatment of all applicants. We do not, of course, express any opinion as to whether News America is entitled to an extension of its remaining waiver."

COMMENT

The congressional Continuing Resolution, better known as the Hollings Amendment, forbade the FCC to change its rules concerning cross-ownership of a daily newspaper and a television station in the community. The student should note that the *News America* decision did not invalidate that major part of the resolution. Only the part of the resolution concerning waiver extensions was invalidated.

In dissent, Judge Spottswood Robinson said that the Congress feared that the FCC was about to repeal the rule; indeed, the FCC brief in the case conceded as much. Congress was also concerned, Judge Robinson said, by the FCC's use of waivers in connection with the cross-ownership rules: "Congress recognized the distinct possibility that through indefinite or successive extensions of a temporary waiver, the FCC could grant the equivalent of a permanent waiver without any showing that the heavy burden of justifying such a waiver had been met." Moreover, Judge Robinson believed that the Hollings Amendment not only did not violate the First Amendment but in fact promoted First Amendment values as explained by Justice Marshall in *FCC v. NCCB*. How so?

Judge Robinson did not believe that the standard of review employed in *League of Women Voters* should have been used: "Congress has blocked News America's access to the Commission only for the purpose of requesting an extension of the waiver it presently enjoys. That is a far cry from the content-

focused restriction involved in *League of Women Voters*, which outlawed a particular type of highly valued speech. The *League of Women Voters* standard of review is unsuitable here."

Does Judge Robinson's First Amendment defense of the no-waiver extension proviso in the Hollings Amendment persuade you? Generally speaking, do you think cross-ownership rules frustrate or further First Amendment objectives?

On April 26, 1989, having still not found a buyer willing to pay its $35,000,000 asking price, *News-America* received an eighteen month extension of its waiver. The FCC allowed the station to be placed in trust but conditioned the extension on the station's terminating its network affiliation with Fox and entering into no new contracts for Fox syndicated programming. *Broadcasting*, May 1, 1989, p. 38.

Cable Television Ownership

The FCC began to regulate cable television ownership in the 1970s. By the late 1980s, regulation consisted of a combination of FCC rules, elements of the antitrust settelment in the AT&T case, and Congressional intervention through the Cable Communications Policy Act of 1984.

Nationwide cable ownership is limited in two ways. Unlike broadcasting, there are no national ownership caps, so that cable multiple system operator's own, in some cases, thousands of systems. Only antitrust law functions as a theoretical limit. The three major national broadcast TV networks, however, are prohibited by FCC rule from owning cable systems. [47. C.F.R. § 76.501(a)(1)]. Faced with this prohibition they have explored ownership of cable programming services (e.g., ESPN which is partly owned by ABC). The FCC has proposed to repeal this rule, a development that would please the networks who feel economically pressed. AT&T is prohibited by the terms of its antitrust settlement reached in 1982, from entering cable ownership—at least until 1990. The settlement's prohibition self-destructs at that time, unless extended by the court supervising the AT&T divestiture.

Local cable system ownership faces two limits as well. Local full-power TV broadcasters may not own cable systems serving the same areas as their television stations [47 C.F.R. § 76.501(a)(2)]. This prohibition was originally only an FCC rule, but Congress codified it through the Cable Communications Policy Act of 1984 47 U.S.C.A. § 533(a) (1988). However, TV broadcasters can own cable systems outside their service areas and many have made such acquisitions.

Local telephone companies are similarly prohibited from acquiring cable systems in their service areas, originally under FCC rule, 47 U.S.C.A. § 63.54 (1988), but now under provisions of the Cable Communications Policy Act of 1984, 47 U.S.C.A. § 533(b). This would allow local telephone companies to own cable systems outside of their telephone service areas were it not for elements of the AT&T antitrust settlement that prohibit the regional holding companies from entering the information services industries. So far, the judge supervising the AT&T divesture has refused to allow local telephone companies into cable system ownership anywhere in the United States. The FCC has found ways to allow limited telephone company involvement. *General Telephone Co. of California*, 3 FCC Rcd. 2317 (Common Car. Bureau, 1988). Congress is being urged by many to intervene, somehow strip Judge Greene of his control over the issue, and allow local telephone companies into the cable industry. Proponents argue that telephone entry would promote competition in what is otherwise argued to be a not-highly-competitive (or responsive) cable industry. Opponents maintain that telephone companies would come to dominate the industry, force out existing cable operators and others and, eventually, monopolize it. The issue of telephone company entry into mass media services is likely to be one of the most active policy issues of the early 1990s.

REGULATION OF CABLE TELEVISION

A Brief History of Cable Television

Cable television is not as recent a development as it sometimes seems. The industry began in 1948 when appliance store owners, anxious to demonstrate television but unable to do so because of weak signals, erected large antennas connected to an amplification and distribution system. Early cable systems grew in communities with weak broadcast reception, either because of natural conditions (such

as shading by mountains) or because the communities were at the fringes of the service areas of early TV broadcasters. They became known as Community Antenna Television Systems (CATVs), and that's really what they were. Large antenna systems fed into a coaxial cable-based distribution system. The primary purpose was to improve a community's reception of available, but hard to receive, over-the-air television programs.

So long as that was all early CATV systems did, they attracted little legal or policy interest. The FCC, in fact, early disclaimed any interest in regulating such systems. CATV and TV Repeater Services, 26 FCC 403 (1959). Broadcasters liked the new medium because it added to their audiences. Only later, when cable began to offer competing services, did the broadcasting industry become concerned. Once agitated, broadcasters manipulated the policymaking system into several years of regulatory suppression of cable television growth. The FCC changed its mind about its regulatory authority. See Carter Mountain Transmission Corp., 32 FCC 459 (1962), aff'd *Carter Mountain Transmission Corp. v.* FCC, 321 F.2d 359 (D.C.Cir. 1963) and First Report and Order in Docket Nos. 14895 and 15233, 38 FCC 683 (1965). Complex regulations were adopted in 1966. In effect, they "froze" growth of the cable industry by making it practically impossible to import "distant" (out-of-market) TV stations into cabled communities. While effectively prohibiting distant signal importation, the rules required cable systems to carry all local TV signals and protected local stations against duplication of their programming by nonlocal stations. Second Report on CATV Regulation, 2 FCC 2d 725 (1966).

The U.S. Supreme Court eventually upheld the FCC's claimed authority to regulate cable. In *United States v. Southwestern Cable* Co., 392 U.S. 157 (1968), the Court bought the arguments of the broadcasting industry and the FCC that cable's impact on broadcasting justified its regulation. The Court ruled that the FCC had authority to regulate cable to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." See also *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

Armed with this vindication of regulatory authority, the FCC continued vigorous cable regulation. In 1970, it required cable systems with 3,500 subscribers or more to originate programming, a requirement subsequently dropped. It prohibited cable systems from being owned by local telephone companies, local broadcasters, or national TV networks. In 1972, it extensively revised its cable rules and began to provide the cable industry with some regulatory relief. The new rules were much less restrictive of distant signal importation but still contained complex signal carriage rules that restricted the programming options of cable system operators.

By the later 1970s, however, many of those oppressive regulations were gone—either through FCC repeal or judicial action—and by the late 1980s, cable television was to a very substantial degree deregulated. Some argued that the result was not a "level playing field" and that it was unfair for cable to be deregulated while broadcasters remained subject to many FCC regulations that did not apply to their cable competitors. Others, however, began to suspect that the deregulation of cable television had gone too far, that cable was at least a local natural monopoly, and that it might be time to reimpose some forms of regulation, especially of cable television rates. All of these debates were made more complex by the simple fact that by the late 1980s, the U.S. Supreme Court had yet to adopt a First Amendment "theory" for cable television. Lower courts, when cable First Amendment issues arose, split badly. Cable law by the late 1980s was still very much an evolving field with the final framework unclear.

Congress Intervenes—The Cable Communications Policy Act of 1984

Congress had attempted to set the regulatory framework for cable in 1984 when it adopted the Cable Communications Policy Act of 1984, Pub.L. 98–549, 98 Stat. 2779, now codified as 47 U.S.C.A. §§ 521–559. The cable act, to a substantial degree, ratified many of the aspects of cable law that had emerged in an ad hoc fashion from the 1960s through the 1980s. It clarified that operators of systems that used public rights of way required franchises from local governments and set up the basic system for granting "1 or more" franchises, as the franchising authority might choose. The law, however, limited the ability of franchising bodies to regulate programming services: they could demand that broad categories of service be provided—say, a music channel—but could not specify which service had to be used (e.g., MTV). They could not take program-

ming into account in making franchise grants. Congress deregulated "basic cable" rates (rates for the cable tiers containing broadcast stations) for most cable systems and made it perfectly clear that rates for premium services (e.g., HBO) were to be completely determined by marketplace forces. These changes greatly pleased the cable television industry.

The cities, however, got something in exchange for their concessions on rate and programming deregulation. Congress clarified that cities could demand franchise fees of up to 5 percent of total cable system revenues (basic service, premium services, and local cable system advertising, for example, all counted). The cities had charged franchise fees for years, but Congress had not ever before specifically authorized it. In addition, franchising bodies were given the right to demand that applicants set aside channels for public, educational, and governmental (PEG) access. Systems of over thirty-six channels also had to be prepared to provide channels for leased access. The number of these varied with the number of activated channels on the system.

The Cable Communications Policy Act of 1984 was the product of a carefully crafted compromise between the franchising bodies (mostly represented by the National League of Cities) and the cable television industry (primarily the National Cable Television Association). It would be correct to say that Congress did not so much adopt the act as it just ratified it. Powerful members of Congress told all parties that if they could settle their differences and present Congress with a compromise bill, Congress would do all it could to adopt it. The compromise was struck, and Congress fulfilled its end of the bargain. Only as the late 1980s rolled around did some in Congress question what they had done and at least consider whether or not it was time to "revisit" the act and, perhaps, reimpose some forms of regulation.

As noted previously, the bill was deregulatory on two points that mattered most to the cable industry: rates and program service. At the same time, it ratified the franchising process and gave the cities substantial capacity to set nonprogram related demands or conditions as a part of franchising. The result in subsequent years was to tend to divide the development of cable television law. On one side of the line there are the efforts, now few-and-far-between (and mostly focused on cable obscenity and indecency) to directly regulate the content of cable communications. Courts, as we will see, have been highly skeptical about many of these attempts to regulate cable's most clearly expressive functions. On the other side of the line are cases arising from the cable television franchising process. Many of these cases involve, at most, rather indirect effects on cable content. As courts have struggled with First Amendment cases related to franchising, they have become deeply entangled in the fact that cable television is, at the moment, without a clear First Amendment model.

The Regulation of Cable Television Content

Prior to adoption of the Cable Communications Policy Act of 1984 general regulation of cable service was common. Cities prescribed what channels systems were to offer. Requests for rate increases were often tied to improvements in program services. To get increased rates, cable companies often promised a new channel or two of programming.

The Cable Communications Policy Act of 1984 brought this to a screeching halt. As now codified at 47 U.S.C.A. § 544(b)(1), franchising authorities may "establish requirements for facilities and equipment, but may not establish requirements for video programming or other information services." Section 544(b)(2), however, allows the franchisor to "enforce * * * requirements contained within the franchise" for "broad categories of video programming or other services." The practical result of all this is that franchising bodies can no longer tell cable operators what channels or services they have to provide.

The act, however, anticipated (and, perhaps, to some extent even caused) three areas of "program" regulation to come into focus. One area of intense action has been cable obscenity and/or cable indecency. A second has been whether or not the FCC can require cable systems to carry local television signals. The third area, related to "must carry," has been the question of whether it is constitutional, as the Cable Communications Act of 1984 permits, for franchisors to require cable access channels.

Several portions of the Cable Act dealt with cable obscenity and, in some instances, indecency. Under the act, operators of cable systems with more than thirty-six channels have to be willing to lease some channels to outsiders. Section 532(h) of 47 U.S.C.A., however, says that such leased access need not be provided if the franchising authority judges the access service to be "obscene, or * * * in conflict with

community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States." Section 544 (d) authorizes the franchising authority and cable operator to specify that certain cable services "shall not be provided, or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution the United States." Section 544(d)(2)(A) says that cable system operators have to provide "lock boxes" for sale or lease that cable subscribers can use to "prohibit viewing of a particular cable service during periods selected by that subscriber." In simple words, this is a way to block out, for example, the Playboy Channel when the children are home alone. Finally, section 559 extends the previously existing criminal sanctions against broadcast obscenity to cable obscenity by providing that "whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined not more than $10,000 or imprisoned not more than 2 years, or both." In 1988, Congress amended this portion of the law to make it clear that both state and federal obscenity prosecutions were possible.

Oddly, these provisions of federal law have not yet been the object of much litigation. Instead, lawsuits have arisen when states and local governments have adopted statutes or ordinances aimed at restricting obscene or, more often, indecent cable programming. Challenges to these laws have forced courts to confront the basic lack of a First Amendment theory for cable television.

The major cases arose from Utah and Miami, Florida. In each instance, laws were adopted prohibiting cable "indecency." The effort, in each, was to transplant the principles of the regulation of broadcast indecency, largely as reflected in the U.S. Supreme Court's *Pacifica* decision, into the area of cable television. The courts that eventually struck down these laws did not establish a general First Amendment theory for cable. They decided, however, that the broadcast model derived from *Pacifica* did not apply. The Utah statute was initially struck down in *Community Television of Utah, Inc. v. Roy City*, 555 F.Supp. 1164 (D.C.Utah 1982). It was disapproved again in *Community Television v. Wilkinson*, 611 F.Supp. 1099 (D.C.Utah 1985), a decision upheld in *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986). The U.S. Supreme Court affirmed without opinion, 107 S.Ct. 1559 (1987). Miami's rather similar ordinance was invalidated in *Cruz v. Ferre*, 571 F.Supp. 125 (S.D.Fla. 1983), a decision upheld in *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985). This Eleventh Circuit Court of Appeals decision gives the best conceptual analysis of the problems of applying broadcast indecency theories to cable television.

CRUZ v. FERRE

755 F.2D 1415 (11TH CIR. 1985).

STAFFORD, District Judge:

This case involves a challenge to the constitutionality of a Miami ordinance regulating the distribution of obscene and indecent material through cable television. The district court found the provisions of the ordinance regulating the distribution of "indecent material" constitutionally overbroad. Additionally, the district judge held that the ordinance "violate[s] the notion of fairness implicit in one's right to due process of law." *Cruz v. Ferre*, 571 F.Supp. 125, 126 (S.D.Fla. 1983). We affirm on both first amendment and due process grounds.

City of Miami Ordinance No. 9223, adopted on October 19, 1981, sets forth the overall system for regulating cable television in the City of Miami. On November 19, 1981, the city enacted Ordinance No. 9332, granting Miami Cablevision ("Cablevision"), a joint venture of Americable of Greater Miami, Inc., and Miami Telecommunications, Inc., a nonexclusive, revocable license to operate a cable television system in Miami.

On January 13, 1983, the city enacted a third cable ordinance, Ordinance No. 9538. This ordinance, which is the subject of this lawsuit, is intended to regulate "indecent" and "obscene" material on cable television. The relevant portions of this ordinance provide:

> *Section 1.* No person shall by means of a cable television system knowingly distribute by wire or cable any obscene or indecent material.
>
> *Section 2.* The following words have the following meanings:
>
> (f) The test of whether or not material is "obscene" is: (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work,

taken as a whole, lacks serious literary, artistic, political or scientific value.

(g) "Indecent material" means material which is a representation or description of a human sexual or excretory organ or function which the average person, applying contemporary community standards, would find to be patently offensive.

Additionally, section 3 of the ordinance provides procedures for complaints alleging violations of the ordinance to be brought. The city manager is to receive all complaints of alleged violations. Furthermore, the city manager is empowered to initiate such claims himself. All complaints, whether received or initiated by the city manager, are to be reviewed by him to determine whether there is probable cause to believe that a violation has been committed. If the city manager determines that such probable cause exists, he must give written notice of the alleged violation to the licensee. The notice must specify the nature of the alleged violation and the date, time, and place of the hearing to be conducted by the city manager. At the hearing, which is to be "informal," the licensee may be represented by counsel and may present evidence and cross-examine witnesses; the proceedings are to be transcribed by a court reporter. The city manager presides over the hearing and governs the admissibility of evidence. The burden of proof (a preponderance of the evidence) is on the city, which is represented by the city attorney or his designee. Within ten days after the conclusion of the hearing, the city manager is to make his written findings and decision, including the nature and extent of any sanctions imposed and the reasons therefore. The only sanctions provided in the ordinance are suspension of the license for a period of time not to exceed nine days, or termination of the license.

This action for declaratory and injunctive relief was filed in February 1983 against appellants, the City of Miami, its mayor, and its city manager. Plaintiff-appellee Ruben Cruz is a Cablevision subscriber. The complaint sought a judgment declaring the ordinance void on its face and an injunction restraining the enforcement of the ordinance. Appellee Home Box Office, Inc. ("HBO") was permitted to intervene as a plaintiff. Cablevision was granted leave to intervene as a defendant and later moved to withdraw, but its motion was denied. Cablevision did not take a position in the lower court and has not participated in this appeal.

Appellants challenge the district court's resolution of the first amendment and due process issues. An amicus curiae brief urging reversal has been filed by the State of Utah. Amicus curiae briefs urging affirmance have been filed by the National Cable Television Association, Inc., and the Motion Picture Association of America, Inc.

The United States Supreme Court has long recognized that the first amendment's prohibition against any "law * * * abriding the freedom of speech" applies to the states and their subdivisions through the fourteenth amendment. *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). The Court has recognized only limited categories of speech that fall outside of the first amendment's protection. In *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), the Court reaffirmed that obscene material is unprotected by the first amendment and set forth the current permissible limits of regulation. However, the *Miller* court "acknowledge[d] * * * the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited." * * *

Appellees did not challenge the Miami ordinance's definition of "obscene" material or the city's constitutional authority to regulate obscenity on cable television. (The ordinance's definition of obscenity is in fact closely derived from the test set forth in *Miller*.) Rather, appellees challenged the provisions of the ordinance which attempt to regulate "indecent" materials. The ordinance's definition of indecent materials goes beyond the *Miller* definition of obscenity in two significant respects. First, the ordinance does not require that the challenged materials, "taken as a whole, appeal to the prurient interest in sex." *Miller*, 413 U.S. at 24, 93 S.Ct. at 2615. Second, the ordinance does not inquire whether the materials, "taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* Therefore, if materials falling within the ordinance's definition of "indecent" are to be regulated, the city's authority to do so must be found somewhere other than in the Supreme Court's obscenity cases.

Appellants' primary argument on appeal is that authority for the city's regulation is found in the Supreme Court decision *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). In *Pacifica*, a radio station broadcast a twelve-minute monologue by comedian George Carlin entitled "Filthy Words." The monologue was replete with language described as "vulgar," "offensive," and "shocking." *Id.* at 747, 98 S.Ct. at 3039.

The broadcast was in mid-afternoon, and the complaining listener heard the monologue while traveling in his automobile with his young son. The narrow issue presented to the court was whether the Federal Communications Commission (FCC) had the authority to regulate and proscribe this particular broadcast. * * * Five members of the Court concluded that broadcasting of indecency could be regulated by the FCC under certain circumstances. The Court noted that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." * * * The Court found two factors regarding broadcasting to be of particular relevance to the case with which it was presented. First, the Court found relevance in the fact that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans" and that "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." Second, the Court found that "broadcasting is uniquely accessible to children, even those too young to read." * * * 98 S.Ct. at 3040. The Court was concerned with "[t]he ease with which children may obtain access to broadcast material," and also recognized "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household.' * * * "

The *Pacifica* Court, however, made a point of "emphasiz[ing] the narrowness of our holding." * * * The Court suggested that factors such as the time of day of the broadcast, the content of the program, and the composition of the audience might affect whether a particular broadcast could be regulated. * * * Moreover, the Court wrote that "differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant."

* * *

The district court, after "a careful consideration of *Pacifica*," found *Pacifica* to be "inapplicable to the facts herein." *Cruz v. Ferre*, 571 F.Supp. at 131. After describing the cable television medium,[4] the district court contrasted the cable medium with broadcast television. A Cablevision subscriber must make the affirmative decision to bring Cablevision into his home. By using monthly program guides, the Cablevision subscriber may avoid the unpleasant surprises that sometimes occur in broadcast programming. Additionally, the district court noted, the ability to protect children is provided through the use of a free "lockbox" or "parental key" available from Cablevision. * * *

In reaching his conclusions, the district judge relied in great part upon two cases from Utah, *Community Television, Inc. v. Roy City*, 555 F.Supp. 1164 (D.Utah 1982), and *Home Box Office, Inc. v. Wilkinson*, 531 F.Supp. 987 (D.Utah 1982). *Roy City* and *Wilkinson* are the only other federal cases to have adjudicated the applicability of *Pacifica* to cable television. The district court in *Roy City* summarized the "key concepts" in *Pacifica* as "the broadcasting of patently offensive material, its presence on public airwaves at a time when it could be available to children, audience surprise, and the power of the F.C.C. to control airwaves in the 'public interest.' " * * * After listing the differences between cable and broadcast television, * * * the *Roy City* court examined these differences in greater detail and concluded, based upon these differences, that *Pacifica* is inapplicable to cable television. The court

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4. Judge Hoeveler gave a brief description of the cable television medium and the nature of subscription services such as HBO:

Unlike broadcast television, which sends over-the-air signals, cable television operates by transmitting programs to subscribers through coaxial cables or wires. These cables or wires are individually attached to ordinary television sets in subscribers' homes. Through the use of a converter, cable television can increase the channel capacity of a television set dramatically. Cablevision, for example, has the capacity to offer up to 104 channels.

Cablevision is presently the sole Miami cable television licensee. It provides basic cable services, which include improved reception of local broadcast television and the reception of more remote broadcast signals. It also has offered and continues to offer subscribers up to six private television services for a separate fee. Subscribers may opt for these services on a monthly basis and must make supplemental payments each month for the services to be maintained.

One private service currently offered by Cablevision is Home Box Office, Inc. ("HBO"). Approximately seventy-five percent of the 2,000 or so Miami households receiving cable television subscribe to HBO. HBO's programming includes feature films, sporting events, and special programs, and is provided 24 hours a day, seven days a week. By agreement, Cablevision retransmits HBO's entire viewing daily.

HBO shows films rated "G," "PG," or "R" by the Motion Picture Association of America, as well as unrated films which would have received such ratings if rated. It is HBO's policy not to exhibit films receiving an "X" rating or its equivalent.

Monthly HBO program guides list the times and dates of all program offerings, and they describe and give the ratings, if any, of the programs. Subscriber-households may control family access to the cable system by using "lockboxes" and "parental keys." These are available from Cablevision free of charge.

Cruz v. Ferre, 571 F.Supp. at 128.

gave particular emphasis to *Pacifica's* "pervasiveness" component and found that cable television, unlike broadcast television, is not pervasive. * * *

Although we recognize the complicated and uncertain area of constitutional interpretation which we are entering and the importance of the interests asserted by the city, we are persuaded that *Pacifica* cannot be extended to cover the particular facts of this case. *Pacifica*, it must be remembered, focused upon broadcasting's "pervasive presence," * * * and the fact that broadcasting "is uniquely accessible to children, even those too young to read." * * * The Court's concern with the pervasiveness of the broadcast media can best be seen in its description of broadcasted material as an "intruder" into the privacy of the home. Cablevision, however, does not "intrude" into the home. The Cablevision subscriber must affirmatively elect to have cable service come into his home. Additionally, the subscriber must make the additional affirmative decision whether to purchase any "extra" programming services, such as HBO. The subscriber must make a monthly decision whether to continue to subscribe to cable, and if dissatisfied with the cable service, he may cancel his subscription. The Supreme Court's reference to "a nuisance rationale," * * * is not applicable to the Cablevision system, where there is no possibility that a non-cable subscriber will be confronted with materials carried only on cable. One of the keys to the very existence of cable television is the fact that cable programming is available only to those who have the cable attached to their television sets.[6]

Probably the more important justification recognized in *Pacifica* for the FCC's authority to regulate the broadcasting of indecent materials was the accessibility of broadcasting to children. "The ease with which children may obtain access to broadcast material * * * justif[ies] special treatment of indecent broadcasting." * * * This interest, however, is significantly weaker in the context of cable television because parental manageability of cable television greatly exceeds the ability to manage the broadcast media. Again, parents must decide whether to allow Cablevision into the home. Parents decide whether to select supplementary programming services such as HBO. These services publish programming guides which identify programs containing "vulgarity," "nudity," and "violence." Additionally, parents may obtain a "lockbox" or "parental key" device enabling parents to prevent children from gaining access to "objectionable" channels of programming. Cablevision provides these without charge to subscribers.

Pacifica represents a careful balancing of the first amendment rights of broadcasters and willing adult listeners against the FCC's interests in protecting children and unwilling adults. The Court held that, under the particular facts of *Pacifica*, the balance weighed in favor of the FCC. Because we determine that under the facts of the instant case the interests of the City of Miami are substantially less strong than those of the FCC in *Pacifica*, we believe that we must hold *Pacifica* to be inapplicable to this case.[9]

Our conclusion regarding the applicability of *Pacifica* to the facts now before us is buttressed by the Supreme Court's own treatment of *Pacifica*. Recent decisions of the Court have largely limited *Pacifica* to its facts.

Even if we were to find the rationale of *Pacifica* applicable to this case, we would still be compelled to strike the ordinance as facially overbroad. As the district judge noted, the ordinance "prohibits far too broadly the transmission of indecent materials through cable television. The ordinance's prohibition is wholesale, without regard to the time of day or other variables indispensable to the decision in *Pacifica*." * * * The ordinance totally fails to account for the variables identified in *Pacifica*: the time of day; the context of the program in which the material appears; the composition of the viewing audience. In ignoring these variables, the ordinance goes far beyond the realm of permissible regulation envisioned by the *Pacifica* Court.

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6. Appellants seem to want to extend Justice Steven's "pig in the parlor" analogy. *See* Brief of Appellants at 16 ("it makes no difference whether the pig enters the parlor through the door of broadcast, cable, or amplified speech: government is entitled to keep the pig out of the parlor"). It seems to us, however, that if an individual voluntarily opens his door and allows a pig into his parlor, he is in less of a position to squeal.

9. Appellants and the State of Utah apparently argue that the limited number of stations on cable television somehow gives the city an interest in regulating indecency on cable television. This argument, however, misconstrues the rationale in *Pacifica* and in other Supreme Court cases such as *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396, 89 S.Ct. 1794, 1809, 23 L.Ed.2d 371 (1969). As Justice Brennan noted in *Pacifica*:

> The opinions of my Brothers Powell and Stevens rightly refrain from relying on the notion of "spectrum scarcity" to support their result. As Chief Judge Bazelon noted below, "although scarcity has justified *increasing* the diversity of speakers and speech, it has never been held to justify censorship."

Pacifica, 438 U.S. at 770 n. 4, 98 S.Ct. at 3051 n. 4 (Brennan, J., dissenting) (quoting *Pacifica Foundation v. FCC*, 556 F.2d 9, 29 (D.C.Cir. 1977)).

However noble may have been the city's intentions, we are constrained to recognize the limitations imposed by the Constitution and the opinions of the Supreme Court. The city's attempt through the challenged ordinance to regulate indecency on its cable television system exceeds these limitations.

For the reasons stated herein, we hold that the findings of the district court were correct as a matter of law.[11] Accordingly, we

AFFIRM.

The "Must Carry" Rules

Another contentious area has been that of "must carry." Few areas of cable law have been of more concern to the broadcasting industry. In most instances when customers connect to cable television, they disconnect (and often remove altogether) their over-the-air antenna. They become totally dependent on the cable system for the delivery of video services, including over-the-air broadcasting. The FCC's 1966 cable television rules required cable systems to carry all "significantly viewed" local TV channels, and for years "must carry" was a well-established cable regulatory policy.

In 1980, however, Turner Broadcasting System asked the FCC to delete the must carry rules. Turner's motives were obvious; his company was developing cable services (such as CNN II, later "Headline News") but finding it hard to place the services on cable systems filled with must carry signals. At about the same time, a small twelve-channel cable system in Quincy, Washington, decided to challenge the FCC by not carrying all the required must carry signals. After the FCC fined the cable system $5,000 for its violation of the rules, Quincy appealed in the U.S. Court of Appeals for the D.C. Circuit. The case was combined with Turner's petition to review the FCC's refusal to repeal the rules; in 1985, the court issued a decision, holding that the must carry rules as then drafted and justified by the FCC violated the First Amendment rights of cable operators. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C.Cir. 1985), cert den. sub nom. *National Assn't of Broadcasters v. Quincy Cable TV, Inc.*, 106 S.Ct. 2889 (1986). Pressured strongly by broadcasters, the FCC in 1986 issued revised must carry rules that it thought would pass constitutional muster. After all, the court of appeals had not said that all "must carry" rules were inherently unconstitutional. The FCC thought it would try to write new rules. They were, however, immediately challenged and, relatively promptly in 1987, also declared unconstitutional by the U.S. Court of Appeals for the D.C. Circuit.

CENTURY COMMUNICATIONS CORP. v. FCC

835 F.2D 292 (D.C.CIR. 1987).

Opinion for the Court filed by Chief Judge WALD.

WALD, Chief Judge:

Two years ago, in *Quincy Cable TV, Inc. v. Federal Communications Commission*, 768 F.2d 1434 (D.C.Cir. 1985), *cert. denied sub. nom. National Association of Broadcasters v. Quincy Cable TV, Inc.*, 476 U.S. 1169, 106 S.Ct. 2889, 90 L.Ed.2d 977 (1986), we struck down as violative of the first amendment the FCC's "must-carry" rules. Those rules required cable television operators, upon request and within the limits of their channel capacity, to transmit to their subscribers every over-the-air television broadcast signal that was "significantly viewed in the community" or otherwise considered "local" under the Commission's rules. * * * Today, we revisit this distinctive corner of first amendment jurisprudence, to evaluate the constitutional validity of the scaled-down must-carry rules adopted by the FCC following our decision in *Quincy Cable TV*. Although the FCC has eliminated the more extreme demands of its initial set of regulations, its arguments in this case leave us unconvinced that the new must-carry rules are necessary to advance any substantial governmental interest, so as to justify an incidental infringement of speech under the test set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Accordingly, we invalidate as incompatible with the first amendment this latest incarnation of the FCC's must-carry rules.

Since the mid-1960's, when the nascent cable television industry began to loom as a threat to ordinary broadcast television, the Federal Commu-

11. Because of our resolution of the issues in this appeal, we find it unnecessary to address the equal protection, prior restraint, and federal preemption issues raised by appellees and amici.

nications Commission has labored to protect the local broadcast media through regulation of the cable industry. The Commission's objective in these endeavors

> was not merely to protect an established industry from the encroachment of an upstart young competitor, although such a result was clearly the byproduct of the regulatory posture that developed. Rather, the Commission took the position that without the power to regulate cable it could not discharge its statutory obligation to provide for "fair, efficient, and equitable" distribution of service among "the several States and communities." If permitted to grow unfettered, the Commission feared, cable might well supplant ordinary broadcast television. A necessary consequence of such displacement would be to undermine the FCC's mandate to allocate the broadcast spectrum in a manner that best served the public interest. In particular, if an unregulated, unlicensed cable industry were to threaten the economic viability of broadcast television, the Commission would be powerless to effect what it saw (and continues to see) as one of its cardinal objectives: the development of a "system of [free] local broadcasting stations, such that 'all communities of appreciable size [will] have at least one television station as an outlet for local self-expression.' "

Must-carry rules in various forms have been major tools in this campaign to protect local broadcasting from cable. The FCC first introduced such rules in 1962, when it sought to impose a must-carry requirement as a condition for granting an application to construct a microwave system to transmit distant signals to a rural cable system. In time, the FCC developed a broader must-carry regime, generally requiring cable operators, "upon request, to carry any broadcast signal considered local under the Commission's complex formula." * * * The philosophy behind these rules was

> to assure that the advent of cable technology not undermine the financial viability of free, community-oriented television. If cable were to "drive out television broadcasting service * * * the public as a whole would lose far more—in free service, in service to outlying areas, and in local service to outlying areas, and in local service with local control and selection of programs—than it would gain." The must-carry rules, together with a comprehensive body of related regulations, would channel the development of the nascent cable industry to limit the risks it might pose to conventional broadcasting, "society's chosen instrument for the provisions of video services."

In 1985, this circuit faced for the first time the question whether the broad must-carry rules which had been in existence for nearly two decades were in harmony with the first amendment. Judge Wright's opinion for a unanimous panel in *Quincy Cable TV* held that they were not. As a threshold matter, we observed that our first amendment review of regulations burdening cable television was not governed by those cases, such as *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969) and *FCC v. League of Women Voters of California*, 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984), upholding regulations on broadcast television. In reaching that conclusion, we noted "the Supreme Court's oft-repeated suggestion that the First Amendment tolerates far more intrusive regulation of broadcasters than of other media precisely because of the inescapable physical limitations on the number of voices that can simultaneously be carried over the electromagnetic spectrum." * * * Wire-carried media like cable, of course, have no such limitations, and thus we found the "scarcity rationale" that the Supreme Court has used to justify broadcast television regulations to offer no succor to those seeking to establish the constitutional validity of cable television regulations. * * *

Quincy Cable TV did not, however, establish the precise degree of first amendment protection enjoyed by cable operators. Although our opinion noted that some parallels existed between the must-carry regulations and regulations impinging on editorial discretion that had been invalidated in the past, *see Quincy Cable TV*, 768 F.2d at 1452 (citing *Miami Herald Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974)), it pointedly declined to "definitively decide" whether cable operators enjoy the heightened protection accruing to newspapers or whether the must-carry regulations were more appropriately evaluated under the test, set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). * * * Rather, we concluded that the must-carry rules would fail even the *O'Brien* test's requirement of a substantial governmental interest furthered by means no greater than are essential to the furtherance of that interest.

The reasons for our invalidation of the 1985 must-carry rules under the *O'Brien* test were twofold. First, we concluded that the Commission had not adequately substantiated its assertion that a substantial

governmental interest existed. In *Quincy Cable TV* we stated that, even accepting the view that the preservation of free local television was an important regulatory goal, our review of the FCC's reports and regulations suggested that the problem the sweeping must-carry rules purported to prevent—the destruction of free, local television—was merely a "fanciful threat," unsubstantiated by the record or by two decades of experience with cable TV. * * * In general, we noted, "the mere abstract assertion of a substantial governmental interest, standing alone, is insufficient to justify the subordination of First Amendment freedoms." * * * Second, even if the interest had been deemed substantial, the broadly-drafted must-carry rules represented a fatally over-inclusive response to the problem. We observed in this vein that the rules indiscriminately protected every local broadcaster, regardless of whether it was in fact threatened, and regardless of the quantity of local service available in the community and the degree to which the cable operator in question already carried local outlets. * * * We did, however, note that our decision in no way foreclosed the Commission from adopting new must-carry rules consonant with the *O'Brien* test. * * *

In the aftermath of *Quincy Cable TV*, the FCC immediately suspended enforcement of the must-carry rules. Four months later, it announced its intention to undertake rulemaking proceedings, *see Notice of Inquiry and Notice of Proposed Rulemaking*, 50 Fed.Reg. 48232 (1985), and eventually, in November 1986, 16 months after *Quincy Cable TV* had been handed down, the agency released a new, more limited set of must-carry rules designed to accommodate *Quincy Cable TV's* concerns. * * * In the decision to promulgate these new rules, the Commission took note of the many comments, submitted primarily but not exclusively by broadcasting interests, arguing that some form of FCC intervention remained necessary to protect local broadcasting.

The most salient feature of the new rules was that the Commission substantially altered its stated justification for imposing must-carry rules at all. No longer did the Commission argue, as it had prior to the *Quincy Cable TV* decision, that the rules were needed for the indefinite future to ensure viewer access to local broadcast stations. Rather, the Commission now argued that must-carry rules were needed to guarantee such access during a shorter-term transition period during which viewers could become accustomed to an existing and inexpensive but largely unknown piece of equipment known as the "input-selector device."

Such devices, if hooked up to a television, allow viewers at any given time to select, simply by flicking a switch, between shows offered by their cable system and broadcast television shows offered off-the-air. These devices, the most common of which is known in the cable industry as an "A/B switch," are about the size of a standard lightswitch, and work by being hooked up to a roof-top, attic or television-top antenna. According to a study cited by the Commission in its report explaining the new must-carry rules, the cost of buying such a switch is approximately $7.50, and the cost of buying an outdoor antenna to go with it is approximately $50.

The Commission estimated that it would take approximately five years for the public to become acclimated to the existence of these switches, and accordingly, its interim rules should be in place for that same five years. At that point, the need for ongoing must-carry rules to ensure viewer access to local broadcast stations would be obviated.

Because the Commission envisoned these switches as guaranteeing effective viewer choice between local and cable shows, it ultimately added to the new must-carry regime the requirement that cable systems offer subscribers, for pay, input-selector devices that could be hooked up to their TVs. It did so over the reservations of some broadcasting concerns, who viewed the input-selector devices as less protective than must-carry rules. The Commission, observing that relatively few consumers knew about the switch-and-antenna mechanism and noting that the long history of must-carry rules had created a public "misperception" that "broadcast signals will always be available as part of their basic cable service," also promised to require cable operators to educate the viewing public about the availability of the switch-and-antenna mechanism.

In addition to thus offering a new and more limited justification for must-carry rules, the Commission also substantially limited the sweep of the new rules in a number of respects. It set forth limits on how many channels a cable carrier must devote to must-carry: carriers with 20 channels or less were not required to carry any must-carry stations; carriers with between 21 and 26 stations could be required to carry up to 7 channels of must-carry signals; and carriers with 27 or more channels could be required

to devote up to 25% of their system to must-carry signals. It also limited the pool of potential must-carry channels to those satisfying a "viewing standard" generally demonstrating a minimum viewership of the channel in question. The Commission also authorized cable operators to refuse to carry more than one station affiliated with the same commercial network. * * * Finally, the Commission limited the number of noncommercial stations required to be carried, stating that when the cable system had fewer than 54 channels and an eligible noncommercial station or translater existed, the cable operator must devote at least one channel to a noncommercial station; and that when the cable system had 54 or more stations, it must devote two must-carry channels to such endeavors. * * *

Constitutional and statutory challenges to these new must-carry rules were lodged shortly after their promulgation by an array of cable operators and a public interest group. Petitioner Century Communications Corp., joined by 13 other cable operators (hereinafter "Joint Petitioners"), protests the must-carry rules as violative of the first amendment of the Constitution, as a taking of property without just compensation in violation of the fifth amendment, and as a measure not authorized by the FCC's statutory jurisdiction and hence *ultra vires*.

The FCC, in response, defends the must-carry rules as based on a satisfactory administrative record and as consonant with the first and fifth amendments. In this endeavor it is joined by five intervenors.

We, however, need look no further than petitioners' first amendment claims to decide this case. Because we invalidate the entire new must-carry regime as unjustified and as unduly sweeping, we do not reach—and therefore express no opinion on—the subsidiary first amendment challenges to particular facets of the rules, or the arguments based on the APA that the rules are too narrow in scope.

A threshold question for our first amendment analysis is what standard of review to apply. As in *Quincy Cable TV*, the parties dwell heavily on this issue, offering clever and flavorful analogies to other corners of first amendment law on which more light has been shed.

Petitioners characterize the must-carry rules as posing more than an incidental burden on speech, likening the rules to the newspaper right-of-reply statute invalidated in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), where the Supreme Court held that the enactment impermissibly interfered with the newspaper's constitutionally protected "editorial discretion." Toward this end, petitioners also offer the recent case of *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986), where the Court noted that the selection and organization of programs on cable television does involve some degree of editorial discretion.

The FCC counters by characterizing the must-carry rules as a commercial regulation that burdens speech in a far more attenuated fashion. Accordingly, the FCC argues, the must-carry rules are more appropriately analyzed under the standards set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), where the Supreme Court stated that to be valid, a regulation incidentally burdening speech and not aimed at the suppression of free expression must advance a substantial governmental interest and must be no more restrictive than necessary to accomplish that end.

The precise level of first amendment protection due a cable television operator is clearly an issue of much moment to the industry and ultimately to viewers. However, having closely analyzed the rationale for and workings of the new must-carry rules, we conclude that we again need not resolve this vexing question. Like the original must-carry regime invalidated in *Quincy Cable TV*, the new, scaled-back edition fails to satisfy even the less-demanding first amendment test of *United States v. O'Brien* whose use here is advocated by the FCC. We now proceed to offer our application of that test.

In *United States v. O'Brien*, the Supreme Court stated:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 U.S. at 377, 88 S.Ct. at 1679.

Typically, analysis under *United States v. O'Brien* begins with an appraisal of whether the interest said to be served by a governmental measure is substantial. If it is, we proceed to the more delicate fact-bound issue of whether the means chosen are congruent with the desired end, or whether they are too broadly tailored to pass muster.

In this endeavor we are mindful of the fact that it is a first amendment test we are applying. Although at times an *O'Brien* inquiry into an agency regulation may appear to resemble an exercise in administrative law analysis, the Supreme Court has often noted that the substantial deference due in the administrative context has little relevance when first amendment freedoms are even incidentally at stake.

We stress at the outset that both the justification offered by the FCC for its new regulations and the scope of those new initiatives differ rather markedly from the justification for and scope of the initial must-carry rules struck down in *Quincy Cable TV*.

Our reservations about the new must-carry rules do, however, implicate both the substantiality of the governmental interest advanced and the narrowness of their design.

It may well be that upon a suitable record showing, the justification offered by the FCC, that interim regulations are needed to keep local broadcasts accessible to viewers while the new switch-and-antenna technology takes hold, would satisfy the *O'Brien* standard. * * * The difficulty is that here, as in *Quincy Cable TV*, the FCC's judgment that transitional rules are needed is predicated not upon substantial evidence but rather upon several highly dubious assertions of the FCC, from which we conclude that the need for a new saga of must-carry rules is more speculative than real. * * * Such speculative fears alone have never been held sufficient to justify trenching on first amendment liberties.

The agency's first questionable contention is that consumers are not now aware and cannot be expected to become aware in fewer than five years that the installation of an A/B switch could preserve their choice of programs:

> [T]he perception [exists] that cable systems may be able to preclude access by their subscribers to off-the-air broadcast signals. This perception derives not from any inherent characteristic of cable service, but rather from cable subscribers' current expectation that broadcast signals will always be available as part of their basic cable service. This expectation is a direct result of the former must-carry rules, which, in fact, required cable systems to carry all available off-the-air broadcast television signals. The expectation that local broadcast signals will be carried by their cable system has caused many subscribers to perceive that there is no need to install or maintain the capability to receive broadcast signals off-the-air.
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> * * *
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> If we did not adopt interim must-carry rules now, until our long-term regulatory plan to educate consumers on the need for independent access to off-the-air signals and to make input selector switches available takes hold, harm to the public interest would ensue.

The FCC, however, adduces scant evidence for its judgment of a widespread "misperception" among cable subscribers that the only means of access to off-the-air signals is through cable service. It puts forth no attitudinal surveys, or polls, suggesting the likely pace of consumer adaptation to the A/B switch technology. Nor does it offer analogies illustrating how swiftly consumers have incorporated previous electronic innovations. Such evidence might have shown what the FCC simply assumes here: that upon the disappearance of must-carry regulations, consumers would collectively fail to install with any dispatch the switches and antennas necessary to gain access to local broadcast stations, conceivably imperiling the survival of these stations and thereby depriving viewers of diverse broadcasting offerings.

* * *

* * * [I]t requires an inferential leap of some distance to arrive at a need for five more years of must-carry. Only through the rosiest of broadcasters' lenses can the NAB study's first salient finding—that there is a dearth of antenna-and-switch set-ups in American households—be seen as pointing to the difficulty of installing such gear or to the inability of consumers to learn of their availability. More likely, the absence of such equipment from most homes reflects the obvious reality that, so long as the government requires cable companies to offer local broadcasting through the must-carry regime, such supplemental equipment is unnecessary. The FCC's own determination that the consumer misperception upon which it so heavily relies "is a direct result of the former must carry rules," * * * seriously undercuts the NAB's implication that the unavailability of switch-and-antenna gear is an endemic or long-term problem.

The NAB study's second finding, that few of those with switch-and-antenna capability currently switch back and forth between cable and broadcast with any regularity, can most reasonably be accounted for by the fact that, in a must-carry world, the need to do so is slight. Like the fact that few households have installed switches and antennas, this finding merely describes present reality without offering any glimpse into how the change of one key variable—the lapse

of must-carry regulations—would affect that reality. * * *

The NAB study's third potentially relevant finding, that many cable subscribers own VCRs and thus would face somewhat complicated problems hooking up the switch-and-antenna, is readily dismissed as a grounds on which to justify the need for new must-carry regulations: the FCC itself, in its report explicating the new regulations, specifically discounts reliance on the VCR-interference theory.

The NAB study's final pertinent observation is that about half of the survey's respondents are unwilling to predict that they would ultimately purchase what the survey question termed a "special switch." Initially, we note that this characterization obscures somewhat the low price and easy installation of the A/B switch. Survey imperfections aside, however, this finding seems to us unpersuasive, for it almost certainly reflects merely the present consumer unfamiliarity with the switch and antenna mechanism. To the extent it does not, it may also reflect consumer disinterest in having access to off-the-air signals. Either way, this finding hardly explains why the five-year transitional period chosen by the FCC is necessary. The NAB's study thus provides only the spongiest of foundations for the FCC's asserted justification for its regulations.

In appraising the FCC's argument that the indelibility of consumer ignorance justifies the reimposition of must-carry rules, we are thus left to ask whether the FCC's contention is so obvious or commonsensical that it needs no empirical support to stand up. We conclude that it is not. For one thing, the FCC's own report elsewhere belies the agency's fears of viewer lethargy. The Commission notes:

> There is evidence that video consumers are now becoming accustomed to switching between alternate program input sources. We observe that many cable systems now offer services through dual cables in order to provide greater channel capacity. Such systems employ switching devices to select between the two cables and often mark the switch positions with "A" and "B" designations. *Cable subscribers apparently have accepted this switching arrangement and do not find it inconvenient.* * * *

More generally, we simply cannot accept, without evidence to the contrary, the sluggish profile of the American consumer that the Commission's argument necessarily presupposes. In a culture in which even costly items like the video-cassette recorder, the cordless telephone, the compact disc-player and the home computer have spread like wildfire, it begs incredulity to simply assume that consumers are so unresponsive that within the span of five years they would not manage to purchase an inexpensive hardware-store switch upon learning that it could provide access to a considerable storehouse of new television stations and shows.

Even were we to accept, however, the Commission's view that consumer ignorance cannot be readily eradicated, we have a second fundamental problem with the Commission's judgment that its interim must-carry rules are needed to advance a substantial governmental interest sufficient to support burdening cable operators' first amendment rights. The Commission relies heavily on its assumption that in the absence of must-carry rules, cable companies would drop local broadcasts. Experience belies that assertion. As cable operators reported to the Commission during rulemaking proceedings, * * * during the 16 months that elapsed between *Quincy Cable TV* and the reimposition of the modified must-carry rules, cable companies generally did not drop the local broadcast signals that they had been carrying prior to *Quincy Cable TV*.

The FCC responds that this constitutes "only limited direct evidence," and that in any event some cable companies did drop individual broadcast stations. * * * One might also speculate on behalf on the FCC that the inaction of cable companies after *Quincy Cable TV* may have partially resulted from their expectation that some new must-carry rules would inevitably emerge. Nevertheless, given *Quincy Cable TV's* vigorous denunciation of the breadth of the old must-carry rules, one can hardly assume that cable companies expected the FCC to reintroduce anything like the old sweeping must-carry requirements. Also undercutting the FCC's fearful assumption is the fact that both the Federal Trade Commission and the Department of Justice have concluded, in separate reports, that the absence of must-carry would not harm local broadcasting.

For these reasons, we conclude that the FCC has not demonstrated that the new must-carry rules further a substantial governmental interest, as the rules must to outweigh the incidental burden on first amendment interests conceded by all parties here. As we stated in *Quincy Cable TV*, "[a]t least in those instances in which both the existence of the problem and the beneficial effects of the agency's response to that problem are concededly susceptible of some empirical demonstration, the agency must do some-

thing more than merely posit the existence of the disease sought to be cured." 768 F.2d at 1455. The FCC error in this case was its failure to go that extra step here.

The second prong of the *O'Brien* test focuses on the congruence between the means chosen by the agency and the end it seeks to achieve. In this case, even were we convinced that the interest in whose name the FCC purports to act was more than a "fanciful threat," see *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir.), *cert. denied*, 434 U.S 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977), the new must-carry regulations, because of their lengthy duration, are too broad to pass muster even under the *O'Brien* test.

If any interim period of must-carry rules is, in fact, necessary, the FCC adduces literally no evidence that this period must last for fully five years. Such a period is strikingly long in an industry that the FCC itself characterizes as "rapidly evolving." * * * In the absence of any empirical support for the new must-carry rules, the FCC falls back on what it terms a "sound predictive judgment," * * * that it will take about five years for consumers to learn about the switch-and-antenna mechanism, and thus that a five-year transition period is needed during which the agency will provide consumer education.

We are, however, unpersuaded. In large part our reluctance to countenance reimposing must-carry rules for five years based on a "sound predictive judgment" that is never explained reflects our perceptions about consumer aptitude stated earlier. Such a guess about consumer instincts hardly presents the sort of issue where, "if complete factual support * * * for the Commission's judgment or prediction is not possible," we should defer to the Commission's expert judgment. * * * It is wholly unclear to us why it should take five years to inform consumers that with the installation of a $7.50 switch and a television antenna they can view more local channels. The FCC report does nothing to shed light on this matter.

Additionally, we are skeptical—and the FCC's report says nothing to relieve this skepticism—that any consumer education campaign will have much impact so long as viewers can continue to rely on must-carry to get their fix of local broadcasts. It is entirely likely that not until the waning few months of the five-year must-carry regime would the FCC's admonitions about the need for switches and antennas begin to sink in, much as the existence of switches and antennas has largely gone unnoticed in a consumer population already accessed to local television as a result of must-carry in recent years. Opting for a five-year interim period therefore merely delays the inevitable, but almost certainly brief, period during which TV owners will learn of, purchase, and install the requisite equipment. We therefore find it difficult to defer blindly to the Commission's unproven belief that half a decade is necessary.

Our decision today is a narrow one. We hold simply that, in the absence of record evidence in support of its policy, the FCC's reimposition of must-carry rules on a five-year basis neither clearly furthers a substantial governmental interest nor is of brief enough duration to be considered narrowly tailored so as to satisfy the *O'Brien* test for incidental restrictions on speech. We do not suggest that must-carry rules are *per se* unconstitutional, and we certainly do not mean to intimate that the FCC may not regulate the cable industry so as to advance substantial governmental interests. But when trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures. As in *Quincy Cable TV*, we reluctantly conclude that the FCC has not done so in this case, but instead has failed to " 'put itself in a position to know' " whether the problem that its regulations seek to solve " 'is a real or fanciful threat.' " Accordingly, we have no choice but to strike down this latest embodiment of must-carry.

So *Ordered*.

COMMENT

The 1976 Copyright Act gives cable operators a compulsory license to retransmit distant signals. But a royalty is then assessed cable operators by the Copyright Royalty Tribunal and ultimately distributed to copyright owners. See text, p. 627. Broadcasters argue that cable operators were given the compulsory license by the 1976 Copyright Act on the assumption that the "must carry" rules would endure. On January 3, 1989, House Telecommunications Subcommittee member John Bryant (D-Texas) re-introduced a bill that would condition the compulsory licenses of cable operators on whether they carried local signals. See *Broadcasting*, April 3, 1989, p. 10.

Broadcasters continue to urge Congress to enact "must carry" legislation. How can such proposals survive constitutional attack?

In May 1988, the FCC re-adopted syndicated exclusivity rules similar to ones repealed by the FCC in 1981. The rules will force cable system operators to block out, on request, much syndicated programming on imported television channels if the local television broadcaster has purchased exclusive rights. The goal is to protect the property rights of local broadcasters. The rules take effect January 1, 1990. *Broadcasting*, (February 27, 1989), 32. What is the impact of the "must carry" cases on syndicated exclusivity rules?

Mandatory Access Rules

The outcome of the "must carry" cases at least casts doubt upon parts of the Cable Communications Policy Act of 1984 that required cable systems to provide for "access" to channels on their systems. There were two related provisions in the act. First, all cable systems, regardless of the number of channels on the system, were subject to demands at franchise time that they provide channels for public, educational, and governmental access channels. 47 U.S.C.A. § 531. In addition, systems with more than thirty-six activated channels were required to be prepared to set aside some channels for leased access. 47 U.S.C.A. § 532. If it violated the First Amendment to require cable systems to carry, against their best judgment, "must carry" local television stations, did it similarly violate the First Amendment to require them to provide access? Lower federal courts are split on the issue, and the U.S. Supreme Court has so far not resolved the debate.

A U.S. Supreme Court decision in 1979 overturned FCC rules requiring access channels. *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). The Eighth Circuit U.S. Court of Appeals held that the FCC's access rules exceeded the FCC's jurisdiction and raised the issue of whether they were violative of the First Amendment rights of cable systems. *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978); the U.S. Supreme Court confined its decision to statutory issues. It concluded that the FCC couldn't require access under the "reasonably ancillary" requirement of *United States v. Southwestern Cable Co.* since it imposes common carrier obligations on cable that could not be imposed on broadcasters. In another pre-Cable Communications Policy Act of 1984 court decision, *Berkshire Cablevision of Rhode Island v. Burke*, 571 F.Supp 976 (D.C.R.I. 1983), vacated as moot, 773 F.2d 382 (1st Cir. 1985), however, a district court generally upheld the authority of the state of Rhode Island to require access channels—which, of course, was what franchisors had done after the FCC's access rules were invalidated. The court implied that the natural economic monopoly status of cable television justified some governmental regulation to protect consumer interests including, if the state so chose, access channel requirements.

The Cable Communications Policy Act of 1984 clarified the federal statutory issues. Congress plainly gave franchisors the ability to require, or at least bargain for, access channels. The as yet unanswered question, of course, is whether such requirements violate the First Amendment rights of cable system operators or, as the cities argue, vindicate the First Amendment rights of cable subscribers to receive the diverse programming cable access offers.

Lower federal courts have approached this issue from several perspectives. The outcome largely turns on the general First Amendment model applied. If cable systems are treated mostly like newspapers, then access channel requirements tend to fail, just as in the *Tornillo* case they failed when it came to the printed press. If, on the other hand, other First Amendment models are applied—especially ones somewhat related to broadcasting—which treat cable systems as natural monopolies requiring some regulation to protect the interests of cable viewers, then access provisions can be sustained. The circuits of our federal judicial system are, at the moment, divided as to which model to apply.

In *Erie Telecommunications, Inc. v. City of Erie*, 659 F.Supp. 580 (W.D.Pa. 1987), access channel requirements were upheld as furthering the First Amendment rights of cable subscribers to receive information. The court appeared to accept the proposition that the cable system enjoyed a governmentally endorsed monopoly position and that, in turn, it could be compelled to provide access and pay franchise fees. The effect of this decision, however, was much blunted by the outcome on appeal. There, the U.S. Court of Appeals for the Third Circuit approached the case much more narrowly and concluded that the company had waived its rights to raise constitutional questions because of the way it

settled a post-franchise award lawsuit. The district court's constitutional analysis was largely ruled irrelevant. *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084 (3rd Cir. 1988).

At least two federal district courts in California, however, have ruled that access requirements violate the First Amendment. *Group W Cable v. Santa Cruz*, 669 F.Supp. 954 (N.D.Cal. 1987) and *Century Federal Inc. v. City of Palo Alto*, 63 RR 2d 1736 (N.D.Cal. 1987). The California courts are much impressed with the argument that cable television doesn't exhibit the physical scarcity of broadcasting and should, therefore, mostly be handled under a newspaper model.

CENTURY FEDERAL INC. v. CITY OF PALO ALTO

63 RR2D 1736 (N.D.CAL. 1987).

LYNCH, District Judge.

The Court has already published two opinions in this case that set forth in great detail the facts surrounding this plaintiff's challenge to defendants' (hereinafter "the Cities") cable television (hereinafter "CTV") franchising and regulatory scheme. * * * At the conclusion of the Century Federal II opinion, the Court stated that the Cities did not "necessarily have to open their cable facilities to all comers regardless of size, shape, quality or qualifications." * * * In this next stage of the litigation, the Court has asked the parties to address, through cross-motions for summary judgment, the constitutionality of the four major minimum re quirements that the Cities seek to impose on all CTV franchisees: (1) access channels; (2) a "universal service" requirement; (3) state-of-the-art technical and equipment requirements; and (4) various fees, including bonding requirements, a security deposit, reimbursement for the Request for Proposals ("RFP") process, and franchise fees.

Having surveyed the relevant case law and applying the rationale and legal conclusions already reached in Century Federal II, the Court has concluded that defendants' access channel, universal service, and state-of-the-art requirements violate the First Amendment of the United States Constitution. The Court has also determined that subjecting CTV operators to municipality-imposed fees in excess of the Cities' costs from the franchising process is not per se unconstitutional, but the fees question raises a number of factual issues and unanswered questions of law and cannot be definitively decided on the record now before the Court.

In response to this Court's decision in Century Federal II, on March 9, 1987 the City Council of the City of Palo Alto, acting on behalf of all defendants, passed Ordinance No. 8744 ("Ordinance"), which approved and awarded a franchise to plaintiff. The Ordinance requires all CTV operators to provide eight leased access channels to unaffiliated persons at negotiated rates. * * * The Ordinance also requires three public and educational channels and two governmental channels ("PEG" access), * * * which the franchisees can satisfy by collaborating to provide a single set of such channels. * * *

Clearly, if such access requirements were applied to the traditional press, such as newspapers, they would violate the First Amendment. *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1401 [57 RR 2d 1339] n. 1 (9th Cir. 1984), aff'd, 106 S.Ct. 2034 [60 RR 2d 792] (1986) ("Imposing access requirements on the press would no doubt be invalid."); see also *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 106 S.Ct. 90 (1986) (plurality opinion); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Only once to date has the Supreme Court "sustained a limited government-enforced right of access," which was in the case of the broadcast media. *Pacific Gas*, 106 S.Ct. at 908 n. 6. This Court has already concluded that the justification for such governmental intrusion into the broadcast media, the physical scarcity of radiowaves, is inapplicable to the instant case. Century Federal II, * * * Finding that " 'the analogy [of cable television] to more traditional media is compelling,' " * * * this Court concluded that, except for its impact on the public domain, "the defendant Cities as a matter of law have failed to persuade this Court that there are any other differences attributable to cable television that can justify a degree of First Amendment protection similar to that applied to the broadcast medium."

Accordingly, the rationale in *Miami Herald* and *Pacific Gas* applies to the access requirements in the instant case. The Cities attempt to distinguish *Miami Herald* and *Pacific Gas* on the ground that the access requirements in those cases were triggered by the newspapers' content, while the access channels here are imposed automatically on all CTV operators regardless of any other programming they cablecast. The Cities read these cases too narrowly.

Regardless of how the Cities attempt to characterize the access channels, their result is undeniable: a CTV operator will be forced to cablecast material by other speakers that it might otherwise choose not to present. Just as in *Miami Herald* and *Pacific Gas*, such forced access has two independent, impermissible effects on a cable operator's right to speak. * * *

First, forcing a speaker to communicate the views of another undoubtedly impacts the content of the speech of the primary speaker. In the case of the traditional press, and in this Court's opinion CTV operators, this impact is inconsistent with the principles of the First Amendment. * * * The cities cannot deny that the PEG channels, which are directly or indirectly controlled by city government, could very well provide a conduit for criticism of the CTV operator. Even the leased commercial access channels, over which the CTV operators have control, carry the impermissible risk of affecting the programming of the CTV operator. As the Supreme Court has stated, a "[g]overnment-enforced right of access *inescapably* 'dampens the vigor and limits the variety of public debate.' " * * * (quoting *Miami Herald*, 418 U.S. at 257).

Admittedly, the access channels provide other cable speakers regular and constant access that is not necessarily dependent on the content of any franchisee's speech. The content sought to be cablecast by the access users, however, will be influenced by what the franchisee cablecasts (why cablecast programming that is already on another channel?), and the reverse is also certain to be true: the material on the access channels will influence what the franchisee presents on its channels. This indirect effect is no less impermissible than the direct effect of a right-to-reply statute in *Miami Herald*. * * *

The second impermissible effect of forced access channels is an intrusion into a CTV operator's considerable editorial functions, see *Century Federal*, 648 F.Supp at 1472 & n. 12, which results regardless of whether the access would force a speaker to forego the communication of a particular opinion or material. *Miami Herald*, 418 U.S. at 258. Speaking of the function of newspaper editors, which this Court believes is closely analogous to the editorial functions of a CTV operator, the Supreme Court in *Miami Herald* stated: "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper * * * constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press." * * *

Because the Ordinance's access requirements must be characterized as content-based, they "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 540 (1980); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); Buckley v. Valeo, 424 U.S. 1, 65 (1974).

The Cities have simply not met this burden. As this Court stated in *Century Federal II* in a review of Supreme Court precedent, " 'the purpose of the First Amendment is to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. * * * " 648 F.Supp. at 1477 (quoting *Red Lion B/casting Co. v. FCC*, 395 U.S. 367, 390 [16 RR 2d 2029] (1969)). The Constitution also " 'command[s] that government itself shall not impede the free flow of ideas. * * * " *Century Federal II*, 648 F.Supp. at 1477 (quoting *Miami Herald*, 418 U.S. at 252). The access channels forced upon plaintiff by the Cities carry the inherent risk that a franchisee's speech will be chilled and the direct, undeniable impact of intruding into the franchisee's editorial control and judgment of what to cablecast and what not to cablecast. Neither result can be tolerated under the First Amendment in the name of an "attitude that government knows best how to fine tune the flow of information to which [the people] have access." *Century Federal II*, 648 F.Supp. at 1477.

COMMENT

The current state of the law, therefore, is unclear. Some courts will support access requirements, but others will overturn it. Definitive law, it appears, will eventually have to come from the U.S. Supreme Court. So far, however, the Court has had remarkably little of substance to say about cable television and the First Amendment. It is not from want of opportunities. The Court has had the chance to analyze cable's First Amendment status but has ducked the chance. Those opportunities have mostly arisen from cases where franchise provisions less directly regulate expressive behavior. Ultimately, it seems likely that the First Amendment status of cable may be decided in cases like these rather than in the few

cases that arise from more direct efforts to regulate cable system content.

Cable Television Franchising

The Cable Communications Policy Act of 1984 made it clear that, as far as Congress was concerned, those who wished to operate cable television systems using public rights of way had to get franchises to do so. While the franchising body couldn't much regulate programming or rates, it appeared as if they could make other requirements. They could, it seemed, require that a franchisor serve everyone in a franchise area—provide universal service. Franchisors might be able to require state-of-the-art cable systems. It certainly said that franchisors could require franchise fees of up to 5 percent of cable system revenues. It implied that franchisors could grant exclusive franchises—after all, it said they could grant "one or more" franchises—but it also implied that they could, if they chose, grant nonexclusive franchises and allow what the cable industry calls "overbuilds"—construction of more than one cable system serving the same areas. All of these options, however, can be—and have been—subjected to First Amendment challenge. The result, so far, is hard to interpret.

The major reason, again, is the lack of a coherent First Amendment theory for cable television. If cable falls under a print model, dominated by *Tornillo*, then many of these requirements are, arguably, unconstitutional. Under such a model, if you couldn't require a newspaper to do it, you can't require a cable system to do it. Newspapers aren't given exclusive franchises by government; they must face competition. Under such a model, exclusive franchising of cable systems could be challenged. However, if no one came forward to run a competing cable system, *de facto* exclusive franchises might be permissible just as *de facto* newspaper "monopolies" are permissible in the print media.

If, on the other hand, cable television is treated either as a natural economic monopoly or as a physically scarce monopoly, then all kinds of government intervention is justifiable. Unlike broadcasting, cable does offer an abundance of channels. It may be, however, that for either physical or economic reasons, only one cable system may operate per community. If the utility poles and underground conduits don't have room for more than one cable system, then there may be physical scarcity. If the economics of cable really predetermine that consumers are most likely in the long run to lack a choice among possible providers of cable television service, then there may be economic scarcity. Each condition may justify special First Amendment treatment of cable television and may allow regulations that would not survive a newspaper-oriented First Amendment analysis.

Finally, there's the possibility that many franchise-related cable television rules may have few direct First Amendment implications. In that case, it may be possible to analyze First Amendment challenges to them under principles developed for governmental actions that have only indirect effects on expression. Such an analysis may allow (or may also disallow) franchise provisions that would be clear-cut cases if they were analyzed under print, broadcast, or other established First Amendment models.

Courts have followed a rather dizzying array of approaches to these issues. In California, cable interests have argued—with substantial initial success—that newspaper models should prevail. Under such models, many franchise provisions can be questioned. Two cases stand out as, at least potentially, likely to affect the development of First Amendment theory applied to franchising.

One of these cases arises from Los Angeles. The City of Los Angeles divided the areas cable might serve into several service areas. It then sponsored, in effect, a competitive process in which potential cable service providers would vie for the rights to *de facto* exclusive licenses to serve designated areas. Many companies participated in the process, but a company called Preferred Communications chose not to do so.

Instead, Preferred Communications later asked the operators of utilities in the part of Los Angeles it wanted to serve for space on their poles and in underground conduits. The utilities said no, claiming that a franchise from the city was needed before a right could be granted to have access to poles and conduit space. Preferred asked for a franchise but was turned down because it had not participated in the earlier grant process. Preferred then sued the city. See *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985). In 1986, the case reached the U.S. Supreme Court.

While some thought that the U.S. Supreme Court might use the case to make some definitive pronouncements of cable's First Amendment status, the Court ducked the opportunity. The case reached the

U.S. Supreme Court without ever having gone to trial. The Court remanded the case to California courts out of a belief that a trial on the merits of Preferred's challenges to what Los Angeles had done might shed light on the First Amendment issues. About the only thing the U.S. Supreme Court said about the First Amendment was that the issues Preferred raised were significant and "would seem to implicate First Amendment interests." But it left the details for the future. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, (1986). It is possible but by no means inevitable that future action and litigation in this case may clarify cable's First Amendment status.

Also working their way up through the courts are a series of cases involving Century Federal, Inc.'s. so far unsuccessful quest for a cable television franchise from Palo Alto, California and the adjacent cities of Menlo Park and Atherton. Palo Alto and its neighboring communities set up an elaborate franchise grant system. They required access channels, "state-of-the-art" construction, a 5 percent franchise fee—in general, all the things that the best consultants urged cities to seek. Century Federal employed a law firm willing to push the newspaper model for cable's First Amendment theory. The result has been a series of cases that may do much, on further review, to determine cable's First Amendment status.

Disputes began prior to adoption of the Cable Communications Policy Act of 1984. Century Federal raised general First Amendment objections to what the cities were doing, and U.S. District Court Judge Eugene F. Lynch decided they were meritorious and worthy of further exploration. *Century Federal, Inc. v. City of Palo Alto, Cal.* (Century Federal I), 579 F.Supp. 1553 (N.D.Cal. 1984).

Subsequently, Judge Lynch, following the First Amendment test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), overturned a number of provisions in the Palo Alto/Menlo Park/Atherton franchising system. *U.S. v. O'Brien* applies when governmental actions have incidental (not direct) effects on communications. The test basically says that the government can justify incidental effects on communications only if what the government wants to do is (1) within its constitutional power, (2) furthers an important or substantial governmental interest, (3) can show that that interest is unrelated to the incidental effects on expression, and (4) can prove that the incidental restriction on First Amendment freedoms is no greater than that essential to protecting the government's interest. When applying the *O'Brien* test, California courts have found many franchise provisions wanting.

It is possible to divide the issues courts face into two broad categories. The first is whether the grant of an exclusive franchise (either *de facto* or *de jure*) is violative of the First Amendment? The second is: are specific franchise provisions, such as a 5 percent franchise fee, "universal service requirements," "access channels," and the like, contrary to First Amendment standards. Courts have taken different views on all these issues.

On the constitutionality of an exclusive franchise, Judge Lynch in the Palo Alto litigation has concluded that it violates the First Amendment under the *O'Brien* test.

CENTURY FEDERAL, INC. v. CITY OF PALO ALTO

(CENTURY FEDERAL II) 648 F.SUPP. 1465 (N.D.CAL. 1986), APPEAL DISMISSED 108 S.CT. 1002 (1988).

LYNCH, District Judge.

This action involves an aspiring cable television operator's first amendment challenge to the defendant municipalities' use of an exclusive franchising arrangement to limit to one the number of cable operators granted access to those facilities necessary to install cables within the defendants' boundaries. Plaintiff now moves for an order granting partial summary judgment on the issue of liability, asking this Court to hold as a matter of law that such a government-imposed restriction on the number of cable speakers is facially invalid under the first amendment. After considering oral argument and reviewing the extensive briefs and exhibits filed on both sides, this Court hereby grants plaintiff's motion for partial summary judgment. In doing so, the Court holds only the following: First, that under the undisputed facts of this case, the insignificant, if any, increase in disruption to the public domain resulting from the initial installation of more than one cable system, as opposed to a single system, does not constitute a substantial or important governmental interest so as to justify the suppression of all cable speakers except the one to which the municipalities grant permission to speak; and second, that because cable television is more closely analogous to newspapers than the broadcast media, the fact

that the cable television market in a proposed service area is a natural monopoly does not justify greater governmental regulation of cable operators than would otherwise be allowed under the first amendment.

Plaintiff Century Federal, Inc., is an aspiring cable television (hereinafter "CTV") operator. The defendants (hereinafter "the Cities") are three California municipalities, Atherton, Menlo Park, and Palo Alto, and a utility company owned by Palo Alto. Plaintiff attempted to enter the CTV business in each of the Cities, but was refused a business license and was told that it must participate in the franchise selection process conducted by Palo Alto on behalf of all the Cities. Plaintiff also sought permission to use the utility poles owned by the Pacific Telephone and Telegraph Company, the Pacific Gas and Electric Company, and the defendant City of Palo Alto Utilities, but was refused "pole attachment services" because it had no CTV operating franchise.

The franchise selection process conducted by the Cities had two parts. First, the Cities issued a Request for Proposals (hereinafter "RFP"). This document specified the minimum requirements that an applicant must meet in order to be considered for a franchise. The RFP also requested certain technical, construction, ownership, and financial information concerning the applicant and its proposed system. The Cities planned subsequently to evaluate the applicants in a number of categories, including service and rates, technical/construction, financial, local commitment, and ownership/structure.

The second phase of the selection process involved negotiations with one or more of the so-called most qualified applicants. Although the RFP guidelines expressly referred to the granting of a "nonexclusive" franchise, implying that the Cities might grant a franchise to more than one CTV operator, it is undisputed that the Cities intended to grant a franchise to only one operator, at least initially.

Of the four CTV operators who answered the RFP, which did not include plaintiff, the Cities targeted two for further negotiations. On October 7, 1985, the Cities awarded a franchise to Cable Co-op, which, at least up until the date of oral argument on this motion, had not yet begun to install its CTV system.

Rather than participate in the RFP, plaintiff originally filed suit in this Court in September 1983, alleging that the franchising process as a whole violated the antitrust laws and the first amendment. See *Century Federal, Inc. v. City of Palo Alto*, 579 F.Supp. 1553 (N.D.Cal. 1984). On the antitrust claims, the Court granted defendants' motion to dismiss on the ground that the defendant municipalities were immune from liability for the challenged conduct. * * * The Court denied the Cities' motion on the first amendment claims, however, finding that plaintiff's pleadings alleged a cognizable constitutional deprivation that gave rise to significant factual questions that could not be resolved on the pleadings alone. * * *

Subsequent to the above rulings, in January 1985, in response to the passage of the Cable Communications Policy Act of 1984, 47 U.S.C. sections 521–611 (Supp. 1986), this Court dismissed plaintiff's original first amendment claims without prejudice.

In early March 1985, however, the Ninth Circuit decided *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1984), *aff'd*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986) (hereinafter "*Preferred I*"). Reversing in part the district court's granting of a motion to dismiss, the Ninth Circuit held in a wide-ranging opinion that a municipality could not "limit access by means of an auction process to a given region of [a] City to a single cable television company, where the public utility facilities and other public property in that region necessary to the installation and operation of a cable television system are physically capable of accommodating more than one system[.]" * * *

Within a few days after the release of the Ninth Circuit's decision, plaintiff filed the instant action, reasserting its first amendment claim. The parties stipulated that the pleadings and record of the prior action would be considered a part of this new action.

After the United States Supreme Court granted certiorari on the *Preferred* I decision, this Court stayed the disposition of the instant action pending the Supreme Court's decision. In *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986) (hereinafter *Preferred II*), the Supreme Court affirmed the judgment of the Ninth Circuit "on a narrower ground," *id.* 106 S.Ct. at 2036, holding only that a CTV operator "seeks to engage [in activities that] plainly implicate the First Amendment," *id.* at 2037, and refusing to decide the applicable first amendment standard solely on the pleadings. * * * The Court left open the question of "whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already

existing standard or whether those characteristics require a new analysis."

Two weeks after the Supreme Court's decision, plaintiff filed the instant motion for partial summary judgment. Essentially, plaintiff's position is that the suppression of all cable speakers except one cannot be justified by any important or substantial governmental interest.[7] The Cities, on the other hand, propose five interests that are furthered by a franchising process that allows access to only one CTV system: (1) minimizing disruption of the public domain; (2) promoting first amendment values by ensuring that their residents, who allegedly live in a market that will economically support only one CTV operator (i.e., a natural monopoly), will receive cable service from that CTV operator that will provide the most reliable and highest quality service; (3) preventing "cream skimming," which is the wiring of only affluent, and therefore more profitable, portions of the franchise area; (4) ensuring community and commercially-leased access channels; and (5) encouraging the development of state-of-the-art cable systems with adequate channel capacity.

The United States Supreme Court has left no doubt that a CTV operator is a speaker entitled to first amendment protection. *Preferred II*, 476 U.S. 488, 106 S.Ct. 2034, 2037, 90 L.Ed.2d 480 (1986). The Court did not state, however, the degree of protection to which a CTV operator is entitled or the amount of governmental regulation of that medium permissible under the first amendment. The threshold issue on this motion, therefore, is whether the first amendment allows the government the same wide latitude in regulating the CTV industry as it allows in the broadcast medium, see *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943), or whether the degree of protection should be closer to that enjoyed by the traditional media, such as newspapers. See *Miami Herald v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974).

As defendants' lead counsel admitted at oral argument, if this Court were to apply the same degree of protection that more traditional forms of the media receive, the Cities' restriction on access to its residents obviously would violate the first amendment. We recognize that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion*, 395 U.S. at 386, 89 S.Ct. at 1805. Application of a lesser standard of protection, however, is an exception to the rule that must be justified by a particular difference. When the Supreme Court was faced with the question of whether a lesser first amendment standard applied to films, it stated that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503, 72 S.Ct. 777, 781, 96 L.Ed. 1098 (1952). Consequently, in developing the first amendment standard to be applied in this case, the question becomes whether there are any differences in the characteristics of the CTV medium that justify a lesser standard of protection for it that would allow a correspondingly greater degree of governmental regulation.

The Ninth Circuit has recognized that the greater degree of governmental regulation of broadcasting rests on the physical scarcity of radiowaves. *Preferred I*, 754 F.2d 1396, 1403 (9th Cir. 1985), *aff'd*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986). As this Court noted earlier in the instant case, "the electromagnetic spectrum is simply not physically capable of carrying the messages of all who desire to speak over it. This principle has been reaffirmed many times."

Notwithstanding its application to the broadcast medium, the Seventh and D.C. Circuits have expressly concluded that the "physical scarcity rationale" is irrelevant to an evaluation of government regulation of cable television. *Quincy Cable TV, Inc. v. Federal Communications Commission*, 768 F.2d 1434, 1449 (D.C.Cir. 1985).

The opinions from these two Circuits strongly suggest that physical scarcity could never arise in a cable television setting. The Ninth Circuit, how-

7. The reference to "important or substantial" government interests is based on the second step of the *O'Brien* test, *O'Brien v. United States*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968), which, as explained below, the Court finds determinative in the disposition of this motion. The Ninth Circuit also refers to such interests as "legitimate." *Preferred I*, 754 F.2d at 1406.

ever, expressly left open the question of how a municipality should "allocate access to poles and conduits to competing cable systems when these structures are incapable of accommodating all those seeking access," because plaintiff had alleged that space was available and the court assumed that fact to be true. *Preferred I*, 754 F.2d at 1404.

In any event, this Court also finds it unnecessary to address the issue of whether physical scarcity could ever arise in the CTV medium because defendants admit that there is no physical scarcity in the instant case.

Consequently, the characteristic in broadcasting that justifies increased governmental intrusion in that medium is absent in the instant case.

Most of the argument on the instant motion centered around whether the natural monopoly or economic scarcity rationale justified a greater degree of government regulation than allowed in a newspaper context. Although the Ninth Circuit in *Preferred I* briefly commented "[i]n passing" on the natural monopoly argument, it did not decide the issue because the court accepted as true plaintiff Preferred's allegation on the economic feasibility of competition for cable services in the Los Angeles area. * * * The court seemed to imply, however, that a natural monopoly would not be a justification for exclusive franchising.

In the instant case, the issue must be confronted because the parties have hotly contested the question of whether the CTV market in the proposed service areas is a natural monopoly. The Cities envision a trial on this economic question, with both sides presenting expert testimony, based upon studies and statistics, opining on the likelihood that the relevant market is a natural monopoly. According to the defendants, if the trier of fact finds that there is a reasonable likelihood that the market is a natural monopoly, then the Cities should be able to institute their franchising scheme.

Before determining whether there is a triable issue of fact on the question, however, this Court must first decide whether the question is material under applicable substantive law. Defendants concede that if this Court decides that the law applicable to newspapers controls in this case, then the natural monopoly issue is immaterial and cannot defeat plaintiff's motion.

The Cities' argument on the materiality of the natural monopoly rationale is basically as follows: because the CTV market in our service area is a natural monopoly, it shares a characteristic analogous to the physical scarcity trait in the broadcasting medium, which results in an inherent limitation on the number of possible speakers. Such a trait warrants government regulation of the number and identity of the speakers, which ensures the enhancement of first amendment values.

The Supreme Court rejected this economic scarcity rationale in the context of newspapers, however, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974). In striking down a Florida statute that required newspapers to print replies of persons subjected to editorials that assailed their character, the Court rejected the suggestion that purely economic constraints on the number of newspaper voices available in the given community justified otherwise unwarranted intrusions into first amendment rights. * * * This Court is convinced that the first amendment mandates the same conclusion in the instant case.

This Court recognizes that newspapers, the most traditional form of the media, are historically the source of most of the debate on politics and government that lies at the core of first amendment values. * * * Yet, just as a "newspaper is more than a passive receptacle or conduit for news, comment, and advertising," * * * the Supreme Court has stated that cable operators exercise a "significant amount of editorial discretion regarding what their programming will include." *Preferred II*, 106 S.Ct. at 2037 (quoting *Federal Communications Commission v. Midwest Video Corp.*, 440 U.S. 689, 707, 99 S.Ct. 1435, 1445, 59 L.Ed.2d 692 (1979)); *see also Preferred I*, 754 F.2d at 1410 n. 10 (recognizing that although CTV operators do transmit programs produced by others, they do exercise considerable editorial discretion). Although the Supreme Court stopped just short of equating cable television to more traditional forms of the media, *see Preferred II*, 106 S.Ct. at 2037, the D.C. Circuit has concluded that there is no "meaningful 'distinction between cable television and newspapers.' " *Quincy*, 768 F.2d at 1450 (quoting *Home Box Office, Inc. v. Federal Communications Commission*, 567 F.2d 9, 46 (D.C.Cir. 1977)). This Court agrees that "the analogy [of cable television] to more traditional media is compelling." *Quincy*, 768 F.2d at 1450.

Not all Circuits have agreed with the D.C. Circuit's conclusion that the reasoning in *Miami Herald* applies to render the natural monopoly rationale irrelevant in the cable television context. * * * De-

fendants cite the Seventh, Eighth, and Tenth Circuits in support of their position that the existence of a natural monopoly is a basis for the limitations on access that the Cities seek to impose. This Court finds these decisions unpersuasive, however, because each lacks a thorough analysis on the relationship between the proposed regulation and the characteristics of the CTV medium, which analysis we believe is now mandated. See *Preferred II*, 106 S.Ct. at 2038.

The most extended discussion of the issue was that of the Tenth Circuit in *Community Communications*, 660 F.2d at 1376–79. The Tenth Circuit distinguished *Miami Herald* by tying the natural monopoly characteristics of the CTV medium to the burden a cable system causes on public utility facilities and streets. Noting that the economic scarcity in *Miami Herald* was "unrelated to the disruptive use of the public domain requiring a government license," * * * the court found that, in contrast, a CTV operator "must significantly impact the public domain in order to operate; without a license, it cannot engage in cable broadcasting to disseminate information." * * *

The weakness in the Tenth Circuit's reasoning stems from the lack of a link between a distinctive characteristic of cable television, e.g., the disruption to the public domain, and the proposed government regulation. The fact that a CTV system can potentially disrupt the streets might justify certain government regulations aimed at minimizing such disruption. As the Ninth Circuit noted, however, "[the Tenth Circuit's] statement is too broad. It suggests that simply because cable's disruption of the public domain gives rise to a need for licensing, it would also justify the monopoly the City seeks to create by its auction process." *Preferred I*, 754 F.2d at 1405.

The Seventh Circuit's opinion in *Omega* is similarly unpersuasive. The court acknowledged that "while today most newspaper markets are natural monopolies, no one thinks that entry into those markets could be regulated without creating profound First Amendment problems." * * * Nevertheless, the court summarily concluded that the "apparent natural monopoly characteristics of cable television provide * * * an argument for regulation of entry." * * * The opinion was devoid of any reason why such a characteristic should make any difference in the cable television setting when it does not in the newspaper context. Indeed, the court did not appear to take a definitive stand on the issue, citing the Tenth Circuit in *Community Communications* and concluding only that "[p]robably there are enough differences between cable television and the non-television media to allow more government regulation of the former." * * *

Finally, while this motion was under submission, the Cities cited to this Court the recent Eighth Circuit decision in *Central Communications*, 800 F.2d 711. That case involved an existing franchised CTV operator's effort to prevent the city from granting a new exclusive franchise to a competing company. The Eighth Circuit held that the natural monopoly characteristics of defendant city's cable market justified the city's granting of a de facto exclusive franchise to a single CTV operator. * * * After reviewing the Supreme Court's *Preferred II* opinion, the court cited and discussed the *Community Communications* and *Omega* decisions in support of the proposition that cable television is more analogous to broadcasting than newspapers, therefore justifying an exclusive franchising scheme. Although "recogniz[ing] that there are profound first amendment implications inherent in the regulation of cable operators," * * * the Eighth Circuit similarly failed to explain why a CTV operator should receive less first amendment protection than a newspaper. Cautioning that it would not decide any question not squarely before it, the court considered the natural monopoly question "only in terms of the competing technologies offered" by the two competing CTV operators in the case. * * * The court then noted that the defendant cable company proposed to provide a more technologically advanced system with far more channels at a lower cost than plaintiff was currently providing. * * * Therefore, although plaintiff had "a first amendment interest in remaining as a cable television 'speaker'," defendant's "proposal went further in advancing the first amendment interests of the viewing public in the greatest variety of programming obtainable." * * *

Like the Seventh and Tenth Circuits, the Eighth Circuit did not explain which characteristics of the CTV medium justify application of less protection than afforded to the nonbroadcasting media. Clearly, the first amendment will not tolerate the government's suppression of speakers, even on a content-neutral basis, in the newspaper, movie, and book industries on the ground that the one speaker granted access provides the greatest variety of articles, movies or publications at the lowest price. It is also clear under *Miami Herald* that the fact that the news-

paper, movie or book markets in a given community are a natural monopoly does not justify greater governmental regulation of such first amendment speakers.

In an age when most people receive their daily news via the television, that medium has established a role as critical to the free flow of ideas and information in this society as any of the more traditional media. The physical scarcity that justified the government's unparalleled intrusion into the broadcasting medium simply does not exist in this case. The Supreme Court has always stressed that "[e]ach medium of expression * * * must be assessed for First Amendment purposes by standards suited to it. * * * " * * * As a result, a particular characteristic of a given form of expression can only justify government regulation aimed at addressing that particular characteristic. Although the fact that cable television places a heavier burden on the public domain than more traditional forms of the media may justify some government regulation of that burden, the defendant Cities as a matter of law have failed to persuade this Court that there are any other differences attributable to cable television that can justify a degree of first amendment protection similar to that applied to the broadcast medium.

Concluding that the allowable degree of governmental regulation is not fixed by physical or economic scarcity does not mean that all regulation of CTV operators is invalid. *Preferred I*, 754 F.2d 1396, 1405 (9th Cir. 1985), *aff'd*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986). The first amendment allows some government regulations of noncommunicative aspects of speech. *Id.* As the Supreme Court has noted, "where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests."

The propriety of governmental regulations of noncommunicative aspects of speech is judged by the standard enunciated in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672. Under the *O'Brien* test, a regulation is constitutional only if (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free speech; and (4) the incidental restriction on first amendment freedom is no greater than essential to further that interest. * * * The defendant Cities bear the burden of proving that the elements of this test are satisfied.

To reiterate, the only government regulation addressed on this motion is that part of the Cities' franchising process that limits to one the number of CTV operators given access to the facilities necessary to install a cable system.

As to the first step of the *O'Brien* test, this Court finds that, as a matter of law, a franchise arrangement is within the Cities' constitutional power of government. Because the second step, whether the regulation furthers an important or substantial governmental interest, is determinative on the instant motion, the Court finds it unnecessary to reach a decision on whether there are genuine issues of material fact under the third and fourth steps.

As noted earlier, the Cities have alleged five interests to satisfy the second step of the *O'Brien* test: (1) minimizing disruption of the public domain; (2) promoting first amendment values by ensuring that their residents receive CTV service from that operator who will provide the most reliable and highest quality service; (3) preventing "cream skimming," which is the wiring of only affluent, and therefore more profitable, portions of the franchise area; (4) ensuring community and commercially-leased access channels; and (5) encouraging the development of state-of-the-art cable systems with adequate channel capacity. This Court finds as a matter of law that, of these five interests, only the facts underlying the first, disruption to the public domain, are material so as to warrant consideration on this summary judgment motion. As to the last four, none state an important or substantial governmental interest that would justify the severe impact on the first amendment rights of all potential CTV operators except the one given access. It is to these last four alleged interests that the Court will first turn.

These four interests are inherently related to the natural monopoly rationale. Essentially, the Cities argue that if there is a reasonable probability that their service area will economically support only one CTV operator, then they should be able to choose, at the outset, that operator who will provide the highest quality service and use the offer of an exclusive franchise as a plum to bargain for certain concessions, e.g., access channels, that they might not be able to acquire if an operator knew that it would have to compete with other cable providers. The existence of a state-of-the-art CTV operator that provides quality service, including community and commercial access channels, to all areas within their boundaries best ensures, the Cities argue, that the

values of the first amendment will be furthered because the Cities' residents will have expanded opportunities to receive diverse sources of information.

The Cities' position is analogous to one taken by municipalities defending antitrust suits by cable operators. They have argued, as cities have successfully done with such industries as water and electricity, that regulation of natural monopolies maximizes economic efficiency, and consequently, consumer welfare. Judge Posner of the Seventh Circuit explains this reasoning in the CTV setting:

> "[I]n a 'natural monopoly' * * * the benefits, and indeed the very possibility, of competition are limited. You start with a competitive free-for-all * * * but eventually there will be only a single company, because until a company serves the whole market it will have an incentive to keep expanding in order to lower its average costs. In the interim there may be wasteful duplication of facilities. This duplication may lead not only to higher prices to cable television subscribers, at least in the short run, but also to higher costs to other users of the public ways. * * * An alternative procedure is to pick the most efficient competitor at the outset, give him a monopoly, and extract from him in exchange a commitment to provide reasonable service at reasonable rates." * * *

The Cities essentially argue that the same is true in the context of the first amendment. Just as the regulation of water and electric companies—or CTV operators as the case may be—enhances consumer welfare through economic efficiency, the regulation of CTV operators furthers the purposes of the first amendment. But in this case, what may foster economic efficiency most certainly inhibits the first amendment.

The paternalistic role in the first amendment that the Cities envision for government is simply inconsistent with the purpose and goals of the first amendment. The Cities nevertheless contend that such a role is consistent with the Supreme Court's oftencited passage that, under the first amendment, it is the rights of viewers and listeners that is paramount, not the rights of speakers. *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371 (1969). We disagree. In fact, the rationale of the Court is just the opposite. The Court proceeds to explain in *Red Lion* that because the viewers' rights are paramount, "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of the market. * * * " *Red Lion*, 395 U.S. at 390, 89 S.Ct. at 1806. Elsewhere, the Court has explained that the Constitution "command[s] that government itself shall not impede the free flow of ideas. * * * " *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 252, 94 S.Ct. 2831, 2837, 41 L.Ed.2d 730 (1974) (quoting *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1425, 89 L.Ed.2d 2013 (1945)). We reach our conclusion with the first amendment interests of the Cities' residents foremost in mind, for their rights are endangered by a governmental attitude that government knows best how to fine tune the flow of information to which they have access. Furthermore, this Court agrees with the Ninth Circuit in *Preferred I* that such governmental intrusion carries with it the inherent risk of covert discrimination against certain CTV operators. * * *

Consequently, the factual questions presented by the Cities on the above four alleged interests are immaterial under the applicable substantive law, and therefore, cannot give rise to issues of fact that can defeat plaintiff's motion for summary judgment.

The analysis is different, however, on the Cities' first alleged interest, disruption to the public domain. In *Preferred I*, the Ninth Circuit recognized that a "City has legitimate interests in public safety and in maintaining public thoroughfares." *Preferred I*, 754 F.2d at 1406; see also *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1377 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001, 102 S.Ct. 2287, 73 L.Ed.2d 1296 (1982) ("A city needs control over the number of times its citizens must bear the inconvenience of having its streets dug up and the best times for it to occur.") Additionally, the fact that a cable system burdens public resources is a characteristic of the medium not shared with traditional media such as newspapers. Therefore, even when applying to CTV operators the same first amendment standard applied to newspapers, the allowable governmental regulation must still be viewed in light of those important or substantial governmental interests specifically implicated by the noncommunicative aspects of the CTV medium.

The above finding that, under the applicable substantive law, the Cities have an important or substantial governmental interest in minimizing disruption to the public domain does not end the inquiry. For purposes of this motion, the Court next must determine whether the Cities have offered sufficient

evidence to create a genuine issue of fact on the question of whether the proposed limitation on access "furthers" that governmental interest. * * * That is, have the Cities offered sufficient evidence on the degree of disruption that will result if they initially allow more than one CTV operator to lay cables?

Both sides presented exhaustive evidence on the disruption that results from the installation and maintenance of cable systems, which run underground and on telephone poles. The Cities presented declarations from their experts on everything from the danger posed to other cable lines to the likely increase in the number of complaints the Cities will receive regarding remiss CTV workers who leave backyard gates open for opportunistic family pets.

The Cities made no showing, however, on how much more disruptive granting access to more than one CTV system would be when multiple systems are installed simultaneously as opposed to the installation of a single system. What is at issue here is a facial challenge to a franchising scheme that grants access to the first CTV operator to lay cables within a particular service area. Consequently, the Cities cannot justify a limitation to one on the ground that, in general, a CTV system is disruptive to the public domain. The Cities are willing to allow the installation of the first system. The question must then become: how is the government's interest in the public domain effected if access is granted initially to more than one system? To this, the Cities provide no answer.

The Cities address this issue only by arguing that unless two or more CTV systems are installed simultaneously, the disruptive burden will be increased whenever more than one system is constructed within the same service area. *See* Defendants Palo Alto and Atherton's Memorandum in Opposition, pp. 17–18. This may be so. But such a contention is incongruous to the facts of this case because when the RFP was issued no cables had previously been installed, the Cities intended to allow installation of one system, and simultaneous installation of multiple systems was possible. This is not a case in which one system has already been fully installed and another CTV operator subsequently seeks to install another system over the same public domain. If disruption can be minimized by simultaneous installation, then what prevents the Cities from taking advantage of that fact with proper time, place, and manner restrictions? Indeed, plaintiff has stated that requiring simultaneous installation would be a valid government regulation. * * *

Because the Cities have made no showing that initially allowing access to more than one operator will implicate or "further" their important or substantial interest in regulating disruption to the public domain, this Court finds that, as a matter of law, there are no genuine issues of material facts under the second step of the *O'Brien* test.

We have not intended to suggest in this decision, nor do we read the Ninth Circuit's *Preferred I* opinion as holding, that the Cities necessarily have to open their cable facilities to all comers regardless of size, shape, quality or qualifications. *Accord Pacific West Cable Co. v. City of Sacramento*, 798 F.2d 353, 355 (9th Cir. 1986). We have not needed to reach the issue of permissible minimum requirements that the Cities might impose on all franchisees. This Court only holds on this motion that the Cities have not offered sufficient evidence to create a genuine issue of material fact on the question of whether there is a substantial or important governmental interest to justify limiting to one the number of CTV operators granted access to the facilities necessary for the installation and maintenance of a cable system. Therefore, under the undisputed facts of this case, that part of the Cities' RFP that imposes such a restriction is unconstitutional on its face.

COMMENT

Other courts, however, have taken a contrary position. In *Central Telecommunications v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), cert den. 107 S.Ct. 1358 (1987), the court took the position that cable television was a natural, local, economic monopoly. The same position was apparently held by the district court in *Erie Telecommunications, Inc. v. City of Erie*, 659 F.Supp. 580 (W.D.Pa. 1987).

Franchise Requirements

Specific franchise provisions have also not fared well under Judge Lynch's analysis. Efforts to assess a 5 percent franchise fee, when similar fees were not assessed of common carriers using the same poles and conduits cable wanted to use, were invalidated in 1988. *Century Federal, Inc. v. City of Palo Alto* (Century Federal IV), 65 RR 2d 875 (N.D.Cal.

1988). Earlier the court struck down Palo Alto's efforts to require state-of-the-art technology, access channels, and "universal service" requirements. *Century Federal Inc. v. City of Palo Alto*, 63 RR 2d 1736 (N.D.Cal. 1987).

CENTURY FEDERAL INC. v. CITY OF PALO ALTO

63 RR 2D 1736 (N.D.CAL. 1987).

LYNCH, District Judge.

The Ordinance requires the franchisee to wire the entire service area except where access is not feasible. * * *

The Court finds that essentially the same analysis on access channels applies here to invalidate the universal service requirement. Could the Cities require a newspaper, movie house, or bookstore to deliver to or be located in a particular geographic area of the community on the ground that it is in the best First Amendment interests of the residents in that area? Surely, the answer is no.

The First Amendment protects both the right to speak freely and the right to refrain from speaking at all. * * *

Dictating to whom plaintiff cablecasts is an impermissible burden on a CTV operator's First Amendment right to determine where and when it speaks. As with the access channel requirement, the Court finds this to be a content-based regulation that the Cities have not sustained by showing that the "regulation is a precisely drawn means of serving a compelling state interest." * * *

The Ordinance requires the franchisee to construct a "state-of-the-art" system. * * * The Ordinance further dictates that "to the extent that the Company and the City reasonably mutually determine that it is economically viable and feasible to do so," the franchisee shall maintain and upgrade its services and technical performance "to keep pace with developments in the State-of-the-Art of [cable] technology." * * * The Ordinance also mandates several specific equipment and technological requirements, including that the cable system be fully two-way and interactive so that it can support services such as two-way conferencing and high-speed data transfer, * * * and that two coaxial cables are installed, only one of which need be activated immediately. * * *

The Court finds that the state-of-the-art requirements in the Ordinance are government regulations of noncommunicative aspects of speech. The propriety of governmental regulations of noncommunicative aspects of speech is judged by the standard enunciated in U.S. *v. O'Brien*, 391 U.S. 367 (1968). Century Federal II, 648 F.Supp. at 1475. Under the *O'Brien* test, a regulation is constitutional only if (1) it is within the constitutional power of government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free speech; and (4) the incidental restriction on First Amendment freedom is no greater than is essential to further that interest. *O'Brien*, 391 U.S. at 377. The Cities bear the burden of proving that all of the elements of this test are satisfied. Century Federal II, 648 F.Supp. at 1475.

Because this Court finds that, as a matter of law, the Cities have not satisfied the second prong of the *O'Brien* test, it is not necessary to analyze the state-of-the-art requirements under the other elements of the test.

The only legally recognized important or substantial governmental interest proffered by the Cities to justify the technical/equipment requirements is cable television's disruption to the public domain. * * * The gist of the Cities' vague argument here is that unless the cities ensure the installation of a technologically advanced system, which includes all the features the Cities believe their residents would use, the CTV operators will need to frequently dig up old cables and unnecessarily disrupt the public domain. * * * The Cities provide absolutely no probative evidence supporting the reasonable possibility that this might be the case. In light of the Cities' burden in satisfying the *O'Brien* test, such speculation cannot save the state-of-the-art requirements.

The Cities have not created a genuine issue of material fact in support of their argument that the technical/equipment requirements further the important or substantial government interest in minimizing cable television's disruption to the public domain. * * * Consequently, the state-of-the-art requirements are an impermissible burden on plaintiff's First Amendment rights and must be stricken from the Ordinance.

The Ordinance requires the franchisee to meet a number of financial obligations. First, the Ordinance requires the franchisee to post construction performance and payment bonds in the amounts of

$1,000,000 and $500,000 respectively, and at the discretion of the City Manager, a franchise performance bond in an amount up to $100,000. * * * Second, the Ordinance requires the franchisee to reimburse the Cities for a pro-rata share of the $350,000 that the Cities incurred in consulting fees during the RFP process, * * * and to reimburse the Cities for any costs they incur in renewal or amendment of the franchise. * * * Third, the Ordinance requires the franchisee to provide a "security fund" in a total initial amount of $1,000,000. * * * Finally, the franchise is obligated to pay the Cities an annual franchise fee of five percent of its annual gross revenue. Id. * * *

Quite understandably in light of the page limitations imposed on the parties' briefs and the number and complexity of the issues that have been addressed on the instant motions for summary judgment, the briefing and evidentiary support on the Ordinance's various financial provisions was too vague and incomplete for the Court to make any definite determinations on these provisions. Before addressing which matters require additional briefing and evidentiary support, the Court will make several observations about the applicable law.

Plaintiff agrees that the Cities are entitled to require construction and performance bonds, but argue that the amount of the bonds should be no greater than that imposed on Pacific Bell.

Both sides also agree that the Cities can pass onto the CTV operators the reasonable administrative costs of the franchising program.

Plaintiff, however, contends that any fees imposed by the Cities beyond such administrative costs is a discriminatory tax on the press that burdens rights protected by the First Amendment. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983). In Minneapolis Star, the Supreme Court struck down a state "use tax" on the cost beyond the first $100,000 of paper and ink consumed in the course of the production of a written publication. The practical effect of the "use tax" was to impact only the large newspapers in the state. The Court determined that "a tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action," * * * and that to satisfy that burden, the government must demonstrate "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." * * * The Court concluded that although the asserted state interest, generating revenue, was compelling, it could be achieved as effectively by a general tax on all businesses. * * *

While disputing the application of the Minneapolis Star rationale to invalidate the Ordinance's financial provisions, the Cities cite for support *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 745 F.2d 767 (2d Cir. 1984), and *Erie Telecommunications, Inc. v. City of Erie*, 659 F.Supp. 580 (W.D.Pa. 1987). Gannett upheld a revenue-raising fee imposed by the Metropolitan Transportation Authority ("MTA") on the placement of coin-operated newspaper vending machines in MTA commuter train stations. The Court in Gannett distinguished between the cases prohibiting licensing fees and the facts before it on the ground that in the former cases the government acted in a government capacity in "raising general revenue under the guise of defraying administrative costs," 745 F.2d at 774, while the MTA operated in a proprietary capacity by charging reasonable rent for the use of business property that it happened to own. Id. at 775. In Erie, a District Court recently upheld a municipality-imposed annual franchise fee on CTV operators equal to five percent of the operator's annual gross revenues. The Court held that such fees were merely fair rental value of the property interest the CTV operator received with the franchise. "[A]s a city holds the streets in trust for the public, it would a dereliction of a city's fiduciary duty to grant franchise rights * * * without receiving the fair market value for the property." Erie, 659 F.Supp. at 595.

Plaintiff's brief was notably silent on the issue of whether the Cities could impose a franchise fee based on plaintiff's substantial use of the public domain. Without deciding the issue, this Court is fairly confident that such a fee, at least if set by the fair market value of the property interest the CTV operator receives, is sustainable under the O'Brien test. Clearly, however, any fee beyond that designed to offset administrative costs is not per se unconstitutional.

COMMENT

As these cases reveal, the controversy about the application of the First Amendment to cable television franchise provisions continues to intensify. Some commentators have argued that many of the First Amendment challenges are not substantial and that

the cities should have substantial powers to regulate terms of service. Brenner, *Cable Franchising and the First Amendment: Preferred Problems, Undesirable Solutions*, 10 Hastings Comm/End L.J. 999 (1988). Others forcefully press the newspaper analogy, as has been so successful in California. Some in the cable industry worry that if the newspaper analogy is carried too far, cable operators—not usually cognizant in advance of what the channels they carry will transmit—may end up bearing a newspaper publisher's liability for content they did not screen in advance. Generally, these challenges to cable television franchise provisions will remain unresolved until the U.S. Supreme Court finally takes a more active role than it has so far. The whole debate, however, may be influenced by a new player on the electronic mass media scene, the telephone companies in the U.S.

Cable Television and the Telephone Industry

Bringing in the telephone companies is a fitting way to close a book on mass communications law. The reason is simple. Historically, the telephone industry was not thought of as a mass medium. Nearly everybody had a phone, but the purpose was to gain access to the telephone system in the U.S. Telephone companies provided "common carriage"—a way for people and industries to exchange voice and data communications with each other—but didn't care about the content of communications and weren't "mass media" in a traditional "one-to-many" sense.

That has begun to change. The telephone is becoming a mass medium. It is more, now, than just automated, electronic person-to-person communications. People can dial up information sources of many kinds—from "Dial-A-Broker" to "Dial-A-Santa" to "Dial-A-Porn"—and receive mass information. Looking at the system the other way, devices such as "demon dialers" can be programmed to persistently call home telephones to deliver advertising messages. What was once something other than mass communication is, more rapidly than the legal system can keep up, becoming our newest form of electronic mass communication.

As telephony goes through these changes, it confronts the traditions of electronic mass media law—something from which, historically, it has been kept separate. The clash with cable television is one example of the new era.

Telephone companies have been prohibited for years from owning cable television companies in the same areas that they provide telephone service. FCC rules reflected this in the 1970s; Congress made the prohibition statutory in the Cable Communications Policy Act of 1984. Section 533(b) of 47 U.S.C. prohibits telephone companies generally from owning cable systems serving the same areas in which they provide telephone service except in the case of rural communities. There, the statute contains a built-in exemption. Also built-in is a waiver system under which the FCC can grant approved operation of a cable system by a telephone company in the phone company's service area if the FCC is convinced that nobody else could provide the cable service. The FCC in 1988 decided to grant such a waiver to allow General Telephone Company to build and partly operate a cable television system in Cerritos, California, where operation of most of the cable system would be conducted by another company but where construction and ownership, it was argued, could be done under no other arrangement than one where GTE owned the system. In no other way, it was argued, could a system be built that would meet the specifications demanded by Cerritos. The decision may be the harbinger of increased telephone company ownership of cable systems. See *In re Application of General Tel. Co. of Cal.*, 64 RR 2d 1156 (1988); *Broadcasting*, May 1, 1989, p. 136.

Allowing General Telephone to own a cable system in Cerritos, California, however, is not the same thing as allowing the titans of telephony into cable. It doesn't involve AT&T, our major national interstate telecommunications system provider, or the former parts of AT&T, the regional Bell holding companies (e.g., Ameritech, U.S. West, NYNEX, etc.), into the cable business. Entry by AT&T and the former parts of the Bell System is currently precluded by the antitrust consent decree that broke up AT&T in 1984. Under that decree, AT&T is barred from entry into the "electronic information" business until late 1989. The operating companies are barred from entry unless they can talk the judge supervising the decree, U.S. District Judge Harold Greene, into allowing them in. So far, they have not been successful at that.

The result, as the 1980s draw to a close, is a major policy dilemma. The telephone companies now op-

erate the only switched information systems reaching all Americans. The system, however, is a limited one—capable at the moment only of delivering information by a relatively primitive twisted pair of copper wires. It delivers low-quality voice and slow-speed data. It is probably not adequate to the needs of the twenty-first century. It needs to be upgraded to deliver more information faster. If upgraded, however, the potential exists for telephone companies to deliver the same kinds of services as cable companies. Telephony and cable, however, have been thought of as distinct fields. As the 1980s draw to an end, it seems likely that the major policy issue of the last decade of the century will be whether or not to allow telephone companies fully into the mass communications business and, if so, under what terms and policies. Broadcasters sit somewhat on the sidelines, anxious that their signals will be delivered, preferably for free, by whatever wired system exists.

It doesn't help in the resolution of this new dilemma that we have practically no First Amendment theory at all for the telephone industry. So long as telephone companies were only common carriers, holding out communications transport services on a nondiscrimatory fashion to all users and not caring about the content of messages transmitted, we didn't worry about how to apply the First Amendment to them. Newer problems, however, have resulted in the glimmerings of development of a First Amendment theory for telephony. The final theory is, if anything, even less clear than for cable television. The outcome of those efforts at theory development, however, could have even more profound impact.

Telephone First Amendment theory is, at the moment, developing in two areas. First, there's a branch of it related to the AT&T antitrust consent decree. In prohibiting both AT&T and its former parts, the divested Bell Operating Companies (DBOC's), from entering the information business, Judge Greene relied upon broadcasting-related First Amendment models. Hopeful that a diverse, competitive, multimembered electronic information industry would develop, he barred AT&T and the DBOCs from entering the information industry. Greene claimed he acted to protect the First Amendment rights of telephone subscribers. Fearful that AT&T or DBOC entry into markets such as videotex would scare off potential competitors at the start of the industry, Greene's solution was to keep the major players out in hopes that minor players would start the industry. So far, that appears not to have worked well. There are few other videotex providers. The relevance of broadcast theory, based on spectrum scarcity, to telephone First Amendment theory, based at best on economic scarcity, can be questioned.

The second area in which telephone First Amendment theory is emerging is so-called "Dial-A-Porn," the provision of on-demand sexually oriented materials for a fee. Obscenity law is, of course, a well-established part of First Amendment law—it's been around in regard to the print, film, and electronic media for years. In other media, however, it never set the tone for the development of general First Amendment theory. In regard to the telephone industry and the First Amendment, however, it's currently a driving force.

Congress seems hell-bent on curbing telephone "pornography." Congress has banned telephone obscenity and indecency twenty-four hours per day, a step promptly enjoined and now before the U.S. Supreme Court for review. See text, p. 841. The FCC has been ordered by Congress to attempt all kinds of limits on "Dial-A-Porn," many of which have been questioned when brought forward for judicial review. At the state level the basic notion of a "common carrier" has been challenged; state public utility commissions have been urged—sometimes successfully—to let telephone companies deny service to providers of information that might hurt the public image or reputation of the telephone companies. Overall, the developments are rapid and are leading to major First Amendment decisions. One has to wonder, however, if First Amendment theory developed to deal with telephone-delivered sexually explicit information is the best way to develop First Amendment principles for what might be the major electronic mass medium of the twenty-first century.

Powerful forces advocate telephone entry into cable communications under somewhat restricted conditions. Some believe telephone entry will break cable's monopoly, increase competition, and result in rapid development of a high capacity national network. Others believe that telephone entry simply substitutes one monopolist for another and that telephone companies will unfairly cross-subsidize cable development out of phone revenues. The National Telecommunications and Information Administration has argued that telephone companies should be able to provide a "video dial tone" service but be prohibited from controlling the content of information carried on their systems. National Telecom-

munications and Information Administration, *Video Program Distribution and Cable Television: Current Policy Issues and Recommendations*, Report No. 88–233 (1988). If adopted, such a recommendation would pose significant competition for the current cable industry, for broadcasters, and, in reality, for other information providers such as newspapers and magazines.

The debate, however it develops, demonstrates a simple reality of mass communications law. For years, we understood what the mass media were; the question was how to regulate them, if at all, and how to work under the important principles of the First Amendment to the U.S. Constitution. The issues as we move toward the twenty-first century are in many ways far more complex. We're rethinking what a mass medium is and, as we do so, confronting novel and perplexing questions about mass communication law.

The Constitution of the United States

PREAMBLE

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit

under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law.

Every Order, Resolution, or Vote, to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power

To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the Presi-

dent, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greater Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law

and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII

The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Amendment I [1791]

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.

Amendment II [1791]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III [1791]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV [1791]

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.

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII [1791]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X [1791]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XI [1798]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII [1804]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-

thirds of the states, and a majority of all states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII [1865]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV [1870]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XVI [1913]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII [1913]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the

people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII [1919]

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XIX [1920]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XX [1933]

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If the President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI [1933]

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII [1951]

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII [1961]

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representa-

tives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV [1964]

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States, or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV [1967]

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration and the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI [1971]

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Appendix A

TEXAS v. JOHNSON

109 S.CT. ___ (1989).

Justice BRENNAN delivered the opinion of the Court.

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." * * * [T]he purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of nuclear war. * * * He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flag pole outside one of the targeted buildings.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted, "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness to the flag-burning collected the flag's remains and buried them in his backyard. * * *

Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex. Penal Code Ann. § 42.09 (a)(3) (1989). After a trial, he was convicted, sentenced to one year in prison, and fined $2,000. The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson's conviction, but the Texas Court of Criminal Appeals reversed, holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances.

* * *

Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words. This fact somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. See, *e.g.*, *Spence v. Washington* 418 U.S. 405 (1974). If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. See, *e.g.*, *United States v. O'Brien* 391 U.S. 367 (1968); *Spence, supra*. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien*'s test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard. A third possibility is that the State's asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture.

* * *

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." * * *

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct

relating to flags. Attaching a peace sign to the flag, *Spence*; saluting the flag, *Barnette*, 319 U.S., at 632; and displaying a red flag, *Stromberg v. California*, 283 U.S. 359 (1931), we have held, all may find shelter under the First Amendment. * * * That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. * * * Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in "America."

* * *

Texas conceded that Johnson's conduct was expressive conduct. Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. * * *

The Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements. * * * It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.

* * * [W]e have limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which "the governmental interest is unrelated to the suppression of free expression." See also *Spence*. In stating, moreover, that *O'Brien*'s test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions," we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O'Brien*'s less demanding rule.

In order to decide whether *O'Brien*'s test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether *O'Brien*'s test applies. The State offers two separate interests to justify this conviction: preventing breaches of the peace, and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression.

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration. However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. * * *

The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute." * * *

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire* 315 U.S. 568 (1942). No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs.

We thus conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent "imminent lawless action." * * *

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. * * * These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression" within the meaning of *O'Brien*. We are thus outside of *O'Brien*'s test altogether.

It remains to consider whether the State's interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson's conviction.

* * * Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values.

Moreover, Johnson was prosecuted because he knew that his politically charged expression would cause "serious offense." * * * The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others. * * *

Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communi-

cative impact of his expressive conduct. Our decision in *Boos v. Barry*, 485 U.S. 312 (1988), tells us that this restriction on Johnson's expression is content-based. * * *

According to the principles announced in *Boos*, Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to "the most exacting scrutiny." *Boos v. Barry*.

Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. * * * According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited.

If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

We have not recognized an exception to this principle even where our flag has been involved. In *Street v. New York*, 394 U.S. 576 (1969), we held that a State may not criminally punish a person for uttering words critical of the flag. * * * Nor may the Government, we have held, compel conduct that would evince respect for the flag. * * *

In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it. To bring its argument outside our precedents, Texas attempts to convince us that even if its interest in preserving the flag's symbolic role does not allow it to prohibit words or some expressive conduct critical of the flag, it does permit it to forbid the outright destruction of the flag. The State's argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here. In addition, both *Barnette* and *Spence* involved expressive conduct, not only verbal communication, and both found that conduct protected.

Texas' focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the Government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea. If we were to hold that a State may forbid flag-burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol—as a substitute for the written or spoken word or a "short cut from mind to mind"—only in one direction. We would be permitting a State to "prescribe what shall be orthodox" by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.

* * *

To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the Government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.

There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone. * * *

It is not the State's ends, but its means, to which we object. It cannot be gainsaid that there is a special place reserved for the flag in this Nation. * * * To say that the Government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest. * * *

We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings its inspires.

* * *

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of

criticism such as Johnson's is a sign and source of our strength. * * * It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag—and it is that resilience that we reassert today.

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. * * * And, precisely because it is our flag that is involved, one's response to the flag-burner may exploit the uniquely persuasive power of the flag itself. * * * We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

Johnson was convicted for engaging in expressive conduct. The State's interest in preventing breaches of the peace does not support his conviction because Johnson's conduct did not threaten to disturb the peace. Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression. The judgment of the Texas Court of Criminal Appeals is therefore

Affirmed.

Justice KENNEDY, concurring.

* * * It is poignant but fundamental that the flag protects those who hold it in contempt.

For all the record shows, this respondent was not a philosopher and perhaps did not even possess the ability to comprehend how repellent his statements must be to the Republic itself. But whether or not he could appreciate the enormity of the offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free.

Chief Justice REHNQUIST, with whom Justice White and Justice O'Connor join, dissenting.

* * *

Both Congress and the States have enacted numerous laws regulating misuse of the American flag.

* * *

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.

* * *

But the Court insists that the Texas statute prohibiting the public burning of the American flag infringes on respondent Johnson's freedom of expression. Such freedom, of course, is not absolute. See *Schenck v. United States*, 249 U.S. 47 (1919). In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), a unanimous Court said:

* * * "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

* * *

Here it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace. Johnson was free to make any verbal denunciation of the flag that he wished; indeed, he was free to burn the flag in private. * * *

But his act, like Chaplinsky's provocative words, conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways. As with "fighting words," so with flag burning, for purposes of the First Amendment: It is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed" by the public interest in avoiding a probable breach of the peace. * * *

The result of the Texas statute is obviously to deny one in Johnson's frame of mind one of many means of "symbolic speech." Far from being a case of "one picture being worth a thousand words," flag burning

is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others. * * * It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished.

* * *

Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning.

Our Constitution wisely places limits on powers of legislative majorities to act, but the declaration of such limits by this Court "is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." *Fletcher v. Peck*, 6 Cranch 87, 128 (1810) (Marshall, C. J.). * * * The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.

Justice STEVENS, dissenting.

* * * Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.

* * *

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. * * * The content of respondent's message has no relevance whatsoever to the case.

* * * It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset.

The Court is therefore quite wrong in blandly asserting that respondent "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. * * *

The ideas of liberty and equality have been an irresistible force. * * * If those ideas are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

I respectfully dissent.

Appendix B

SABLE COMMUNICATIONS OF CALIFORNIA, INC. v. FEDERAL COMMUNICATIONS COMMISSION ET AL.

109 S.CT. _____ (1989).

Justice WHITE delivered the opinion of the Court.

The issue before us is the constitutionality of § 223(b) of the Communications Act of 1934. 47 U. S. C. § 233(b). The statute, as amended in 1988, imposes an outright ban on indecent as well as obscene interstate commercial telephone messages. The District Court upheld the prohibition against obscene interstate telephone communications for commercial purposes, but enjoined the enforcement of the statute insofar as it applied to indecent messages. We affirm the District Court in both respects.

In 1983, Sable Communications, Inc., a Los Angeles-based affiliate of Carlin Communications, Inc., began offering sexually-oriented pre-recorded telephone messages (popularly known as "dial-a-porn") through the Pacific Bell telephone network. * * *

On January 15, 1988, in *Carlin Communications, Inc. v. FCC*, 837 F. 2d 546 *(Carlin III)*, cert. denied, 488 U. S. _____ (1988), the Court of Appeals for the Second Circuit held that the new [FCC] regulations, which made access codes, along with credit card payments and scrambled messages, defenses to prosecution under § 22(b) for dial-a-porn providers, were supported by the evidence, had been properly arrived at, and were a "feasible and effective way to serve" the "compelling state interest" in protecting minors, 837 F.2d, at 555; but the Court directed the FCC to reopen proceedings if a less restrictive technology became available. The Court of Appeals, however, this time reaching the constitutionality of the statute, unvalidated § 223(b) insofar as it sought to apply to nonobscene speech.

Thereafter, in April 1988, Congress amended § 223(b) of the Communications Act to prohibit indecent as well as obscene interstate commercial telephone communications directed to any person regardless of age. The amended statute, which took effect on July 1, 1988, also eliminated the requirement that the FCC promulgate regulations for restricting access to minors since a total ban was imposed on dial-a-porn, making it illegal for adults, as well as children, to have access to the sexually explicit messages. * * *

[T]he District Court upheld § 223(b)'s prohibition of obscene telephone messages as constitutional. We agree with that judgment. In contrast to the prohibition on indecent communications, there is no constitutional barrier to the ban on obscene dial-a-porn recordings. We have repeatedly held that the protection of the First Amendment does not extend to obscene speech. See, *e.g.*, *Paris Adult Theatre I v. Slaton*, 413 U. S. 49, 69 (1973). * * *

In its facial challenge to the statute, Sable argues that the legislation creates an impermissible national standard of obscenity, and that it places message senders in a "double bind" by compelling them to tailor all their messages to the least tolerant community.

We do not read § 223(b) as contravening the "contemporary community standards" requirement of *Miller v. California*, 413 U. S. 15 (1973). Section 223(b) no more establishes a "national standard" of obscenity than do federal statutes prohibiting the mailing of obscene materials, 18 U. S. C. § 1461, see *Hamling v. United States*, 418 U. S. 87 (1974) or the broadcasting of obscene messages, 18 U. S. C. § 1464. In *United States v. Reidel*, 402 U. S. 351 (1971), we said that Congress could prohibit the use of the mails for commercial distribution of materials properly classifiable as obscene, even though those materials were being distributed to willing adults

who stated that they were adults. Similarly, we hold today that there is no constitutional stricture against Congress' prohibiting the interstate transmission of obscene commercial telephone recordings.

We stated in *United States v. 12 200-ft. Reels of Film*, 413 U. S. 123 (1973), that the *Miller* standards, including the "contemporary community standards" formulation, apply to federal legislation. As we have said before, the fact that "distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." *Hamling v. United States, supra*, at 106.

Furthermore, Sable is free to tailor its messages, on a selective basis, if it so chooses, to the communities it chooses to serve. While Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages. Whether Sable chooses to hire operators to determine the source of the calls or engages with the telephone company to arrange for the screening and blocking of out-of-area calls or finds another means for providing messages compatible with community standards is a decision for the message provider to make. There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages.

[T]he District Court concluded that while the government has a legitimate interest in protecting children from exposure to indecent dial-a-porn messages, § 223(b) was not sufficiently narrowly drawn to serve that purpose and thus violated the First Amendment. We agree.

Sexual expression which is indecent but not obscene is protected by the First Amendment; and the government does not submit that the sale of such materials to adults could be criminalized solely because they are indecent. The government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards. The government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. It is not enough to show that the government's ends are compelling; the means must be carefully tailored to achieve those ends.

* * *

In attempting to justify the complete ban and criminalization of the indecent commercial telephone communications with adults as well as minors, the government relies on *FCC v. Pacifica Foundation*, 438 U. S. 726 (1978), a case in which the Court considered whether the FCC has the power to regulate a radio broadcast that is indecent but not obscene. In an emphatically narrow holding, the *Pacifica* Court concluded that special treatment of indecent broadcasting was justified.

Pacifica is readily distinguishable from this case, most obviously because it did not involve a total ban on broadcasting indecent material. The FCC rule was not " 'intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.' "

The *Pacifica* opinion also relied on the "unique" attributes of broadcasting, noting that broadcasting is "uniquely pervasive," can intrude on the privacy of the home without prior warning as to program content, and is "uniquely accessible to children, even those too young to read." The private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in *Pacifica*. In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it medium required the listener to take affirmative steps to receive the communication. There is no "captive audience" problem here; callers will generally not be unwilling listeners. The context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message.

Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.

The Court in *Pacifica* was careful "to emphasize the narrowness of [its] holding." As we did in *Bolger v. Youngs Drug Products Corp.*, 463 U. S. 60 (1983), we distinguish *Pacifica* from the case before us and reiterate that "the government may not 'reduce the adult population . . . to . . . only what is fit for children.' " *Butler v. Michigan*, 352 U.S. 380 (1957).

The Government nevertheless argues that the total ban on indecent commercial telephone communications is justified because nothing less could prevent children from gaining access to such messages. We find the argument quite unpersuasive. The FCC, after lengthy proceedings, determined that its credit card, access code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors. The Court of Appeals, after careful consideration, agreed that these rules represented a "feasible and effective" way to serve the Government's compelling interest in protecting children.

The Government now insists that the rules would not be effective enough—that enterprising youngsters could and would evade the rules and gain access to communications from which they should be shielded. There is no evidence in the record before us to that effect, nor could there be since the FCC's implementation of § 223(b) prior to its 1988 amendment has never been tested over time. In this respect, the Government asserts that in amending § 223(b) in 1988, Congress expressed its view that there was not a sufficiently effective way to protect minors short of the total ban that it enacted. The Government claims that we must give deference to that judgment.

To the extent that the Government suggests that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution. * * *

There is no doubt Congress enacted a total ban on both obscene and indecent telephone communications. But aside from conclusory statements during the debates by proponents of the bill, as well as similar assertions in hearings on a substantially identical bill the year before, H. R. 1786, that under the FCC regulations minors could still have access to dial-a-porn messages, the Congressional record presented to us contains no evidence as to *how* effective or ineffective the FCC's most recent regulations were or might prove to be. * * *

For all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people will manage to secure access to such messages. If this is the case, it seems to us that § 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages. Under our precedents, § 223(b), in its present form, has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear. * * *

Because the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages, we hold that the ban does not survive constitutional scrutiny.

Accordingly, we affirm the judgments of the District Court.

It is so ordered.

Justice BRENNAN, with whom Justice Marshall and Justice Stevens join, concurring in part and dissenting in part.

I agree that a statute imposing criminal penalties for making, or allowing others to use a telephone under one's control to make, any indecent telephonic communication for a commercial purpose is patently unconstitutional. I therefore join [part] of the Court's opinion.

In my view, however, § 223(b)(1)(A)'s parallel criminal prohibition with regard to obscene commercial communications likewise violates the First Amendment. I have long been convinced that the exaction of criminal penalties for the distribution of obscene materials to consenting adults is constitutionally intolerable. In my judgment, "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms." *Paris Adult Theatre I v. Slaton*, (BRENNAN, J., dissenting). To be sure the Government has a strong

interest in protecting children against exposure to pornographic material that might be harmful to them. *New York v. Ferber*, 458 U.S. 747 (1982) (BRENNAN, J., concurring in judgment); *Ginsberg v. New York*, 390 U. S. 629 (1968). But a complete criminal ban on obscene telephonic messages for profit is "unconstitutionally overbroad, and therefore invalid on its face," as a means for achieving this end. *Miller v. California*, 413 U. S. 15, 47 (1973) (BRENNAN, J., dissenting).

* * *

Justice SCALIA, concurring.

Glossary

A

Actionable. Providing legal reasons for a lawsuit.

Affidavit. The sworn written statement of a party or a witness in a suit. The person who makes the statement is called an *affiant*.

Affirmed. Signifies that the appellate court agreed with the lower court's decision and has decided to let it stand after review, thus "affirming" it.

A fortiori. It follows unavoidably, as, for example, the next step in an argument.

Amicus Curiae. A friend of the court. Usually refers to legal briefs submitted to a court by persons or groups, not parties of record to an action. Briefs amici curiae are submitted to courts to help the court reach its decision and to bring to the attention of the court factors and problems raised by a case which the parties to the action may not bring to the court's attention.

Appellant. The party who appeals a lower court decision rendered against him to a higher court is the appellant.

Appellee. The party who opposes an appeal and who is usually content with the lower court decision is the appellee. Courts sometimes use terms like "plaintiff-appellee" or "defendant-appellant" to indicate that the defendant lost at trial and now appeals, and plaintiff won below and now opposes the appeal.

A priori. From cause to effect. Inferring specific facts from general principles.

Arguendo. Assume something true for the sake of argument.

B

Balance of Interests Doctrine This was an approach often used by courts in cases involving First Amendment issues in the 1950s and 1960s. The stated mission of the doctrine or test is to weigh the state's interest in effecting a restraint on freedom of expression as distilled in a particular statute against the claim that the statute offends freedom of speech or press.

Barratry. Provoking a lawsuit intentionally, e.g., a lawyer for profit.

Bill of Attainder. A legislative act pronouncing a person guilty of a crime without a trial. Such acts are prohibited in the U.S. Constitution.

Bill of Rights. First 10 Amendments to the Constitution of the United States.

Black Letter Law. Legal principles accepted by the judiciary in most jurisdictions.

Brief. The written legal arguments which are presented to the court by a party to a lawsuit. A brief is generally partisan. The brief states the facts and the relevant legal authorities on which a party relies for the result which it seeks.

C

Canon Law. The law of the Church. During the Middle Ages, the ecclesiastical or church courts had considerable control over family and other matters. The law thus developed has influenced the common law.

Certiorari. A writ by which review of a case is sought in the United States Supreme Court. Tech-

nically, when the writ is granted, the Court will order the lower court to send the record of the case, a transcript of the proceedings below, up to the Supreme Court for it to review. The Supreme Court has discretion over which petitions for certiorari (cert.) it will or will not grant, and can thus retain control over what cases it will review.

Civil Action. A lawsuit brought to enforce a private, civil right or to redress a wrong, as distinguished from a criminal prosecution.

Civil Law. Law based on codes originating with the Romans. This is the name for the legal system which operates in France and Germany.

Clausus. A closed class, a quota.

Clear and Convincing Proof (or Evidence). A standard of proof in civil litigation more stringent than the normal requirement that the successful party be favored by a preponderance of the evidence. The standard is, yet, less stringent than the standard of proof used in criminal litigation which is that the evidence must show guilt beyond a reasonable doubt.

Collateral Estoppel. Prohibition of making a claim that has been disproved in a prior court.

Collusion. When two or more parties agree to maintain a suit even though there is no real adversity between them, it is termed collusion. When a suit is brought under these circumstances it is called a "collusive suit" and is constitutionally proscribed since the U.S. Constitution, Article III, limits federal courts to deciding actual "cases or controversies." Also, when two parties agree to practice a fraud upon the court or a third party.

Common Law. The legal system of the United States and Great Britain and other countries whose formative legal institutions derive in some measure from England. A common law system is distinguished from the *civil law* systems of Europe since the former is based upon general rules and principles found in judicial decisions, as opposed to the codification of those rules and principles in statutory law. Common law is judge-made law as opposed to law made by legislatures, or statutory law. The historic understanding of American law as common law is no longer apt since, increasingly, "law" in the United States is statutory law.

Complainant. The person who brings a lawsuit. It can also refer to the "complaining witness" or the person who has asked the state to bring criminal charges against the defendant. Often used as a synonym for plaintiff.

Concurring Opinion. When a court, consisting of more than one judge, reaches its decision, one or more of the judges on the court comprising the majority may agree with the decision reached, but for different reasons than those found in the court's opinion. Such judges may decide to state their separate reasons for joining in the result reached by the majority of the court in a concurring opinion. A concurring opinion is often used by a judge to emphasize or de-emphasize a particular portion of a majority opinion or to argue with a dissent (an opinion filed by a judge who disagrees with the court's decision and wishes to make the reasons explicit).

Constitutional Law. Law based on the basic principles of the Constitution as to structure, rights, and functions of government.

Contempt of Court. Any act which is deemed by a court to embarrass, hinder, or obstruct the court in the administration of justice or calculated to lessen its authority or its dignity. *Direct* contempt is committed in the presence of the court, or very near thereto, and can be punished summarily, without a jury trial. *Constructive* or indirect contempt refers to actions outside of court which hinder the administration of justice, as when a court order is not obeyed.

Contra. Against.

Counterclaim. A claim brought by the defendant *against* the plaintiff. A counterclaim may be similar to the plaintiff's claim against the defendant, or it might be totally unrelated to the plaintiff's claim.

D

Damages. Money that a person receives as compensation, as the result of a court order, for injury to her person, property or rights because of the act, omission, or negligence of another.

Declaratory Judgment. A judicial decision that sets out the rights and obligations of the parties to a dispute and expresses an opinion on a question of law, but which does not necessarily order any coercive relief such as an injunction or damages.

Defeasance. A collateral deed made at the same time as another conveyance of property (e.g., a deed

or will), containing certain conditions upon the performance of which the estate then created may be defeated, or totally undone.

Defendant. The party against whom a suit is brought. The defendant must answer the plaintiff's complaint and defend against his allegations. In criminal cases, the defendant is the party accused of crime by the state.

De jure. A matter of law whether or not consistent with fact.

De minimis. Something, or some act, which does not rise to a level of sufficient importance to be dealt with judicially.

De novo. Means anew or fresh. A new trial of a case is a "trial de novo." A new trial can be granted by the trial judge or ordered by an appellate court.

Deposition. A sworn, recorded, oral statement made by a party or a witness out of court, either in the form of a narrative or as answers to questions posed by an attorney. The party whose deposition is taken is called the deponent. The deposition is a device often used to obtain testimony in advance of a trial or to secure the testimony of a person unable to come into court. A deposition can be used at trial to contradict a deponent's testimony at trial, or it can be used in the event of the deponent's unavailability.

Dicta. See *Obiter dictum*.

Directed Verdict. The trial judge decides that as a matter of law reasonable people cannot differ concerning the proper verdict in a case, and directs the jurors to reach that verdict. The judge, in effect, makes the jury's decision for them; he takes it out of their hands.

Discovery. A period of information exchange between the parties in a lawsuit accomplished by interrogatories and deposition.

Disparagement. An untrue or misleading statement about a competitor's goods that is intended to influence or tends to influence the public not to buy the goods. Trade disparagement is distinguished from libel in that it is directed toward the goods rather than the personal integrity of the merchant.

Diversity Action. An action brought in a federal court between parties who are citizens of different states. Such an action is based on the provision in the U.S. Constitution, Article III, granting jurisdiction to federal courts in diversity cases. Congress has enacted legislation, under this authority, granting the federal courts such jurisdiction. The action is in federal court *only* because the parties are from different states. The federal court, in this situation, is supposed to apply the substantive law of the state in which it sits.

Doctrine of Judicial Restraint. A doctrine associated in twentieth-century American constitutional law with Supreme Court Justices Frankfurter and Harlan as well as jurists such as Judge Robert Bork. Under this view, courts should only rarely exercise their power to invalidate legislation on constitutional grounds. This doctrine holds that as long as the legislation in controversy is reasonable and has some constitutional authorization it should be given a presumption of validity. The doctrine holds that in a democratic society nonelected judges should be reluctant to invalidate legislation enacted by the elected representatives of the people.

Doctrine of Preferred Freedoms. In constitutional litigation, a statute is normally presumed to be constitutional until it is shown to be otherwise. The doctrine of preferred freedoms states that when a statute seeks to limit a preferred freedom such as the freedom of expression, those who seek to uphold the statute must prove that it is constitutional, instead of making those who attack the statute prove that it is unconstitutional. The usual presumption of validity attaching to legislation attacked on constitutional grounds is thus reversed. Increasingly, the strict scrutiny standard of review is employed to achieve this result.

Duces tecum. A subpoena commanding a person to appear in court with documentary evidence; a subpoena *ad testificandum* commands a person to appear in court to give testimony.

Due Process. A complex of rights guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution, as interpreted by the Supreme Court. There are two kinds of due process. Procedural due process is offended when the fair procedures of the judicial process have not been complied with such as right to notice of the charges against one and a fair hearing concerning those charges. Substantive due process is offended by legislative action abridging substantive rights guaranteed by the due process clause of the Fourteenth Amendment such as free-

dom of speech, freedom of religion, freedom of assembly, the right to privacy, etc.

E

Equity. As distinguished from common law, equity means to be flexible where the common law is rigid. Equity fashions remedies where the law is inadequate in order to do substantial justice. Also, refers to the separate equity court system developed in England and to the remedies fashioned by those courts. Many of these remedies have now been adopted by American courts. Thus courts have the broad power to order the equitable remedy of an injunction when money damages (the legal remedy) are inadequate.

Estoppel. An estoppel works a preclusion on the basis of a party's own act, or acceptance of facts, relied upon by another party. Thus, when a party makes a promise on which another relies, such a party may later be precluded from denying such a promise or refusing to accept its consequences.

Ex parte. Something done by, for, or on the application of *one party only*. An example of an ex parte proceeding is a hearing on a temporary restraining order. Such an order can be granted to a party in the absence of the party sought to be restrained.

Ex proprio vigore. By their or its own force.

Ex rel. Legal proceedings which are instituted by the attorney general in the name of and on behalf of the state, but on the information and at the instigation of an individual who has a private interest in the matter.

F

Federalism. The complex interaction between federal and state governments. This term is also sometimes used to emphasize the primacy of the role of the states in the American federal system.

Felony. A serious crime, in contrast to a misdemeanor.

G

Gloss. An annotation, explanation, or comment on any passage in the text of a work for purposes of elucidation or amplification.

Grand Jury. A jury whose responsibility it is to decide whether probable cause exists to warrant the trial of an accused for a serious crime. A finding of probable cause is not equivalent to a finding of guilt. If the grand jury believes sufficient evidence exists to establish probable cause, it issues an indictment. The grand jury is termed a "grand jury" because it has more members than the trial or "petit" jury.

H

Habeas Corpus. "You have the body." Often called the "Great Writ" because it has been considered basic to liberty in American law. Typically, a writ of habeas corpus issues to order a warden or jailer to bring a prisoner before the court so that the court can determine whether the prisoner is lawfully confined. The writ can be used to secure review of a criminal conviction in the hope that the court will release the prisoner if it decides the prisoner is unlawfully confined.

Haec Verba. In these exact words.

Holding. The authoritative core of a judge's holding or a court's decision.

I

In camera. In a judge's chambers, or in a courtroom with the public excluded.

Indefeasible. A right that cannot be taken away or defeated.

Indictment. A written accusation made by a grand jury charging that the person named therein is accused of committing a crime. An indictment should be distinguished from an information (see below). Most jurisdictions require a grand jury indictment as the basis for charges of the most serious crimes.

Inducement. The benefit or advantage that the promisor is going to receive from a contract is the inducement for making it.

Information. The *information* is an alternate method by which a criminal prosecution can be commenced. In states which allow a prosecutor to proceed by information as an alternative to a grand jury indictment, a preliminary hearing is first held before a magistrate to determine if there is "probable cause" to believe that a crime has been committed. If the magistrate determines that, on the evidence

presented by the state prosecutor, probable cause exists, the accused is bound over for trial and the prosecutor files an information which states the crime with which the accused is charged, serving substantially the same function as a grand jury indictment.

Infra. Refers to something printed later in the text. Used in the sense of "see below."

Injunction. A court-issued writ ordering a party either to refrain from doing something or to perform a specific act. When a court issues an injunction against a party, it *enjoins* that party. This equitable remedy is issued at the request of a litigant. An injunction may be granted temporarily to preserve the *status quo* while the issue in controversy is still pending before a court. This is called a preliminary injunction. A permanent injunction is granted only after a hearing on the merits.

In limine. On or at the threshold; at the very beginning; preliminarily.

Instanter. Immediately.

Inter alia. Literally "among other things"; reference to only a part of something.

Interlocutory Appeal. An appeal of a judicial order in a case rendered by a court prior to final decision of that case. An order which is not final, or which is not dispositive of the entire suit, is interlocutory in nature. Interlocutory appeals, except for a few statutory exceptions, are not permissible in federal practice. But this rule is sometimes circumvented by application to appellate courts for prerogative writs such as writs of mandamus which in effect do subject interlocutory orders to appeal.

Intermediate Standard of Review. This standard is used for gender and some other classifications; it is not as severe as the strict scrutiny standard which is used in racial discrimination cases. Under the intermediate standard of review the state must show that the challenged classification is substantially related to achieving an important government objective.

Interrogatories. Written questions submitted by one party to the opposing party before the trial. The opposing party is then required under oath to provide specific written answers to the interrogatories of the other party. Interrogatories are part of the discovery process used by counsel prior to the actual trial to inform each other of the basic facts and issues in the case. The interrogatories are usually written and answered by counsel after consultation with the client.

Ipse Dixit. To rely on one's own *ipse dixit* is to say something which rests not on independent evidence but solely on the say-so of the speaker.

J

Judgment. The final decision of the court defining the rights and duties of the parties to a law suit. A judgment should be distinguished from a verdict (see below) which is the name given to the decision of a jury rather than of a court.

Judgment n.o.v. (non obstante veredicto). A judgment notwithstanding the verdict occurs when the court renders a judgment in favor of one party after the jury has returned with a verdict in favor of the other party. When a motion for a judgment *n.o.v.* is granted, the judge in effect overrules the jury's verdict. The motion is usually granted on the grounds that the jury's verdict was clearly unreasonable and not supported by the evidence. This decision by the judge can be the basis for an appeal.

Judicial Activist. A judicial activist is the opposite of an exponent of a doctrine of judicial restraint (see this glossary). A judicial activist believes the judiciary may, in some circumstances, serve as a fulcrum for social change. The Warren Court, often charged by its critics with judicial activism, through the process of constitutional interpretation, imposed new rules and duties in the areas of reapportionment, racial equality, and criminal procedure.

Judicial Review. The invalidation or validation by courts of governmental action on the ground that that action is inconsistent or consistent with the Constitution.

Jurisprudence. The philosophy of law. Sometimes used as a synonym for law itself.

L

Long-arm Statute. A state law allowing its courts jurisdiction outside the state.

M

Malfeasance. Usually refers to wrongdoing by a public official.

Mandamus. A writ ordering a lower court judge or other public official to perform a legal duty as to which he has no discretion.

Memorandum Decision. A court ruling without written opinion or reasons given.

Misprision. A word used to describe a misdemeanor which does not possess a specific name. More specifically a contempt against the government or the courts, all forms of sedition or disloyal conduct; or maladministration of high public office; or failure of a citizen to endeavor to prevent the commission of a crime, or, having knowledge of its commission, to reveal it to the proper authorities.

Mistrial. A trial interrupted and concluded for a major procedural defect.

Model Acts. Laws proposed by law reform groups such as the National Conference of Commissioners on Uniform State Laws.

Movant (Movent). One who makes a motion before a court; the applicant for a rule or order.

Moving Papers. Such papers as are made the basis of some motion in court proceedings.

N

Nolle Prosequi (nol. pros.). When the prosecuting attorney in a criminal suit decides that he will "prosecute the case no further," a *nol. pros.* is entered into the court records. The use of a *nol. pros.* usually terminates the lawsuit. Unless a *nol. pros.* is obtained with leave of court, the case will not be reopened at a later date; a *nol. pros.* usually signifies that the matter has been dropped altogether.

N.O.V. *Non obstante veredicto.* Notwithstanding the verdict of a jury the judge gives judgment to the other side.

Nonfeasance. Usually failure of a public official to perform an assigned public duty.

Nunc pro tunc. Retroactive.

O

Obiter Dictum, or Dicta. Statements made in a judge's opinion that strictly speaking are not necessary to the decision of the court. These "statements by the way" are often responsive to some suggestion that is made by the case's facts or its legal issue, but are not themselves part of the court's holding. To characterize a statement in a judicial decision as "dicta" means that the statement does not have the precedential value of a statement which recites the holding of the decision.

Original Jurisdiction. This refers to a court's jurisdiction to permit a case to be commenced there in the first place.

P

Per Curiam. When the opinion of a court or more than one judge is styled *per curiam*, what is meant is that the opinion is issued by and for the entire court, rather than by one judge writing for the court.

Peremptory. Conclusive, even if arbitrary, and requiring no explanation, e.g., peremptory challenges of prospective jurors.

Petitioner. One seeks review of a lower court decision in the United States Supreme Court by petitioning for a writ of certiorari. The person who files the petition seeking review is called the petitioner. A person who petitions for any judicial relief such as a party who seeks other writs, such as mandamus, is also called a petitioner.

Plaintiff. The party who brings the lawsuit. The party who complains.

Pleading. The written statements of the parties containing their respective allegations, denials, and defenses. The plaintiff's complaint and the defendant's answer are examples of pleadings.

Police Blotter. At the police station, the book in which a record is first made of the arrest of an accused person and the charges filed against him. Often used as a source for the journalist's report on the facts of the arrest.

Positive Law. Law enacted by a legislature.

Precedent. A judicial decision that is said to be authority for or to furnish a rule of law binding on the disposition of a current case. A precedent will involve similar facts or raise similar questions of law to the case at bar.

Preliminary Hearing. A hearing before a judge to determine if there is enough evidence to show that there is probable cause to justify bringing a person

accused of crime to trial. In some jurisdictions, if probable cause is shown to exist at the preliminary hearing, the accused will be bound over to the grand jury.

Preponderance of Evidence. The standard of proof in civil as distinguished from criminal litigation. The greater weight of evidence, i.e., that evidence which is more credible and convincing to the mind and therefore entitled to be given probative value (to be believed as proven true) in a civil law suit.

Prima facie. On the face of it, e.g., a *prima facie* or presumptively winning case.

Public Law. Law defining the relationship between government and persons, and the operations of government, e.g., constitutional, administrative, and criminal law.

R

Ratio decidendi. The essential rationale of a judicial decision.

Rational Basis Standard of Review. This standard of review, used for legislation dealing with economic matters, gives great deference to the legislative judgment. Under this standard of review, a statutory classification, challenged under the equal protection clause of the Fourteenth Amendment, will be deemed valid if it is rationally related to a permissible government interest.

Recusation. Process of disqualifying a judge for prejudice or a special interest in a lawsuit.

Remand. A remand is an order of a higher court directing the lower court to conform its decision to the mandates of the higher court.

Remittitur. When the jury awards the plaintiff excessive damages, the court may, in lieu of awarding the defendant a new trial, remit what it considers to be the excess and award the remaining damages to the plaintiff. The judge gives the plaintiff the option of accepting the damages the court believes authorized by the evidence in the form of reduction of damages by a remittitur or else facing a new trial.

Replevin. A lawsuit instituted to reclaim private property held by another.

Res Judicata. Literally, the "thing judicially acted upon." This doctrine states the rule that a party cannot bring the same suit on the same facts against the same parties after these matters have already been decided once by a court. A party has only one "day in court" and once a case has been finally decided, he cannot bring the same suit again.

Respondeat Superior. The legal doctrine whereby the employer can be held liable for the torts of his employee committed in the scope of his employment. Thus, in a media setting, the publisher may be required to respond in damages for defamation perpetrated in his newspaper by a journalist in his employ.

Respondent. The term used to identify the party opposed to granting a petition. The party petitioning for judicial relief is the petitioner, her opponent is the respondent.

Restatement of Torts. A publication of the American Law Institute which attempts to state in a comprehensive way the modern common law of torts on the basis of both a study of the judicial decisions and what it believes to be sound policy. The ALI also publishes restatements on other areas of the common law, such as contracts or conflicts of law.

Reversed. This term found at the end of an appellate decision simply means that an appeals court has reversed or overturned the judgment of a lower court.

Reversible Error. An error in law or procedures by the trial court substantial enough to warrant reversal of the lower court on appeal.

S

Scienter. Guilty knowledge. In some criminal prosecution, an allegation of scienter, or guilty knowledge, concerning the act or omission complained of is a prerequisite to prosecution. Proof of scienter has often been an issue in obscenity prosecutions.

Sealed Records. The records of certain cases may be sealed, and closed from public view, by order of the court. Cases involving trade secrets or juveniles are examples of what a court might order sealed.

Sequester. To put aside, e.g., to lock up a jury.

Slip Opinion. A copy of a court opinion printed and distributed immediately after it is delivered.

Standards of Review. Tests employed by courts to determine the constitutional validity of legislation. Depending on the strength of the constitutional claim at issue, the state in defending its action will be held to one of the following standards of review: rational basis, intermediate, or strict scrutiny.

Stare Decisis. Literally, to hold the decision. A doctrine intended to provide continuity in the common law system. The doctrine requires that when a court has developed a principle of law and has applied it to a certain set of facts, it will apply the same principle in future cases where the facts are substantially the same. The doctrine does not operate inexorably and in contemporary American law, particularly constitutional law, has not been the barrier to legal, and thus to social, change as may have been the case in the past.

State Action. The requirement that there be governmental involvement in a matter in order for the standards of the Fourteenth Amendment to be operative.

Strict Scrutiny Standard of Review. This standard of review will be used when either a fundamental right is said to be significantly burdened by governmental action or when a government classification is deemed "suspect" because it classifies on the basis of race. Unlike the rational basis standard, this standard is not deferential to state legislation. Government action challenged under this standard will be valid only if the government can show that it serves a compelling state interest. Courts sometimes describe this standard as strict in theory but fatal in fact. Increasingly, this standard is used in free expression cases.

Sua Sponte. To do something on one's own initiative. A term used when a court makes a ruling on its own even though the ruling has not been requested by counsel for either side.

Sub nom. When used in case citations, this abbreviation means that the same case as the previous case is being noted, but that it was decided on appeal under a *different name.*

Substantive Law. The basic law of rights and duties.

Sui generis. One of a kind.

Summary Judgment. A motion for summary judgment is a pretrial motion which will be granted when the pleadings, affidavits, and discovery materials disclose that there is no issue of material fact in controversy between the parties. In that event, the only issues left to resolve are questions of law which can be decided by the court. Summary judgment, therefore, is a pretrial device which if appropriate for rendition will result in judgment to the successful party without the necessity of going through a trial.

Summons. A notice delivered by a sheriff or other official (or sometimes a private individual) to a person to inform him that he has been named as a defendant in a civil suit and must come to court on a certain day and answer the complaint against him.

Supra. Refers to something printed earlier in the text in the sense of "see above."

T

Tort. A civil wrong not based on contract. A tort may be accomplished with or without force, against the person or property of another. Typical torts include trespass, assault, libel, slander, invasion of privacy, or negligence. The same word used to identify a tort may also be used to identify a crime, but the two meanings will often be quite different. Relief is usually sought through a suit seeking money damages.

Tortfeasor. One who commits a tort. A wrongdoer.

Trover (Trover and Conversion). An action for the recovery of damages against a person who has found another's goods and has wrongfully converted them to his own use.

U

Ultra Vires. Acts beyond the scope of the powers of a corporation, as defined by its charter or act of incorporation.

V

Vel Non. (Latin for "or not"), i.e., the issue is the validity *vel non* of this statute. (The issue is the validity or invalidity of the statute.)

Venireman. A member of a panel of jurors.

Verdict. The decision of the trial or "petit" jury. The jury reaches its verdict on the basis of the instructions given by the trial judge. The verdict may be a general verdict of "guilty" in a criminal case or a general verdict for either the defendant or the plaintiff in a civil case.

A special verdict consists of answers in the affirmative or negative to specific questions posed by the judge.

Viva voce. Orally rather than in writing.

Void. Without legal effect.

W

Writ. A judge's order requiring or authorizing something to be done outside the courtroom.

Writ of Prohibition. An extraordinary judicial writ from a court of superior jurisdiction directed to an inferior court or tribunal to prevent the latter from usurping a jurisdiction with which it is not lawfully vested, or from assuming or exercising jurisdiction over matters beyond its cognizance or in excess of its jurisdiction.

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